APPENDIX A

Supreme Court of Florida

No. SC15-1795

JUAN DAVID RODRIGUEZ,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[April 20, 2017]

PER CURIAM.

This case is before this Court on appeal from an order denying a motion to vacate a sentence of death under Florida Rule of Criminal Procedure 3.851. We have jurisdiction under article V, section 3(b)(1), Florida Constitution. For the reasons that follow, we affirm the judgment and sentence.

FACTS AND PROCEDURAL HISTORY

The instant case is Juan David Rodriguez's second successive postconviction appeal. "Juan David Rodriguez was convicted of first-degree murder, armed robbery, conspiracy to commit a felony, attempted armed robbery, armed burglary with an assault, aggravated assault, and attempted first-degree

murder." Rodriguez v. State (Rodriguez I), 609 So. 2d 493, 495 (Fla. 1992). Rodriguez's convictions stem from a shooting at a shopping center on May 13, 1988, and an attempted home invasion robbery the next day. The facts are summarized in detail in Rodriguez's direct appeal. Id. at 495-97. We briefly discuss the facts as they relate to Rodriguez's postconviction claims.

Seeking to discharge a debt, Rodriguez led Ramon Fernandez and Carlos "Tata" Sponsa to a shopping center. Id. at 495. Rodriguez accosted Abelardo Saladrigas in the shopping center parking lot, shot him, and took his watch and briefcase, which held cash and a revolver. Id. at 496. Saladrigas died after hospitalization. Id. Eye-witnesses observed the attack and the men fleeing in a blue Mazda. Id. at 495.

The next day, Rodriguez joined Fernandez, Sponsa, and several other men at a residence to stage a home invasion robbery. Rodriguez v. State (Rodriguez II), 919 So. 2d 1252, 1259 (Fla. 2005). On the way to the residence, Rodriguez told Sergio Valdez about the shooting in the shopping center parking lot. Id. The owner of the residence averted the home invasion by firing a gun at the men. Id. Fernandez dropped the stolen revolver from the previous day as the men ran from the home. Id. at 1260. When arrested, Fernandez confessed, told police about his role in the shopping center shooting, and described Rodriguez's involvement. Id. Rodriguez was arrested, charged, and found guilty of all charges. Id.

Prior to the penalty phase, Rodriguez moved for appointment of a mental health expert to evaluate him for mitigation, and the trial court granted the motion. Id. at 1270. Dr. Leonard Haber testified that Rodriguez claimed to have left school after the first grade to work and that he demonstrated a lack of effort during Dr. Haber's evaluation. Id. Dr. Haber found signs that Rodriguez might be brain damaged, but determined that "the activities in which Rodriguez engaged . . . belied a finding of [intellectual disability]." Id. at 1265. Dr. Haber suggested further testing, which Dr. Noble David conducted and which revealed that Rodriguez was normal.

The penalty phase began on March 25, 1990:

> Rodriguez was found guilty of all charges which were tried together. By a vote of twelve to zero the jury recommended that he be sentenced to death in connection with the Saladrigas murder. The court followed this recommendation, finding three aggravating factors: 1) prior conviction of violent felony; 2) the murder was committed during a robbery and for financial gain; and 3) the murder was especially heinous, atrocious, or cruel, and one nonstatutory mitigating factor: Rodriguez had a good marriage and family life.

Rodriguez I, 609 So. 2d at 497. Rodriguez raised multiple claims related to his guilt and penalty phases on direct appeal,[1] and this Court affirmed his death sentence. Id. at 501.

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1. Rodriguez raised the following guilt phase claims on direct appeal:

(1) It was error to compel him to proceed without the presence of a defense witness and to refuse to permit him to introduce that witness's

Rodriguez filed his initial postconviction motion on September 12, 1994, and filed amended motions in October 1995, April 1997, and July 1997.[2]

> prior deposition testimony; 2) it was fundamental error to conduct a joint trial for the first-degree murder and the charges stemming from the attempted home invasion; 3) it was error to admit the victim's sister-in-law's identification testimony; and 4) inadmissible hearsay testimony was introduced to improperly bolster the testimony of the State's chief witnesses.

Rodriguez I, 609 So. 2d at 497. Rodriguez raised the following penalty phase claims:

> (1) the death penalty is disproportionate in this case; 2) the prosecutor's comments on the defendant's demeanor off the witness stand rendered the sentencing proceedings unfair; 3) the homicide was not heinous, atrocious, or cruel; 4) the sentencing order is deficient and reflects that the trial court failed to consider certain mitigating factors; 5) the trial court considered the impassioned pleas of family members, contrary to Booth v. Maryland, 482 U.S. 496 (1987), overruled by Payne v. Tennessee, 501 U.S. 808 (1991); and 6) Florida's death penalty statute is unconstitutional.

Id. at 500.

2. Rodriguez raised 12 issues regarding the original denial of postconviction relief and three claims relating to relinquishment of jurisdiction:

> (1) [T]he trial court erred in denying a new penalty phase where the evidentiary hearing showed that trial counsel failed to investigate and present mental health mitigation and the mental health expert rendered inadequate mental health assistance; (2) the trial court erred in allowing the State to prepare the sentencing order; (3) the trial court erred in summarily denying his claims of a Brady[v. Maryland, 37 U.S. 83 (1963)] violation based on the State's failure to disclose information concerning Tata, an Ake[v. Oklahoma, 470 U.S. 68 (1985)] violation based on failure to provide him with an adequate mental health evaluation, and ineffective assistance of trial counsel based on counsel's failure to investigate or prepare for trial, to request

Rodriguez II, 919 So. 2d at 1260. Following a Huff[3] hearing, the circuit court granted an evidentiary hearing on two ineffective assistance of trial counsel claims relating to his alleged intellectual disability. Id. at 1260-61. Both Dr. Haber, who evaluated Rodriguez for trial, and Dr. Latterner, who evaluated Rodriguez for his postconviction claims, testified at the hearing. Id. at 1275. Dr. Latterner's evaluation contradicted Dr. Haber's findings.

> a severance of offenses, and to object to various other errors at trial; (4) Rodriguez was denied effective assistance of counsel due to the failure of various agencies to comply with his public records requests; (5) the trial judge displayed judicial bias at trial and during the postconviction proceedings; (6) trial counsel was ineffective in failing to object to jury instructions regarding the aggravating circumstances, burden shifting, the jury's responsibility for sentencing, and an automatic aggravating circumstance; (7) prosecutorial misconduct occurred during the closing argument; (8) the Florida death penalty statute is unconstitutional; (9) an incomplete record on direct appeal led to ineffective assistance of counsel; (10) the Rule Regulating the Florida Bar 4-3.5(d)(4) prohibition on communication with jurors restricts Rodriguez's access to the courts; (11) impermissible victim impact was considered in Rodriguez's sentencing; and (12) Rodriguez did not receive a fundamentally fair trial because of cumulative error. . . . (13) [T]he trial judge should have disqualified himself from presiding over Rodriguez's original postconviction proceedings; (14) he was not afforded a full and fair hearing on the sentencing order issue during relinquishment of jurisdiction; and (15) the trial court erred in denying him relief on the merits of the sentencing order issue after the evidentiary hearing.

Rodriguez II, 919 So. 2d at 1262.

3. Huff v. State, 622 So. 2d 982 (Fla. 1993).

Dr. Latterner assessed Rodriguez with an IQ score of 64, found he was likely to have been born intellectually disabled, and opined that Rodriguez had difficulty appreciating the criminality of his actions and conforming his behavior to the law. Id. at 1265-66. Based on the conflicting expert testimony and Rodriguez's courtroom behavior, which demonstrated awareness and understanding of the proceedings, the circuit court found that while Rodriguez had a low IQ, he was not intellectually disabled. Id. at 1266. This Court concluded that because Rodriguez was not intellectually disabled, he could not establish that any alleged deficiency of trial counsel prejudiced him for the purposes of his ineffective assistance of counsel claims. Id. at 1267. This Court also denied Rodriguez's petition for habeas corpus relief.[4] Id. at 1259.

The circuit court summarily denied Rodriguez's first successive postconviction motion.[5] This Court remanded the summary denial for an

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4. In his habeas petition, "Rodriguez raise[d] several claims of ineffective assistance of appellate counsel. He also question[ed] this Court's harmless error analysis on direct appeal and ask[ed] this Court to revisit the constitutionality of his indictment in light of the subsequent decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002)." Rodriguez II, 919 So. 2d at 1262.

5. Rodriguez's first successive postconviction motion raised two claims: (1) Rodriguez is intellectually disabled under Atkins v. Virginia, 536 U.S. 304 (2002); and (2) Florida Rule of Criminal Procedure 3.203 violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Rodriguez II, 919 So. 2d at 1267.

evidentiary hearing on Rodriguez's intellectual disability claim. Rodriguez v. State (Rodriguez III), 968 So. 2d 557 (Fla. 2007) (table). The circuit court held the evidentiary hearing on January 3, 2011, and subsequently denied relief. Rodriguez appealed, and this Court determined that Rodriguez failed to demonstrate adaptive behavior deficits or a reliable IQ score below 70. Rodriguez v. State (Rodriguez IV), 2013 WL 462069 (Fla. Feb. 6, 2013).

On December 19, 2013, Rodriguez filed a habeas petition in the Southern District of Florida, which was ultimately denied after the Southern District denied a motion to stay pending the determination of Hall v. Florida, 134 S. Ct. 1986 (2014). Order Denying Petition, Rodriguez v. State, Case No. 13-cv-62567 (S.D. Fla. Jan. 4, 2016). Rodriguez filed a second successive motion for postconviction relief on May 26, 2015. Rodriguez claimed that Hall entitled him to further litigate his intellectual disability claim.

The circuit court conducted a Huff hearing on his intellectual disability claim at which Rodriguez agreed that he had presented evidence regarding all the elements of intellectual disability in prior proceedings. Rodriguez claimed that he was entitled to a new evidentiary hearing under Hall because Hall made improper the requirement of concurrent adaptive deficits to establish intellectual disability. Over the State's objection, the circuit court allowed Rodriguez to file a memorandum of law containing additional arguments following the Huff hearing.

Rodriguez's subsequent memorandum argued that he had satisfied all pleading requirements of Florida Rule of Criminal Procedure 3.851 and that evidence from his prior hearings had been improperly evaluated under Hall. The circuit court summarily denied the second successive postconviction motion, finding that Rodriguez's prior evidentiary hearing on intellectual disability and other proceedings provided him with the full protections afforded by Atkins and Hall.

ANALYSIS

Rodriguez appealed the circuit court's denial of his Hall claim on February 19, 2016. Rodriguez also filed in this Court a motion requesting permission for supplemental briefing on Hurst v. Florida, 136 S. Ct. 616 (2016), which was decided January 12, 2016. This Court allowed the supplemental briefing, and Rodriguez challenged his death sentence as unconstitutional under Hurst. We address both Rodriguez's Hall and Hurst claims.

I. Whether Rodriguez is Entitled to Relief under Hall

Rodriguez argues that the circuit court erred in refusing to grant an evidentiary hearing on his intellectual disability claim. A circuit court may summarily deny a claim if it is legally insufficient or positively refuted by the record. Mann v. State, 112 So. 3d 1158, 1161 (Fla. 2013). A decision on whether

to grant an evidentiary hearing for a successive postconviction motion is a pure question of law reviewed de novo. Id. at 1162.

This Court has determined that Hall is retroactive under Witt v. State, 387 So. 2d 922 (Fla. 1980). Walls v. State, 41 Fla. L. Weekly S466, S469 (Fla. Oct. 20, 2016). Thus, we must determine whether Hall requires relief in this case. Hall established that Florida courts should allow defendants with IQ scores above 70 to present evidence of the other prongs of intellectual disability at an evidentiary hearing. This Court has also interpreted Hall to mean that no single factor may be dispositive and that "if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of the other prongs." Oats v. State, 181 So. 3d 457, 467-68 (Fla. 2015). Rodriguez argues that Hall also requires postconviction courts to make all determinations, including credibility findings, in a manner deferential to the standards of the medical community and that the use of those standards entitles him to a new evidentiary hearing.

In summarily denying the claim, the circuit court below considered the entire record and the evidence presented at Rodriguez's July 20, 2015, Huff hearing. The circuit court determined that Rodriguez received the full benefit of the protection provided by Atkins and Hall in prior proceedings. To determine whether summary denial was appropriate, this Court must determine whether Hall

requires increased deference to the standards of the medical community. We also consider whether the record conclusively refutes Rodriguez's claim that the circuit court below improperly relied upon one single factor and it was dispositive in violation of Oats and Hall. Finally, we consider whether Rodriguez is entitled to a new evidentiary hearing based on the changes in Hall in light of similar cases.

