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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1280

JOSE ANTONIO JIMENEZ,

Defendant-Appellant,

v.

STATE OF FLORIDA,

Plaintiff-Appellee.

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

INITIAL BRIEF FOR APPELLANT

MARTIN J. MCCLAIN
Florida Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, Florida 33334
(305) 984-8344
martymcclain@earthlink.net

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of a post-conviction motion. The following symbols will be used to designate references to the record in this appeal:

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

"T." transcript of trial;

"1PC-R." record on appeal of denial of first Rule 3.851 motion;

"2PC-R." record on appeal of denial of the second Rule 3.851 motion;

"3PC-R." record on appeal of denial of the third and fourth Rule 3.851 motion.

REQUEST FOR ORAL ARGUMENT

Mr. Jimenez has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. Due process dictates that this Court must grant Mr. Jimenez an opportunity to present oral argument. *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993). A full opportunity to air the issues through oral argument is warranted in this case, given the seriousness of the claims involved, the stakes at issue, and this Court's opinion in *Huff v. State*, Mr. Jimenez, through counsel, accordingly urges that the Court permit oral argument.

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INTRODUCTION

It is an "obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him is the foundation for our adversary system." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). When initial collateral counsel is ineffective by failing to alert the court to trial counsel's ineffectiveness, collateral counsel's failure "could [ ] deprive a defendant of any review of that claim at all." *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013). The same principle applies when the initial collateral counsel is ineffective by failing to alert a court conducting collateral review to the State's failure to comply with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). Given the importance of effective defense counsel to the justice system, the United States Supreme Court recognized an exception to "modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Trevino*, 133 S. Ct. at 1917.

The exception enables a court to find cause to excuse a procedural default where four criteria exist:

(1) the claim of ineffective assistance of trial counsel and/or the *Brady* claim were substantial claims;

(2) the cause consisted of there being no counsel or only ineffective counsel during the state collateral review proceeding;

(3) the state collateral review proceeding was the initial review proceeding in respect to the ineffective-assistance-of-trial-counsel claim and/or *Brady* claim; and

(4) state law requires that an ineffective assistance of trial counsel claim and/or *Brady* claim be raised in an initial-review collateral proceeding.

Trevino, 133 S. Ct. at 1918. All four criteria are met in this case, and therefore, this Court should find cause to overcome the procedural default and remand this case for an evidentiary hearing in the circuit court.

STATEMENT OF CASE AND FACTS

José Jimenez was indicted on October 21, 1992, in Dade County, Florida, for one count of first-degree murder and one count of burglary with an assault. (R. 1-2). His trial began on October 3, 1994, before Judge Rothenberg, and on October 6, 1994, the trial jury found Mr. Jimenez guilty of both first-degree murder and burglary with a deadly weapon. (T. 957).

On November 10, 1994, a penalty phase proceeding regarding Mr. Jimenez's sentence was conducted before the same jury that had determined his guilt. The jury returned a recommendation of death. (R. 487). On December 8, 1994, a sentencing hearing was held before Judge Rothenberg. (T. 1119). Judge Rothenberg then imposed a sentence of death on December 14, 1994, and found four aggravating circumstances: (1) a prior conviction for a crime of violence (Mr. Jimenez had pled *nolo contendere* to "resisting officer with violence to his person" and was sentenced to serve six months in jail with credit for time served); (2) the

homicide occurred during the course of a burglary; (3) the defendant was on community control during the time of the homicide; and (4) the homicide was heinous, atrocious, or cruel. (R. 529; T. 1138). Judge Rothenberg found one statutory mitigating circumstance and two non-statutory mitigating circumstances. (R. 529; T. 1138).

On direct appeal, this Court affirmed the judgment and death sentence. *Jimenez v. State*, 703 So. 2d 437 (Fla. 1997), *cert. denied*, 523 U.S. 1123 (1998). Mr. Jimenez raised the following claims in his direct appeal:

(1) The trial court conducted an inadequate hearing regarding an alleged conflict between penalty phase counsel and Mr. Jimenez;

(2) Mr. Jimenez was improperly excluded from sidebars where cause challenges were exercised;

(3) Mr. Jimenez's right to cross-examine was erroneously restricted;

(4) The trial court erroneously failed to obtain a personal waiver of the right to have the jury instructed as to a lesser included offense;

(5) There was insufficient evidence to support the guilty verdicts;

(6) The prosecutor made impermissible arguments during the penalty phase proceedings;

(7) The sentence of death was disproportionate;

(8) The sentence order was replete with errors that warranted a resentencing; and

(9) Capital punishment as administered by Florida was unconstitutional.

This Court found that arguments 1-5 and 7-9 had no merit; argument 6 was found to be unpreserved. *Id*.

Judge Rothenberg subsequently appointed Louis Casuso on August 21, 1998, to represent Mr. Jimenez in his initial state court capital post-conviction litigation pursuant to § 27.711 of the Florida Statute. (1PC-R. 48). On January 15, 1999, nearly five months after the appointment, Casuso informed Mr. Jimenez of his appointment as Mr. Jimenez's initial collateral counsel. Mr. Jimenez asked to meet with Casuso, who responded that a visit would not be a problem and advised Mr. Jimenez that he would visit him soon at Union Correctional Institution. Months passed, however, and neither Casuso nor anyone on his behalf ever visited Mr. Jimenez to discuss his case. Under Rule 3.851, Mr. Jimenez had one year from May 18, 1998, in which to file his motion for post-conviction relief. May 18, 1999, passed without Mr. Jimenez's ever receiving a visit from Casuso or any notification that his initial petition for post-conviction relief needed to have been filed.

When Casuso offered to withdraw as initial collateral counsel in August 1999, Mr. Jimenez readily accepted. Casuso filed a motion to withdraw as counsel on November 21, 1999, and stated:

> Since the undersigned cannot file anything on behalf of Mr. Jimenez, and has found it difficult to find the time as well as the finances to travel to personally see Mr. Jimenez to get his approval on the motion to vacate, undersigned moves that this Honorable court allow him to

> withdraw his [sic] attorney of record in this case and appoint another lawyer who can visit Mr. Jimenez and who can underwrite the travel expenses necessary to visit the defendant where he is being held.

(1PC-R. 25).

Casuso's motion to withdraw was initially granted on December 1, 1999,[1] but on December 7, 1999, the order granting the withdrawal was vacated. (1PC-R. 9). Judge Rothenberg then held an off-the-record proceeding on December 20, 1999.[2] The resulting order indicated that during this proceeding, Casuso appeared before Judge Rothenberg and complained about Mr. Jimenez, who was not present.

Based solely on Casuso's *ex parte* complaints regarding his client, Mr. Jimenez, Judge Rothenberg issued an order on December 21, 1999, in which she determined:

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[1] Casuso asserted in his motion, and Judge Rothenberg subsequently accepted his assertion, that Casuso was financially unable to travel to Union Correctional Institution to visit his client. Florida registry attorneys provided for under Florida Statute §27.711 are funded to visit their clients on death row, and registry counsel have routinely been reimbursed for travel to visit clients on death row. *See McClain v. Atwater*, 110 So. 3d 892 (Fla. 2013). Since registry counsel was funded to visit their clients on death row, then Casuso's failure to know the law was deficient performance under *Hinton v. Alabama*, 134 S. Ct. 1081 (2014).

[2] The state circuit court record does not contain a transcript of a proceeding on December 20, 1999. The Case Progress Notes, however, reflect an action on December 20, 1999. (1PC-R. 12). The record contains an order entered on December 21, 1999. (1PC-R. 27-28). The order indicated that the cause came before the court "on January 20, 1999," but the month is clearly a typographical error. During this proceeding, the order stated, "this Court reviewed the record and [has] been advised as to status by LOUIS CASUSO, attorney for the defendant." The order does not reflect that anyone else was present for the proceeding between Judge Rothenberg and Louis Casuso.

> The Defendant has refused to cooperate in the preparation of a Motion for Post-Conviction Relief, in that the Defendant has refused to do so by written communication and has insisted on meeting with his attorney, Mr. Casuso, face-to-face. Mr. Casuso is unable to travel to communicate with the Defendant by any means other than in writing.

(1PC-R. 27).[3] The order concluded by directing Mr. Jimenez to "review the proposed Motion" and to communicate with Casuso in writing by January 31, 2000, or otherwise the proposed Motion was "to be filed on his behalf by MR. CASUSO no later than February 7, 2000." (1PC-R. 27-28).

Thereafter, Mr. Jimenez received a copy of the order along with a letter from Casuso stating, "Since you have more time than I do, the order provides for you to tell me by January 31st in writing what it is you need me to raise on [sic] the motion."

On January 31, 2000, Louis Casuso filed a Motion to Vacate in Mr. Jimenez's case. The eight-page motion raised six claims for relief and included a verification signed by Mr. Jimenez. (1PC-R. 29-36). The claims raised were:

(1) trial counsel was ineffective when he failed to call a witness who had observed "Mr. Jimenez exit the elevator on the third floor and saw Mr. Jimenez then walk towards the apartment;" (1PC-R. 31);

(2) trial counsel was ineffective in the penalty phase when he failed to investigate and prepare mitigating evidence;

(3) trial counsel was ineffective in failing "to object to certain evidence;"

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[3] Judge Rothenberg's order was wrong as a matter of law to the extent that it accepted Casuso's representation that registry counsel could not obtain reimbursement for travel to visit his client.

(4) the trial was fraught with procedural and substantive errors that rendered the outcome unreliable;

(5) penalty phase counsel was burdened with a conflict of interest and thus rendered constitutionally deficient representation; and

(6) death by electrocution violates the Eighth Amendment.

On February 7, 2000, Casuso appeared at a status hearing and requested time to review the public records in the custody of the Repository. (1PC-R. 48).[4] Casuso provided no explanation in the record as to why he did not attempt to view the public records prior to filing the Rule 3.850 motion. On February 22, 2000, Casuso attended another hearing on behalf of Mr. Jimenez and announced that he intended to file an amendment based upon a new decision by this Court (*Delgado v. State*, 776 So. 2d 233 (Fla. 2000)) and that he no longer needed time to examine the public records. When Judge Rothenberg asked Casuso whether there was "any reason why you need to review these records," Casuso responded, "Not really, I mean we tried the case." (1PC-R. 122). Judge Rothenberg then found that, in light of Casuso's waiver of access to the public records, "it doesn't appear that I am going to have to review the records *en camera* since based upon the – because the notes were the index of what has been retained by the State as [work] product." (1PC-R. 122).

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[4] No transcript of the February 7, 2000, hearing exists because "no notes were taken," according to the court reporter. (1PC-R. 118). However, the State indicated in a response motion that Casuso sought access to the public records that had been sent to the Repository at the hearing.

On March 10, 2000, Casuso filed a one-page amendment, in which he added a seventh claim based upon this Court's decision in *Delgado v. State*, 776 So. 2d 233 (Fla. 2000). The seventh claim was an attempt to apply *Delgado* retroactively to this case.

The circuit court ordered the clerk of court to destroy "certain evidence [ ] now in the possession of the Clerk," without notice to Mr. Jimenez, on March 23, 2000. (1PC-R. 40).

On April 25, 2000, the State filed its Response to the Motion to Vacate. (1PC-R. 42). The Response was twenty-eight pages long.

