No. _____

OCTOBER TERM 2020

IN THE SUPREME COURT OF THE UNITED STATES

JUAN DAVID RODRIGUEZ,

Petitioner,

v.

MARK INCH, Secretary,
Florida Department of Corrections

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CAPITAL CASE

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This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

Juan David RODRIGUEZ,
Petitioner-Appellant
v.
SECRETARY, FLORIDA DEPARTMENT
OF CORRECTIONS, Respondent-Appellee

No. 16-11258
|
(June 22, 2020)

Synopsis

Background: After the Florida Supreme Court affirmed his convictions, including first-degree murder conviction, and death sentence on direct appeal, 609 So.2d 493, affirmed denial of his post-conviction relief motion, 919 So.2d 1252, and affirmed denial of his motion for determination of intellectual disability, 2013 WL 462069, petitioner filed federal habeas petition, claiming that he had received ineffective assistance from penalty-phase counsel and that he was ineligible for death penalty due to intellectual disability. The United States District Court for the Southern District of Florida, Joan A. Lenard, Senior District Judge, denied petition. Petitioner appealed.

Holdings: The Court of Appeals, William H. Pryor, Chief Judge, held that:

penalty-phase counsel had not rendered ineffective assistance;

the Florida Supreme Court's determination that petitioner did not have intellectual disability did not involve unreasonable application of clearly established federal law; and

same determination was not based on unreasonable determination of facts.

Affirmed.

Jill A. Pryor, Circuit Judge, concurred in result only.

Attorneys and Law Firms

***947** Rachel Lawrence Day, Scott Gavin, Capital Collateral Regional Counsel - South, Fort Lauderdale, FL, for Petitioner-Appellant

Carla Suzanne Bechard, Attorney General's Office, Criminal Division, Tampa, FL, Melissa Roca Shaw, Attorney General's Office, Miami, FL, for Respondent-Appellee

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:13-cv-24567-JAL

Before WILLIAM PRYOR, Chief Judge, WILSON, and JILL PRYOR, Circuit Judges.

Opinion

WILLIAM PRYOR, Chief Judge:

Juan David Rodriguez, a Florida prisoner under a death sentence for murder in the course of a robbery, appeals the denial of his petition for a writ of habeas corpus, 28 U.S.C. § 2254. After unsuccessfully pursuing state postconviction relief, Rodriguez filed a federal petition, which the district court denied. Rodriguez argues that his penalty-phase counsel was ineffective because he failed to investigate and present mitigating evidence of his mental health. He also argues that he is ineligible for the death penalty because he is intellectually disabled. Because Rodriguez cannot establish that he suffered prejudice from his trial counsel's performance, *see Strickland v. Washington*, 466 U.S. 668, 691–92, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and the Supreme Court of Florida reasonably determined that he is eligible for the death penalty, *see Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), we affirm.

I. BACKGROUND

We divide the background of this appeal in three parts. First, we discuss the facts of Rodriguez's crime, trial, and direct appeal. Second, we describe his state postconviction proceedings. Third, we review Rodriguez's federal habeas proceedings.

A. Rodriguez's Crime, Trial, and Appeal.

In May 1988, shortly after he was released on bail in an unrelated case, 32-year-old Rodriguez led several teenage coconspirators on a two-day crime spree to obtain money to pay off a debt he owed to Ramon Fernandez, one of the coconspirators. *Rodriguez v. State* (*Rodriguez I*), 609 So. 2d 493, 495–97 (Fla. 1992). The spree began when Rodriguez led Fernandez and Carlos Sponsa to the parking lot of a local shopping center and told them to remain in front while he went to the back. *Id.* at 495–96. Behind the shopping center, Rodriguez accosted one of the shop owners, Abelardo Saladrigas. *Id.* at 496. Rodriguez demanded that Saladrigas hand over his Rolex watch and briefcase before shooting Saladrigas four times while he pleaded, "Don't do this to me." *Id.* (internal quotation marks omitted). Rodriguez fired the first shot in Saladrigas's leg and the second in his stomach. *Id.* After being shot twice, Saladrigas gave up the briefcase, which contained a revolver and some cash, but he did not surrender the Rolex. *Id.* So Rodriguez shot Saladrigas a third time, and after Saladrigas ran behind a car, Rodriguez shot him once more and grabbed the Rolex. *Id.* Rodriguez then fled the scene. *Id.* Saladrigas died after being transported to the hospital. *Id.*

The next day, Rodriguez, Fernandez, Sponsa, and others attempted a home-invasion robbery. ***948** *Rodriguez v. State* (*Rodriguez II*), 919 So. 2d 1252, 1259 (Fla. 2005). Although Rodrigues anticipated that the residents would be home and planned to tie them up, he did not anticipate that the residents would be able to defend themselves. *Rodriguez I*, 609 So. 2d at 497. The robbery was foiled when one resident began firing his gun at the invaders. *Id.* As the men fled, Fernandez dropped the revolver that belonged to Saladrigas. *Id.*

Police arrested Fernandez three weeks later. *Id.* He confessed to his involvement in the crimes and told the police that Rodriguez had shot Saladrigas. *Id.* The authorities then arrested Rodriguez and charged him with 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. *Id.* at 495, 497. While he was awaiting trial, Rodriguez offered a fellow inmate $3,000 in exchange for perjured testimony that Fernandez had confessed to the murder. *Id.* at 496–97. The fellow inmate instead testified at trial to the bribe. *Id.* The jury found Rodriguez guilty of all charges. *Id.* at 497.

After the jury returned its verdict, the trial court discussed scheduling the penalty phase with counsel. Rodriguez's trial counsel, Scott T. Kalisch, advised the trial court, "I am not in any way prepared to go forward in a death penalty phase in this case. I need at least two weeks to even understand what it is about." So the trial court deferred the penalty phase for two weeks. It later granted another two-week continuance on Kalisch's request. Kalisch explained he was busy working on another case, "[a]ll of [his] efforts [had been] addressed to demonstrating that [Rodriguez] was not the assailant in this case," and he "was unprepared for the outcome insofar as preparing for the death phase in advance of the verdict."

Kalisch also moved for the appointment "of an independent psychiatric examiner, namely Dr. Leonard Haber ... to assist [the defense] in the death phase of this case." The trial court granted the motion, and Dr. Haber met with Rodriguez twice.

Dr. Haber conducted a psychological interview, a mental status examination, and the Bender Gestalt Visual Motor Test. In conducting his evaluation, Dr. Haber elicited information from Rodriguez about his personal and medical history, but he received no documents from Kalisch about Rodriguez's background. Dr. Haber instead reviewed information that he received from the State about Rodriguez's prior convictions and the latest crimes. Dr. Haber described his examination and conclusions in a letter to the trial court and during a deposition that the State conducted and Kalisch attended.

Dr. Haber reviewed the information relevant to statutory mitigation and concluded that Rodriguez did not satisfy any of the criteria. *See* Fla. Stat. § 921.141(6) (1990). In considering Rodriguez's mental capacity, Dr. Haber found that Rodriguez demonstrated an "appreciation of the charges placed against him," "thought processes that were productive and goal oriented," and that he a "fund of general information [that] was adequate." Although Rodriguez reported becoming unconscious when he fell from a horse as a child, two suicide attempts because of unrequited love, and short term admissions to psychiatric hospitals in connection with the suicide attempts and nerves, Dr. Haber concluded this history did not establish "a significant ... history of mental disorder or a[n] extreme mental disorder." And Dr. Haber concluded that he had no significant history of drug or alcohol use to support mental impairment because Rodriguez denied abusing drugs or alcohol.

***949** Dr. Haber also explored Rodriguez's family background. He stated that Rodriguez was born in "San German, Cuba" and "only attended school up until the 1st grade in Cuba" and then "had to work." Dr. Haber testified that Rodriguez said his parents divorced when he was two years old and described his four siblings. Rodriguez said he "came to this country in 1979 via the Mariel Boatlift" and spoke about his work and criminal history. Dr. Haber testified that he "asked if he was a happy or unhappy person and what kind of childhood he had," and Rodriguez said "he's an unhappy person and has always been unhappy" except that he "loved his wife" and when "he thinks about his child."

Although Rodriguez's test results and personal history did not support finding any statutory mitigation, Dr. Haber explained that Rodriguez's results from the Bender Gestalt Visual Motor Test raised the possibility that Rodriguez suffered "an organic brain syndrome." He opined that "[t]he presence or absence of such a disorder is best made following a complete neurological and neuropsychological test examination." In any event, Dr. Haber concluded that an "organic brain dysfunction would likely not provide the basis, in and of itself, for statutory mitigation." *See* Fla. Stat. § 921.141(6) (1990). Dr. Haber explained that the "absence of a significant history of drug abuse symptoms, major mental disorder, treatment for the same or other evidence of significant impairment of mental or emotional functioning at the time of the alleged offense appears to preclude the applicability of an organic brain syndrome to statutory mitigation."

On the morning the penalty phase was to start, Kalisch moved to prohibit the State from questioning defense witnesses about Rodriguez's criminal record. Kalisch stated that he wanted to call Dr. Haber as a witness to testify about Rodriguez's background and childhood and the possibility that Rodriguez may be suffering from an organic brain disorder. But Kalisch was concerned that putting Dr. Haber on the stand would open the door for the State to question him about Rodriguez's previous felony convictions, which Kalisch believed would be detrimental given the "very, very difficult jury." The trial court denied Kalisch's motion.

The penalty phase started with the testimony of the State's only witness, paramedic Dante Perfumo. Perfumo testified that while he and other first responders transported Saladrigas to the hospital, the victim "was in extreme pain." Perfumo recalled that Saladrigas "asked ... all the way into the hospital if he was going to make it," "stayed conscious all the way to the hospital," and "did not have an easy time." The State rested.

For the defense, Kalisch decided not to call Dr. Haber and instead called only Marlene Castellano, Rodriguez's wife. Castellano testified that she and Rodriguez had been married for nearly 11 years and had one child, who was almost two. When asked whether Rodriguez had been a supportive husband, she answered "yes." She testified that Rodriguez was a "very good father" who was "tender and loving" and had never been violent, but she conceded on cross-examination that Rodriguez had been in jail continuously since his son was two months old. Although Castellano said she never knew her husband to be violent, she admitted on cross-examination that she knew nothing about the facts of his crime, Rodriguez's past before their marriage, or his friends or associates. When asked about her husband's jealous and controlling nature, Castellano gave only a partial and indirect denial, saying he permitted her to leave the house to spend time with members of her family. She also ***950** told the jury she believed Rodriguez to be innocent.

The jury unanimously recommended a death sentence. *See* Fla. Stat. § 921.141(2) (1990). After the jury recommendation but before the trial court imposed sentence, Dr. Noble David, a neurologist and a professor in the Department of Neurology at the University of Miami School of Medicine, conducted a neurological evaluation of Rodriguez. Dr. David's examination revealed nothing "to suggest brain damage," but he ordered an electroencephalogram of Rodriguez "before concluding that his neurological examination is entirely within normal limits." The electroencephalogram revealed "no abnormalities." The trial court received a copy of Dr. David's report.

Based on all the information presented, the trial court determined the aggravating and mitigating factors and imposed a death sentence. It found three statutory aggravating factors: Rodriguez had a prior violent felony conviction; the murder was committed during a robbery and for financial gain; and the murder was especially heinous, atrocious, or cruel. *See* Fla. Stat. § 921.141(5) (1990). Although the court identified no statutory mitigating factors, *see id.* § 921.141(6), it found that Rodriguez's good marriage and family life constituted one nonstatutory mitigating factor. After weighing these factors, the trial court adopted the jury's recommendation and imposed a death sentence. *See* Fla. Stat. § 921.141(2)–(3) (1990).

On direct appeal, the Supreme Court of Florida affirmed Rodriguez's "convictions and sentences, including the sentence of death." *Rodriguez I*, 609 So. 2d at 501. The Supreme Court of the United States denied his petition for certiorari. *Rodriguez v. Florida*, 510 U.S. 830, 114 S.Ct. 99, 126 L.Ed.2d 66 (1993) (Mem.).

B. Rodriguez's Motion for Postconviction Relief.

In 1994, Rodriguez filed a motion for postconviction relief, Fla. R. Crim. P. 3.850, which he thrice amended. *Rodriguez II*, 919 So.2d at 1260. His motion raised thirty claims for relief and requested an evidentiary hearing on each claim.

The postconviction trial court conducted a hearing pursuant to *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993), to determine which, if any, of Rodriguez's claims warranted an evidentiary hearing. During the hearing, the State preemptively agreed, out of "an abundance of caution," to a hearing on all issues raised under Claim VIII, including the "mental litigation" and "family history" claims. And in response to a request for clarification from Rodriguez as to whether it agreed to a hearing only on the mental-health claim, the State explained that Rodriguez could "litigate" "[w]hatever [he] put in [his] claim." So the postconviction trial court granted Rodriguez an evidentiary hearing on his claim that his counsel rendered ineffective assistance at the penalty phase of his trial by failing to investigate and present mitigating evidence. *See Rodriguez II*, 919 So. 2d at 1260–61 & n.3. Although the postconviction trial court initially limited the hearing to evidence about "mental retardation in the penalty phase only," it later clarified that it would permit Rodriguez to introduce evidence that his counsel failed to investigate and present evidence about his background, including his childhood in Cuba. The postconviction trial court also granted a hearing on Rodriguez's claim that his counsel failed both to obtain an adequate mental health evaluation and to provide necessary background information to the mental health consultants.

Before the evidentiary hearing, Rodriguez's counsel submitted a list of 30 possible witnesses from Cuba and discussed the ***951** testimony of these witnesses at two preliminary hearings. During those hearings, the parties and the postconviction trial court also discussed the best method of obtaining the Cuban witnesses' testimonies. And the postconviction trial court granted extensions to allow Rodriguez to obtain their testimonies. Despite every opportunity to do so, Rodriguez offered none of this evidence about his childhood at the hearing. Instead, he called only his trial counsel, Kalisch, and a psychologist, Dr. Ruth Latterner.

Kalisch testified about his investigation and use of mental-health mitigation evidence at the penalty phase of Rodriguez's trial. He testified that he had arranged for Dr. Haber, the mental-health expert, to evaluate Rodriguez. But he decided not to call Dr. Haber because he "had nothing from Dr. Haber" to establish either "mental retardation" or "any statutory mitigators" and wanted to avoid having the State cross-examine Dr. Haber about Rodriguez's criminal history. Kalisch also testified that Rodriguez did not cooperate with him to develop mitigation evidence. In Kalisch's words, "[i]t was difficult to talk to [Rodriguez] about the case" because Rodriguez acted as if the case "ha[d] nothing to do with [him]."

In her testimony, Dr. Latterner described the results of the intelligence and neuropsychological tests that she administered to Rodriguez. Based on the results, she diagnosed Rodriguez with "mild mental retardation" and "characteristics of ... brain damage." She testified that she followed the diagnostic guidelines in the ninth revision of the International Classification of Diseases, or ICD-9, instead of those in the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders, or DSM-IV. Dr. Latterner explained that the ICD-9 and the DSM-IV had different definitions of intellectual disability. She elaborated that "the only requirement" for establishing intellectual disability in the ICD-9 was an IQ score below 70, but the DSM-IV also required "concurrent difficulties or impairment in present adaptive functioning" and "onset before 18 years of age." Dr. Latterner also relied on Rodriguez's test results to find two statutory mitigating circumstances: that Rodriguez had a substantially impaired capacity to conform his conduct to the requirements of the law and that he was under extreme emotional disturbance when he committed the crime. *See* Fla. Stat. § 921.141(6)(b), (f) (1990).

Some of Dr. Latterner's testimony on direct examination undermined the credibility or mitigation value of her opinion. For example, she testified that when she met with Rodriguez for a clinical interview, his "social skills ... seemed to be functioning at a higher cognitive level" than his low scores would suggest. She testified that brain damage does not necessarily correlate with impairment; indeed, even having "a huge structural lesion" with "no neuropsychological impairment" would be "not that unusual." When she acknowledged that the diagnostic guidelines for intellectual

disability in the DSM-IV required concurrent difficulties or impairment in present adaptive functioning in addition to a low intelligence quotient, she explained that, without reference to the included explanation, she had "difficulty understanding what [adaptive functioning] mean[t] in [her] language." And she testified that she found it "very difficult" to relate the findings of her evaluation of Rodriguez to the "legal definition[s]" of the statutory mitigating circumstances.

On cross-examination, Dr. Latterner admitted that her diagnosis of brain damage was based on "soft science," not "hard science," because she had not looked at a brain scan of Rodriguez. When the State ***952** challenged her about her preference for the ICD-9 over the DSM-IV, she "agree[d]" that to determine whether someone is "truly mentally retarded, it would be important to look and see how they conducted themselves in everyday life," even though her diagnosis of Rodriguez was based on "testing" and not on evidence "from his family" or others of his functioning "in his everyday life." She also admitted that her understanding of the statutory mitigating circumstances was based not on Rodriguez's emotions at the time of the crime but on her estimate of his permanent functional capacity. Indeed, she admitted that she never asked Rodriguez about his crime, "how he felt that day," or "whether he had some problem controlling himself that day." And she agreed that Rodriguez knew it was wrong to kill and rob.

During Dr. Latterner's testimony, Rodriguez asked if she "had an opportunity to review [any] background" material before offering an opinion. She said she had reviewed "several boxes of papers," most of which "were not helpful." Rodriguez then requested these "background" materials be marked without further description. But the postconviction trial court wanted to know what this background material contained, so it asked for more information. Rodriguez replied again that "they are background materials"—"composite exhibits"—which included "some investigative reports from [some] people interviewed in Cuba, concerning Mr. Rodriguez's background, family members, teacher, etc."

Dr. Latterner made clear that these background materials were irrelevant to her diagnosis because, consistent with her adherence to the ICD-9, she believed that "mental retardation is diagnosed by an IQ test." She testified that she was not "happy about reviewing them" and that "[m]ost of them were not helpful." Although she testified that some of the background materials provided evidence that "through [Rodriguez's] childhood he was regarded by his teacher and various family members and people in the community as retarded," she emphasized that this evidence would support a diagnosis of intellectual disability only under the diagnostic framework of the DSM-IV, which, she made a point of stating, "I don't use."