A. Whether Hall Requires Courts to Make Credibility Findings in Accordance with Medical Authorities

Rodriguez contends that his prior evidentiary hearing does not comport with Hall because the circuit court made credibility findings that conflict with medical standards not in evidence. Specifically, Rodriguez contends that credibility findings made by the circuit court contradict medical standards detailed in a publication of the American Association on Intellectual and Developmental Disabilities (AAIDD). See American Association on Intellectual and Developmental Disabilities, The Death Penalty and Intellectual Disability, (Edward A. Polloway, ed., 2015). Rodriguez also contends that Cardona v. State, 185 So. 3d 514 (Fla. 2016), supports his position because it held that a circuit court wrongfully discarded the opinions of medical experts in evaluating intellectual disability. Id. at 527. Rodriguez further argues that he is entitled to a new evidentiary hearing because Jones v. State, 966 So. 2d 319 (Fla. 2007), guided the previous determination regarding his disability in violation of Hall. We affirm the

summary denial below because Rodriguez's claims are conclusively refuted by the record. See Mann, 112 So. 3d at 1162.

The language Rodriguez cites in Hall does not stand for the proposition that credibility findings are improper when they conflict with medical standards. Instead, the language justifies the expansion of Florida's definition of intellectual disability to encompass more individuals than just those with full-scale IQ scores below 70. See Hall, 134 S. Ct. at 1993-95. Hall looks to the medical community "[t]o determine if Florida's cutoff rule is valid," but does not change credibility determinations in intellectual disability proceedings. Id. at 1993. The United States Supreme Court has clarified that "Hall indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide." Moore v. Texas, 2017 WL 1136278, slip op. at 10 (March 28, 2017).[6] This Court does not reweigh evidence or second guess a circuit court's credibility determinations. Nixon v. State, 2 So. 3d 137, 141 (Fla. 2009) (quoting Brown v. State, 959 So. 2d 146, 149 (Fla. 2007)).

Even if Hall increases deference to medical standards as Rodriguez claims, the circuit court in the prior proceeding weighed the testimony of multiple experts

6. Unlike the defendant in Moore, Rodriguez's intellectual disability was evaluated under "the generally accepted, uncontroversial intellectual-disability diagnostic definition," and this Court follows the same three-part standard. Moore, 2017 WL 1136278, slip op. at 6.

and made its findings based on competent, substantial evidence. See Rodriguez IV, 110 So. 3d at 441. Dr. Weinstein evaluated Rodriguez's IQ using the Mexican WAIS-III test and United States norms and testified that he believed Rodriguez was intellectually disabled. Dr. Suarez opined that the appropriate test for a Cuban immigrant like Rodriguez was not the Mexican WAIS-III but the Spanish version because Cuban culture more closely aligns with Spanish culture. Dr. Suarez further opined that the proper way to accommodate Rodriguez using the Mexican WAIS-III would be to use Mexican norms to obtain scaled scores and United States norms to calculate the final score. Dr. Suarez also testified that according to his tests, Rodriguez was malingering and that none of his IQ scores below 70 were reliable. Doctors Tasse and Oakland also offered expert opinions on evaluating intellectual disability.

The circuit court ultimately found Dr. Suarez's testimony most credible. The circuit court agreed that the Mexican WAIS-III test administered by Dr. Weinstein was unreliable because Rodriguez was not a member of the population with whom the test is intended to be used. The circuit court also determined that the IQ scores obtained by Dr. Suarez were unreliable because of Rodriguez's malingering. The circuit court also found that Rodriguez had not provided sufficient evidence to establish adaptive functioning deficits or onset before age

18. This Court does not reweigh evidence or second guess credibility findings on appeal. See Nixon, 2 So. 3d at 141.

Contrary to Rodriguez's claim, the circuit court did not disregard his IQ scores by simply ignoring expert opinions as occurred in Cardona, 185 So. 3d at 526-27. In Cardona, the circuit court disregarded tests that experts recommended for the Spanish-speaking, Cuban defendant based solely on the translation of tests from English to Spanish. Id. at 525-27. The circuit court in Cardona followed a rigid interpretation of the Florida Administrative Code, which permits only "specific tests . . . interpreted by trained personnel in conformance with the instructions provided by the producer of the test," rather than accepting the accommodations the experts "considered acceptable in the field in order to provide the best estimate possible as to [the defendant's] IQ, in light of the fact that the tests available to them were not as reliable in this situation." Id. at 526. The trial court in Cardona also failed to perform "a comprehensive analysis of all three prongs [of intellectual disability] as set forth in Hall and its progeny." Id. at 527. The circuit court's evaluation of Rodriguez's scores in this case does not suffer from the same errors.

Unlike Cardona, the circuit court in this case did not evaluate the IQ scores based on a strict reading of the Florida Administrative Code, but a careful weighing of all the evidence presented. The circuit court concluded that Dr.

Weinstein's administration of the test was unreliable based on Dr. Suarez's expert testimony about proper accommodations. The circuit court found the score Dr. Suarez obtained unreliable because of Rodriguez's malingering. The circuit court noted that even if the scores below 70 were reliable, Rodriguez had not demonstrated adaptive deficits or onset before age 18. The circuit court also considered all three prongs of intellectual disability, further distinguishing this case from Cardona.

Finally, Rodriguez contends that he is entitled to a new hearing because Jones, 966 So. 2d 319, guided the evaluation of his intellectual disability in a manner contradicting standard medical practices and, therefore, is in violation of Hall. In Jones, we rejected the argument that "in determining whether a person experiences deficits in adaptive functioning, only the person's childhood behavior is considered," in favor of evaluating both long-term and current adaptive functioning. Id. at 325-27. Medical standards indicate that experts cannot accurately evaluate adaptive functioning in a prison setting. See AAIDD, The Death Penalty and Intellectual Disability, supra, at 189. Rodriguez argues that to the extent that Jones requires a defendant to exhibit present deficits in adaptive functioning, Jones encourages the unreliable practice of evaluating defendants in prison. Rodriguez asks this Court to find that his prior proceeding violated Hall to the extent that the circuit court relied on Jones.

Even if Rodriguez's interpretation of Hall were correct, the circuit court considered more than just adaptive functioning testing conducted in prison. The circuit court evaluated long-term evidence, including testimony of Rodriguez's friends who knew him as a child, Dr. Weinstein's testimony regarding behavior alleged to demonstrate adaptive functioning deficits and regarding interviews of Rodriguez's friends and family, and testimony of other experts who either evaluated Rodriguez or testified to medical standards related to intellectual disability. While the circuit court followed Jones in considering IQ alongside present adaptive functioning, it also considered evidence from family and friends as Rodriguez argues that the AAIDD and Hall require.

Hall does not change the standards for credibility determinations in prior proceedings. The record conclusively refutes Rodriguez's claim because the circuit court made findings supported by competent, substantial evidence in prior proceedings. See Mann, 112 So. 3d at 1162.

B. Whether One Factor Was Dispositive of Rodriguez's Intellectual Disability Claim in Violation of Oats

In applying Hall, this Court has held that the test for intellectual disability must include comprehensive analysis of all three prongs. See Oats, 181 So. 3d at 459, 467 (citing Brumfield v. Cain, 135 S. Ct. 2269, 2278-82 (2015)); Cardona, 185 So. 3d at 527. Rodriguez contends that the circuit court failed to evaluate all three prongs in tandem after his evidentiary hearing in the prior proceeding and

that this Court did not evaluate manifestation before age 18 in affirming the circuit court's decision. We affirm the circuit court's summary denial because the record conclusively refutes Rodriguez's claim. See Mann, 112 So. 3d at 1162.

The circuit court considered Rodriguez's current IQ and adaptive deficits based on the experts' tests and testimony. Dr. Weinstein believed that there was no need to demonstrate previous adaptive deficits before age 18, and the other experts disagreed. Rodriguez's friends familiar with him before age 18 testified that he had good hygiene, could care for himself, and could drive. The circuit court made findings as to Rodriguez's IQ, adaptive functioning deficits, and age of onset in its order finding that he is not intellectually disabled:

> The court finds that the results obtained from Dr. Weinstein on the Mexican WAIS III are not reliable. Dr. Weinstein conceded that IQ tests must be given to a representative example of the population with whom it is intended to be used. IQ norming, according to Dr. Suarez, takes into account a person's culture and level of education. He stated that if the person is not a member of the population that was used to formulate the norm, the results are meaningless. The full scale score of 60 obtained on the WAIS is invalid according to Dr. Suarez, who administered the test, because of the Defendant's malingering. There are no valid test results to establish that the Defendant's IQ is less than 70.
>
> Even if this Court accepts the IQ test results of Dr. Weinstein and it is assumed that the Defendant's IQ is less than 70, there is absolutely no evidence that Defendant exhibits deficits in his adaptive behavior and that they manifested before the age of 18. Dr. Weinstein testified that the Defendant leaving the Merchant Marines because he fell in love is an example of poor judgment. Millions of men who are not mentally retarded have left the military for a job, a family and even the love, or perceived love, of a woman. The fact that he may

> have acted on impulse and not reasoning does not render him mentally retarded.
>
> The Defendant has failed to carry his burden of proving the three elements necessary to establish that he is mentally retardation [sic]: significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.

Given this discussion of all three prongs in the circuit court's order and the related evidence both in the record and described throughout the order, the record conclusively refutes Rodriguez's claim that the circuit court did not consider each prong of the intellectual disability test in tandem.

This Court did fail to discuss whether evidence below showed onset before age 18 in its opinion in affirming the circuit court's order. See Rodriguez IV, 110 So. 3d at 441. Nevertheless, this Court had the full record below at its disposal, including the circuit court's holistic review of all three prongs, in determining that Rodriguez had not demonstrated intellectual disability. See id. While Rodriguez is correct that this Court did not mention evidence of onset before age 18 in affirming the circuit court's decision, he cannot demonstrate that this Court did not consider the record, which shows no reliable evidence of early onset presented at his prior evidentiary hearing.

Summary denial was appropriate because the record reflects that the circuit court made findings as to all three prongs and evaluated them as a whole in denying Rodriguez's claim. See Mann, 112 So. 3d at 1162. Therefore, we deny

relief on this claim. Finally, we consider whether Rodriguez is entitled to an evidentiary hearing based on the changes in Hall in light of our recent decisions.

C. Whether Rodriguez is Entitled to a New Evidentiary Hearing under Hall

Rodriguez contends that this Court cannot speculate as to whether Hall might affect the testimony of experts or how the defense presented his case at the prior hearing. While the change in Hall could have affected how the defense prepared, it is unlikely that the change would affect the outcome in this case. Rodriguez had IQ scores below 70 such that a finding of intellectual disability was possible prior to Hall, and Rodriguez's defense had every opportunity to present its best case at his prior Atkins evidentiary hearing. Therefore, this case is distinguishable from cases warranting Hall relief.

The facts in this case—specifically the findings made after the prior evidentiary hearing as to each prong of intellectual disability—distinguish this case from the clear Hall error this Court found in Oats, 181 So. 3d at 471, and Cardona, 185 So. 3d at 527. In Oats, the circuit court wrongfully determined that the defendant failed to establish onset before age 18 and limited its inquiry to that single prong in violation of Hall. Oats, 181 So. 3d at 471. In Cardona, the trial court wrongfully ignored expert recommendations as to the best language accommodation for IQ tests in rejecting the defendant's IQ scores and wrongfully found IQ dispositive of the holistic intellectual disability inquiry. 185 So. 3d at

525-27. In contrast, the circuit court considered evidence concerning all three prongs of intellectual disability in both Rodriguez's prior proceeding and in the summary denial below. In addition, Rodriguez introduced evidence of his intellectual disability at a hearing on his ineffective assistance of counsel claims during his initial postconviction proceeding, which this Court found insufficient to demonstrate intellectual disability. Rodriguez II, 919 So. 2d at 1267.

Rodriguez had a full Atkins evidentiary hearing, a prior hearing discussing his intellectual disability in relationship to an ineffective assistance of counsel claim, and a robust defense at each proceeding. Rodriguez's argument regarding Hall's effect on credibility determinations is legally insufficient. The record conclusively refutes his argument that one prong was dispositive of his claim. Based on the foregoing, we affirm the circuit court's summary denial of Rodriguez's Hall claim. Next, we turn to his claim under Hurst.

II. Rodriguez is Not Entitled to Relief under Hurst

This Court has determined that Hurst should not be applied retroactively to those cases final on direct appeal before Ring was decided. Asay v. State, No. 41 Fla. L. Weekly S646, S648 (Fla. Dec. 22, 2016). Because Rodriguez's death sentence was final in 1993, Rodriguez is not entitled to Hurst relief. Therefore, we deny relief on this claim.

CONCLUSION

Based on the foregoing, we affirm the circuit court's summary denial of an evidentiary hearing on Rodriguez's Hall claim, find that Rodriguez is ineligible for Hurst relief, and affirm his death sentence.

It is so ordered.

LABARGA, C.J., and LEWIS, and QUINCE, JJ., concur.
PARIENTE, CANADY, and POLSTON, JJ., concur in result.
LAWSON, J., did not participate.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Miami-Dade County,
Nushin G. Sayfie, Judge - Case No. 131988CF018180B000XX

Neal A. Dupree, Capital Collateral Regional Counsel, Rachel Day, Assistant Capital Collateral Regional Counsel, and Scott Gavin, Staff Attorney, Southern Region, Fort Lauderdale, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida; and C. Suzanne Bechard, Assistant Attorney General, Tampa, Florida,

for Appellee

APPENDIX B

Supreme Court of Florida

THURSDAY, JUNE 15, 2017

CASE NO.: SC15-1795
Lower Tribunal No(s).:
131988CF018180B000XX

JUAN DAVID RODRIGUEZ vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, and POLSTON, JJ., concur.
LAWSON, J., did not participate.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

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C. SUZANNE BECHARD
RACHEL DAY
SCOTT GAVIN
REID RUBIN
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HON. NUSHIN G. SAYFIE, JUDGE
PENNY H. BRILL

APPENDIX C

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff

v.