On May 1, 2000, Casuso failed to appear to argue the Rule 3.850 motion pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993). (1PC-R. 129). The *Huff* hearing was rescheduled for May 3, 2000. On May 3, Casuso appeared without Mr. Jimenez and waived an evidentiary hearing on the ineffectiveness claim, stating, "I don't think there is a necessity for an evidentiary hearing on that. Take a look at it [deposition of Anna Brandt, a witness whose statements pertained to the first ineffectiveness claim] and see if she should have been called or not." (1PC-R. 136). At this point, the State provided Judge Rothenberg with a copy of the deposition of Anna Brandt. (1PC-R. 72, 136). Casuso made no argument as to why Anna Brandt should have been called as a witness and informed the court that he had no argument in general.

Unsurprisingly, Judge Rothenberg issued an order denying the Motion to Vacate on June 8, 2000. (1PC-R. 91). She found Claim I to be refuted by the record. Claims II, III, and IV were deemed insufficiently pled; Claim V was found procedurally barred because it had been raised on direct appeal; and Claim VI was moot. Judge Rothenberg then found that Claim VII, the *Delgado* claim that had been raised in the one-page amendment, could not be applied retroactively.

Casuso filed a notice of appeal on June 28, 2000.

In his fifteen-page initial brief filed on November 14, 2000 in this Court, Casuso raised only one argument: Judge Rothenberg erred in denying relief under *Delgado*. This Court subsequently found the single issue to be meritless. *Jimenez v. State*, 810 So. 2d 511 (Fla. 2001). Mr. Jimenez filed a *pro se* motion for rehearing, which this Court denied. The rehearing was denied on December 17, 2001.

Meanwhile, Mr. Jimenez filed a *pro se* "Petition for Writ of Habeas Corpus, Seeking a Belated Appeal" in the circuit court, while the Rule 3.850 appeal was pending before this Court. In this petition, Mr. Jimenez claimed that his registry counsel, Casuso, had failed to provide adequate assistance of counsel, and Mr. Jimenez requested the appointment of new counsel. Specifically, Mr. Jimenez wrote:

> I have absolutely no idea of what is going on in my case because of the improper way Mr. Casuso has been handling my case.

> On Friday afternoon Oct. 5, 2001, I received my opinion from the F.S.C. notifying me of the denial of the 3.850 appeal but Mr. Casuso did not enclose a letter telling me what else if anything he plans to do.
>
> His actions are that of a person who doesn't care about me and by his lack of communication and very poor handling of my case that should be obvious to everyone.
>
> I am begging this Court to please take the time to look into this matter and grant me a rehearing so that all my issues can be heard properly and if possible I ask that I be given a new attorney so that I can have better representation as I believe that Mr. Casuso is only going to do me more harm than good.
>
> I also ask that this Court forgive me for coming to you in this manner but as I've said I have no idea what Mr. Casuso is doing and I am desperately in need of some help and I hope that this Court can see that.

The circuit court denied the petition. After Mr. Jimenez had filed a notice of appeal, the State moved to rescind the order because the lower court lacked jurisdiction, and the circuit court rescinded the order. The State then moved to dismiss the appeal in this Court. On November 13, 2001, this Court dismissed the *pro se* appeal.

Finally, the circuit court granted Mr. Jimenez's request that Casuso be discharged as his state-court registry counsel on June 11, 2002. At that time, the circuit court appointed the undersigned counsel as Mr. Jimenez's new state-court registry attorney.[5]

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[5] Although undersigned counsel was appointed in June 2002, undersigned counsel could not obtain approval of reimbursement of his attorney fees until June 27, 2006. (2PC-R. 578). Due to

Through undersigned counsel, Mr. Jimenez filed a petition for writ of habeas corpus in this Court on December 11, 2002, in which he alleged that (1) he had been denied his statutory right to effective representation in collateral proceedings, (2) he had been denied due process by *ex parte* contact between Judge Rothenberg and Casuso, and (3) his death sentence violated *Ring v. Arizona*, 536 U.S. 584 (2002). This Court denied the petition in an unpublished opinion on June 10, 2003. *Jimenez v. Crosby*, 861 So. 2d 429 (Fla. 2003).

Mr. Jimenez filed a Rule 3.851 motion on April 28, 2005.[6] (2PC-R. 68-93). The second Rule 3.851 motion alleged, *inter alia*, that the State engaged in conduct that effectively discouraged two witnesses critical to Mr. Jimenez's defense from becoming involved in the case or appearing for depositions and that trial counsel was ineffective for failing to investigate other critical witnesses, such as Anna Brandt, or the nefarious colluding between Manuel Calderon, the Medellin drug cartel, and the North Miami Police. Mr. Jimenez pled the claims arising from his

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the uncertainty regarding which fees and expenses would be reimbursed, undersigned counsel was unable to obtain assistance with the investigation until 2005, when undersigned counsel learned that the federal court had granted his motion for investigative services.

[6] During the interim between this Court's denial of Mr. Jimenez's petition in 2003 and the filing of the second Rule 3.851 motion, Mr. Jimenez filed a petition for federal habeas corpus relief in the Federal District Court for the Southern District of Florida on January 20, 2004. The federal district court approved counsel's request for the assistance of an investigator. Undersigned counsel specifically alerted the district court of initial collateral counsel's ineffectiveness through the waiver of all issues regarding ineffective assistance of trial counsel in a detailed amendment filed on April 25, 2005. The district court denied the petition on January 30, 2006, and Mr. Jimenez appealed to the Eleventh Circuit.

factual allegations as alternatively violations of the prosecutor's obligations under *Brady v. Maryland* or violations of trial counsel's obligation to provide effective representation under *Strickland v. Washington*.

A *Huff* hearing was held on July 27, 2005, regarding the allegations in Mr. Jimenez's second Rule 3.851 motion. At that hearing, counsel for Mr. Jimenez argued for an evidentiary hearing during which Mr. Jimenez could be afforded the opportunity to present the full evidence in support of his claims. The second Rule 3.851 motion was denied in the fall of 2005.[7]

Mr. Jimenez filed a petition for rehearing and a motion to disqualify the issuing judge (Judge Ward) on October 5, 2005. Mr. Jimenez then filed a motion to get the facts on November 4, 2005. On November 7, 2005, an order denying rehearing and a separate order denying disqualification of Judge Ward were entered, and on November 28, 2005, a third order denying the motion to get the facts was entered. Mr. Jimenez filed a notice of appeal on December 15, 2005. This Court affirmed the denial of relief. *Jimenez v. State*, 997 So. 2d 1056 (Fla. 2008).

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[7] The exact date that the denial was issued is unclear. Undersigned counsel received a service copy of a Notice to Court in the federal court regarding Mr. Jimenez's pending federal petition for habeas relief on September 23, 2005. The date of the issuing judge's signature was September 9, 2005, but the mail was stamped by the U.S. postal service on September 22, 2005.

On November 29, 2010, Mr. Jimenez filed a Successive Motion to Vacate Judgments of Convictions and Sentence, which was premised upon this Court's misapplication of the standard for evaluating claims of ineffective assistance of counsel in *Porter v. McCollum*, 130 S. Ct. 447 (2009). The motion was denied on February 11, 2011. (3PC-R. 134-40). Mr. Jimenez filed a notice of non-compliance with Fla. R. Crim. Pro. 3.851(f)(5)(D), or in the alternative a motion for rehearing on March 16, 2011. (3PC-R. 141-44). On April 22, 2011, Mr. Jimenez filed a motion to amend to include a lethal injection claim. (3PC-R. 145-60). The State filed a response to the motion to amend; however, the record shows that the circuit court did not rule on either the motion for rehearing or the motion to amend.

On March 20, 2013, Mr. Jimenez filed another Rule 3.851 motion. In this motion, he reasserted that initial collateral counsel, Louis Casuso, was ineffective and argued that Casuso's ineffectiveness was sufficient under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), to overcome the procedural default found by each court since Casuso's waiver of ***all claims*** regarding the State's failure to comply with its obligation under *Brady v. Maryland* and the ineffective assistance of trial counsel. (3PC-R. 165-90). The lower court denied the motion on April 25, 2013. (3PC-R. 211-13).

On June 4, 2013, undersigned counsel filed a motion for rehearing and notice of supplemental authority in which undersigned counsel alerted the court to the United States Supreme Court's decision in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), which held that *Martinez* applied to those states -- such as Florida -- that followed the Texas procedure regarding non-record collateral claims. (3PC-R. 220-46). On June 10, 2013, the circuit court summarily denied the motion for rehearing. (3PC-R. 247). Mr. Jimenez filed his notice of appeal on July 10, 2013. (3PC-R. 274-75).

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving questions of law and fact. Normally, where evidentiary development has been permitted in circuit court, rulings of law are reviewed *de novo* while deference to the trial court is given as to findings of fact. However, here the circuit court denied an evidentiary hearing, and therefore, the facts alleged by Mr. Jimenez must be accepted as true for purposes of this appeal in order to determine whether he is entitled to an opportunity to present evidence in support of his factual allegations. *Peede v. State*, 748 So. 2d 253 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509 (Fla. 1999); *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989).

SUMMARY OF THE ARGUMENT

José Jimenez relied on initial collateral counsel, Louis Casuso, to investigate the facts in light of the controlling standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and in light of the State's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), to challenge the adequacy of his trial counsel's representation and the State's compliance with due process and the conviction and death sentence that resulted from these constitutional violations. Casuso's failure to conduct an adequate investigation – or any investigation whatsoever – and raise the available challenge to the adequacy of trial counsel is no different than those circumstances outlined in *Hinton v. Alabama*, 134 S. Ct. 1081 (2014), where counsel failed to adequately represent his client due to ignorance of the law . As a result of Casuso's ignorance of the law and his failure to adequately investigate, he caused Mr. Jimenez's *Brady* claims and *Strickland* claims to not be pled in his initial Rule 3.850 motion and thereby erected procedural bars as to those claims. *See Trevino v. Thaler*, 133 S. Ct. 1911 (2013); *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

This Court should remand this case for an evidentiary hearing to enable Mr. Jimenez to demonstrate that he received ineffective representation during his initial collateral review proceedings and as result he has cause to overcome the procedural bars arising from collateral counsel's failure to properly raise and

litigate his Mr. Jimenez's *Brady* and *Strickland* claims which render his conviction and sentence of death unconstitutional. The equity principles discussed in *Holland v. Florida*, 130 S. Ct. 2549 (2010), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), warrant a finding that Casuso's ineffective assistance constituted cause sufficient to overcome procedural default. Mr. Jimenez is not raising a claim that he is entitled to relief due to collateral ineffective assistance; he instead argues collateral counsel's ineffectiveness as cause to overcome any procedural bars to consideration of the merits of his *Brady* and/or *Strickland* claims.

ARGUMENT

I. JOSE JIMENEZ IS ENTITLED TO EQUITABLE RELIEF AND CONSIDERATION OF the MERITS REGARDING HIS CLAIMS THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT AND *STRICKLAND V. WASHINGTON* AT BOTH THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL.

A. Introduction

When counsel for an initial collateral review proceeding is ineffective, as in this case, and courts refuse to consider those claims that should have been raised in the initial collateral proceedings but were not (e.g., ineffective assistance of trial counsel and claims under *Brady v. Maryland*), the defendant suffers the inequitable result of having those constitutional claims procedural barred and not subject to meaningful review. *See Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013); *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012). "When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." *Martinez*, 132 S. Ct. at 1316. The "failure to consider a lawyer's ineffectiveness during an initial-collateral proceeding as a potential cause for excusing a procedural default will deprive the defendant of *any opportunity at all* for review of an ineffective-assistance-of-trial-counsel claim." *Trevino*, 133 S. Ct. at 1921.