Despite his expert's indifference to the background materials, Rodriguez offered these "composite exhibits" into evidence "as background materials that a mental health professional would reasonably rely on in rendering a diagnosis." He added that "any and all of these documents would be admissible in a penalty phase in Florida, because hearsay is admissible in a penalty phase." The State responded that it did not object to any of the background materials "coming in for what [Dr. Latterner] relied on." But it insisted that it "would object" to admitting "the actual substance" of the materials "for the truth of the matter asserted." The postconviction trial court then ruled that "[w]ith [the State's] limited objection, I will admit [the background materials] in that way." After Rodriguez asked it to repeat its ruling, the postconviction trial court confirmed that it "admitted them with [the State's] limited objection"—that is, as Rodriguez's counsel conceded at oral argument, background materials for Dr. Latterner's evaluation and not for their substance. *See* Oral Argument at 34:43–53 (Aug. 24, 2017) (agreeing that this evidence was only "presented as something for an expert to look at").

The State presented testimony from two experts, Dr. Haber and Lisa Wiley, a psychological specialist at the prison where Rodriguez was incarcerated. Both testified that in their opinion Rodriguez is not intellectually disabled. But Dr. Haber acknowledged ***953** that Rodriguez's intelligence was probably below average. He considered Rodriguez's facility with language, his employment history, his ability to maintain a bank account, his understanding of financial transactions, his schemes to use false names and birthdates, the details of crimes in which he participated, his leading role in the home invasion as described by the other participants, his attempt to procure perjured testimony, and his leadership role in prison.

Dr. Haber maintained that Rodriguez did not meet the criteria for any statutory mitigation. He testified that, in his opinion, Rodriguez had the ability to conform his conduct to the law and that there was no information to indicate that Rodriguez was under extreme emotional disturbance when he killed Saladrigas. He also acknowledged that he received nothing from Rodriguez's trial counsel in preparation for his evaluation. The postconviction trial court accepted

Rodriguez's request that Dr. Haber's original report and deposition, described previously, be admitted into evidence.

The postconviction trial court denied Rodriguez's petition. It discounted Dr. Latterner's testimony because "her diagnosis [was] incompatible with the facts of the crimes" and "[in]consistent with the DSM IV." And it found Dr. Haber's opinion that Rodriguez was not intellectually disabled to be "completely supported by the evidence." So in addition to finding Dr. Haber's evaluation adequate, it concluded that Kalisch was not ineffective for failing to investigate further or to present additional evidence of mental-health mitigation. It also concluded that Kalisch could not be faulted for not traveling to Cuba for two independent reasons: "First, the defendant would not talk to Mr. Kalisch about his family in Cuba, and [s]econd, ... Mr. Kalisch would not have been permitted entry to Cuba anyway."

Rodriguez appealed the denial of his motion to the Supreme Court of Florida. He argued that "the lower court erred in denying [him] a new penalty phase" because of his "trial counsel's failure to investigate and present mental health mitigation." The Supreme Court of Florida affirmed the denial of all postconviction relief. *Rodriguez II*, 919 So. 2d at 1288.

The Supreme Court of Florida rejected Rodriguez's argument that the postconviction trial court "erred in denying him a new penalty phase" based on the "mental health mitigation" presented at the evidentiary hearing. *Id.* at 1263. It held that "counsel did not render ineffective assistance to Rodriguez by failing to fully investigate mental health mitigation." *Id.* at 1264. It agreed with the postconviction trial court's finding that Rodriguez did not cooperate with Kalisch to develop mitigation evidence and "did not wish to involve his family," which supported Kalisch's decision not to travel to Cuba. *Id.* at 1263; *see also id.* ("Rodriguez's lack of cooperation undermines his allegations of ineffective assistance of counsel."). But the Supreme Court of Florida disagreed with the finding that Kalisch could not have legally traveled to Cuba by law. *Id.* at 1264.

The Supreme Court of Florida also reviewed Dr. Haber's clinical findings and held that Kalisch could not "be faulted for not pursuing further testing" after Dr. Haber's findings proved unhelpful and an electroencephalogram "revealed no evidence of brain damage." *Id.* at 1265. So it upheld Kalisch's decision not to call Dr. Haber as a penalty-phase witness "[i]n light of the fact that Dr. Haber's report did not substantiate the statutory mental health mitigators or mental retardation." *Id.* And it determined that trial counsel made a reasonable strategic decision not to ***954** call Dr. Haber as a witness at the penalty phase because the potential mitigating effect of his testimony did not clearly outweigh the harm of permitting the State to question him about Rodriguez's criminal history. *Id.* It then agreed with the postconviction trial court's assessment that Dr. Latterner's testimony, which contained weaknesses, was insufficient to establish an intellectual disability in the light of the countervailing evidence. *See id.* at 1265–66.

The Supreme Court of Florida also concluded that Rodriguez failed to establish prejudice. *Id.* at 1266–67. It explained that any useful background information that Kalisch would have uncovered if he had traveled to Cuba was "substantially the same background information" already known to Dr. Haber. *Id.* at 1266; *see also id.* at 1264. In other words, any additional background information would have added little to the presentation of mental-health-mitigation evidence. *Id.* at 1266–67. The Supreme Court of Florida affirmed the denial of Rodriguez's motion. *Id.* at 1288.

Rodriguez then filed a motion for a determination of intellectual disability under Florida Rule of Criminal Procedure 3.203 (2009), which required proof of an IQ score of 70 or below and concurrent adaptive behavioral deficits that onset before age 18. *See Rodriguez v. State* (*Rodriguez III*), 110 So. 3d 441 (Fla. 2013) (Table); *Jones v. State*, 966 So. 2d 319, 329 (Fla. 2007). The postconviction trial court held an evidentiary hearing on this issue. It considered testimony from a total of 16 witnesses. Rodriguez's star witness was Dr. Ricardo Weinstein, a psychologist who diagnosed Rodriguez with intellectual disability based on a battery of mental tests and his assessment of Rodriguez's adaptive behavior throughout his life. Another psychologist, Dr. Enrique Suarez, testified for the State and denied that Rodriguez was intellectually disabled. Dr. Suarez testified that Rodriguez's test scores were consistent with malingering and were questionable for methodological reasons, that Rodriguez's life activities were inconsistent with an intellectual disability, that he had no deficits in adaptive behavior, and that the evidence of manifestation before the age of 18 was thin.

The postconviction trial court denied Rodriguez's motion. It accepted Dr. Suarez's testimony and found that "no valid test results" established an IQ below 70. It also found that Rodriguez had failed to establish adaptive-behavior deficits and manifestation before the age of 18. The Supreme Court of Florida affirmed the denial of Rodriguez's Rule 3.203 motion

in 2013. *Rodriguez III*, 110 So. 3d at 441. It concluded that the trial court's ruling was "supported by competent, substantial evidence" and that no evidence supported a reliable IQ score of 70 or below or that Rodriguez exhibited adaptive-behavior deficits. *Id.*

C. Rodriguez's Federal Petition for a Writ of Habeas Corpus.

After he exhausted his state remedies, Rodriguez filed a petition for a writ of habeas corpus in the district court. He reasserted several claims he had made in his postconviction motion, including his claims of ineffective assistance of penalty-phase counsel and ineligibility for the death penalty. Although the district court concluded that the Supreme Court of Florida unreasonably applied *Strickland v. Washington*, 28 U.S.C. § 2254(d), the district court, on *de novo* review, determined that Kalisch's deficient performance did not prejudice the outcome of the penalty phase. The district court also concluded that the denial by the Supreme Court of Florida of the *Atkins* claim did not involve an unreasonable application of clearly established law or an unreasonable determination ***955** of the facts. As a result, the district court denied Rodriguez's petition.

The district court granted Rodriguez a certificate of appealability on his claim of ineffective assistance of penalty-phase counsel and on his claim that the Supreme Court of Florida rejected his *Atkins* claim based on an unreasonable determination of the facts. This Court then expanded the certificate of appealability to include his argument that the Supreme Court of Florida's rejection of Rodriguez's *Atkins* claim was an unreasonable application of clearly established law.

II. STANDARDS OF REVIEW

"When reviewing a district court's grant or denial of habeas relief, we review questions of law and mixed questions of law and fact *de novo*, and findings of fact for clear error." *Reaves v. Sec'y, Fla. Dep't of Corr.*, 717 F.3d 886, 899 (11th Cir. 2013) (internal quotation marks omitted). A claim of ineffective assistance of counsel "presents a mixed question of law and fact that we review *de novo*." *Pope v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 1254, 1261 (11th Cir. 2014).

The Antiterrorism and Effective Death Penalty Act governs our review of the decision of the Supreme Court of Florida. *See Wilson v. Sellers*, —— U.S. ——, 138 S. Ct. 1188, 1191–92, 200 L.Ed.2d 530 (2018). The Act bars federal courts from granting habeas relief on a claim that was adjudicated on the merits in state court unless the relevant decision "was contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d). The Act requires us to review the decision based on the record developed in the state court. *See* 28 U.S.C. § 2254(d); *Cullen v. Pinholster*, 563 U.S. 170, 180–81, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). Section 2254(d) sets a "highly deferential standard for evaluating state-court rulings," *Pinholster*, 563 U.S. at 181, 131 S.Ct. 1388 (internal quotation marks omitted), with all factual findings accorded "substantial deference," *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1259 (11th Cir. 2016) (internal quotation marks omitted).

"[C]learly established Federal law," 28 U.S.C. § 2254(d)(1), refers to "the governing legal principle or principles set forth by the Supreme Court at *the time the state court renders its decision*," *Lockyer v. Andrade*, 538 U.S. 63, 71–72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (emphasis added). "That statutory phrase refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). To obtain relief under this subsection, a petitioner must show a conflict with those holdings so clear that it is "beyond any possibility for fair-minded disagreement." *Harrington v. Richter*, 562 U.S. 86, 102–03, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

When evaluating whether a state court made "an unreasonable determination of the facts," 28 U.S.C. § 2254(d)(2), we presume its factual findings are correct unless rebutted "by clear and convincing evidence." *Conner v. GDCP Warden*, 784 F.3d 752, 761 (11th Cir. 2015) (citing 28 U.S.C. 2254(e)(1)). We must be careful not to "characterize ... state-court factual determinations as unreasonable merely because we would have reached a different conclusion in the first instance." *Brumfield v. Cain*, 576 U.S. 305, 135 S. Ct. 2269, 2277, 192 L.Ed.2d 356 (2015) (alteration adopted) (internal quotation marks omitted). "If 'reasonable minds reviewing the record might disagree about' the state court factfinding in question, 'on habeas ***956** review that does not suffice to supersede' the state court's factual determination." *Daniel*, 822 F.3d at 1259 (alteration adopted) (quoting *Rice v. Collins*, 546 U.S. 333, 341–42, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006)).

III. DISCUSSION

We divide our analysis in two parts. First, we conclude that, even under *de novo* review, Rodriguez failed to prove prejudice sufficient to establish his claim of ineffective assistance of penalty-phase counsel. Second, we conclude that the Supreme Court of Florida reasonably concluded that Rodriguez was eligible for the death penalty.

A. Rodriguez's Claim of Ineffective Assistance Fails Even on De Novo *Review.*

We affirm the denial of relief on Rodriguez's claim of ineffective assistance of counsel because there is no reasonable likelihood that the postconviction evidence would have led to a different sentence, even under *de novo* review. *See Berghuis v. Thompkins*, 560 U.S. 370, 390, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010) ("Courts can ... deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review." (citing 28 U.S.C. § 2254(a))). To prevail on his claim of ineffective assistance of penalty-phase counsel, Rodriguez "must establish both that trial counsel's performance was deficient, and that the deficiency prejudiced the defense during the penalty phase." *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1326 (11th Cir. 2013) (en banc) (internal quotation marks omitted). The Supreme Court has advised that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which ... will often be so, that course should be followed." *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052. We follow that course here.

To establish prejudice, Rodriguez must prove that "there is a reasonable probability that, but for [Kalisch's] unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112, 131 S.Ct. 770. Indeed, "the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.' " *Id.* (quoting *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052). In the context of a challenge to a sentence of death, the question is whether "there is a reasonable probability that [the judge and jury] would have returned with a different sentence." *Wiggins v. Smith*, 539 U.S. 510, 536, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). To answer that question, "we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation." *Porter v. McCollum*, 558 U.S. 30, 41, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (alteration adopted) (internal quotation marks omitted).

We review only the evidence actually admitted during the state trial or postconviction proceedings. *See Pinholster*, 563 U.S. at 180–81, 131 S.Ct. 1388; *Pope v. Sec'y for Dep't of Corr.*, 680 F.3d 1271, 1289 (11th Cir. 2012). The statements of his family and friends describing Rodriguez's upbringing were admitted only as evidence of what an expert might look at in evaluating mental health. *See* Oral Argument at 34:43–53 (agreeing the statements of the Cuban witnesses were only ***957** "presented as something for an expert to look at"). Because these statements were not admitted into evidence for their substance, they were not mitigation evidence in their own right. And Rodriguez is not entitled now to present this evidence even on *de novo* review, *see* 28 U.S.C. § 2254(e)(2), because he did not take advantage of the opportunity to present the evidence during the postconviction proceedings. *See Pope*, 680 F.3d at 1289 ("[W]here a petitioner was granted an evidentiary hearing or other means of presenting evidence to the state court on the particular claim, and the petitioner failed to take full advantage of that hearing, despite being on notice of and having access to the potential evidence and having sufficient time to prepare for the hearing, that petitioner did not exercise diligence in developing the factual foundation of his claim in state court.").

Nobody doubts that the evidence presented at trial was unfavorable to Rodriguez. He "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 I*, 609 So. 2d at 495. The State proved that Rodriguez robbed and murdered Saladrigas. *See id.* at 495–96. Indeed, Rodriguez shot Saladrigas four times after he begged for his life—twice before he surrendered his briefcase, once after he surrendered his briefcase, and once more after he ran away to hide. *See id.* at 496. And when Rodriguez rejoined his teenage coconspirators, he split the money in the briefcase but kept the Rolex watch for himself. *Id.*

The next day, Rodriguez, wearing the Rolex, joined Fernandez, Sponsa, Sergio Valdez, and two others in an

attempted armed home invasion. *Id.* at 497. When they arrived, he told Valdez that the two of them and a third co-conspirator were "to tie up the people in the house and search for money and drugs" after Fernandez and two other confederates forced their way in. *Id.* This scheme was foiled only because the homeowner opened fire on the would-be invaders. *Id.* And after Rodriguez was arrested for these crimes, he attempted to bribe another inmate to perjure himself by framing Fernandez for the murder. *Id.* at 496–97. The jury heard all of these facts. *Id.*

At the penalty phase, the jury heard from Perfumo, the paramedic who helped transport Saladrigas to the hospital. Perfumo testified that although he had "been in this business 10 years" and the shooting happened two years before he testified, Saladrigas's "case st[ood] out in [his] mind." He testified that Saladrigas seemed to be "in more agony than most" shock victims, "was conscious all the way to the trauma room," "did not have an easy time," and asked "more than three or four times" on the way to the hospital if he was going to survive. Perfumo told him he had "a good chance" even though he "personally did not think he was going to make it," and he "held [Saladrigas's] hand most of the way into the hospital." On cross-examination, he also testified that one of Saladrigas's wounds could "very well have been through the heart."

Based on this evidence, the jury recommended a sentence of death. *Rodriguez I*, 609 So. 2d at 497. At the time, Florida law required only 7 of the 12 jurors to agree to recommend a death sentence. *See Capehart v. State*, 583 So. 2d 1009, 1012, 1015 (Fla. 1991). But the recommendation for Rodriguez was unanimous. *Rodriguez I*, 609 So. 2d at 497.

The trial court adopted the jury's recommendation and sentenced Rodriguez to death. *Id.* It found three statutory aggravating factors: Rodriguez had a prior conviction ***958** for a violent felony; Rodriguez had murdered Saladrigas during a robbery and for financial gain; and the murder was especially heinous, atrocious, or cruel. *Id.*; *see also* Fla. Stat. § 921.141(5) (1990). The trial court found "great relevance in" Rodriguez's participation in the home invasion, explaining that it "show[s] the kind of person he is and the despicably bad and dangerous behavior he has exhibited." The trial court found only one nonstatutory mitigating factor, that "Rodriguez had a good marriage and family life." *Rodriguez I*, 609 So. 2d at 497. But it discounted this factor based on Castellano's admission that she knew nothing about her husband's friends or his criminal activities.

To the evidence "adduced at trial," we must add that "adduced in the habeas proceeding." *Porter*, 558 U.S. at 41, 130 S.Ct. 447 (internal quotation marks omitted). In the postconviction proceedings, Rodriguez called only one mitigation witness, Dr. Latterner. "[W]e have held more than once that the mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial." *Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997). That admonition could make it difficult for Rodriguez to establish prejudice from Dr. Latterner's testimony alone, even if its mitigation value had not been severely compromised on cross-examination. But it was.

The State's cross-examination left the mitigation value of Dr. Latterner's testimony in tatters. She admitted that she diagnosed Rodriguez with brain damage without ever looking at a brain scan of Rodriguez. She "agree[d]" that her testing-only approach to diagnosing intellectual disability conflicted not only with the DSM-IV but also with "the common sense standpoint in determining whether someone is truly impaired." Dr. Latterner admitted that she based her conclusions concerning the statutory mitigating circumstances on her estimate of Rodriguez's permanent mental disabilities instead of his emotions at the time of the crime. She admitted to not even questioning Rodriguez about the murder, his emotions on that day, or "whether he had some problem controlling himself that day." She acknowledged that Rodriguez knew, even at the time of the murder, that it was wrong to kill and rob. And even on direct examination, Dr. Latterner confessed to struggling with the "legal definition[s]" of the mitigating factors.

To be sure, Rodriguez introduced evidence other than Dr. Latterner's testimony, but that evidence was also weak. He introduced a two-page report and a summary of test results by another psychologist, Dr. Denis Keyes, whose findings mirrored Dr. Latterner's and were open to all of the same criticisms. Indeed, Rodriguez did not call Dr. Keyes as a witness at the evidentiary hearing because "[h]is evidence would have been substantially the same as Dr. Latterner's." Rodriguez also introduced Dr. Haber's report and deposition, in which Dr. Haber referred to Rodriguez's two suicide attempts; his childhood injury from falling off a horse; his first-grade formal-education level; his parents' divorce when he was two; his admission for treatment "for nerves" to a Cuban psychiatric hospital, which he voluntarily left on the

same day after deciding "he was really okay and didn't really belong there"; and his statement that he had "been unhappy all of his life." The mitigation value of Dr. Haber's report and deposition was slender in the light of Dr. Haber's opinion—expressed in the report, the deposition, and his postconviction testimony—that no statutory mitigators applied to Rodriguez. Indeed, in his deposition, Dr. Haber opined ***959** that Rodriguez's history did not raise any significant nonstatutory mitigators either.

