IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-522

PABLO IBAR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT PABLO IBAR

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INTRODUCTION

From the moment of his first police contact, Pablo Ibar steadfastly denied his involvement in the 1994 home-invasion, triple homicide for which he was convicted. He proclaimed his innocence at trial. There was no fingerprint, DNA, hair, blood, or other physical evidence that tied him to the crime scene. He was never found in possession of any property stolen from, or forensically connected to, the crime scene. The murder weapons were never recovered. Five alibi witnesses corroborated that at the time of the murders, Ibar was in bed at the home of Tanya, his girlfriend whom he later married. Ibar's first, 1997, nine-month, joint trial with co-defendant Seth Penalver resulted in a hung jury and a mistrial.

The most significant evidence was a grainy, soundless, black and white, 22 minute surveillance video that captured two disguised intruders committing the murders. Penalver successfully challenged this video with a forensic anthropologist, Dr. Mehmet Iscan, at the first trial. He did so again at his second, 1999, severed trial. This court prominently discussed Iscan's discreditation of the video in its opinion reversing Penalver's conviction based on evidentiary errors. At a discovery deposition preceding the 1997 joint trial, Iscan told Ibar's defense counsel Morgan that Ibar looked less like the video-depicted perpetrator

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he was accused of being than Penalver looked like the other.

Ibar's second, 1999 trial was aborted and severed from Penalver when Morgan was arrested shortly before jury selection for aggravated battery on a pregnant woman. Leading up to and during Ibar's third, 2000 trial, Morgan was seriously ill with pneumonia, bronchitis, and sinusitis. He suffered bouts of laryngitis, fatigue, sleeplessness, breathlessness, and profuse sweating throughout trial. Morgan was amidst contentious child custody litigation against the state which had taken his newborn daughter at birth and was seeking to terminate the parental rights of her mother, Morgan's drug-addicted girlfriend. Trial followed closely on the heels of Morgan's highly publicized prosecution for aggravated battery on his daughter's mother.

In this weary, distracted state, Morgan placed all hope for Ibar's acquittal upon the alibi testimony of Ibar's wife Tanya and her family members. Although well-supported, the alibi had a defect which Morgan left unaddressed. Morgan failed to present vital exculpatory evidence including an expert (like Penalver successfully presented) to challenge the centerpiece of the state's case, the grainy crime video that was the source of nearly all the identification evidence against Ibar. Morgan failed to present the testimony of the civil engineer he hired to take crime scene measurements which showed that the perpetrator identified as Ibar was several inches shorter than Ibar. Morgan failed to retain an expert to

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demonstrate the unreliability of the post-crime, eyewitness identification of Ibar by Foy, a neighbor of victim Sucharski, who briefly saw two men drive from Sucharski's house around the time of the murders. Morgan failed to adequately investigate the alibi, procure phone records to corroborate it, or rectify the curable defect; engage an investigator to better demonstrate the unreliability of Foy's identification; make meritorious objections to significant inculpatory testimony; and request jury instructions limiting the jury's consideration of other evidence.

Ibar moved to vacate his conviction and death sentences based on, *inter alia*, these violations of his right to counsel. Despite detailed proffers and affidavits supporting his claims, the lower court denied an evidentiary hearing on all but one ineffectiveness claim. The trial court fundamentally misconceived this claim regarding counsel's failure to present expert testimony challenging the identifications based on the video and derivative photographic evidence. The court made findings and legal conclusions that were unsupported and belied by the evidence. Ibar was entitled to an evidentiary hearing on his other claims. They were amply supported by the proffers (that now must be accepted as true) and required factual resolution. To correct this travesty of justice, Ibar's convictions and death sentences must be vacated and this case remanded for a new trial or an evidentiary hearing.

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STATEMENT OF THE CASE

This case arose from a two month, 2000 trial on the 1994 indictment charging Ibar and co-defendant Seth Penalver with three counts of first degree murder, one count of armed burglary, one count of armed robbery, and one count of attempted armed robbery. (R1. 2-7).[1] A jury found Ibar guilty on all counts, (R6. 1000-5), and the Broward County Circuit Court entered judgments of conviction. (PC2. 197-98). The jury voted 9-3 in favor of death on each murder count. (R6. 1021-3). Subsequent to a ***Spencer***[2] hearing, the court filed its Sentencing Order, (R6. 1094-1116), and sentenced Ibar to death on three murder counts and concurrent terms of twenty-five and ten years on the other felonies. (PC2. 199-216).

On direct appeal, Ibar raised the following issues:

> (1) whether certain out-of-court statements were "statements of identification" as contemplated by section 90.801(2)(c), Florida Statutes (1995); (2) whether the trial court erred in admitting witness

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[1] References include, by volume and page number, the direct Record on Appeal ("R"); the trial transcript ("T"); the Supplemental Record on Appeal ("SR"); the Postconviction Record on Appeal ("PC"); exhibits from the postconviction hearing ("PC Def. Ex."), co-defendant Penalver's Record on Appeal ("SPR"); and Penalver's 1999 trial ("SPT"). There is some duplication in the numbering of the PC Record. Care must be taken to ensure that page references are searched in the identified volume. Other documents are referred to by name. Ibar will move to supplement the record with these additional documents to which this court may not have easy access.

[2] ***Spencer v. State***, 615 So.2d 688 (Fla. 1997).

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> 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 v. State, 938 So.2d 451, 459 (Fla. 2006).

This court found error in the introduction of police officer testimony about supposed identifications of Ibar by several friends and family members from blurry photos distilled from the crime video. *Id.* at 459-63. But pointing first to the crime video and next to the (post-crime) eyewitness testimony, this court held these errors were harmless. *Id* at 463.[3] After this court denied rehearing, the United States Supreme Court denied certiorari. ***Ibar v. Florida***, 127 S. Ct. 1326 (2007).

Ibar timely filed his Motion for Postconviction Relief, (PC1. 117-93), and supporting Appendix. (PC2. 194-286). He asserted violations of his federal and Florida constitutional rights to effective counsel for the following reasons:

A. Morgan's failure to procure the assistance of a facial identification

[3] In Penalver's separate appeal, this court found other evidentiary errors but concluded these errors were prejudicial and reversed. ***Penalver v. State***, 926 So.2d 1118 (Fla. 2006). Penalver is currently being tried for the third time.

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expert to establish the inability to positively identify Ibar as one of the perpetrators depicted in the crime surveillance video and photo distillations;

B. Morgan's failure to introduce the exculpatory testimony of civil engineer Clifford Mugnier that the perpetrator the state claimed was Ibar was at least two inches shorter than him;

C. Morgan's failure to procure the assistance of a misidentification expert to assist in seeking to suppress critical identification testimony and preparing for cross-examination of witnesses regarding their identifications of Ibar, and to testify as an expert regarding scientific principals undermining the identifications of him;

D. Morgan's failure to effectively investigate and prepare witnesses to give testimony regarding the alibi;

E. Morgan's failure to procure and utilize a private investigator to investigate and give testimony regarding important factual matters bearing on the prosecution and defense;

F. Morgan's failure to subpoena or otherwise procure co-defendant Penalver's forensic anthropologist, Mehmet Iscan, to testify that Penalver, with whom Ibar had been inextricably linked, could not be reliably identified in the surveillance video and probably was not the perpetrator depicted with the hat;

G. Morgan's failure to elicit from Detective Manzella that police located a Tec-9 in the possession of an Ibar associate, Anthony Kordich, to whom Ibar claimed the owner of the Lee Street house Tec-9, Alex Hernandez, sold it before the murders, the ballistics for which did not match the murder weapon;

H. Morgan's failure to interpose all necessary and appropriate objections at trial including to:

1. Testimony of alibi witness Mimi Quinones who was called by the state solely to impeach her;

2. Testimony of Casas, Vindel, and Peguera who were called by the state solely to impeach them;

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3. Testimony of late-disclosed state rebuttal witness McEvoy who was not disclosed until after the jury was sworn;

4. Foy's out-of-court statements identifying Ibar on the ground that the procedures were unnecessarily suggestive leading to an irreparably mistaken identification of Ibar;

I. Morgan's Failure to request instructions throughout trial and before jury deliberations limiting the jury's consideration of numerous prior statements and testimony of witnesses to impeachment.

J. Morgan's Failure to request an instruction directing the jury to cautiously evaluate all eyewitness testimony and identifying factors to consider in determining reliability of identification.[4]

(PC2. 122-23). Ibar further urged several ***Brady***[5] violations. (PC1. 123-25).

The state filed a response, (PC2. 292-363), and appendix, (PC3, 4, 5, 6. 837-40), and Ibar filed a reply. (PC6. 841-66). The court granted an evidentiary hearing only on Ibar's claim that counsel failed to procure and present expert testimony to challenge the crime video and his multi-part ***Brady*** claim. (PC6. 867-68). The evidentiary hearing spanned three days. (PC11. 1790-1851A; PC12. 1852-2019; PC13. 2020-2102; PC14. 2103-2294; PC15. 2295-2362).

Subsequently, Ibar filed his Post-Hearing Memorandum, (PC7. 1042-1128), and Forensic Literature Appendix. (PC7. 1129-1227). The state filed its

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[4] This was added in Ibar's Supplement to Motion for Postconviction Relief. (PC8. 1339-49; PC9. 1449-81).

[5] ***Brady v. Maryland***, 373 U.S. 83 (1963).

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Post-Hearing Memorandum. (PC8. 1228-1323).

On February 13, 2012, the circuit court entered its order denyng each of the claims upon which it previously denied an evidentiary hearing, (PC9. 1484-1508), denying the supplemental claim regarding failure to request eyewitness identification instructions, (PC9. 1512), and denying the ineffective counsel and ***Brady*** claims upon which the court conducted an evidentiary hearing. (PC9. 1513-29). Ibar timely appealed. (PC9. 1530-31).

STATEMENT OF THE FACTS

A. Trial Evidence

1. Crime, Crime Scene, and Video: On June 26, 1994, at 7:18 a.m., two masked robbers entered the sliding glass door of the Miramar home of Casimir "Butch Casey" Sucharski. (T27. 3723; St. Ex. 1). One wore a hat, sunglasses, and wielded a Tec-9, semi-automatic pistol. (T14. 1942-7; PC Def. Ex. 1). The other had a shirt wrapped around his face and carried a stick. Sucharski, the owner of a nightclub called Casey's Nickelodeon, was entertaining two women, Maria Rogers and Sharon Anderson, drinking champagne and smoking marijuana. (T14. 1914; T27. 3717). The entire crime was captured by a surveillance camera that Sucharski had installed in his living room one week earlier because of fear of an irate, former live-in girlfriend, Kristal Fisher. (T17. 2344-7). A twenty-two minute soundless, grainy, black and white videotape

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depicting the entire crime was the state's primary evidence at trial. (St. Ex. 1.)

The videotape depicts the two men beating Sucharski and searching for property throughout his home. The men touched many surfaces throughout the house. Eventually, the perpetrator with the shirt wrapped around his face produced a small caliber handgun and appears to shoot at each of the victims from behind. Subsequently, the perpetrator wearing the hat also shoots each of the victims in the back with the large firearm. Before leaving through the garage door, the one with the shirt can be seen vigorously wiping the table he touched as if to erase fingerprints. (T14. 2060). Shortly before departing, the perpetrator with the shirt wrapped around his face can be seen removing, and then wiping his face with, the shirt. (PC Def. Ex 1).

At approximately 10:45 a.m., a Palm Beach County police officer discovered Sucharski's black Mercedes 300 SL convertible on fire on a road 12 miles south of South Bay. (T13. 1739-41, 1753; St. Exs. 2-6). He notified a Miramar police officer who went to Sucharski's residence that afternoon, saw nothing unusual, and left a card in the door. (T13. 1763-5).

On Monday, June 27, at 12:57 a.m., Broward County police officer Schaub took a missing person's report from the mother of Marie Rogers who stated that her daughter went to Casey's Nickelodeon on Saturday night with a friend, Sharon Anderson, and never returned. (T13. 1773-5). Shaub went to Sucharski's home

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where, after seeing a blue t-shirt on the ground by the front door and the business card of the Miramar officer, he peered through the sliding glass door and saw the three bloody bodies on the floor. (T13. 1775-83; T14. 1797-1811).

At the crime scene, police uncovered and/or seized, *inter alia*, the videotape that captured images from the surveillance camera, (T13. 1671-3; St. Ex. 1); a blue t-shirt bearing the logo "Consolidated Electric Supplies" (apparently the one wrapped around one perpetrator's face) found outside the residence, (T13. 1689-91; St. Exs. 31-34); live and spent 9 mm and .38 caliber casings, (T14. 1897-9 1905-8; St. Exs. 69, 77, 78); jewelry including gold and diamond bracelets, rings, and a chain with pendants found on Sucharski, (T14. 1903; T27. 3718-20; St. Ex. 76); three locked safes, (T14. 1921); the contents of the safes including gold rings, a Cartier watch, more than $5,000 in currency, and several firearms, (T27. 3713-15); a business card bearing part of a bloody shoeprint; dozens of latent fingerprints lifted from doorknobs (T13. 1678-82, T14. 1885), the safes, the stick, and other locations, (T14. 1932-1935; T15. 2042); narcotics including cocaine and Quaaludes, (T27. 3717-18); some 200 videos of Sucharski having sex with Fisher and other females, (T27. 3720-1); shoeprints, (T.14 1908-11, 1990-2; St. Exs. 61-2 80-86); and bloodstains. (T14. 1897; St. Ex. 68). Every surface conducive to fingerprints was examined. (T14. 1905, 1930-5). The t-shirt was processed for hair and DNA. (T14. 1875). The burned Mercedes was

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processed and latent fingerprints were lifted. (T14. 2191).

2. **Initial Suspects:** Peter Bednarz, a manager and later owner of Casey's Nickelodeon, testified that several weeks before Sucharski's murder, he kicked out his long-time live-in girlfriend, Kristal Fisher. (T17. 2345-6; T18. 2389-91, 2407). Sucharski felt threatened by Fisher who he suspected of having broken into his house after he kicked her out. (T18. 2419-20). He also felt threatened by Fisher's new boyfriend, a white male, approximately 5'9" tall, who Sucharski believed was a drug dealer. (T18. 2407-8). This fear motivated Sucharski to install the surveillance camera. (T17. 2346-7).

Bednarz provided a long list of persons who had disputes with Sucharski and who he suspected in his murder including one of Casey's cooks, Alex Escobar, (T18. 2371-2), Stanley Seneca, a New York acquaintance of Sucharski who got into a heated dispute with Sucharski the night before the murder, (T18. 2382-8), and Dotty Sanford, an ex-manager at Casey's who Sucharski fired upon suspicion that she was skimming money. (T18. 2424-85).

3. **Lead to Ibar:** FBI forensic video analyst Ron Evans converted approximately fifteen frames of the analog video format to digitally enhanced prints. (T16. 2206, 2217-26; St. Exs. 111-18). Evans admitted that the enhancement process altered and distorted the original images. (T16. 2231-41). Miramar homicide detective Scarlett created a flyer with a photograph and a

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description of the crime and perpetrators. (T18. 2454-5, 2470-81; St. Ex. 137)

On July 14, 1994, Miramar homicide detectives Manzella, Scarlett, and Black were summoned to Miami to meet Ibar by a Metro-Dade detective who had seen the flyer. (T19. 2493, 2498-2500, 2535-41). Ibar had been arrested with Alberto Rincon and Alex Hernandez for an unrelated crime. Ibar immediately waived his Miranda rights, consented to a search of his house, and cooperated with Scarlett taking several Polaroid photographs of him. (T19. 2500-05, 2540-3, 2547-61; St. Ex. 140). Manzella testified that after advising Ibar he was investigating a triple homicide, Ibar acknowledged being associated with John ("Jean") Klimeczko and Hernandez, being a patron of Casey's Nickelodeon, and being familiar with Consolidated Electric Supply. (T28. 3821-2).[6] Manzella questioned Ibar about his whereabouts on June 26th. Manzella testified that Ibar, under the influence of prescription muscle relaxers, stated he was with Klimeczko and "Latasha" at a Fort Lauderdale club Cameo's until 3 or 4 a.m. They then went to Casey's where he had a fight with Latasha. He then went to Latasha's where he fell asleep and did not wake until Monday morning causing him to miss work. (T28. 3823-5).[7]

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[6] Ibar denied ever telling Manzella he was familiar with Consolidated Electric Supply. (T50. 6617).

[7] Manzella later admitted Ibar's supposed date with "Latasha" was on Sunday

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4. **Post-Crime Eyewitness Foy:** On Monday, June 27th, a neighbor of Sucharski, Gary Foy, contacted police and claimed he saw two men leaving Sucharski's home early Sunday morning in one of Sucharski's Mercedes. (T18. 2458-62). Foy claimed to have left his house Sunday morning between 7:00 and 7:30 a.m. (T21. 2787, 2881). As he drove past Sucharski's house, he saw two young, teen or early 20's, white or Latin males get into Sucharski's black Mercedes convertible, pull out of the driveway, and follow him down the street. (T21. 2795-2800).

After driving out of the neighborhood, Foy approached a red light in the left turn lane and the men pulled up on his right a few feet in front of him. Foy claimed to look to his right through his tinted window, in the direction of the rising sun, and through the tinted window of Sucharski's car, and observe the passenger, for between ten and fifteen seconds. (T21. 2801-7, 2895; T22. 2950, 2957-9, 2961-5).