The effect of Casuso's ineffectiveness during Mr. Jimenez's initial collateral proceedings in this case is a striking example of the very inequity sought to be

corrected by the United States Supreme Court in *Martinez* and *Trevino*. The *Brady* and/or *Strickland* claims in Mr. Jimenez's case did not fall within the prevue of those "rare" cases in which *Brady* and/or *Strickland* claims could have been considered by this Court on direct appeal. *See Ellerbee v. State*, 87 So. 3d 730, 739 (Fla. 2012). Thus, Mr. Jimenez relied on his initial collateral counsel, Louis Casuso, to raise any and all available *Brady* and *Strickland* claims during the initial collateral review proceedings and litigate them in Rule 3.851 proceedings. *See id*.

Because Casuso failed to conduct any investigation and failed to review any public records, he did not plead the wealth of favorable evidence such investigation and/or review of public records would have readily revealed. Casuso did not plead a *Brady* claim at all. The cursory ineffectiveness claim that he pled, he waived at the case management hearing. But the wealth of available favorable information was not pled at all in the cursory and conclusory claim that appeared in the Rule 3.851 motion. As a result, all aspects of Mr. Jimenez's *Brady* and/or *Strickland* claims were procedurally defaulted, and thus procedurally barred from subsequent consideration. *Jimenez v. Fla. Dep't. of Corr.*, 481 F.3d 1337, 1343 (11th Cir. 2007) (noting "Section 2254 explicitly bars this claim. 'The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254'") (quoting 28 U.S.C. § 2254); *Jimenez v. State*, 810 So. 2d 511 (Fla. 2001);

Jimenez v. Crosby, 861 So. 2d 429 (Fla. 2003). Meanwhile, the inequitable effect of Mr. Jimenez's initial collateral counsel's ineffective assistance compounded the prosecution's violation of *Brady v. Maryland*, and trial counsel's violation of Mr. Jimenez's constitutional right to effective representation under *Strickland.* *See Trevino*, 133 S. Ct. at 1921.

B. The Available Favorable Information That Casuso Failed to Investigate and Present in Initial Collateral Review.

There was a wealth of favorable evidence that did not get presented to Mr. Jimenez's jury at the guilt phase because of either the State's unreasonable failure to disclose or because of trial counsel's inadequate investigation, or both. This evidence was readily discoverable by collateral counsel through investigation and review of the public records. However, Casuso failed to learn of this favorable information and present Mr. Jimenez's constitutional challenges arising from the fact that the jury did not learn of the favorable information either due to *Brady* violations or due ineffectiveness of trial counsel under *Strickland v. Washington*.

Mr. Jimenez had made a wealthy enemy willing to spend considerable money and energy to ruin Mr. Jimenez. Police had determined that Manuel Calderon was a member of the Medellin drug cartel. Calderon had found his live-in girlfriend, Marie Debas, dead from a drug overdose on October 22, 1990. He hired a number of private investigators to look into the circumstances of her death and ascertain whether Ms. Debas had been seeing another man. He was advised

that she had frequently been in the company of Mr. Jimenez and that the police had found a fingerprint of Mr. Jimenez in the apartment Mr. Calderon shared with Ms. Debas. The assistant medical examiner who had examined Ms. Debas's body concluded that she died of a drug overdose. A private investigator and former Metro-Dade police officer hired by Mr. Calderon advised Mr. Calderon that Ms. Debas may have died from asphyxiation during consensual sexual activity with Mr. Jimenez. Thereafter, Calderon's agents tried to get Mr. Jimenez charged with her homicide. The private investigator contacted the Chief Medical Examiner in order to convince him to override the finding of a drug overdose on the basis that property was missing from the apartment.

Miami Beach police investigating Ms. Debas' death believed that Mr. Calderon may have taken items from the apartment after discovering her body or may have reported items missing that he did not own as part of an effort to defraud his insurance company. After the communication with Mr. Calderon's agent urging a finding that Debas was the victim of a homicide, the Chief Medical Examiner overrode the drug overdose finding and ultimately found the death a homicide that resulted from mechanical asphyxiation. Miami Beach police on the other hand became angry with the interference into their investigation that was being mounted by Calderon's people. In October of 1991, the Miami Beach police closed the case refusing to charge Mr. Jimenez with the murder of Debas.

Calderon's people refused to accept the action of the Miami Beach police. In August of 1992, an investigator acting on Calderon's behalf discovered that Mr. Jimenez was living in North Miami and was on community control. This investigator on Calderon's behalf confronted Assistant State Attorney Gerald Bagley, who had been assigned the Debas case at the time of the discovery of her body. The investigator accused the Miami Beach police of corruption. He advised Bagley that Mr. Jimenez was a confidential informant working for the Miami Beach police and that the police were protecting him from prosecution. Dissatisfied with Bagley's failure to do anything, the investigator and former Metro-Dade police officer set up surveillance on Mr. Jimenez. His neighbors were interviewed. Gossip was gathered and rumors regarding Mr. Jimenez were spread. Hoping to find a way to make trouble for Mr. Jimenez and his community control status, the private investigator used contacts from his days as a cop to gather a dossier on Mr. Jimenez.

On October 2, 1992, Phyllis Minas was stabbed to death at the North Miami apartment complex at which Mr. Jimenez lived. Through his contacts and surveillance, Calderon's private investigator immediately learned of the incident. He contacted North Miami police personnel and advised them that Jose Jimenez, a known burglar, lived in the building. The investigator provided the lead detectives the dossier of Mr. Jimenez's criminal history that he had put together. He advised

them of Debas' death and fed them the story that the Miami Beach were protecting Mr. Jimenez from murder charges.

The police in turn intentionally covered up the source of the information that led them to suspect Mr. Jimenez. The lead detectives fabricated a story that Officer Cardona had advised them that she recognized Mr. Jimenez getting off the elevator and that he was a known burglar. In fact, Officer Cardona did recognize Mr. Jimenez when she saw him, but she did not remember his name, nor did she have any knowledge that he had any involvement with any burglaries. Her only contact with Mr. Jimenez had been when she had responded to a domestic disturbance situation at the same apartment complex several months before.

The police fabricated the story because they did not want it known that Calderon, a member of the Medellin drug cartel, who was out to get Mr. Jimenez, was the source of the information first leading them to look at Mr. Jimenez. Revealing this connection to Calderon could be used to impeach their work. The private investigators hired by Calderon were being paid thousands of dollars by Calderon to go after Mr. Jimenez. Money was readily available and was willingly spent.

The police intentionally misled the defense of the involvement that Calderon's hired private investigator had in developing their case. This private investigator, who had been a homicide detective prior to his sudden departure from

the Metro-Dade police in 1984, pooled information with the lead detectives in the Minas investigation. He gave the North Miami detectives all of the information that he had gathered regarding Mr. Jimenez. In return, he was advised who the witnesses in the case were. He learned of Merriweather's statement that he had observed an unknown individual with a Mohawk jump off the balcony unto a van and get into cab. Soon, Merriweather's testimony changed. The Mohawk, the van and the cab were forgotten, and suddenly Merriweather remembered that the individual was known to him and that it was Mr. Jimenez. The undisclosed connection between the North Miami police and Calderon's private investigator precluded the defense from building a case that favors were being traded in order to produce more evidence against Mr. Jimenez. And in turn, Mr. Jimenez was deprived of his right to impeach the State's case at trial because of the decision to withhold evidence that an agent of Mr. Calderon was involved in building the case against him.

Meanwhile, the police contacted the cab company and discovered that at approximately 8:25 p.m., on the night of Minas homicide a cab driver had picked up a man who was bleeding from the face at the apartment complex. The cab driver was shown a photograph of Mr. Jimenez and indicated that he was not the man who was bleeding and who had gotten in his cab. The police officer conducting the interview of the cab driver forgot to write a report and was not able

to remember the details of the interview at his deposition. Interestingly, the prosecuting attorney, Michael Band, had a phone message from the cab driver providing him with phone numbers at which the cab driver could be reached. In fact, law enforcement made repeated efforts to issue state attorney subpoenas on the cab driver in order to try to get him to identify Mr. Jimenez. Soon, the cab driver – disgusted and weary of the subpoenas at the time that he would have to take off work – decided to ignore the subpoenas and not comply with their directive. As a result, defense counsel was never able to get the cab driver to appear for a deposition in order to learn what he knew. Again because of the withheld evidence, the jury did not learn of the cab driver's story nor of the State's repeated efforts to get him to identify Mr. Jimenez as the fare he picked up who was bleeding from his face. Because of the decision not to disclose the involvement of Calderon's people, the defense was unaware that a wealthy Calderon was interested in the case and had reason to use muscle and money to facilitate the State's effort to convict Mr. Jimenez of Minas' murder.

The North Miami police investigating the Minas homicide met with Calderon's private investigator and received evidence from him, and then they met with Michael Band, the Assistant State Attorney assigned to the Minas case. Band's assistance was obtained to remove the Miami Beach police off the Debas case in order to get the North Miami police involved and to get charges in that

homicide filed. To facilitate this, a jailhouse informant's assistance was obtained. One of the North Miami officers had just used a jailhouse informant in another case and was sure that he would cooperate. Soon, Mr. Jimenez was housed with this informant, Jeffrey Allen. Within a week, Allen was in contact with the North Miami police officer. He remained housed with Mr. Jimenez for two months working on a bogus claim that Mr. Jimenez confessed to killing both Ms. Minas and Ms. Debas.

By including an alleged confession in the Debas case along with an alleged confession to the Minas case in his statements to the North Miami police, Mr. Allen gave Band leverage to remove the Miami Beach police from the Debas investigation and to turn the Debas case over to the North Miami detectives who were handling the Minas case. However, in concocting his story, Mr. Allen was acting as an agent of the State. He had numerous conversations with the police as he improved his story. In early March of 1993, Band arranged with the jail for an interview room to confer with Allen. After Band was satisfied with Allen's story, he advised the North Miami police to interview Allen in an official capacity. This interview took place on March 15, 1993. The defense was falsely advised that this was the first substantive communication with Mr. Allen regarding Mr. Jimenez.

Band and the North Miami detectives intentionally misled Mr. Jimenez's defense lawyers indicating that contact with Mr. Allen commenced on March 15th.

Use of Mr. Allen as an informant had another specific benefit in the Minas prosecution that Band exploited. Mr. Allen had been represented in 1992 by the Dade County public defender's office. When he was disclosed as a state's witness against Mr. Jimenez, it created a conflict that forced the public defender's office to withdraw from representation of Mr. Jimenez. The disclosure of Mr. Allen as a witness occurred after Ms. Hartman's withdrawal as counsel for Mr. Jimenez in the Minas case on April 5, 1993, when the money paid her by Mr. Jimenez's parents ran out. Thereupon, the case was set to revert to the experienced team of capital lawyers with the public defender's office. However, the State was able to force the public defenders off the case by advising them that Jeffrey Allen was a witness and the public defender's office possessed a conflict of interest and could not represent Mr. Jimenez in the Minas case. On April 29, 1993, the State filed a formal notice disclosing Jeffrey Allen as a witness (PC-R. 78).

After using Mr. Allen to force the removal of the public defender's office from representing Mr. Jimenez, Band arranged undisclosed polygraph examinations of Mr. Allen because he had developed doubts about whether Mr. Allen could credibly be used as a witness against Mr. Jimenez. Indeed, Mr. Allen performed poorly on the polygraph examinations. As a result, the conclusion was reached that he could not be used as a witness in either case. This meant that the State was left with insufficient evidence to obtain an indictment in the Debas case.