The State also presented powerful rebuttal evidence at the postconviction hearing. Its most important witness was Dr. Haber himself. He testified that Rodriguez had been "oriented," "pleasant," "cooperative," and "responsive" when he interviewed him before the penalty phase of his trial. He testified that he had recommended testing for possible brain damage but that an electroencephalogram came back normal. He offered an expert opinion that Rodriguez was "clearly not mentally retarded." He testified that mental deficiency was inconsistent with multiple aspects of Rodriguez's life history, including his facility with language, his employment history, his understanding of financial transactions, his past criminal activities, his leading role in the home invasion, and his preeminent social position in jail.

Dr. Haber also contradicted Dr. Latterner's testimony. He explained that IQ tests alone, which is all that Dr. Latterner relied upon, could not diagnose intellectual disability. And he disagreed with Dr. Latterner's findings that any statutory mitigating circumstances existed. Dr. Haber explained that, in his opinion, Rodriguez had the ability to conform his conduct to the law and that there was no information to indicate that Rodriguez was under extreme emotional disturbance when he killed Saladrigas.

The State's other witnesses—Sergeant Mike Young, a death-row prison officer; George Morin, a homicide investigator for the City of Miami Police Department; and Wiley, the prison psychologist—also provided compelling testimony. Sergeant Young testified that he saw Rodriguez virtually every day, that his verbal abilities "seemed above average," and that he was a "leader" of the Hispanic inmates. Morin testified that when he interviewed Rodriguez in prison to investigate a murder, Rodriguez gave Morin valuable details about a conversation he had a year earlier with one of the suspects. And Wiley gave her opinion that Rodriguez "is not retarded" based on her years of monthly interviews with him. She also testified that the DSM-IV was "the bible of diagnostic criteria," and when asked if Rodriguez showed any adaptive-behavior deficits that would support a diagnosis of intellectual disability under the DSM-IV, she replied that he showed "[n]one whatsoever."

Even if Rodriguez's jury and sentencing judge had heard the evidence from the postconviction proceedings, "[t]he likelihood of a different result" would not have been "substantial," *Richter*, 562 U.S. at 112, 131 S.Ct. 770. Rodriguez's postconviction mental-health evidence "was not clearly mitigating." *Evans*, 703 F.3d at 1327. Dr. Latterner's testimony was seriously undermined on cross-examination, and the State's witnesses thoroughly rebutted every important point in her testimony.

Not only was the postconviction evidence weak, it was also "a two-edged sword [that] would have opened the door to damaging evidence." *Wood v. Allen*, 542 F.3d 1281, 1313 (11th Cir. 2008) (internal quotation marks omitted), *aff'd*, 558 U.S. 290, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). The postconviction evidence would have apprised the jury of Rodriguez's criminal history, including his federal conviction for drug trafficking and his use of aliases. The same jury that unanimously concluded Rodriguez was guilty beyond a reasonable doubt would have heard Dr. Haber say that Rodriguez showed "no remorse" but rather "stated that he was a victim himself" because he was innocent. And it would have heard Dr. Haber's tentative but still unfavorable opinion that nothing in his interview with Rodriguez suggested the possibility of rehabilitation. *See* ***960** *Pinholster*, 563 U.S. at 201, 131 S.Ct. 1388 ("The new evidence relating to Pinholster's family ... is also by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation.").

When Rodriguez's weak postconviction mitigation evidence is weighed against the aggravation evidence it would have invited and the lopsided evidence adduced at trial, there is no substantial likelihood that it would have persuaded six of 12 jurors to vote against a recommendation of death. Nor does it create a substantial likelihood that it would have convinced the judge to impose a different sentence.

B. The Supreme Court of Florida Reasonably Determined that Rodriguez Is Eligible for the Death Penalty.

Rodriguez next argues that he is ineligible for the death penalty because of intellectual disability. But this argument too fails. The rejection of this claim neither involved an unreasonable application of then-existing Supreme Court

precedent nor was based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d).

To establish intellectual disability, Rodriguez needed to present clear and convincing evidence to prove "(1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen." *Rodriguez III*, 110 So. 3d at 441; *see also* Fla. R. Crim. P. 3.203 (2009); *Atkins*, 536 U.S. at 318, 122 S.Ct. 2242. At the time, Florida law equated "significantly subaverage general intellectual functioning" with an IQ score of 70 or below. *See Jones*, 966 So. 2d at 329 (internal quotation marks omitted). "The term 'adaptive behavior' " refers to "the 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." Fla. R. Crim. P. 3.203(b) (2009). The Florida Supreme Court concluded that Rodriguez failed to present evidence establishing either a sufficiently low IQ or deficits in adaptive behavior. *Rodriguez III*, 110 So. 3d at 441.

Rodriguez argues that the decision of the Supreme Court of Florida involved an unreasonable application of *Atkins* because the then-existing standards for determining intellectual disability conflicted with the "basic principle" of *Atkins* "that state courts must defer to scientific understandings of intellectual disability." To prove that *Atkins* "clearly established" this principle, 28 U.S.C. § 2254(d)(1), he directs us to two footnotes in *Atkins*, *see* 536 U.S. at 308 n.3, 317 n.22, 122 S.Ct. 2242, and relies heavily on the decisions in *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), *Brumfield v. Cain*, 576 U.S. 305, 135 S. Ct. 2269, 192 L.Ed.2d 356, and *Moore v. Texas*, —— U.S. ——, 137 S. Ct. 1039, 197 L.Ed.2d 416 (2017).

The Supreme Court of Florida did not unreasonably apply *Atkins*, which held only that the intellectually disabled cannot constitutionally be executed, 536 U.S. at 307, 321, 122 S.Ct. 2242, not that states must "defer to scientific understandings" in any specific way. The footnotes cited by Rodriguez do nothing more than say that the "state statutory definitions of mental retardation at the time ... 'generally conformed to the clinical definitions' " adopted by the American Association on Mental Retardation and the American Psychiatric Association. *Shoop v. Hill*, —— U.S. ——, 139 S. Ct. 504, 507, 202 L.Ed.2d 461 (2019) (first alteration adopted; second alteration rejected) (citing *Atkins*, 536 U.S. at 308 n.3, 317 n.22, 122 S.Ct. 2242). These footnotes did not "clearly establish" that states ***961** had to defer to scientific understandings. 28 U.S.C. § 2254(d)(1). Indeed, the *Atkins* Court expressly "le[ft] to the States the task of developing appropriate ways to enforce th[is] constitutional restriction." 536 U.S. at 317, 122 S.Ct. 2242 (alteration adopted) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (plurality opinion)).

Rodriguez's argument about the decisions that postdate *Atkins* also cannot establish an unreasonable application of clearly established law. His argument is exactly the kind of argument foreclosed by the Antiterrorism and Effective Death Penalty Act, which limits habeas relief based on legal error to violations of "*clearly established* Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1) (emphasis added). *Hall*, *Brumfield*, and *Moore* had yet to be decided when the Supreme Court of Florida affirmed the finding that Rodriguez is not intellectually disabled. So none provided legal principles that were "clearly established" when the Supreme Court of Florida rendered its decision. *See Shoop*, 139 S. Ct. at 507; *Lockyer*, 538 U.S. at 71–72, 123 S.Ct. 1166; *Williams*, 529 U.S. at 412, 120 S.Ct. 1495.

Rodriguez also argues that the finding that he is not intellectually disabled was an unreasonable factual determination in the light of the evidence. *See* 28 U.S.C. § 2254(d)(2). Because that determination was a finding of fact, *see Fults v. GDCP Warden*, 764 F.3d 1311, 1319 (11th Cir. 2014), it is presumed correct in federal habeas proceedings unless rebutted by clear and convincing evidence, *see* 28 U.S.C. § 2254(e)(1). Rodriguez has produced no such evidence, and the evidence in the state-court record supported the finding that he is not intellectually disabled.

Although Dr. Weinstein diagnosed Rodriguez with an intellectual disability, Dr. Suarez testified that Rodriguez is not intellectually disabled "within a reasonable degree of medical certainty." And "[r]easonable minds reviewing the record," *Collins*, 546 U.S. at 341, 126 S.Ct. 969, could agree with the decision to trust Dr. Suarez's judgment instead of Dr. Weinstein's. Dr. Suarez testified that Dr. Weinstein's use of the Mexican version of the Wechsler Adult Intelligence Scale, or WAIS-III, was questionable because of cultural differences between Mexico and Cuba. He explained that Dr. Weinstein's method of norming the Mexican WAIS-III to United States IQ levels was likely to underestimate the IQ of a subject without a high school education.

Dr. Suarez also testified that he suspected Rodriguez of malingering on tests because of his obvious motive for underperformance, the conflict between his low scores and his everyday functioning, his lack of cooperation with evaluation, and his antisocial personality traits. Dr. Suarez explained that he tested Rodriguez for malingering by administering the Validity Indicator Profile and a dot-counting test, and the results from both suggested malingering. For example, Dr. Suarez testified that Rodriguez did no better on extremely easy questions on the Validity Indicator Profile than on extremely hard ones, which strongly suggested that Rodriguez was answering at random.

Dr. Suarez testified that a finding of adaptive-behavior deficits was undermined by many aspects of Rodriguez's life history. Dr. Suarez pointed to Rodriguez's enlistment in the Cuban Merchant Marines as a teenager, his ability to carry on correspondence in English with a pen pal in Holland, his employment history, his use of aliases, his ability to negotiate and organize a large-scale drug transaction, his interest ***962** in and ability to monitor his medical treatment, and his detailed correspondence with his girlfriend. Dr. Suarez explained that some intellectually disabled people might be able to engage in any one of these behaviors, but the likelihood of an intellectually disabled person being able to engage in all of them was minimal.

Other witnesses' testimony supported Dr. Suarez's opinion. For example, Wiley testified on cross-examination that when she told Rodriguez she would be testifying in his postconviction proceedings, he replied that his lawyers had told him to lean back with a blank look on his face. This testimony was consistent with Rodriguez's intent to malinger.

Faced with conflicting expert testimony, the Supreme Court of Florida credited Dr. Suarez's opinion instead of Dr. Weinstein's and determined that Rodriguez is eligible for the death penalty. We are bound to respect that determination because it was reasonable in the light of the evidence before the state court, and Rodriguez has failed to rebut it by clear and convincing evidence.

IV. CONCLUSION

We **AFFIRM** the denial of Rodriguez's petition for a writ of habeas corpus.

JILL PRYOR, Circuit Judge, concurring in result:
I concur in the result only.

All Citations

818 Fed.Appx. 945

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-11258-P

JUAN DAVID RODRIGUEZ,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

BEFORE: WILLIAM PRYOR, Chief Judge, WILSON, and JILL PRYOR, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Juan David Rodriguez is DENIED.

ORD-41

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

July 27, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 16-11258-P
Case Style: Juan Rodriguez v. Secretary, FL DOC
District Court Docket No: 1:13-cv-24567-JAL

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

REHG-1 Ltr Order Petition Rehearing

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 13-24567-CIV-LENARD

JUAN DAVID RODRIGUEZ,

Petitioner,

vs.

JULIE L. JONES, Secretary,
Florida Department of Corrections[1],

Respondent.
_____\

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

THIS CAUSE is before the Court upon, Petitioner, Juan David Rodriguez's ("Mr. Rodriguez") Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254. [DE 1]. Mr. Rodriguez is on Florida's death row at the Union Correctional Institution in Raiford, Florida following his conviction for the first-degree murder of Abelardo Saladrigas. Mr. Rodriguez filed this petition on December 19, 2013. [DE 1]. On March 18, 2014, the State filed its Response. [DE 10]. On August 21, 2014, Mr. Rodriguez filed his Reply. [DE 22]. The Court has carefully reviewed Mr. Rodriguez's petition, the entire court file, and is otherwise fully advised in premises. For the reasons that follow, the Petition for Writ of Habeas Corpus is **DENIED.**

[1] During the course of these proceedings, Michael D. Crews was replaced as the Secretary of the Department of Corrections by Julie L. Jones who is now the proper respondent in this proceeding. Jones should, therefore, "automatically" be substituted as a party under Federal Rule of Civil Procedure 25(d)(1). The Clerk is directed to docket and change the designation of the Respondent.

I. FACTUAL BACKGROUND

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. The charges which stem from two incidents occurring on consecutive days were tried together. Rodriguez appeals his convictions and the attendant sentences, including a sentence of death imposed in connection with the first-degree murder. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm the convictions and sentences.

According to his testimony at trial, on April 22, 1988, Ramon Fernandez was introduced to the defendant at a bail bondman's office by Carlos Sponsa. Sponsa asked Fernandez to give the bondsman the title to his car for a few hours, so Rodriguez could go get some money to pay his bail. Fernandez complied with the request; however, Rodriguez never returned with the money.

On May 13, 1988, Fernandez met with Sponsa and Rodriguez and asked Rodriguez to pay the bondsman so his car would be returned. Rodriguez told Fernandez and Sponsa that he knew where he could get the money and told them to follow him. The two followed Rodriguez, who drove a blue Mazda, to a shopping center. According to Fernandez, Rodriguez went to the door of an auto parts store in the shopping center and talked to a man inside. Rodriguez then came over to their vehicle and told Fernandez and Sponsa to wait in front while he drove around to the back of the shopping center to wait for the owner of the auto parts store. Instead of waiting in the car, Fernandez went up some stairs to the other end of the shopping center, where he saw the owner exit the store through the front door carrying a briefcase. The owner, Abelardo Saladrigas, began walking to the back of the shopping center. When Fernandez could no longer see Saladrigas, he heard two shots. As Fernandez was coming down the stairs, he heard a third shot and then saw Rodriguez chasing the victim with a gun in one hand and the victim's briefcase in the other. Rodriguez was yelling, "Give me the watch; give me the watch." The victim ran behind a car where Rodriguez shot him a fourth time, grabbed the victim's watch and ran to the Mazda. Fernandez also ran to the Mazda and left with the defendant. After fleeing, Rodriguez and Fernandez met Sponsa who had fled as soon as the first shots were fired. Rodriguez opened the briefcase which contained papers, keys, a revolver, and $1,200 in cash. He gave $600 to Sponsa and kept the other $600 and the victim's Rolex watch.

According to Fernandez, Rodriguez then described the events leading up to the murder. Rodriguez explained that he shot Saladrigas first in the leg and then in the stomach because the victim would not surrender his briefcase and watch. After

being shot, the victim threw the briefcase at Rodriguez and began screaming. Rodriguez shot him again in an attempt to get the watch. After the victim ran behind a car, Rodriguez shot him the final time and took the watch.

There was also testimony from another witness that pleas of "Don't do this to me, please" were heard coming from the back parking lot prior to the shots being fired.

Jose Arzola, an employee of the murder victim, testified that he was the man who spoke to the defendant at the front door of the auto parts store. Although Rodriguez's appearance had changed, Arzola made an in-court identification of him. Arzola further testified that he had seen Rodriguez at the shopping center on two or three occasions prior to the murder, standing on the side of the stairwell next to the entrance to the auto parts store.

Several witnesses testified concerning Saladrigas' dying declarations. A woman who worked in the shopping center testified that at approximately 7:00 p.m. on the day of the murder, she heard an argument in the back lot and heard four muffled gunshots. According to the witness, a few seconds after hearing a scream, Saladrigas came to the front of the shopping center and fell near the door to her shop. When she went to him, Saladrigas told her that he had been shot by a Mulatto, that he had been robbed of his watch and purse, and that they had left in a blue Mazda.

The victim's sister-in-law testified that when she arrived at the scene, Saladrigas told her, "They robbed me, and they take my keys from the business. They take my watch and my briefcase." When she asked him if he knew the robbers, he told her, "No, but I've seen them. They are two Mulattos." He also told her, "They go away in a blue Mazda."

Officer Jans testified that he overheard Saladrigas describe the shooting. According to the officer, Saladrigas said a couple of Mulatto males robbed him in the back parking lot. The man who shot him was taller than average, 5 10" or 5 11" and very skinny. The robbers left in a small blue car which was either a Mazda or a Toyota. They took his briefcase and Rolex watch. As he approached his car, they tried to get his briefcase. There was a struggle, and he was shot a couple of times.

Saladrigas died a short time after being taken to the hospital. According to the medical examiner, although there were six separate gunshot wounds on the body, these wounds were consistent with four separate projectiles having struck the victim. The victim had two wounds to the right arm; one wound to the upper left chest; one wound one inch above the right knee; and two wounds to the right

chest, one of which was fatal.

Francisco Reyes, who met Rodriguez in the county jail prior to trial, testified that Rodriguez told him that Fernandez was a "snitch" and because of him Rodriguez was "facing the chair." According to Reyes, Rodriguez also told him Fernandez could not have seen him commit the murder because he had told him to wait around the corner and if Rodriguez could "get rid" of Fernandez, "they would never know he was the one that killed or murdered." Reyes also testified that the defendant offered to pay him $3,000 if Reyes would testify that Fernandez confessed to Reyes that he committed the murder.

Testimony concerning the attempted home invasion came primarily from Fernandez and another of the participants in that incident. According to Fernandez, the day after the murder, he, the defendant, and several other young men went to a residence intending to invade it and rob the occupants who according to Sponsa had large amounts of drugs and cash. Fernandez and two of the men went in one vehicle; Rodriguez and the other two went in a separate vehicle. Fernandez and the two men who rode with him went to the door. When a man answered, the three attempted to push their way in. However, when the man's wife brought him a gun, the three ran from the house. The attempted robbery victim shot at the three and one of them returned fire. Although Fernandez was carrying the murder victim's revolver during the attempted home invasion, he did not fire it. Fernandez dropped the revolver on the front lawn while fleeing.

Sergio Valdez, a participant in the attempted home invasion, who rode to the scene with the defendant, also testified. Valdez' account of the attempted home invasion was generally consistent with that of Fernandez. He explained that he, Rodriguez, and another man circled the residence while the other three men went to the door. According to Valdez, Rodriguez told him it was their job to tie up the people in the house and search for money and drugs after the others gained entry. Valdez also testified that while in route to the residence, Rodriguez admitted that he "had done a job" at an auto parts store the day before, and that he had stolen a thousand dollars and the Rolex watch he was wearing from the victim.

Three weeks after the attempted home invasion, Fernandez was arrested. He confessed to his involvement in both crimes and told police that Rodriguez shot the victim at the auto parts store. Rodriguez was arrested and ultimately charged in a single indictment with first-degree murder and the other offenses stemming from the robbery/murder and the attempted home invasion.

Rodriguez v. State, 609 So.2d 493, 495-97 (Fla. 1993).

