No. 21-7018

IN THE
SUPREME COURT OF THE UNITED STATES

JOSE FUENTES
Petitioner

v.

STATE OF FLORIDA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jose Fuentes # B10274
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Rehabilitation Facility
P.O. Box 7171
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QUESTIONS PRESENTED FOR REVIEW

I

Question one of ground one of Fuentes §2254 petition:

Relevancy is everything when it comes to evidence, and the Petitioner's private psychologist, Dr. Garcia testimony at his insanity defense trial in which Fuentes was founded to be insane at the time of the incident by the defense's assigned psychologist, Dr. Homes, was essential, however, defense counsel failed to subpoena Dr. Garcia at the time he subpoenaed Fuentes's medical records from Dr. Garcia. Was Counsel's failure to subpoena such an important witness when he had the chance to do so be considered ineffective assistance of trial counsel?

II

Question two of ground two of Fuentes's § 2254 petition:

Here we have a needed witness who gave a deposition that supported Fuentes's insanity at the time of the incident, and also gave excellent character testimony of Fuentes including Fuentes not being an overtly jealous guy, which was the State's main accusation against Fuentes. Was counsel's decision of not calling Fuentes' next door, Ms. Lorenza Cunningham after hearing her very beneficial testimony during deposition be considered ineffective assistance of trial counsel?

III

Question three of ground three of Fuentes' § 2254 petition:

Here we have another one of Fuentes' neighbors who gave a sworn statement to the police stating among other things that he saw Fuentes walking towards his home holding a Catholic candle, which was evidence that was tied to Fuentes insanity on the day of the incident. Was counsel's failure to call JoeManny Castro knowing of his beneficial evidence testimony considered ineffective assistance of trial counsel?

IV

Question four of ground four of Fuentes § 2254 petition:

A prospective juror complained to the Court's bailiff outside the courtroom of not wanting to be a juror because she didn't speak English, and when the Judge found out from the bailiff of Mrs. Rodriguez English situation, the Judge determined that Mrs. Rodriguez could speak and understand English. However, the Judge never actually talked to Mrs. Rodriguez about her complaint of not knowing how to speak English. Was the Court's failure to hold a hearing to make sure that Mrs. Rodriguez knew enough English to be able to serve an abuse of discretion, or do you agree with the postconviction Court's reasoning that the trial court has very wide discretion when it comes to voir dire matters?

V

Question five of ground five of Fuentes' § 2254 petition:

Was the prosecutor's decision to use Fuentes' (15) fifteen year old son to identify the bodies of his own mother and grandmother, the victims, which caused Fuentes to have to sign a stipulation that would keep his son from having to see pictures of his dead mother and grandmother in exchange for defense counsel not cross-examining or raising any objection during the testimony of the State's expert, which hurt his case. Was this a reasonable thing to do by the prosecutor?

VI

Question six of ground six of Fuentes § 2254 petition:

It was established early on during pretrial hearings by all parties that competency had nothing to do with Fuentes' sanity, and the State even asked the Court for a Motion in Limine to make sure that competency would be kept out of the trial. However, when the prosecutor saw a small window from Fuentes' competency examination that accused him of faking his mental illness, the prosecutor called a side bar with all the parties to inform them that she was going to ask the witness, Dr. Homes, about Fuentes' competency examinations answer, but that she was not going to use the word competency during the questioning and although defense counsel objected, the Judge granted the State permission to ask the competency related question. Was the trial court bias in letting the State introduce competency matters in Fuentes' insanity defense trial?

VII

Question seven of ground seven of Fuentes' § 2254 petition:

The defense in Fuentes' trial raised a "Judgment of Acquittal" for the State's failure to prove the essential element of premeditation and the appellate attorney who raised two grounds on direct appeal even mentioned this matter in the brief's footnote. However, he failed to raise this premeditation issue, which was 100% true. Was appellate counsel ineffective for not raising this issue on direct appeal?

VIII

Question eight of Fuentes' § 2254 petition:

This is the same argument that was raised on ground four concerning a prospective juror who complained to the Court of not wanting to serve due to her English speaking deficiency which the Court completely ignored. However, here the issue goes against the appellate counsel for not raising this very important issue on direct appeal. Was appellate counsel ineffective for not raising this issue on direct appeal?

IX

Question nine of ground nine of Fuentes' § 2254 petition:

Here, Fuentes' claims that appellate counsel was ineffective for failing to raise on direct appeal the Trial Court's error in not substituting defense counsel and allowing him to remain as Fuentes' counsel when their relationship had gotten so

bad that Fuentes stopped talking to him. Was appellate counsel ineffective for not raising this issue that covered (63)pre-trial pages of Fuentes' and the other parties, going back and forth concerning Fuentes' complaints against counsel for him not calling key witnesses to testify at his trial?

X

Question ten of ground ten of Fuentes § 2254 petition:

Here, Fuentes claims that his appellate counsel was constitutionally ineffective for not raising on direct appeal the Court's abuse of discretion for denying the defense's "mistrial" regarding a testimony that accused Fuentes of being unfaithful to his wife (victim), which was inadmissible bad character evidence. Was appellate counsel constitutionally ineffective for not raising this so damaging character issue on direct appeal?

XI

Question eleven of ground eleven of Fuentes § 2254 petition:

In this ground, Fuentes claims that his appellate counsel was ineffective for failing to raise on direct appeal a defense objection to the Trial Court that concerned the Court's error in granting the State a motion in limine to exclude "family mental health history" testimony at Fuentes's insanity defense trial. Therefore, relevant evidence with the excuse that it was hearsay when "family history" is in fact one of the hearsay exceptions. Was appellate counsel ineffective for not raising this issue on direct appeal?

XII

Question twelve of ground twelve of Fuentes § 2254 petition:

Here, the Court's bailiff unsupervised communication with the jury concerning how long they would be allowed to deliberate required reversal yet this issue was raised on direct appeal and denied. Was trial counsel ineffective for failing to raise an objection when this issue came up?

INTERESTED PARTIES

There are no interested parties to the proceeding other than those named in the caption of the case.

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IV. Because Fuentes' trial counsel was constitutionally ineffective for failing to raise an objection to the Trial Court's abuse of discretion for allowing a non-English speaking person to participate as a member of the jury without ever holding a proper hearing to find out whether this person could or could not speak English after this prospective juror, because she had not been sworn in yet. Mrs. Maria Rodriquez brought to the Courts attention her not wanting to serve because of her inability to speak English in violation of the "Jury Selection and Service Act of 1968", which requires a juror to have English language literally and speaking proficiency which is constitutional, which violated Fuentes' 6th and 14th Amendment to the United States Constitution.

V. Because Fuentes' trial counsel was constitutionally ineffective for failing to raise an objection the prosecutor's misconduct of using his grieving (15) year old son to identify the dead bodies of his own mother and grandmother, whom he loved and missed greatly without taking into consideration the psychological trauma that seeing these gory pictures could cause him, which coerced Fuentes to have to enter a stipulation that weakened his case substantially, because the condition of the stipulation was that neither his son nor Fuentes' sister would have to identify the victims in exchange for defense counsel not cross-examining/challenge the State's medical expert witness. Counsel's failure to look at any other alternatives in order to avoid having to enter the State's biased stipulation violated Fuentes' 6th and 14th Amendment rights of the United States Constitution.

VI. Because Fuentes' appellate counsel was constitutionally ineffective for failing to raise on direct appeal trial counsel's objection to the Court concerning allowing the State to introduce a competency related piece of evidence in order to be able to accuse Fuentes of malingering or faking his mental illness, which was irrelevant at his insanity defense trial. Therefore, violating Fuentes' 6th and 14th Amendment rights to the United States Constitution.

VII. Because Fuentes' appellate counsel was constitutionally ineffective for not raising on direct appeal the defenses "Judgment of Acquittal" for the State's failure to prove the essential element of premeditation in violation of Fuentes' 6th and 14th Amendment rights to the United States Constitution.

VIII. Because Fuentes' appellate counsel was constitutionally ineffective for failing to raise on direct appeal the Court's abuse of discretion for allowing juror Mrs. Maria Rodriguez to remain as a juror after she complained of not knowing how to speak English right before getting sworn in as a juror without ever holding a hearing to find out whether she could or could not speak and understand English well enough to be a juror in violation of the "Jury Selection and Service Act of 1968", which requires a juror to have English language literacy and speaking proficiency, which is constitutional. Therefore violating Fuentes' 6th and 14th

amendment rights to the United States Constitution. (This is the same argument that was raised on ground four only here Fuentes claimed ineffective assistance of appellate counsel).

IX. Because Fuentes' appellate counsel was constitutionally ineffective for failing to raise on direct appeal the Court's error in allowing trial counsel to remain as counsel when their relationship got so bad that Fuentes stopped talking to him in violation of Fuentes' 6th and 14th Amendment rights to the United States Constitution.

X. Because Fuentes' appellate counsel was constitutionally ineffective for not raising on direct appeal the Trial Court's abuse of discretion for denying the defense's mistrial regarding a testimony that accused Fuentes of being unfaithful to his wife (victim), which was inadmissible bad character evidence that violated Fuentes' 6th and 14th amendment rights to the United States Constitution.

XI. Because Fuentes' appellate counsel was constitutionally ineffective for failing to raise on direct appeal the defense's objection concerning the Trial Court's error in granting the State a Motion in Limine to exclude any family mental health history testimony at Fuentes' insanity defense trial. Therefore, relevant evidence with the excuse that it was hearsay when family history is one of the hearsay exceptions, which violated Fuentes' 6th and 14th Amendment rights to the United States Constitution.

XII. Because Fuentes' trial counsel was constitutionally ineffective for failing to raise on direct appeal an objection to the Court's bailiff unsupervised communication with the jury concerning how long they would be allowed to deliberate in violation of Fuentes' 6th and 14th Amendment rights to the United States Constitution.

APPENDIX

TABLE OF AUTHORITIES CITED

CASES PAGES

STATUTES

TREATISES

CONSTITUTIONAL PROVISIONS

IN THE SUPREME COURT OF THE UNITED STATES

No._____

JOSE FUENTES
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ON PETITION FOR A WRIT OF CERTIORARI TO
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PETITION FOR WRIT OF CERTIORARI

Jose Fuentes, pro se, respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the denial of his Certificate of Appealability ("COA") filed in the United States Court of Appeal for the Eleventh Circuit to appeal the Southern District Court's denial of his 28 U.S.C. § 2254 petition. The United States Court of Appeal for the Eleventh Circuit rendered its denial on February 12, 2021.