At that point, Band turned the North Miami detectives loose to find additional evidence in the Miami Beach case. Band went to Judge Rothenberg on an *ex parte* application in the Minas case and obtained authorization to send the North Miami detectives to Los Angeles to interview "material witnesses" at county expense (R. 104-06). However, these witnesses concerned the effort to find evidence to charge Mr. Jimenez with the alleged murder of Debas, not Minas. Using the assistance provided by Calderon's private investigator, the new witnesses in Los Angeles were located and they now provided evidence that advanced Calderon's interest in getting the state to indict Mr. Jimenez in the death of Marie Debas.

An indictment in that case was obtained in early 1994. Ms. Debra Cohen, who had been appointed as Mr. Jimenez's counsel in the Minas prosecution in April of 1993, withdrew in the Minas case in May of 1994 due to the birth of her baby. Thereupon, Judge Rothenberg assigned the Debas case to the public defenders. As before, Mr. Band immediately used Jeffrey Allen to force the withdrawal of the public defender's office from the Minas case, even though the decision had been made that Mr. Allen would not be used as a witness. This was after Mr. Allen had failed polygraph examinations. The non-disclosure of favorable and/or exculpatory evidence regarding Jeffrey Allen precluded the defense from knowing the lengths to which the State would go to obtain a conviction and to control who was appointed to represent Mr. Jimenez.

The State had planted Jeffrey Allen in order to find evidence to support a weak case. The State's actions constitute impeachment of the tactics and techniques used in this case and impeachment of the credibility of the lead detectives who consciously misled the defense. Even though Jeffrey Allen was not called as a witness, Mr. Jimenez was prejudiced by the State's deliberate and undisclosed deception and by the State's use of Jeffrey Allen to veto defense attorneys that the State feared would provide Mr. Jimenez with a more zealous representation and a stronger defense. More importantly, the lengths the State had gone to build its case through the use of unconstitutional and false evidence could have been used by the defense to impeach the State, its motives, and the evidence presented at trial. *Kyles v. Whitley*, 514 U.S. 419 (1995).

As trial approached in the Minas case in the summer of 1994, Officer Cardona continued to be unavailable as a witness for deposition. Officer Cardona's significance in the case grew as the lead detectives had testified in depositions that she was the original source of Mr. Jimenez's name and his alleged status as a known burglar. On the eve of the trial, the defense went to court and forced the state to produce Officer Cardona for deposition. She revealed that she had not known Mr. Jimenez's name and had no knowledge of him as a burglar. She also revealed that the white van parked underneath the balcony that supposedly the assailant hang dropped off of when fleeing Minas's apartment, was occupied

when she checked it out upon her arrival at the apartment complex at 8:27 p.m., on October 2, 1992. The occupants included a middle aged woman and two young males, potential witnesses whose names Officer Cardona failed to obtain. Officer Cardona's sworn testimony supported Merriweather's original story that the person dropped from the balcony onto the white van. It contradicted Merriweather's later changed story that was given at trial that there was no van under the balcony. It also directly contradicted the testimony of the North Miami detectives who claimed that Officer Cardona supplied the name, Jose Jimenez, and his status as a known burglar. Yet, defense counsel did not call her as a witness to impeach Merriweather's testimony and the reliability of law enforcement's investigation.

Of course, defense counsel was handicapped by the state's failure to disclose the involvement of Calderon's private investigator. Either significant exculpatory material was withheld, and/or defense counsel unreasonable failed to investigate and present this exculpatory evidence, as a result the jury did not learn of this evidence. Had the exculpatory evidence been disclosed, investigated and developed, the defense could have presented the fact that Calderon's people directed the police investigation to look at Mr. Jimenez.

At trial, the State presented evidence that Mr. Jimenez advised Ms. Baron that the police wanted to talk to him about a stabbing at a time when no one outside law enforcement knew that Minas had been stabbed and law enforcement had not

told Mr. Jimenez. In combating this evidence, defense counsel failed to present Ms. Baron's desk calendar, which showed that she had written Mr. Jimenez's statement that the police wanted to talk to him about a stabbing in the square marked October 9th, and not the square marked October 5th, the day she claimed he had made the statement. Ms. Baron acknowledged in her testimony that she had also talked to Mr. Jimenez on October 9th.

Of course, defense counsel was further handicapped in challenging the state's evidence by the state's failure to disclose instances of false and misleading testimony of the North Miami police detectives that could have been used to impeach their credibility as to their claim that Mr. Jimenez was not told that they wanted to talk to him about a stabbing. Defense counsel was also handicapped by the failure to disclose the involvement of Calderon's private investigator and his staff of assistants who impersonated police officers while contacting Mr. Jimenez in order to get a statement from him about the stabbing. Either significant exculpatory material was withheld, and/or defense counsel unreasonable failed to investigate and present this exculpatory evidence. Had the exculpatory evidence been disclosed, investigated and developed, the significance of Ms. Baron's testimony could have been completely undermined; one of the three pieces of circumstantial evidence relied upon by the State to convict Mr. Jimenez could have been shot down.

Additionally, evidence was readily available from the residents of the apartment complex that it was common knowledge on the evening of October 2, 1992, that Ms. Minas had been stabbed. Presentation of this evidence would have undermined the significance of Ms. Baron's testimony. Yet, the jury was not apprised of this fact.

The defense also failed to investigate the circumstances of the alleged fingerprint identification, the second of three circumstances used by the State to convict Mr. Jimenez. Supposedly, Mr. Jimenez's latent fingerprint was identified in the early morning hours of October 3, 1992. According to the State this was the basis for its arrest warrant. Yet, the police made no effort to go to Mr. Jimenez's parent's house where he had previously advised his probation officer that he would be living until Monday, October 5th, more than 48 hours after they supposedly had probable cause. Defense counsel did not investigate whether the fingerprint identification could be impeached. Nor did the defense investigate Mr. Jimenez's actions during Hurricane Andrew in August of 1992 in assisting residents of the apartment complex – including Ms. Minas – in hurricane preparations and other occasions when he assisted Ms. Minas and was in her apartment. Evidence was available had counsel pursued it to establish that the fingerprint may have been placed there on any one of numerous occasions.

Defense counsel was handicapped by the failure to disclose Calderon's private investigator's involvement in the investigation and the potential for planting or manipulating evidence. The reliability of police investigation presupposes that those conducting the investigation do not have an interest in a particular result and are neutral and/or detached. The involvement of Calderon's private investigator and his staff completely defeated that premise. Exculpatory and/or favorable evidence was either not disclosed or was unreasonably not discovered. Had the evidence been disclosed, investigated and presented to the jury, the significance of the fingerprint identification would have been destroyed.

Trial counsel failed to ask Detective Ojeda either in a deposition or when he was recalled at trial regarding his alleged conversation with Officer Cardona. According to Officer Cardona, the conversation did not occur. Trial counsel failed to call Officer Cardona to testify to those matters that she stated in her deposition (i.e., she did not remember Mr. Jimenez's name on the evening of October 2nd, she did not remember speaking to any other police officers regarding Mr. Jimenez on the evening of October 2nd, she left the crime scene at 9:00 p.m. after arriving at 8:27 p.m., she had no knowledge of Mr. Jimenez as a burglar, and she had observed the white van under the balcony). Trial counsel's performance was deficient in this regard. Moreover, to the extent that the State had not fully disclosed all favorable or exculpatory evidence in its possession, counsel was

handicapped regarding his ability to cross-examine these detectives. Had the state disclosed the exculpatory and/or favorable evidence in its possession or had defense counsel adequately investigated and presented the available favorable evidence, each of the three circumstances of the state's circumstantial evidence were subject to serious attack.

Counsel failed to adequately impeach Merriweather and present all the available evidence that his story changed as time passed from exonerating Mr. Jimenez to implicating him. Certainly counsel was handicapped by the State's failure to disclose Calderon'a animus toward Mr. Jimenez and his willingness to spend thousands of dollars to get him. The fact that Calderon's agent was assisting the lead detectives and had access to information including witnesses' names and addresses would have provided the defense with an additional means of impeaching Merriweather.

Counsel did not locate and present evidence concerning the cab driver's indication that he picked up a fare from the apartment complex at which Ms. Minas lived at approximately 8:25 p.m. on October 2, 1992, and that this fare was a male who was bleeding from his face. The cab driver was shown a photograph of Mr. Jimenez and did not recognize him as the man bleeding from the face. The failure to present this evidence was deficient performance that prejudiced Mr. Jimenez.

As to the penalty phase of the capital proceedings, the state had in its possession considerable mitigating evidence which in violation of *Brady* it did not disclose. According to numerous witness statements in the State's possession, Mr. Jimenez had a severe drug problem. The reports of Calderon's private investigator was rife with information about Mr. Jimenez's drug problems, the names of witnesses who possessed details regarding Mr. Jimenez's drug history, and details about Mr. Jimenez's history with drugs. This information, had it been disclosed, could have been provided to the defense's mental health expert in order to strengthen his testimony and the weight of the mitigation that he identified.

These reports also contained information regarding Mr. Jimenez's efforts to kick his drug abuse, the effect of his drug problems on his interpersonal relationships, his breakup with his girlfriend in the summer of 1992, and his emotional downward spiral that resulted. The State had in its possession information regarding Mr. Jimenez's eviction from the apartment complex due to failure to have money to continue to pay the rent. This provides information regarding Mr. Jimenez's dire financial straights which this Court has recognized as a mitigating factor under Florida law.

The State also had considerable undisclosed evidence that could have been used to impeach the witnesses called by the State, as outlined above, that could have been used at the penalty phase. This Court has said that "credibility problems

could have served to mitigate [a capital defendant's] crime." *Keen v. State*, 775 So.2d 263, 286 (Fla. 2000); *Pomeranz v. State*, 703 So.2d 465, 472 (Fla. 1997).

Michael Band, the trial prosecutor, had in his possession a message that Ms. Minas's daughter had called and indicated that she wished "no capital punishment." Yet, this information was not disclosed to Mr. Jimenez's lawyers.

Other information that was available but not investigate by Casuso for the initial collateral review proceedings concerned Mr. Jimenez's penalty phase counsel, Mr. Andrew Kassier. Kassier remained as Mr. Jimenez's penalty phase counsel even though Mr. Jimenez advised the trial court that Kassier had a conflict, even though Kassier advised the trial court that he had a conflict, and even though Mr. Michael Matters (guilt phase counsel) advised the trial court that Kassier had a conflict. The trial court was repeatedly advised that those involved did not wish to discuss the nature of the conflict in open court before the prosecuting attorneys and others. It also appears on the record Kassier, due to the conflict and due to the prior guilt phase counsel's withdrawal from the case, had ceased working on the case and/or preparing. Indeed, Casuso was aware that there was a basis to investigate the adequacy of Kassier's representation. As Mr. Casuso wrote to Roger Maas after he had been appointed to represent Mr. Jimenez, he had been advised by Matters that Kassier's performance was defective and that Kassier had

been disbarred for problems that he was having at the time of the penalty phase proceedings.[8]

Casuso, like Kassier before him, failed to conduct an adequate investigation. Counsel did not contact Mr. Jimenez's neighbors and learn of the information that Calderon's private investigator had gathered. Counsel did not contact the neighbors and learn of the details of the history of Mr. Jimenez's drug abuse. Counsel did not learn of Mr. Jimenez's efforts to assist his neighbors during Hurricane Andrew. Counsel failed to learn that Mr. Jimenez had made himself available to help his neighbors at the apartment complex. Counsel did not learn that one of Mr. Jimenez's neighbors reported that he believed that Mr. Jimenez was a confidential informant for the Miami Beach police department. Counsel did not learn of the dissolution of Mr. Jimenez's longtime relationship in the summer of 1992. Counsel failed to fully and completely investigate Mr. Jimenez's background and obtain the services of an investigator and/or mitigation specialist who could detail Mr. Jimenez's life history or present the information to the mental health expert that he did call as a witness. Had counsel investigated and developed the available mitigating information, he could have made his mental health expert's testimony more credible, thereby supporting the expert's conclusion that Mr.