II. STATUTE OF LIMITATIONS

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposed a one-year limitations period for the filing of an application for relief under § 2254. Accordingly, 28 U.S.C. § 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of State court. The limitation period shall run from the latest of -
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

In most cases, including the present case, the limitation period begins to run pursuant to §2244(d)(1)(A). The Eleventh Circuit has decided that the judgment becomes "final" within the meaning of § 2244(d)(1)(A) as follows: (1) "if the prisoner files a timely petition for certiorari, the judgment becomes 'final' on the date on which the Supreme Court issues a decision on the merits or denies certiorari, or (2) the judgment becomes 'final' on the date on which the

defendant's time for filing such a petition expires." *Bond v. Moore*, 309 F.3d 770, 773-74 (11th Cir. 2002). The State has not argued that the petition is time-barred. The Court proceeds to the merits.

III. PROCEDURAL HISTORY

Mr. Rodriguez was found guilty of all charges, and a unanimous jury recommended that Mr. Rodriguez be sentenced to death for the murder of Abelardo Saladrigas. The trial court followed the recommendation, and found three aggravating factors: (1) a 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 (HAC). The trial court found that Mr. Rodriguez's good marriage and family life constituted one nonstatutory mitigating factor.

On direct appeal, Rodriguez raised multiple claims relating to both the guilt and penalty phases of his trial.[2] The Florida Supreme Court did not find reversible error on any of Rodriguez's claims and affirmed both his convictions and sentences, including the death sentence. *Id*. at 501.

In September 1994, Mr. Rodriguez filed his first motion for postconviction relief pursuant

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[2]Rodriguez claimed that the trial court erred by proceeding without the presence of a defense witness and by refusing to permit introduction of the witness's prior deposition testimony; it was fundamental error to conduct a joint trial for the first-degree murder charge and the charges stemming from the attempted home invasion; it was error to admit the identification testimony by the victim's sister-in-law; inadmissible hearsay was introduced to improperly bolster the testimony of State witnesses; the death penalty is disproportionate in his case; the prosecutor made improper comments on Rodriguez's demeanor off the stand; the murder was not HAC; the sentencing order was deficient and reflected that the trial court did not consider certain mitigating factors; the trial court improperly considered the impassioned pleas of family members; and Florida's death penalty statute is unconstitutional. *Rodriguez*, 609 So.2d at 497, 500.

to Florida Rule of Criminal Procedure 3.850. He filed amended motions in October 1995, April 1997, and July 1997. Mr. Rodriguez based each amendment on continued compliance with his public records requests by state agencies. At a *Huff* hearing, the defense attempted to file a fourth amended motion, but the trial court refused to recognize this amendment and proceeded on the claims raised in the third amended motion. After argument, the trial court ruled that an evidentiary hearing would be conducted on two of the thirty claims raised in Mr. Rodriguez's motion.[3] The trial court granted an evidentiary hearing on claims three and eight, regarding the

[3] The thirty claims raised in Mr. Rodriguez's 192-page motion alleged: (1) certain public files and records pertaining to his case were withheld in violation of chapter 119, Florida Statutes (1997); (2) the State withheld exculpatory evidence; (3) counsel failed to obtain an adequate mental health evaluation and failed to provide the necessary background information to the mental health consultants as required under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); (4) counsel rendered ineffective assistance at the guilt phase in failing to prepare an adequate defense, to request a severance of the offenses, to object to the admission of identification testimony, and other deficient performance; (5) counsel was ineffective in failing to discover and remove biased jurors during voir dire; (6) Mr. Rodriguez was denied adversarial testing when exculpatory evidence was withheld; (7) Mr. Rodriguez is innocent of first-degree murder; (8) counsel rendered ineffective assistance at both the guilt and sentencing phases in failing to investigate mitigating evidence; (9) the aggravating circumstances set forth in the death penalty statute are unconstitutionally vague and overbroad; (10) the jury instruction on the violent felony aggravating circumstance was vague and overbroad; (11) the jury instruction on the pecuniary gain aggravating circumstance was vague and overbroad; (12) the jury instruction on the committed during the course of a robbery aggravating circumstance was vague and overbroad; (13) the jury was improperly instructed on the HAC aggravating circumstance; (14) the jury was improperly instructed that one single act supported two separate aggravating circumstances; (15) comments by the court and the prosecutor as to the jury's advisory role diluted the jury's sense of responsibility for sentencing in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985); (16) the penalty phase jury instructions improperly shifted the burden to Rodriguez to prove that the death penalty was inappropriate; (17) the use of the underlying robbery to support the felony aggravating circumstance is an unconstitutional automatic aggravating circumstance; (18) the sentencing judge failed to find mitigating circumstances established by the evidence in the record; (19) newly discovered evidence establishes that Mr. Tata planned the crimes and was the leader of the group, not Mr. Rodriguez; (20) the prosecutor introduced nonstatutory aggravating factors which the sentencing court relied upon in imposing the death penalty; (21) counsel rendered ineffective assistance in failing to object to the prosecutor's improper conduct and argument; (22) Florida's capital sentencing statute is

adequacy of Mr. Rodriguez's mental health evaluation and counsel's investigation of possible mitigating evidence. At the evidentiary hearing, the trial court heard testimony from Mr. Rodriguez's trial counsel, the mental health expert who evaluated Mr. Rodriguez for trial, and the mental health expert who evaluated Mr. Rodriguez for his postconviction claims. After the hearing, the trial court found no merit to Mr. Rodriguez's mental health, mitigation, and other claims, and denied postconviction relief.

Mr. Rodriguez appealed the denial of postconviction relief[4] to the Florida Supreme Court

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unconstitutional on its face and as applied; (23) the prosecutor impermissibly suggested that the law required the jury to recommend a sentence of death; (24) Mr. Rodriguez was denied a proper direct appeal due to omissions in the record; (25) Rule Regulating the Florida Bar 4-3.5(d)(4) prohibits Mr. Rodriguez from interviewing jurors regarding juror misconduct; (26) juror misconduct occurred in both the guilt and penalty phases of the trial; (27) cumulative error requires a new trial; (28) judicial bias, including that the judge permitted the State to prepare the sentencing order, requires a new trial; (29) Mr. Rodriguez was incapable of making a knowing, intelligent waiver of any constitutional rights due to his mental retardation; and (30) newly discovered evidence establishes that execution by electrocution is cruel and unusual punishment. *Rodriguez*, 919 So.2d at 1261 (Fla. 2005).

[4] On appeal, Mr. Rodriguez raised twelve issues and several sub-issues regarding the trial court's original denial of postconviction relief. Mr. Rodriguez contends that (1) the 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* violation based on the State's failure to disclose information concerning Mr. Tata, an *Ake* 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 a severance of offenses, and to object to various other errors at trial; (4) Mr. 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

and also sought a writ of habeas corpus.[5]

The Florida Supreme Court concluded that Mr. Rodriguez's allegation relating to the preparation of his sentencing order, which Mr. Rodriguez had attempted to raise in the fourth amended motion, warranted an evidentiary hearing. Thus, the court temporarily relinquished jurisdiction to the trial court for the purpose of conducting an evidentiary hearing on that issue and to make additional findings and conclusions. The trial court denied Mr. Rodriguez relief on the sentencing order claim and he appealed. During the pendency of his appeal, Mr. Rodriguez also moved for the court to relinquish jurisdiction to the trial court so that he could file a motion under Florida Rule of Criminal Procedure 3.203[6] for a determination of mental retardation. The

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4-3.5(d)(4) prohibition on communication with jurors restricts Mr. Rodriguez's access to the courts; (11) impermissible victim impact was considered in Mr. Rodriguez's sentencing; and (12) Mr. Rodriguez did not receive a fundamentally fair trial because of cumulative error.

[5] Mr. Rodriguez raised the following claims in his petition for a writ of habeas corpus: (1) appellate counsel was ineffective for failing to raise numerous issues, including improper prosecutorial argument, improper jury instructions, the unconstitutionality of Florida's death penalty statute, the improper admission of opinion testimony, the introduction of gruesome and misleading photographs, the improper exclusion of testimony regarding Tata's non-arrest, and an incomplete record on appeal; (2) this Court failed to conduct a meaningful harmless error analysis when considering the effect of improper prosecutorial argument and inadmissible hearsay testimony in the direct appeal case; and (3) the constitutionality of the first-degree murder indictment must be revisited in light of the United States Supreme Court's decisions in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

[6] Florida Rule of Criminal Procedure 3.203, which became effective on October 1, 2004, "applies in all first-degree murder cases in which the state attorney has not waived the death penalty on the record and the defendant's mental retardation becomes an issue." Fla. R.Crim. P. 3.203(a). The rule specifies the time for filing a motion for determination of mental retardation as a bar to execution. In circumstances such as Mr. Rodriguez's, i.e., if the death-sentenced prisoner has filed a motion for postconviction relief that has been ruled on by the trial court and an appeal is pending on or before the effective date of the rule, the prisoner may file a motion to relinquish jurisdiction for determination of mental retardation. Fla. R.Crim. P. 3.203(d)(4)(E).

court issued an order denying the motion, but without prejudice to Mr. Rodriguez's right to file a rule 3.203 motion upon disposition of his postconviction appeal. Ultimately, the Florida Supreme Court found "no merit to Mr. Rodriguez's rule 3.850 claims, affirm[ed] the trial court's denial of the motion, and den[ied] his petition for writ of habeas corpus." *Rodriguez*, 919 So. 2d at 1288.

Thereafter, Mr. Rodriguez filed a Motion to Vacate Sentence of Death and for Determination of Mental Retardation as a Bar to Execution. *See Rodriguez v. State*, 110 So.3d 441 (Fla. 2013). After an evidentiary hearing, the trial court concluded that Mr. Rodriguez was not mentally retarded as defined by Florida Rule of Criminal Procedure 3.203. On appeal, the Florida Supreme Court concluded that the trial court's finding that Mr. Rodriguez was not mentally retarded was supported by competent, substantial evidence and affirmed the denial of relief. *Id*.

On December 19, 2013, Mr. Rodriguez filed his petition for writ of habeas corpus by a person in state custody pursuant to 28 U.S.C. §2254 . [DE 1]. The State has responded and Mr. Rodriguez has replied. This matter is now ripe.

IV. MR. RODRIGUEZ'S CLAIMS AND APPLICABLE STANDARDS

Mr. Rodriguez's habeas corpus petition is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214 (1996) (codified at various provisions in Title 28 of the U.S. Code), which significantly changed the standards of review that federal courts apply in habeas corpus proceedings. Under the AEDPA, if a claim was adjudicated on the merits in state court, habeas corpus relief can only be granted if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable

application of, clearly established federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1)-(2). This is an "exacting standard." *Maharaj v. Sec'y, Dep't. of Corr.,* 432 F.3d 1292, 1308 (11th Cir. 2005). Pursuant to § 2254(d)(1), a state court decision is "contrary to" Supreme Court precedent if it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [an] [opposite] result." *Williams v. Taylor,* 529 U.S. 362, 405 (2000). In other words, the "contrary to" prong means that " the state court's decision must be substantially different from the relevant precedent of [the Supreme] Court." *Id.*

With respect to the "unreasonable application" prong of § 2254(d)(1), which applies when a state court identifies the correct legal principle but purportedly applies it incorrectly to the facts before it, a federal habeas court "should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409*; see also Wiggins v. Smith,* 539 U.S. 510, 520-21 (2003). Significantly, an "objectively unreasonable application of federal law is different from an incorrect application of federal law." *Woodford v. Visciotti,* 537 U.S. 19, 24-25 (2002). An "unreasonable application" can also occur if a state court "unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." *Putman v. Head,* 268 F.3d 1223, 1241 (11th Cir. 2001).

As noted above, § 2254(d)(2) provides an alternative avenue for relief. Habeas relief may be granted if the state court's determination of the facts was unreasonable. "A state court's determination of the facts, however, is entitled to deference" under § 2254(e)(1). *See Maharaj,*

432 F.3d at 1309. This means that a federal habeas court must presume that findings of fact by a state court are correct; and, a habeas petitioner must rebut that presumption by clear and convincing evidence. *See Hunter v. Sec'y, Dep't. of Corr.,* 395 F.3d 1196, 1200 (11th Cir. 2005).

Finally, where a federal court would "deny relief under a de novo review standard, relief must be denied under the much narrower AEDPA standard." *Jefferson v. Fountain,* 382 F.3d 1286, 1295 n.5 (11th Cir. 2004). Even if the Court believed the Florida Supreme Court's determination to be an incorrect one, under AEDPA deference that alone is not enough to grant habeas relief, the Court must also find that "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [United States Supreme Court] precedents." *Harrington v. Richter*, 131 S.Ct. 770, 783 (2011). In other words, as a condition for obtaining habeas corpus relief from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was *so lacking in justification* that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. *See id.* (emphasis added).

V. ANALYSIS

Mr. Rodriguez asserts six claims for federal habeas relief. First, Mr. Rodriguez argues that his trial counsel failed to obtain an adequate mental health evaluation and provide necessary background information to his mental health consultants in violation of *Ake v. Oklahoma*. Second, Mr. Rodriguez asserts that he is mentally retarded and his execution is barred by *Atkins v. Virginia*. Third, Mr. Rodriguez contends his counsel was ineffective during the penalty phase of his trial, in particular, that trial counsel failed to investigate and present mitigating evidence.

Fourth, the Florida courts made an unreasonable determination of the facts when it concluded that Mr. Rodriguez is not mentally retarded. Fifth, Mr. Rodriguez contends his counsel was ineffective during the guilt phase of his trial, in particular, that trial counsel failed to investigate and prepare for trial and he also alleges that the State withheld information in violation of *Brady* and *Giglio*. Sixth, Mr. Rodriguez contends he received ineffective assistance of appellate counsel when counsel failed to argue on direct appeal that his constitutional right to confrontation was denied at trial. For the reasons that follow, the Court finds that Mr. Rodriguez has not satisfied the statutory mandates of the AEDPA. Therefore, federal habeas relief cannot be granted.

Claim I: *Ake v. Oklahoma* Violation

In Mr. Rodriguez's first claim for federal habeas relief, he asserts that his counsel failed to obtain an adequate mental health evaluation and provide necessary background information to his mental health consultants.[7] ([DE 1] at 22). Mr. Rodriguez argues that he was not only prejudiced during the penalty phase of his trial for this failure but that he was also prejudiced

[7] Mr. Rodriguez's claim seems to vacillate between an ineffective assistance of trial counsel and ineffective assistance of the appointed clinical psychologist. Neither argument is directly supported by *Ake v. Oklahoma* which held "that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83. In analyzing an *Ake* claim, "[w]e first examine the information before the trial court when it is alleged to have deprived the defendant of due process. We then determine whether that information should have led the trial court to conclude that the defendant would probably not receive a fair trial." *Clisby v. Jones*, 960 F.2d 925, 929-30 (11th Cir. 1992)(en banc)("Specifically, we must assess the reasonableness of the trial [court]'s action at the time [it] took it and we are to evaluate the actions of the trial [court] based on the evidence presented to [it].").

during the guilt phase because his mental state "was also relevant to his waiver of his rights, to his capacity to form the requisite intent for the charged offenses, and his ability to assist counsel in his own defense." (*Id*.). Specifically, Mr. Rodriguez contends that while his counsel did seek an independent psychiatric examiner and Mr. Rodriguez was evaluated by a clinical psychologist, it was the defense expert's opinion that the presence or absence of organic brain disorder could not be diagnosed until a complete neurological and neuropsychological test examination was conducted. (*Id*. at 23). Where Mr. Rodriguez finds fault is in defense counsel's failure to retain a neuropsychologist to examine Mr. Rodriguez and for failing to provide background information concerning Mr. Rodriguez's family history, educational background, and medical history to the retained expert. Without that information, the expert could not conduct a complete or thorough evaluation of Mr. Rodriguez.[8]

Here, Mr. Rodriguez's *Ake* claim does not satisfy the pleading requirements of the Federal Rules Governing Habeas Petitions. To the extent this is an *Ake* claim at all, it is insufficiently pled.[9] Habeas corpus petitions must meet heightened pleading requirements, *see*

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[8] Mr. Rodriguez did not advise the Court that in addition to retaining a psychologist, defense counsel also retained a neurologist following Dr. Haber's evaluation. This fact was brought to the Court's attention by the State. ([DE 10] at 63). "Based on Dr. Haber's concerns, trial counsel retained Dr. Noble David, a professor and acting chairman of Department of Neurology at the University of Miami School of Medicine, to conduct a neurological evaluation. Dr. David reported "no evidence of significant neurologic or brain disease." *Rodriguez*, 919 So.2d at 1265.

[9] Mr. Rodriguez has simply duplicated his appellate brief to the Florida Supreme Court in his federal habeas petition by merging the allegations in his *Ake* claim with his other sub-claim that "[t]he lower court erred in denying Mr. Rodriguez a new penalty phase after the limited evidentiary hearing" claim. (*See* [DE 15-4] at 33 & [DE 15-4] at 87). The Florida Supreme Court viewed this sub-claim to be part of Mr. Rodriguez's ineffective assistance of counsel claim not an *Ake* claim. Here, Mr. Rodriguez does not cite or argue *Strickland*.

28 U.S.C. § 2254 Rule 2©, and comply with this Court's doctrines of procedural default and waiver, *see Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face, *see* 28 U.S.C. § 2254, Rule 4. Mr. Rodriguez's petition fails to advise the Court of even the most minimal information required for the Court to make the requisite determinations pursuant to the AEDPA. Mr. Rodriguez has failed to cite or attempt to explain how the decision of the Florida Supreme Court was an unreasonable application of clearly established federal law. This omission, in and of itself, is enough to warrant denial of federal habeas relief.

Mr. Rodriguez must show that the highest state court, in this instance, the Florida Supreme Court, made an unreasonable application of clearly established federal law or made an unreasonable determination of the facts based on the record. It is imperative for a petitioner to advise the federal habeas court of the state court's determination and explain why that determination is either: (1) an unreasonable application of clearly established federal law (citing the clearly established federal law) or (2) an unreasonable determination of the facts based on the record (citing the portions of the record that supports his argument). Mr. Rodriguez has done neither.

Nonetheless, the Court culled the opinions of the Florida Supreme Court. The denial of this claim was affirmed on appeal without a merits determination. The court found that this claim was "procedurally barred because it should have been raised on direct appeal." *Rodriguez*, 919 So.2d at 1267. In Florida, issues which could be but are not raised on direct appeal may not be the subject of a subsequent Rule 3.850 motion for postconviction relief. *Kennedy v. State*,

547 So.2d 912 (Fla. 1989). Further, even if the subject claim was amenable to challenge in a Rule 3.850 motion, it cannot now be raised in a later Rule 3.850 motion because, except under limited circumstances not present here, Florida law bars successive Rule 3.850 motions. *See* Fla.R.Crim.P. 3.850(f)*; see also Moore v. State*, 820 So.2d 199, 205 (Fla. 2002)(holding that a second or successive motion for postconviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion).