OPINIONS BELOW

None of the Courts from appendixes A, B, C, D, E, F and G gave an opinion.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a) part III of the Rules of the Supreme Court of the United States of America. The decision of the United States Court of Appeals for the Eleventh Circuit denying Fuentes' Certificate of Appealability (COA) to appeal the Southern District Court's denial of his pro se 28 U.S.C. § 2254 petition that was filed on February 12, 2021. This was followed by a Motion for Reconsideration, which was also denied, and filed by this Court on June 10, 2021, but Fuentes received it on June 15, 2021, and it ends on September 13, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Jose Fuentes questions involve the Sixth and Fourteenth Amendments to the United States Constitution.

The Sixth Amendment to the United States Constitution states, in pertinent part that, "a defendant has the right to have compulsory process for obtaining witnesses in his favor..." U.S. Const.., Amend. VI.

And the Fourteenth Amendment to the United States Constitution states, in pertinent part that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law..." U.S. Const. Amend. XIV.

STATEMENT OF THE CASE AND FACTS

Jose Fuentes was charged with two counts of first degree murder. (R. 23-25). A jury trial on these charges commenced on November 1, 2011 and concluded on November 14, 2011. (TR. 1-2257). At the trial, the defense did not dispute the fact that Mr. Fuentes shot and killed the two victims, his wife and his wife's mother. The primary defense at trial was that Mr. Fuentes was not guilty by reason of insanity.[1]

THE STATE'S CASE-IN-CHIEF

The evidence presented at trial by the State established the following. At approximately 6:00 p.m. on March 30, 2006, police officers responded to the area of 10817 Southwest 226 Street pursuant to a 911 call to the police. (TR. 1278-79). A recording of the statements made by an anonymous witness to the 911 operator was introduced at trial over the repeated objections of defense counsel on hearsay grounds and on the ground that the admission of the statements of the anonymous out-of-court witness violated defendant's rights under the Confrontation Clause. (TR. 877, 1271-77). The Court ruled that the recording of the anonymous witness' out-of-court statements was admissible based solely on the testimony of a records custodian for the City of Miami Police Department that the recordings were made at or near the time the calls were received, and the recordings were kept in the regular course of business at the Department. (TR. 873-77, 1274-75). On the recording, an unidentified person claiming to be a neighbor stated that Jose Fuentes approached her and stated that he had done something wrong. (TR.1863).

As an officer approached the scene in response to the 911 call, Jose Fuentes stepped out of the garage of his home and waved down the officer. (TR. 1281-82). Fuentes told the officer that he did something bad and then said that he shot his wife and mother-in-law. (TR.1284). The officer took Fuentes into custody and put him in the back of a police car. (TR, 1285-86) Fuentes was crying and upset but he did not resist the officer in any way. (TR. 1285-86). As Fuentes was being processed

[1] The defense also argued that the State's evidence failed to establish the essential element of premeditation

at the scene, an officer heard him say, "God why did I run out of bullets." (TR. 898) This was an apparent reference to Fuentes having placed the gun to his head and pulled the trigger after he shot his wife and her mother.

Subsequent investigation at the scene revealed the body of Fuentes' wife, Belkis Cisneros, inside the home. (TR.884-85, 899). Belkis' mother, Viera Cisneros, was also found inside the home. (TR.885). Viera Cisneros had been critically wounded and she died a short time after being transported by helicopter to the trauma unit. (TR.886-87,924-25). The medical examiner subsequently determined the cause of death of both women to have been multiple gunshot wounds. (TR.1496, 1505). Belkis Cisneros suffered four gunshot wounds and Viera Cisneros suffered two gunshot wounds. (TR. 1486, 1497).

Fuentes' car was parked a short distance away from his home. (TR. 1103). Inside the police car found what appeared to be a suicide note. (TR. 1040-41). The note began, "This was not due to jealousy." (TR.1083). Fuentes claimed that his wife and mother belonged to a society of witches and followers of Santeria who worshipped Satan and were trying to kill him. (TR.1083). He claimed that his family had been the target of a group of witches for over twenty-five years. (TR. 1083-84). He asked that his children be raised by his brother and that his house be burned down to end the curse of the witches. (TR.1084). He said he was not crazy and that he had written the truth. (TR. 1084). He ended the note by saying that he had seen Jesus and everything would seem clearer when they all saw each other again. (TR.1084).

Following his arrest at the scene, Fuentes was taken to the police station where he was interrogated by the lead detective in the case through the night and into the following morning. (TR. 1117-18). He was questioned for approximately three hours in a non-recorded "pre-interview". (TR. 1124-31). He then gave a thirty-minute statement to the lead detective which was both recorded by a video camera and transcribed by a stenographer. (TR.1131). The video recorded statement was played for the jury at trial. (TR.1139).

Fuentes told the detective about his tumultuous relationship with his wife and how she had been verbally abusive to him. (TR. 1125).He said that the night before the shooting his wife told him that he should leave and never return. (TR. 1126). She told him he should not try to see their children. (TR. 1126). This upset Fuentes but he hoped it would all "blow over" as it had in the past. (TR.1126). Fuentes told the detective that on the day of the shooting he picked up his children at school and drove them to his sister's house. (TR. 1126-27). After dropping off the children, Fuentes told his sister to take care of his children as he had to go back and get a book bag that one of the children had forgotten to take home. (TR. 1127). As he was driving away from his sister's house, Fuentes had a telephone conversation with his wife in which his wife refused to talk to him about their problems. (TR. 1127). When Fuentes told his wife he would see her later, she told him that was "just too bad". (TR. 1127). Fuentes told the detective this comment upset him and he decided to drive home and speak to his wife. (TR.1127). He said he decided to take his gun with him to make her listen to him. (TR. 1287).

Fuentes told the detective he parked his car at the clubhouse near his house so that he could surprise his wife. (TR. 1128). He tucked the gun in his waistband and walked to his house. (TR.1128). He walked into his house and saw his wife and her mother standing inside the house. (TR.1128). He tried to talk to his wife but she refused to talk to him. (TR. 1128-29). He then took out the gun and shot his wife's mother and she fell to the ground. (TR.1129). His wife turned and ran toward the front door and he shot her several times until she fell just outside the front door. (TR. 1129.) He then put the gun to his head and pulled the trigger but no bullets remained in the gun. (TR. 1129).

Fuentes told the detective he felt bad when he saw his wife on the ground outside the house so he dragged her body inside the house. (TR.1129). He then walked outside and told a neighbor to call the police because he had done something crazy. (TR.1129). He threw the gun into the garage and waited for the police to arrive. (TR. 1129-30). When an officer arrived on the scene he flagged down the officer and was taken into custody without incident. (TR. 1130).

The State called several witnesses at trial to testify concerning their interaction with Jose Fuentes prior to the shootings. Jose Hernandez testified that Fuentes studied the Bible with him for a period of seven or eight months starting in the summer of 2005. (TR. 1320-23). Fuentes had a lot of problems during that time period. (TR.1370). During their final session of Bible study, Fuentes appeared sad and stated a number of times that he wanted to kill his wife. (TR. 1330-31). When Hernandez told Fuentes that would be wrong and that Fuentes' children would lose their mother and their father would go to jail, Fuentes said he would just kill himself. (TR.1131). These statements were made eight months prior to the date of the shootings. (TR.1338). The State also called Fuentes' 15 year old son, Jose Agusto Fuentes, as a witness at trial. (TR. 1393). The State asked the son about an incident that occurred a few months before the shooting when his father took him to a lake and showed him a gun. (TR. 1403-04). His father took the gun from the trunk of the car and helped him fire one shot into the water. (TR. 1403-04). During the time when the shot was fired into the water, his father told him it was really dangerous to have a gun because someday he might shoot the boy's mother. (TR. 405).

Jose Fuentes' half-sister, Laura Rodriguez, also testified as a State witness at the trial. (TR. 1415-16). She testified about the marital difficulties between Fuentes and his wife, as well as Fuentes' long history of strange behavior. (TR. 1424-31, 1453-57). He frequently went to the hospital because he thought he was dying. (Tr. 1454-55). She repeatedly suggested that he see a psychiatrist because she thought he needed psychological medical attention. (TR. 1456-57). Fuentes told her he did not need such medical attention, but she thought he was unstable. (TR.1457).

Rodriguez testified that on the day of the shooting, she planned to eat dinner with Fuentes and his family at his house. (TR.1442). At approximately 2:00 p.m. Fuentes called her at work and asked if they could meet earlier at her house. (TR.143-44). Rodriguez reluctantly agreed but said she could not be home before 5:00 p.m. (TR. 1444-45). Fuentes called her again around 3:30 or 4:00 and asked if he could leave his children with her mother-in-law because he needed to do something. (TR. 1445-46). Rodriguez's mother-in-law was not home so Fuentes was

still there when Rodriguez arrived home from her work. (TR. 1446-47). He was in the parking lot with his three children. (TR.1447). He said he had to leave to get his son's backpack which his son had left at the park. (TR.1448). He said goodbye to Rodriguez and his three children, he asked Rodriguez to take care of his kids, and then he drove off. (TR. 1449-50). Rodriguez testified that Fuentes appeared to be acting normal during this encounter. (TR.1450).

THE DEFENSE CASE

The first defense witness at trial was Orestes Fuentes, the father of defendant José Fuentes. (TR.1527). Orestes testified that his son's mental condition started to deteriorate after his son followed his wife to Panama and lost all his money in a business he opened there. (TR. 1528-31). When his son returned from Panama, he called paramedics at least three times a week complaining of various ailments. (TR. 1531-32). He didn't sleep at night and was barely eating. (TR.1532). Orestes believed his son was mentally ill and he took his son to see a psychiatrist many times. (TR. 1533-34).

Jose Fuentes' brother, Freddy Fuentes, gave additional testimony concerning the mental state of the defendant. (TR.1542). Freddy testified that he observed a number of incidents of disturbing behavior by his brother. (TR. 1545). On one occasion his brother came out of his room hysterically screaming that something had tried to abduct him. (TR. 1545-46). As Jose got older these problems worsened. (TR. 1546-47). Eventually, he seemed to have lost all contact with the real world. (TR.1547). He believed there were evil forces trying to destroy him and his family. (TR.1547). He started talking about his wife and her mother being demons or working for Satan. (TR.1547). He believed his wife and her mother had placed a curse on him and were out to destroy the entire family. (TR.1551). Freddy unsuccessfully tried to get his brother to admit that he was mentally ill and needed to see a psychiatrist. (TR.1549).

Jose Fuentes was called to the witness stand following the testimony of his father and his brother. (TR.1633). He testified that in regards to the actions he took

against his wife and her mother, he did not know what he was doing was wrong. (TR.1633). At the time of his testimony he realized he was suffering from a mental illness, and that he had been suffering from a mental illness since 2004.(TR.1543-44). Starting in 2004, he repeatedly sought to be hospitalized because he thought he was suffering from a number of different physical ailments. (TR.1646-49). He believed that he had been visited by aliens two or three times. (TR. 1650-51). He believed his wife and her mother were practicing Santeria and were trying to kill him with witchcraft. (TR.1653). He believed they were devils. (TR.1653).