[8] Kassier was suspended from the practice of law in 1997 for conduct occurring in 1994-95. The suspension was the result of his failure to properly represent or handle several clients' cases, his failure to comply with a subpoena for records from this Court, mismanagement and irregularities in both his trust and operating bank accounts. *Florida Bar v. Kassier*, 711 So. 2d 515 (Fla. 1998).

Jimenez's capacity was impaired, a conclusion rejected by the sentencing judge. Had counsel acted reasonably, he could have presented evidence to establish that Mr. Jimenez was emotionally disturbed on October 2, 1992, another mitigating circumstance. Had counsel conducted an adequate investigation counsel could have marshaled evidence to support a number of non-statutory mitigating circumstances, detailed above. Had counsel conducted a reasonable investigation, counsel could have presented impeaching information through cross-examination or through extrinsic evidence undermining the credibility of the State's witnesses on whom the conviction and establishment of aggravators were dependent.

The prosecutor's message that Ms. Minas's daughter had called and indicated that she wished "no capital punishment" was information that defense could have pursued had it been disclosed. Counsel would have undoubtedly sought to present this information to the sentencer. Yet, this information was not disclosed to Mr. Jimenez's lawyers.

As a result of the State's failure to honor its obligations under *Brady*, and as a result of both guilt and penalty phase counsel to adequately investigate and develop the available favorable evidence and information, and as a result of the inadequacy of collateral counsel at the initial collateral review proceedings, Mr. Jimenez did not receive the constitutionally guaranteed adequate adversarial

testing, nor did he receive an equitably adequate review of his *Brady* and *Strickland* claims.

C. *Trevino* Establishes That Ineffective Assistance of Collateral Counsel Constitutes Cause to Overcome a Procedural Default as to Claims That Must Be Raised Collaterally in Florida.

On direct appeal, a capital defendant in Florida cannot raise a non-record claim, such as those premised on *Strickland v. Washington*, 466 U.S. 668 (1984), or *Brady v. Maryland*. *See Nixon v. State*, 572 So. 2d 1336 (Fla. 1990) (after this Court remanded a case for an evidentiary hearing regarding a claim of ineffective assistance of counsel in the course of a direct appeal, this Court decided to defer ruling on the claim until further record development in collateral proceedings). Claims dependent on information not contained in the direct appeal record must be raised in collateral proceedings. Court-appointed collateral counsel for Mr. Jimenez did not raise any claims under *Brady v. Maryland* and failed to raise the substantive ineffective assistance of trial counsel claims that were available to Mr. Jimenez upon investigation. Court-appointed collateral couunsel's performance was deficient and constitutes cause to overcome the procedural bars arising from his deficient performance in Mr. Jimenez's initial collateral proceedings.

Mr. Jimenez subsequently raised his non-record claims, including claims of ineffective assistance of counsel and prosecutorial misconduct, at the earliest practicable proceeding once his ineffective collateral counsel had been replaced.

Moreover, during the course of Casuso's ineffective representation, Mr. Jimenez proactively applied to the courts in an effort to have his claims heard despite his counsel's sabotage. This Court, along with the lower court, however deemed Mr. Jimenez's subsequent claims for habeas relief procedurally defaulted because the claims had not been raised in the initial collateral proceedings. *Jimenez v. State*, 997 So. 2d 1056 (Fla. 2008).

Subsequently the United States Supreme Court held in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), that there exists an equitable right to effective collateral counsel in initial collateral proceedings as to constitutional claims that are not subject to adequate review on direct appeal. As a result, deficient performance by collateral counsel will constitute cause to overcome a procedural bar that arose as a result of collateral counsel's deficient performance in presenting constitutional claims that could not have been adequately review on direct appeal.[9]

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[9] Under *Trevino*, there is an equitable right to adequate representation during initial-review collateral proceedings regarding constitutional claims, including a claim regarding a violation under *Strickland*, in states such as Texas and Florida where there is no express rule requiring such non-record constitutional claims to be raised on direct appeal. *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013).

> Unlike Arizona, Texas does not expressly require the defendant to raise a claim of ineffective assistance of trial counsel in an initial collateral review proceeding. Rather Texas law on its face appears to permit (but not require) the defendant to raise the claim on direct appeal. Does this difference matter? Two characteristics of the relevant Texas procedures lead us to conclude that it should not make a difference in respect to the application of *Martinez*.

Id.

The State of Florida took the position in an amicus brief filed with the U.S. Supreme Court in *Trevino* that Florida's scheme for raising a claim that required record development, such as trial counsel's performance, was more like the procedure used by Texas, which was at issue in *Trevino*. Both Florida and Texas argued in the U.S. Supreme Court that *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), did not apply to cases in Florida or Texas because there was no express preclusion from raising non-record constitutional issues on direct appeal. *See Trevino v. Thaler*, United States Supreme Court Case No. 11-10189 *Brief for Amici Curiae Utah and 24 Other States in Support of Respondent*, January 22, 2013. The U.S. Supreme Court rejected the argument proposed by Florida and Texas. That is, the U.S. Supreme Court rejected the notion that *Martinez* did not apply in those states where a defendant was not categorically precluded from raising an ineffective assistance of counsel claim on direct appeal.[10]

After *Trevino*, the equitable right to effective collateral representation to constitutional claims that are impeded from being heard on direct appeal exists in Florida and a denial of that equitable right constitutes cause to overcome a procedural bar to consideration of the merits of the underlying constitutional claims. Further, the U.S. Supreme Court specifically and pointedly left open the

[10] Although the constitutional issue in both *Trevino* and *Martinez* was an ineffective assistance of trial counsel, the logic applies equally to claims of prosecutorial misconduct raised under *Brady v. Maryland* that require evidentiary development in collateral proceedings.

question of whether this equitable right to effective collateral counsel is constitutional in nature. Thus, this Court's previous reliance upon U.S. Supreme Court precedent as justification to procedural bar claims that a capital defendant's collateral counsel failed to preserve was misplaced. *See Trevino*, 133 S. Ct. at 1917-18; *compare Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996)(citing *Murray v. Giarrantano*, 492 U.S. 1 (1989) and *Pennsylvania v. Finley*, 481 U.S. 551 (1987)). While under *Trevino*, ineffective assistance of collateral counsel still does not constitute a basis for Rule 3.851 relief, it does constitute a basis for defeating a procedural bar of a constitutional claim.

It is clear from *Trevino* that the U.S. Supreme Court believes defendants in Florida have an equitable right to effective collateral representation regarding constitutional claims that cannot be adequately raised on direct appeal. As the Supreme Court explained:

> We have recently said that courts of equity must be governed by rules and precedents no less than the courts of law. But we have also made clear that often the exercise of a court's equity powers must be made on a case-by-case basis. In emphasizing the need for flexibility, for avoiding mechanical rules, ***we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity***. The flexibility inherent in equitable procedure enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices. Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior precedent, but with awareness of

> the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

Holland v. Florida, 130 S. Ct. 2549, 2563 (2010) (emphasis added) (internal citations omitted).

This Court has acknowledged that it is a court of equity. *E.g.*, *State v. Atkins*, 69 So. 3d 261, 268 (Fla. 2011) (explaining when equity requires a court to override a procedural bar to avoid manifest injustice). "Under Florida law, appellate courts have 'the power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice.'" *Id*. (quoting *Muelman v. State*, 3 So. 3d 1149, 1165 (Fla. 2009) and citing *State v. J.P.*, 907 So. 2d 1101, 1121 (Fla. 2004); *Parker v. State*, 873 So. 2d 270, 278 (Fla. 2004); *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 106 (Fla. 2001)).

In 1965, this Court discussed the very same equitable principles outlined by the U.S. Supreme Court in 2011 in *Holland*:

> 'We may change 'the law of the case' at any time before we lose jurisdiction of a cause and will never hesitate to do so if we become convinced, as we are in this instance, that our original pronouncement of the law was erroneous and such ruling resulted in manifest injustice. In such a situation a court of justice should never adopt a pertinacious attitude.'
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> * * *
>
> [This] decision, as well as the *McGregor* and similar decisions, are, however, consistent with our decisions respecting the doctrine of res judicata and stare decisis, *see Wallace v. Luxmoore*, 156 Fla. 725, 24 So. 2d 302, and with what appears to be the trend in other courts to

> recognize that the administration of justice requires some flexibility in the rule. . . . ***[I[nsofar as these earlier decisions may be construed as holding that an appellate court in this state is wholly without authority to reconsider and reverse a previous ruling that is 'the law of the case,' we hereby expressly recede therefrom.***

Strazulla v. Hendrick, 177 So. 2d 1, 3-4 (Fla. 1965) (citations omitted).

In light of *Trevino*, this Court --- as a court of equity --- should honor the US Supreme Court's determination that equitable principles (*i.e.*, basic fairness) dictate that there must be an equitable right to effective collateral representation in an initial collateral review proceeding regarding those constitutional rights that cannot be properly and fully vindicated in a direct appeal.[11] Fairness dictates that the equitable right recognized by the US Supreme Court in *Trevino* must apply in Florida and be honored by Florida courts.[12] Under *Trevino*, this Court should

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[11] In the context of Mr. Jimenez's case, the court appointed collateral counsel who would represent Mr. Jimenez and the State provided funding for initial collateral counsel in virtually identical fashion to how the State of Florida provides court-appointed trial counsel to indigent capital defendants. The State bears the responsibility for trial counsel's deficiency. Equitable principles place similar responsibility on the State regarding state-provided collateral counsel for a capital defendant who has absolutely no say as to who counsel is or what counsel does.

[12] Mr. Jimenez acknowledges this Court's ruling in *Gore v. State* that:

> It appears that *Martinez* is directed toward federal habeas proceedings and is designed and intended to address issues that arise in that context.
>
> Here, Gore previously received full consideration of his ineffective assistance of penalty phase counsel claims in the postconviction court and a comprehensive review of those claims during his appeal before this Court. Gore has received a full collateral review to which he is entitled in the Florida state courts system. We hold that under the facts and circumstances of this case, *Martinez* provides Gore with no

recognize that a showing of collateral counsel's deficient performance as to a constitutional claim, while not warranting collateral relief by itself, constitutes sufficient cause to overcome a procedural bar where the capital defendant was prejudiced by that deficient performance.

The events of this case exhibited exactly the circumstances contemplated – and deemed inequitable – by the U.S. Supreme Court in *Martinez*: "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default[,] no court will review the prisoner's claims."[13] *Martinez*, 132 S. Ct. 1309. This is a case in which "exceptional circumstances" exist such that "reliance on the previous decision would result in manifest injustice." *Muehlman v. State*, 3 So. 3d 1149, 1165 (Fla. 2009). To rectify the manifest injustice that Mr. Jimenez has experienced as a result of collateral counsel Louis Casuso's ineptitude

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basis for relief in this Court.