JUAN DAVID RODRIGUEZ,
Defendant.
_____/

CASE NO. F88-18180B

Section F002

JUDGE NUSHIN G SAYFIE

ORDER DENYING SUCCESSIVE MOTION TO VACATE
JUDGMENTS OF CONVICTION AND SENTENCE

THIS CAUSE having come before this court on Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence, filed May 26, 2015, and this court, having reviewed the Defendant's Motion, the State's response dated June 5, 2015, heard arguments of the parties at a *Huff* hearing, pursuant to *Huff v.State*, 622 So.2d 982 (Fla. 1993), on July 20, 2015, and reviewed memoranda of law submitted by both parties subsequent to the hearing, finds as follows:

A recitation of the facts underlying the crimes charged is found in *Rodriguez v. State,* 609 So.2d 493, 495-497 (Fla. 1993).

Juan David Rodriguez was indicted by a grand jury on May 3, 1989, and charged with first-degree murder, armed robbery, conspiracy to commit a felony, attempted armed robbery, armed burglary with an assault, aggravated assault and attempted murder in the first degree. He was ultimately found guilty on all counts. On March 1, 1990, the jury recommended a death sentence by a vote of twelve to zero and on March 28, 1990, the trial court sentenced him to death. The Florida Supreme Court (hereinafter, "FSC") affirmed the convictions and sentences. *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992), *cert. denied,* 510 U.S. 830 (1993).

In 1994 the Defendant filed his first post-conviction motion pursuant to Fla. R. Crim. P. 3.850. Amended motions were subsequently filed in 1995 and 1997. After an evidentiary hearing on some of the claims raised the trial court denied his motion. While his appeal was

pending, the FSC promulgated Fla. R. Crim. P. 3.203, regarding procedures to be employed for defendants seeking to raise mental retardation (intellectual disability) as a bar to execution. *See Atkins v. Virginia*, 536 U.S. 304 (2002). Thereafter, on November 30, 2004, the Defendant requested that the FSC relinquish jurisdiction to the trial court for a determination of mental retardation pursuant to the Rule 3.203 (d)(4)(E).

On May 26, 2005, the FSC affirmed the trial court's denial of the Defendant's 3.850 motion, *Rodriguez v. State*, 919 So. 2d 1252 (Fla. 2005), and entered an order denying his request to relinquish jurisdiction without prejudice to permit him to file a Rule 3.203 motion in the trial court within sixty (60) days of the appeal becoming final.

The Defendant ultimately filed his Successive Motion to Vacate Sentence of Death/Motion for Determination of Mental Retardation as a Bar to Execution which was summarily denied by the trial court on May 1, 2006. On October 3rd, 2007, the FSC reversed the summary denial, remanding the case for an evidentiary hearing pursuant to *Atkins*. An evidentiary hearing was held and on January 3, 2011 the post-conviction court denied the claim. The FSC affirmed. *Rodriguez v. State*, 110 So.3d 441 (Fla. 2013).

In *Hall v. Florida*, 134 S. Ct. 1986 (2014), the U.S. Supreme Court qualified *Atkins* as well as Fla. Stat. Sec. 921.137 and Rule 3.203(b). In pertinent part, the Court held that a defendant should be permitted to prove intellectual disability by presenting evidence of deficits in adaptive functioning and that a court cannot deny *Atkins* protection simply based on bright line IQ score of 70. *Id.* at 2000. The Defendant now files this successive motion, again seeking *Atkins* relief pursuant to *Hall*.

CLAIM I

DEFENDANT'S SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION UNDER *ATKINS V. VIRGINIA* AND *HALL V. FLORIDA*.

Defendant contends he is intellectually disabled pursuant to *Hall v. Florida*, 134 S.Ct.

1986 (2014). He seeks an evidentiary hearing on the issue.

Two points must be noted. The first is that *Hall* does not create a new right. Rather, as discussed above, the effect of the USSC's holding is that a trial court must consider the margin of error in determining IQ and allow a defendant an opportunity to provide evidence of deficits in adaptive functioning:

> Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.

Hall, at 2001.

Secondly, the Defendant in the instant case had a full and complete evidentiary hearing on his *Atkins* claim, and the post-conviction court that heard the claim entered a lengthy, detailed order (*see* exhibit A, Order of Judge Orlando Prescott, Denying Defendant's Motion to Vacate, January 3, 2011) outlining the testimony of all the witnesses and making specific findings regarding the adaptive functioning of the Defendant. The Defendant called fourteen (14) witnesses, two of whom were childhood friends who could testify as to his adaptive functioning historically.

The court ultimately found that "[e]ven if this Court accepts the IQ test results of Dr. Weinstein and it assumed that the Defendant's IQ is less than 70, there is absolutely no evidence that Defendant exhibits deficits in his adaptive behavior and that they manifested before the age of 18." (See exhibit A at p. 53). In affirming the post-conviction court's decision the FSC stated: "Furthermore, there is no evidence that Rodriguez exhibits adaptive behavior deficits." *Rodriguez v. State*, 110 So.3d 441 (Fla. 2013).

Additionally, the issue of mental retardation had been previously litigated during the Defendant's initial post-conviction motion. In affirming the lower court's denial of relief the FSC stated:

> When asked by the State whether a low IQ or an individual's adaptive functioning was more indicative of mental retardation, Dr. Haber responded that you could

not look at one factor without considering the other. According to Dr. Haber, the activities in which Rodriguez engaged (e.g., running a drug trafficking operation, balancing a bank account of $7000 at the time he was arrested, and understanding the mechanics of financing a new car) belied a finding of mental retardation.

Rodriguez v. State, 919 So.2d 1252, 1265 (Fla. 2005).

The FSC further stated:

Although all of the experts who examined Rodriguez concluded that he has low intelligence, Rodriguez's behavior throughout the trial proceedings indicated his awareness and understanding about what was happening in the courtroom. He variously made comments about the prosecutor's statements and the evidence presented, even denying his presence at the murder scene during one witness's testimony. Rodriguez's subsequent conversations with Dr. Haber, particularly one in which he recited the State's plea offer in detail, also indicate an understanding of the situation. These incidents support the trial court's finding that Dr. Haber's opinion was not only adequate, but also completely supported by the evidence. In denying postconviction relief on this claim, the court stated:

No doubt the defendant has a low IQ, but low IQ does not mean mental retardation. For a valid diagnosis of mental retardation under DSM IV there must also be deficits in the defendant's adaptive functioning. All the evidence points to no deficits. Additionally, there was no evidence at all that the defendant had any memory impairments or problems of impulsivity. Not only was Dr. Haber's opinion not inadequate but it is completely supported by the evidence. A conclusion by a new expert that is different is interesting but pales in an analysis of available facts and standards.

Rodriguez, 919 So.2d at 1266.

Based on the thorough and detailed findings made by two prior lower courts, both of which were affirmed by the Florida Supreme Court, including findings made by the court most recently that were based in part on historical evidence, this Court feels bound and satisfied that the Defendant, Juan David Rodriguez, has received the full benefit of the protection provided by *Atkins* and *Hall*.

WHEREFORE, it is HEREBY ORDERED AND ADJUDGED that the Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence is **DENIED.**

Done and Ordered in Miami-Dade County, this 24th day of August, 2015.

NUSHIN G SAYFIE
CIRCUIT COURT JUDGE

Copies to:

Rachel Day, Counsel for Defendant
Scott Gavin, Counsel for Defendant
Penny Brill, ASA
Sandra Jaggard, AAG

APPENDIX D

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

JUAN DAVID RODRIGUEZ.
Defendant.

Criminal Division
Case No.: F0-81180B
JUDGE: ORLANDO PRESCOTT

ORDER DENYING DEFENDANT'S MOTION TO VACATE SENTENCE OF DEATH AND FOR DETERMINATION OF MENTAL RETARDATION AS A BAR TO EXECUTION

THIS MATTER is before the court on Defendant's Motion to Vacate Sentence of Death and for Determination of Mental Retardation as a Bar to Execution filed on March 8, 2006. The Court held an evidentiary hearing on the motion on the dates of March 27, 2009 and from June 22 through June 30, 2009. The Court having reviewed the motion and the testimony presented at the evidentiary hearing, the court file and applicable case law, and having been fully advised in the premises makes the following findings of facts and conclusions of law:

PROCEDURAL HISTORY

In May of 1989 the defendant was charged by indictment with first degree murder, armed robbery, conspiracy to commit a felony, attempted armed robbery, armed burglary with an assault, aggravated assault, and attempted murder in the first degree. The trial commenced on January 23, 1990 and the jury returned a verdict of guilty on all counts on January 30, 1990, the Defendant was found guilty of first degree murder. Prior to the penalty phase, the defendant sought and the court granted the appointment of a

mental health expert to evaluate him for mitigation. The expert conducted the evaluation and testified at the hearing. After the penalty phase proceeding was held, a jury recommended the death sentence by a vote of twelve to zero. On March 28, 1990 the Defendant was sentenced to death for the first degree murder; life in prison for armed robbery; fifteen years for conspiracy to commit robbery and attempted robbery; life in prison for the armed burglary with an assault and the attempted first degree murder; and five years for the aggravated assault.

The Florida Supreme Court affirmed the Defendant's convictions and sentences on October 8, 1992. *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992). Rehearing was denied on January 7, 1993. On October 4, 1993, the United States Supreme Court denied the Defendant's Petition for a Writ of Certiorari. *Rodriguez v. State*, 510 U.S. 830 (1993). On August 10, 1993, the Defendant filed his third amended motion for postconviction relief raising thirty claims. The court denied the motion. The Defendant appealed. While the Defendant's appeal was pending, the Florida Supreme Court promulgated Fla. R. Crim. P. 3.203, effective October 1, 2004 based on *Atkins v. Virginia*, 536 U.S. 304 (2002). On November 30, 2004, the Defendant requested that the Florida Supreme Court relinquish jurisdiction to the Circuit Court for a determination of mental retardation under the rule. The Motion to Relinquish Jurisdiction remained pending until May 26, 2005. The Motion was denied. Also, on that day, the court affirmed the Defendant's appeal. *Rodriguez v. State*, 919 So. 2d 1252 (Fla. 2005). The Defendant filed a Motion for Rehearing which was denied on January 19, 2006. On March 9, 2006, the Defendant filed a Motion to Vacate Sentence of Death/Motion for Determination of Mental Retardation as a Bar to Execution. A case management

conference was held on April 27, 2006 in accordance with *Huff v. State*, 622 So. 2d 982 (Fla. 1993). On May 1, 2006 the Circuit Court entered an order summarily denying relief. The order denying relief was not served on the Defendant.

On June 20, 2006 the Defendant filed a Motion to Re-Enter Order Denying Motion for Postconviction Relief with the Circuit Court. On June 26, 2006 the lower court entered an order granting the Defendant's motion. The lower court re-entered the Order Denying Defendant's Motion for Postconviction Relief. The Defendant appealed. On October 3, 2007, the Florida Supreme Court reversed the summary denial and remanding for an evidentiary hearing in accordance with *Atkins*.

THE EVIDENTIARY HEARING

On remand, this Court conducted the evidentiary hearing over the course of several days and received the testimony of a number of witnesses whose testimony will be summarized.

Defendant's Case

Jennifer Sagle

The defendant first called Jennifer Sagle, a psychological specialist with the Department of Corrections. Ms. Sagle testified that she received her master's degree in education from Ohio University in 1999, and then began her employment at Union Correctional Institution (UCI). In 2005, Ms. Sagle was assigned as the psychological specialist for death row.

As a psychological specialist, Ms. Sagel provided individual therapy to the inmates, was involved in case management and formulation of treatment plans,

performed suicide risk assessments, met with the rest of the mental health treatment team and made treatment recommendations. She also made weekly confinement rounds and conducted 90 day assessments of inmates, such as Defendant, who were not under the active care of a mental health professional. During her weekly rounds, Ms. Sagle stopped by the cell of each inmate, made sure the inmate was awake and conversed briefly with the inmate. During the 90 day assessments, Ms. Sagel met privately in her office with the inmate for approximately 30 minutes.

Between January 2006 and November 2007, Ms. Sagle had conducted seven 90 day assessments with Defendant. She believed that she had a good rapport with him and noted that he spoke to her frequently about which family members were writing to him and which were not. She stated that he was able to communicate with her in English and believed that he understood their conversations. At their last 90 day assessment, Defendant exposed himself to her and was given a disciplinary report for this behavior. After this visit, Defendant refused to participate in any further 90 day assessments.