Fuentes testified that he made the statement to Jose Hernandez about wanting to kill his wife because his wife had physically attacked him that day. (TR. 1649-50). Fuentes did not think he made the statement to his son about killing his mother, but if he did he must have been having a bad day. (TR. 1654).

Fuentes testified that on the day of the shooting the plan was for everyone to meet at his sister's house for dinner. (TR. 1657-58). He picked up his children from school and drove them to his sister's house. (TR. 1658). When they arrived at his sister's house his son mentioned that he had forgotten to take his book bag. (TR. 1658-59).

On the way to get the book bag Fuentes had a phone conversation with his wife. (TR. 1659). At the end of the conversation he told his wife he would see her later. (TR. 1659). She responded by telling him it was too bad that she had to see him. (TR.1659). Fuentes testified that the next thing he remembered after hearing this statement by his wife was crying in his truck and the Jesus candle in his truck looking at him.(TR. 1659-60). He had no idea why he drove to his house and parked by the clubhouse because he had never parked there before. (TR.1660). His clearest memory after that was being outside his house after the shootings and seeing what had happened. (TR. 1660-61). He thought he had tried to kill himself but the gun had not fired. (TR.1661). He remembered throwing the gun into the garage and flagging down the police officer. (TR.1661). He did not remember writing the note found in his car. (TR.1663). He recalled speaking to Detective Williams and he testified that he tried to appear as normal as possible during that questioning to

hide his mental illness. (TR. 1663-65). Fuentes testified that he now understood that he had a major mental illness and required treatment for that illness. (TR. 1665).

Dr. Holmes testified that Fuentes clearly suffered from a mental illness at the time of the shootings. (TR.1849). He was mentally ill from the delusional fear that his wife was trying to kill him. (TR.849). Those delusions could have prevented him from knowing the difference between right and wrong. (TR.1850). As a result, Dr. Holmes testified that in her opinion at the time of the shootings Fuentes might have met the legal criteria for insanity. (TR.1849).

THE STATE'S REBUTTAL CASE

The final witness at trial was Dr. Enrique Suarez, testifying as a rebuttal witness for the defense. (TR.1940). Dr. Suarez practiced clinical, forensic and neuropsychology. (TR.1941). He examined Jose Fuentes on a single occasion, approximately three years after the shooting. (TR.1953). The examination lasted about five hours. (TR.1955). Dr. Suarez concluded that Fuentes did suffer from a mental illness at the time of the shootings, but he did not consider it to be a major serious degree of impairment. (TR.1985-86). In his opinion, Fuentes was sane at the time of the shootings; he knew what he was doing at the time and he knew it was wrong. (TR.1985).

THE JURY DELIBERATIONS

After nine days of trial, spread over a period of three weeks, the jury in this case retired to begin its deliberations at 1:55 p.m. on Monday, November 14, 2011 (TR.2217). The bailiff brought lunch to the jury room at approximately 2:15 p.m. (TR.2231). Shortly thereafter, the jury sent a note to the Court indicating that juror Thompson needed some fresh air. (R. 144; TR.2228). The Court held a conference call with the State and the defense and it was agreed that the Court would send a note to the jury advising them that juror Thompson could get some fresh air as long as deliberations were suspended while she was outside. (R. 144, TR.2228).

When the bailiff went to the jury room to take juror Thompson outside, several other jurors asked the bailiff how long the Court would allow their deliberations to continue that day. (TR. 2229-30). The bailiff told the jurors that the Judge generally allowed deliberations to continue until 5:30 p.m. (TR. 2229, 2238).

At 3:55 p.m., the Court sent a note to the jurors advising them that Ms. Thompson and others would be allowed to get some fresh air. (R.144). While the bailiff was outside the jury room with juror Thompson and three other jurors, Thompson asked the bailiff for a glass of ice and the bailiff observed that Thompson had tears in her eyes. (TR. 2229-30). The bailiff asked Thompson if she was all right, and Thompson said she would be fine. (TR. 2230). The bailiff then reported this conversation with the jurors to the Court (TR.2229-30). The Court held a hearing with all parties present to determine if any action should be taken concerning juror Thompson. (TR.2230). After a short discussion, it was agreed that no further action would be taken regarding juror Thompson. (TR. 2230-35).

During this hearing, the parties began discussing how long the jurors should be allowed to deliberate before being sent home for the evening. (TR.2232-45). The Court noted that the jury had been led to believe by the bailiff that their deliberations for the day would end at 5:30. (TR. 2232). The parties then engaged in a lengthy discussion concerning how the jury should be advised concerning how long they could deliberate that day. (TR. 2235-45).

While the Court and parties were still engaged in this discussion, the jury sent out a note at 5:18 p.m. stating that it had reached a verdict. (R.146; TR.2245).

The jury returned a verdict of guilty as charged of two counts of first degree murder. (TR.2246-47). The Court entered adjudications of guilt and sentenced Mr. Fuentes to consecutive terms of life imprisonment. (TR. 2253-54, 2256). Notice of appeal was filed. (R. 168).

REASON FOR GRANTING THE WRIT

I. BECAUSE FUENTES' TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO CALL TO TESTIFY HIS PRIVATE PSYCHOLOGIST DR. MANUEL A. GARCIA, WHO WAS TREATING HIS MENTAL ILLNESS BEFORE HE COMMITTED THE CRIME

As a preliminary matter, the Magistrate claims that this ground should be denied because the Petitioner did not meet the necessary prong of availability of the witness.[2] Specifically, it stated on quote, "The record reflects that defense counsel attempted to locate Dr. Garcia without success." (R&R. 16). The Petitioner agrees with the Magistrate in part due to the fact that counsel did claim at a Nelson hearing that he was attempting to locate Dr. Garcia, but without any success. However, the Petitioner objects due to the fact that the record also shows that counsel located Dr. Garcia at C.H.I., the location where the Petitioner had told him he worked at. On this particular occasion counsel made the big mistake of only subpoenaing the Petitioner's medical records from Dr. Garcia instead of subpoenaing Dr. Garcia himself. That would have been the perfect time for counsel to explain to Dr. Garcia what his patient had done, and how he was in jail facing double murder charges. That due to his prior history in dealing with the Petitioner's mental health problems, his testimony at the trial would be of great value, especially since the defense's argument was going to be that Fuentes was insane at the time of the crime.

Counsel's failure to subpoena Dr. Garcia while he was still working at C.H.I. instead of just subpoenaing Fuentes' medical records from him, which was something that took place before he stopped working at C.H.I. proves the availability factor of Dr. Garcia. The fact that defense counsel missed the chance to subpoena Dr. Garcia constitutes ineffective assistance of counsel that prejudice the

[2] Nelson v. State, 875 So.2d 579 (Fla. 2004)("holding: The Supreme Court granted review and held that facially sufficient post-conviction motion alleging the ineffectiveness of counsel for failing to call certain witnesses must include an assertion that those witnesses would in fact have been available to testify at trial")
NOTE: The Magistrate Judge adopted all of the state courts reasons for denying this claim. Also, Fuentes is addressing his objections to the Magistrate's (R&R) to your Honorable Court because the Magistrate Judge never addressed Fuentes' objections.

Petitioner.[3] He strongly believes that had Dr. Garcia been able to testify concerning his severe mental health issues, the outcome of his trial would have been different. For a more clear understanding of this availability factor been met here, see the portion of the transcripts below:

> **The Defendant:** Manual Garcia
> **Mr. Williams (counsel)**: We attempted to locate Dr. Garcia and he was not at C.H/.I. where Fuentes indicated he would be...we have records from him (Dr. Garcia). He is not **where he was** at that time.
> **The Court**: So he's continuing to look for the doctor (DR. Garcia) that is not a location even though they have the records
> **Mr. Williams: We subpoenaed the records**, he (Petitioner) signed a consent for the records. (R.229-31)

The availability factor of Dr. Garcia can be clearly seen here when defense counsel Mr. Williams tells the Court "he (Dr. Garcia) is not '**where he was**' at that time." "**WHERE HE WAS"** are the key words to identify that at the time in which counsel subpoenaed Fuentes' medical records from Dr. Garcia, he was still working at C.H.I., therefore showing prima facia the availability factor.

The Petitioner agrees with the Magistrate that depression formed part of Dr. Garcia's treatment to him, but Dr. Garcia's medical records have his diagnosis, which reflect that Fuentes suffered from "psychosis, r/o, bi-polar disorder depression." Dr. Holmes, the psychologist for the defense testified that Dr. Garcia was treating the Petitioner for depression, but left out explaining to the jury Dr. Garcia's medical records contents, and his diagnosis, which clearly show the Petitioner's mental condition was something more serious than a simple depression. Furthermore, Dr. Garcia's diagnosis was 11 months old, which was enough time for it to have turned into something worse, which obviously it did. (TR. 1898) (TR.1919-20) and (Attachment).

Concerning the 11 months that were previously mentioned, the Magistrate said that because Dr. Garcia had not seen the Petitioner for 11 months prior to the

[3] Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed. 2d 391 (1986) ("single error may constitute counsel ineffectiveness").

incident he wouldn't be able to determine whether the Petitioner was insane at the time of the incident. The Petitioner respectfully disagrees. In support of his objection, the rationale that the Petitioner would like to present here concerning the 11 months that had elapsed since the last time he saw Dr. Garcia prior to him committing the incident is that Dr. Heather Homes, the psychologist assigned to the defense, a complete stranger whom he met after the incident while in jail testified that he might have been insane at the time of the crime, then how much more possible it would have been for Dr. Garcia, who had an established history with the Petitioner to arrive to the same conclusion, especially if he would have worked in Fuentes' case from the beginning alongside Dr. Homes. For this reason the Petitioner made the 99% chance claim in his petition that Dr. Garcia would have founded him insane at the time of the crime.

Lastly, the Magistrate claimed on quote that "the Petitioner failed to demonstrate how Dr. Garcia's testimony would have been favorable or exculpatory and that his allegations were at best speculative. Further, that Petitioner cannot maintain an ineffective assistance of counsel claim simply by pointing to additional evidence that could have been presented." (R&R, 17-18).

As objection to the statements from Magistrate to deny this ground, the Petitioner will just say that good old common sense dictates the contrary, because of the 100% relevancy evidence of Dr. Garcia's testimony.