Gore v. State, 91 So. 3d 769, 778 (Fla. 2012). However, this Court's decision in *Gore* was issued over one year before the decision in *Trevino*, which further clarified the scope of *Martinez* and explicitly found that *Martinez* applies in states like Florida.

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Specifically, the US Supreme Court found that this equitable right to effective representation at the initial collateral review proceeding meant ineffective representation by collateral counsel in the initial collateral review proceeding constituted cause to overcome a procedural bar arising from either principles of *res adjudicata* or procedural default. In another words, a procedural bar precluding consideration of an ineffectiveness claim regarding the adequacy of trial counsel's representation may be defeated by cause where the procedural bar is due to an attorney's errors in the initial-review collateral proceeding. *Martinez*, 132 S. Ct. 1309.

– indeed, where Casuso actively subverted Mr. Jimenez's rights by failing to review the public records and present the available *Brady* claims that were apparent from the public records and by waiving an evidentiary hearing on all ineffectiveness claims – this Court should invoke "[t]he 'flexibility' inherent in 'equitable procedure'" noted in *Holland*, 130 S. Ct. at 2563.

Here, based on a review of the procedural history and the actions of counsel at the initial-collateral proceeding, Mr. Jimenez's assertion that Casuso's "actions are that of a person who doesn't care about me" and concern that "Mr. Casuso is only going to do me more harm than good" were dangerously accurate. Casuso demanded that his client review the record on his own and tell him (the attorney) what claims to raise. Casuso went on to file *pro forma* ineffective assistance of counsel claims regarding both the guilt and penalty phases of trial, each of which was simply outlined on approximately one and one-half pages, and then waived ***all*** claims of ineffectiveness by waiving an evidentiary hearing.

Casuso's presentation at the *Huff* hearing on May 3, 2000, in which he admitted that he had no argument, was arguably worse than his initial failure to appear at the originally scheduled hearing for two days prior. (1PC-R. 129). Casuso appeared without his client, and then dismissed his own case by casually noting, "I don't think there is a necessity for an evidentiary hearing on that [issue of ineffective assistance of trial counsel]." (1PC-R. 136).

Meanwhile, Casuso possessed a deposition from Anna Brandt, who refuted the State's claim that no one but the killer knew the manner of victim's death. (T. 881; 1PC-R. 83). The State relied on this claim when portraying Mr. Jimenez's statement that police wanted to talk to him about a "stabbing" as incriminating. (T. 774, 881). Brandt testified that when another neighbor came upstairs on the night of the homicide, that neighbor informed her, "Phyllis was murdered." (1PC-R. 83). More importantly, the neighbor told Brandt that the victim "was stabbed." (1PC-R. 83). Rather than explain how trial counsel was ineffective for failing to investigate Mr. Jimenez's case by interviewing readily available eye-witnesses,[14] such as Anna Brandt, who had been interviewed by the police and could have provided exculpatory information,[15] Casuso merely instructed the lower court to "[t]ake a look at it [Brandt's deposition] and see if she should have been called or not." (1PC-R. 136). There was absolutely no advocacy. *Wilson v. Wainwright*, 474 So. 2d 1162, 1165 (Fla. 1985). This constituted deficient performance.

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[14] As has been outlined *supra*, Casuso had wealth of witnesses from which to interview to support post-conviction claims of ineffective assistance of counsel under *Strickland v. Washington* and prosecutorial misconduct under *Brady v. Maryland*.

[15] In addition to supporting Mr. Jimenez's claim that the manner of the victim's death was common knowledge among residents in his (and the victim's) apartment building, Brandt also provided police with a statement that placed Mr. Jimenez in his own apartment before the victim's front door was snapped shut by the assailant inside. (2PC-R. 113).

In addition to failing to appear at the first *Huff* hearing, failing to investigate and present Mr. Jimenez's *Brady* claims and then waiving ***any and all*** claims of ineffective assistance of counsel without consulting with Mr. Jimenez, Casuso further subverted Mr. Jimenez's case by: (a) erroneously reporting to the circuit court that "Mr. Jimenez has a history of being dissatisfied with all his lawyers"[16] (1PC-R. 25); (b) claiming that Mr. Jimenez refused to discuss his case after Casuso had told Mr. Jimenez, "[s]ince you have more time than I do, the order provides you to tell me by January 31st in writing what it is that you need me to raise on [sic] the motion;" and (c) filing an eight-page Rule 3.850 motion that raised only six *pro forma* claims with no record cites, dates, or other specific details[17] (1PC-R. 29-36). The single *pro forma* claim regarding penalty phase ineffective assistance of counsel was not pursued or presented. Casuso did not investigate any penalty

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Contrast Mr. Casuso's report with Mr. Jimenez's relationship with Ms. Cohen, who represented Mr. Jimenez before his trial and only withdrew because of pregnancy. (R. 127). Ms. Cohen had been Mr. Jimenez's counsel for over thirteen months. Her replacements, Mr. Matters and Mr. Kassier, were given approximately five months in which to prepare for a capital trial, and based on their performance, Mr. Jimenez had cause to be dissatisfied. Kassier was suspended from the Florida Bar in 1998 for misappropriating funds and *failing to respond to all investigative inquiries* in 1992-1995. *Florida Bar v. Kassier*, 711 So. 2d 515 (Fla. 1998).

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The closest Casuso came to articulating details was his assertion in Claim I that trial counsel was ineffective when he failed to call a witness who had observed "Mr. Jimenez exit the elevator on the third floor and saw Mr. Jimenez then walk towards the apartment." (PC-R. 31). Likely, this claim was based on Anna Brandt's deposition testimony. Given that Casuso made no supporting argument at the *Huff* hearing or in writing, Claim I was found to be refuted by the record.

phase issues and effectively waived all potential penalty phase issues through his waiver of an evidentiary hearing regarding all claims of ineffectiveness. Two of the three claims initially raised by Casuso regarding guilt phase ineffective assistance of counsel[18] were likewise not investigated or presented, and ***all claims of ineffectiveness were waived when Casuso waived the evidentiary hearing***.

When Casuso appealed the circuit court's findings regarding the initial-collateral proceedings to this Court, he did not raise an ineffectiveness claim because he knew that he had waived all claims of ineffective assistance at the case management hearing. Casuso focused solely on the single claim that had been found moot. The lone claim was based entirely upon the record from direct appeal. Casuso did not consult with Mr. Jimenez in his decision; instead, he reported to Mr. Jimenez, "[t]he brief that's filed is a winner [so] we need not file anything else." This Court quickly denied the one-issue appeal. *Jimenez v. State*, 810 So. 2d 511 (Fla. 2001).

Mr. Jimenez sought to reinvestigate the work of Casuso – which Mr. Jimenez questioned significantly in both his *pro se* motion filed in October 2001 and in his second Rule 3.851 motion filed in 2002 – to ascertain whether counsel at

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[18] Claim 2 stated that trial counsel was ineffective in failing "to object to certain evidence," which was not identified (PC-R. 33), and claim 3 asserted that the trial was fraught with procedural and substantive errors that rendered the outcome unreliable (PC-R. 33-34). None of the alleged procedural or substantive errors were specifically identified. (PC-R. 33-34). The circuit court found claims 2 and 3 to be among those that had been insufficiently pled.

the initial-collateral proceeding was ineffective. Based on a review of the procedural history, the actions of Louis Casuso at the initial-collateral proceeding, and subsequent investigation, Mr. Jimenez was deprived of the necessary "guiding hand of counsel at every step in the proceedings against him." *Martinez*, 132 S. Ct. at 1317 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

D. Initial Collateral Counsel Failed to Investigate and Present Readily Available Evidence of the State's Violation of its *Brady* Obligation and of Trial Counsel's Ineffectiveness.

Had initial collateral counsel, Louis Casuso, conducted any investigation into Mr. Jimenez's *Brady* and ineffective assistance of counsel claims, there was plenty to discover. However, Casuso, as he stated on the record, did not review the public records that were provide to him. These public records included the State Attorney's files and records from Mr. Jimenez's trial, as well as all of law enforcement's files and records regarding Mr. Jimenez. In evaluating what if any *Brady* claims Mr. Jimenez had to raise in his initial collateral review proceedings, Casuso, as Mr. Jimenez's collateral counsel, would have had to review those public records and ascertain what favorable information and/or evidence was contained in those public records which was not provided to Mr. Jimenez's trial counsel. Choosing not to review the public records provided was in fact a waiver of Mr. Jimenez's *Brady* claims without conducting any investigation to determine what *Brady* claims existed. As detailed in Section B of this argument, there was a

wealth of favorable information in the public records provided to Casuso and not reviewed by him which did not come out at trial and inform the jury's verdict.

Once collateral counsel is able to determine that favorable information and/or evidence appears in the public records, but did not reach the jury, the next step is to determine whether the favorable information and/or evidence was not disclosed to trial counsel as required by *Brady* or whether trial counsel knew or should have known of the favorable information and/or evidence, but failed to conduct a reasonable investigation and discover it in violation of his obligation under *Strickland v. Washington*. Here collateral counsel simply failed to review the public records and thus failed to conduct a reasonable investigation of Mr. Jimenez's potential *Brady* and *Strickland* claims. The favorable information that was available from a review of the public records as set forth in Section B, *supra*, clearly demonstrates that strong *Brady* and *Strickland* claims were not developed and presented on Mr. Jimenez's behalf because collateral counsel quite simply did not do his job.

Besides not reviewing the public records, collateral counsel conducted no investigation and talked to no witnesses, relevant either as to the guilt or penalty phases of the trial. Because of this failure by collateral counsel, he did not learn that trial counsel had failed conduct an adequate investigation within the meaning of *Strickland v. Washington.* The Supreme Court stated in *Hinton v. Alabama*

explained that a thorough investigation of the law and facts is a critical component of effective representation:

> The selection of an expert witness is paradigmatic example of the type of "strategic choic[e]" that, **when made "after thorough investigation of [the] law and facts**," is virtually unchallengeable.

Hinton v. Alabama, 134 S.Ct. at 1089, quoting *Strickland v. Washington*, 466 U.S. at 690 (emphasis added) (brackets in original). Here, collateral counsel did not conduct a thorough investigation of the law and facts when he failed to adequately investigate whether Mr. Jimenez had *Brady* and/or *Strickland* claims to present in his Rule 3.851 motion.

As to the penalty phase for example, Kassier (penalty phase counsel) spoke to no one outside Mr. Jimenez's immediate family, and even then, did not adequately interview Mr. Jimenez's father or sister, who both testified on his behalf despite scant preparation. Kassier, believing that there would be a favorable outcome at the guilt phase, failed to conduct a timely penalty phase investigation. Trial counsel in this case hampered his own efforts by limiting their preparation and interviews of Mr. Jimenez's father and sister. Kassier failed to adequately explained what constituted mitigation to Mr. Jimenez's father and sister and failed to discover the mitigating evidence that was available. Beyond last minute conversations with the father and sister, Kassier failed to conduct any investigation at all.

It is axiomatic that competent counsel must interview witnesses to develop and present a complete picture of the client's background. *Wiggins v. Smith*, 539 U.S. 510 (2003); *see Sears v. Upton*, 130 S. Ct. 3259, 3261-62 (2010) (noting the striking difference between evidence presented at trial that the defendant had a middle-class background and behaved in a manner that "shocked and dismayed his relatives" and evidence uncovered during the post-conviction investigation that the defendant suffered sexual abuse at the hands of a cousin, that the defendant's mother's favorite way of describing her sons was as "little mother fuckers," and that the defendant's father disciplined with age-inappropriate military-style drills). Had Casuso merely conducted a more thorough interview of Mr. Jimenez's sister and father than trial counsel, Casuso would have found a wealth of information. Instead, he did not talk to anyone in Mr. Jimenez's family (or anyone else).