On cross, Ms. Sagle stated that Defendant was coherent, goal directed, not confused and able to converse in English. She stated that Defendant was neatly dressed, his hygiene was good and he kept his cell clean. When she went by Defendant's cell, she observed him coloring and drawing. Ms. Sagle had prior experience dealing with mentally retarded individuals and never observed anything about the Defendant that caused her to be concerned that he might be retarded. If she had concerns that an inmate was retarded, she would have reported it to the psychologist on the treatment team and have recommended an evaluation.

Ms. Sagle went on to testify that her opinion of Defendant's functioning was based on her observations of him and the lack of any reports of any functioning problems from the guards. She noted that the guards were required to report problems with inmate's ability to function to her. She acknowledged that she had not formally evaluated Defendant's functioning and admitted that the Department had an adaptive functioning checklist available to be completed about an inmate, which she had never used regarding Defendant. She stated that she had never used the form because she never had any reason to believe Defendant had any mental health issues.

Lisa Wiley

Ms. Lisa Wiley was another psychological specialist with the Department of Corrections. Ms. Wiley stated that she had worked at UCI for almost 20 years in total, explaining that she had left UCI around the end of 2005 and returned in 2008. She held a master's degree in psychology from George Mason University. She confirmed Ms. Sagle's testimony concerning the duties of a psychological specialist.

Ms. Wiley was not presently assigned to death row and was not involved with Defendant as a result; however, she had been involved in his treatment from 1993 until she left UCI around the end of 2005. As a result, she had testified at the hearing on Defendant's first motion for post conviction relief.

Ms. Wiley identified a series of reports from the time when she was involved in Defendant's care. She noted that at times, Defendant had received medication for depression. She stated that Defendant had received periodic treatment for depression at his own request but that Defendant had never exhibited more than generalized complaints about being depressed. She also noted that the reports included a social history that was

based on a review of prior records and Defendant's reporting of his history. She stated that these reports reflected that Defendant had a seventh grade education. They did not reflect an intellectual testing because Defendant always refused to undergo such testing. She stated that the reports did not directly address adaptive functioning deficits, but to the extent that they contained information about adaptive behavior, they did not reflect any deficits. She stated that the reports did show that Defendant had a problem with publically masturbating and being depressed.

Ms. Wiley noted that Defendant had once exposed himself to her during her cell rounds. She did not issue a disciplinary report as a result because she simply told him to cover himself.

On cross examination, Ms. Wiley stated that she had conducted around 90 day assessments with Defendant and that she met with Defendant for an average of 30 minutes for each assessment. She stated that Defendant was always coherent and oriented during these meetings. He was neat and clean and able to communicate with her in English. She noted that Defendant had learned English during his incarceration. She stated that Defendant did not jump between topics during her discussions with her and was able to sit still during these meeting.

Ms. Wiley stated that the social history information in the reports reflected that Defendant had left school after the seventh grade to go to work. Defendant had obtained employment as a mechanic on a fishing boat and had also previously been employed as an electrician and mechanic. The reports also showed that Defendant had traveled internationally.

Ms. Wiley stated that the defendant had demonstrated leisure skills by listening to music, exercising and doing legal work. He interacted socially with others in the prison and was interested in sports and was a fan of the Miami Dolphins.

Ms. Wiley stated that she had a conversation with the Defendant in connection with her testimony at the last evidentiary hearing. During this conversation, she informed the defendant that she did not believe that he was retarded. Defendant responded by telling her it was alright and stated that his attorney had directed him to sit and stare blankly while in court. She also discussed her opinion that the defendant was not retarded with the other members of the treatment team, memorialized that opinion in a report and had the report approved by the treatment team, which included psychiatrist Dr. Aurora and psychologist John Jennette. She stated that the treatment team had diagnosed Defendant instead with depression-not otherwise specified and antisocial personality disorder.

John Flaherty

Off. John Flaherty testified that he had been employed by the Department of Corrections for about 12 years and assigned to death row for about five years. He came into contact with the Defendant on a daily basis for 5 years. Most of the contact with the Defendant was brief and concerned doing security checks and dealing with Defendant's needs. On average Off. Flaherty spent around 20 minutes each day dealing exclusively with Defendant.

Off. Flaherty testified that inmates had two methods of raising complaints. The first was an informal grievance addressed directly with the officers and the other was a formal grievance form that is sent to Tallahassee.

Off. Flaherty stated that he became involved in assessing Defendant for the present hearing because a sergeant instructed to go to the conference room. When he arrived, there were other guards in the room, the evaluation form was explained, he read the directions and he filled out the form. He did so independently even though other officers were present and did not find the environment to be distracting. He stated that he was not questioned before completing the form. Off. Flaherty admitted that he guessed on a number of items and that he did not always mark the guess box when he did so. He stated that he did so because he was in a hurry to get back to work.

On cross examination Off. Flaherty stated that he was Defendant's lifeline to things Defendant needed. He stated that the canteen forms were printed in english and were distributed on Sunday, and that the inmates needed to know the balance in their account and have the a bility to add a nd subtract to fill out the form. He stated that Defendant asked for the forms when he wanted one. He stated that Defendant contacted him when he needed repairs made in his cell. He stated that Defendant asked for things when he needed them and was able to communicate in english. Off. Flaherty observed that the defendant's hygiene was good, his bed was made and he was always clean shaven. He believed that the defendant was able to perform all of the behaviors listed on the assessment form based on his years of interaction with him.

Leonila Dela

Leonila Dela testified that she met Defendant when they were both children living in San German, Cuba, which she described as a medium sized, industrial city. She claimed that she knew where he lived as a child but was unable to give a description of his house and did not remember whether his family had a telephone or car. When she

was 18 and Defendant was 17, they dated for seven or eight months. She never went to Defendant's house during this relationship and did not recall if he ever came to hers. Instead, she would meet Defendant either at a park or a party during the weekends. During their dates, they would dance, talk and stroll. They did not go to restaurants or movies because they could not afford to do so. Defendant never brought friends with them on their dates, which lasted about four to five hours.

After she and Defendant stopped dating, they lost touch. Ms. Dela then immigrated to this country around 1995. While living here, Ms. Dela's family gave her a phone number for someone related to Defendant's family. She got Defendant's address from this person and began to write and visit with Defendant in prison in 2004. Ms. Dela stated that she took her daughter with her for two visits. Ms. Dela initially claimed that she was unaware that Defendant was on death row or denied knowing anything about his criminal history until she was deposed prior to the hearing. However, she immediately changed her testimony and admitted that her daughter had looked Defendant up on the internet after the first visit and informed her Defendant was on death row. She then claimed that she intentionally kept herself ignorant of Defendant's crime at that time because she had promised Defendant she would visit again and bring his son with her.

Ms. Dela claimed that she brought Defendant a cheap watch during the second visit. She stated she had Defendant's son wear the watch into the prison and that Defendant and his son exchanged watches during the visit because Defendant's watch was broken. She stated that Defendant had sent her a store ad with the watch he wanted, and she had purchased it for him. She felt the request for a cheap watch was unusual because Defendant could have asked her for a better watch.

Ms. Dela stated that Defendant did not remain still during her visits and that he kept changing the topic of conversation. She also claimed not to have seen Defendant since this visit.

On cross, Ms. Dela stated that she did not recall the number of times that she and Defendant went on dates 40 years earlier. However, she did admit that she had no contact with Defendant prior to dating him and would just have seen Defendant from a distance. She stated that Defendant's hygiene was good and that he knew how to care for his own needs when they were dating. She did not believe that Defendant was stupid. She admitted that Defendant had told her he had traveled to Canada during their visits.

Ms. Dela did acknowledge that Defendant sent her art work, that he asked for money from her and that the letters contained sexually explicit references. She agreed that Defendant had asked her to purchase shoes for him and provided his size and that Defendant used the money she sent him to purchase canteen items. A composite exhibit of thirty-five letters written by Defendant and addressed to Ms. Dela were admitted into evidence. Ms. Dela admitted that she saved the letters because Defendant was important to her and she considered him the love of her life. She acknowledged that she wanted to help Defendant and believed that her testimony could free Defendant.

Diogenes Navarro

Diogenes Navarro testified that he had met Defendant when they were in a Cuban prison together and had known each other for around 17 years. While in prison, the inmates would read, talk and play chess and checkers to pass the time. Defendant did not join in the chess games because he did not know how to play chess. Defendant was treated as a mascot by the other inmates because he was the youngest and a little crazy.

Around 1981 or 1982, Mr. Navarro met up with Defendant again. At the time, Mr. Navarro was working as a pawn broker and Defendant would come in the store. Mr. Navarro stated that Defendant would frequently buy expensive items and then pawn them for much less than they were worth. He stated that he filled out the pawn slips for Defendant and that Defendant did not take the receipts after pawning the items. Instead, Mr. Navarro claimed that he had to keep track of Defendant's pawn slips for him.

During this time, Mr. Navarro and Defendant maintained a friendship and would go out to eat together. When they did so, Mr. Navarro claimed that Defendant would not order for himself but would ask Mr. Navarro to order him something good. Mr. Navarro believed that Defendant was not able to order food. Mr. Navarro also averred that he and Defendant would go four to five months without seeing each other and that Defendant would then come looking for him.

Mr. Navarro admitted that he was arrested and convicted for possession of drugs. He stated that he was sentenced to five years imprisonment but only served three because of his good behavior. He averred that he did not see Defendant while he was incarcerated. However, when he was released from prison in 1986, Mr. Navarro again saw Defendant at the pawn shop, where Mr. Navarro claimed that Defendant continued his habit of purchasing expensive items and pawning them for less. Mr. Navarro stated that after Defendant was arrested, one of Defendant's in laws came to the pawn shop and told him of Defendant's arrest. He stated that he had had no contact with Defendant since that time.

On cross, Mr. Navarro admitted that he had not seen Defendant for 20 years. He admitted that Defendant was operating a tow truck at the time of their friendship in this

country. He assumed that Defendant knew how to do so. He claimed that he did not see Defendant with numerous cars. However, he acknowledged he had seen Defendant with a Camaro, a Corvette and a tow truck. He had never seen Defendant write, but had received letters from Defendant. He assumed that someone was writing the letters for Defendant. He claimed never to have seen Defendant use a phone but assumed that Defendant knew how to do so. He also assumed that Defendant knew how to get from his house to the pawn shop. He acknowledged that Defendant asked him to order food for him because he was more familiar with the food at the restaurant they frequented.

Dr. Ricardo Weinstein

Defendant next called Ricardo Weinstein, a psychologist. Dr. Weinstein testified that he had a bachelor's degree in business and master's and doctorate degrees in psychology. He had earned his doctorate at an institution called International College. He also stated that he obtained a certificate in neuropsychology from the Fielding Institute. He considered himself an expert in neuropsychology and cross cultural evaluation. He had testified regarding mental retardation in Washington, Oregon, New Mexico, California, Texas, Alabama, Florida and Virginia. He claimed that he had consulted in cases regarding retardation but had concluded that the defendant was not retarded on many occasions.

During voir dire, Dr. Weinstein admitted that International College did not have classes, a library or departments, that he did not receive grades and that the school was not accredited. He admitted that he had done his dissertation on PCP use. He acknowledged that he was not board certified in anything.

Dr. Weinstein described retardation as a developmental disability affecting three percent of the population. He stated that there are many causes for retardation, including fetal alcohol syndrome/fetal alcohol effect. He claimed that most mildly mentally retarded individuals can disguise their condition. He stated that they act exactly like everyone else but usually hold only simple jobs. He averred that clinical judgment was important in doing a retardation evaluation and the expert must decide what tests to administer. He acknowledged that considering malingering was important, but asserted that it was not always necessary to test for malingering.

In this case, Dr. Weinstein spent 10 to 12 hours on October 6 and 7, 2004, interviewing and testing Defendant. He also reviewed documents and spoke on the phone with individuals in Cuba. Dr. Weinstein stated that his interactions with Defendant occurred in a private room, which was quiet and which he considered adequate to perform his evaluation. He believed that Defendant was put forth sufficient effort in the testing and did not appear to be malingering.

In testing Defendant, Dr. Weinstein administered the Mexican version of the WAIS-III, the Spanish version of the Woodcock test, the Comprehensive Test of Nonverbal Intelligence (CTONI), the Test of Memory Malingering (TOMM), the Rey 15-Item test, the Rey Complex Figure Test, the Wisconsin Card Sort Test and the Color Trails test. He stated that the WAIS-III, Woodcock test and the CTONI all measured intellectual functioning a nd that the WAIS produced the most relevant evidence. He stated that the score obtained on an IQ test was derived by comparing the score obtained on an administration of a test to the scores obtained when the test was given to a stratified group so that the reported scaled scores compared to the population through a process

called norming. However, he opined that in scoring tests in a forensic case one used the norming data to score a test based on the specific question that the evaluator was asked to address. Because he believed that the question in this case was whether Defendant's IQ was low in Florida, he used the norms for the version of the WAIS used in the United States even though he did not administer that version of the WAIS. In fact, he stated that any testing of Defendant had to be based on a comparison to the United States population because the testing should not include an accommodation for culture. He also believed that the norms associated with the Mexican version of the WAIS he g ave had errors because the standard error of measure in the scores was broad.