Dr. Garcia's medical records from the Petitioner indicate that he knew about his hospitalizations due to his mental illness worsening, and knew about the elements or signs that existed in the Petitioner's mind that caused him to go totally insane 11 months after the last time he saw the Petitioner. (R. 213) & (TR. 1897-98). Dr. Garcia's testimony alone was necessary due to the before and after effect between his information of the Petitioner, and the defense's psychologist, Dr. Homes information of the Petitioner. They were different types of information. Therefore, this before and after effect would have complimented each other. The fact that Dr. Home's found that Fuentes was insane at the time of the crime proves this theory.

Concerning Dr. Garcia's testimony been unnecessary additional evidence, the Petitioner have the following to say. At a couple of Nelson hearings that were held by the Court for counsel's failure to call needed witnesses according to the Petitioner's complaints to the Court, but primarily for not calling Dr. Garcia, defense counsel never said that Dr. Garcia's testimony would not be favorable, or exculpatory or that it would be cumulative, because he had hired a psychologist to start working in the Petitioner's case, "NO", the record is completely devoid of such comments from counsel. Counsel knew that his testimony would be extremely important in order for him to have a chance of winning the case that is why the last thing he said to the Court at this Nelson hearing was that he was going to keep looking for Dr. Garcia. For a full understanding see (R.207-47). See, Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S.Ct. 17210, 1714, 123 L.Ed 2d 353, 363 (1993); Arizona v. Fulminate, 499 U.S. 279, 309, 111 S.Ct. 1246, 1264, 113 L.Ed 2s 302, 331 (1991).

REASONS FOR GRANTING THE WRIT

BECAUSE FUENTES' COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO CALL TO TESTIFY HIS NEXT DOOR NEIGHBOR, MS. LORENZA CUNNINGHAM, AFTER AT HEARING HER DEPOSITION EXCULPATORY EVIDENCE THAT WOULD HAVE REFUTED THE STATE'S "JEALOUSY/MARITAL PROBLEM THEORY" USED AGAINST HIM, AS WELL AS EVIDENCE THAT SUPPORTED HIS INSANITY AT THE TIME OF THE CRIME. AND, THE JURY NOT BEEN ABLE TO HEAR THESE TWO MATERIAL EVIDENCES FROM MS. CUNNINGHAM HERSELF GREATLY PREJUDICE HIM.

BACKGROUND AND ANALYSIS

The Magistrate gave two reasons to deny this ground, they were: First, that Ms. Cunningham's testimony regarding the Petitioner answering her, "witchcraft" after she asked him "why did you do that?" would have been cumulative evidence due to the testimonies given by both, the Petitioner and Dr. Homes, the defense psychologist. This part is incorrect; Dr. Homes didn't testify about this particular situation between the Petitioner and Ms. Cunningham because she didn't know; only the Petitioner testified about it. (TR.1918). And two, that counsel, made the strategic decision not to call her because Ms. Cunningham's testimony would have

undermined the Petitioner's insanity defense because according to her he seemed normal after the crime took place. The Petitioner respectfully disagrees. In support of his objection, the Petitioner will say that Magistrate only mentioned Ms. Cunningham's deposition testimony concerning her " never seeing the Petitioner hitting his, or being overly jealous", without elaborating further into the matter because it wasn't convenient to say anything else about it due to the fact that the State's strategy used against the Petitioner was that his jealousy had caused all of their marital problems and a future separation between him and his wife was inevitable. (TR. 1732-35). However, Ms. Cunningham's testimony reflects evidence that completely refutes the State's "jealousy/marital problems theory" used against the Petitioner.

Ms. Cunningham's testimony shows a lot of other material evidence that was necessary for the jurors to hear besides the "witchcraft" situation between the Petitioner and her. For example, due to Ms. Cunningham's close relationships to the victims in this case, the Petitioner's wife and mother-in-law, a lot of the State's speculations and accusations against the Petitioner would have been clarified and rebutted. By the time the incident took place, Ms. Cunningham had been the Petitioner's next door neighbor for 7 years, which is more than enough time to see what a couple is all about, especially because their relationship was a close one. The words "close friendship" are being used here due to the fact that M.s Lorenza Cunningham, the Petitioner's wife and his mother-in-law were all from Panama which was the spark that ignited their close friendship.

For this reason, Ms. Cunningham would have known if anything was wrong between the Petitioner and his wife, because she would have been able to find out from either one of them. See, Brecht v. Abrahamson, 507 U.S. 619, 638, n.9, 123 L.Ed 353, 369, n.9 (1993).

In support of this close friendship, Ms. Cunningham's deposition reflects that on the very same day the incident occurred, she loaned her cell phone to the Petitioner's mother-in-law, so she could call Panama to confirm the day she was going back and were also supposed to go shopping together.

Ms. Cunningham specifically remembered that the Petitioner's mother-in-law wanted to go to JoAnn Fabrics to buy a part for her sewing machine. However, although Ms. Cunningham and the Petitioner's mother-in-law were close, due to the fact that they only saw each other only once a year because she lived in Panama, the relationship between the Petitioner's wife, who was the State's main character behind their "jealousy/marital problems theory", and her was much closer, which pretty much guaranteed Ms. Cunningham knowing if they were having marital problems, or anything else that might have been wrong with the Petitioner. See, a portion of Ms. Cunningham's deposition, page (6) below:

> Q: Were you aware of any marital problems they were having?
> A: No. Never, because she never would say anything. I personally didn't see anything wrong.
> Q: If you could qualify who were you better friends with. Jose or Belkys?
> A: With Belkys.
> Q: Did she ever talk to you about Jose?
> A: Well, they would talk about they had businesses in Panama. They had businesses here you know, thing like that.

The other vital evidence that should have come from the horse's mouth, because it would have had more weight instead of just coming from the Petitioner, for which reason Magistrate claimed the Ms. Cunningham's testimony would have been cumulative, was her encounter with the Petitioner immediately after the incident.[4] Since Ms. Cunningham personally witnessed the aftermath that took place that day she asked the Petitioner while he was already sitting in the back seat of the police car "Why did you do that" and he answered her " because they were performing witchcraft on me", which was evidence that supported the Petitioner's insanity that day.[5] (TR.1827). In further support, the Petitioner's response to Ms. Cunningham about witchcraft was directly linked to a suicide letter he wrote right before committing the crime stating among other things that his wife and mother-

[4] Skipper v. South Carolina, 476 U.S. 1, 90 L.Ed 2d 1, 106 S.Ct. 1669 (1986) ("the United States Supreme Court held that cumulative testimony is not a basis for denial").
[5] Johnson v. Dugger, 911 F.2d 440 (11th Cir. 1990)("Failing to develop and present evidence relevant to defendant's state of mind")

in-law were witches that worked for Satan who were attempting to kill him with witchcraft (R.8081). See, the defense's psychologist, Dr. Homes testimony below:

> A: [I] think he was mentally ill from the delusions, the fear that his wife was trying to kill him. He had voice that to other people way before the crime had taken place. And several people were concerned and were trying to insist that he get treatment and he was in complete denial and decided to believe that his problems were medical.
> Q: And those delusions would prevent him from knowing right from wrong?
> A: Yes. (TR. 1849-50)

Concerning counsel making a strategic decision not to call Ms. Cunningham as a witness due to her statement of Petitioner looking normal right after committing the incident would have undermined his insanity defense, the Petitioner respectfully disagrees for the following reasons: First, the Petitioner agrees with Magistrate that Ms. Cunningham stated during her deposition that Petitioner seemed normal, but on the same token there was another testimony from her in which she stated that Petitioner didn't look so normal. See this portion of Ms. Cunningham's depo, pages (17-18) below:

> Q: Now, while you were there, you saw the police put Jose in the back of the police car?
> A: Yes, I got close and said, **why did you do that, because they were performing witchcraft on me.**
> Q: That is what Jose said, they were performing witchcraft on him?
> A: Yes.
> Q: Did you ask him how or what they were doing?
> A: No, I didn't, he just said they were performing witchcraft on me. He looked at me, then I left.
> Q: How did Jose look when he said that? Did he look normal or did he seem different?
> A: I saw him as scared. I don't know. He answered me and he remained like so and I left.
> Q: When you say he remained like so, was he just staring out into space?
> A: Right. I mean, he remained like so, I imagine he was thinking about what he had done, I don't know.
> Q: When you say he remained like so, what do you mean?

A: I didn't say anything else to him, he remained like so. He answered, I left.
Q: When you say he remained like so, you're sitting up straight and still not moving is that what he was doing?
A: When you get into a position like the one he was in, it's like the person is being pensive or lost, or something.
Q: **So he looked like he was lost?**
A: **Yeah,** he remained like so.

("Believing a witness would testify in one fashion does not excuse failure to investigate and ascertain and call alibi witnesses.") Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986).

Two, the fact that Petitioner answered Ms. Cunningham that his reason for committing the offense was because they were performing witchcraft on him alone was more than enough reason to call Ms. Cunningham, especially since counsel was fully aware that Florida Statute §775.027 (2) clearly states that "the defense has the burden of proving the defense of insanity by clear and convincing evidence." However, the third and most important reason was Ms. Cunningham's testimony concerning never having seen the Petitioner hitting his wife, or being overly jealous, or anything like that. Especially the last part of "or anything like that", because that covered all of this type of negative behavior coming from Petitioner towards his wife, which proves that things like this never happened between them. In summation, Ms. Cunningham's deposition testimony shows that the Petitioner, his wife, and their three children were happy, which supported the fact that Petitioner committed the crime for really believing in his ill mind at the time that both of the victims were witches, who were trying to kill him with witchcraft, which would have rebutted the State's "jealousy/marital problems theory". See another portion of Ms. Cunningham's deposition, pages 20-21 below:

Q: Over the period of time that you knew him, did you notice how his mannerisms changed or he allowed his appearance to go down?
A: No. I saw him normal like, he was always playing with his kids, he would cook. He would go and do groceries. Say hi to the neighbors. Sometimes he would bring me food over to the house. If he needed anything from my house, I would give it to him.

Q: You indicated that Jose would cook and go shopping; did Belkys do any of those things?
A: Yeah, they would both go. They were always sharing along with the kids. They would go to the Church or parties that friends would invite them to.
Q: **Did you notice they were together, but did they seem to be getting along?**
A: **No.** the thing is I always saw them as very private people. Maybe they were embarrassed in front of me. I don't know.
Q: Did you ever see anything that would lead you to reason why José would have done this?
A: No, I am always asking myself that question, why.
Q: Do you have any idea why it happened?
A: No, I mean, during the short that I met him, **I never saw him hitting her or being overly jealous, or anything like that.**

REASONS FOR GRANTING THE WRIT

III. BECAUSE FUENTES' TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO CALL TO TESTIFY HIS NEIGHBOR, MR. JOEMANNY CASTRO, WHO GAVE A SWORN STATEMENT TO THE POLICE STATING THAT HE SAW THE PETITIONER WALKING TOWARDS HIS OWN HOME HOLDING A CANDLE THEN MINUTES LATER HEARING THE GUNSHOTS. THE TESTIMONY FROM MR. CASTRO WAS NECESSARY BECAUSE THIS CANDLE FORMED PART OF ANOTHER TWO PIECES OF EVIDENCE THAT WHEN PUT TOGETHER, THE PETITIONER'S INSANITY THAT DAY WOULD HAVE BEEN ESTABLISHED, WHICH WAS NECESSARY DUE TO THE DEFENSE'S INSANITY DEFENSE. NOT BEING ABLE TO HAVE THIS EVIDENCE PRESENTED BY MR. CASTRO HIMSELF, DUE TO COUNSEL'S FAILURE TO CALL HIM PREJUDICE THE PETITIONER.