On July 15, 1994, detectives Scarlett and Manzella, armed with two photo arrays, went to visit Foy. One contained the picture of Pablo Ibar who they believed was the perpetrator with the shirt wrapped around his face; the other

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night through Monday morning, not Saturday night through Sunday morning. (T40. 5399). Ibar testified that he told Manzella he was with Tanya on Sunday morning. (T50. 6608-09, 6582-83). He testified he knew no one named "Latasha" but told Manzella he was with Natasha McGloria on Sunday night

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contained a photograph of Hernandez who the detectives thought possibly might be the perpetrator with the hat and glasses. (T20. 2693, 2722; T21. 2811). Foy selected two photos from the first array, the ones in positions one and five, but asked to see them from a different angle. (T21. 2815-17, 2909-13; St. Ex. 144). Foy selected the picture in the fourth position from the second array. (T21. 2819-23; St. Ex. 145).

Regarding the first photo array, Foy testified "it was obvious that the police had a suspect in these pictures." (T21. 2810; T22. 2981). He initially eliminated four photos. (T21. 2909). He selected the two remaining photos because the two men in them "were pretty close" to the passenger in Sucharski's vehicle. (T21.2815). Foy believed from the reactions of Manzella and Scarlett that "he was on the right track." (T22. 2981). The detectives' aggression in steering Foy to Ibar and their other suspect is reflected in their statement to Foy when he expressed an inability to identify someone from the second array, "No matter what, pick somebody out." (T22. 3022).

On July 21st, Manzella and Scarlett brought Foy to the Dade County Jail to view a live line-up. (T21. 2825-7). Ibar was the only one in the line-up from the photo array viewed several days before. (T22. 2983). Foy identified number four, Ibar. (T21. 2827-8). Foy acknowledged that his selection may have been

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through Monday morning. (T50. 6587, 6607-11).

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influenced by his prior exposure to the photo array. (T22. 2989).

At trial, Foy could not identify the person in the distilled photo on the left of the flyer as Ibar and thought it looked like his bowling friend, Justin. (T21. 2835-44). He never identified Ibar as the person he saw on the morning of June 26th. (*Id.* at 2837-8).

5. Third Party Identification Witnesses: Another significant part of the state's case was its evidence of third party identifications of Ibar from the grainy images distilled from the video. These supposed identifications, by persons who either denied them at trial, couldn't recall them, or in some other way undermined the identification statements Scarlett and Manzella claimed they had made, were successfully challenged on appeal as improper identification hearsay. ***Ibar***, 938 So. 2d at 459. Thus, the claimed identification statements of Casas, Vindel, Peguera, and Klimeczko were admissible only as impeachment. *Id.* at 463. This court upheld admission of Ian Milman's and Melissa Munroe's prior statements identifying Ibar on alternative grounds. *Id.* at 462-3. The testimony of all these witnesses was obscured by repeated impeaching references to their prior statements and testimony.

a. Casas, Vindel, and Peguera: On July 14, 1994, after obtaining Ibar's consent to search his room in the house of his mother, Maria Casas, detective Scarlett testified that, during the search, while standing alone with Casas,

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he showed her a copy of the picture of the second perpetrator from the police flyer. (T19. 2520-2). But no picture has Casas's name on it. (T19. 2626). Scarlett also encountered Casas's friend, Marlene Vindel, and Vindel's fourteen year old daughter Roxana Peguera. (T19. 2523-29). Scarlett showed Vindel and Peguera the grainy picture from the crime scene video. (T19. 2523-33). Unlike the other identification statements Scarlett took, instead of having these witnesses sign the back of the photograph, Scarlett personally wrote the names of Vindel and Peguera. (T19. 2524-6; T22. 3060; St. Ex. 139).

Based on Scarlett's testimony and for the acknowledged purpose of setting up impeachment, (T19. 2516), the state read Pablo's deceased mother's 1997 trial testimony to the jury. Casas denied ever identifying Pablo as the person depicted in the picture. (T24. 3333-4). She testified that the police never showed her the flyer picture, (T24. 3333, 3348-9), but showed her a single photo with an image similar to the one of the unhatted person depicted in the flyer. (T24. 3339-54). She testified that the police asked her, "Isn't this Pablo" to which she responded, "[N]o, it's not . . . I don't see no resemblance to Pablo." (T24. 3354).

Vindel testified that when police confronted her with the blurry photograph, she stated that the person did not look familiar. Only after they pressed, "does this look like Pablo," did she state that the hair on the person in the picture reminded her of Pablo. (T23. 3230-34). Peguera testified that both she and her

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mother, when shown the picture and asked, "Does this person look familiar," answered, "We don't know." They responded to the next question, "is this Pablo, does it look like Pablo," "It resembles Pablo." (T22. 3040-56; T23. 3086, 3106-12, 3127).

Solely to impeach Casas, Vindel, and Peguera, Scarlett testified that when he asked Casas if she recognized the person in the picture, she responded, "Yes, it's Pablo." (T25. 3797-9). Scarlett testified that when he showed Vindel and Peguera the grainy picture, both identified the person as Pablo. (T25. 3400-04).

b. Jean Klimeczko, who was released from prison in 1994, stayed briefly at the Lee Street house with Ibar. (T30. 4005-12). Klimeczko was a daily user of drugs; he had little recall from when he stayed on Lee Street. He could not distinguish between what he recalled and what he may have read or been told. (T30. 4020-1; T32. 4273-8, 4301). Klimeczko's disjointed testimony was repeatedly interrupted by the state's efforts to impeach him with his various prior statements and testimony.

Klimeczko recalled having testified in a previous proceeding that he had gone to Casey's on Friday, June 24, with Ibar and Penalver, and they stayed until 6:00 a.m. the following morning. (T30. 4065-80). He testified that around 5:00 a.m. on Sunday morning, June 26, 1994, Ibar and Penalver arrived at the Lee Street house, came in, and left in Penalver's burgundy Oldsmobile with Ibar in

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possession of the Tec-9. (T31. 4180-1, 5154). They returned as the sun was rising at which time Klimeczko claimed to have seen Penalver's car and a big, black, shiny new car outside. Soon after the two departed. (*Id.* at 4182-4). Klimeczko next saw Ibar and Penalver when they returned about 1:00 p.m. (*Id.* at 4183). They no longer had the black car. He testified that in response to his question where they had gotten the black car, Ibar stated "it was some girl's car." (*Id.* at 4184).

Klimeczko's testimony revealed several reasons why his prior statements were unreliable and untrustworthy. He testified about chronic abuse of LSD, cocaine, marijuana, and alcohol such that his prior statements were "half speculation, . . . half knowledge . . .." (T32. 4235-9, 4270-8). He was angry at Ibar because that day, Ibar kicked him out of the house for doing drugs and stealing money. (T30. 4018-34). Shortly after he was thrown out, someone (who he initially believed was Ibar but later found out was not), drove by his new residence and fired a gun through the window. (T31. 4140-2, 4147; T33. 4329 - 33).[8] Lastly, he was angry at Ibar because when the police interviewed him, he thought they were implicating him in the murders. (T33. 4338-41).

[8] Despite these myriad reasons undermining Klimeczko's testimony, this court found his reference to seeing a "*big*, black, shiny new car" significant to its harmless error analysis. ***Ibar***, 938 So.2d at 463. This description hardly fits a Mercedes convertible coupe.

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Klimeczko examined one of the images distilled from the surveillance video and testified that, because it was too blurry, he did not recognize the person and could not say that it looked like Ibar. (T32. 4251, 4258-60). Klimeczko testified that police had previously shown him pictures like the ones distilled from the video, but "better quality." After being told "we got Pablo," Klimeczko stated the pictures looked like Ibar and Penalver. (T30. 4083-4, 4103-4; T31. 4109-13, 4136-9). He also testified he had no knowledge of people at the Lee Street house swapping clothes or shoes and no recollection of seeing a black car or anyone with guns. (T33. 4342 - 52).

c. **Ian Milman**, another friend of Ibar, lived at the Lee Street house until mid-July, 1994. (T34. 4426-31, 4436). When police showed him the flyer with the "gray and shady pictures," he could not, and did not, identify the people. (*Id.* at 4437-39). He likewise never identified anyone at the grand jury. (*Id.* at 4441-3). His initials on the photos merely indicated he had looked at them. (*Id.*). Milman testified that he had been to Casey's with Pablo and once had shaken hands with Sucharski. (*Id.* at 3432-3). Milman knew and despised Klimeczko. (*Id.* at 4429-30). He testified that Alex Hernandez owned a Tec-9 that he kept in his Lee Street bedroom closet. (*Id.* at 4477). Milman testified that on Monday, June 27, 1994, (the day *after* the murders), Klimeczko was kicked

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out of the house. (*Id.* at 4469, 4481-3). [9] Milman was repeatedly impeached with his grand jury testimony. (*Id.* at 4451-8, 4461-3; T35. 4524-31, 4533-47).

d. Melissa Munroe, a former Penalver girlfriend, testified that Penalver moved into her house in July, 1994, and was there until his arrest on August 3rd. (T35. 4605-15). Police visited her the next day, searched her home, took her statement, and elicited another disputed identification. Munroe testified that she could not identify Pablo from the images distilled from the video, (T37. 4770), but later testified the picture "could resemble" Pablo (and "a lot of people"). (*Id.* at 4794). She recalled seeing Ibar and dancing with a drunken Penalver at Casey's on a Saturday night/Sunday morning, but did not recall which weekend. (T36. 4652). She was impeached with prior statements that this was the weekend of the homicides and also that she identified Ibar and Penalver in the distilled images. (*Id.* at 4652-74, 4713-14). She testified before the grand jury that the suspect the police believed was Ibar with his head down, really couldn't be seen, but might resemble Ibar or Penalver. (T37. 4764).

e. Kimberly San, a girlfriend with whom Penalver resided in May and

[9] Klimeczko claimed it was the day he was thrown out of the house that he saw Pablo and Seth with the gun and the black car. The police officer who took Klimeczko's statement on Wednesday, June 29, regarding the drive-by shooting reported that Klimeczko had left the Lee Street house on Monday, June 27th. (T35. 4588-98). This completely undermined Klimeczko's testimony that he saw Ibar and Penalver with the Tec-9 on the morning of the murders.

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June, 1994, came forward in 1997, because of her "conscience" and desire to assist her fiancé, Bill Grace, who was charged with a felony and serving prison time. (T44. 5925-33, 5960-1; T45. 5984-92). She told authorities that on Sunday morning of the last weekend of June, 1994, she had seen Penalver and another man who she had never seen before, but who identified himself as "Pablo." (T44. 5930-44, 5960; T45.5984-92). By that time, San had seen Pablo's picture several times on television news and in a recent newspaper. (T45. 6027-31). San described seeing Penalver coming out of the garage attic and a black Mercedes, not a two door, parked in the garage. (T44. 5949, T45. 6015-19). Penalver said the car was "a friend's." (T44. 5950). The stranger was tall and thin and had black hair that was puffy on top, collar length in back, and not shaven around the ears. (T44. 5953-4; T45. 6039-45). Although San recounted picking out photo number five from the photo array containing Ibar, (T45. 5992-4, St. Ex. 144), she never identified Ibar in court as the person she had seen in her house.

f. Phillips and Kinnamon: David Phillips, San's younger brother's friend, testified that one weekend in 1994 when he was helping Kimberly move out, most likely a Saturday morning, he saw Penalver backing out of San's garage in a black Mercedes convertible. (T43. 5836-50, 5883). Phillips testified he saw a stranger with Penalver, a Latin male, six feet tall with medium length hair. (T43. 5850-1, 5878-9). Phillips described Penalver as about 5'6" or 5'7", five to

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six inches shorter than the other guy, with a crew cut. (T43. 5861, 5876-9). Phillips never identified Ibar in court as the stranger he had seen.[10] Brenda Kinnamon, San's mother, testified that she was present one Sunday in July, 1994, with Phillips and her son helping San move. (T44. 5906-10). After confessing to prior perjury on this, she claimed she heard Brian say, "I wonder where he got that Mercedes" and saw the tail end of a black car in the garage. (T44. 5911, 5915-18; T46. 6091). Kinnamon saw Penalver but could not identify another 25-27 year old Latin male she had seen as Ibar. (T46. 6084-7).

6. None of the physical evidence at the crime scene matched Ibar. DNA analysis of blood samples from the scene and sweat and hair specimens on the discarded shirt excluded Ibar. (T33. 4383-4418; T48. 6236-8, 6295-6303; T52. 6767-74, 6891). The t-shirt had animal, Caucasian, and Negroid hair samples on it but none were consistent with Ibar. (T35. 4554-86). None of the 145 latent impressions lifted from the crime scenes, including thirty-three unidentified, belonged to Ibar. (T39. 5073-5139). The state called Fred Boyd, a latent shoeprint examiner, who testified, over objection, that two, partial

[10] Although this court relied on San's and Phillips' identification testimony regarding Pablo to support its harmless error conclusion, ***Ibar***, 938 So.2d at 463, San's description of this stranger having collar length hair, not shaven around the ears, and Phillips' testimony that the stranger had medium length hair, were inconsistent with Ibar's short, shaven-around-the ears hair. (T40. 5394).

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shoeprints were consistent with a pair of shoes seized from Ibar's house mate Rincon. (T47. 6145-98). But forensic scientist Dale Nute highlighted that Boyd only concluded the shoes "could have" matched the prints, there were significant differences between the shoes and the prints, and that the most that could be said is that the shoes could not be eliminated as having made the prints. (T48. 6400-11, 6416).

7. **Alibi:** Four witnesses, in addition to Ibar, (T50. 6573-6636), established Ibar's alibi. On the morning of Sunday, June 26, 1994, several hours past midnight, Ibar went to the home of his then girlfriend, Tanya Quinones. (T49. 6516, 6582). After talking and making love, Ibar spent the rest of the night with Tanya in her bedroom. (*Id.*). Around 7:30 a.m., Tanya's younger sister, Heather, entered the room and discovered Pablo, with whom she was acquainted. (T49. 6465, 6469, 6521, 6523). She reported this to her cousin, Elizabeth Claytor, who was caretaking the Quinones sisters while their mother, Alvin, and older sister Mimi, were in Ireland. (T49. 6451, 6469, 6484). While calling home during the early part of the week after their June 25, 1994, arrival in Ireland, Mimi learned from Heather that Tanya had broken the rules by having a boy at the house. (T49. 6455-7, 64). Mimi talked to Tanya about this from Ireland but did not tell her mother. Alvin learned of the incident several weeks later when she returned home. (T49. 6458, 6487-90).

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B. Postconviction Hearing Evidence

1. Kayo Morgan, who was admitted to the Florida Bar in 1984 and exclusively practiced criminal defense, was retained by Ibar's mother in 1995. (PC14. 2107, 2276). When Ibar's mom was unable to pay his fee, Morgan obtained an appointment. (R1. 88-89, 91; PC14. 2110-11).

Ibar steadfastly proclaimed his innocence to Morgan. (PC14. 2114). Morgan believed Ibar. (*Id.*). Ibar's first, nine month trial with co-defendant Penalver began in May, 1997. (PC14. 2116). Morgan's strategy was to demonstrate Ibar was not the perpetrator and that the crime scene video was "vague," "grainy," and "not detailed," and could depict many people with Ibar's general ethnic/physical appearance. (PC14. 2115). He tried to attack the state's other evidence and highlight the evidence indicating Ibar was not the person in the video, but put on no evidence. By contrast, Penalver's counsel, Moldof, had engaged a forensic anthropologist, Mehmet Iscan, who would testify that the video was too blurry to discern sufficient details for identification purposes and that Penalver's appearance did not comport with the second perpetrator. (PC14. 2118-20).[11] Morgan believed that the testimony of an expert like Iscan was "very

[11] Iscan testified at his May 16, 1997, deposition, in the presence of Morgan, that it was impossible to identify Penalver from the video and still pictures because the quality of the images was too poor, but the discrepancies in their appearances suggested they were different persons. (PC Def. Ex. 8 at 12-14, 33).

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important." (PC14. 2124, 2280). During an off-record conversation with Morgan at Iscan's deposition, Iscan told Morgan that Ibar resembled the first perpetrator even less than Penalver resembled the second. (PC14. 2121).

Iscan testified for Penalver at Ibar's first, joint trial. (PC14. 2129). Consistent with his deposition testimony, Iscan testified that the video and still crime imagery was of such poor quality as to preclude a reliable identification and that to the extent comparison was possible, several features differentiated Penalver from the perpetrator. (PC Def. Ex. 10 at 40-7; Ex. 12 at 41-5). Morgan believed Iscan's testimony was "very important," helped him "tangentially," and that the jury could use Iscan's forensic perspective to determine that the same deficiencies in the video and still photographs that prevented a reliable identification of Penalver, precluded a reliable identification of Ibar. (PC14. 2130, 2203-04, 2242).

Morgan got sick with a flu or pneumonia toward the end of the first, joint trial. (PC14. 2138, 2284). The illness confined him to bed for three weeks and required a trial postponement. When he returned, the trial concluded and, after several days of jury deadlock, resulted in a mistrial. (PC14. 2138-43).

After the first trial ended in January, 1998, Morgan took a brief hiatus from work. (PC14. 2143). He took ill, again, with pneumonia resulting in a seven year downward spiral in Morgan's health. (PC14. 2140-41).