In his report, Dr. Weinstein stated that the WAIS produced a verbal IQ of 63, a performance IQ of 59 and a full Scale IQ of 58. When he testified, Dr. Weinstein described these result as a verbal IQ of 59 to 69, a performance IQ of 55 to 68 and a full scale IQ of 55 to 65. He also stated that the Woodcock produced an IQ of 45 to 51 and the CTONI produced an IQ of 44. He averred that these scores were very consistent.

Dr. Weinstein claimed that it was not possible to test for malingering; only effort. He stated that the TOMM and the Rey 15-item tests he gave measured effort and showed that Defendant was putting forth effort. He did not consider administering the MMPI because it tested personality and psychopathology. He also believed that an individual needed to have an eighth grade reading level to complete the MMPI and that the MMPI was inappropriate for retarded individuals. He also felt that using the Validity Indicator Profile (VIP) was inappropriate because its verbal section was only available in English and because it produced false positive results in retarded people.

Dr. Weinstein felt that the best way to tell if the IQ scores were valid was to look at other IQ test scores. He based this opinion on his belief that it would be difficult for a mentally retarded individual to malinger over multiple IQ scores. He stated that he had reviewed reports from Dr. Latterner, Dr. Keyes and Dr. Suarez regarding the result of their intelligence testing and that the IQ tests results he had seen for Defendant were consistent; however, he admitted that it would not be difficult to obtain very low scores consistently because there was a minimum score awarded even if the person did not answer any of the questions.

Dr. Weinstein defined adaptive functioning as the ability to function in society and stated that it was best assessed using a standardized test. He evaluated Defendant's functioning retrospectively to determine Defendant's level of adaptive functioning before the age of 18. He claimed he did so because he wanted to evaluate how Defendant functioned in "the real world" before he was incarcerated. He acknowledged that all information was important but stated that he did not believe prison personnel would have sufficient information both about an inmate and about how the inmate would operate in society.

Here, it was not possible for him to speak to Defendant's caretakers from his childhood. As a result, he based his opinions on records, reports of interviews with individuals who knew Defendant in Cuba and Florida, interviews with a few people in Florida and phone interviews with Defendant's family and a teacher from Cuba. He did not attempt to use a standardized adaptive functioning test because none of the individuals he spoke with knew enough about Defendant's functioning. He also admitted that having a person rely on their memory to answer questions about a person's

functioning and using individuals whose identities he could not verify created concerns regarding the reliability of the data.

Yet, Dr. Weinstein claimed to have gleaned from his review and conversations that Defendant was delayed in reaching developmental milestones and that he did not do well with others or in school. He stated that Defendant joined the Merchant Marines in Cuba without informing his family and worked as an assistant to the engineer on the boat. He claimed that Defendant's work was limited to fetching tools for the engineer. He stated that Defendant jumped ship in Spain and ended up in a Cuban jail as a result. He averred that Defendant worked in construction in Florida before becoming involved in drug trafficking. Dr. Weinstein chose to ignore Defendant's behaviors during his commission of illegal activities in assessing his adaptive functioning because he considered it irrelevant. He also looked only at information suggesting Defendant had deficits in adaptive behavior and ignored evidence suggesting that Defendant had the ability to function adaptively. He believed that this was appropriate because diagnosing retardation only required evidence of deficits and because retarded people can have strengths in adaptive behavior.

Dr. Weinstein found that Defendant had deficits in adaptive behavior in the areas of functional academics and interpersonal skills. He stated that Defendant functioned at the sixth grade level academically, could only add and subtract, could not recite the alphabet and made spelling and grammar mistakes in his writing. However, he acknowledged that Defendant could read. He admitted that he did not perform achievement tests because Defendant did not want to be tested. He believed that these deficits were typical in individuals such as Defendant who lacked a formal education.

In determining whether the onset of Defendant's condition was before the age of 18, Dr. Weinstein believed that so long as he was able to identify intellectual disabilities and deficits in adaptive behavior existing at that time, it was unnecessary for there to be any objective tests results from that time. Utilizing this method of analysis, Dr. Weinstein opined that Defendant was mentally retarded.

Dr. Weinstein stated that he had reviewed Dr. Suarez's evaluation and believed that Dr. Suarez's IQ test results were consistent with his. However, he believed that Dr. Suarez was wrong to find malingering because he did not believe it was appropriate to use the MMPI and VIP. Dr. Weinstein also rescored Dr. Suarez's administration of the Dot Counting test based on the timer on a videotape of Dr. Suarez's evaluation and his believe that all fractions of second should be rounded down. He believed that this showed that Defendant's score on that test was below the cut off score indicating malingering.

On cross, Dr. Weinstein admitted that he only spends ten hours a year involved in the clinical practice of psychology and devotes the rest of his time appearing as a witness or lecturing to organizations. His forensic practice was limited to death penalty cases at this point. In his career, Dr. Weinstein had only appeared as a state expert regarding competency but had appeared as a defense expert regarding sanity, sex offender status and issues related to *Miranda* waivers and had only lectured to defense organizations.

Dr. Weinstein believed it was proper to score a test using norms that were not associated with that test. He admitted that he ignored the instructions in test manuals if he disagreed with them. He acknowledged he had done so in this case by scoring his WAIS using the norms for the United States version of the WAIS even though he had

given the Mexican version of the test. He stated that he did not like the norms for the Mexican version because they had a large standard error of measure. However, he used the Mexican version of the test because he found it to be well translated. He chose not to use the Spanish version of the WAIS. He acknowledged that he chose what tests to give, how to score them and whom to interview.

Dr. Weinstein admitted that since the conversations were conducted over the phone he had no way of knowing if the people he spoke with about Defendant's functioning were really who they purported to be. He ignored the possibility that he was receiving incorrect or biased information because it was "not the question."

Dr. Weinstein stated that he believed Defendant only completed the second grade but had never seen any school records. He stated that Defendant's family claimed Defendant did badly in school and was sent to a special program where he continued to do badly. However, he acknowledged they also stated that Defendant did not like school. He did not believe the family knew that stating that Defendant did badly in school might benefit Defendant. He was aware that there was a general concern that family and friends might not be honest in reporting information in a death penalty case but believed that the dishonesty could be to either help or hurt the inmate.

Dr. Weinstein acknowledged that Defendant was capable of lying. He was aware that Defendant had made false statements about his mental condition to Dr. Suarez during his evaluation. However, he insisted that Defendant's false statement to him concerning hallucinations was merely a flippant response. Dr. Weinstein did not recall if the prison medical records showed that Defendant had consistently denied having hallucinations. He stated that he had not paid attention to the mental health records because he

considered them irrelevant. He also admitted that he had ignored Defendant's claim that he had been in a haze during his testing because he did not think anything in Defendant's mental state interfered with Defendant's ability to take the tests. When confronted with records showing that Defendant had malingered on psychological tests in 1984, Dr. Weinstein claimed not to recall having seen the records and asserted that it was merely the opinion of the evaluator.

Dr. Weinstein stated that he believed that Defendant's employment history was limited to being a roofer and painter. He acknowledged there were no social security records showing what his employment was. He claimed that he was unaware that Defendant had run a wrecker service and been a taxi driver, restaurant manager and electrician. He claimed not to recall having read the prison records or the deposition of Diogenes Navarro, reporting these portions of Defendant's employment history. He also claimed not to recall documents showing Defendant went to the seventh grade in school. However, he admitted that Defendant would have been capable of operating a tow truck and conducting financial transactions associated with doing so. He claimed that this was because these skills would be among Defendant's adaptive strengths.

Dr. Weinstein acknowledged that a person had to be disabled in daily life to be considered retarded. He admitted that if any alleged deficit did not affect a person's life, it did not support a diagnosis of retardation. He stated that the purpose of identifying deficits in adaptive functioning was to determine what supports a person needed to live a normal life. He acknowledged that a person's background had to be considered in determining whether a person truly had a deficit. He stated that a mildly mentally retarded person would function at the level of an eight to eleven year old child.

Dr. Weinstein admitted that he conducted a clinical interview with Defendant. However, he did not include any information about the interview in his report. He acknowledged that the information Defendant provided to him was not consistent with the information Defendant provided to Dr. Suarez.

Dr. Weinstein also admitted that Defendant had not behaved in a naïve and gullible manner during his criminal activities. However, he described Defendant's drug trafficking activities as being a well paid mule and denied knowing that Defendant had actually negotiated the drug deals. When confronted with records showing that Defendant was actually doing so, Dr. Weinstein first stated that he included this activity in his definition of a drug mule and then claimed that he really meant to say Defendant was an intermediary. He also claimed not to have been aware that the crimes Defendant was convicted of committed in this case did not occur on same day. When confronted with the fact that Defendant had been the leader of the gang that committed these crimes on different days, Dr. Weinstein claimed that Defendant might be a leader in some situations and gullible in others.

Dr. Weinstein knew that Defendant had travelled internationally while in the Merchant Marines and had engaged in other travels, but he did not recall the other travel to include international travel. He knew that Defendant had purchased a house, several luxury cars and expensive jewelry; however, Dr. Weinstein did not believe that this was inconsistent with his opinion. In fact, he insisted that an eleven year old child could make his own travel arrangement, engage in business dealings and purchase houses and cars.

Dr. Weinstein knew that Defendant had written letters and had learned English as a second language. However, he insisted that Defendant really did not know the alphabet. He claimed that Defendant was incapable of looking at a figure and drawing it. When confronted with the artwork Defendant sent to Ms. Dela, Dr. Weinstein claimed that Defendant was unable to put figures in perspective.

Dr. Weinstein stated that he would consider a person to have a deficit in adaptive behavior unless the person could live in society without breaking the law. However, he acknowledged that being a criminal did not equate with being retarded.

Dr. Weinstein admitted that a person's strengths in adaptive behavior could overcome their weakness such that a diagnosis of retardation was not proper. However, he claimed that the person might needs supports to function if "things changed." He claimed that retarded people can learn but just did so more slowly. He claimed not to be aware that Defendant had completed an adult education course. He admitted that Defendant evidenced good hygiene and was able to seek medical attention when he needed it. He acknowledged that Defendant had more adaptive strengths than weaknesses.

Dr. Weinstein stated that it was possible to outgrow retardation with supports. In fact, he admitted that Defendant functioned better in prison. He claimed that this was because the prison provided the supports Defendant needed, which were a structured environment and tutoring.

Dr. Marc Tasse

Dr. Tasse testified as a defense expert. He is a psychologist and associate professor at the University of Florida. His main area of specialization is developmental

disability with a focus on mental retardation and autism. Dr. Tasse, stated that he was not a forensic psychologist, had not evaluated Defendant and was only testifying concerning the definition of mental retardation He has been working in this field since 1985. He stated that mental retardation is a lifelong condition if there is no early intervention. With early intervention, especially where children are concerned, negative effects and risk factors can be prevented. However, when assessing adults with no history of mental retardation, Dr. Tasse's opinion is that a retrospective analysis is necessary to determine whether it started before the age of 18.

Dr. Tasse stated that in assessing adaptive behavior, multiple sources of information are used. Among those sources are standard tests that help quantify if there are deficits, interviewing the person who is being evaluated, speaking to people that know the person well and any record such as school or employment that would provide information about the person's adaptive behaviors or skills that the person performs. In assessing the Defendant, it must be done retrospectively. He explained that it is impossible to do a current adaptive functioning assessment of the Defendant because he has been living in prison. Therefore, there is a narrow range of behavior that he is able to perform. The standardized tests that exist today although designed for purposes of mental retardation, they are not normed or developed in prison settings. Dr. Tasse stated that the main focus in conducting an evaluation of an incarcerated person such as the Defendant is on the people who observed the Defendant function in the community and the people who lived with him.

He stated that adaptive behavior should also be stable over time. He did not believe it was appropriate to administer an adaptive functioning test to a prison guard because an inmate has a limited ability to display adaptive behaviors and the guards would not have seen the person's full range of functioning. He also would not consider any criminal behavior in assessing adaptive behavior because it is maladaptive. He also believed it was important that the behaviors be exhibited independently. He noted that the person had to exhibit significant deficits to be considered retarded but also opined that the person would have strengths. As such, he stated that a retarded person could be employed but averred that the employment would be limited to low skilled jobs that paid little.

On cross, Dr. Tasse stated that less than ten percent of his work involved clinical practice. The only mental retardation evaluations he personally conducts were forensic evaluations. He had done these evaluations in 12 cases and had always been hired by the defense. He did not administered malingering tests when he conducted his evaluations. He had no opinion regarding whether Defendant was retarded. He stated that he determined an inmate's adaptive functioning based on a retrospective analysis of how the inmate functioned before he was incarcerated. However, he was aware that prison guards had been used during the evaluations in the *Atkins* case itself. He noted that it was possible to glean information about adaptive functioning from prison records but stated that the weight to be given to such information should be considered. He admitted that he had given the ABAS to inmates during his retardation evaluations. He also acknowledged that family members might underreport a defendant's level of adaptive functioning to benefit the inmate.