BACKGROUND AND ANALYSIS

The Magistrates' reason for denying this ground was that because the Petitioner testified at the trial concerning this candle, Mr. Castro's testimony would have been cumulative.[6] The Petitioner respectfully disagrees.

A triangle is made up of three parts, if you take any of those parts out, you won't have a triangle anymore. This case is like a triangle, there were three pieces of evidence that needed to be put together in order to be able to prove that the

[6] Skipper v. South Carolina, 476 U.S. 1, 90 l/.Ed 2d 1, 106 S.Ct. 1669 (1986).

Petitioner was in fact insane when he committed the crime. Those three pieces were:

1. The Petitioner began a suicide letter he wrote on the day of the incident with a sentence saying, "this was not due to jealousy", clearly admitting of the crime because he believed in his ill mind at that moment among other things that both of the victims, his wife and mother-in-law, were witches who worked for Satan and were trying to kill him with witchcraft. (R. 80-81) (TR. 1661-63) & (TR. 1798-03).
2. The Petitioner testified that while sitting inside his car crying that day, the Jesus image of a Catholic candle he had on the passenger's seat was looking at him; that the face of Jesus turned into something else, something wicked and began to talk to him. During his testimony, the Petitioner stated that he was not clear of what exactly this wicked thing was telling him, however, sometime afterward, he walked to his own house with a loaded gun, and this candle and committed the crime. (TR. 1660) & (TR. 1829-30).
3. Lastly, the response the Petitioner gave to his next door neighbor, Ms. Lorenza Cunningham of committing the crime because the victim's were performing "witchcraft" on him after she asked him while sitting in the backseat of the police car, "why did you do that? (TR. 1827) & (Ms. Cunningham's depo. Page 18).

Therefore, just like a triangle these three pieces of evidence together were necessary in order to be able to prove the Petitioner's insanity, which makes Mr. Castro's testimony of having seen the Petitioner holding this candle and minutes later hearing the gunshots material and relevant. "Florida law defines relevant evidence as evidence tending to prove or disprove a material fact". Charles W. Ehrhardt, Florida Evidence, Section 90.401 concerning Mr. Castro's testimony being cumulative because the Petitioner testified at the trial concerning this candle, the United States Supreme Court in Skipper held that "cumulative testimony is not a basis for denial." (See, footnote 6) "Failing to develop and present evidence relevant to defendant's state of mind." Johnson v. Dugger, 911 F.2d 440 (11th Cir. 1990).

REASONS FOR GRANTING THE WRIT

IV BECAUSE FUENTES' TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO RAISE AN OBJECTION TO THE COURT'S ABUSE OF DISCRETION FOR ALLOWING A NON-ENGLISH SPEAKING PERSON TO PARTICIPATE AS A MEMBER OF THE JURY WITHOUT HOLDING A HEARING TO FIND OUT WHETHER THIS PERSON COULD OR COULD NOT SPEAK ENGLISH AFTER THIS JUROR, MRS. MARIA RODRIGUEZ BROUGHT TO THE COURT'S ATTENTION HER INABILITY TO SPEAK ENGLISH TELLING THE COURT THAT SHE DIDN'T WANT TO BE A JUROR FOR THAT REASON IN VIOLATION OF THE "JURY SELECTION AND SERVICE ACT OF 1968", WHICH REQUIRES A JUROR TO HAVE ENGLISH LANGUAGE LITERACY AND SPEAKING PROFICIENCY, WHICH IS CONSTITUTIONAL.[7]

BACKGROUND AND ANALYSIS

The Magistrate's main argument to deny this ground is that the Court used its wide discretion in leaving as a juror Mrs. Rodriguez because she was using her inability to speak English as an excuse not to serve. However, because the Court failed to hold a hearing to find out what Mrs. Rodriguez's problem was concerning not being able to speak English and find out exactly whether her knowledge of the English language was good enough to be able to serve as a juror, the Court abused its discretion. Furthermore, the Petitioner contends that if the Court was so certain that Mrs. Rodriguez spoke good English, what was the fear of holding a hearing to find out; it would have taken the court (15) minutes to find out. The Petitioner will explain next why the Court didn't take those (15) minutes to find out.

The facts on this matter will show that the trial Judge didn't use its wide discretion, it abused its discretion. The real reason why the Court left Mrs. Rodriguez as juror was because when she brought her complaint to the Court's attention of not being able to speak English, the tedious "VOIR DIRE" process had finally finished and at that moment the Court didn't want to start the process all over again of having another group of people to find somebody that could take her place. Therefore, because the prosecutor and defense counsel felt that same way,

[7] U.S. v. Martinez-Salazar, 528 U.S. 304 (2000) ("The court improperly refused to excuse a juror for cause.")

they supported the Court's determination that Mrs. Rodriguez was only making that up as an excuse to not serve.

In further support of the fact that Mrs. Rodriguez really didn't speak English, upon having finished hearing the bailiff's explanation to the Court about Mrs. Rodriguez telling him that she didn't want to be a juror because she didn't speak English, the prosecutor instantly said "I knew it" openly admitting prima facie that she knew that Mrs. Rodriguez didn't speak English, which makes her complain to the Court of not wanting to serve due to her not being able to speak English completely legitimate...true!

Counsel's failure to raise an objection upon hearing the bailiff tell the Judge about Mrs. Rodriguez's English situation, instead of actually helping the Court's determination by saying "PRETEXT" constitutes an even greater ineffective assistance on his part, due to the fact that it is really unknown if Mrs. Rodriguez fully understood the proceedings to an extent of been able to make her own determinations instead of following another jurors or even the majorities determinations for that matter, which prejudiced the Petitioner. (TR. 832-33)

The Magistrates second reason to deny this ground was that because Mrs. Rodriguez was able to answer the questions that she was asked including her answer of "NO", her English was good enough to be a juror. The Petitioner can identify with Mrs. Rodriguez English barrier because not knowing English made things difficult for him too when he first came to the United States from Dominican Republic.

One of the things that make people not to be concerned with having to learn English thoroughly upon arriving in Miami where the Petitioner had lived for 30 plus years is the fact that most people in Miami speak Spanish. The Petitioner is not suggesting that Mrs. Rodriguez is one of those people, but the fact is that she could be one.

The Petitioner believes that Mrs. Rodriguez knew basic general things that people need to know to get by, but not to the point of, for example, understanding a

medical expert's professional opinion or the Court's jury instructions, which were essential for her to know.

As stated previously that Petitioner can identify with Mrs. Rodriguez's lack of English knowledge and knows himself that because he didn't want to appear dumb or ignorant back when his English wasn't that good; copying other people was not unusual. For this reason, Mrs. Rodriguez copying or that every least been able to grasp somewhat the meaning of these questions after hearing the other jurors responses is all she needed to do to be able to answer them. For example, the Magistrate claimed Mrs. Rodriguez understand English well, because she did not name a Spanish news source and answered "Anyone" to the question "Where do you get the news? Petitioner contends that "Anyone" is such a broad statement that it points in that direction. But even if Mrs. Rodriguez didn't copy their response been able to answer such mundane general questions was not enough to determine that her English was good enough to be a juror, especially if she said herself that it wasn't good enough, which is the real issue, Mrs. Rodriguez saying that she didn't speak English. (TR. 772).

The Magistrate's third claim to deny this ground was that Petitioner had argued on his Federal petition on quote "the individual who would have" replaced Mrs. Rodriguez on the jury would have found the Petitioner not guilty." This claim is true, but only in part, because it's missing (5) key words that were on his petition, they were: "There was a reasonable probability..." Also, the Petitioner did not argue this on this Federal petition, he made this claim on his 3.850 post-conviction motion years back when he used to go to the law library everyday to learn the law. The Petitioner agrees with Magistrate that his claim was extreme, however, extreme does not equal impossible...doesn't somebody always hit the lottery?

The Petitioner hopes that because you are a Federal Court and Federal Court cases and Act are very clear on a prospective juror not being able to serve if he or she doesn't read, write, speak, and understand English that you will be able to see the Constitutional violation that was committed against him. When the Court failed to strike for cause Mrs. Rodriguez upon finding out from the Court's bailiff that she

told him during their lunch break that she didn't speak English. The very least the Court should have done was hold a hearing to find out whether Mrs. Rodriguez could or could not understand English enough to be a juror.

Therefore, the Court's failure to strike Mrs. Rodriguez, or hold a hearing to make sure she was fit for the job was an abuse of discretion that violated the Petitioner's Constitutional rights due to the fact that the statutory provisions requiring English proficiently in order to serve as juror are constitutional[8]. As stated previously, if the Court was so sure that Mrs. Rodriguez understood English good enough and was only using that as an excuse not to serve, what was the Court's fear in holding a hearing to find out, it would have taken the court just (15) minutes to find out.

REASON FOR GRANTING THE WRIT

V. BECAUSE FUENTES' TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO RAISE AN OBJECTION TO THE PROSECUTOR'S MISCONDUCT OF USING HIS GRIEVING (15) YEAR OLD SON TO IDENTIFY THE DEAD BODIES OF HIS OWN MOTHER AND GRANDMOTHER, WHOM HE LOVED AND MISSED GREATLY, WITHOUT TAKING INTO CONSIDERATION THE PSYCHOLOGICAL TRAUMA THAT SEEING THESE PICTURES COULD CAUSE HIM WHICH COERCED THE PETITIONER TO HAVE TO ENTER A STIPULATION THAT WEAKENED HIS CASE SUBSTANTIALLY BECAUSE THE CONDITION OF THE STIPULATION WAS THAT HIS SON AND PETITIONER'S SISTER WOULDN'T HAVE TO IDENTIFY THE VICTIM'S IN EXCHANGE FOR COUNSEL NOT CROSS-EXAMINING THE STATE'S MEDICAL EXPERT. ADDITIONALLY, FOR COUNSEL FAILING TO LOOK AT ANY OTHER ALTERNATIVES IN ORDER TO AVOID HAVING TO ENTER THE STATE'S BIAS STIPULATION.