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During the first trial, in early 1998, Morgan fell in love with Deb, who he later learned was a long time addict and came from a difficult family. (PC14. 2146-49). Deb had two daughters and was still married to another addict. (PC14. 2168). She became Morgan's primary project. (PC14. 2147). Morgan began living with Deb around February. (PC14. 2148). Morgan was reprimanded by this court (for unrelated reasons) in July 1998. (PC14. 2147). Deb became pregnant in October. (PC14. 2148). Morgan had to deal with Deb's problems daily. (PC14. 2149). The next three to four years were the worst of Morgan's life. (PC14. 2150, 2231).

On the morning of January 27, 1999, when jury selection was to commence for Ibar's joint retrial, Morgan awoke at home to realize Deb, who was on community control, had, once again, stolen his truck. (PC14. 2151-52). In his effort to rescue her from another drug relapse, Morgan was arrested for battery on a pregnant woman. (PC14. 2151-54). Ultimately, this forced a severance from Penalver and a continuance for Ibar. (PC14. 2155-63; PCH Def. Ex. 14).

Morgan's daughter was born in July, 1999. (PC14. 2168, 2231). She was taken away at birth by Child Protective Services. (*Id.*). This began a lengthy battle against the termination of Deb's parental rights and Morgan's enmeshment in on-going custody disputes. (PC14. 2168-70). The newborn child spent time at the homes of various local relatives of Morgan so he could visit her. (PC14.

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2170-71). Morgan's bouts with acute illness - sinusitis, bronchitis, asthma, fatigue, insomnia, and depression - persisted; he continued to try to break Deb's addiction. (PC14. 2165, 2171). He was taking a potpourri of drugs including Prednisone ("took like candy" in "large personal doses"), anti-depressant drugs including Zoloft, and sleeping pills including Ambien. (PC14. 2164-66, 2235).

Morgan was under extreme duress. (PC14. 2163). He did not share these difficulties with friends, much less judges and lawyer colleagues. (PC14. 2163, 2183, 2185; 2232-33). He didn't tell the trial judge because he "had an egotistical perception of [him]self that [he] would overcome it." (PC14. 2184).

Ibar's retrial was to commence in April, 2000. Morgan recruited new second chair, Barbara Brush. (PC14. 2144-45, 2176-79, 2285-86; R2: 415-18, 426). Because of his difficulties, Morgan began assigning Brush various guilt phase responsibilities, as well as work concerning other cases and his personal life. (PC14. 2176, 2178, 2183, 2212-13, 2218-20, 2225-26, 2229). But unquestionably, Morgan was, and functioned as, the "first chair;" Brush acted only at his direction. (PC14. 2219).

Prior to the second trial, Ibar specifically requested that Morgan procure a forensic anthropologist (as he had seen Penalver effectively use at the first trial). (PC.14 2239-40). Morgan agreed to obtain such an expert. Morgan testified that he would have assigned this to Brush. (PC14. 2182-83, 2229, 2287-88).

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On January 31, 2000, Morgan sent a fax to Brush stating, "We will also need the anthropologist, Falsetti, who can establish discrepancies in (*sic*) the culprit and Ibar . . . . As usual, I have put my back to the wall. We need to move ASAP." (PC Def. Ex. 16). In another fax sent that same day, Morgan told Brush: "Falsetti is our forensic anthropologist. Please call him as to his fee. I am going to get some still photos to send him." (PC Def. Ex. 17). In Brush's only reference to a forensic anthropologist or Falsetti in her 16-page billing statement for fees in this case, on February 29, 2000, Brush listed a telephone call with Falsetti lasting 12 minutes. (PC7. 1111-28, 1117).

On March 8, 2000, as trial drew near, Brush filed a Notice of Hearing on a Motion for Payment of Expert Witness Fees (PC14. 2225-26; PC Def. Ex. 21; R3: 447). On March 27, 2000, the court entered an order allowing $1,000 in fees for Falsetti at $200/hr. (PC14. 2226-27; PC Def. Ex. 22; R3: 450). On April 20, 2000, Morgan listed additional potential witnesses to be identified to the jury venire, including Falsetti. (PC14. 2227-28; PC Def. Ex. 23; R3: 541). But Morgan testified that he never paid Falsetti, never sent him materials, and never spoke with him. (PC14. 2229, 2241, 2287; PC15. 2333). Morgan never identified Falsetti to the jury as a potential witness. (PC15. 2315-16).

Morgan testified that the second trial differed from the first in that (1) Ibar's mother, who he believed was a very effective witness in denying that she ever

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identified Pablo from the police photos of the perpetrator, had died (and whose first trial testimony was read at the second trial), (PC14. 2134-36); (2) an alibi was presented, (PC14. 2223-24; PC Def. Ex. 20; R3: 448); and (3) there was no expert forensic testimony discrediting the video or picture distillations as evidence which the jury could reliably use to identify Ibar. (PC14. 2239).

Morgan was physically ill as trial approached, often bed-ridden, suffering from bronchitis, nausea, and depression, and over-medicating himself with Prednisone which helped him breath. He continued to struggle with Deb's addiction issues. (PC14. PC14. 2164-65, 2229-32). On April 27, 2000, he sought a last minute continuance stating that he was not feeling "well," that he had not recovered from his relapse following Ibar's first trial and was "having medical problems," but not sharing the details of the trauma going on in his life. (PC14. 2232-33; PC15. 2320-25; PC St. Exs. 5, 7; T7. 964; T11: 1530). He testified that anyone looking at him, bloated and at least 25 pounds overweight, would have seen he was ill and "not himself." (PC14. 2166-67, 2232-33). The court denied this request.

The trial court record is replete with references to the symptoms from which Morgan was suffering - laryngitis, fatigue, sleeplessness, breathlessness, and profuse sweating. (T7. 964, 1064; T8. 1071, 1083, 1088, 1107, 1128, 1139, 1151, 1166, 1183, 1215; T9. 1317; T11. 1508, 1530; T53. 6939, 6953, 6959; T58.

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7231, 7234). Morgan was exhausted during trial and had great difficulty concentrating. (PC14. 2237). He could not rise while arguing. (*Id.*). He felt completely depleted by mid-morning. (PC14. 2238). He slept after court on trial days; didn't review his notes; and slept and rested all weekends long. (T. 449). He looked to cut his cross-examinations short. (PC14. 2237; PC15. 2311). His illnesses and symptoms persisted through closing arguments during which he was "very sick," had bronchitis and was sweating profusely, and was coming down with pneumonia. (PC14. 2244). He went to the hospital shortly afterwards. Pictures in the record depicted his debilitated physical condition. (PC14. 2244-50; PC Def. Ex. 24).

Morgan knew it was "vital," "critical," to get a forensic anthropologist or facial identification expert to establish the unreliability of the video and distillations to identify Ibar - "this was the heart of the case." (PC14. 2238, 2242, 2289). He knew from the "get-go" it was essential to get such testimony. (*Id.*). He fully recognized the value of a witness like Iscan and the tangential benefit Ibar obtained from his testimony at the first trial. (PC14. 2130-31; PC15. 2318). Given that "everything was done" to get Falsetti, he didn't know why he didn't secure his testimony. (PC14. 2238-39). He acknowledged that he took no steps to introduce Iscan's favorable testimony from the first joint trial. Morgan's only explanation for his omissions was that he "wasn't paying attention." (PC14.

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2238-39). He attempted to delude himself and Ibar that the alibi would save Pablo. (PC14. 2239-40). But Morgan testified unequivocally that the type of favorable opinion he got from Iscan, and likely would have gotten from an alternative expert, was entirely consistent with his defense and there was "absolutely" no tactical reason why he did not develop and present it. (PC15. 2316-18).

On cross, Morgan again emphasized that he wanted Falsetti as a witness but he was perplexed why it did not happen. (PC15. 2304-07). He reiterated that this was a "critical feature of the case," but that he never had Ibar evaluated by an expert or received any report from Falsetti. (PC15. 2306). In his opinion, no effective cross-examination on an issue could supplant the need for available, helpful, expert testimony. (PC15. 2309). Morgan repeated that his failure to procure Falsetti or any other forensic anthropologist or facial identification expert was not for tactical reasons. (PC15. 2316-17).

2. **Professor Dr. Anthony Falsetti**, accepted by the postconviction court as an expert in forensic anthropology, (PC14. 2187-90), testified that in 2000 he was an assistant professor, the director of the Pound Human Identification Lab, and was consulting and providing expert testimony in the area of forensic anthropology. (PC14. 2189-90). Forensic anthropology was the identifying of skeletal remains as human, and developing a biographic profile of the individual.

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(*Id.*). He described biometrics as the evaluation of anything on a person's body, and that facial identification was part of this and a measurement he could make. (PC14. 2192). The sub-field of anthropometry was the measure of anatomic features on a human or image of a human, and that video or photographic superimposition and facial mapping were techniques he used for comparing images to living persons. (PC14. 2193-97). Falsetti testified that he and his predecessor had both testified as experts on facial identification in Florida and other courts and facial identification was recognized as an area of expertise in Florida courts since at least 2000. (PC14. 2191-92, 2198-99).

Falsetti had no recollection, of ever being contacted by Morgan or Brush in connection with this case. (PC14. 2192-93). His records from the year 2000 showed no consultation with them. (*Id.*). In 2000 Falsetti's expert witness rate was $200 per hour. (PC14. 2197). He was not aware of any reason why he could not have consulted regarding Ibar. (PC14. 2197, 2202-03). On cross Falsetti testified that, though he was not sure when they were established, the applicable guidelines for facial recognition were on the web by 2004. (PC14. 2199). He clarified that the technique of a forensic anthropologist comparing photos of a known and unknown person was accepted in Florida by 2000. (PC14. 2199). He explained that a simple telephone inquiry was not a "consultation" and would not have generated a record. (PC14. 2202).

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3. Registered British facial identification expert Raymond Evans testified about his background and credentials reflected in his CV. (PC Def. Ex. 3). Evans was the manager of the Unit of Art in Medicine at the University of Manchester, United Kingdom. (PC11. 1822). He joined the Unit in 1990 and became its manager in 2005. (PC11. 1831-32). The Unit is "well known, . . . worldwide," and produces research and expert witnesses in the area of facial identification, facial morphology, facial recognition and facial reconstruction. (PC11. 1832-33). He explained that facial identification analysis (FIA) consists of the systematic comparison of facial images and draws upon the disciplines of anthropology, anatomy, facial reconstruction, morphology, and computer sciences. (PC11. 1834-35). FIA had been an active science in the UK since 1988 where CCTV surveillance is a part of daily life. (PC11. 1826). The UK contains approximately two-thirds of the world's CCTV surveillance cameras, approximately one for every fourteen residents. (PC11. 1827). FIA is based on scientific principles that have been accepted as valid and reliable within the scientific community. (PC11. 1828).

In 2004, Evans co-founded the Forensic Image Analysis Group (FIAG), a professional group of forensic image analysts which did research and helped develop standards. (PC11. 1840-A-41, 1847; PC12. 1857). He was also a member of the British Association for Human Identification (BAHID), founded in

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2006, a broader group of forensic scientists affiliated with various universities and private companies, that also served as a registry for expert witnesses. (PC11. 1845-46, 1848-49; PC12. 1857). Evans was one of only three FIA assessors on the Council for Registry of Forensic Practitioners, to which he was appointed in 2007. (PC11. 1846; PC12. 1858).

Evans testified that he was doing FIA consulting in 2000 and before. (PC11. 1843). He received his professional expert witness training in 2001. (PC12. 1867). He has testified as an expert in England and North and South Ireland, for the Crown Prosecution Service, Scotland Yard, Metro Police, and most of the 43 police forces. (PC11. 1844-45). His split between prosecution and defense consulting was 70%/30%. (PC11. 1846). He has been recognized throughout England as a facial identification expert. (PC11. 1848-49).

Evans was trained at the Unit by Richard Neave, its 1991 to 2000 director. (PC12. 1873). Neave and others in the Unit had been going to court and testifying on FIA matters throughout the 1990's, even as early as 1988. (PC12. 1875). There were three people in the Unit in 2000 that were recognized as FIA expert witnesses. (PC12. 1876). Based on this direct examination and voir dire, the court deferred ruling upon the state's ***Frye*** objection. (PC12. 1886).

Evans identified the materials he reviewed in preparing his affidavit supporting Ibar's motion, (PC2. 226-36), including the crime scene video, (PC

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Def. Ex. 1), and the various photos appended to his affidavit as RWE/01-07. (PC12. 1890; PC Def. Ex. 5). He testified that the crime scene imagery, both the video and distillations, was of "poor quality" and did not have the clarity of resolution necessary to reliably identify a person according to the CCTV Operational Requirements Manual of the Home Office Scientific Development Branch for making such determinations. (PC12. 1891,1893-99, 1914). Because of this deficiency, the video and still images could not be used for identification in the UK. He further testified that because of the poor resolution, a lay witness could be lulled into believing that the distorted image is the same person as one being presented to them for identification. (PC12. 1918). Evans opined that the video and pictures of the perpetrator to be compared with Ibar were of inadequate quality to make a reliable identification. (PC12. 1918-19).

Upon comparing the crime video distillation of the unmasked perpetrator to the similarly positioned face of Ibar,[12] Evans testified that there were five significant facial discrepancies. These were the jaw-line/chin shape, (PC12. 1961-67), the right eyebrow shape, (PC12. 1968-71), the shape and width of the mouth, (PC12. 1971-73), the dorsal ridge or shape of the nose (PC12. 1973-77), and the shape and length of the jaw-line. (PC12. 1977-79). Based on these

[12] Evans used a photo of Ibar from 2008. The state's objection was overruled. (PC12. 1942). Evans explained that Ibar's appearance changed between 1994

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discrepancies, Evans opined that one could not conclude that the perpetrator and Ibar were the same person. (PC12. 1980). He explained that "most lay persons" are "sort of hard-wired to spot similarities" and, thus, most such persons would say that Ibar and the perpetrator "look alike, because of these general similarities." (PC12. 1980-81).

Evans' final opinion was that due to the poor quality, the crime scene video and distillations would not even be permitted to be used in the UK for positive identification. (PC12. 1981). Employing the six level standard of evaluation promulgated by FIA in its Guidance for Evaluating Levels of Support, ranging from level 1, no support, to level 6, powerful support, (PC Def. Ex. 13), Evans testified there was only "limited support," level 2, for an identification of Ibar, in that there were only a "few general characteristics observable" that would suggest "facial similarity." (PC12. 1992-95).

Evans also reviewed the deposition testimony of Penalver's forensic anthropologist, Mehmet Iscan, (PC Def. Ex. 8), the unsworn statement of the state's expert at the first, joint trial, Dr. Walter Birkby, (PC Def. Ex. 9), and the testimony of Iscan from the first, joint trial. (PC Def. Exs. 10, 12). (PC12. 2003-08). Evans testified that both Iscan and Birkby similarly opined that the quality of the crime video and distillations was too poor to make a reliable,

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and 2008. (*Id.* at 1957).

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positive identification. (PC12. 2007-08).

SUMMARY OF THE ARGUMENTS

IA. Morgan was ineffective for failing to procure and present a facial identification expert to establish the inability to positively identify Ibar as one of the perpetrators depicted in the crime video. This was the state's most damning evidence. Morgan had seen co-defendant Penalver successfully utilize such an expert, Iscan, at the first, joint trial. Iscan specifically told Morgan that Ibar resembled the perpetrator he was accused of being less than Penalver resembled the other. Morgan, who was ill and debilitated at trial, testified this evidence would have helped Ibar and there was no tactical reason not to have introduced it. In light of the opinion of Ibar's postconviction expert Evans that Ibar could not be reliably identified from the video, and there were material discrepancies between Ibar's face and the face of the perpetrator, Morgan's omission was highly prejudicial.

B. Morgan was ineffective for failing to procure Iscan's expert testimony that Penalver could not be identified in the crime video and probably was not the perpetrator. One of the state's primary strategies was to link Ibar and Penalver around the time of the murders. By undermining the state's proof that Penalver was one of the perpetrators, Morgan would have undermined the state's proof that Ibar was the other perpetrator.

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C. The trial court erred in denying Ibar an evidentiary hearing on his claim that Morgan was ineffective for failing to procure the assistance of an eyewitness identification expert. The significance of Foy's identification of Ibar was manifest. Ibar presented the affidavit of such an expert who, upon analyzing the circumstances surrounding Foy's identification of Ibar, concluded that the procedures were unnecessarily suggestive casting substantial doubt on Foy's identification of Ibar. A hearing was necessary to determine why Morgan did not engage such an expert and what assistance and testimony such an expert would have provided.

D. The trial court erred in denying a hearing on Ibar's claim that Morgan was ineffective for failing to present the testimony of the civil engineer he hired before trial and determined that Ibar was two and one-half to three and one-half inches taller than the perpetrator. A hearing was necessary to determine the testimony of the engineer and the reason why Morgan did not present it.

E. The trial court erred in denying a hearing on Ibar's claim that Morgan failed to effectively investigate and prepare the alibi. This was a critical element of the defense. Morgan took no steps to corroborate it and failed to attempt to remedy an inconsistency which he learned from the state's pretrial discovery. A hearing was necessary to determine why Morgan did nothing to corroborate the alibi or cure the inconsistency, and what impact this would have had on the rest of the

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case.