Claims that are unexhausted and procedurally defaulted in state court are not reviewable by the Court unless the petitioner can demonstrate cause for the default and actual prejudice, *Wainwright v. Sykes*, 433 U.S. 72 (1977), or establish the kind of fundamental miscarriage of justice occasioned by a constitutional violation that resulted in the conviction of a defendant who was "actually innocent," as contemplated in *Murray v. Carrier*, 477 U.S. 478 (1986). *See House v. Bell*, 547 U.S. 518 (2006). Since Mr. Rodriguez has not alleged, let alone established, cause to excuse his default, it need not be determined whether he suffered actual prejudice.[10] *See Glover v. Cain*, 128 F.3d 900, 904 n.5 (5th Cir. 1997). This claim is insufficiently pled and procedurally barred. Habeas relief is denied.

Claim II: Legal Determination of Mental Retardation

Mr. Rodriguez's second claim for federal habeas relief is that he is mentally retarded and ineligible for the death penalty. Mr. Rodriguez argues that his death sentence is contrary to *Atkins v. Virginia* and is in violation of the prohibition against cruel and unusual punishment

[10] Moreover, Mr. Rodriguez has not argued that his postconviction counsel was ineffective such that any procedural bar should be excused. *Martinez v. Ryan*, 132 S.Ct. 1309 (2012)(a federal habeas court may excuse the procedural default of an ineffective assistance of trial counsel claim when that claim was not properly presented in state court due to postconviction counsel's errors in an initial-review collateral proceeding.).

under the Eighth and Fourteenth Amendments. ([DE 1] at 35). The substance of this claim is legal argument; rather, than factual argument. Mr. Rodriguez makes his factual arguments relating to his *Atkins* claim in Claim IV of the instant petition. (*See* [DE 1] at 54).

Mr. Rodriguez admits that he does not meet Florida's definition of mental retardation but argues that Florida's definition is unconstitutional. Specifically, Mr. Rodriguez asserts that "the Florida scheme for determining whether a death sentenced inmate is mentally retarded is arbitrary and runs the very real risk that people who meet the accepted clinical definition of mental retardation will still be executed." (*Id*. at 37). Mr. Rodriguez contends that the Florida Supreme Court unreasonably applied *Atkins*. The Florida Supreme Court denied Mr. Rodriguez's *Atkins* claim as follows:

> 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. We also deny Rodriguez's claim that Florida's scheme for the assessment of mental retardation in post-conviction death penalty cases is unconstitutional.
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> *Rodriguez v. State*, 110 So.3d 441 (Fla. 2013).

In the interim period between when Mr. Rodriguez filed his federal habeas petition and the date of this Order, the Supreme Court has clarified how state courts should interpret mental retardation statutes. *See Hall v. Florida*, 134 S.Ct. 1986 (2014). The Court considers the law before and after *Hall*.

***Atkins v. Virginia*, 536 U.S. 304 (2002)**

In *Atkins*, the United States Supreme Court held that the execution of mentally retarded offenders is categorically prohibited by the Eighth Amendment to the U.S. Constitution. 536 U.S. at 321. *Atkins* did not define mental retardation, leaving it to the states to develop appropriate ways to prohibit the execution of the mentally retarded. However, the Court did provide some guidance to the states regarding the definition of mental retardation by citing two clinical definitions of mental retardation that it noted were consistent with many state statutory definitions.

> 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." 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.

Atkins, 536 U.S. at 308, n. 3. Since 2002, when the United States Supreme Court determined that "mentally retarded defendants are unable to contribute fully to their defenses, particularly having an under-developed conception of blameworthiness, a lack of knowledge of basic facts, and an increased susceptibility to the influence of authority figures," state courts have varied as to how to define mental retardation. *Atkins*, 536 U.S. at 318. This variance resulted from the Court not defining mental retardation; instead, leaving it up to the states to craft a definition within the bounds of the established medical community.

At the time of Mr. Rodriguez's state collateral proceedings, Florida defined "mental retardation" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." The Florida statutes further defined "significantly subaverage general intellectual functioning" as "performance that is two or more standard deviations from the mean score on a standardized intelligence test." The Florida Supreme Court interpreted this definition as requiring a petitioner to establish that he has an IQ of 70 or below. *See Jones v. State*, 966 So.2d 319, 329 (Fla. 2007).

Mr. Rodriguez argues that Florida's requirement that a defendant must have an IQ of 70 or below to be considered mentally retarded violates the clear dictates of *Atkins* and is unconstitutional under the Eighth Amendment. Mr. Rodriguez avers that is so because, in *Atkins*, the Court (while explaining the Wechsler Adult Intelligence Scales test and how the results are often interpreted) stated that "[i]t is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation definition." *Atkins*, 536 U.S. at 2245, n.5. The Court cited the Diagnostic and Statistical Manual of Mental Health Disorders

in *Atkins* which states that "[m]ild mental retardation is typically used to describe people with an IQ level of 50-55 to *approximately* 70." *Id.* at 309, n.3. (emphasis added). The Court could have, but did not, dictate a numerical score that would be the cut-off for IQ test results and mental retardation. Rather, the Court left it up to the states to "develop appropriate" ways to enforce the constitutional restriction. *See Hill v. Schofield*, 608 F.3d 1272, 1278 (11th Cir. 2010)(*rev'd on other grounds*). This was the clearly established federal law at time the Florida Supreme Court denied Mr. Rodriguez's *Atkins* claim.

It was not until May 27, 2014, that the United States Supreme Court determined "Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world" and that "[s]tates are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects." *Id.* at 2001. Specifically, "Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider *other* evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise." *Id.* at 1995 (emphasis added). Effectively, the Supreme Court found that a strict IQ cut-off of 70, without more, cannot be the sole consideration in the determination of mental retardation. This change, however, does not effect the outcome of Mr. Rodriguez's claim.

***Hall v. Florida*, 134 S.Ct. 1986 (2014)**

At issue in *Hall* was whether or not the Florida Supreme Court's interpretation of Florida law ("a person whose test score is above 70, including a score within the margin for

measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited") violates the Eighth Amendment. *Id.* at 1994. The Court held that "the Florida statute [Fla. Stat. 921.137(1)], *as interpreted by its courts*, is unconstitutional." *Id.* at 2000. (emphasis added). The Court, citing medical experts, agreed that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 2001. The Court remanded the case back to the Florida Supreme Court with the directive that "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." *Id.*

Mr. Rodriguez's claim is not factually similar to Mr. Hall's. Mr. Rodriguez has had the opportunity to present evidence of his alleged intellectual disability during an evidentiary hearing in state court. While Mr. Rodriguez disagrees with the state court's factual findings (Claim IV), the application of the clearly established federal law to the facts is not unreasonable. The Florida Supreme Court reviewed the testimony from the Rule 3.203 hearing and determined, not only, did Mr. Rodriguez not establish an IQ of 70 or below but it also found that Mr. Rodriguez failed to show that he exhibits adaptive deficits. Considering *Atkins* and *Hall*, the court's legal analysis was not unreasonable. Habeas relief is denied.

Claim III: Ineffective Assistance of Penalty Phase Counsel

Mr. Rodriguez's third claim for federal habeas relief is that trial counsel's performance during the penalty phase was ineffective. ([DE 1] at 54). Specifically, Mr. Rodriguez alleges that "[t]rail [sic] counsel Scott Kalisch failed to conduct the 'requisite, diligent' investigation into Mr.

Rodriguez's background to unearth available and plentiful mitigation." (*Id*. at 60). In support of his claim, Mr. Rodriguez argues that his counsel did not retain a mental health expert until *after* he was convicted of first-degree murder. (*Id*. at 61). Mr. Rodriguez contends this illustrates counsel's unpreparedness for the penalty phase of his trial. (*Id*.) Further, Mr. Rodriguez argues that "without having conducted any research into likely areas of mental health investigation, and without having conducted any adequate investigation into Mr. Rodriguez's family history in Cuba, Mr. Kalisch was in large part responsible for Dr. Haber's constitutionally inadequate evaluation." (*Id*. at 96-97). Mr. Rodriguez contends that the social and family background information should have been an integral part of a psychological assessment but also that information was mitigation in its own right. (*Id*. at 68-69). Mr. Rodriguez seeks "a full hearing on these mattes [sic], as evidence of mitigation its [sic] own." (*Id*. at 95). The State contends that Mr. Rodriguez's arguments regarding the reasonableness of the state court's determination "should be rejected and the claim denied . . . as the record amply supports the state court's factual findings." ([DE 10] at 205). Mr. Rodriguez replies that the Florida Supreme Court's factual determination - even if trial counsel attempted to contact collateral sources such as family members and friends in Petitioner's native Cuba, the investigation would have only uncovered the same information that was already known - is refuted by thirty interviews of family and friends conducted by postconviction counsel. ([DE 27 at 38). The substance of the interviews revealed a much more extensive and detailed social history than that which was contained in Dr. Haber's report. (*Id*.) Mr. Rodriguez concluded that "[t]he Florida Supreme Court finding is simply not supported by the record and an unreasonable determination of fact." (*Id*. at 38).

The Court has conducted a thorough review of the state court record. The facts are as

follows:

Penalty Phase

On January 31, 1990, the jury recessed at 2:37 p.m. to deliberate on Mr. Rodriguez's guilt. ([DE 15-31] at 51). At 4:45 p.m., the jury reached their verdict. Mr. Rodriguez was found guilty of first-degree murder. (*Id*. at 52-54). Immediately following the verdict, the trial court inquired about timing for the sentencing phase of the trial. Counsel for Mr. Rodriguez, Scott T. Kalisch, Esq. advised the court.

> Frankly, I have never had to do this before.
>
> Frankly, the verdict takes me by surprise. I am not in any way prepared to go forward in a death penalty phase in this case. I need at least two weeks to even understand what it is about.

([DE 15-31] at 58). The court set the penalty phase of trial for February 15, 1990. (*Id*. at 60). One week later, while requesting a further continuance of the sentencing date, the record shows that Mr. Rodriguez's case was not the only matter occupying Mr. Kalisch's time in the weeks preceding the penalty phase. The continuance sought by Mr. Kalisch on February 6, 1990 (one week before the penalty phase was to begin) was, in part, because he needed to travel to Santo Domingo, Dominican Republic the upcoming week to obtain releases from other clients who were involved in "what has been described as the largest mass disaster litigation in United States history." ([DE 15-71] at 13-14). Mr. Kalisch further advised the court that "[a]ll of undersigned counsel's efforts were addressed to demonstrating that the defendant was not the assailant in this case and undersigned was unprepared for the outcome insofar as preparing for the death phase in advance of the verdict." ([DE 15-17] at 14).

The trial court rescheduled the penalty phase for March 1, 1990. In the twenty-nine days

between the guilty verdict and the penalty phase, Mr. Kalisch filed only one motion requesting the appointment of "an independent psychiatric examiner...to assist him in the death penalty phase of this case." ([DE 15-17] at 11). The court granted the motion and appointed Dr. Leonard Haber "to conduct an independent psychological evaluation of the defendant... prior to sentencing in this case." ([DE 15-17] at 15). On February 22 and 26, 1990, Dr. Haber examined Mr. Rodriguez "pursuant to a Court Order issued by Circuit Court Judge Thomas M. Carney." ([DE 15-17] at 49). Dr. Haber believed that his examination was, in part, to determine if Mr. Rodriguez was "competent to proceed with sentencing."[11] (*Id.* at 52). Following the examinations, Dr. Haber prepared a written report in which he concluded that his examination of Mr. Rodriguez revealed "no statutory mitigation." (*Id.* at 53). Dr. Haber closed his report by thanking the judge "for the opportunity to examine this interesting person and to be of service to the Court." (*Id.*). The report was addressed and mailed to Judge Thomas M. Carney at the Metropolitan Justice Building. (*Id*. at 49).

Dr. Haber's report was dated February 26, 1990. On February 27, 1990, the State deposed Dr. Haber. Mr. Kalisch attended the deposition. Shortly after the deposition began, Mr. Kalisch asserted a doctor-patient privilege objection. The prosecutor stated that "[i]f you have no intention on calling Doctor Haber as a witness, then I have no reason to conduct this deposition." ([DE 15-92] at 19). Mr. Kalisch responded:

My problem is I have *never spoken* to Doctor Haber, and *I don't know what Mr.*

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[11] The record shows that counsel did not clarify with Dr. Haber that his evaluation for sentencing should be vastly different from a competency evaluation. *See Blanco v. Sec'y, Dep't of Corr*., 943 F.2d 1477, 1503 (11th Cir. 1991)("One can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider.").

> *Rodriguez told* Doctor Haber, and based on that I don't know what I should advise Doctor - - excuse me, I mean Mr. Rodriguez to do regarding what I believe to be a privilege between a client and a psychologist. I just want that on the record. You can continue with the questions at trial time.

(*Id.* at 20)(emphasis added). The penalty phase began two days later. The complexities of Dr. Haber's perceived role became apparent when defense counsel wanted Dr. Haber to testify but only if the State was precluded from asking Dr. Haber about Mr. Rodriguez's prior convictions. ([DE 15-32] at 38). The State objected and argued that if Dr. Haber considered Mr. Rodriguez's prior convictions in forming his opinion then the State should be able to inquire. (*Id*. at 39). Dr. Haber happened to be in the courtroom at the time of the objection. Before ruling on the objection, the court asked Dr. Haber whether or not he had reviewed Mr. Rodriguez's prior criminal record. Dr. Haber advised that he had. Dr. Haber further stated that he "was not given any documents by defense counsel" and that the only documents he reviewed were given to him by the Assistant State Attorney. (*Id.*). The records from the State Attorney's Office included Mr. Rodriguez's prior convictions. Thereafter, Dr. Haber answered questions from counsel and the court regarding his opinion on whether certain statutory mitigators had a basis such that they should be submitted to the jury. Defense counsel asked for an exemption to the sequestration rule so that Dr. Haber could act as an advisor at counsel table during the testimony and also testify in the proceedings.

> MR. KALISCH: Judge, may I ask the Court's indulgence on a matter with regard to Dr. Haber?
>
> Dr. Haber has been appointed as a court expert; however, I submitted a form of order motion to appoint an independent psychiatric examiner, which motion I believe your Honor did sign.
>
> What I would like to do is use Dr. Haber during the course of this proceeding as a source of advice as to how to go forward in presenting my case, and in that way he

> becomes more my expert because the Court named him a court expert. I would like to have the Court to authorize Dr. Haber to assist me in this proceeding.

([DE 15-32] at 56-57). The State *and* Dr. Haber objected to this dual role. In particular, Dr. Haber stated that he felt he was unable to perform both roles as an advocate and an impartial witness.

> DR. HABER: Let me add, your Honor, I think I would be prohibited ethically from carrying on two functions simultaneously.
>
> Respectfully, either if I'm an expert witness who is totally independent no matter who appoints me or who I work for as an expert for one side or the other, I do have an interest and I cannot testify, but in assisting with ideas that I may myself not testify to, but to simply advise to what the possibilities are, and there would be a conflict in that role. I could do one or the other.

(*Id*. at 58). When faced with the choice of having Dr. Haber testify or act as an advisor, Mr. Kalisch decided that he would like Dr. Haber to be available to testify as an expert witness for the defense. (*Id.* at 59). Dr. Haber left the courtroom. The State called its first witness.

The State called Dante Perfumo. Mr. Perfumo is a fireman and paramedic with the City of Miami Fire Department. Mr. Perfumo arrived at the scene of the murder and had rendered aid to Mr. Saladrigas. Mr. Perfumo testified that Mr. Saladrigas was in "extreme pain." ([DE 15-32] at 71). During the transport to the hospital, Mr. Saladrigas asked Mr. Perfumo many times if he was going to survive. (*Id*.). Mr. Perfumo testified that Mr. Saladrigas had multiple gun shot wounds which would have "inflicted tremendous amounts of pain." (*Id*. at 75). Following Mr. Perfumo's testimony, the State rested.

Following the State's case, Mr. Kalisch called Marlen Castellano. Mrs. Castellano is Mr. Rodriguez's wife. Ms. Castellano testified that Mr. Rodriguez was a supportive husband and a good father. On cross-examination, Ms. Castellano admitted that Mr. Rodriguez had been

incarcerated during most of their son's life. (*Id.* at 83). Ms. Castellano's entire testimony encompassed ten pages of the transcript. (*Id*. at 78-88). Following Ms. Castellano's testimony, the defense rested. Counsel rested without having Dr. Haber testify. Dr. Haber's report was not admitted into evidence and the jury heard no testimony regarding his report and clinical findings.

At 11:30 a.m., the jury retired to deliberate and make a sentencing recommendation to the judge. ([DE 15-33] at 46). In less than an hour, the jury returned with an advisory sentence of death. The vote was twelve to zero. (*Id*. at 47). One month later, the trial court held a *Spencer* hearing.[12] At the hearing, Mr. Rodriguez addressed the trial court and proclaimed his innocence. ([DE 15-31] at 86). The defense presented no additional testimony. The State presented the testimony of Mr. Saladrigas' brother, sister and niece. All the witnesses testified as to how the murder has taken a toll on their family and about Mr. Saladrigas' character. Following their testimony, the trial court sentenced Mr. Rodriguez to death by electrocution. ([DE 15-32] at 25). Here, Mr. Rodriguez argues that the result of his penalty phase would have been different had his counsel investigated available family background and history and conducted an adequate mental health investigation.

Rule 3.851/Postconviction Proceedings

Eight years later, Mr. Rodriguez asserted an ineffective assistance of penalty phase counsel claim in his Rule 3.851 motion. On March 13, 1998, the Court held a *Huff* hearing.[13] At the hearing, the State conceded that Mr. Rodriguez had raised two claims which required an

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[12] In Florida, the parties can present additional evidence before the sentencing judge that the sentencing jury did not consider. *See Spencer v. State*, 615 So.2d 688, 691 (Fla. 1993).

[13] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

evidentiary hearing. One of those claims was Claim VIII (ineffective assistance of counsel for failing to "adequately investigate and prepare additional mitigating evidence and failed to adequately challenge the State's case as well as to present evidence in support of the mitigating circumstances.").

On April 5, 1999, the court held the evidentiary hearing. Mr. Rodriguez did not call any family members or lay witnesses to the stand. The only two witnesses called by the defense were Dr. Ruth Latterner and Scott Kalisch, Esq.[14] The State called Dr. Leonard Haber, two employees of the Florida Department of Corrections, and a homicide detective from the City of Miami Police Department. (*See* [DE 15-82] at 71-113).