[8] United States v. Pineda, 743 F.3d 213, 217 (7th Cir. 2014)("A juror that is unable to read, write, speak, and understand English may be appropriately stricken for cause") (citing United States v. DeLa Paz Rentas, 613 F.3d 18, 24 (1st Cir. 2010)(upholding the constitutionality of the requirement [under 28 U.S.C.,§1865] that individuals must understand and be literate in English to serve on a federal jury) See also United States v. Rouco, 765 F.2d 983, 988, n.3 (11th Cir. 1985) ("The jury selection and service act of 1968, 28 U.S.C. §1861-1877 (1982) provides that a person shall not be deemed qualified for service on a grand or petit jury unless he or she is unable to read, write, and understand the English language with a degree of proficiency sufficient t fill out satisfactory the juror qualification form...[or] is able to speak the English language.") See, Rabinowitz v.United States, 366 F.2d 34 (1966) from the 5th & 11th Cir.

BACKGROUND AND THE ANALYSIS

The Magistrate's main reason to deny this ground among others is that defense counsel made a strategic decision to enter the stipulation. The Petitioner respectfully disagrees. Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed 674 (1984).

The law states on quote that "Strategic decisions do not constitute ineffective assistance if (1) alternative course have been considered and rejected, and (2) counsel's decision was reasonable under the norms of professional conduct."[9] Also, "strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable."[10] The Petitioner contends that counsel failed to meet the two prongs necessary for making a strategic decision.[11] First, counsel never considered any alternative courses or options such as suggesting the State and the Petitioner as well to just use the Petitioner's (50+) year old sister to indentify the victims and leave his (15) year old son out of it due to the possible psychological trauma of seeing pictures of his own dead mother and grandmother could cause him. And two, entering the State's proposed stipulation of not challenging their medical expert on cross-examination when "the greatest engine ever intended for the discovery of truth is cross-examination[12] **weakened his case substantially**, was not a reasonable decision.

The other thing Magistrate claimed was that there was nothing on the record that supported the Petitioner's argument that the stipulations condition was to exchange the Petitioner's son and sister for defense counsel not cross-examining the State's medical expert, this is incorrect. This condition was explained to him off the record and counsel only revealed a portion of what was discussed between them to the Court; it's not 100% clear, but it can be seen.[13]

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[9] Patton v. State, 878 So.2d 368, 373 (Fla. 2004) (quoting Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000).
[10] Strickland, 466 U.S. at 690-91
[11] Wiggins v. State, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed 2d 471 (2003)
[12] Erhardt's Florida Evidence, Section 801.1
[13] Crisp v. Duckworth, 743 F. 2d 580, 584 (7th Cir. 1984) ("patently unreasonable decision although characterized as tactical are not immune").

> **The Court:** [And do you (Petitioner) understand that the reason that your attorneys would advise you of the stipulation is that it's a trial strategy so that they don't have to bring in your son, who testified earlier...[Okay let the record reflect that we're going to go off the record so Ms. Williams and Mr. Ferrero are now speaking to their client off the record.
>
> **Mr. Ferrero:** Your Honor, the discussion we had with Mr. Fuentes, we told him the next witness is the medical examiner. **We told him basically there's going to be no challenges to the medical examiner's testimony by defense."** (TR. 1468-71)

See next portion of the Magistrate's R&R giving another reason to deny this ground on quote: "Petitioner stated under oath at the pre-trial hearing and at the trial that he wanted to enter the stipulation and that he understood that if he refused to stipulate, someone other than his young son could make the identification. He cannot challenge prior sworn testimony." Here, the Petitioner agrees that he voluntarily entered the stipulation, however, he only did it because he was following his attorney's advice; at the time he didn't even know what a stipulation was. But the biggest reason was because at that moment he would have done anything to keep his son from seeing pictures of his dead mother and grandmother, so much so that he would rather get found guilty...[14]

> "No, no, that's what I was going to tell you, that **if my son needs to see this picture, you can find ,me guilty and take me right now, or this is over."** (TR. 1469)

Concerning the part where Magistrate says "if Petitioner refused to stipulate, someone other than his young son could make the identification." Here, the Petitioner contends that counsel's job/burden is being put on him which call in layman's term is passing the buck. This was exactly what counsel should have done, refuse to stipulate and find another person other than his son to identify the victims. "The decision to enter a stipulation as to a matter of fact to avoid having the State prove the fact before a jury is for the lawyer and not the client" Poole v. United States, 832 F.2d 561 (11th Cir. 1987).

[14] U. S. v. Bailey, 444 U.S. 394 (1980) ("Petitioner's conviction was obtained as a result of unconstitutional duress") Fuentes only agreed to stipulate because he didn't want his son to see pictures of his dead mother and grandmother, which was duress from the state.

The Magistrate's other claim was on quote: "The trial court noted that someone other than Petitioner's son could have made the identification as follows": (R&R) "I just wanted you to understand that the point of this (stipulation) is so that no family member has to look at a picture of your deceased wife and deceased mother-in-law". (TR.1470). The Petitioner contends that the Court's statement here does not translate into "someone other than his son could make the identification", like Magistrate claimed. Furthermore, when the Court said that the stipulation was being done "so that no family has to look at the pictures" that was the Court's own interpretation of what was going on concerning this stipulation. Neither the State nor defense counsel said anything of the sort due to the fact that they knew that the stipulation condition was to keep the Petitioner's son and sister in exchange for counsel not challenging the State's medical expert.[15]

Sure the Petitioner didn't really want anybody in his family to have to look at these pictures due to the hurt he had caused them; however, his main concern was his son not seeing these pictures. On the record the Petitioner didn't say "if my sister, or my brother, or if my father, or if my mother needs to see these pictures you can find me guilty, 'No' he specifically said '**IF MY SON!**'"

On a more personal note, my son was almost (11) years old when I killed his mother and grandmother. After the incident took place he was devastated because he loved them a lot. He also loved me very much, but I was in prison, which was hard on him too. How can the prosecutor even think of using him to identify his own dead mother and grandmother? For this teenager, who was (15) years old at the time of the trial to have to re-live such a traumatizing event all over again by looking at these pictures, possibly of them naked, is completely unreasonable. Sadly, my son Jose Augusto was found floating in a canal dead (5) years after the trial; he was only 20 years old. He was my biggest incentive for wanting to come out of prison some day, but now that he's dead, I don't care too much because out there without him is going to be very hard for me. Also, his mother believe it or not.

[15] Dorsey v. Chapman, 262 F.3d 1181,1186 (11th Cir. 2001) ("A strategic or tactical decision by counsel amounts to ineffective assistance if it is so patently unreasonable...decision that no competent attorney would have chosen it")

REASONS FOR GRANTING THE WRIT

VI. BECAUSE FUENTES' APPELLATE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL COUNSEL'S OBJECTION TO THE COURT CONCERNING ALLOWING THE PROSECUTOR TO INTRODUCE A COMPETENCY RELATED PIECE OF EVIDENCE IN ORDER TO BE ABLE TO ACCUSE THE PETITIONER OF MALINGERING, OR FAKING HIS MENTAL ILLNESS, WHICH WAS COMPLETELY IRRELEVANT AT HIS INSANITY DEFENSE TRIAL.[16]

BACKGROUND AND ANALYSIS

The Magistrate's main issue to deny this ground is that defense counsel opened the door which gave them permission to go into the issue also. The Petitioner respectfully disagrees. See Smith v. Robbins, 528 U.S. 259 (2000).

To play fair is essential in life in order to be able to look back with a clear conscience. In this situation, the State didn't play fair. The record will show that the prosecutor was extremely concerned with the defense not saying anything about competency during the trial, so much so, that she (prosecutor) proposed a Motion in Limine to the Court concerning competency not coming forward. (R. 258-68). However, when the window opened to be able to accuse the Petitioner of malingering, or faking his mental illness, the prosecutor didn't care that this evidence came from a competency evaluation/examination given to the Petitioner. When this competency issue came up during trial, the State told the Court that she was going to ask Dr. Homes, who was the defense's psychologist, about a single answer given by the Petitioner in which he appeared to have malingered. At this point, the Court granted the prosecutor' request for a side bar conference.

> **The Court:** Let the record reflect that all four lawyers are sidebar.
> **Prosecutor:** Judge, I'm going to ask her now, she talked about how on one of her meetings with the defendant was for competency, and I'm not using the word. When she met with the defendant the second tie, she thought he was faking as to a particular answer.
> **The Court:** Okay.
> **Prosecutor:** Judge, I just want to let everyone know "I'm not using the word competency", or asking what it was about it, but the fact that

[16] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984)

he had told her that he did know, and she told him I think you are feigning. So I'm going to ask her one time, he knew, and you thought he was faking, because it relates to that, I wanted to come to sidebar.
The Court: So she's not confused, because I imagine Mr. Williams (counsel) instructed her, maybe to make it easier you can just say, you know, I know that you and he met on such date and he gave you an answer on a topic.
Prosecutor: That's exactly how my questions are.
Defense Counsel: For the record, **"I object to the relevance, this has nothing to do with sanity."**
The Court: No, I agree with what you're saying. If [the prosecutor] was going to---then I would sustain, but she's going to show that the doctor found that an answer to a question, one time he said one thing and another time another thing. She confronted him and said I thought you're feigning or faking. **"I'm going to allow it."**

(Thereupon, the sidebar discussion had outside the presence of the jury concluded after which the proceedings continued as follows:)

Prosecutor: Dr. Homes I just want to point out something about your April 7, 2007 meeting with the defendant.
Dr. Homes: Okay.
Prosecutor: Without going into specifics of the subject, matter, you had thought that at that meeting **he was feigning** regarding certain questions, correct?...You thought **he had been feigning** regarding a certain question, right?
Dr. Homes: Yes.
Prosecutor: And that he had been able to tell you those things previously when you met him in May?
Dr. Homes: Correct. There was intervention of medications or introduction in between so theoretically speaking-
Prosecutor: He should have been better.
Dr. Homes: Correct.
Prosecutor: And is **feigning the same as** what we talked before like **faking it?**
Dr. Homes: Yes. (TR. 1892-95)

On the above portions of the transcripts, the Court's response to defense counsel after he raised an objection was that she (prosecutor) was going to show that the doctor found an answer to a question one time he (petitioner) said one thing and another time another thing. Here, the Court completely ignored the fact that this question was from a competency examination. In addition, the prosecutor

said that she wasn't going to use the word competency, however, what does that even mean? Not using the word competency doesn't mean anything, because it was.[17] By being able to introduce a competency issue with the Court's permission, the prosecutor was able to bank big time on its accusation concerning Fuentes faking his mental illness, because they won the trial, which proves how prejudicial it was. See, Arizona v. Fulminate, 499 U.S. 279(1991).