Dr. Thomas Oakland

Dr. Thomas Oakland, a board certified clinical neuropsychologist and professor in educational psychology at the University of Florida, testified that he was involved in the development of the ABAS. There were three forms for the ABAS: one designed to be completed by the subject's parents if the subject was less than 21 years old; one designed to be completed by the subject's caretakers if the subject was less than 21 years old; and one designed to be administered in the evaluation of adults. He stated that the ABAS consisted of 225 questions, which were designed to look at the ten adaptive functioning areas listed in the Diagnostic and Statistical Manual (DSM) and the three domains of adaptive functioning recognized by the American Association of Intellectual and Developmental Disabilities (AAIDD). He stated that it generally takes 20 to 30 minutes to complete an ABAS. He stated that the individuals who are asked to complete an ABAS should have frequent and recent contact with the subject of the evaluation and should have the opportunity to observe the subject's behavior for extended periods of time. He believed that the best respondents were family members, friends and work supervisors.

Dr. Oakland explained that the ABAS can be used to assess adaptive behavior because it is consistent with both the American Association on Intellectual and Developmental Disabilities (AAIDD) and the Diagnostic and Statistical Manual of Mental Disorders (DSM). He explained that there are ten adaptive skills [1] from the DSM that can be embedded in one of the three domains from AAIDD which are conceptual,

[1] The ten adaptive skills include: communication, community use, functional academic, home living, health and safety, leisure, self care, self direction, social skills, work skills.

social and practice skills. With the ABAS, one can assess the ten adaptive skills and assess the three domains and arrive at a general adaptive composite.

He explained that in order to assess a person on death row with the ABAS, the respondents must have direct knowledge of the display of adaptive behavior with this person, prior to the age of 18 and frequent contact. It is also important that the contact be recent. The form should be explained by the evaluator. There are boxes numbered from zero to three. There is also a guess box which is used on each question if the behavior has never been observed. It is also very important that the respondents be able to communicate the information they remember in order to be able to complete the ABAS. Dr. Oakland was critical of using the ABAS with prison guards because they don't meet these standards. The ABAS was not normed for a prison population because it is too restrictive for a person to function independently.

Dr. Oakland disagrees that the terms "concurrent" and "present" mean "now." Dr. Oakland does not consider criminal activity in assessing the Defendant's adaptive behavior. He also stated that the ABAS cannot be used to make a determination on the Cuban population. The form could be used, but the results would not help. The total scale to arrive at the number for adaptive behavior would not be used because he would have to know the Cuban culture in order to know the reference of item.

Dr. Oakland reviewed the ABAS forms and depositions of the prison personnel in this case and believed that they showed that the prison personnel did not have sufficient information about Defendant to produce reliable results.

On cross examination, Dr. Oakland acknowledged that his understanding of the diagnostic criteria for retardation was that both the intellectual functioning and adaptive

functioning components referred exclusively to functioning before the age of 18. He admitted that the ability to plan and to engage in goal directed behavior was inconsistent with retardation. He acknowledged that many of the items on the ABAS could be answered by someone from a country such as Cuba.

Wendy Hearndan Hall

Mrs. Wendy Hall obtained her degree from Lake City Nursing College and worked at Union Correctional Institution as a licensed practical nurse where she was assigned to death row. She had worked there for two and a half years. She knows the Defendant from working there. She said that she saw him approximately ten minutes every week. She had conversations with the Defendant that lasted approximately 15 minutes. She testified that in July of 2008, she was asked to assess the Defendant's adaptive behavior. She filled out an ABAS form regarding the Defendant.

In assessing the Defendant, Mrs. Hall's knowledge was minimal. When rating the Defendant on communication skills, Ms. Hall stated that she had observed him using sentences with a noun and a verb when conversing with him. She heard the Defendant conversing with other inmates while in the waiting line to get his medications. Mrs. Hall attempted to relate the questions to the Defendant's surroundings.

Mrs. Hall testified that the Defendant was able to articulate any discomforts and pains in order to receive his medication. She stated that she had observed the Defendant

clean himself and that his hygiene was immaculate. Mrs. Hall was of the opinion that the Defendant could do everything that was listed on the ABAS. She has had experience with people who are mentally retarded in a mental health clinic. Ms. Hall testified that she had taken courses and seminars on how to assess adaptive functioning and that in all the time she has had contact with the Defendant she had not seen any problems in his adaptive behavior. She concluded that she had no reason to believe that the Defendant could not live independently

Brenda Harris

Brenda Harris testified that she had been employed at Union Correctional Institution for eleven years and was presently a registered nurse. She had known Defendant for four to five years.

Ms. Harris was asked to complete ABAS assessment of Defendant and another inmate. She sat in her office with Dr. Suarez present to complete the forms, which he had explained to her. Ms. Harris stated that she understood she was to check the guess box if she had not seen Defendant do the activity described but believed he was capable of doing so. She stated that she did not believe that the form was appropriate for incarcerated individuals.

On cross examination, Ms. Harris stated that Defendant could express his problems in a clear manner and that his appearance was always clean. Defendant had never exhibited any behavior that indicated that he was retarded and Ms. Harris believed that Defendant was capable of doing all of the behaviors listed on the ABAS.

Off. Marcus Sweat III

Off. Marcus Sweat III testified that he was presently a guard at Lawty Correctional Institution but had previously been assigned to Union Correctional Institution (UCI). At UCI, his duties included delivering legal mail, delivering grievance forms to inmates, picking up inmate grievances, signing inmates up to go to the recreation yard and taking the inmates to the yard. He stated that inmates were able to choose whether to go the yard or not. He does not engage in social chats with inmates.

Off. Sweat was asked to complete an ABAS evaluation of Defendant, which he did in the conference room on death row. He read the instructions and understood them before completing the form but did not speak to Dr. Suarez after he did so. When questioned about items on the form, Off. Sweat stated that he had seen Defendant conversing with other inmates and doing so based on information from the newspaper and television. He had observed Defendant receiving clothes from the laundry and putting them away, ordering food from the canteen and eating it, washing his cup after meals, making his bed, cleaning his cell and attending to his personal hygiene. He possessed the least amount of information of all the witnesses and therefore no weight is given his testimony.

Sgt. Robby Boone

Sergeant Boone testified that he was employed at UCI as the housing supervisor on death row. He testified that he had minimal interaction with the Defendant. He said he was asked to assess the Defendant by filling out an ABAS form. Sgt. Boone testified that he felt the questions that were asked applied to someone who may have employed the Defendant or may have given him a job, but not for him because he had no way of

observing him in the settings the questions pertained to. Sgt. Boone said that although he did not mind taking the test, it did not make sense for the situation.

Sgt. Boone testified that the Defendant had no problems communicating what he wanted. For example, he knew to ask to play volleyball, for telephone request forms and the canteen. Furthermore, Sgt. Boone testified that he had seen him interact with other inmates and tell others about his favorite activities at the recreational yard. Sgt. Boone had observed the Defendant fill out mail and pack his own clothing. He also observed the Defendant using the canteen; he read through the receipt to see what he bought, how much money was spent and how much was left.

Sgt. Boone relayed that he has family members who have problems with intellectual disabilities that range from mild to moderate mental retardation. It is the opinion of Sgt. Boone that the Defendant does not exhibit deficits that are indicative of an adaptive functioning disability.

Sgt. Henry Walker

Sgt. Henry Walker testified that he was a guard at UCI and had been employed there since 2003. He knew Defendant, and his longest interaction with Defendant was about five minutes. He completed ABAS evaluations for both Defendant and another inmate at one time. He did so in a conference room on death row and was provided with instructions by Dr. Suarez before doing so. In completing the forms, Sgt. Walker did not make a distinction between behaviors he had seen Defendant perform as described and behaviors that he believed Defendant could perform based on having observed similar

behaviors. He noted that Defendant had once asked him to return a canteen form so that he could make changes to it. He stated that Defendant was not polite in his interactions with him.

On cross, Sgt. Walker testified that he holds a bachelor's degree in philosophy and sociology. He has experience with the retarded because members of his family are retarded. He observed that Defendant was always neat and clean, that he exercises, goes to the yard, orders from the canteen properly and sorts his laundry and puts it away properly. He stated that Defendant behaves without deficits and that he believed Defendant was capable of performing all of the behaviors listed in the ABAS. He testified that he did not confuse Defendant and the other inmate in completing the ABAS forms.

Sgt. Steve Ruggs

Sgt. Steve Ruggs testified that he had been a guard at UCI for approximately twelve years and that for the past four years, his main duty was escorting inmates to their appointments. In this capacity, he sees between 15 and 30 inmates a day and deals with them for less than 30 minutes each. While the inmates are waiting for their appointments, they are placed in holding cell. He had chatted with Defendant while he was in the holding cell but had not engaged in a long conversation with him. Sgt. Ruggs estimated that his longest conversation with Defendant lasted between three and five minutes. He stated that he had seen Defendant going to the law library and stated that Defendant will go multiple times in a single week when a filing deadline approaches. He completed ABAS forms on both Defendant and another inmate and took a break between the forms. Prior to completing the forms, Dr. Suarez instructed him on how to do so,

including explaining that he was supposed to check the guess box if he did not see the activity. However, he did not discuss the forms with Dr. Suarez after he finished.

Sgt. Ruggs' testimony was of no evidentiary value.

The defense rested their case.

States's Rebuttal Case

Andres Falcon

In rebuttal, the State presented the testimony of Andres Falcon, who was presently a patrol sergeant with the Florida International University Police. Previously, he had been a homicide detective with the Miami-Dade Police Department. In 1987, Defendant called that department and said he had information about a case. Sgt. Falcon met with Defendant, who stated that he had been involved in the planning of a crime with a friend from Cuba. Defendant claimed that he had decided not to participate in the crime because the plan was too dangerous. According to Sgt. Falcon, Defendant stated that he was providing the information in the hopes of gaining leniency, particularly regarding the immigration consequences of his prior actions. Sgt. Falcon was able to corroborate the information that Defendant provided to him. He believed that Defendant demonstrated a concern for his own well being and stated that Defendant did not seem slow, meek or gullible. He had no difficulty communicating with Defendant and found him to be goal directed. Sgt. Falcon added that Defendant was cunning.

Dr. Enrique Suarez

Dr. Enrique Suarez, a psychologist, testified that the criteria for retardation were subaverage general intellectual functioning, concurrent deficits in adaptive functioning and onset of those two criteria before the age of 18 and that all three criteria must be satisfied for the diagnosis to be made. He stated that the second element referred to the present time period and that adaptive functioning concerned the ability to do daily living tasks. To be considered a deficit in adaptive functioning, the impairment had to interfere with the person's daily life.

In conducting his evaluation in this case, Dr. Suarez reviewed the reports of other experts, the depositions of witnesses, all of Defendant's incarceration records, testimony from prior proceedings, police reports and Defendant's statements. He also conducted an interview with Defendant and considered it proper to have done so because it provided information about Defendant's ability to communicate and other areas of adaptive functioning. He stated that Defendant was generally guarded during the interview but was able to provide crisp responses and relate his background.

During the interview, Defendant stated that he had joined the Cuba Merchant Marines at age 13 by using a false birth certificate and that he assisted the engineer and fixed the engines on the boat. While with the Merchant Marines, Defendant traveled internationally, including trips to Africa, Mexico, Spain and Canada. Dr. Suarez opined that the ability to join and function in the Merchant Marines at such a young age was inconsistent with retardation.

Defendant acknowledged having a wife and son in this country but denied having seen his son since his imprisonment. Dr. Suarez was aware that Defendant had seen his

son from reviewing Defendant's girlfriend's deposition. Defendant also claimed to be illiterate and barely able to read and write and stated that he generally lied about his education level, which he claimed to be no more than second grade level. However, Dr. Suarez saw correspondence written by Defendant and was aware that Defendant was able to communicate in writing fairly well even though he tended to write phonetically. Dr. Suarez also noted that Defendant was able to write in English. He stated that Defendant's ability to communicate and do so in a foreign language was also inconsistent with retardation. He also stated that Defendant's statement to the police also indicated that Defendant was able to communicate.

Dr. Suarez noted that he had seen no actually school records but had seen other records indicating education levels varying between the sixth and eleventh grades. He had also seen a notation in the federal prison records that Defendant had completed an adult education program.

Dr. Suarez stated that the federal prison records also reflected that Defendant had been assigned as a furniture refinisher, landscaper, unit orderly and food service worker while incarcerated. All of Defendant's work reviews were good, and Defendant had received very good ratings regarding the quality and quantity of his work and his responsiveness to supervision for his work as a furniture refinisher and had his pay raised. He noted that Defendant's work with furniture corroborated the statement in the prison records that Defendant had worked as a carpenter and that they showed that Defendant was able to follow directions. He also noted that the prison records also reflected employment as an electrician, restaurant manager and taxi driver.

During the interview, Defendant claimed that his employment history in this country included painting houses, doing roofing work and being a tow truck driver. Dr. Suarez stated that being a tow truck driver was relevant to adaptive behavior because such work involved being able to get a license, being able to operate the necessary equipment, being able to navigate and being able to negotiate the financial arrangements involved in towing a car. Being a taxi driver also involved the abilities to navigate, communicate, follow directions and engage in functional mathematics to make change and pay tolls. He opined that these abilities were inconsistent with retardation and noted that the work as a tow truck driver had been corroborated by the depositions of Mr. Navarro and Defendant's wife.