Mr. Jimenez's father has reported since trial that trial counsel specifically asked him to describe how he and Mr. Jimenez fought, even though Mr. Jimenez's father had compelling stories regarding his son's loving nature and insight into how his son fell into a dysfunctional lifestyle. Mr. Jimenez's father recalled how, even as his son struggled with drugs, he was exceptionally compassionate and insisted that the family take in a dog who had been the victim of a hit and run accident in front of the family's home. The dog was pregnant, and Mr. Jimenez's parents both recalled that he insisted that they care not only for the wounded dog

but that they ensure that she receive adequate care to enable her to have the puppies.

Mr. Jimenez's sister, Iris Gildelria,[19] would have told trial counsel (and Casuso) if she had been asked, how accessible cocaine was in Miami in the 1970s and 1980s, especially for a susceptible youth like her brother. Since her testimony at Mr. Jimenez's trial, she has described Miami as accurately portrayed by "Scarface," where high school party hosts directed guests to the cooler full of beer and the table with lines of cocaine, and indicated that only those with very strong will power alluded the temptation of drugs. However, the cursory and last minute interview that Kassier conducted failed to full explore the mitigation with her knowledge.

Further, Mr. Jimenez's family knows of two significant women in Mr. Jimenez's life, Jane Friedland and Evette Imhoff. Each woman had a single, young child upon whom Mr. Jimenez doted. Had trial counsel --- or subsequently, Casuso --- conducted a thorough investigation, Mr. Jimenez's family could have led counsel to Ms. Friedland or Ms. Imhoff (or their now adult children), who in turn could have shed light on both Mr. Jimenez's struggle with cocaine use and nurturing instincts. Instead, trial counsel was left with the uninformed and

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[19] Gildelria is Iris' correct last name. The trial transcript erroneously lists her as Iris Deleria. (T. 973).

inaccurate impression of Mr. Jimenez as violent and angry, as evidenced by counsel's specific request to have Mr. Jimenez's father describe his adult fights in the midst of Mr. Jimenez's cocaine abuse.

Mr. Jimenez's family, would also have informed counsel that Mr. Jimenez had moved to Miami Beach when he was in the fifth grade and lived in the same house as an adult for a long time. Many of the neighbors knew Mr. Jimenez and his family and could have shared their observations of Mr. Jimenez's interactions with his parents, sister, and extended family. In addition, neighbors could have substantiated the evidence that Mr. Jimenez had at least two serious, long-term relationships with older women with small children. Again, each of these women could have been located and interviewed and possibly brought to court to present mitigating evidence, either regarding Mr. Jimenez's addiction, relationships with his family, or simple good deeds as a live-in significant other who tenderly assisted in the raising of small children. Instead, the jury only heard that Mr. Jimenez fought with his father because trial counsel failed to adequately investigate.

Trial counsel in this case collected *no* records regarding Mr. Jimenez's childhood, work history, past arrests, school experience, or attempts to curb his addiction. Even though Mr. Jimenez's father testified that he believed Mr. Jimenez had sought treatment for his addiction, Mr. Jimenez's father could not recall details, such as how long Mr. Jimenez received treatment, why he left, or whether

the treatment was successful for even short periods of time. School records could have shed light as to why Mr. Jimenez was asked to leave and would have revealed that his drug addiction began at a significantly young age. Instead, the prosecution was able to argue, "I guess we're living in an age of what is called an excuse defense, I was on cocaine and therefore, I'm not responsible for my actions." (T. 1092).

Kassier's failure (and Casuso's subsequent failure) to obtain *any* records can only have resulted from inattention. As was admitted at trial, Mr. Jimenez had prior convictions. Therefore, counsel knew that Mr. Jimenez had been in jail and possibly even prison prior to his arrest in this case, yet counsel did not obtain those records, which could have revealed how well Mr. Jimenez adapts in a structured environment. Mr. Jimenez attended drug rehabilitation programs while in the Miami West Detention Center, indicating his sincere struggle to overcome his dependence on cocaine. In addition, the records would have provided more witnesses who could have testified about Mr. Jimenez's adaptability to structure and willingness to adjust his behavior when placed in an orderly environment. As evidenced by counsel's closing arguments during the penalty phase, counsel sought to portray Mr. Jimenez as having struggled with cocaine addiction for a long while; counsel was not trying to hide this fact for any strategic reason. Thus, there was no strategic rationale for failing to obtain records that would have supported counsel's

argument. There was simply an inadequate and last minute investigation that did not comport with *Strickland*.

Last, because counsel failed to speak with witnesses outside the family or to collect any records, counsel was unable to adequately prepare the psychologist that he asked to evaluate Mr. Jimenez. Dr. Gary Schwartz was provided with no records of any kind, including school records, records of past arrests, police reports, or witnesses' observations. Instead, counsel simply asked Dr. Schwartz to meet with Mr. Jimenez and conduct his own search mitigating information.

Simple inattention prevented trial counsel from adequately preparing his chosen psychologist. Dr. Schwartz had worked at as a drug and alcohol counselor in Gainesville, Florida, approximately twenty years before the trial. As a result, he was sympathetic to Mr. Jimenez's struggle with addiction, and tried to describe how addiction affects the body generally. Because he had no records, however, he was unable to state with specificity how cocaine affected Mr. Jimenez or how Mr. Jimenez's personality had changed over time. Instead, because counsel failed to provide Dr. Schwartz with sufficient information regarding Mr. Jimenez's background – either through other witnesses' observations while Mr. Jimenez was actively using or through records that described Mr. Jimenez's withdrawal symptoms – Dr. Schwartz inadvertently assisted the prosecution by describing Mr.

Jimenez as "more aggressive . . . he would be less aggressive without the [e]ffect of crack cocaine." (T. 1045).

Trial counsel depended heavily on Dr. Schwartz's testimony during the penalty phase of trial, yet counsel failed to adequately prepared Dr. Schwartz or any other witness who testified on behalf of Mr. Jimenez during the penalty phase of trial. As a result, the prosecution was able to limit Dr. Schwartz's testimony to "well, [Mr. Jimenez's] had a drug problem and I think it kind of had an [e]ffect on him, and his conduct was substantially impaired." (T. 1092).

Counsel attempted to correct the State's limited portrayal of the impact of Mr. Jimenez's cocaine abuse during the closing argument, but because counsel had not collected or presented any records or adequately prepared any witnesses, or adequately investigated, counsel had no evidence to support their statements. For example, counsel informed the jury that no drug is "more addictive than crack cocaine . . . [m]ore addictive than heroin, to the point where a crack addict, and that's what José is, a crack addict, spends his time doing two things, smoking crack cocaine or doing something to obtain money to buy crack cocaine." (T. 1103). While counsel's argument was true to some extent, *none* of the witnesses were prepared to testify that they saw Mr. Jimenez stuck between these two options. Furthermore, the evidence at counsel's disposal revealed that Mr. Jimenez was regularly engaged in a third activity: trying to get away from cocaine. Counsel

presented some evidence through Mr. Jimenez's father's testimony that Mr. Jimenez had sought out rehabilitation programs, but counsel failed to see the mitigating value of the failed rehabilitation attempts, perhaps because counsel had no objective witnesses who could describe Mr. Jimenez's struggle with withdrawal symptoms or objective records that described Mr. Jimenez's thoughts during these difficult times.

Because counsel's failure to investigate was the result of inattention, counsel's performance during the penalty phase of trial was deficient. *See Wiggins*, 539 U.S. 511-12. Counsel unreasonably limited his investigation to interviews of Mr. Jimenez's immediate family and routine psychological testing, even though a number of witnesses could have described Mr. Jimenez in a very different light or elaborated on good memories that Mr. Jimenez's family had of him and even though records could have revealed how well Mr. Jimenez would adapt to prison and his willingness to overcome his cocaine addiction. Counsel's inattention was inexcusable. *See Hinton,* 134 S. Ct. 1081 (2014).

Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 685. The minimal skill and knowledge necessary to render constitutionally effective assistance of counsel demands a thorough investigation of the client's background to provide the court and the jury with relevant, critical information

regarding the client's background "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable." *Porter v. McCollum*, 130 S. Ct. 447, 454 (2009) (citing *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)).

Simply because trial counsel presented some evidence does not necessarily mean counsel conducted a constitutionally adequate investigation. *See Sears,* 130 S. Ct. 3259. Here, as in *Sears*, counsel relied heavily on the impact of a death sentence on Mr. Jimenez's family in their attempt to persuade the jury to recommend a life sentence, and just as in *Sears*, the State took advantage of this argument to question Mr. Jimenez's character. (T. 1093-94). *Compare Sears*, 130 S. Ct. at 3262 (noting that defense counsel's strategy "backfired"). In *Sears*, the prosecution argued "[w]e don't have a deprived child from an inner city; a person who[m] society has turned its back on at an early age. But, yet, we have a person, privileged in every way, who has rejected every opportunity that was afforded him." *Id*. Here, the prosecution rhetorically asked

> Is there anything about his record or character? Did we learn that he's a beautiful son? Did he ever listen to his parents when they tried to get him help? When his father testified about going to the principal, putting him in drug programs, and finally they had to throw him out of the house because of the fight?
>
> Was he a boy scout? Any academic achievements? Was he a good worker? Did he ever have a job and was he a good worker, and productive member of society?

(T. 1093).

In this case, trial counsel was very aware of Mr. Jimenez's long-term struggle with cocaine addiction, and as evidenced by the side-bar arguments between the defense and the prosecution during the penalty phase of trial, counsel knew that evidence of significant impact of long-term cocaine use on Mr. Jimenez's brain could have been compelling mitigation evidence. Counsel, however, severely limited his investigation regarding Mr. Jimenez's cocaine use by only at the last minute conducting cursory interviews of Mr. Jimenez's father and sister, and having cursory, routine psychological testing conducted. Counsel further limited their investigation unnecessarily by failing to collect *any* records,[20] even though Mr. Jimenez and his father had told counsel that Mr. Jimenez had been active with Narcotics Anonymous, that Mr. Jimenez had sought treatment several times for his addiction, and that there should be records reflecting this.

The United States Supreme Court has

> never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented . . . we also have found deficiency and prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase. We did so most recently

[20] Collateral counsel, Casuso, initially filed a request to review public records in the custody of the Repository, but once he determined that he would file an amended petition with a claim based on the Florida Supreme Court's decision in *Delgado v. State*, 776 So. 2d 233 (Fla. 2000), Casuso waived access to the public records, noting, "we tried the case." (PC-R. 122). Three months later, Casuso waived the issue of ineffectiveness entirely, stating that "I don't think there is a necessity for an evidentiary hearing on that." (PC-R. 136).

> in *Porter v. McCollum*, where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties that only came to light during postconviction relief. Not only did we find prejudice in *Porter*, but – bound by deference owed under 28 U.S.C. § 2254(d)(1) – we also concluded the state court had unreasonably applied *Strickland's* prejudice prong when it analyzed *Porter's* claim.
>
> We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant . . . And, in *Porter*, we recently explained, 'To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – and reweigh[h] it against the evidence in aggravation.' 558 U.S. at ---[, 130 S.Ct. at 453-54] (internal quotation marks omitted; third alteration in original).
>
> That same standard applies – and will necessarily require a court to 'speculate' as to the effect of the new evidence – regardless of how much or how little mitigation evidence was presented during the initial penalty phase.