Vinegar and apple juice come from the apple, yet they are different. Therefore, you wouldn't put apple juice on your salad, you would put vinegar. In comparison, the Petitioner's sanity was the vinegar, and his mental health condition was the salad. Competency or the apple juice was completely irrelevant at the trial. For this reason the defense didn't open the door, they had every right to ask Dr. Homes questions from these examinations that she used to determine the Petitioner's sanity, and whether or not she used the same examinations to determine the Petitioner's competency was completely irrelevant because sanity was the only issue to consider. (TR. 1839-41) (TR. 1888-95)[18] See, Brecht v. Abrahamson, 507 U.S. 619, 638, n 9, 113 S.Ct. 1718, n. 9, 123 L. Ed 353, 369, n. 9 (1993).

REASONS FOR GRANTING THE WRIT

VII. BECAUSE FUENTES' APPELLATE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR NOT RAISING ON DIRECT APPEAL THE DEFENSE'S "JUDGMENT OF ACQUITTAL" FOR THE STATE'S FAILURE TO PROVE "PREMEDITATION". [19]

BACKGROUND AND ANALYSIS

The Magistrate's main reason to deny this ground, among other things that do not amount to premeditation, was that Petitioner intentionally left his three sons

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[17] Darden v. Wainwright, 477 U.S. 168 (1986) ("Petitioner's conviction was obtained as a result of prosecutorial misconduct.")

[18] Estelle v. Smith, 451 U.S. 454, 467-69, 101 S.Ct. 1866, 1875-76, 68 L. Ed 2d 359, 372 (1981)("Finding that defendant's statements in a court ordered psychiatric examination could not be admitted at a capital trial when the defendant had not been warned of his 5th Amendment privilege against compelled self-incrimination.") Fuentes was never warned of his 5th amendment rights against self-incrimination regarding his competency examination.

[19] United States v. Gari, 572 F.3d 1352, 1359 (11th cir. 2009) ("We review de novo the denial for a judgment f acquittal based on the insufficiency of the evidence.")

at his sister's home to go commit the crime. The Petitioner respectfully disagrees. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984).

On Petitioner's "Initial Brief" appellate counsel included a footnote that stated the following:

> "The defense also argued that the State's evidence failed to establish the essential element of premeditation."

The statement was 100% true because there was no premeditation in this case. The record reflects that three different witnesses testified that the only reason the Petitioner left his three sons at his sister's home that day was because he needed to go pick up his son's book bag which he had forgotten in school. (TR. 1399-08)(TR. 1442-58)(TR. 1657-59) and (TR. 1788).

The Petitioner was seeing a psychologist and had been hospitalized (8) times over (14) months prior to this incident, so clearly he was having some very serious mental problems, which had lead him to think that his wife and mother-in-law were trying to kill him with witchcraft. (R. 229) (TR. 1843) (TR. 1844). The defense's psychologist, Dr. Homes testified the following concerning this issue:

> **A:** "I think **he was mentally ill from the delusions, the fear that his wife was trying to kill him**. He had voice that to other people way before this crime took place...
> **Q: And those delusions would prevent him from knowing right from wrong?**
> **A: Yes.** (TR. 1849-50)

The Magistrate was fully aware that there was ample evidence that supported the Petitioner's lack of premeditation, that's why Magistrate used Gibson[20], which states that "even if there was some evidence which gave support to Petitioner's theory in innocence, such a fact does not warrant habeas corpus relief." The Petitioner contends that the degree of "SOME" evidence from Gibson varies from case to case and it is that difference that the Court uses to make its decision. As previously stated, its 100% true that Petitioner didn't plan to do anything, the

[20] Gibson v. Collins, 947 F.2d 780, 783 (5th Cir. 1991)

Petitioner just went insane. Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2789, 61 L.Ed 2d 560 (1979).

REASONS FOR GRANTING THE WRIT

VIII. BECAUSE FUENTES' APPELLATE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE COURT'S ABUSE OF DISCRETION FOR ALLOWING JUROR MARIA RODRIGUEZ TO REMAIN AS JUROR AFTER SHE COMPLAINED OF NOT KNOWING HOW TO SPEAK ENGLISH RIGHT BEFORE GETTING SWORN IN AS A JUROR WITHOUT EVER HOLDING A HEARING TO FIND OUT WHETHER SHE COULD OR COULD NOT SPEAK AND UNDERSTAND ENGLISH WELL ENOUGH TO BE A JUROR IN VIOLATION OF THE "JURY SELECTION AND SERVICE ACT OF 1968", WHICH REQUIRES A JUROR TO HAVE ENGLISH LANGUAGE LITERACY AND SPEAKING PROFICIENCY WHICH IS CONSTITUTIONAL.[21] (THIS IS THE SAME ARGUMENT THAT WAS RAISED ON GROUND FOUR ONLY HERE THE PETITIONER IS CLAIMING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

REASONS FOR GRANTING THE WRIT

IX. BECAUSE FUENTES' APPELLATE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE COURT'S ERROR IN ALLOWING TRIAL COUNSEL TO REMAIN AS COUNSEL WHEN THEIR RELATIONSHIP GOT SO BAD THAT PETITIONER STOPPED TALKING TO HIM[22].

BACKGROUND AND ANALYSIS

The Magistrate gave several reasons to deny this ground and the Petitioner respectfully disagrees to each one. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984).

The Petitioner's record reflects a total of (63) pages worth of himself and the other parties going back and forward concerning his complaints that counsel was not getting the witnesses the Petitioner needed for his defense, primarily for not calling his private psychologist, Dr. Manuel A. Garcia. Upon the Trial Court finding

[21] Smith v. Robbins, 528 U.S. 259 (2000)

[22] United States v. Calabro, 467 F.2d 973 (2nd Cir. 1972)("holding that defendant must show good cause for rejecting assigned counsel, like a complete break-down in communication, a conflict of interest, or irreconcilable conflict with the attorney')

that counsel was not being ineffective[23] at the last Nelson hearing held, the Petitioner's last words to the Court were:

> **The Defendant**: That's your (judge) point, but since Mr. Williams has been my lawyer, I am telling you that he has not done a good job to my case. He's a good man. I am not talking about his personality. It's that he doesn't have faith in my case and I will tell you right now that **when this happened I was insane, and I want to prove that if I go to trial.** (R. 244)

To best prove that counsel failed to do his job is the fact that Dr. Garcia never came to testify at the Petitioner's insanity defense trial, and as a result he lost trial. There was nothing else the Petitioner's could do, for years he told the Court the many reasons why counsel was being ineffective, and the Court always came up with ways to justify counsel's actions and inactions ultimately ruling that he was not being ineffective at both Nelson inquiries. (R. 184-247).

The Magistrate used one of the Court's justifications to claim that the Court made an adequate Nelson inquiry on quote:

> "Upon noting that it had made a Nelson inquiry, the court concluded that defense counsel was not ineffective, as he was doing his best to represent Petitioner and trying to track down people who were **no longer at locations that they were at say (15) years ago.** (R. 243)

The people the Court mentioned here is just one person, Dr. Manuel A. Garcia. This is the Petitioner's private psychologist, whom counsel was able to subpoena his records from in one occasion, but failed to subpoena him. (R. 229-31) During the Nelson Inquiry counsel said to the Court that Dr. Garcia didn't work any longer at the location in which he was able to subpoena the Petitioner's medical records from and this particular Nelson hearing took place no more that (2) to (3) years later, not the exaggerated (15) years that the Court claimed.[24](R. 228-30).

Additionally, Magistrate stated something else the Court had said on behalf of counsel on quote:

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[23] United States v. Moore, 159 F.3d 1154, 1160 (9th Cir. 1998) ("where irreconcilable conflict existed between defendant and counsel, trial court's failure to appoint substitute counsel was reversible error.)

[24] Arizona v. Fulminate, 499 U.S. 279 (1991) ("Judicial bias contributed to Petitioner's conviction...")

"That counsel had filed a notice of insanity, listed a doctor as defense witness and deposed the state's doctor." (R.233-34)

The problem with the above statement by the court is that there were not witnesses per se, both of these doctors, the State's psychologist and the defense psychologist, were people that the Petitioner met after the crime while he was in jail, they didn't know anything about the Petitioner's past mental health problems, how his condition was before the crime, there was just one person who knew, and counsel failed to call him... Dr. Garcia.

The Magistrate's last claim to deny this ground was on quote:

"Because the record refutes Petitioner's argument that he would have prevailed on this issue on appeal, his appellate counsel did not provide ineffective assistance of counsel". (R&R page 39)

The Petitioner thinks differently especially when you have the State, who is the opposing party supporting your cause. See the State's statement to the court on quote:

"Ms. Sanders-Ledo for the State:
The salient point is that he (Petitioner) talks about witnesses that his told Mr. Williams (counsel) about, so I think you need to ask him about that...**I have my concerns about the witnesses.**" (R. 204-07)

The fact that counsel never brought these witnesses that Ms. Sanchez-Ledo was concerned about to testify at Petitioner's trial, primarily for not calling his private psychologist, Dr. Garcia, prove his ineffectiveness, therefore, the record **"DOES NOT"** refute his argument.

REASONS FOR GRANTING THE WRIT

X. BECAUSE FUENTES' APPELLATE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR NOT RAISING ON DIRECT APPEAL THE COURT'S ABUSE OF DISCRETION FOR DENYING THE DEFENSES MISTRIAL REGARDING A TESTIMONY THAT ACCUSED THE PETITIONER OF BEING UNFAITHFUL TO HIS WIFE (VICTIM), WHICH WAS INADMISSIBLE BAD CHARACTER EVIDENCE.

A. BACKGROUND AND ANALYSIS

The Magistrates reason to deny this ground, concerned the Petitioner mentioning the State's motion in limine that precluded bad acts from coming forward from the victim only, not Petitioner's. However, the Magistrate's main argument to justify the Court's denial of the defenses mistrial was the "Williams Rule,"[25] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Imagine a married woman with children finding out that her husband is cheating on her; nothing else can enrage a woman more. This kind of thing is something that no woman wants to hear about. Now, there were (8) female jurors, possibly married with children, who heard from a witness that the Petitioner had been unfaithful to his wife, and that that was the reason why she broke-up with him. The Petitioner was on trial for killing his wife, which was bad enough, now on top of doing that, these female jurors heard that he cheated on her. How much worse can things get. This was the most prejudicial evidence against the Petitioner.[26] (T1424-29)

Magistrate is right that the Petitioner touched a point regarding the State's motion in limine precluding prior bad acts of the victim from coming forward, not of himself, but he only did it because of the "Rule of Completeness." (R.273-83) He contends that that wasn't his main argument at all, the Petitioner's main argument was that the Court abused its discretion for denying the defense's mistrial, and allowed an extremely prejudicial "**NOT**" permitted by law prior bad act character evidence to come forward. See United States v.Caro, 454 Fed. Appx. 817 (2012) 5th & 11 Cir.