Ruth Latterner, PhD was the first witness called during the Rule 3.851 hearing. Dr. Latterner is a licensed psychologist who is board certified in psychology and neuropsychology. ([DE 15-81] at 34). Dr. Latterner evaluated Mr. Rodriguez on September 20, 1995. (*Id*. at 35). She administered the WAISR and Woodcock Brief Cognitive Cluster examinations to test Mr. Rodriguez's intellect and neuro-psychological functioning. Mr. Rodriguez scored a full scale IQ score of 64. ([DE 15-81] at 39). In making her clinical diagnosis, Dr. Latterner reviewed Mr. Rodriguez's Department of Corrections medical records, Federal Bureau of Prisons records, the investigative summaries of Mr. Rodriguez's relatives, friends, and teachers in Cuba. It is Dr. Latterner's opinion that Mr. Rodriguez is educable mentally retarded. ([DE 15-81] at 62)

Scott Kalisch, Esq. is an attorney licensed in the State of Florida. Mr. Rodriguez's trial was his first death penalty case. ([DE 15-82] at 31). Mr. Kalisch had no experience with a capital

[14] The defense was planning on calling a second expert witness, Dr. Denis W. Keyes. However, the decision was made not to call him because his testimony would have been "substantially the same as Dr. Latterner." ([DE 15-83] at 90).

penalty phase of trial, had attended no continuing legal education courses, nor did he receive any training in law school related to mental health mitigation. (*Id*.). Mr. Kalisch described Mr. Rodriguez as "on the low scale of a person who would become involved in his own defense." (*Id.* at 39). When he was asked if he was able to interview Mr. Rodriguez's relatives or family members in Cuba, Mr. Kalisch responded: "I don't know. I didn't make a request to go to Cuba. I had thought at the time that we were not able to go down to Cuba." (*Id*. at 40). On cross-examination, Mr. Kalisch stated that "[I]t was difficult to talk to this defendant about the case, or what I was going to do. His position was this has nothing to do with me, even when he knew they were about to do these mental mitigators." ([DE 15-82] at 57).

The State called three lay witness. Sergeant Mike Young and Psychological Specialist, Lisa Wiley from the Florida Department of Corrections and George Morin, Special Homicide Unit, City of Miami Police Department. Each witness testified that in their interactions with Mr. Rodriguez, he spoke in English, had good cognitive abilities, and did not present as mentally retarded. (*See* [DE 15-82]).

Finally, Dr. Leonard Haber testified. Dr. Haber evaluated Mr. Rodriguez the week before the penalty phase. At that time, he had reviewed documents provided to him by the State, including "the defendant's own statement; police reports; the defendant's prior record; co-defendant's statement, things of that kind." ([DE 15-83] at 23). Dr. Haber testified that, after he issued his 1990 report, he had also reviewed "trial testimony, and state and federal pre-sentence investigation reports, and records of incarceration." (*Id*.). Ultimately, Dr. Haber found that Mr. Rodriguez was of below average intelligence but not mentally retarded. (*Id*. at 26-28). However, Dr. Haber testified "there was a possibility that there may be an underlying organic brain

disfunction [sic]. I raised that as a possible issue for the defense to consider." (*Id*. at 25). Consistent with his 1990 report, Dr. Haber testified that no statutory mitigating circumstances applied to Mr. Rodriguez. (*Id*. at 52).

Appeal to Florida Supreme Court

On November 23, 1999, the trial court denied Mr. Rodriguez's Rule 3.851 motion. The court found that "even if this mitigating evidence had been introduced, in light of all the aggravating factors in this case, there is no reasonable probability that the jury recommendation would have been different." ([15-74] at 87). On appeal, the Florida Supreme Court affirmed.

> In the instant case, the trial court found trial counsel was not ineffective for failing to investigate because Rodriguez did not wish to involve his family. Trial counsel testified at the evidentiary hearing that "[i]t was difficult to talk to this defendant about the case, or what I was going to do. His position was this has nothing to do with me, even when he knew they were about to do these mental mitigators." Trial counsel also stated that Rodriguez did not want his family involved and refused to offer information that would have helped in the presentence investigation. This testimony reveals that trial counsel was limited by his client's lack of cooperation. As the Supreme Court noted in *Strickland*, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. Rodriguez's lack of cooperation undermines his allegations of ineffective assistance of counsel. *See Sims v. Singletary*, 155 F.3d 1297, 1316 (11th Cir.1998) (finding counsel not deficient for failure to present additional mitigation evidence which counsel was unaware of due to defendant's refusal to assist him); *Cherry v. State*, 781 So.2d 1040 (Fla.2000) (finding no ineffective assistance of counsel in light of defendant's refusal to supply names of witnesses who would have testified on his behalf); *Rose v. State*, 617 So.2d 291, 294-95 (Fla.1993) (finding counsel was not ineffective for failing to call family members as witnesses where defendant told counsel that he had no contact with his family for several years and that his family's testimony would not be helpful).
>
> Trial counsel was also questioned about his failure to travel to Cuba in order to interview Rodriguez's family, friends, and acquaintances and to search for possible mitigating evidence. The trial court concluded that trial counsel would not have been permitted to travel to Cuba. However, this finding is refuted by federal legislation existent at that time and still in effect today. *See* 31 C.F.R. § 515.560 (2004) (permitting travel-related transactions to, from, and within Cuba

by persons subject to U.S. jurisdiction for a number of listed activities, including professionals conducting research related to their profession as long as a license is obtained). During the evidentiary hearing, trial counsel admitted he did not make a request to go to Cuba because he believed travel to that country was prohibited. Rodriguez argues that had trial counsel gone to Cuba, he would have been able to uncover the type of mitigating evidence presented by collateral counsel at the evidentiary hearing. This evidence, which collateral counsel gathered from interviews with Rodriguez's friends and family, reveals the following: family, peers, and teachers considered Rodriguez to be slow intellectually; there is a substantial family history of mental health problems including Rodriguez's father, grandparents, and other relatives; Rodriguez's family was impoverished; Rodriguez went without medical care even after he fell off a horse and sustained a head injury; Rodriguez was often beaten by family members including an uncle who once tied him to a tree and whipped him; and Rodriguez was sent to work camps by his family because they considered him uneducable.

* * *

The record in this case shows that counsel did not render ineffective assistance to Rodriguez by failing to fully investigate mental health mitigation. This case is distinguishable from *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), in which counsel curtailed their investigation of mitigating evidence in favor of the alternative strategy of convincing the jury that the defendant was not directly responsible for the murder. In the instant case, the court appointed Dr. Haber to interview Rodriguez before the penalty phase. Dr. Haber filed a report indicating that he had interviewed Rodriguez on two separate occasions. That report included much of the mitigation that Rodriguez now raises, including the following: Rodriguez's birth and childhood in Cuba; his immigration to the United States as part of the Mariel boatlift; his injury after falling off a horse as a child; his desertion from the Merchant Marine and resulting incarceration in a Cuban prison; his imprisonment for four years in Washington, D.C., for cocaine trafficking; his temporary confinement in a Cuban psychiatric hospital; and two separate suicide attempts. Dr. Haber also noted that Rodriguez was able to explain his rejection of a plea offer, deny his participation in the murder, and appreciate the seriousness of the charges against him. Based on his interviews, Dr. Haber found that Rodriguez had no "suicidal or homicidal ideation" and seemed "alert ... responsive and cooperative."

* * *

Trial counsel was also questioned about his strategic decision not to call Dr. Haber as a witness in the penalty phase. Counsel explained that he made this decision in order not to open up Rodriguez's criminal history during cross-examination questioning by the State. As counsel explained, "I had nothing

> from Dr. Haber as to ... mental retardation," which he balanced against a history of prior felony convictions, including drug trafficking conviction and escape, that could have been revealed to the jury. In light of the fact that Dr. Haber's report did not substantiate the statutory mental health mitigators or mental retardation, counsel's decision not to put Dr. Haber on the stand and thereby open up Rodriguez's prior convictions to inquiry by the State was a reasonable decision.
>
> * * *
>
> Rodriguez's conduct also supports the State's contention that although Rodriguez has a low IQ, he is not mentally retarded. Thus, Rodriguez's claims are without merit. *See Hall v. State*, 742 So.2d 225 (Fla.1999) (noting that although the defendant had several mental deficits which had required treatment for several years, all members of the defense team were aware of the impairments and the defendant understood the proceedings against him). Although trial counsel could have traveled to Cuba, his efforts would have uncovered substantially the same background information that was already known. Even if this evidence had been admitted, there is no reasonable probability that the outcome of this case would have been different. *See Spencer v. State*, 842 So.2d 52, 61 (Fla. 2003) ("For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different."). Thus, Rodriguez cannot satisfy the prejudice prong of his claim of ineffective assistance in this regard.

Rodriguez, 919 So.2d at 1263-68. (footnote omitted).

Standard of Review on §2254 Claims

As this claim was decided on the merits,[15] habeas relief cannot be granted unless the Florida Supreme Court's determination "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme

[15] Although the decision of the Florida Supreme Court does not directly analyze the implications of the investigative information from Mr. Rodriguez's family and friends in Cuba as independent mitigation, the Court must still apply AEDPA deference to this claim. *See Lee v. Comm., Dep't of Corr.*, 726 F.3d 1172, 1223 (11th Cir. 2013)("Under Supreme Court and our Circuit precedent, a state court's written opinion is not required to mention every relevant fact or argument in order for AEDPA deference to apply. Just the opposite is true. AEDPA deference under § 2254(d)(1) or (2) applies to summary adjudications and does not depend in any way on whether a state court opinion "mentions" or discusses a particular relevant fact or argument for purposes of § 2254(d).").

Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. §2254(d)(1)-(2). In making such a determination, the Court may only consider the record that was before the state court. *See Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011)("We now hold that review under §2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.").

If, after review, the Court concludes that Mr. Rodriguez satisfies either 28 U.S.C. §2254(d)(1) or (d)(2), then the Court should determine if he is entitled to present additional evidence in support of his claim in a federal evidentiary hearing. To be entitled, Mr. Rodriguez must show diligence. *See Pope v. Sec'y, Dep't of Corr*., 680 F.3d 1271, 1289 (11th Cir. 2012)("In general, our precedent says that when a petitioner requested an evidentiary hearing at every appropriate stage in state court and was denied a hearing on the claim entirely, the petitioner has satisfied the diligence requirement for purposes of avoiding Section 2254(e)(2)."). However, if a petitioner fails to develop the factual basis of a claim in the State court proceedings, an evidentiary hearing is barred. *See Williams v. Alabama*, 2015 WL 3916740, *8 (11th Cir. 2015)("In this context, the Supreme Court has 'explained that "fail" connotes some omission, fault, or negligence' on the part of the petitioner . . . [t]hus, 'a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel.'"). Once the entitlement to an evidentiary hearing is resolved, the Court will conduct a *de novo* review of the claim. *Jones v. Walker*, 540 F.3d 1277, 1288 n. 5 (11th Cir. 2008) (*en banc*)*; see also Green v. Nelson*, 595 F.3d 1245, 1251 (11th Cir. 2010) (finding state court unreasonably determined the facts under 2254(d)(2) and

applying *de novo* review).

The Court begins its review of Mr. Rodriguez's claim of ineffective assistance of penalty phase counsel with: (1) an AEDPA analysis of Mr. Rodriguez's claim, (2) a determination on entitlement to an evidentiary hearing in federal court, and (3) concludes with a *de novo* review of the claim.

28 U.S.C. §2254(d)(1) &(2)

Any analysis of an ineffective assistance of counsel claim should begin with *Strickland v. Washington,* 466 U.S. 668 (1984). In *Strickland*, the United States Supreme Court set forth the two-prong test that a convicted defendant must meet to demonstrate that his or her counsel rendered ineffective assistance. First, a defendant "must show that counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms." *Strickland*, 466 U.S. at 688. Second, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The Court defines a "reasonable probability" as one "sufficient to undermine confidence in the outcome." *Id*. And "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id*. at 693. The Supreme Court clarified the *Strickland* standard as follows:

> In *Strickland*, this Court made clear that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation ... [but] simply to ensure that criminal defendants receive a fair trial." 466 U.S., at 689, 104 S. Ct. 2052. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, at 686, 104 S. Ct. 2052 (emphasis added). The Court acknowledged that "[t]here are countless ways to provide effective assistance in any given case," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id*., at 689, 104 S. Ct. 2052.

Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011). The Court reviews Mr. Rodriguez's claim applying the clearly established federal law of *Strickland* and its progeny while also giving deference to the state court's decisions as required by the AEDPA.

§2254(d)(1)

Mr. Rodriguez asserted two primary arguments in support of his claim. First, he argued that his counsel did not conduct an adequate mental health investigation. ([DE 1] at 60) Second, he argued that his counsel failed to investigate available family background and history. (*Id*.). The Florida Supreme Court, in denying these claims, cited to *Strickland* and concluded that Mr. Rodriguez must show "both deficient performance by counsel and resulting prejudice from the deficient performance." *Rodriguez*, 919 So.2d at 1263. Here, the Court must determine if the court's legal determinations were either contrary to *or* an unreasonable application of clearly established federal law. "Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) '*contrary to* ... clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) '*involved an unreasonable application of* ... clearly established Federal law, as determined by the Supreme Court of the United States.'" *Williams v. Taylor*, 529 U.S. 362, 404-405 (2000)(emphasis in original). The two clauses have independent meaning. *See id.*

"contrary to"

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that

> ... the result of the proceeding would have been different." *Id*., at 694, 104 S.Ct. 2052. A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.

Id. at 405-06. Mr. Rodriguez has not established that the Florida Supreme Court's determination was "contrary to" clearly established federal law as defined by the United States Supreme Court. Here, the Florida Supreme Court found that "[e]ven if this evidence had been admitted, there is no *reasonable probability* that the outcome of this case would have been different." *Rodriguez*, 919 So.2d at 1266-67. (emphasis added). As "reasonable probability" is the correct standard, the state court properly applied the rule from *Strickland*. Therefore, the court "correctly identifie[d] *Strickland* as the controlling legal authority and, applying that framework, reject[ed] the prisoner's claim." *Williams*, 529 U.S. at 406. While the Court may disagree with the resolution of the claim, it cannot find that the decision was "diametrically different" from, "opposite in character or nature" from, or "mutually opposed" to clearly established federal precedent. *See id.* Having found that the court's determination was not "contrary to" clearly established federal law, the Court must next consider the reasonableness of the court's "application" of clearly established federal law.

"unreasonable application"

> Stated simply, a federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case.

Williams, 529 U.S. at 409-410. In applying *Strickland*, the Florida Supreme Court made three

critical determinations. First, that Dr. Haber's report "included much of the mitigation that Rodriguez now raises." *Rodriguez,* 919 So.2d at 1264. Second, that counsel made a "strategic decision not to call Dr. Haber as a witness in the penalty phase." *Id*. at 1265. Third, the court found that "trial counsel was limited by [his client's] lack of cooperation." *Id.* at 1263. Ultimately, the court concluded that counsel's performance was not deficient nor was Mr. Rodriguez prejudiced by any perceived deficiency. After review, the Court finds that the Florida Supreme Court unreasonably applied clearly established federal law.

First, the Florida Supreme Court's application of clearly established federal law was unreasonable when it determined that counsel conducted a thorough investigation, made a strategic decision not to call a witness; therefore, his performance cannot be deemed deficient. *See Strickland v. Washington*, 466 U.S. 668, 690-91 (1984)("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.").

While it is true that counsel made a strategic decision to not call Dr. Haber to testify, that decision was made by Mr. Kalisch without him having ever investigated Mr. Rodriguez's family background, mental health history, or any other mitigation. Counsel cannot have made a reasonable strategic decision without having conducted any investigation. As such, the Florida Supreme Court's determination that Mr. Kalisch's strategic decision was reasonable becomes an unreasonable application of clearly established federal law. *See Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991)("The question of whether a decision was a tactical one is a question of fact.

See Bundy v. Wainwright, 808 F.2d 1410, 1419 (11th Cir.1987) . . . [h]owever, whether this tactic was reasonable is a question of law.").

There is no question that Mr. Kalisch balanced the value of Dr. Haber's opinion against the potential damage to Mr. Rodriguez if the jury found out that he had prior felony convictions. Mr. Kalisch made a strategic decision to not call Dr. Haber. However, that decision came from uninformed judgment because counsel failed to conduct even the most minimal of investigation into Mr. Rodriguez's background; not because he believed to be counterproductive, but rather because he erroneously believed that he could not travel to Cuba to meet Mr. Rodriguez's family. *See Williams v. Taylor*, 529 U.S. 362 (2000). Counsel was unable to make a sound strategic decision which considered the pros and cons of Dr. Haber's testimony because counsel did not have an informed view of all the possible mitigation. It certainly may have been that after hearing all the possible mitigation, the scales would have shifted and counsel would find that the value of the mitigation evidence outweighed any negative effect of Mr. Rodriguez's prior criminal record. Likewise, counsel may have considered all the mitigating evidence and still made a strategic decision not to call Dr. Haber but it would have been a reasonable informed strategic decision. *See Wong v. Belmontes*, 558 U.S. 15 (2009)(counsel was limited in his ability to put on character evidence because of an uncharged murder case which the trial judge had ruled would come into evidence if Mr. Belmontes "opened the door."). Based solely on the record before the Court, to find Mr. Kalisch's strategic choice to have been a reasonable strategic decision was an unreasonable application of *Strickland*. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003)("*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the

reasonableness of the investigation said to support that strategy. 466 U.S., at 691, 104 S.Ct. 2052."). Therefore, the "unreasonable application" clause of §2254(d)(1) is satisfied.

Second, the Florida Supreme Court unreasonably applied clearly established federal law when it found that Mr. Kalisch's performance was not deficient because "[t]rial counsel also stated that Rodriguez did not want his family involved and refused to offer information that would have helped in the presentence investigation. This testimony reveals that trial counsel was limited by his client's lack of cooperation." *Rodriguez*, 919 So.2d at 1263.

As an initial matter, this is not an accurate recitation of trial counsel's testimony. There is no indication in the record that before, during, or after the penalty phase Mr. Rodriguez indicated that he *did not want* his family involved or that he *refused* to offer information. During postconviction, Mr. Kalisch testified as follows:

> Q: Now, you go to explain to him, review the application what is involved for defense motions and the trial, the penalty phase, what is involved, possible mitigating circumstances; you presented that, sir? Correct?
>
> A: Correct.
>
> Q: And you talk to the defendant about that, correct, about what was going to happen in trial?
>
> A: It was difficult to talk to this defendant about the case, or what I was going to do. His position was this has nothing to do with me, even when he knew they were about to do these mental mitigators.
>
> Q: He did not want to consult with you and give you information that would aid you in that pre-sentence investigation?
>
> A: That's correct.
>
> Q: He didn't want his family involved, correct?
>
> A: The only family member that I remember was Marleny, his wife. And I wanted Marleny for before, and he never told [sic] to get Marleny as a witness.

Q: But other family members he didn't want involved?