F&G. The trial court erred in failing to grant a hearing on Ibar's claim that Morgan was ineffective for failing to procure and utilize an investigator to investigate and give testimony regarding important factual matters. An investigator could have (1) replicated the conditions of Foy's observation of the men in the car to bolster the defense's challenge to his identification of Ibar, (2) corroborated the testimony that the Lee Street Tec-9 was sold before the murders, and (3) interviewed Natasha to corroborate Ibar's testimony that he was with her the night of Sunday, June 26th, thereby corroborating his alibi for the morning of June 26th. The evidence that the Tec-9 had been sold was important to impeach Klimeczko's testimony that Ibar and Penalver took it from the Lee Street house on the morning of the murders.

H. Morgan was ineffective for failing to interpose all necessary objections to inadmissible testimony at trial including (1) the testimony of alibi witness Mimi Quinones, improperly called by the state in rebuttal solely to set up her impeachment by another state witness; (2) the identification testimony of Ibar's mother Casas, Vindel, and Peguera, who were called by the state solely to impeach; (3) late-disclosed state rebuttal witness McEvoy, who was not disclosed in accordance with discovery rules; and (4) Foy's testimony identifying Ibar on the ground that the identification procedures were unnecessarily suggestive leading to

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an irreparably mistaken identification. Morgan also failed to request instructions (5) limiting the jury's consideration of the out-of-court identifications and prior identification testimony to impeachment; and (6) directing the jury to cautiously evaluate all eyewitness identification testimony and identifying factors to consider in determining the reliability of any identification. These omissions prejudiced Ibar and undermined any reasonable confidence in the jury's verdicts.

II. Ibar was denied his constitutional right to due process as a result of the state's failure to preserve/turn-over a lead to a possible suspect, Rubino, recognized as one of the composite pictures; (B) information that Klimeczko told his mother on the day of the murders that "something bad was going to happen" and requesting help to get out of town "in a hurry;" (C) information regarding all persons to whom state investigators showed the perpetrators' images who denied these were or resembled Ibar; (D) the camera that captured the images and the VHS machine that recorded the videotape. This exculpatory or impeaching evidence was suppressed by the state and would have been material to Ibar's defense.

ARGUMENTS AND CITATIONS OF AUTHORITY

I. DEFENSE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR HIS:

A. Failure to Procure A Facial Identification Expert to Establish the Inability to Positively Identify Ibar as One of the Perpetrators Depicted

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in the Crime Surveillance Video and Photo Distillations, and Physical Discrepancies Between Ibar and the Perpetrator.

The state's primary piece of evidence was the soundless, grainy, black and white videotape of the murders. (St. Ex. 1). As this court observed in ***Penalver v. State***, 926 So.2d 1118 (Fla. 2006), the "grainy" videotape was "the primary source of evidence in this case . . . ." *Id.* at 1125, 1138. In ***Ibar v. State***, 938 So.2d 451 (Fla. 2006), this court again labeled the video as the primary evidence, rendering the erroneous admission of other identification testimony harmless: "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." *Id.* at 463. The video and the still distillations were published repeatedly to the jury and were a primary focus of the state's closing argument. (T 52.6827, 6830, 6846, 6854, 6858; T53. 7013, 7018, 7022, 7024-6, 7045-6). The video and still distillations were the only evidence from which the jury could determine, independent of the state's other challenged and substantially impeached evidence, whether Ibar was one of the murderers. Any effective defense would have to include a substantial attack on the reliability of this evidence as a basis to identify Ibar.

To sustain a claim of ineffective counsel, Ibar was required to demonstrate that Morgan's failure to procure and present an expert to discredit this evidence

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fell below an objective standard of professional reasonableness. ***Strickland v. Washington***, 466 U.S. 668, 688 (1984). He only needed to show that Morgan "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Additionally, Ibar needed to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of his trial proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Thus, the question becomes "whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Id.* at 695. *Accord* ***Sims v. State***, 967 So.2d 148, 153-4 (Fla. 2007).

"[A] lawyer who fails adequately to investigate and introduce evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." ***Duncan v. Ornoski***, 528 F.3d 1222, 1234 (9th Cir. 2008) (counsel found ineffective for failing to investigate and present exculpatory scientific evidence).[13] The failure to consult with, and present the exculpatory

[13] *Accord* ***Dugas v. Coplan***, 428 F.3d 317, 327-32 (1st Cir. 2005) (counsel ineffective for failure to investigate and seek expert to support "no arson" defense where uninvestigated defense complimented "other perpetrator" defense presented at trial); ***Gersten v. Senkowski***, 426 F.3d 588, 607-14 (2d Cir. 2005) (counsel ineffective for failure to consult or call medical and psychological experts in child sex abuse prosecution); ***Pavel v. Hollins***, 261 F.3d 210, 220 (2d Cir. 2001) ("[a]n

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opinion testimony of, an expert on a critical issue in a case is frequently found to violate ***Strickland***. *See also* ***Hutchinson v. Hamlet***, 243 Fed. Appx. 238 (9th Cir. 2007) (counsel ineffective for failure to procure and present expert testimony regarding photogrammetry to differentiate height of defendant from video-depicted perpetrator). When counsel offers no strategic reason for failing to perform what would otherwise constitute the duty of a reasonably competent counsel, a court may not invent such a strategy by engaging in "a post-hoc rationalization of counsel's conduct" in lieu of relying on "an accurate description of [counsel's] deliberations prior to [trial]." ***Wiggins v. Smith***, 539 U.S. 510, 526-7 (2003).

A trial court's resolution of an ineffective counsel claim involves a mixed question of fact and law. This court defers to the circuit court's factual findings that are supported by competent, substantial evidence, but reviews *de novo* the court's legal conclusions. *See, e.g.,* ***Sims***, 967 So.2d at 153.

Reasonably competent counsel would not have failed to procure some sort

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attorney's failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it"); ***Hendricks v. Calderon***, 70 F.3d 1032, 1040 (9th Cir. 1995) ("an attorney 'must provide factual support for the defense where such corroboration is available'"); ***Griffin v. Warden***, 970 F.2d 1355, 1358 (4th Cir. 1992); ***Troedel v. Wainwright***, 667 F.Supp. 1456, 1461 (S.D. Fla. 1986) (failure to consult with expert to contradict key evidence of the "most crucial aspect of the trial" was deficient), *aff'd.*, ***Troedel v. Dugger***, 828 F.2d 670 (11th Cir. 1987).

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of facial identification expert, forensic anthropologist, or other expert to discredit the video and photographic evidence and any derivative identification. Ibar requested that Morgan procure such an expert. (PC14. 2239-40). Morgan knew from the "get-go" that it was "vital," "critical," to get this testimony to establish the unreliability of the video and distillations to identify Ibar - "this was the heart of the case." (PC14. 2238, 2242, 2289; PC15. 2302). Morgan saw co-defendant Penalver's counsel successfully employ such an expert and thought it was a good idea. (PC14. 2118-20, 2124, 2130-31, 2242, 2280). Morgan knew from Iscan that there were material discrepancies between the facial features of Ibar and the perpetrator in the video. (PC14. 2121).

Morgan testified that his failure to procure and present a facial identification expert was not a tactical decision. (PC15. 2316-18). Instead, it was the result of incompetence, oversight, or neglect because Morgan "wasn't paying attention." (PC14. 2238-39). The record demonstrates that this "inattention" was the result of acute illness, heavy medication, and severe emotional stress which plagued Morgan prior to and during Ibar's trial.

Morgan's actions were not those of a lawyer who had made a tactical decision to forego such an expert. On January 31, 2000, Morgan faxed second chair Brush to explore retaining Falsetti as an expert but warned: "As usual, I have put my back to the wall. We need to move ASAP." (PC Def. Exs. 16, 17). As

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trial drew near, Brush moved for and obtained expert witness fees. (PC14. 2224-27; PC Def. Ex. 21, 22; R 3: 447, 450). On April 20, 2000, as jury selection was commencing, Morgan listed Falsetti as a witness to be identified to the jury venire. (PC14. 2227-28; PC Def. Ex. 23; R 3: 541). But Morgan testified that he never paid Falsetti, never sent him materials, and never spoke with him. (PC14. 2229, 2241, 2287; PC15. 2316, 2233). And Falsetti confirmed **he never received any materials from, or consulted with, Morgan or Brush in connection with Ibar's case**. (PC14. 2192-93, 2197-98, 2202).

Morgan's ineffectiveness in failing to procure and present an expert was patently prejudicial. The effectiveness of expert testimony to establish the significant deficiencies in the video and photographic materials that rendered them unreliable for identification purposes was demonstrated by Penalver's expert Iscan and the state's expert Birkby, who testified at the first trial, upon deposition, and at Penalver's second trial. (PC Def. Ex. 16 (Depo. of Iscan, May 16, 1997) at 34-6; PC Def. Ex. 10 (SPT 11/24/97) at 33, 40-46; PC Def. Ex. 12 (SPT 11/25/97) at 41-45; SPR 96.12755, 12762-3; SPR 99.13181-2, 13198, 13202, 13206; PC Def. Ex. 9 (Unsworn Tele. Stmt. of Birkby, June 25, 1997) at 12-15). The testimony of Ibar's postconviction expert, Raymond Evans, further demonstrated the deficiencies in the video and photos that rendered them inadequate to reliably identify Ibar. Evans identified five distinctions between Ibar and the depicted

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perpetrator that supported his opinion that the perpetrator was not Ibar.

Evans' experience and credentials at the time of the postconviction hearing established his pre-eminence as an FIA expert. He was the manager of the world renown UK University of Manchester Unit of Art in Medicine. (PC11. 1822, 1832-33). He was integrally involved in the development of FIA in the UK, where its use is prevalent. He had done research in the discipline, written peer reviewed articles, and was involved in FIAG and BAHID, the two exclusive professional groups that conducted research, wrote articles, and developed standards regarding FIA. (PC11. 1840A-41, 1845-49; PC12. 1857). Evans was one of only three FIA assessors on the prestigious Council for Registry of Forensic Practitioners. (PC11. 1846; PC12. 1858). He had extensive experience teaching, training, consulting, and testifying as an FIA expert throughout the UK, predominantly for the prosecution. (*Id.* 1844-49; PC Def. Ex. 3).

Evans, like Iscan and Birkby, testified that in his opinion, the crime scene video and still distillations were so lacking in clarity and of such poor quality that they did not permit a scientifically reliable identification. (PC12. 1891, 1893-99, 1912-15, 1918-19). He testified that because of these deficiencies, UK courts would prohibit their use for identification. (*Id.* at 1980-81). Evans testified that because of the poor resolution, a lay observer could be lulled into believing that the distorted image is the same person as one being presented to for identification.

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(PC12. 1918; PC13. 2090). He explained that "most lay persons" are "sort of hard-wired to spot similarities" and, thus, they would say that Ibar and the perpetrator "look alike because of these general similarities." (PC12. 1980-81).

Of more significance, Evans testified that upon comparing the crime video distillation of the unmasked perpetrator to the similarly positioned face of Ibar, there were five material facial discrepancies between Ibar and the perpetrator. These consisted of the jaw-line/chin shape, (*id.* at 1961-67), the right eyebrow shape, (*id.* at 1968-71), the shape and width of the mouth, (*id.* at 1871-73), the dorsal ridge or shape of the nose, (*id.* at 1873-77), and the shape and length of the jaw-line. (*Id.* at 1877-79). Based on these discrepancies, Evans opined that one could not conclude that the perpetrator and Ibar were the same person. (*Id.*). This was similar to Iscan's testimony regarding his comparison between Penalver and the other perpetrator.

Denying this claim, the trial court found that Morgan was not proven deficient because he, through Brush, did everything necessary to procure Falsetti as an expert. (PC9. 1516). The court found that Brush moved for Falsetti's appointment in January 2000, secured funding for his appointment in March 2000, moved for additional photographic evidence for Falsetti, and "consulted" with Falsetti during phone "calls" reflected in Brush's billing records. (*Id.*). Given Brush's "dealings" with Falsetti, the court reasoned that Morgan must "have had

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reason not to present such evidence." (*Id.*).

The record fails to support the circuit court's findings. There is no evidence that Brush "moved for Dr. Falsetti's appointment in January 2000." The first reference to Falsetti was in Morgan's January 31, 2000, fax to Brush stating: "We will also need the anthropologist, Falsetti, who can establish discrepancies in (*sic*) the culprit and Ibar . . . ." (PC Def. Ex. 16). Morgan's warning, "As usual, I have put my back to the wall. We need to move ASAP," (*id.*), makes clear that nothing had been done until then. Morgan's second fax to Brush on that same day, to call Falsetti to find out his fees, (PC Def. Ex. 17), confirms that no one had "moved" for Falsetti's appointment."

Nor is there any evidence that Brush "moved" for photos. The only reference to photos was in Morgan's same fax, "I'm going to get some still photos to send him." (PC Def. Ex. 17). Morgan never sent any materials to Falsetti; Falsetti testified unequivocally that he never received any materials from Morgan or Brush. (PC14. 2197, 2241; PC15. 2333).

The record fails to support that Morgan or Brush had "dealings" with Falsetti amounting to "consultation." Morgan testified that he had no contact with Falsetti; he would have assigned this to Brush. (PC14. 2229; PC15. 2333). Brush's comprehensive, 16-page billing statement reflected a single entry concerning procuring an expert to challenge the identification of Ibar from the

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video and distilled photographs, a 12-minute telephone call with Falsetti. (PC7. 1111-28, 1117). Falsetti testified that he did not recall ever being contacted by Morgan or Brush in connection with this case. (PC14. 2192-93). He had his records of consultations in and around 2000, but none regarding Pablo Ibar or attorneys Morgan or Brush. (*Id.* at 2193). He explained that a simple telephone inquiry was not a "consultation" that would have generated a record. (*Id.* at 2202). He never reviewed materials, consulted, or rendered any opinion regarding the Ibar case for Morgan or Brush. (*Id.* at 2193, 2197-98).

The circuit court criticized Ibar for failing to call Brush as a witness and used that fact to find that Ibar failed to demonstrate "that the decision not to call Dr. Falsetti was anything but strategic." (PC9. 1516). But **Ibar proved through Falsetti that Brush never consulted him.** And Morgan testified that he was "first chair," responsible for all guilt phase decisions, and that Brush acted only at his specific direction. (PC 14. 2219). The court found that Ibar failed to overcome the "deferential presumption" that Morgan made the decision not to call Falsetti "in the exercise of reasonable professional judgment." (PC9. 1516). But Morgan testified unequivocally that he wanted and needed an expert to challenge the identification from the video and derivative photos and that the failure to procure such an expert was neither tactical nor strategic. (PC15. 2316-18). Morgan explained that this deficiency was because he "wasn't paying attention."

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(PC14. 2238-39). The circuit court was prohibited from engaging in the "post-hoc rationalization of counsel's conduct" contained in its order, in lieu of relying on Morgan's "accurate description of [counsel's] deliberations prior to [trial]." ***Wiggins***, 539 U.S. at 526-7; *see* ***Duncan***, 528 F.3d at 1237 n.7 (elaborating on impermissibility of postconviction court assuming facts not in record to manufacture strategic decision); *cf.* ***Sims***, 967 So.2d at 152, 154 (court relying on defense counsel's testimony that he was unable to recall any strategy reason for failing to move to exclude damning evidence, to support finding of deficient representation).

To refute Ibar's showing of prejudice, the circuit court noted the cross-examination Morgan conducted of various witnesses in an effort to impeach any identification based on the video and photo evidence. (PC9. 1517-19). But Morgan flatly rejected the state's suggestion that he declined to put on his own expert because of his "effective" cross-examination: "Whatever I did on cross is not going to supplant an identification witness . . . However well a lawyer might cross-examine witnesses and defeat the integrity of their testimony, a lawyer is not going to take the place of this kind of available testimony from an expert." (PC15. 2309). Penalver's successful use of Iscan, and the caselaw highlighting the importance of experts in the context of eyewitness identification, *see* IB at 67-71, *infra*, confirm Morgan's testimony and belies the circuit court's

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conclusion.[14] No cross-examination could have established the most important aspect of a facial identification expert's testimony – that material discrepancies in appearance distinguished Ibar from the perpetrator in the video.

The circuit court incorrectly found that Ibar failed to show an expert was "available" to testify at his 2000 trial and could have offered a "favorable" opinion. (PC9. 1520). Regarding availability, Falsetti testified that he and his predecessor at the Pound Lab had testified as experts on facial identification in Florida and other courts in 2000 and that facial identification was recognized as an area of expertise at that time. (PC14. 2191-92, 2298-99). He testified that he was available to consult and testify as an expert in 2000. (PC14. 2202-3). Evans testified that he and colleagues were doing FIA consulting and testifying in 2000 and before. (PC11. 1843; PC12. 1875-76).

Regarding a "favorable" opinion, Iscan, the expert whose testimony this court approved in ***Penalver***, 926 So.2d at 1125-26, established in Penalver's trial that "the poor quality of the video and the lighting conditions" precluded a reliable identification. He testified that there were discrepancies between Penalver's facial

[14] *See* ***Richter v. Hickman***, 578 F.3d 944, 960 n. 14 (9th Cir. 2009) ("When defense counsel obtains concessions . . . on cross-examination, that may on occasion be sufficient to establish reasonable doubt [but i]t is not ordinarily . . . a substitute for affirmative evidence that would directly prove the point to be established"), *rev'd on other grounds,* ***Harrington v. Richter***, 131 S.Ct. 770 (2011).