The Magistrate used the Williams Rule to support the Court's determination in allowing the prior bad act of Petitioner being unfaithful to his wife to come forward. The Williams Rule, codified in Fla. Stat. §90.404 is similar to Federal Rule of

[25] Williams v. State, 110-So.2d 654, 662 (Fla. 1959).
[26] United States v. Miller, 874 F2d 1255, 1268 (9th Cir. 1989) ("We review the admission of bad acts evidence under Rule 404 (b) for a clear abuse of discretion"). Smith v. Robbins, 528 U.S. 259 (2004)

Evidence 404. Under Fla. Stat. §90.404 (2), "evidence of other crimes, wrongs, or acts is admissible when relevant as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, or accident, but is inadmissible when the evidence is relevant solely to prove bad character propensity." Because premeditation is governed by a specific time frame, and premeditation is a necessary component in order for bad character acts to be admissible, an explanation on premeditation follows. Under Florida Law, "premeditation is defined as more than a mere intent to kill; it is a fully formed conscious purpose to kill. The purpose may be a moment before the act, but, must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of the act." Wilson v. State, 493 So.2d d1019, 1021 (Fla. 1986).

This accusation regarding the Petitioner being unfaithful to his wife took place over (10) years prior to the crime, which makes this evidence inadmissible. Defense counsel said the following:

> "We are moving for a mistrial on the grounds that this is a character evidence against accused. Additionally it's absolutely not relevant, there is no predicate laid. I don't care if it's true this is (1995) if he was unfaithful towards his wife is totally irrelevant and brings out bad character evidence of the defendant."[27] (T1425-29)

The other thing that Magistrate claimed was that the Petitioner's break-ups with his wife was relevant to both, motive and premeditation. The Petitioner thinks this is absurd, how many people in the world break-up and make-up all the time, even you have probably done it. There's even a song that goes, "Break-up to make-up that's all we do, first you love me then you hate me..." But to satisfy the timing factor being laid-out here, the last time the Petitioner and his wife broke-up was (5) years prior to the incident. (T1641-42). In light of the foregoing, the Trial Court

[27] United States v. Breining, 70 F.3d 850 (6th cir. 1995) Id. At 853 ("the Sixth Circuit concluded the former-couple's trials, should have been severed, because the evidence about the husband's unfaithfulness or been unfaithful, was impermissible and highly inflammatory evidence of his bad character.")

abused its discretion in denying the defense's mistrial regarding Petitioner's infidelity; because you can't unring a bell.

REASONS FOR GRANTING THE WRIT

XI. BECAUSE FUENTES' APPELLATE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL A DEFENSE'S OBJECTION TO THE COURT THAT CONCERNED THE COURT'S ERROR IN GRANTING THE STATE'S "MOTION IN LIMINE" TO EXCLUDE "FAMILY MENTAL HEALTH HISTORY" TESTIMONY AT THE PETITIONER'S INSANITY DEFENSE TRIAL, THEREFORE, RELEVANT EVIDENCE, WITH THE EXCUSE THAT IT WAS HEARSAY, WHEN "FAMILY HISTORY" IS ONE OF THE HEARSAY EXCEPTIONS. [28]

A. BACKGROUND AND ANALYSIS

The Magistrate gave three reasons to deny this ground, they were: First, that Fla. Stat. §90.804 (2) (d) do not include the words "mental health," therefore, inapplicable. Two, that Petitioner's diagnosis was different from his grandfather's and uncle's diagnosis of "Bi-Polar Disorder." And three, that "mental health at his trial. (R268-73). Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)

Again, Magistrate claimed that because Fla. Stat. §90.804 (2) (d) do not include the words "mental health" in the statute; it's not one of the hearsay exceptions. This is inaccurate; the statute doesn't need to specifically include the words "mental health," because family history pertains to any type of past event that happened within the family. Something of significance that most members of the family knows happened years ago. In this case, the Petitioner's grandfather, and uncle suffered from mental illness, which makes it probable that the Petitioner inherited his mental illness from them. [29] See the Petitioner's sister Mrs. Laura

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[28] Luce v. U.S., 105 S.Ct. 460, 469 U.S. 38 (U.S. Tenn. 1984) ("although the Federal Rules of Evidence does not explicitly authorize in 'Limine' rulings, the practice has developed pursuant to the District Court's inherent authority to manage the course of trials"). See Fed. R. 103 ©, and Fed. R. Crim. P. 12 (i). United States v. Baker, 432 F.3d 1189 5th & 11th Cir. (2005)

[29] Holmes v. S. Car, 126 S. Ct. 1727 (2006) ("State rules of evidence were applied in a way which denied petitioner the right to present a complete defense")

Rodriguez's testimony concerning is mental illness, and not being able to testify about mental illness running in the family due to this motion in limine:

Q. Now do you recall talking to Jose about visits from Jesus?
A. He mentioned it, but it's not like we had a conversation about it.
Q. Okay, and how about aliens?
A. I don't know aliens.
Q. Do you ever have those conversations with your husband about Jose, the things he told you?
A. Yes.
Q. Now, during the period of time that you know, you said the summer started, summer of 2005 and Jose was doing all these doctor visits, and did you ever suggest that he see a psychologist or psychologist
A. Yes.
Q. More than one time?
A. Yes.
Q. Why did you do that?
A. I felt that he needed medical attention for his behavior.
Q. Meaning psychological medical attention?
A. Yes
Q. And what did he tell you in reference to that?
A. He felt he didn't need it.
Q. What did he say specifically, do you know or do you remember?
A. That he wasn't insane
Q. and every time you bring it up, would that be the first thing he say?
A. That would be the first thing.
Q. You were calling him crazy and he saying he wasn't crazy?
A. I said he wasn't stable.
Q. Now, you think Jose inherited his mental illness?
Ms. Klein (prosecutor): objection
The Court: sustained. [30] (T1456-58)

Magistrate's second claim was that the Petitioner's mental health illness was unrelated to those of his grandfather's and uncle's "Bipolar disorder," is incorrect. The Petitioner was diagnosed with "Psychosis Bipolar Depression disorder" by his private psychologist Dr. Manuel A. Garcia, the same as his relatives. Lastly, Magistrate supported the Court's determination that mental health family history was not relevant to the issues at the trial. This is absurd, mental health illness history running in the petitioner's family was 100% relevant to both him inheriting

[30] Arizona v. Fulminante, 499 U.S. 279 (1991)

his mental illness, and relevant to the defense's insanity defense. Fla. Stat. §90.401-02 defines relevant evidence as "evidence tending to prove or disprove a material fact. In this case, the defense needed to prove the Petitioner's insanity at the time of the crime, and not being able to have his family members testify about other family members, who were mentally ill like the Petitioner, prejudiced him.[31] See 388 U.S. 14 (1967) ("Improperly restricted the right to present evidence of significant probative value...")

REASONS FOR GRANTING THE WRIT

XII. BECAUSE, FUENTES' TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO RAISE AN OBJECTION TO THE COURT'S BAILIFF UNSUPERVISED COMMUNICATION WITH THE JURY CONCERNING HOW LONG THEY WOULD BE ALLOWED TO DELIBERATE.

A. BACKGROUND AND ANALYSIS.

Magistrate's claimed a couple of things to deny this ground, they were: First, that the Court's bailiff did not communicate with the jurors on any subject connected with the trial, and second, that Petitioner failed to show how counsel's objection would have changed the outcome of his trial. The Petitioner respectfully disagrees. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)

The Magistrate's first claim, concerning bailiff telling the jurors how much longer they had left to deliberate not having anything to do with the trial, fails, because it does. The deliberations stage is the most important part of the trial, the Petitioner's future was in the juror's hands, when the bailiff told the jurors that the Judge generally only allowed deliberations to continue until (5:30 p.m.), the jury subsequently returned its verdicts of guilty at (5:18 p.m.). Had the Court's bailiff done his job right by going to the Judge, and asking her how much time they had

[31] Matthews v. Evatt, 105 F.3d 907, 920 (4th Cir. 1997) cet. Denied, 522 U.S. 833, 118 S. Ct. 102, 139 L. Ed. 2d 57 (1997) ("Failure to uncover family history of mental illness not unreasonable where family members and friends did not reveal such information to defense investigator"). The opposite occurred in Fuentes' case, his family members wanted to testify regarding family history of mental illness, but were stopped, which makes the courts determination unreasonable. See Smith v. Robbins, 528 U.S. 259 (2000) ("Petitioner's Appellate counsel ineffectiveness...)

left to deliberate, the Judge could have told the jurors to finish deliberating the next day, which the record reflects that that was something the Judge was considering of doing already. (TR. 2245-46). Under these circumstances, the bailiff unsupervised communication with the jury during their deliberations prejudice the Petitioner, because its unknown if that extra time would have produced a different outcome.

Magistrate's second claim that Petitioner cannot establish that, but for defense counsel's failure to raise an objection to the Court's bailiff telling the jury that "the judge typically dismisses jurors at around (5:30 p.m.) the outcome would have been different "Strickland, the Petitioner thinks different. First of all, the law is very clear on this issue, concerning an officer telling the jury anything that has to do with the trial. [32] Section 918.17, Fla. Stat. (2011) provides that an officer in charge of jurors "shall not communicate with the jurors on any subject connected with the trial." In State v. Merricks, 831 So.2d 156, 161 (Fla. 2002), the Florida Supreme Court held that "A bailiff's unsupervised communication with the jury during deliberations in violation of section 918.07 constituted per se reversible error not subject to the harmless error rule."

Second, giving the jurors a time limit created an unnecessary amount of pressure on the jury to finish deliberating, especially when there was a juror crying, which shows that their discussions, concerning the Petitioner's guilt was very crucial at that moment. (TR. 2228-35). But the bailiff's pressure to wrap things up by (5:30 p.m.) stopped the jurors from discussing the Petitioner's fate more in depth, which as mentioned earlier may have possibly produced a different outcome. The truth of the matter is that due to the seriousness of this situation counsel should have gone beyond an objection; he should have called a mistrial.

[32] Remmer v. U.S., 347 U.S. 227 (1954) ("Outside influences upon a jury raise a presumption of prejudice that imposes a heavy burden on the State to overcome by showing that those influences were harmless to the petitioner....")

CONCLUSION

Based upon the foregoing petition, the Supreme Court should grant a writ of certiorari to the United States Court of Appeal for the Eleventh Circuit. It is so prayed in Jesus' name...Amen.

January, 14, 2022

Provided to South Bay Corr. and Rehab. Facility on January 14, 2022 for mailing. J.F.

Respectfully Submitted,

/s/

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