A: No, not particularly.

([DE 15-82] at 56-57). At best, the record shows that Mr. Rodriguez was ambivalent about his criminal trial. In context, the record shows that Mr. Rodriguez did not do much to help his cause in the way of volunteering information which could have been fruitful to investigate for mitigation but it certainly falls short of a *refusal*.

"It's just his general attitude which was not at all unpleasant or problematic. It just didn't have that element of intense interest of someone who is facing the death penalty." ([DE 15-92] at 64; testimony of Dr. Leonard Haber). "He is that way. I have to admit." (*Id*.; statement of Scott Kalisch). These are the words of the court-appointed psychologist and Mr. Rodriguez's lawyer describing his demeanor prior to the penalty phase. This characterization of Mr. Rodriguez as disinterested or dispassionate is how he was portrayed throughout trial and in the postconviction record.

Moreover, the deposition of Dr. Haber and his subsequent report indicate the opposite of uncooperative behavior. In fact, Dr. Haber testified many times about how cooperative and pleasant Mr. Rodriguez was during his evaluations. There is no evidence that Mr. Rodriguez ever stated that he did not want to talk to Dr. Haber even when he knew that Dr. Haber was there to examine him for possible mitigation. In his report, Dr. Haber found Mr. Rodriguez did not demonstrate "disinterest, disrespect, or in any way interfere with this examiner." ([DE 15-115] at 24). The trial transcript does not have a single reference to any overt express unwillingness to involve his family or refusing to provide information for possible mitigation. In fact, his wife did testify at the penalty phase of the trial while his two-year old son sat in the front row of the

gallery. Mr. Kalisch even pointed the child out to the jury during closing arguments when pleading for mercy. ([DE 15-32] at 79). While circumstantial, these actions do not support a factual finding that Mr. Rodriguez did not want his family involved. The facts here are vastly different from those cases where the petitioner explicitly refused to allow counsel to put on mitigating evidence. A lack of enthusiasm differs from a refusal. *See Cummings v. Sec'y, Dep't of Corr*., 588 F.3d 1331, 1366 (11th Cir. 2009) (defendant "consistently opposed the presentation of mitigating evidence at his trial" and told counsel and the trial court "repeatedly that he did not want a penalty-phase presentation."); *Pope v. Sec'y Dep't of Corr.*, 752 F.3d 1254, 1266 (11th Cir. 2014) (defendant "told the court, 'I'd really rather not have him make a presentation on my behalf to the jury. You only have two choices, and I know what my choice is.... I would rather have the death sentence than the twenty-five years in prison.'"); *Schriro v. Landrigan*, 550 U.S. 465 (2007)(Landrigan explicitly and repeatedly informed the trial court at sentencing that he did not wish to put on any mitigating evidence—even going so far as to interrupt his counsel's attempt to proffer evidence to which the mitigating witnesses would have testified.).

More importantly, even if Mr. Rodriguez did "not wish to involve his family" and "refused" to offer information, it was an unreasonable application of clearly established federal law to conclude that this refusal absolved Mr. Kalisch of his duty to investigate possible mitigation. Clearly established federal law at the time of the Florida Supreme Court's decision was that counsel had a duty to conduct a reasonable investigation even for an disinterested and uncooperative client. Mr. Rodriguez's appeal to the Florida Supreme Court concluded after the denial of rehearing on January 19, 2006, when a revised opinion issued. At that time, the United States Supreme Court had recently determined that even when a defendant made minimal

contribution to any mitigation, was uninterested in helping, said he was "bored being here listening" and was "actively obstructive by sending counsel off on false leads" counsel still had an obligation to investigate. *See Rompilla v. Beard*, 545 U.S. 374, 381 (2005)(defendant refused to assist in the development of a mitigation case, but did not inform the court that he did not want mitigating evidence presented.). The law recognizes a distinction between passive non-cooperation and active instruction. At the time of the Florida Supreme Court's decision, *Rompilla* did not obviate counsel's obligation to investigate and present mitigation evidence even when the client failed to cooperate. *See Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)("We look for "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71–72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).").

Indeed, it was more than a year after Mr. Rodriguez's appeal when the United States Supreme Court first considered whether a defendant who refused to *allow the presentation* of any mitigating evidence (a different factual scenario than here where the court found that Mr. Rodriguez refused to *offer information* which would have helped in the presentence investigation) could establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence. *See Schriro v. Landrigan*, 550 U.S. 465, 478 (2007) ("Indeed, we have never addressed a situation like this.").

Therefore, when the Florida Supreme Court found that trial counsel was not ineffective for failing to investigate mitigation because Mr. Rodriguez did not want his family involved and refused to offer information that would have helped in a mitigation investigation, the court made an unreasonable application of clearly established federal law. In so finding, the Court

recognizes "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams*, 529 U.S. at 365. (emphasis added). The facts of this case present such a rare circumstance. The Court finds that the Florida Supreme Court's application of clearly established federal law was unreasonable because no "fairminded jurist" could agree with the court's determination or conclusion. *Holsey v. Warden*, 694 F.3d, 1230, 1257 (11th Cir. 2012)(quoting *Harrington*, 562 U.S. at 101, 131 S.Ct. at 786).

Finally, as to the one legal determination by the Florida Supreme Court that was a reasonably applied (Dr. Haber's report contained much of the mitigation now raised), the Court finds that the underlying factual determination to which the law was applied to be unreasonable. Accordingly, while Mr. Rodriguez satisfied §2254(d)(1) as to the failure to cooperate and counsel's strategic decision determinations, he also satisfied §2254(d)(2) because the court's rejection of his ineffective assistance of counsel claim based on the redundancy of mitigating evidence in Dr. Haber's report was an "unreasonable determination of facts."

§2254(d)(2)

In affirming the denial of postconviction relief to Mr. Rodriguez, the Florida Supreme Court made a crucial factual finding. Given the state court record, the Court finds that factual determination to be unreasonable.

> We may not characterize these state-court factual determinations as unreasonable "merely because [we] would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Instead, § 2254(d)(2) requires that we accord the state trial court substantial deference. If " '[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's ... determination.' " *Ibid*. (quoting *Rice v. Collins*, 546 U.S. 333, 341–342, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006)). As we have also observed, however, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review," and "does not by definition

> preclude relief." *Miller–El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Here, our examination of the record before the state court compels us to conclude that both of its critical factual determinations were unreasonable.

Brumfield v. Cain, 135 S.Ct. 2269, 2277 (2015). When conducting the §2254(d)(2) analysis "we do not question the propriety of the legal standard the trial court applied...[i]nstead, we train our attention on the [] underlying factual determinations on which the trial court's decision was premised." *See id.* at 2276. The Florida Supreme Court's rejection of Mr. Rodriguez's ineffective assistance of penalty phase counsel claim rested, in part, on this critical factual finding: Dr. Haber's report "included *much of the mitigation* that Rodriguez now raises." *Rodriguez*, 919 So.2d at 1264-65 (emphasis added). However, there is no record support for finding that "*much* of the mitigation" now raised by Mr. Rodriguez was included in Dr. Haber's report. No fairminded jurists would agree with the state court's determination.

The Florida Supreme Court found that Dr. Haber's report included information about: "Rodriguez's *birth and childhood*." (*Id.*)(emphasis added). However, a comparison of Dr. Haber's report (which was never submitted to the jury and not admitted into evidence until after the jury gave the sentencing recommendation) and the investigative summaries from the family, friends, and educators in Cuba illustrates just how cursory and incomplete the report was in comparison to the available mitigation information. More importantly, the court's factual finding suggests that the report contained more information than it did.

While it is true that Dr. Haber's report included Mr. Rodriguez's *birth date* and *place of birth*, the report did not include any of the detailed information contained in the investigative reports. According to Mr. Rodriguez, this information was available for mitigation purposes. The investigative reports reveal that at the time of Mr. Rodriguez's "*birth*":

- Mr. Rodriguez's mother was malnourished throughout her pregnancy
- His mother had no prenatal care or vitamins
- His mother consistently drank shots of alcohol and beer during her pregnancy
- His mother lived next to about 50 chemical tanks leaking toxic chemicals and during a hurricane those tanks opened and the chemicals were floating in waist high water
- Mr. Rodriguez was born in and lived in a house with a dirt floor, no running water, no toilet and no electricity
- Mr. Rodriguez was born with crossed eyes

([DE 15-90] at 26-66). Further, the only "*childhood*" information contained in Dr. Haber's report aside from his place of birth being in San German, Cuba was that Mr. Rodriguez self-reported that he stopped attending school in first grade because he "had to work" and he "once fell from a horse, 'when [he] was a kid.'" ([DE 15-17] at 50). However, the mitigating evidence in the investigative reports showed that:

- Mr. Rodriguez's teachers considered Mr. Rodriguez to be the "slowest" child in the class
- He could not read, do math, or recite the alphabet.
- Mr. Rodriguez's family sent him to work camps because he did so poorly in school
- He could not understand basic errands or simple chores
- His family consistently described him as "crazy"
- Mr. Rodriguez fell from a horse, did not receive medical treatment, and afterwards "seemed slower in the head."
- He was universally described as "hyperactive"
- Mr. Rodriguez's family has a long history of mental illness and substance abuse
- His elementary school teachers believed him to be "retarded"
- Other children at school called him "dummy", "idiot", and "stupid"
- Mr. Rodriguez was reported to have talked to himself.
- He inappropriately sucked on his hand
- He had poor body control, and frequently walked into walls
- Mr. Rodriguez's uncle tied him to a tree while naked and beat him, sometimes striking him in the face or neck and threatening to "kill" him
- Mr. Rodriguez's mother and uncle would punish him by having him kneel on the dirt floor which was full of peebles. Mr. Rodriguez would cry until he was allowed to get up.
- Mr. Rodriguez's mother, uncle, and grandfather beat him with a belt
- Mr. Rodriguez's grandmother also beat him with a thorny vine on his bare legs.
- His grandmother sometimes punished him by making him kneel on a piece of tin with little holes punched in it.

([DE 15-90] at 26-66). For the court to have found that Dr. Haber's report "contained *much*

of the mitigation that Mr. Rodriguez now raises" is simply unreasonable based on the record. In fact, a comparison of the investigative summaries and Dr. Haber's report shows that almost none of the mitigation information raised during postconviction was in Dr. Haber's report; let alone "*much*" of the information. Having found that Mr. Rodriguez has satisfied §2254(d)(1) & (d)(2), the Court must consider if he is entitled to an evidentiary hearing in federal court pursuant to §2254(e)(2).

Evidentiary Hearing

Mr. Rodriguez argued that he was "not granted an evidentiary hearing on his family and social history as mitigation in and of itself." ([DE 1] at 71). Therefore, Mr. Rodriguez seeks an evidentiary hearing in federal court. However, Mr. Rodriguez has failed to establish an entitlement to one because he had an opportunity to present relevant evidence at his evidentiary hearing in state court but failed to do so. *See Pope v. Sec'y, Dep't of Corr*., 680 F.3d 1271, 1289 (11th Cir. 2012). The record shows the following:

Huff hearing and Rule 3.851 evidentiary hearing

On March 13, 1998 the Court held a *Huff* hearing. At the hearing, the State (ASA Penny Brill) conceded that Mr. Rodriguez had raised two claims which required an evidentiary hearing.

> MS. BRILL: Claim VIII. It deals with ineffective assistance of counsel at his sentencing and it deals with counsel's inadequate investigation on mental litigation, *on family history*. Basically everything that you do in sentencing pretty much. And the State feels that in abundance of caution that Your Honor in spite of the fact that we think they would not be able to prove prejudice at the hearing, but I think that in an abundance of caution we should have an evidentiary hearing and give the defendant an opportunity to prove his allegations. So, as to that claim, maybe we can speed up on that particular claim, you don't have to waste time arguing that. We would certainly agreed to that and we can argue other claims.

([DE 15-80] at 49)(emphasis added).

> MS. BRILL: Claim VIII includes part of the allegations of Claim III. Anything to do with mental health at sentencing the State has basically said in an abundance of caution this court should grant an evidentiary hearing on that issue. I don't think you want to call part of Claim III or all of Claim VIII because they are interwoven together. But as it deals with the sentencing, the State agrees to that in an abundance of caution.

([DE 15-80 at 50-51).

The *Huff* hearing concluded with what appears to be an understanding that Mr. Rodriguez intends to produce witnesses from Cuba and that the claim involves testimony from the family. ([DE 15-80] at 78).

> Specifically, Ms. Brill clarified with the court:
>
> "But VIII is a little bit more - - we have to bring the family members to testify about his past and all of that stuff."
>
> THE COURT: "Yes."

(*Id*.). Then a logistical and financial discussion ensued - without resolution - regarding the testimony of witnesses from Cuba. Later that day, the judge issues a written order granting an evidentiary hearing with the caveat - "The issue defined is the question of mental retardation at the penalty phase of the trial *only*." ([DE 15-69] at 6)(emphasis added). On May 19, 1998, CCRC filed its witness list - including the family members from Cuba. ([DE 15-86] at 18-21). On June 19, 1998, there was a status conference where the family witnesses were discussed. ([DE 15-69] at 93-97). At that time, it appeared that Mr. Rodriguez was still planning on calling family members from Cuba. On July 10, 1998, there was another status conference where the family witnesses were discussed. ([DE 15-81] at 21-27). At that time, it still appeared that Mr. Rodriguez was planning on calling family members from Cuba. On October 7, 1998, the Assistant State's Attorney sent a letter to CCRC requesting a proffer of what the witnesses were

going to say. The State requested that the witness proffers be submitted before October 16, 1998. ([DE 15-72] at 7). On February 22, 1999, the State filed a response to the defendant's objection to the State's witness list which indicated that it still had not received the proffers of the family's testimony. ([DE 15-72] at 41-45). After that, the record is silent on the issue.

On April 5, 1999, the court held the evidentiary hearing. Mr. Rodriguez did not call any family members or lay witnesses to the stand. The issue was not discussed except for when the witness summaries were admitted along with the other background materials that Dr. Latterner relied on for her report. The ASA did not object to the admission of the summaries as something that the defense expert relied on but did object to their admission for the "actual substance." Defense counsel voiced no objection to the limited admission as long they were "entered." ([DE 15-81] at 60-62).

Post Rule 3.850 Hearing

After the April 5, 1999 hearing each side submitted a post hearing memorandum to the court. In the initial memo, Mr. Rodriguez argued that "[h]ad family members *been able to travel* from Cuba to testify at the evidentiary hearing, further non-statutory mitigating circumstances would have been established." ([DE 15-74] at 45, n.6)(emphasis added). The State characterized the witness summaries as "[t]hese statements were entered into evidence, only as part of material the[sic] Dr. Latterner reviewed, and not substantive evidence for this Court to consider as proof, that this mitigation existed and was available to defense counsel. Although hearsay is admissible in penalty proceedings, the opposing party must have a fair opportunity to rebut that testimony, something which the State did not have in this case." ([DE 15-74] at 72, n.1). In reply, Mr. Rodriguez (for the first time) argued that "[t]he scope of the evidentiary hearing was narrowly

defined to mental health issues only. In practical terms, however, it is impossible to disentangle family history issues form [sic] mental health issues neatly. Mr. Rodriguez was thus deprived of his rights by the failure of this Court to grant a full evidentiary hearing on ineffective assistance of counsel." ([DE 15-74] at 80, n.3). The court denied the motion without comment on the issue. ([DE 15-74] at 83-87).

Florida Supreme Court

On appeal to the Florida Supreme Court, Mr. Rodriguez separated out the family history which would have been helpful to the expert witnesses' evaluation from the family history which would have been independent non-statutory mitigation. A differentiation was made between the mental retardation/expert witness penalty phase claim and the "summary denial of the non mental health penalty phase claim." ([DE 15-4] at 3). In his brief, Mr. Rodriguez argued that he "was not afforded the opportunity of putting on evidence from family members and other individuals who could have shown his abusive, poverty stricken and neglected early life." ([DE 15-4] at 52).

In response, the State argued that Mr. Rodriguez did not meet his burden and his claim was properly denied. "Moreover, Defendant was given the opportunity at an evidentiary hearing and did not present any alleged witnesses from Cuba to testify regarding Defendant's alleged retardation and background." ([DE 15-5] at 21). "In fact, Defendant failed to present any witnesses at his evidentiary hearing from Cuba to testify regarding Defendant's alleged mental retardation mitigation evidence, despite the fact that the lower court indicated a willingness to consider this evidence during the *Huff* hearing." ([DE 15-5] at 49).

In reply, Mr. Rodriguez again asserted that he was denied the opportunity to present the witnesses from Cuba at his Rule 3.850 evidentiary hearing. ([DE 15-5] at 118-120 & [DE 15-6]

at 1-3). "However, the lower court's order is unequivocal in its limitation of the evidentiary hearing to ineffective assistance of counsel relating to trial counsel's failure to investigate Mr. Rodriguez's mental retardation." ([DE 15-5] at 119). Later, Mr. Rodriguez seemed to indicate that, because the hearing was limited to mental retardation, the only information needed to be provided to Dr. Latterner were summaries of the family's testimony and those summaries were sufficient. However, "had a full evidentiary hearing been granted on Mr. Rodriguez's penalty phase issues, Mr. Rodriguez would have been compelled to present witness testimony in some form, whatever the administrative and logistical hurdles." ([DE 15-6] at 1). The Florida Supreme Court referenced the witness summaries only when it found that mitigation information was already known to Dr. Haber. The concept of it being mitigation, in and of itself, was not reflected anywhere in the opinion. The court did not address Mr. Rodriguez's argument that he was not granted an evidentiary hearing on this issue and was limited in his representation of evidence at the trial court.

Federal Habeas Petition

In his initial petition, he argued that his counsel failed to investigate available family and cultural background, both in Cuba and Florida, which would have provided "non statutory mitigation in its own right." ([DE 1] at 69). Mr. Rodriguez further argued that he "was not granted an evidentiary hearing on his family and social history as mitigation in and of itself." (*Id*. at 71). Mr. Rodriguez then asserted that he was "not afforded the opportunity to show the compelling mitigation arising from his wretched life history that was readily available from family members, friends, teachers and cultural experts." He seeks an evidentiary hearing in federal court.

In response, the State alleged that "[w]hile the court stated that it was limiting the hearing to retardation, it also agreed that Petitioner would be permitted to present testimony from his family members. As a result, the state postconviction court agreed to defer the evidentiary hearing for about six months." ([DE 10] at 18). "Further, it should be remembered that Petitioner presented no admissible evidence from the family members themselves." (*Id*. at 223).