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features and those of the perpetrator he was convicted of being "which led him to lean to a conclusion that the individual on the tape was not Penalver." *Id.* Iscan opined to Morgan during his 1997 deposition that *Ibar looked less like the first perpetrator than Penalver resembled the second.* (PC14. 2121). The existence of such differences was corroborated by Evans who identified five significant facial discrepancies that led him to the opinion that one could not conclude that the perpetrator and Ibar were the same person. (PC12. 1961-79).

The circuit court criticized Ibar's proof as if he were required to present evidence of the specific expert Morgan should have called and establish that expert's availability and favorable opinion. Thus, the court highlighted that "Falsetti was not asked to provide an opinion as to the identity of the person in the video," (PC9. 1517), and Evans, who gave detailed testimony regarding the discrepancies between the facial features of Ibar and the perpetrator, relied on science that was not fully recognized in 2000 and expertise he did not have at that time. (*Id.* at 1515). Although Ibar maintains that the evidence at the postconviction hearing established the acceptance of the science upon which Evans relied and his expertise as early as 2000, the court's reasoning demonstrates a fundamental misunderstanding of this claim.

Ibar did not assert that Morgan was ineffective for failing to procure and present a *particular* expert at trial. Nor did he claim that Morgan was required to

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present the testimony of an expert who adhered to a *particular* facial identification science or discipline. Instead, Ibar's claim was that Morgan needed to procure and present *some* expert, whether a forensic anthropologist, biometricist, anthropometrist, or facial identification analyst, to provide the same type of opinion he saw Penalver successfully use to attack the most damning evidence against Ibar. (PC1. 122, 146; PC7. 1077-78).[15] Thus, it did not matter that Falsetti failed to render an opinion that Ibar's appearance failed to match the perpetrator in the video. Ibar never claimed that Morgan was ineffective for failing to consult with, or elicit the expert testimony of, Falsetti.

Regarding the ***Frye***-worthiness[16] of FIA testimony about the quality of the video and photographic materials, and the reliability of identifications based on them, Ibar maintains that the earliest point for evaluation of this issue was in 2006 when his direct appeal was decided, not in 2000 when he was tried. *See, e.g.,* ***Ramirez v. State***, 810 So.2d 836, 844-45 (Fla. 2001) (acceptance of particular science is to be determined "at the time of review, not the time of trial"); ***Harrison***

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[15] *See* ***Terrell v. State***, 9 So.3d 1284, 1289 (Fla. 4th DCA 2007) ("we are aware of no authority requiring the defendant to provide the name of a particular expert where the defendant claims the trial counsel failed to secure an expert in a named field of expertise"); ***Pavel***, 261 F.3d at 227-28 (defense counsel ineffective for failing to conduct adequate pretrial investigation and expert search which left "little doubt that [counsel] would have come across and called to the stand a[n expert] *such as* [the expert presented in the postconviction proceedings]").

[16] ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923).

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v. State, 33 So.3d 727, 731 (Fla. 1st DCA 2010) (***Frye***-worthiness to be determined at time of appeal, not trial). "Any doubt as to admissibility under ***Frye*** should be resolved in a manner that minimizes the chance of a wrongful conviction." ***Ramirez*** at 853. A ***Frye*** ruling is reviewed *de novo*. *Id.* at 845.

Falsetti established that forensic anthropology, biometrics, anthropometry, and facial mapping, the scientific disciplines and techniques upon which he, Evans, Iscan, and other similar experts relied, are all interrelated and techniques used to compare living individuals to video or photographic images. (PC14. 2187-97). Falsetti confirmed, as this court recognized in ***Penalver***, *id.*, 926 So.2d at 1125-26, n. 3, 1134, that facial identification was recognized as an area of expertise in Florida courts since at least 2000. (PC14. 2191-2, 2298-9). He and his predecessor were providing expert testimony in this area since then. Evans, whose science and expertise *as of the time of the postconviction hearing* seemed to pass muster with the circuit court,[17] corroborated that facial identification is based on scientific principles and has been accepted as a valid and reliable discipline within the forensic science community since at least 2000. (PC11. 1827-28;

[17] The circuit court's only dissatisfaction with Evans' science and expertise concerned their status in 2000. (PC9. 1515) ("Evans was not an expert under the requisite law and . . . the subject about which he testified was not a generally accepted scientific field *established by the time of Defendant's trial*"). The court deferred, but never seemingly resolved, the state's ***Frye*** challenge to the status of Evans' science and expertise in 2009. (*Id.*; PC12. 1886).

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PC12. 1881-82). His mentor, Neave, a facial reconstruction expert and FIA pioneer, and others began testifying as FIA experts in the UK courts in the early 1990s. (PC12. 1873, 1876-77, 1880, 1986). He testified that in 2000, there were three people in his Unit who were recognized as expert witnesses. (PC12. 1876). By 2006, Ibar's postconviction materials, including Evans' testimony about the existence, development, and status of FIA in the UK, (PC11. 1827-28; PC12. 1873, 1876-7, 1880-82, 1886-88), the forensic literature (PC7. 1129-1227), and caselaw demonstrating acceptance of such testimony in U.S. courts,[18] now even stronger and more broadly supported, established the ***Frye***-worthiness of Evans' scientific discipline and expertise. (PC7. 1080-92).[19]

Assuming, arguendo, that Evans was not qualified as an expert in 2000, or later in 2006, this was not fatal either. The deficiency in the video and photos,

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[18] *See, e.g.,* ***United States v. Martin***, 262 Fed. Appx. 392, 404 (3d Cir.), *cert. denied*, 129 S.Ct. 273 (2008); ***United States v. Williams***, 235 Fed. Appx. 925, 927-8 (3d Cir.), *cert. denied*, 552 U.S. 1082 (2007); ***United States v. McKreith***, 140 Fed. Appx. 112, 114, 116 (11th Cir. 2005), *cert. denied*, 546 U.S. 1129 (2006); ***United States v. Johnson***, 114 F.3d 808, 811 (8th Cir. 1997); ***Dampier v. State***, 973 So.2d 221, 225 (Miss. 2008).

[19] The fact that Evans' credentials developed in the UK, and not the U.S., did not disqualify him as an expert. *Cf.* ***Rose v. State***, 506 So.2d 467, 470-71 (Fla. 1st DCA 1987) (trial court abused discretion in precluding testimony of expert who was licensed in a different state); ***Ferraro v. Federal Insurance Co.*** 479 So.2d 159 (Fla. 4th DCA 1985) (same); ***Lee County Electric v. Lowe***, 344 So.2d 308, 310 (Fla. 2d DCA 1977) (same).

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and their inability to support any reliable identification, was static beginning in 1994 when they came into existence. The deficient status of these materials was recognized and made a part of this record in 1997 when Iscan (and state expert Birkby) rendered his opinions prior to and during the first joint trial. Iscan further opined at that time (albeit informally to Morgan) that there were material discrepancies between the appearances of Ibar and the perpetrator he was convicted of being. Evans' testimony, and the supporting materials Ibar submitted at the postconviction hearing, (PC7. 1080-92, 1129-1227), *overwhelmingly* established the ***Frye***-worthiness of Evans' science and expertise in 2009. As explained *supra*, the court below never found to the contrary. Accordingly, Evans' opinion that the video and photographic materials were insufficient to support a reliable identification and that objective discrepancies existed between the facial features of Ibar and the perpetrator depicted in the video, at the very least, corroborated what this record amply demonstrated was the deficient status of these materials, and the unreliability of any identification of Ibar based on them, prior to the time of Ibar's 2000 trial. Thus, any appropriately qualified expert that was available in 2000 could have provided these favorable opinions had they been elicited by Morgan.

Finding a lack of prejudice, the circuit court pointed to other identification testimony implicating Ibar which it claimed "Evans' expert testimony would not

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have undercut in any respect." (PC9. 1519). The circuit court was wrong about this, too. It asserted that several of Ibar's "friends and family members identified him as the person depicted in the video and in the distilled photos." But the record establishes that most of these witnesses *denied* identifying Ibar or otherwise *discredited the state's claim* that they made such identifications. (T24. 3333-34, 3354 (Ibar's mother Maria Casas denying she ever identified Ibar); T23. 3156, 3173 (Marlene Vindel testifying that person in blurry photograph did not look familiar); T34. 4437-39 (Ian Milman testifying that when shown the flyer with the "gray and shady pictures," he could not, and did not identify the people); T37. 4770 (Munroe testimony that she could not identify Ibar from the images distilled from the video). This court limited the state's identification testimony regarding Casas, Vindel, Peguera, and Klimeczko, to impeachment only. ***Ibar***, 936 So.2d at 459-60. The testimony of an expert like Iscan, Falsetti, or Evans, explaining the technical deficiencies in the photos and identifying discrepancies between the physical appearance of Ibar and the perpetrator in the video, certainly would have cast doubt on the reliability of these "identifications."

Klimeczko was, at best, a marginal witness whose complete discreditation is demonstrated earlier. IB at 18-19. Contrary to the circuit court's finding, Milman *never* linked Ibar to the victim's car. Munroe testified she could *not* identify Pablo from images distilled from the video. (T37. 4770); ***Penalver***, 926

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So.2d at 1137 ("Munroe testi[fied] at trial . . . that she could not identify the men in the videotape"). Regarding San and Phillips, they were not acquainted with Ibar and testified that the stranger with Penalver had medium, collar length hair, *not* shaven around the ears, (T43. 5850-51, 5878-79; T44. 5953-54; T45. 6039-45), unlike Pablo's appearance at the time. (T40. 5394; PC Def. Ex. 5 at RWE/05). Neither identified Pablo in court as the person they saw on the morning of the murders. This phantom "evidence" arrayed by the circuit court utterly failed to dispel Ibar's claim of prejudicial ineffective counsel.

Regarding Foy, he *never* identified Ibar in the courtroom as the person he saw leaving Sucharski's house. (T21. 2837-38). He was unable to identify the person in the distilled photo on the left side of the flyer and thought it looked like his bowling friend Justin. (*Id.* at 2835-44). And as Ibar's postconviction eyewitness identification expert *conclusively* established, *see* IB at 66-67 *infra*, Foy's testimony identifying Ibar as the passenger in Sucharski's Mercedes leaving the crime scene shortly after the murders was highly unreliable due to a wide variety of compounding factors including unnecessarily suggestive identification procedures. (PC1. 158-59; PC2. 244-61).

If this court finds that counsel was ineffective for failing to present an expert like Iscan, Falsetti, or Evans, and/or failed to present an eyewitness identification expert, this would substantially undercut the probity of the video

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and/or Foy's identification. With this new calculus of the evidence, the proof in this case begins to look much more like (if not weaker than) the evidence that rendered the errors in ***Penalver*** harmful and reversible. Following this court's reference in ***Ibar*** to the video and Foy's "eyewitness" testimony as evidence that rendered the evidentiary errors in his trial harmless, this court pointed to the testimony of Klimeczko, Milman, and Munroe. ***Ibar***, 938 So.2d at 463. Ibar has shown substantial flaws in each of these witnesses' testimony; it was *not* powerfully incriminating of Ibar and certainly *no less* incriminating of Penalver. ***Penalver***, 926 So.2d at 1123. Regarding San and Phillips, the next testimony this court pointed to, their testimony was *far more* incriminating of Penalver, a person they knew well and testified was at San's house driving a black Mercedes on the morning of the murders. *Id.* at 1126. Regarding the testimony of Peguera and Ibar's mother Casas, the last evidence this court addressed, this was, at best, of marginal value to the state and was, more accurately, *exculpatory* of Ibar.

Besides this, the state introduced other *highly incriminating evidence against Penalver* that was *not* introduced against Ibar. Chris Bass, Penalver's cellmate, testified he overheard Penalver tell Ibar, "My lawyer says I got a shot because I didn't take my mask off, you did." ***Penalver***, 926 So.2d at 1126. San testified that Penalver "said something to the fact that he had to go and kill somebody to get some money." *Id.* And McMurtry, the mother of San's

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brother's children, testified that she "heard San say that Penalver was involved in the murders." *Id.* at 1135. Thus, in several respects, the evidence introduced at Penalver's trial was *more* incriminating of Penalver (whose conviction was reversed on appeal) than the evidence introduced at Ibar's trial was of Ibar (for whom this court found the trial errors harmless). Thus, Morgan's failure to engage an expert to discredit the pivotal video and photo materials and the identifications based on them, and present an opinion distinguishing Ibar from the perpetrator in the video, alone and in conjunction with Morgan's numerous other omissions,[20] undermines any reasonable confidence in the jury's verdicts and requires vacating Ibar's convictions.

B. FAILURE TO PROCURE MEHMET ISCAN TO TESTIFY THAT PENALVER, WITH WHOM IBAR HAD BEEN INEXTRICABLY LINKED, COULD NOT BE RELIABLY IDENTIFIED IN THE SURVEILLANCE VIDEO AND PROBABLY WAS NOT THE PERPETRATOR DEPICTED WITH THE HAT.

One of the state's primary strategies was to link Ibar and Penalver, particularly around the time of the June 26th murders. It elicited suspect testimony from Munroe that Ibar and Penalver were together at Casey's, perhaps

[20] Even if this court declines to conclude that this claim of ineffective counsel, or any of his succeeding claims, *on its own*, fails to establish deficiency or prejudice, he is entitled to reversal because the *cumulative* deficiencies established by the record and *cumulative* prejudice demonstrate a denial of his right to counsel. *See, e.g.,* ***Harvey v. Dugger***, 656 So.2d 1253, 1257 (Fla. 1995); ***Goldman v. State***, 57 So.3d 274, 278 (Fla. 4th DCA 2011); ***Lindstadt v. Keane***, 239 F.3d 191, 203-04

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in the early morning hours of June 26th. (T36. 4652-74, 4713-14). It elicited suspect testimony from Klimeczko that the two were together around 5:00 a.m. on Sunday, June 26th, 1994, when they entered the Lee Street house and left with the Tec-9. (T31. 4180-1). It elicited from Klimeczko that the two returned as the sun was rising with a big, black, shiny new car. (*Id.* at 4182-4). The state elicited testimony from San and Phillips that Penalver and someone named "Pablo" were at her house later that morning with "a friend's" black, "not a two door," Mercedes. (T43. 5836-51, 5878-79, 5883; T44. 5930-44, 5949-50, 5960; T45. 5984-92, 6015-19). An essential link in the state's proof of Ibar's guilt was that Penalver was the other perpetrator.

As explained *supra*, Penalver's expert Iscan testified at deposition, the 1997 joint trial, and Penalver's 1999 trial that Penalver could not be positively identified from the videotape and most likely was not the second perpetrator depicted in it. (PC Def. Ex. 8 (Depo. of Iscan, May 16, 1997) at 34-6; PC Def. Ex. 10 (SPT 11/24/97) at 33, 40-46; PC Def. Ex. 12 (SPT 11/25/97) at 41-45; SPR 96. 12755, 12762-3). Establishing these facts at Ibar's trial would have substantially impugned the state's evidence that Ibar was the other perpetrator in the videotape.

Morgan testified that he spoke to Iscan after Penalver was convicted in 1999

(2d Cir. 2001); ***Stouffer v. Reynolds***, 168 F.3d 1155, 1163-64 (10th Cir. 1999).

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and that Iscan was leaving the country and would not be available for Ibar's re-trial. (PC14. 2240). Morgan could have subpoenaed Iscan or arranged to have brought him back to Broward to quickly testify during Ibar's 2000 trial. Alternatively, he could have offered Iscan's 1997 deposition, 1997 trial testimony, or 1999 trial testimony as former testimony of an unavailable declarant. *See* ***Ibar***, 938 So.2d at 464; section 90.804(a), Fla. Stats. Although Morgan saw the substantial value of Iscan's testimony, he never contemplated introducing transcripts of Iscan's testimony from Penalver's trials or deposition. (PC14. 2241). Morgan's testimony made clear he had no tactical reason for not introducing Iscan's opinion. (PC15. 2316-18).

The circuit court denied this claim because Iscan could not reach a conclusion about whether Penalver was depicted in the video, his testimony on this issue would not have been helpful to Ibar's jury, and, because Iscan's testimony only pertained to Penalver, it may have been excluded as irrelevant. (PC9. 1523-24). These findings are unsupported and belied by the record. Indeed, Iscan testified that "there were discrepancies in the lower half of the [second perpetrator's] face which led him to lean to a conclusion that the individual on the tape was not Penalver." ***Penalver***, 926 So.2d at 1125-26. His testimony about the unreliability of *any* identifications from the video and derivative photos, given their "poor quality" and "the [bad] lighting conditions," *id.*, certainly would have

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been helpful to the Ibar jury. Lastly, Iscan's opinion undermining the state's evidence that Penalver was depicted in the video was plainly relevant to rebut all the evidence the state introduced attempting to link Ibar with Penalver at and around the time of the murders.[21] It hardly seems plausible that the same court that admitted Iscan's testimony at the joint 1997 trial and Penalver's 1999 trial would exclude it from Ibar's 2000 trial.