Dr. Suarez stated that Defendant admitted that he had a driver's license but claimed he obtained it by having a friend take the test for him. He was aware that Defendant had informed Dr. Weinstein that he had taken the test himself but been coached in how to take the test. A copy of Defendant's driver's license was admitted to corroborate that Defendant did have a license.

In addition to his legal employment, Defendant also acknowledged that he had been involved in cocaine trafficking. Defendant stated that he would be given drugs to deliver in places such as Georgia, Washington, D.C., Virginia and Michigan and would drive himself during these trips. While Defendant described himself as a mule, Dr. Suarez was aware that the records regarding Defendant's federal conviction showed that he actually made telephone contact with the buyers and negotiated the deals as well as delivering the drugs. Dr. Suarez opined that these activities were also inconsistent with retardation.

Dr. Suarez also noted that the prison records contained an estimate of Defendant's intelligence as average and a notation that he had not been truthful during psychological testing. He noted that being truthful during testing was important because the tests were based on the assumption that the test taker was being truthful and putting forth good effort.

Dr. Suarez noted that the prison records reflected that Defendant played pool and baseball in his leisure time and that he used false identities. He stated that the ability to use a false identity reflected abstract reasoning and problem solving abilities, which were inconsistent with retardation.

Dr. Suarez stated that he inquired about delusions and hallucinations because such conditions can affect the validity of the tests he planned to give. Defendant told him that he experienced hallucinations continually and had done so since he had fallen off a horse as a child. He stated that the description of the hallucinations made them implausible and that the medical records belied Defendant's claims. Further, Defendant did not exhibit any symptoms of experiencing hallucinations during the evaluation. Dr. Suarez noted that the medical records instead showed that Defendant had been diagnosed with depression, obsessive-compulsive disorder and antisocial personality disorder. They also contained no indications of any behaviors consistent with retardation.

Defendant told Dr. Suarez that he had never received disability benefits and that he had always supported himself and his family. This was corroborated by Defendant's wife's deposition. Dr. Suarez was also aware that Defendant had been able to provide his family with housing, purchased a home for them and purchased several luxury cars for their use. The ability to engage in these activities, which was corroborated by deposition

testimony of witnesses, was inconsistent with retardation. Dr. Suarez noted that Defendant stated that he had registered the cars he purchased because he was aware of the legal responsibility to do so.

Dr. Suarez stated that the prison medical records Defendant had been very active in seeking medical care. He noted that Defendant had even recognized that his sodium and cholesterol levels had been high on lab reports and requested adjustments in his diet to control these levels. They also showed that Defendant had discussed copayments for his medical care.

Dr. Suarez stated that a determination of whether a person satisfied the first element of retardation was made by administering an intelligence test. He noted that the accuracy of the results of such a test was predicated on the assumption that the person was trying their best to complete the test. He stated that in forensic cases, that assumption was not generally applicable because there were incentives to doing badly.

In this case, Dr. Suarez administered the version of the WAIS normed in Spain. He selected this test because it was in Spanish and the cultural background of the population in Spain and Cuba were closer than the cultural background of the population of Mexico. He noted that culture and education level impacted the result of intelligence tests because they did not measure intelligence directly but by looking at what the person had learned. He stated that he scored the test in accordance with the norms for the test he used because doing so was required to get valid results.

Dr. Suarez noted that the publisher of the Mexican version of the WAIS had admitted the population sample they used to norm the test overrepresented people with a ninth grade or higher education level. As a result, the test tended to underestimate the IQ

level of individuals at the lower end of the scale. He stated that to compensate for this norming error, the publishers suggested using the Mexican norms to obtain the scaled subtest scores and then using the United States norms to calculate the final IQ score. He stated that the use of the Mexican norms in the first step was important because these were the norms that actually corresponded with the test given.

Defendant obtained a verbal IQ of 70, a performance IQ of 58 and a full scale IQ of 60 on Dr. Suarez's WAIS administration. He noted that Defendant's score on the verbal comprehension subtest was 9, which was essential average, but that his scores on four of the other subtests was in the borderline range and on one subtest was extremely low. He stated that he found this unusual, particularly given the high literacy rate in Spain.

Dr. Suarez stated that he also administered the TONI, which was a test of nonverbal intelligence because it reduced the effect of language barriers and correlated with a malingering test he planned to give. Defendant received a score of 63 because he only got three answers correct. Dr. Suarez noted that the score was inconsistent with the level of functioning that Defendant had exhibited during his life.

Dr. Suarez administered symptom validity tests because the IQ tests are based on the assumption the person is performing at their best and both the DSM and National Academy of Neuropsychology require validity testing in forensic evaluations. The tests he gave were the nonverbal portion of the VIP and the dot counting test. He stated that the VIP used the same test items as the TONI but gave only two options for answers and organized the items randomly instead of in order of increasing difficulty. Defendant's performance resulted in an invalid profile classified as irrelevant, which was consistent

with having answered the questions randomly. This profile was consistent with either an inability to understand or attend to the test questions, a lack of effort or a purposeful attempt to do badly.

Dr. Suarez stated that the dot counting test involved showing Defendant cards with dots on them and having Defendant tell him the number of dots as quickly as possible. The test was timed using a stopwatch accurate to hundredth of a second. Ideally, Dr. Suarez would have been able to start the watch as soon as he revealed the card but he was unable to do so because of the physical constraints of the testing environment. Dr. Suarez stated that the test manual required factions of seconds to be rounded up if they were above half a second and rounded down if they were below half a second. The score Defendant achieved indicated that he was not putting forth good effort.

Dr. Suarez also administered the MMPI-II, a test of psychopathology and personality. He stated that it was necessary to do so because a person's mental state affects his test performance. The test requires a fifth grade reading level. Dr. Suarez offered to allow Defendant to take the test by listening to a tape recording of the questions. However, Defendant decided, after looking at the test, to take the written version. Defendant's profile on the test was invalid because he over reported symptoms but his response pattern showed that he was not answering randomly.

Dr. Suarez stated that considering the result of the VIP, dot counting test and MMPI together showed that Defendant was malingering, which was consistent with the notation that Defendant had malingered during psychological testing in the federal prison records. As such, his IQ test results were probably inaccurate.

Dr. Suarez stated that the ability to obtain similar scores on multiple test administrations depended on the level of the scores. He explained that it was easier to get very low scores consistently because a person obtained a score between 45 and 48 even if they got every question wrong. Thus, scores in the range of 60 or 58 were easily achieved consistently.

Dr. Suarez stated that use of the Rey 15-Item test and the TOMM was appropriate when one suspected that a person was faking a memory deficit. However, Defendant did not feign problems with memory. He noted that he had reviewed the drawings Defendant made for Dr. Weinstein during his testing and the drawings Defendant had placed in his letters to Ms. Dela. He stated that the difference in the drawings suggested that Defendant had not put forth sufficient effort in drawing the pictures for Dr. Weinstein. Further, Dr. Suarez stated that a person with a low education level would be expected to do poorly on a standardize test such as an IQ test because they do not have a sufficient exposure to test taking.

Given all of this information, Dr. Suarez opined that it was not possible to opine whether Defendant met the first prong of retardation. This was true because Defendant's malingering rendered the IQ test results invalid.

Regarding the adaptive functioning element of retardation, Dr. Suarez decided to administer a standardized test of adaptive functioning to people who were around Defendant continually at the present time. He did so because the standard of practice recommended that such tests be given and he wanted to have as much information as possible. He noted that individuals do not cease to be required to engage in daily living tasks simply because they are incarcerated. He noted that the literature on the ABAS test

he used not only did not prohibit its use in a prison but also acknowledged that it could be used there.

The prison authorities selected the individuals to whom Dr. Suarez administered the ABAS based on his request for personnel who were familiar with Defendant. When he gave the test, he spoke to the personnel provided to ensure they were familiar with Defendant and to provide instructions on completing the test. In doing so, Dr. Suarez informed the personnel that he was aware that they would not have had the opportunity to see Defendant do some of the behaviors described in the test because of the prison environment but that they should attempt to complete these items by relating them to similar behaviors they had seen Defendant perform. He stated that the consensus was that Defendant did not have deficits in adaptive behavior. Dr. Suarez was aware these individuals had subsequently indicated that they should have indicated that they had guessed on more of the items than they indicated but would not change their rating of Defendant's abilities. However, this did not change Dr. Suarez's opinion that the test results did not indicate that Defendant had deficits in adaptive behavior. He noted that his opinion was based not only on the test results but on all of the information about Defendant, which consistently indicated that Defendant did not have adaptive functioning deficits.

Dr. Suarez noted that Defendant had demonstrated the ability to form social relationships with friends and girlfriends and had maintained relationships with people he knew from Cuba. He stated that the fact that Defendant chose to associate with criminals did not indicate that he was unable to form social relationships. He also noted that Defendant's ability to engage in planned criminal behavior, to lead a group of criminals,

to arrange and post bond and to engage in financial transactions that included financing arrangements all were significant and inconsistent with retardation. He also noted that Defendant had provided Ms. Dela with instructions on what paperwork was necessary for her to bring his son to visit him, items he wanted her to purchase at store and phone calls he wanted her to facilitate and had asked her forgiveness for selling a watch she had bought for him to pay a debt.

Dr. Suarez agreed that it was possible for retarded people to have strengths in adaptive behavior. However, he stated that when a retarded person has engaged in a number of activities that are inconsistent with retardation, the sheer number of activities engaged in shows that the person is not retarded. He noted that deficits in adaptive behaviors were evidence by the need for support in engaging in daily tasks, such as having someone bring a person's meal to them or manage their finances for them. He noted that there was no evidence that Defendant had ever required such supports, and that there was ample evidence that Defendant had been able to learn job skills and a second language. Given all of the information, Dr. Suarez opined that Defendant did not satisfy the second element of retardation.

Regarding the third element, Dr. Suarez noted that there were no school or medical records to corroborate that Defendant had either significantly general intellectual functioning or adaptive functioning deficits as a child. Instead, all of the information about this element was based on statements from family members. Moreover, this information was inconsistent with the abilities Defendant had demonstrated during his life in this country. Given all of these circumstances, Dr. Suarez opined that Defendant was not retarded.

On cross, Dr. Suarez stated that he was not board certified. He had not worked exclusively with the retarded in any setting but had conducted retardation evaluations for rehabilitative purposes, guardianship purposes and in criminal cases. He had testified regarding retardation on seven occasions, always for the State. He had been asked to consult with a defense attorney on retardation and agreed to do so but had yet to do the work. He estimated that 70 percent of his practice was forensic but the majority of that work was not for the State. Instead, he had worked with defense attorneys and accepted court appointments as well as working for the State.

Dr. Suarez stated that he would only have attempted to make a retrospective analysis of Defendant if he had found that Defendant satisfied the other two elements of retardation. He relied on the records and report used by Dr. Weinstein and other collateral data in reaching his conclusion. Having this information, he did not feel a need to speak to Defendant's family or teachers. He noted that adaptive functioning should be relatively stable unless there was some injury. As such, he considered all of the information about Defendant's pre and post incarceration functioning in reaching his opinion about the second element.

Dr. Suarez acknowledged that he interviewed Defendant and had no indication that Defendant necessarily provided accurate information. However, he explained that the importance of the interview concerned Defendant ability to communicate and that he was able to corroborate information Defendant gave him through other sources. He admitted that people in the field of retardation suggest that retarded people provide unreliable information. However, he noted that this opinion was based on one study that was done on a very small sample that was not randomly chosen and failed to consider the

motivation of its respondents. He stated that he felt no need to administer an achievement test to Defendant to evaluate his claim of illiteracy because there was a wealth of documentation showing the claim was untrue. He also admitted that Defendant lied about hallucinations. He acknowledged that he ignored information from Defendant that he could not corroborate or knew to be false. He admitted that he did not know the details of the adult education program Defendant successfully completed or the jobs Defendant did in prison or out of prison. He acknowledged that there were consequences to the failure to obey instructions both in prison and out of prison.

He stated that he used the Spanish WAIS because the culture of Cuba was more similar to the culture in Spain than Mexico. He noted that culture was extremely important in measuring both intelligence and adaptive functioning such that he would not attempt to correlate someone from a different culture to the population of the United States. He admitted that the TONI he administered was not one of the tests listed in the administrative code for use in these proceedings. However, he used it merely to correlate to his WAIS results and his VIP administration. He stated that the VIP was only contraindicated if the person was confirmed to be retarded.

Dr. Suarez acknowledged that his full scale IQ for Defendant was almost 15 point above the lowest possible score on the test. However, he explained that a person had to get only a couple of questions correct to achieve that score. He understood Defendant's wife's statement that Defendant was intelligent but lacked culture to be an indication that Defendant's manners were poor. He admitted that he did not know how long Defendant took to complete the drawing he made for Ms. Dela or whether he traced the drawings.

He stated that it did not matter if Defendant had traced the drawing because they still showed a great deal of coordination even if they were traced.