Sears, 130 S. Ct. at 3266-67 (footnotes and internal citations omitted). *Sears*, as *Porter*, requires in all cases a "probing and fact-specific analysis" of prejudice. *Id.* at 3266. A truncated, cursory analysis of prejudice will not satisfy *Strickland*.

In this case, neither the jury nor the court were presented with the full range of available information regarding Mr. Jimenez's long-term struggle with cocaine addiction. Trial counsel's failure to speak with witnesses outside the family or to collect any records regarding Mr. Jimenez's past deprived the jury and the court of the opportunity to hear from objective sources that – contrary to the State's closing

statements (T. 1094) – Mr. Jimenez regularly held a job as painter, took his GED shortly after leaving school, and tried to be a productive member of society by consistently seeking help with his cocaine addiction. In addition, Mr. Jimenez sought to help those around him, including his neighbors after Hurricane Andrew in the fall of 1992 and his long-term girlfriends with their young children.

Instead of providing objective sources to make the very argument that defense counsel sought to make during their closing argument (that Mr. Jimenez's addiction was well beyond his control), counsel admitted "I don't know what words I can use or what things I can say to keep you focused that we're not discussing guilt or innocence." (T. 1098). Counsel continued, "I have to rely on what I heard from the witness stand and my common sense, and work and effort that I put into this case to try to get you to do that, to use your common sense and effort that you put into this case, and ask you to keep that effort a little longer." (T. 1099).

The reality is that very little mitigating information was dispensed from the witness stand and counsel put very little work and effort into the penalty phase of trial, and the effect of counsel's lackadaisical approach to the penalty phase was revealed through the severely lacking evidence regarding the long-term effects of Mr. Jimenez's cocaine use. Because counsel had failed to collect a single record, Dr. Schwartz had no historical documentation upon which to determine whether

Mr. Jimenez suffered deteriorated or abnormal brain function. No witnesses described how well Mr. Jimenez would adapt to a prison setting, which would very likely have affected the jury's recommendation.

Trial counsel's ineffective assistance was not limited to the penalty phase, yet Casuso raised and subsequently *waived* three issues regarding trial counsel's ineffectiveness during the guilt phase. There was a wealth of favorable evidence that did not get presented to Mr. Jimenez's jury at the guilt phase either because of the State's unreasonable failure to disclose evidence or because of trial counsel's failure to investigate and present evidence of Mr. Jimenez's actual innocence, or both.

Police had determined that Manuel Calderon was a member of the Medellin drug cartel. Calderon had found his live-in girlfriend, Marie Lise Debas, dead from a drug overdose on October 22, 1990, and in an effort to ascertain the exact circumstances of her death and whether Ms. Debas had been seeing another man, Calderon hired a number of private investigators. The investigators reported to Calderon that Debas had been frequently seen in the company of Mr. Jimenez and that police had found Mr. Jimenez's fingerprint in the apartment that Debas shared with Calderon. Even though the assistant medical examiner that conducted the autopsy of Debas' body concluded that she had died of a drug overdose, a private investigator hired by Calderon advised Calderon that Ms. Debas might have died

from asphyxiation during consensual sexual activity with Mr. Jimenez. Thereafter, Calderon's agents tried to have Mr. Jimenez charged with homicide.

The private investigator working on behalf of Calderon contacted the Chief Medical Examiner in an effort to convince him to override the finding of a drug overdose as the cause of Ms. Debas' death. Based upon the urging of Calderon's private investigator, the Chief Medical Examiner overrode the drug overdose finding and found that Ms. Debas death was a homicide that resulted from mechanical asphyxiation. The Miami Beach police, however, were angered by the private investigator's interference and in October 1991, closed the Debas case, refusing to charge Mr. Jimenez with the murder of Ms. Debas.

Calderon and his agents refused to accept the actions of the Miami Beach police. In August 1992, a private investigator hired by Calderon discovered that Mr. Jimenez was living on community control in North Miami Beach. The investigator then confronted Assistant State Attorney Gerald Bagley, who had been assigned to the Debas case at the time of her body's discovery. The investigator accused Bagley and the Miami Beach Police Department of corruption. He claimed that Mr. Jimenez was a confidential informant who worked for the Miami Beach police and that, as a result, the police were protecting Mr. Jimenez from prosecution.

After Bagley refused to assist the private investigator, the investigator and former Miami-Dade police officer set up surveillance on Mr. Jimenez. Mr. Jimenez's neighbors were interviewed. Gossip was gathered, and rumors were spread regarding Mr. Jimenez. The investigator used contacts as a former police officer to create a dossier on Mr. Jimenez.

When Phyllis Minas was stabbed to death at the North Miami apartment complex in which she and Mr. Jimenez lived as neighbors, Calderon's private investigator leapt at the opportunity to use his dossier. He immediately advised North Miami police personnel that José Jimenez was a known burglar who lived in the building. He provided the lead detectives with the dossier of Mr. Jimenez's criminal history, advised them of Debas' death, and fed the detectives the story that the Miami Beach police were protecting Mr. Jimenez from murder charges.

The jury at Mr. Jimenez's trial heard nothing about the powerful enemy that Mr. Jimenez had in Calderon or how Calderon's private investigator had pointed the finger at Mr. Jimenez since the day of Ms. Minas' stabbing. The jury heard nothing either because the North Miami police covered up the source of their information that led them to suspect Mr. Jimenez or because trial counsel failed to conduct a thorough investigation, or both. The lead detectives investigating Ms. Minas' death fabricated a story that Officer Cardona had advised them that she

recognized Mr. Jimenez as he exited the apartment elevator and that Mr. Jimenez was a known burglar.

In exchange for information that he had gathered about Mr. Jimenez, Calderon's private investigator was provided information about the witnesses in the Minas case by the North Miami detectives. The investigator learned of a statement that a cab driver had observed an unknown individual with a Mohawk jump from a balcony onto a van and enter a cab. Shortly after the investigator learned of these observations, the witness' testimony changed. The Mohawk, the van, and the cab were forgotten. Instead, the witness suddenly remembered that he knew the individual he had seen, and it was Mr. Jimenez.

On the eve of trial, defense counsel appeared in court and forced the State to produce Officer Cardona for a deposition. Officer Cardona then testified that she had *not* known Mr. Jimenez's name and had no knowledge of him as a burglar. She further revealed that the white van parked beneath the balcony upon which the assailant allegedly landed when fleeing the balcony of Ms. Mina's apartment was occupied when she investigated the apartment complex at 8:27pm on October 2, 1992. The occupants included a middle-aged woman and two young males, all potential witnesses from whom Officer Cardona failed to obtain names.

Officer Cardona's sworn testimony supported the witness' original story that he had seen a person drop off a balcony onto a white van and contradicted the

changed story --- which was given to the jury at trial --- that there was no van under the balcony. Officer Cardona's testimony also directly contradicted the testimony of the North Miami detectives who claimed that Officer Cardona had supplied Mr. Jimenez's name and status as a known burglar. Although Officer Cardona's testimony impeached the testimony given by several other witnesses, defense counsel did not call her as a witness. Had the exculpatory evidence been disclosed, investigated, and developed, trial counsel could have presented the fact that Calderon's people directed the police investigation to Mr. Jimenez.

The undisclosed connection between Calderon's private investigator and the North Miami police prevented the defense from building a case or presenting evidence that favors were being traded in order to produce more evidence against Mr. Jimenez. In turn, Mr. Jimenez was deprived of his right to impeach the State's case at trial because of the decision by the prosecution to withhold evidence that Calderon's agent was involved in building the case against Mr. Jimenez.

Counsel also failed to investigate the reliability of fingerprint identification, the second of three circumstances used by the State to convict Mr. Jimenez. Supposedly, Mr. Jimenez's latent fingerprint was identified in the early morning hours of October 3, 1992, and used by the State as the basis for the arrest warrant. Police made no effort, however, until October 5 to visit Mr. Jimenez's parents' house, where he had previously advised his probation officer that he would be

living. Defense counsel did not investigate whether the fingerprint identification could be impeached, nor did counsel investigate Mr. Jimenez's actions during Hurricane Andrew in August 1992, in which Mr. Jimenez assisted Ms. Minas in her apartment. Had counsel pursued the evidence, the evidence could have established that Mr. Jimenez's fingerprint may have been placed in Ms. Mina's apartment on any number of occasions.

Certainly, the State failed to honor its obligation under *Brady v. Maryland* and disclose Calderon's private investigator's involvement in the Mina investigation and a wealth of other favorable evidence. But guilt and penalty phase counsel were constitutionally ineffective in failing to conduct adequate investigations. Indeed, it is clear that Mr. Jimenez had substantive and substantial *Brady* and *Strickland* claims to present in his first Rule 3.851 motion; but his collateral counsel, Casuso, failed to investigate. His performance was deficient under *Trevino v. Thaler*. As a result, Mr. Jimenez can demonstrate cause to overcome the procedural bar that otherwise prevents consideration of Mr. Jimenez's *Brady* and *Strickland* claims.

This Court has made it clear that not only must all individual *Brady* violations be evaluated cumulatively and that all individual *Strickland* violations must be evaluated cumulatively for prejudice purposes, it has also held that *Brady* violations must be evaluated cumulative with *Strickland* violations in order to

insure a constitutionally adequate trial occurred. *Parker v. State*, 89 So. 3d 844, 867 (Fla. 2012) ("Because we conclude that trial counsel was deficient concerning the May 7 statement and that the State improperly withheld favorable impeaching information (...), we consider the impact of these errors cumulatively to determine whether Parker has established prejudice.") This Court must "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial" to determine whether the newly discovered evidence would probably produce a different result upon retrial. *Lightbourne v. State*, 742 So. 2d 238, 247-48 (Fla. 1999). The cumulative analysis that must be conducted under *Brady* and *Strickland* to enable the court to develop a "total picture" of the case. *See also Rivera v. State*, 995 So. 2d 191, 198 (Fla. 2008) ("We conclude that this evidence, *when viewed in conjunction with* Rivera's *Giglio* and *Brady* claims . . . is sufficient to warrant an evidentiary hearing on whether it is of such nature that it would probably produce an acquittal on retrial") (emphasis supplied).

Because initial collateral counsel (Casuso) failed to investigate Mr. Jimenez's *Brady* and *Strickland* claims, he performance was deficient and constitutes cause which defeats the procedural bars that preclude consideration of the merits of Mr. Jimenez's *Brady* and *Strickland* claims at this juncture. *Trevino v. Thaler*. As a result, the merits of the *Brady* and *Strickland* claims must be heard

now. Certainly accepting the factual allegations as true as is required in this appeal, evidentiary hearing is required. *Rivera*, 995 So. 2d at 198.

CONCLUSION

In light of the foregoing argument, Mr. Jimenez respectfully requests that this Court reverse the summary denial of his Rule 3.851 motion and remand to the circuit court for a full and fair evidentiary hearing on his claims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Sandra Jaggard, Assistant Attorney General, at her primary email address, Sandra.Jaggard@myfloridalegal.com,on this the 15th day of April, 2014.

CERTIFICATION OF COMPLIANCE

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

/s/ Martin J. McClain
MARTIN J. MCCLAIN
Florida Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, FL 33334
(305) 984-8344
martymcclain@earthlink.net

COUNSEL FOR MR. JIMENEZ