The circuit court quoted this court's harmless error analysis on direct appeal to support its conclusion that any ineffectiveness was not prejudicial. (PC9. 1524). This analysis is fundamentally flawed. First, Ibar has alleged ineffective counsel regarding most of the evidence listed there, *i.e.*, identification of Ibar from the video, the eyewitness testimony of Foy, and the impeachment testimony of Peguera, Vindel, Casas, and Klimeczko. With regard to most of these and several other ineffective counsel claims, no evidentiary hearing was granted so all the facts Ibar alleged to support his claims must be accepted as true. Ibar has addressed the significant discrepancies in the testimony of Milman, Munroe, San, and Phillips in his statement of facts and analysis of the circuit court's

[21] At Penalver's trial, the state employed the same strategy. It introduced Foy's testimony identifying Ibar, though he could not identify Penalver, because placing Ibar at the scene of the crime tended to incriminate Penalver. *See* ***Penalver***, 926 So.2d at 1126. The state also introduced the former testimony of Maria Casas, Ibar's mother, *id.* at 1136, the sole purpose of which was to attempt (though she didn't) to place Ibar at the crime scene.

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no-prejudice conclusion regarding the FIA issue, *supra*. *See* IB at 19-22; 56-60. Finally, Ibar is addressing several significant discrepancies between the trial evidence and this court's opinion on direct appeal, in his contemporaneously filed petition for writ of habeas corpus, that substantially undermine the harmless error analysis upon which the circuit court relied. For these reasons, the circuit court erred in concluding that any ineffectiveness regarding Morgan's failure to procure the exculpatory testimony of Iscan was not prejudicial.

C. FAILURE TO PROCURE THE ASSISTANCE OF AN EYEWITNESS IDENTIFICATION EXPERT TO DEMONSTRATE THE UNRELIABILITY OF FOY'S IDENTIFICATION OF IBAR.

The circuit court denied an evidentiary hearing on this and all of the following ineffective counsel claims. (PC6. 867-68). It limited the scope of the evidentiary hearing based on this ruling. (PC15. 2275-77, 2298-2302).

This court has repeatedly stressed that "an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief." ***Floyd v. State***, 808 So.2d 175, 182-3 (Fla. 2002). Indeed, this court has "strongly urged trial courts to err on the side of granting evidentiary hearings in cases involving initial claims for ineffective assistance of counsel in capital cases." *Id.* *Accord* ***Rivera v. State***, 995 So.2d 191, 197 & n. 2 (Fla. 2008). Rule 3.851(f)(5)(a) specifically states that an evidentiary hearing must be scheduled on any claims "requiring a factual determination." Absent such a

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hearing, this court must accept all of Ibar's factual allegations as true unless conclusively refuted by the record. ***Rivera*** at 197; ***Valle v. State***, 705 So.2d 1331, 1333 (Fla. 1997). A court can rarely decide if counsel's actions were for tactical reasons without an evidentiary hearing. *See, e.g.,* ***Ford v. State***, 825 So.2d 358 (Fla. 2002). The circuit court's denial of an evidentiary hearing on Ibar's ineffective counsel claims was based on the written materials before the court and is subject to *de novo* review. ***Franqui v. State***, 59 So.3d 82, 95 (Fla. 2011).

Next to the videotape and still images, the state's most important piece of evidence was Foy's identification of Ibar. Foy was the only "eyewitness." He is the only identification witness who did not previously know Ibar, did not have some external motive to incriminate Ibar, and did not subsequently deny or distance himself from his identification. Foy's identification of Ibar was the second piece of evidence to which this court pointed to support its ruling that the error it found in the introduction of the hearsay identification statements was harmless. ***Ibar***, 938 So.2d at 463. To establish reasonable doubt, it was essential for Morgan to effectively challenge Foy's identification of Ibar.

Morgan quickly recognized the need for an identification expert and filed a request in January, 1997. (R1. 107-8). No ruling appears in the record. It appears the motion was not pressed or set for hearing before the first trial. (PC2. 222). Morgan filed a Motion in Limine to Exclude Witness Foy's

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Identifications, (R1. 143-5), litigated this motion, (SR11. 1-215; SR12. 1-37), and cross-examined Foy and other identification witnesses at trial in an effort to demonstrate their unreliability. Morgan knew assistance of an identification expert would be helpful. (PC2. 222). But he never sought to renew his motion to appoint an expert, or consulted with one. (*Id.*). **His omission was not based on a tactical decision that such consultation and testimony would not have benefitted Ibar.** (*Id.*). This "testimony" must all be accepted as true.

At the request of postconviction counsel, professor of psychology and eyewitness identification expert Ronald Fisher scrutinized the materials bearing on Foy's identification of Ibar. (PC2. 244-95). Fisher opined that Foy's initial conditions of observation, the identification procedures employed by Manzella and Scarlett, and the circumstances attendant to Foy's identifications of Ibar "reveal unnecessarily suggestive and unreliable identification procedures and cast substantial doubt on Foy's identification of Pablo Ibar as the passenger in the car leaving the victim's driveway on the morning of the homicides." (*Id.* at 247-48).

Some of the problems undermining the reliability of Foy's identification of Ibar include (1) Foy's poor opportunity for initial observation, (PC1. 48-49); (2) the fact that he selected two photographs from the array he viewed, (*id.* at 252-53); (3) Foy's manifest reliance upon relative judgment, e.g., "[f]ive looks *more* like him," (*id.* at 253), and elimination strategy, *e.g.*, before selecting pictures one

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and five, Foy stated he eliminated the other four photographs, (*id.* at 253-54); (4) Foy's prior exposure to only Ibar's photograph before selecting Ibar from the live line-up, (*id.* at 254); (5) Foy's misleading expression of confidence in his selection, (*id.* at 254-55); (6) the existence of post-identification feedback reinforcing Foy's photo array selection, (*id.* at 255-56); (7) and the deleterious effect of a cross-racial identification, *i.e.*, Foy, a white Anglo, selecting Ibar from what appears to be a line-up consisting solely of Hispanic men. (*Id.* at 258). Fisher proffered that most people are unaware of how influential these and other psychological principles are in determining the accuracy of an eyewitness's identification and do not properly account for them when assessing the reliability of an eyewitness's identification. (*Id.* at 258-60). He further proffered, based on a recent survey, that attorneys and judges are also unaware of these principles. (*Id.* at 259-60). This testimony, too, must be accepted as true.

Courts are recognizing the essential role of experts in assisting juries and judges to understand the dramatic impact of psychological principles on identification reliability with increasing frequency. In ***United States v. Smithers***, 212 F.3d 306 (6th Cir. 2000), the court reversed the defendant's bank robbery conviction holding that the district court abused its discretion by excluding expert testimony on factors bearing upon the reliability of eyewitness identification. The court noted a plethora of scientific studies demonstrating that "while juries

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rely heavily on eyewitness testimony, it can be untrustworthy under certain circumstances." *Id.* at 311-12 & n.1. Citing various studies, the court noted that "jurors are unaware of several scientific principles affecting eyewitness identifications" and that "because many of the factors affecting eyewitness impressions are counter-intuitive, many jurors' assumptions about how memories are created are actively wrong." *Id.* at 312. The court explained the grave consequence of such ignorance:

> One study has estimated that half of all wrongful convictions result from false identifications. . . . And "[i]t has been estimated that more than 4,250 Americans per year are wrongfully convicted due to sincere, yet woefully inaccurate eyewitness identifications." . . . A principal cause of such convictions is "the fact that, in general, juries are unduly receptive to identification evidence and are not sufficiently aware of its dangers." . . . Jurors tend to overestimate the accuracy of eyewitness identifications because they often do not know the factors they should consider when analyzing this testimony. *Id.*

Many other courts are following this trend. In ***State v. Copeland***, 226 S.W. 3d 287 (Tenn. 2007), the court affirmed a lower appellate court's reversal of the defendant's conviction and death sentence based on the erroneous exclusion of expert testimony on the issue of the reliability of eyewitness identification. The court cited studies emerging from the staggering number of DNA exonerations as proof of the high incidence of mistaken identification in the criminal justice system and the need for expert testimony:

> "[S]tudies of DNA exonerations . . . have validated the research of

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> social scientists, particularly in the areas of mistaken eyewitness identification . . ." and have highlighted "the role that mistaken identification . . . play[s] in convicting the innocent . . .." Studies have shown that erroneous identification accounted for as much as eighty-five percent of the convictions of those individuals later exonerated by DNA testing . . .. **"[E]xpert testimony on memory and eyewitness identification is the only legal safeguard that is effective in sensitizing jurors to eyewitness errors."**

Id. at 299 (citations omitted).

Regarding the awareness of judges and juries, the court cited a recent survey "finding that judges ha[ve] limited understanding regarding eyewitness accuracy and confidence and [citing] studies indicating that half or more of all wrongful felony conviction[s] are due to eyewitness misidentification." *Id.* at 300 (citations omitted). The court cited a variety of other authorities to support its conclusion that judges and juries lack the requisite knowledge to accurately assess identification evidence:

> Although research has convincingly demonstrated the weaknesses inherent in eyewitness identification, jurors are, for the most part, unaware of these problems. People simply do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory processes of an honest eyewitness.
>
> . . .
>
> Further, **the research also indicates that neither cross-examination nor jury instructions on the issue are sufficient to educate the jury on the problems with eyewitness identification . . .** "[E]ven when presented with an eyewitness who was quite thoroughly discredited by counsel, a full 68% still voted to convict." . . . "Considered as a whole, **the studies of juror knowledge and decision making indicate that expert psychological testimony can serve as a safeguard against mistaken identification."**

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Id. (citations omitted).[22] The absence of such vital testimony at Ibar's trial, demonstrating the unreliability of what this court has already indicated may be the second most significant piece of evidence against him, undermines any reasonable confidence in the jury's verdicts.

In Florida, admission of expert eyewitness identification testimony is left to the sound discretion of the trial judge. *See* ***McMullen v. State***, 714 So.2d 368, 372 (Fla. 1998). Although this court *previously* has taken a restrictive view of admission, contrary to the modern trend, *see* ***Simmons v. State***, 934 So.2d 1100, 1116-17 (Fla. 2006), other Florida courts and jurists have recognized the grave dangers inherent in eyewitness identification testimony and the need to take measures, including presenting expert testimony, to protect against them. *See,*

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[22] *See also* ***Perry v. New Hampshire***, 132 S.Ct. 716, 729 (2012) (noting value of expert testimony in safeguarding against unreliable identifications); ***United States v. Owens***, 682 F.3d 1358, 1359-64 (11th Cir. 2012) (Barkett, J., dissenting) (reviewing current state of law and studies and endorsing discretionary admission of expert eyewitness identification testimony); ***United States v. Brownlee***, 454 F.3d 131, 141-2 (3d Cir. 2006)(reversing conviction based on exclusion of expert testimony on unreliability of eyewitness identification); ***United States v. Stevens***, 935 F.2d 1380 (3d Cir. 1991); ***People v. LaGrand***, 8 N.Y. 3d 449, 867 N.E. 2d 374 (2007)(same); ***State v. Cheatam***, 150 Wash. 2d 626, 81 P.3d 830 (2003); ***People v. McDonald***, 690 P.2d 709 (1984)(same); ***State v. Chapple***, 135 Ariz. 281, 660 P.2d 1208 (1983)(same); *cf.* ***State v. Henderson***, 208 N.J. 208, 27 A.3d 872 (2011) (adopting report of special master who presided over 10-day hearing at which seven experts testified concerning some 200 published scientific studies, articles and books about eyewitness identification; revising eyewitness identification jury instructions and *recognizing the importance of eyewitness*

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e.g., ***Simmons*** at 1123-6 (Pariente C.J., specially concurring); ***Rimmer v. State***, 825 So.2d 304, 336-8 (Fla. 2002) (Pariente, J., concurring and dissenting in part); ***Lee v. State***, 873 So.2d 582, 584-5 (Fla. 3d DCA 2004); ***Otero v. State***, 754 So.2d 765, 770 (Fla. 3d DCA 2000) (Ramirez, J. concurring and dissenting in part).[23]

Florida law has *always* allowed courts to exercise sound discretion in admitting a defendant's proffered testimony of an eyewitness identification expert. It continues to trend toward providing jurors more guidance regarding the vagaries of eyewitness identification. *See* ***In re: Standard Jury Instructions in Criminal Cases*** – Report No. 2011-05, No. SC11-2517, 2012 WL 5869675 (Fla. Nov. 21, 2012) (adopting detailed eyewitness identification jury instructions to alert jurors to the factors tending to undermine the reliability of this evidence).

In denying a hearing, the circuit court reasoned that counsel could not have been ineffective because expert testimony on eyewitness identification was "generally inadmissible in Florida" and defense counsel noted his belief about the inadmissibility of such testimony. (PC9. 1485-86). As demonstrated *supra*, both the postconviction court and Morgan were wrong about the state of the law. *See* ***Williams v. Taylor***, 529 U.S. 362, 395 (2000) (decision based on legal

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identification expert testimony).

[23] George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 Am. J. Crim. L. 97, app. B (2011) (listing Florida in "unlimited discretion" category.

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misunderstanding was not animated by "strategic calculation"). Even if Morgan believed such testimony was inadmissible, he acknowledged in his affidavit (which must be taken as true) that an expert would have been helpful to assist in litigating the motion to suppress to exclude Foy's identifications and to prepare for cross-examination of identification witnesses at trial. (PC2. 222). Because there are factual issues that needed to be determined, including the reason why Morgan did not engage an eyewitness identification expert and what assistance and testimony such an expert would have provided, this court must remand for an evidentiary hearing. *Cf.* ***Parker v. State***, 904 So.2d 370, 376-77 (Fla. 2005) (reversing for evidentiary hearing on claim counsel was ineffective for failing to present expert testimony).

D. FAILURE TO INTRODUCE TESTIMONY OF MORGAN'S CIVIL ENGINEER THAT THE PERPETRATOR WAS TWO AND ONE-HALF TO THREE AND ONE-HALF INCHES SHORTER THAN IBAR.

Morgan retained civil engineer Clifford Mugnier to analyze the crime surveillance videotape and crime scene to determine the height of the perpetrator the state claimed was Ibar. (R3. 450; PC2. 221). Mugnier conducted the testing and determined that the perpetrator was either 5'6" or 5'7" tall. (PC2. 221, 242-43). The margin of error was two inches. (*Id.*). Clad in athletic shoes, Ibar is more than 5'9½ " inches tall, (PC1. 156), a significant margin above the

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computed height of the perpetrator and outside the estimated margin of error.

Ineffectiveness can arise from counsel's failure to elicit the testimony of an exculpatory factual witness. *See, e.g.*, ***Balmori v. State,*** 985 So.2d 646 (Fla. 2d DCA 2008); ***Duffey v. State***, 982 So.2d 1285, 1287 (Fla. 2d DCA 2008); ***Jackson v. State***, 965 So.2d 302 (Fla. 1st DCA 2007); ***Pavel,*** 261 F.3d at 217-23.

Morgan's failure to present Mugnier's testimony denied Ibar his constitutional right to effective counsel. Mugnier's testimony was exculpatory, consistent with the misidentification and alibi defenses, and admissible. *See* ***Hutchinson*** (counsel ineffective for failing to introduce testimony of expert using photogrammetry to show height of perpetrator). Morgan acknowledged that this testimony was exculpatory and facilitated reasonable doubt, and his failure to introduce it was not based on any tactical decision. (PC2. 221-22).

The circuit court found no deficiency because Morgan cross-examined Manzella about "the relative heights of the victims and [Ibar]" and the jury viewed "the videotape of the offense" and heard the other identification testimony. (PC9. 1484). But the cross the court cited merely established that the perpetrator Ibar was accused of being was between 4'2" and 6'6". (T40. 5392-93). Neither this, nor the jury's viewing of the video, could substitute for affirmative testimony that *the perpetrator was two and one-half to three and one-half inches shorter than Ibar*. Moreover, the other evidence introduced against Ibar, much of it

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challenged in connection with Ibar's other ineffective counsel claims or otherwise discredited, failed to refute Ibar's showing of prejudice.

E. FAILURE TO EFFECTIVELY INVESTIGATE AND PREPARE WITNESSES TO GIVE ALIBI TESTIMONY.

On March 21, 2000, Morgan filed his notice of alibi listing Elizabeth Claytor, Heather Quinones, Alvin Quinones, and Tanya Quinones. (R3. 448). On April 4, 2000, Morgan additionally listed Mimi Quinones. (R3. 493).

On April 27, 2000, the state deposed Tanya (Ibar) Quinones, (R4. 675-782), Alvin Quinones, (R5. 783-828), Elizabeth Claytor, (R5. 829-75), and Heather Quinones, (R5. 876-96). They testified that on the morning of Sunday, June 26, 1994, Tanya, age sixteen, was home with her younger sister Heather, being cared for by their older cousin Elizabeth Claytor. Tanya's mother Alvin, and older sister Mimi, were visiting Ireland. Alvin testified that while calling home to check on the family, Mimi learned that Pablo had slept at the house on the morning of Sunday, June 26, 1994. Mimi used a telephone calling card to make this call. Alvin testified that Mimi did not tell her while they were in Ireland. She learned about Tanya's transgression when she returned home weeks later.

On May 2, 2000, the state deposed Mimi Quinones. (R5. 899-944). Attempting to explain how she made a simple phone call six years earlier, Mimi testified, after repeated questioning from the prosecutor, that she purchased the

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telephone calling card from a hotel vending machine. (R5. 912-13). Mimi was a regular user of international calling cards. (T52. 6780-3). She further suggested that she had purchased the card with ten or twenty dollars. (R5. 912).