Dr. Suarez admitted that prison guards were not ideal respondents for the ABAS. He stated that he did tell the respondents to mark guess if they did not see the behavior. He acknowledged that the manual stated that the person giving the test should speak to the person taking the test to determine why they were guessing. Here, Dr. Suarez felt no need to do so because he was already aware of why the test takers were guessing.

Dr. Suarez admitted that Defendant may have had help writing the letters and documents he had seen. However, he asserted that the information in the letter had to have come from Defendant, given their contents. He acknowledged that the prison documentation contained estimates of Defendant's intelligence but not IQ test scores.

On redirect, Dr. Suarez estimated that between 1998 and 2006, more than 900 of his forensic cases were court appointments, more than 600 were cases where he was hired by the defense and 198 cases were cases where he was hired by the State. He averred that he had previously found a defendant to be retarded. He stated that Defendant's MMPI scores were extremely high for malingering. He believed that Defendant's statements about hallucinations were indicative of Defendant's attempt to display himself as extremely disturbed. He noted that Defendant had told Ms. Wiley that he was told to fake retardation.

Dr. Enrique Suarez

Dr. Suarez testified as the State's expert. He is a licensed psychology in the state of Florida. He specializes in forensic and neuropsychology. He stated that Florida's definition of mental retardation was consistent with the definition of the DSM-IV. He indicated that the requirements that adaptive behavior be determined concurrent means in the present which is consistent with the same time frame as the IQ testing. He stated that one has to look at the whole spectrum of trauma of an individual's ability to deal with all the demands that have been placed on him at the present time frame in whatever community he may be found.

Dr. Suarez conducted an evaluation of the Defendant. He described the Defendant's responses as crisp with no problems in understanding what the questions were. In addition, he reviewed numerous reports and tests done by the defense's experts. He also reviewed State and Federal prison records, prior testimony and police reports. Dr. Suarez said he looked at the Defendant's adult life before prison because it allows him to correlate information. Dr. Suarez did not find evidence that the Defendant was mentally retarded prior to his incarceration.

Dr. Suarez Administered the Wexler Adult Intelligence Scale (WAIS) normed in Spain to test the Defendant's IQ. The use of the Mexican norms was not appropriate because of its large indigenous population. Dr. Suarez felt that this test was more in line with the culture and background of the Defendant. This was significant according to Dr. Suarez because the cultural correlation and education have an impact on the outcome of IQ tests. The results obtained from the WAIS were a full scale of 60. The Defendant's verbal score was 70 and non-verbal was 58. Dr. Suarez also tested verbal and literacy

sub-skills. He stated that one that stuck out was the Defendant's verbal skill score which was 9; and that would list him in the 37th percentile. Dr. Suarez explained that this score predicts the other areas of intelligence in the verbal realm. Dr. Suarez stated that his concern was why the Defendant had a high range of verbal and literacy and the rest of the scores were borderline?

Dr. Suarez also administered the C-TONI because it is a non-verbal test. It tests abstract reasoning and it is not contaminated by education or dependent on language. The test requires the solving of visual puzzles. The score on the C-TONI was 63. He found that the fact that the Defendant was able to get three of the easiest answers correct was completely incongruent because getting three right would place a young individual, six years old in a low range or borderline range and based on what Dr. Suarez knows about the Defendant's life and the writings he has done, it does not make sense. As a result, Dr. Suarez's administered the two symptom validity tests in order to test malingering. Four factors are noted. The first factor is where there is a payoff. Dr. Suarez explained that one of the payoffs is to evaluate or afford or avoid prosecution. The second one is if the claims of incapacity or impairment do not fit with what is known. The third is lack of cooperation with treatment and evaluation. The fourth is the presence of antisocial personality. Dr. Suarez stated that the Defendant has all four.

The first symptom validity test that Dr. Suarez administered was the Validity Indicator Profile (VIP). This test is made up of items taken from the C-TONI test. Dr. Suarez explained that there was no correlation between his responses; they were all random. The second symptom validity test administered by Dr. Suarez was the Dot Counting Test (DCT). Dr. Suarez explained that the individual is timed on how long he

takes to count groups of dots on a card. Dr. Suarez used a stopwatch accurate to one hundredths of a second. The results were that the Defendant was above the cutoff in terms of the overall E-score that takes into consideration both of the numbers that the Defendant made as well as the amount of time that he took on producing a response. Dr. Suarez explained that this score labels the Defendant as a suspect effort, meaning that he did not give the amount of effort that one sees when someone is in the norm process of that test when there is no reason to not do a good effort.

Dr. Suarez stated that the Defendant seemed to be withholding his best effort with the MMPI-II. Dr. Suarez explained that the MMPI-II is a test of personality and psychological functioning. It requires a great amount of reading. He administered this test in Spanish in order to play it for the Defendant from a tape version. Two hypotheses were offered by the computer scoring system as to why the results were invalid. The first, hypothesis is that the Defendant may be confused. This however is not the case according to Dr. Suarez. The second is the hypothesis of psychological deterioration. This would mean that the Defendant has extreme psychological problems. However, this is also not the case according to Dr. Suarez.

Dr. Suarez used the ABAS with several persons who worked at the Department of Corrections. Even though he recognized that there were problems using the ABAS, Dr. Suarez said that he used it qualitatively. He instructed the assessors to estimate the Defendant's ability to do behaviors based on comparable behavior they had seen. The ABAS forms provided Dr. Suarez with information from the people who saw the Defendant functioning on a daily basis. Dr. Suarez instructed them to use their intelligence and knowledge of the Defendant's behavior to make an informed decision on

whether he can do a particular task that they do not have the ability to see because the Defendant is on death row. All of the assessors agreed that the Defendant does not have any deficits. Based on the results of the ABAS and other collateral factors that were considered, it is Dr. Suarez's conclusion that the Defendant is not mentally retarded.

The following are the collateral factors that were considered by Dr. Suarez:

One of the factors pertained to the Defendant's international travel. Dr. Suarez testified that this factor is significant because the Defendant began travelling when he was very young and was able to withstand many types of burdens that would befall someone young and mentally retarded. The Defendant was also able to travel to the United States on his own, make hotel arrangements and plan for food and clothing. The Defendant was able to work as a taxi driver and roofer. In addition, the Defendant was able to form a social relationship. He had both friends and girlfriends. He maintained relationships from Cuba even when he came to the United States. Dr. Suarez explained that this shows that the Defendant had social relationship skills.

Dr. Suarez reviewed the Defendant's statement to the police. It shows that the Defendant had the ability to post bond. This reflects awareness and understanding of what a bond is and how it works. It also shows that the Defendant had the ability to buy and sell luxury cars through a dealer. The Defendant was able to finance a car. Dr. Suarez testified that this reflects awareness of taking on a responsibility and following through. This is not a characteristic of a person with mental retardation.

Another factor was that the Defendant was able to think about the consequences of his actions. For example, in the police report, the Defendant mentioned specifically that he wanted to avoid arrest and that he felt that the enterprise that was discussed in that

meeting was too dangerous. He was afraid of being arrested. The Defendant also attempted to communicate with the assistant state attorney to try to work out a deal in his case.

Dr. Suarez reviewed other doctor's reports and the testimony of the death row administrator. He reviewed letters written in English and drawings the Defendant made to his girlfriend. Dr. Suarez compared these to the drawings the Defendant made and the English he wrote for Dr. Weinstein. Dr. Suarez said that he would expect the Defendant to do much better. Dr. Suarez testified that he did not believe the Defendant had given his best effort in the intelligence tests. He explained that given the testing and given the validity of the testing and the malingering, he was able to say with a reasonable degree of medical certainty that he did not know what the Defendant's exact IQ was; however, Dr. Suarez testified that even though this was the case, the Defendant had achieved at least the floor of the intelligence level; meaning that the Defendant cannot show that he is mentally retarded simply by having an IQ that is less than 70. The prongs of current deficits in adaptive behavior and onset before the age of 18 must also be shown. There are no records that reveal that the Defendant had adaptive behavior deficits before he was 18 and therefore, it is Dr. Suarez's opinion that he is not mentally retarded.

The Defendant, according to Dr. Suarez, has the ability to accomplish tasks that are at the same level as someone who is not mentally retarded. He explained that even though mentally retarded people are able to work, marry and drive cars, when you put it all together in one individual, it becomes less likely that the person is mentally retarded. In addition, the Defendant's criminal history does not indicate that he is mentally

retarded. Dr. Suarez said that criminal behavior, depending on what it is, can be very sophisticated and reflected in adaptive functioning.

Based on the totality of the circumstances, Dr. Suarez's opinion is that the Defendant is not mentally retarded.

LEGAL STANDARD

Mental Retardation is defined in §921.137(1), Fla. Stat. and Fla. R. Crim. P. 3.203.

> [T]he term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term " adaptive b ehavior," f or t he p urpose o f t his de finition, m eans t he effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

This definition is consistent with that found in *Atkins v. Virginia,* 536 U.S. 304, 309. (2002).

The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed.1992).

The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed.2000). "Mild" mental retardation

is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.,* at 42-43.

The three elements which Defendant must prove by ***clear and convincing*** evidence are: 1) substantial subaverage intellectual functioning, 2) existing concurrent deficits in adaptive behavior and 3) manifestation before a ge 18. §921.137, Fla. Stat. Florida law defines the first element of mental retardation as an IQ under 70. *Zack v. State*, 911 So. 2d 1201 (Fla. 2005); *Cherry v. State*, 959 So. 2d 702 (Fla. 2007). The Florida Supreme Court has found that the definition of concurrent contained in the second element means occurring at the same time as the IQ score determination and that a retrospective diagnosis is insufficient to prove this element. *Phillips v. State*, 984 So. 2d 503, 511 (Fla. 2008); *Jones v. State*, 966 So. 2d 319, 325 -327 (Fla. 2007). The third element requires that the first two elements must have first become evident before the age of 18. *Jones, Supra.* The lack of proof on any one of these three elements would result in a defendant not being found to suffer from mental retardation. *Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009).

FINDINGS OF FACT

The court finds that the results obtained from Dr.Weinstein on the Mexican WAIS III are not reliable. Dr. Weinstein conceded that IQ tests must be given to a representative example of the population with whom it is intended to be used. IQ norming, according to Dr. Suarez, takes into account a person's culture and level of

education. He stated that if the person is not a member of the population that was used to formulate the norm, the results are meaningless. The full scale score of 60 obtained on the WAIS is invalid according to Dr. Suarez, who administered the test, because of the Defendant's malingering. There are no valid test results to establish that the Defendant's IQ is less than 70.

Even if this Court accepts the IQ test results of Dr. Weinstein and it is assumed that the Defendant's IQ is less than 70, there is absolutely no evidence that Defendant exhibits deficits in his adaptive behavior and that they manifested before the age of 18. Dr. Weinstein testified that the Defendant leaving the Merchant Marines because he fell in love is an example of poor judgment. Millions of men who are not mentally retarded have left the military for a job, a family and even the love, or perceived love, of a woman. The fact that he may have acted on impulse and not reasoning does not render him mentally retarded.

The Defendant has failed to carry his burden of proving the three elements necessary to establish that he is mentally retardation: significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.

CONCLUSION

The court finds that the scores obtained by Dr. Weinstein are not credible and that there is no valid IQ score below 70. There is no clear and convincing evidence that the Defendant suffers from mental retardation and he has failed to prove by any standard that he suffers from any deficits in adaptive functioning and an onset before the age of 18.

WHEREFORE IT IS ORDERED AND ADJUDGED that the Defendant's Motion to Vacate Sentence of Death and for Determination of Mental Retardation as a Bar to Execution is **DENIED.**

DONE AND ORDERED at Miami-Dade County, Florida, this 31st day of December, 2010.

Orlando D. Prescott

Judge Orlando Prescott
Circuit Court Judge

APPENDIX E

Supreme Court of Florida

WEDNESDAY, FEBRUARY 6, 2013

CASE NO.: SC11-202
Lower Tribunal No(s).: 88-18180-B

JUAN DAVID RODRIGUEZ vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Juan David Rodriguez, a prisoner under sentence of death, appeals the trial court's order denying his Motion to Vacate Sentence of Death and for Determination of Mental Retardation as a Bar to Execution. After an evidentiary hearing, the trial court concluded that Rodriguez is not mentally retarded under Florida Rule of Criminal Procedure 3.203. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. We conclude that the trial court's finding that Rodriguez is not mentally retarded is supported by competent, substantial evidence and affirm the denial of relief.

To establish mental retardation as a bar to the imposition of the death penalty, Rodriguez must prove each of the following three elements: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. See Fla. R. Crim. P. 3.203(b); see also § 921.137(1), (4), Fla. Stat. (2009); Franqui v. State, 59 So. 3d 82 (Fla. 2011). "'[S]ignificantly subaverage general intellectual functioning' correlates with an IQ of 70 or below." Jones v. State, 966 So. 2d 319, 329 (Fla. 2007). Here, there is no evidence that Rodriguez has ever had a reliable IQ score of 70 or below. Furthermore, there is no evidence that Rodriguez exhibits adaptive behavior deficits. Thus, Rodriguez has failed to prove that he is mentally retarded under Florida law. Accordingly, we affirm the trial court's order which concluded that Rodriguez is not mentally retarded.