On May 23, 2000, the state filed supplemental discovery listing George McEvoy of Pembroke Vending, Ireland, with his "memorandum" that his company was the "sole call card vending contractor for [Irish telephone company] Eircom" and records demonstrated that his company "did not have a call card vending machine located in any hotel in Ireland in June 1994." (R3. 594).

Despite this obvious discrepancy in the alibi, Morgan did nothing to investigate it. (PC2. 223). He never highlighted or fully explained the discrepancy to Ibar or explained that this potential flaw might discredit the entire defense. Instead, beginning on June 6, 2000, Morgan began putting on the alibi witnesses as planned. (T49.6433-59, 6461-6555; T50. 6558-9). The prosecutor then announced his intent to call Mimi Quinones to set up his rebuttal witness McEvoy. (T50. 6562-6, 6647; T51. 6652-8).[24]

Ultimately, the state called Mimi Quinones as a witness. (T 52. 6775-86). Morgan made no objection to the state's manifest impeachment purpose. Mimi

[24] Ibar's argument that Morgan was ineffective for failing to object to the state calling Mimi in its rebuttal case solely to set up impeachment by McEvoy is presented at pgs. 84-87, *infra*.

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testified, as she did at deposition, that she purchased the telephone calling card from a hotel vending machine and that the card came in ten or twenty dollar denominations. (T52. 6777-83). The state's next witness, McEvoy, testified consistent with his memorandum, that there were no telephone calling cards in hotel lobby vending machines in 1994. (T52. 6787-96). He testified that the vending machines that existed elsewhere in Ireland required Irish coins and did not take U.S. currency. (Id.). Morgan conducted no cross-examination.[25]

The failure to investigate or effectively present a viable alibi defense can substantiate a claim of ineffective counsel. *See, e.g.*, ***Workman v. Tate***, 957 F.2d 1339, 1345-6 (6th Cir. 1998); ***Nealy v. Cabana***, 764 F.2d 1173 (5th Cir. 1985); ***Stringer v. State***, 757 So.2d 1226 (Fla. 4th DCA 2000). Although Morgan's primary defense was alibi, (T52. 6900-1; T53. 6905-23), he failed to investigate it. (PC2. 223). Morgan procured private investigator funds, (R1. 80; R3. 94-95), and retained investigator Robert Stotler. But Morgan never directed Stotler or anyone else to develop an alibi for Ibar. Stotler did nothing more than act as a communication link between Ibar and Morgan. (PC2. 262-65). Since Ibar claimed misidentification, it was essential to quickly employ strategies to determine where Ibar was, and who he was with, at the time of the crime. (PC2.

[25] Ibar's argument that Morgan was ineffective for failing to object to McEvoy based on a discovery violation is presented at pgs. 88-90, *infra*.

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223, 263-64, 266-68).

Even when Morgan learned from the May 23, 2000, disclosure of McEvoy's memorandum that there were no telephone calling cards in hotel vending machines in Ireland, he failed to investigate whether McEvoy's information was correct. Indeed, postconviction investigation revealed that by 1994, hundreds of thousands of telephone call cards were available throughout Ireland. (PC2. 269). Nor did Morgan confront Mimi with this potential flaw in her recollection to determine if she possibly had obtained the phone card from a vendor or, perhaps, from a non-hotel vending machine in Dublin (where McEvoy testified such vending machines existed). (T51. 6658-9).[26] Nor did Morgan seek to confirm the alibi by **securing records showing all in-coming and out-going long-distance telephone calls to and from the Quinones' residence to corroborate the call from Ireland.** (PC2. 268). **Such records were maintained by Bellsouth at the time and would have been available at least through the time of the 2000 trial.**

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[26] It is certainly possible that Mimi Quinones was mistaken as to where and how she purchased the telephone calling card. Her May, 2000, deposition was the first time she was probed in such detail about how and where she purchased the telephone card. Her deposition makes clear that her reference to purchasing the card from a vending machine was simply used to orient the prosecutor to the type of calling card she was discussing. (R5. 912). The skilled prosecutor quickly led Mimi into testifying (and repeating) that she had purchased *this particular card* from a hotel vending machine. (*Id.* at 912, 913, 917).

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Due to his debilitated state, Morgan failed to do what was necessary to properly investigate, corroborate, and present Ibar's alibi. Instead, without fully explaining this critical decision to Ibar, Morgan put his head down and charged forward. Not only did Morgan's investigation fail to support this strategic decision, his failure to conduct a "complete investigation" was not supported by a reasonable judgment to limit his investigation. Not surprisingly, after McEvoy discredited Mimi Quinones' testimony that she had purchased the telephone calling card from a hotel vending machine with U.S. currency, the prosecutor argued in rebuttal summation that "the alibi had begun to unravel." (T53. 7032-3). Morgan's failure to investigate and reconcile the alibi, or alternatively, his decision to put on an alibi with a material flaw, constituted ineffective counsel.

Denying this claim, the circuit court reasoned that, "short of assisting Mimi into changing her account of where she purchased the calling card," there was nothing more Morgan could have done. (PC9. 1487). First, Morgan acknowledged that he did not "independently investigat[e] *any* aspects of the alibi as reported to [him] by the family." (PC2. 223). Upon learning of the discrepancy in Mimi's statement about purchasing the calling card, reasonably competent counsel would have confronted her with the McEvoy memorandum contradicting her six-year old recollection to see if, in light of this new information, her initial recollection may have been mistaken. Additionally,

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Morgan could have conducted the investigation that was presented in Ibar's postconviction affidavits which disclosed that telephone cards were available for purchase throughout Ireland in 1994. (PC2. 269-70, 274-79). Upon reconsidering this information, Mimi may have refreshed her recollection and testified that she got her calling card from a vendor at a train station or a vending machine in Dublin. Moreover, the circuit court failed to acknowledge Morgan's failure to procure Bellsouth telephone records that were available in 2000 and would have confirmed Mimi's international call from Ireland to the Quinones home. Thus, an evidentiary hearing is necessary to determine (1) the alternate sources from which Mimi may have procured her telephone card, (2) what telephone records were available in 2000 to confirm the 1994 call, (3) what steps Morgan could have taken to better investigate and support the alibi, (4) what impact further investigation would have had on the decision to present the alibi, and (5) what effect a better presented alibi would have had on the verdicts.

F. FAILURE TO PROCURE AND UTILIZE A PRIVATE INVESTIGATOR TO INVESTIGATE AND GIVE TESTIMONY REGARDING IMPORTANT FACTUAL MATTERS BEARING ON THE PROSECUTION AND DEFENSE.

Diligent factual investigation is a baseline requirement for competent counsel. A decision not to investigate is only reasonable to the extent that reasonable professional judgments support such a decision. In this case, despite

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the myriad facts, circumstances, and nuances bearing on Ibar's prosecution, Morgan adopted a strategy of relying solely upon the Florida discovery rules to learn about the case. Although Morgan obtained funds for and hired an investigator, (R1. 80; R3. 94-95), he only used the investigator as a communication link with Ibar. (PC2. 222-23, 263-65). Reasonably competent counsel would have undertaken several investigations that would have led to the discovery of exculpatory information and evidence.

Investigator Kiraly opined that an investigation should have been undertaken to replicate the obstructed conditions under which Foy briefly observed the passenger in Sucharski's car. (*Id.* at 270-71). Such a demonstration would have bolstered the challenge to Foy's identification of Ibar.

Kiraly noted it would have been essential to interview witnesses to confirm, as Ibar testified, that the Tec-9 belonging to Hernandez had been sold *prior to the murders* to Anthony Kordich, a brother of Ibar's friend. (T50. 6592-4). In April, 1995, Detective Manzella received information from a Hollywood police officer that he had recovered a Tec-9 from the Kordich brothers. It was tested and found not to match the ballistics of the Sucharski crime scene. (Manzella's Narrative Continuation, August 2, 1995). It would have been essential to establish that this Tec-9 was the one from the Lee Street house. Anthony Kordich died in prison before trial. Ibar was unable to locate Kordich's brother

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or Hernandez at the time of the postconviction proceedings (PC2. 271).

It was crucial to interview Natasha McGloria. Manzella claimed that when he first interviewed Ibar and asked him about the weekend of June 26, Ibar said he was with "Latasha." (T28. 3823-5). Ibar testified that he knew no one named "Latasha," he had mentioned "Tanya," and he had also identified "Natasha" McGloria, a friend with whom he was with Sunday night and at whose house he slept until Monday morning when he missed work. (T50. 6608-15). Interviewing and presenting the testimony of Natasha would have confirmed this portion of Ibar's recollection of the weekend and further bolstered his alibi.

Denying this claim, the circuit court summarized Morgan's cross-examination of Foy. (PC9. 1490). The court concluded that given Morgan's "comprehensive cross-examination of [Foy]" and Morgan's closing argument which "thoroughly keyed the jury in on the weaknesses of Foy's ability to make a reliable identification," Ibar failed to demonstrate either deficient performance or prejudice. (*Id.* at 1491).

Despite Morgan's cross-examination, Foy stood by his selection of two photos, including one of Ibar, from the initial photo array, and his subsequent selection of Ibar from the live line-up, based on his momentary observation of the passenger at the red light. The only way to effectively demonstrate the implausibility of Foy's observation would have been to depict Foy's vantage point

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so that the jurors could test the limits of their observation skills from 15 feet away, through two sets of tinted windows, looking into the sun.

Regarding the Tec-9 investigation, the circuit court concluded there was no ineffective counsel or resulting prejudice because the Tec-9 that the police recovered from Kordich did *not* match the ballistics of the Sucharski homicides. This is the very point that needed to be corroborated.

The depiction of the large firearm in the videotape was an important facet of the state's case. It is uncontroverted that Hernandez owned a Tec-9 that he kept at the Lee Street house. (T50. 6592-3). Klimeczko, whose testimony was highly suspect due to chronic drug abuse, lack of recollection, and a motive to harm Ibar, (T31. 4140-2; T32. 4236-9, 4270-8; T.33 4338-41), testified that around 5:00 a.m. on Sunday, June 26, 1994, he saw Ibar and Penalver arrive at the Lee Street house and leave with the Tec-9. (T31. 4180-1).

To the extent an investigator could have confirmed through photographs, serial numbers, or other identifying information for Kordich's Tec-9, that Hernandez's firearm, which Klimeczko claimed Ibar and Penalver took when they left the house at 5:00 a.m. on Sunday, June 26, 1994, was sold *before* that date, it would have substantially discredited Klimeczko's incriminating testimony. A factual determination is necessary.

Regarding Latasha McGloria, the circuit court concluded there was no

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deficient counsel because Ibar testified he spent the night *after* the offenses with McGloria, a matter irrelevant to his trial. (PC9. 1492). Indeed, Detective Manzella testified to Ibar's *supposed* statement that he spent the night of Saturday, June 25, and the morning of Sunday, June 26, during the time of the murders, with "Latasha." (T28. 3823-25). The state attempted to use this to discredit Ibar's trial testimony that he spent the morning of June 26 with his now-wife Tanya. (T50. 6581-86). McGloria's testimony that she was with Ibar on the night of Sunday, June 26, through the morning of Monday, June 27, as Ibar testified, (T50. 6607-14), would have confirmed that it was the police who made the error regarding which night Ibar said he spent with McGloria. A factual determination needed to have been made about what investigations could have been undertaken, what the results would have been of these investigations, why Morgan did not pursue them, and what impact they may have had on the verdicts.

G. FAILURE TO ELICIT FROM DETECTIVE MANZELLA THE EVIDENCE THAT THE TEC-9 FROM THE LEE STREET HOUSE WAS LATER RECOVERED AND PROVED NOT TO MATCH THE BALLISTICS OF THE SUCHARSKI MURDERS.

The circuit court denied this claim again reasoning that the Tec-9 recovered from Kordich was irrelevant because its ballistics did not match those of the Sucharski homicides. (PC9. 1493-94). Ibar relies on his argument regarding ineffective investigation of Kordich's Tec-9 under argument F, *supra*, to refute the

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circuit court's ruling. This claim required a factual determination about what Manzella would have said, why Morgan did not pursue this, and what impact this information would have had on the verdicts.

H. FAILURE TO INTERPOSE ALL NECESSARY OBJECTIONS AT TRIAL TO INADMISSIBLE TESTIMONY AND FAILING TO SEEK LIMITING INSTRUCTIONS.

To preserve an issue regarding the inadmissibility of evidence for appeal, counsel must contemporaneously object at trial. *See, e.g.,* ***Corona v. State***, 64 So.3d 1232, 1242 (Fla. 2011). An appellate court will consider only grounds specifically articulated in the trial court. *See, e.g., id.;* §§ 90.104(1)(a), 924.051 (1)(b),(3), Fla. Stats. For instance, an objection based on "lack of foundation" does not preserve arguments regarding all facets of the foundation that may have been missing. *See, e.g.,* ***Williams v. State***, 967 So.2d 735, 748 n.11 (Fla. 2007). Objection is waived if the litigant fails to secure a ruling. *See, e.g.,* ***State v. Simpson***, 53 So.3d 1135, 1145-46 (Fla. 2009).

Because of his weary and debilitated state, Morgan rendered ineffective assistance of counsel by failing to fully object to the following evidence and to preserve these issues for appellate review.

1. Failure to Object to Testimony of Alibi Witness Mimi Quinones, Called by the State Solely to Impeach.

Unquestionably, the state called Mimi Quinones in rebuttal solely to set up

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impeachment by McEvoy. The prosecutor specifically announced his intent to do so. (T50. 6562-6, 6647; T51. 6652-8). Ibar raised this as error on appeal. (PC3. 419-29). The state argued it was not preserved. (PC4. 511-12). This court agreed that the issue of calling witnesses for the sole purpose of impeachment was not preserved. ***Ibar***, 938 So.2d at 463-4.

In ***Stoll v. State***, 762 So.2d 870 (Fla. 2000), the court considered the admissibility of the rebuttal testimony of a friend of the murder victim conveying hearsay statements made by the victim tending to implicate the defendant. The court sought to determine whether this witness's testimony fairly rebutted the defendant's testimony and earlier statements that the state had introduced but which tended to exculpate the defendant. The court held that "the State may not introduce rebuttal evidence to explain or contradict evidence that the State itself offered." *Id.* The court noted that the state's rebuttal witness did not truly rebut the defendant's testimony. *Id. See* ***Rimmer***, 825 So.2d at 321-22 (rebuttal testimony permitted only to refute defense theory or impeach witness); *cf.* ***United States v. Kane***, 944 F.2d 1406, 1411 (7th Cir. 1991) ("Impeachment of one's own witness cannot be permitted where employed as a subterfuge to get before the jury evidence not otherwise admissible").

Under ***Stoll*** and ***Rimmer***, objection to the testimony of Mimi and McEvoy should have been sustained. Mimi's testimony did nothing to "rebut" any

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defense theory or impeach a witness. It clearly supported the alibi. The only reason (specifically announced by the prosecutor) to call Mimi was to set up impeachment by McEvoy. Absent Mimi's testimony, McEvoy's testimony had no relevance. Morgan was ineffective for failing to interpose this meritorious objection which should have resulted in the exclusion of McEvoy's testimony that the prosecutor later argued "unraveled" the entire alibi.

The circuit court concluded that Morgan *did* object to the state calling Mimi in rebuttal. (PC9. 1496). To the contrary, though Ibar claimed on appeal that the state improperly offered Mimi's testimony in rebuttal, (PC3. 422-23), this court held that this argument had not been preserved. ***Ibar***, 938 So.2d at 463-64. The circuit court cited the record to show Morgan *did* challenge Mimi's testimony. (T51. 6652-59). But this transcript reveals that Morgan's objection was to the state initiating an "investigation" into why this witness wasn't made available to the state.

The circuit court, again, pointed to this court's harmless error analysis to show that the failure to object to Mimi's improper rebuttal was not prejudicial. (PC9. 1496-97). Ibar has shown why the harmless error analysis was flawed. IB at 55-59. Lastly, the circuit court pointed to this court's response on the merits that "there was other evidence gleaned from these witnesses that was not impeached and was used by the State to put together various pieces of evidence

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that linked Ibar to these murders." ***Ibar*** at 464. But this court did not mention Mimi in this excerpt. Her testimony seems not to have been contemplated because she provided no testimony "that linked Ibar to these murders."

2. Failure to Object to the Identification Testimony of Casas, Vindel, and Peguera, Called by the State Solely to Impeach.

The state introduced the testimony of Casas, Vindel, and Peguera. In her 1997 testimony, Casas emphatically denied identifying her son, Ibar. (T24. 3333-4, 3354). Vindel and Peguera testified that, though the person in the photograph they were shown looked like Ibar, they could not be sure because the picture was poor and they had not seen Ibar recently. (T22. 3040-69; 3172-3238). The state called detective Scarlett and elicited from him that each of these witnesses had identified Ibar from the pictures. (T25. 3797-9, 3400-04).

On direct appeal, Ibar argued that Scarlett's testimony regarding these witnesses' supposed, prior identifications should not have been admitted as identification hearsay. (PC3. 409-19). This court agreed but upon holding the error harmless, noted that these statements were properly introduced as impeachment. ***Ibar***, 938 So.2d at 463. Ibar also asserted that the state impermissibly called Casas (by introducing her 1997 testimony), Vindel, and Peguera solely to impeach them. (PC3. 419-22). This court held that this argument, too, had not been preserved. ***Ibar*** at 463.

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In ***Morton v. State***, 689 So.2d 259 (Fla. 1997), *receded from on other grounds*, ***Rodriguez v. State***, 753 So.2d 29 (Fla. 2000), this court held "if a party knowingly calls a witness for the primary purpose of introducing a prior statement which otherwise would be inadmissible, impeachment should ordinarly be excluded." *Id.* at 264. Thus, not only should Scarlett's testimony have been excluded as substantive evidence, ***Ibar*** at 459-60, but upon proper objection, it was subject to being excluded as improper impeachment. ***Morton***.[27] Morgan was ineffective for failing to interpose this objection and preserve it for appeal.

3. Failure to Object to Late-Disclosed State Rebuttal Witness McEvoy.

The defense gave timely notice of its alibi. (R3. 448, 493). Nonetheless, the state did not disclose McEvoy until May 23, 2000, after the jury had been sworn, opening statements had been given, and the state's case was well underway. (R3. 594). The state was required to disclose its witnesses, including rebuttal witnesses, before trial. *See* Fla. R. Crim. P. 3.220. Absent timely disclosure, to block McEvoy's devastating testimony, it was incumbent upon Morgan to demand a ***Richardson*** hearing. At a ***Richardson*** hearing, the trial court would have explored whether the state's failure was willful, negligent,

[27] *See also* ***Bartholomew v. State***, 4D10-4520, 2012 WL 5348436 at *5 (Fla. 4th DCA Oct. 31, 2012); ***Senterfitt v. State***, 837 So.2d 599, 600-01 (Fla. 1st DCA 2003).

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or inadvertent, and trivial or substantial, and whether Ibar was prejudiced in his trial preparation. *See, e.g.*, ***Thomas v. State***, 63 So.3d 55, 59 (Fla. 4th DCA 2011).

Morgan had a substantial basis to object to McEvoy. The state delayed a full month before deposing the alibi witnesses. (R4. 675-782; R5. 783-896). By this time, trial was under way. It delayed nearly one more month, well into the presentation of its case, before it disclosed McEvoy.

It appears that the failure to disclose was willful. The state delayed its disclosure some 60 days after disclosure of the alibi, and some 21 days after its May 2, 2000, deposition of Mimi. By this time, Ibar was locked into the alibi defense. This violation was substantial.

Regarding prejudice, in jury selection, Morgan declared his intent to present an alibi defense, (T8. 1176-1206, 1215-22; T9. 1226-7, 1243-5), and in opening statement Morgan committed again. (T12. 1639-41, 1648-54). Having fully committed the alibi defense, there was no remedy for the state's belated disclosure of McEvoy who would contradict significant facets of the alibi. *See* ***McDonnough v. State***, 402 So.2d 1233 (Fla. 5th DCA 1981). Accordingly, Ibar was irreparably prejudiced by the state's late disclosure. Nothing short of

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exclusion could cure the state's discovery violation.[28] Morgan was ineffective for failing to insist upon a ***Richardson*** hearing to exclude McEvoy's testimony.[29]

4. Failure to Object to Foy's Testimony Identifying Ibar on Ground That Identification Procedures Were Unnecessarily Suggestive Leading to an Irreparably Mistaken Identification.

Prior to the 1997 trial, Morgan moved to exclude Foy's identifications. (R1. 143-5). Besides a claim that Ibar was denied his right to counsel at this critical stage, Morgan asserted that the identification procedure utilized by the police was unduly suggestive and irreparably tainted Foy's identification of Ibar. (*Id.* at 144). At a hearing, Morgan cross-examined both Foy and Manzella regarding the circumstances surrounding presentation of the photo array and the live line-up. (SR11. 1-215; SR12. 1-80). But, argument came to focus sharply upon whether Ibar was entitled to counsel during the line-up. (SR12. 6-7, 13). Morgan did not press the other issues. (Id. at 48). As the sole basis for denying the motion, the court ruled that Ibar had no right to counsel at the line-up. (*Id.* at 46). Subsequently, Morgan filed a Supplemental Proffer and Motion to Reconsider, again focusing on the right to counsel issue. (R2. 199-215). The

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[28] *See, e.g.*, ***Irish v. State***, 889 So.2d 979, 981 (Fla. 4th DCA 2004) (procedural prejudice established by late-disclosed evidence that contradicted defense opening statement); ***Acosta v. State,*** 856 So.2d 1143, 1145 (Fla. 4th DCA 2003)(same).

[29] *See, e.g.*, ***Thompson v. State***, 796 So.2d 511, 519 (Fla. 2001)(defendant entitled to evidentiary hearing on claim counsel was ineffective for failing to seek

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trial court denied this "for reasons as stated on the record in open court." (R2. 217).

On April 27, 2000, after the jury had been sworn, the court readdressed Morgan's original motion to exclude Foy's identifications. (T10. 1400-16; T11. 1434-78). The court framed the question as whether, if it suppressed the line-up identification based on a violation of Ibar's right to counsel, would it then suppress any subsequent in-court identification. (T11. 1481-5). The court voiced its specific concern that the motion had been re-raised untimely and that if he granted it, "the state is up the creek without a paddle." (*Id.* at 1486). The court denied the motion based on the fact that Ibar was not entitled to counsel. (*Id.* at 1486-7).

Morgan was ineffective for failing to fully object to the introduction of Foy's out-of-court identifications of Ibar on the ground that the identification procedures were so unnecessarily suggestive as to give rise to a substantial likelihood of irreparable misidentification. *See, e.g.*, ***Rimmer***, 825 So.2d at 316. Foy's testimony establishing unnecessary suggestiveness has been reviewed *supra*. IB at 13-15. Likewise, eyewitness identification expert Fisher's affidavit explaining how the facts Foy testified to support a claim of irreparable misidentification also has been reviewed *supra*. IB at 66-67. (PC2. 247-58).

Richardson hearing).

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For all these reasons, Foy's identifications of Ibar were subject to suppression[30] and Morgan was deficient for failing to properly object and secure a ruling on these bases.

To support its denial, the circuit court noted that Morgan raised these issues in his (1997) written motion and *briefly touched* on the relationship between the photo array and the lineup in Manzella's *re-cross* during the 1997 evidentiary hearing. (PC9. 1501) (quoting SR11. 212-13). Contrary to the court's order, Morgan's truncated remark at the conclusion of Manzella's re-cross hardly qualified as "attacking the makeup of the lineups." Moreover, Ibar's complaint is that Morgan failed to fully renew, argue, and preserve the suggestiveness and irreparable misidentification issues at the time of the 2000 trial.[31] Lastly, in support of its conclusion of no prejudice, the circuit pointed to the 2000 trial court's remark following Morgan's argument renewing his claim of a violation of Ibar's right to counsel, "even if I were to suppress [the lineup], . . . I would allow the in-court identification . . .." (*Id.*). This establishes that the trial court *never*

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[30] *See* ***Rimmer***, 825 So.2d at 338 ("With regard to a subsequent live line-up, the dangers of suggestibility as a result of the prior photographic lineup are substantial"); ***Henry v. State***, 519 So.2d 84 (Fla. 4th DCA 1988); ***State v. Sepulvado***, 362 So.2d 324, 326 (Fla. 2d DCA 1978)(victim selected defendant from second photo pack where he was the only one depicted from the first photo pack).

[31] Although Ibar maintains this issue was *not* preserved for appeal, as the circuit court suggested, Ibar has also raised the failure to raise this on appeal in his habeas

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resolved the suggestiveness/irreparable misidentification issue that had *not* been pressed by Morgan. Moreover, as Ibar has pointed out previously, Foy *never* identified Ibar in court as the person he saw in the Mercedes on the morning of the murders. The issues Ibar maintains Morgan ineffectively failed to preserve concern the admissibility of his out-of-court identifications. Thus, the postconviction court's ruling neither supports affirmance based on no deficiency or no prejudice.

5. Failure to Request Instructions Limiting the Jury's Consideration of Out-of-Court Statements and Prior Testimony to Impeachment.

The testimony of Peguera, Vindel, Klimeczko, Milman, and Munroe was completely disjointed due to repeated impeachment by earlier statements and testimony. Although the court occasionally gave instructions (over defense objection) limiting consideration of these statements to impeachment only, (T30. 4060; T32. 4218; T34. 4447), Morgan failed to repeatedly request instructions for all such impeachment throughout trial. (T31. 4135-7, 4155-9; T33. 3139-46, 3181-3). At the conclusion of trial, Morgan *refused* a jury instruction limiting the jury to considering the prior statements and testimony for impeachment only. (T51. 6747-9; T53. 7049). Competent counsel was required to seek such instructions to limit this incriminating evidence and the failure to do so required

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petition as ineffective appellate counsel.

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an evidentiary hearing. *See, e.g.,* ***Neal v. State***, 854 So.2d 666, 668-69 (Fla. 2d DCA 2003).

6. Failure to Request an Instruction Directing the Jury to Cautiously Evaluate All Eyewitness Identification Testimony and Identifying Factors to Consider in Determining Reliability of Identification.

As a supplemental claim, Ibar urged that Morgan was ineffective for failing to request a jury instruction on the eyewitness identification testimony. (PC8. 1343-48; PC9. 1476-81). A defendant is entitled to have the jury instructed on the law applicable to his theory of defense where there is *any* evidence to support it. *See, e.g.,* ***Gregory v. State***, 937 So.2d 180, 182 (Fla. 4th DCA 2006). Ibar's theory was that Foy was mistaken in his identification of Ibar, and that the state's unnecessarily suggestive lineup resulted in an irreparable misidentification. *See, e.g.,* ***Neil v. Biggers***, 409 U.S. 188 (1972); ***Rimmer***, 825 So.2d at 338; ***Sepulvado***, 362 So. 2d at 326. There was evidence from which a jury could have concluded that Foy's identification of Ibar was unreliable. Ibar is entitled to an evidentiary hearing on this claim. *See, e.g.,* ***Aversano v. State***, 966 So.2d 493, 494-96 (Fla. 4th DCA 2007); ***Owens v. State***, 866 So.2d 129, 131 (Fla. 5th DCA 2004).

This court has recently adopted *standard* instructions identifying the factors a jury needs to consider in evaluating the reliability of eyewitness identification testimony. ***In re Standard Jury Instructions in Criminal Cases – Report***, No.

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2011-05, No. SC11-2517, 2012 WL 5866975 (Fla. Nov. 21, 2012). New Jersey has similarly amended its jury instructions regarding eyewitness identification testimony to reflect the current state of this science. ***State v. Henderson***, 208 N.J. 208, 27 A. 3d 872 (2011). These are precisely the types of instructions Morgan should have requested.

Denying this claim, the circuit court first asserted it was procedurally barred. (PC9. 1508). Where this claim was essentially legal in nature, closely related to other claims Ibar made, and filed before the circuit court ruled, it was an abuse of discretion for the court to deny it for procedural reasons. *Cf.* ***Rogers v. State***, 782 So.2d 373, 376 n. 7 (Fla. 2001) (recognizing propriety under rule 3.850 of enlarging issues raised in timely filed initial motion for postconviction relief).

On the merits, the circuit court concluded that ***Henderson*** is not "binding" and is based on the New Jersey Constitution. (PC9. 1511). But Ibar's entitlement to such an instruction was based squarely on *well-settled Florida law* regarding theory of defense instructions. Nor did Morgan need to "anticipate changes in the law." (*Id.*). Morgan merely needed to recognize the importance of the eyewitness testimony and that the jury needed guidance in assessing it. These were basic functions that the "counsel" envisioned by the Sixth Amendment was required to fulfill.

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II. IBAR WAS DENIED DUE PROCESS AS A RESULT OF THE STATE'S FAILURE TO TURN OVER *BRADY* MATERIAL.

To protect a defendant's due process rights, the state is required to disclose all material impeaching and otherwise favorable evidence. ***Brady***; ***Strickler v. Greene***, 527 U.S. 263, (1999); ***Cardona v. State***, 826 So.2d 968 (Fla. 2002).

Ibar maintains that the state failed to preserve, suppressed, or failed to disclose material, exculpatory evidence including: (A) a lead provided to Miramar police officer Ron Peluso that an unidentified informant at Casey's Nickelodeon reported that John Giancarlo Rabino, W/M 20s, was a possible "suspect" and "was one of [the] composite pictures," (PC2. 281-82); (B) information that on the day of the murders, Jean Klimeczko told his mom, Michelle Klimeczko, that "something bad was going to happen" and asked for her help to get out of town in a hurry, (*id.* at 283-85); (C) information regarding all persons to whom the perpetrator images were shown but who denied this was, or resembled, Ibar; and (D) the camera that captured the images and the VHS machine that recorded the videotape. (PC1. 190).

Regarding the lead about a "suspect" who "was one of [the] composite pictures," this was favorable to Ibar. *Cf.* ***Penalver***, 926 So.2d at 1126 (noting introduction of testimony of Penalver acquaintances that he was *not* the person in the videotape). Contrary to the circuit court's ruling, Morgan testified he *never*

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received any document reflecting this investigatory lead. (PC1. 188; PC14. 2263; PC9. 1526-27). There was *no* evidence that second chair Brush had this document or investigated it. It is clear that this third-party suspect evidence fit squarely into Morgan's defense strategy.

Regarding the information from Michelle Klimeczko, Jean Klimeczko's worry and desire to quickly leave town at the time of the murders, (PC2. 283-85), was favorable to Ibar because it suggested Klimeczko's involvement (not Ibar) in the murders. Morgan never knew about this investigation or was provided this document. (PC1. 189; PC14. 2264). Ibar was prejudiced by his inability to impeach Klimeczko with this information.

The state introduced testimony from numerous witnesses to whom it showed the distilled images of the perpetrator and who putatively claimed Ibar was, or resembled, the perpetrator. Certainly they showed the images to persons who could *not* identify Ibar. This type of "non-identification" evidence was favorable to Ibar. There was no such evidence in Morgan's file. (PC1. 189). Ibar was prejudiced by his inability to present such exculpatory evidence.

Regarding the camera that captured the images and VHS that recorded them, the state failed to preserve these. The record established that these were necessary to more carefully analyze the video and photo materials. Given the testimony that established discrepancies between Ibar's face and that of the

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perpetrator, analysis including the camera and VHS machine could only have further illuminated these discrepancies. Thus, this evidence was more than merely potentially useful to the defense." (PC9. 1505). Accordingly, Ibar did not need to show bad faith to sustain this claim.

CONCLUSION

Death is final. It is irreversible and irremediable. For Florida death sentenced defendants, this court is effectively the last guardian of the fundamental protections enumerated in the Florida and United States Constitutions. It is the final arbiter of the justice that is required by these protections. Through its case-by-case adjudication of these protections, this court sets the course for how these foundational rights will be interpreted and what justice will mean, for decades to come.

Pablo Ibar has proclaimed his innocence of the horrific crimes of which he was accused from day one. Yet he was found guilty and sentenced to the ultimate penalty - death. He claims, and maintains he has established, that his conviction resulted from a clear and egregious denial of his constitutional rights to counsel and due process.

The Sixth Amendment Right to Counsel is denoted the most important of all the constitutional rights of criminal defendants because it is the one through which all of the other rights and protections are accessed and effectuated. But Ibar's

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counsel Morgan, facing the most daunting of all prosecutions, was beleaguered by severe illness and personal trauma. He was not fit for this overwhelming task. As a result, he failed to undertake basic investigations, procure vital exculpatory evidence and witnesses, and to make basic, meritorious objections to improper evidence throughout trial. Overall, Morgan failed to fulfill the role of "counsel" demanded by the Sixth Amendment and Article I section 16.

The record amply demonstrates what Morgan could have, and should have done to effectively represent Ibar. It shows this, as best as possible, through the prism of Morgan's credible recollections of his state of mind and actions at the time of Ibar's prosecution. These recollections, in which Morgan recognized his numerous missteps and omissions, are anchored in the concrete of the trial record and the prosecution and defense of Ibar's co-defendant Penalver.

This case is riddled with uncertainty. Ibar has steadfastly maintained his innocence from the outset. No physical evidence has ever connected him to the crime or crime scene. Ibar's alibi was supported by the testimony of five witnesses and corroborating documents. His first nine-month, joint trial with co-defendant Penalver ended in a hung jury. And in the second trial leading to Ibar's conviction, the grainy video that was the primary evidence against him, and the source of most of the other identifications, was not effectively challenged.

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Penalver successfully employed an expert to establish that the video materials were deficient, and by accepted scientific analysis could not support a reliable identification. Ibar has now shown material facial discrepancies between him and the video-depicted perpetrator. Any competent trial counsel would have done the same. Given Morgan's debilitated state and numerous omissions, this court cannot countenance Ibar's conviction or death sentence.

Based on the foregoing arguments and supporting authorities, Ibar requests that this court reverse the judgment below and vacate his convictions and sentences, remand to the trial court for a plenary evidentiary hearing, or provide such other and further relief as it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-filed with the Clerk of the Supreme Court and sent by United States mail this 18th day of December 2012, to AAG Leslie T. Campbell, Office of the Attorney General, 1515 N. Flagler Dr. Floor 9, West Palm Beach, FL 33401-3428, and emailed to CrimAppWPB@MyFloridaLegal.com.

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