In reply, Mr. Rodriguez maintained that "had Petitioner been permitted to present evidence on social history mitigation, in and of itself, it could have been established through the testimony of family and friends had they been permitted to do so at the 1999 evidentiary hearing." ([DE 27] at 29, n.4). Mr. Rodriguez argued that he was precluded from presenting his family members as witnesses at the Rule 3.850 hearing because he was not granted an evidentiary hearing regarding background mitigation.

However, the record belies that assertion. When the state post conviction court granted Petitioner an evidentiary hearing, both he and the State immediately recognized that testimony from Petitioner's family members would be relevant and admissible regarding the claims for which an evidentiary hearing was granted. (App. V-Vol. 17 at 382-84).[16] In fact, the timing of the evidentiary hearing was substantially influenced by the need to arrange for the family members to come from Cuba. *Id*. Moreover, Petitioner clearly understood that he was entitled to call family members to testify because he listed them as witnesses for the evidentiary hearing. (App. V-Vol. 21 at 240-43, App. V-Vol. 12 at 439-46). The time needed to obtain witnesses from Cuba influenced the decision regarding when the evidentiary hearing would be held, and

[16] Throughout the Order, the Court has cited to the record as it exists in this Court's electronic CM/ECF record. However, certain documents were not located in the record and the Court has cited them in their original format.

Petitioner assured the state post conviction court he would be able to call the witnesses after the start of the new fiscal year. (App. V-Vol. 12 at 2446). However, when the evidentiary hearing was conducted almost 13 months after it was ordered and more than 9 months after the start of the new fiscal year, Petitioner made no attempt to call any family members. Instead, he simply sought to admit statements from the family members during Dr. Latterner's testimony. (App. V-Vol. 18 at 62-63). When the state post conviction court ruled that these statements could not be admitted for their truth, Petitioner did not object or appeal that ruling. (App. V-Vol. 18 at 463-64). As such, the record shows that Petitioner could have presented evidence from the family members had they been available but failed to do so. ([DE 10] at 223-24).

Based on the above information, Mr. Rodriguez has failed to show that he was denied the opportunity to present the familial and social witnesses' testimony. The record does not indicate that the state court refused or denied his counsel's request to have those witnesses testify. "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim..." §2254(e)(2). This is even more true when "petitioner failed to take full advantage of that hearing, despite being on notice of and having access to the potential evidence and having sufficient time to prepare for the hearing, that petitioner did not exercise diligence in developing the factual foundation of his claim in state court." *Pope v. Sec'y Dep't of Corr*., 680 F.3d 1271, 1289, n.12 (11th Cir. 2012).

While this conclusion does not preclude federal habeas relief on his penalty phase claim, it does limit the facts upon which federal habeas relief could be granted to the state court record. Having found that Mr. Rodriguez satisfied §2254(d)(1) & (d)(2) but does not meet the criteria for a §2254(e)(2) evidentiary hearing, the Court will conduct a *de novo* review of Mr. Rodriguez's

ineffective assistance of penalty phase counsel utilizing only the facts admitted in the state court record. *See Williams v. Alabama*, 2015 WL 3916740, *8 (11th Cir. 2015)("Section 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief.")(citation omitted).

De Novo Review

Before reviewing the claim *de novo*, the Court acknowledges that it did not make a determination regarding the factual finding of the Florida Supreme Court pursuant to §2254(e)(1)("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). It did not do so because Mr. Rodriguez's claim fails on *de novo* review. *See Berghuis v. Thompkins*, 560 U.S. 370 (2010) (permitting denial of "writs of habeas corpus under §2254 by engaging only in *de novo* review when it is unclear whether AEDPA deference applies").

Given the opportunity, the United States Supreme Court and the Circuit Court of Appeals for the Eleventh Circuit have both declined to make a determination on the interplay between §2254(d)(2) & §2254(e)(1). *Burt v. Titlow*, 134 S.Ct. 10, 15 (2013)("We have not defined the precise relationship between § 2254(d)(2) and §2254(e)(1), and we need not do so here."); *see also Cave v. Sec'y, Dep't of Corr.*, 638 F.3d 739, 746 (11th Cir. 2011)("[A]s we have previously observed, '[n]o court has fully explored the interaction of §2254(d)(2)'s "unreasonableness" standard and §2254(e)(1)'s "clear and convincing evidence" standard.'"). The instant case does not require the Court to define the respective purviews of (d)(2) and (e)(1). Therefore, the Court declines to do so.

Deficiency

There can be little doubt that defense counsel did not anticipate nor did he prepare for a penalty phase until *after* the guilty verdict. Indeed, he has said as much. The record shows that Mr. Kalisch failed to conduct any presentence investigation prior to his client being found guilty of first degree murder. Subsequent to the verdict, counsel failed to retain an investigator to find viable mitigation evidence, conduct his own investigation, or contact any of Mr. Rodriguez's relatives in Cuba. With the limited exception of Marlen Castellano, Mr. Kalisch made no attempt to present any family or social background mitigation.[17] Mr. Kalisch failed to retain a *defense* expert,[18] mental health or otherwise, to evaluate Mr. Rodriguez for statutory and non-statutory mitigation. Conducting a *Strickland* analysis shows counsel's performance to have been deficient. The Court has reviewed the law governing deficiency and finds that Mr. Rodriguez's trial counsel's performance was similar to that of other trial counsel who were found to have performed deficiently. *See Sears v. Upton*, 130 S.Ct. 3259 (2010)(the jury was told one thing during the penalty phase when the truth was far from the picture painted in mitigation), *Porter v. McCollum*, 558 U.S. 30 (2009)(defense counsel presented only one witness, Mr. Porter's ex-wife, and read an excerpt from one deposition), *Wiggins v. Smith*, 539 U.S. 510 (2003)(defense counsel had failed to conduct a reasonable investigation into Mr. Wiggins' life

[17] Mr. Rodriguez's wife's uncle, Orlando Herrera, knew Mr. Rodriguez and his family when he was growing up in Cuba. Mr. Herrera resides in Miami and came to watch Mr. Rodriguez's trial. Mr. Herrera had a wealth of information which could have been used in mitigation but Mr. Kalisch never spoke with him. ([DE 15-90] at 63).

[18] While Dr. Noble J. David, Neurologist, University of Miami, was retained to examine Mr. Rodriguez, the evaluation was conducted *after* the jury had already rendered their advisory sentence. ([DE 15-17] at 55). Dr. Noble ordered an electroencephalogram; the result showed "no abnormalities." ([DE 15-17] at 57).

history before making a strategic decision to not put on mitigation other than the fact that Mr. Wiggins had no prior convictions), *Rompilla v. Beard*, 545 U.S. 374 (2005)(defense counsel did not review his prior convictions or his prison file despite knowing that the State was planning on using those convictions as an aggravating circumstance), *Wiggins v. Smith*, 539 U.S. 510 (2003)(defense counsel had failed to conduct a reasonable investigation into Mr. Wiggins' life history before making a strategic decision to not put on mitigation other than the fact that Mr. Wiggins had no prior convictions); *compare Bobby v. Van Hook*, 558 U.S. 4 (2009)(counsel contacted their lay witnesses early and often: They spoke nine times with his mother - beginning within a week after the indictment - once with both parents together, twice with an aunt who lived with the family and often cared for Van Hook as a child, and three times with a family friend whom Van Hook visited immediately after the crime).

While the Court recognizes that perfection is not required, to have done little to nothing in preparation for Mr. Rodriguez's penalty phase either before, during, or after the guilt phase, is not the decision an effective counsel would have made. "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is whether some reasonable attorney could have acted in the circumstances . . . [as this attorney did]-whether what . . . [this attorney] did was within the 'wide range of reasonable professional assistance.'" *Waters v. Thomas*, 46 F.3d 1506, 1518 (11th Cir. 1995) (en banc) (quoting *Strickland*, 466 U.S. at 689) (citation omitted). *See also Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) (stating that to show unreasonableness "a petitioner must establish that no competent counsel would have made such a choice."). The Court finds counsel's complete failure to investigate and

prepare for the penalty phase of a capital trial to be deficient.

Nonetheless, Mr. Rodriguez must show that his penalty phase counsel's deficiency caused him prejudice. *Strickland*, 466 U.S. at 687. ("Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."). He has not done so.[19] Despite the Court's determination that counsel's performance was constitutionally deficient, habeas relief must be denied.

Prejudice

The Supreme Court has emphasized that the "*Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." *Harrington v. Ritcher,* 562 U.S. 86, 105 (2011).

> When an IATC claim is based upon a failure to present mitigating evidence, we must consider "whether counsel reasonably investigated possible mitigating factors and made a reasonable effort to present mitigating evidence to the sentencing court." *Henyard v. McDonough*, 459 F.3d 1217, 1242 (11th Cir.2006) (per curiam). When mental health is at issue, counsel does not offer ineffective assistance when it later becomes apparent that an expert who would have testified more favorably than the expert who was actually called may have existed. *See Ward v. Hall*, 592 F.3d 1144, 1173 (11th Cir.2010) ("As we have held many times before, 'the mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel

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[19] The Court did not need to reach a determination on the performance prong in order to deny habeas relief. *See McClain v. Hall*, 552 F.3d 1245, 1251 (11th Cir.2008) ("We may decline to decide whether the performance of counsel was deficient if we are convinced that [the petitioner] was not prejudiced."). In fact, the Supreme Court has made clear that "[t]he object of an ineffectiveness claim is not to grade counsel's performance" and therefore, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. However, because the Court finds this claim to have met the standard for a certificate of appealability, it must reach a determination on the deficiency prong. *See Williamson v. Sec'y, Dep't of Corr.*, 2015 WL 6685369, *8 (11th Cir., Nov. 3, 2015)("The district court should have considered both the debatability of whether counsel was deficient and the debatability of whether the petitioner suffered prejudice before granting a certificate of appealability.").

> was ineffective for failing to produce that expert at trial.' " (quoting *Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir.1997))). When evaluating the claim, the court must "consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.' " *Porter v. McCollum*, 558 U.S. 30, 41, 130 S.Ct. 447, 453–54, 175 L.Ed.2d 398 (2009) (per curiam) (quoting *Williams v. Taylor*, 529 U.S. 362, 397–98, 120 S.Ct. 1495, 1515, 146 L.Ed.2d 389 (2000)).

Barwick v. Sec'y, Dep't of Corr., 794 F.3d 1239, 1244 (11th Cir. 2015). "Prejudice occurs when the challenger has shown 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id*. Prejudice results only when counsel's errors were "so serious" that they deprived the defendant of a "fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. To satisfy the prejudice prong, the "likelihood of a different result must be substantial, not just conceivable." *Harrington*, 131 S.Ct. at 792. In considering whether Mr. Rodriguez has established the requisite prejudice mandated by *Strickland*, the Court reviewed all the evidence admitted during trial and during the state postconviction proceedings.

Penalty phase aggravators and mitigators

During the penalty phase, trial counsel called only Marlene Castellano, Mr. Rodriguez's wife and the mother of his son, to testify. Ms. Castellano testified that Mr. Rodriguez was a good husband and father. The trial judge found that this mitigation was "not sufficient to excuse him." ([DE 15-17] at 66). During the *Spencer* hearing, Mr. Rodriguez presented no additional evidence, other than his own statement proclaiming his innocence.

The State presented the testimony of the paramedic who transported Mr. Saladrigas to the hospital. His testimony described, in detail, the pain and fear experienced by the victim as a result of being shot multiple times. The court used this as the basis for finding that the crime was

"wicked, heinous, and cruel." ([DE 15-17] at 65). At the *Spencer* hearing, the State presented several family members of the victim's testimony. They all testified that the murder of Abelardo Saladrigas has been a great loss to their family.

Postconviction mitigation and rebuttal

During postconviction, Mr. Rodriguez called Ruth Latterner, PhD. ([DE 15-81] at 30). Dr. Latterner is a licensed neuropsychologist. Dr. Latterner evaluated Mr. Rodriguez in 1995. Dr. Latterner conducted psychological and intelligence testing during her evaluation. Mr. Rodriguez tested at a full scale IQ score of 64. (*Id*. at 39). Dr. Latterner concluded that Mr. Rodriguez was "exhibiting characteristics of a neuropsychological impairment, or brain damage." (*Id.* at 45). Through Dr. Latterner's testimony, the investigative summaries were admitted - not as substantive evidence - but as evidence the doctor relied on in making her diagnosis. (*See* [DE 15-81] at 61). In her expert opinion, Dr. Latterner found that Mr. Rodriguez met the criteria of two statutory mitigators: (1) defendant's ability to appreciate the criminality of his conduct and conformity to the law (§921.141(6)(f), Fla. Stat.), and (2) the defendant was under extreme emotional distress at the time of the crime (§921.141(6)(b), Fla. Stat.). ([DE 15-82] at 14-15).

In rebuttal, the State produced a Department of Corrections officer, a City of Miami police officer, a Psychological Specialist from the Union Correctional Center,[20] and Dr. Leonard Haber. (*See* [DE 15-82 & 15-83]). Dr. Haber testified that he conducted a psychological

[20] The Court questions the admissibility of the testimony from the Department of Corrections' staff and the City of Miami police detective. They had no contact with Mr. Rodriguez at the time of the penalty phase in 1990. Sergeant Mike Young and Lisa Wiley, psychological specialist, did not meet Mr. Rodriguez until 1993. ([DE 15-82] at 73 & 96). Detective Morin met with Mr. Rodriguez for the first time in 1998. ([DE 15-82] at 85).

interview and mental status exam of Mr. Rodriguez.[21] ([DE 15-83] at 24). He found no signs of "of any major mental illness." (*Id*.). While he conducted no formal intelligence testing, he found Mr. Rodriguez's intelligence to be below average but not mentally retarded. (*Id*. at 26-27). In making that determination, Dr. Haber considered Mr. Rodriguez's ability to speak two languages, his previous levels of employment, his ability to maintain a bank account, his prior criminal convictions for drug trafficking and escape, his use of false names and birthdates, the details of the crimes for which he been convicted, and his functioning as a leader in jail. Dr. Haber also testified that when he interviewed Mr. Rodriguez, he was able to discuss a plea offer from the State "directly and cogently." (*Id*. at 47). Dr. Haber opined that Mr. Rodriguez did not meet the criteria for any statutory mitigation including the inability to conform one's conduct under the law and the inability to appreciate the criminality of his conduct. ([DE 15-83] at 53-54.).

As the Court begins its analysis, it is noteworthy that Mr. Rodriguez offered nothing in postconviction which would discredit the aggravating factors found by the trial court. The trial court found the State proved four aggravating factors during the penalty phase. Without more, the Court accepts the establishment of those four aggravating factors as true. *Barnwick*, 794 F.3d at 1251. ("Barwick's arguments here concern mitigation, not aggravation; accordingly, the five aggravating factors found to support the death-penalty sentence would remain.").

In the Sentencing Order, the judge found "great relevance in [Mr. Rodriguez's prior violent felony convictions] to show the kind of person he is and the despicably bad and dangerous behavior he has exhibited." ([DE 15-17] at 65). The court also found that the murder

[21] Dr. Haber examined Mr. Rodriguez in February of 1990. He did not conduct any additional interviews or perform any additional examinations of Mr. Rodriguez during postconviction. (*See* [DE 15-83] at 22-23).

"occurred during a robbery with a firearm" and was "committed for financial gain." (*Id.*). Finally, the court found the murder of Mr. Saladrigas was "wicked, heinous, and cruel."[22] (*Id.*) The victim was quoted as saying "[p]lease don't do this to me." Mr. Rodriguez chased the victim around a car as the victim was trying to escape and shot him three additional times.

In mitigation, the trial court considered that Mr. Rodriguez was a loving father and husband and that his co-defendants were facing much lighter sentences. (*Id.* at 65-66). While the sentencing order does not specify the weight assigned to each individual aggravating and mitigating factor, the court concluded that no mitigating circumstances "exist to outweigh the aggravating circumstances." (*Id.*). The Florida Supreme Court affirmed the death sentence on direct appeal. *Rodriguez v. State*, 609 So.2d 493 (Fla. 1992).

In conducting a *de novo* review, the Court has considered all the evidence adduced at trial and during postconviction. For analytical purposes, the Court will accept the family and social background documented in the investigative summaries as true.[23] It goes without saying that any new mitigation presented during postconviction would be more compelling than the mitigation presented during the penalty phase of trial. Mr. Kalisch called a single witness who testified for less than ten pages of the entire trial transcript. However, the fact that Mr. Rodriguez has provided much more in the way of mitigation now then he did back then does not, in and of

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[22] The Florida Supreme Court has characterized the "heinous, atrocious and cruel" aggravator as one of the most serious aggravating circumstances. *See Brown v. State*, 143 So.3d 392, 405 (Fla. 2014).

[23] The Court makes no determination of whether or not those summaries would or should have been admitted for any purpose other than information that Dr. Latterner relied upon. Accepting that the substance of the testimony summarized in those reports would have been properly admitted at the penalty phase, it does not change the result here.

itself, show prejudice. It is not a forgone conclusion that when a Petitioner provides mitigation in postconviction where none had been presented during trial, he establishes prejudice. *See Sears v. Upton*, 561 U.S. 945, 955 (2010)("[W]e have explained that there is no prejudice when the new mitigating evidence "would barely have altered the sentencing profile presented" to the decision maker, *Strickland, supra*, at 700, 104 S.Ct. 2052."). The Court must still weigh the aggravators and mitigators just as the trial court would have twenty-five years ago had the postconviction mitigation been presented to the jury. Having done so, the Court does not find that Mr. Rodriguez has shown *Strickland* prejudice.

The Court does not reach this conclusion easily. Indeed, it is a laborious and paradoxical process to look back in time and through history to determine if there was a reasonable probability that six persons would have voted for a life sentence over a death sentence had certain mitigation evidence - from witnesses the Court has not seen and cannot consider their demeanor or credibility - had been presented. At best, it is an imperfect science. It is, however, one that most be done. In doing so, the Court sought guidance from the facts of comparable cases where the habeas petitioner had established prejudice from the deficient performance of penalty phase counsel.

In *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907 (11th Cir. 2011), the Eleventh Circuit granted federal habeas relief on an ineffective assistance of penalty phase counsel claim applying a *de novo* standard of review to the prejudice prong. During the penalty phase, counsel put on minimal mitigation evidence. Nonetheless, the jury voted for death by a bare majority of seven to five. *Id*. at 911. During postconviction, Mr. Johnson was able to show that his counsel failed to discover a multitude of mitigation which included:

An adequate investigation would have led to the jury hearing about how Johnson and his siblings would hide in their bedroom "huddled together in terror" when their father would come home drunk and beat their mother, knowing that if they did not hide they would be beaten, too. And the jury would have heard that the violence extended both ways, with Johnson's mother getting into "knock-down, drag-out fights" with his father and even attacking him with a butcher knife. It would have also heard that the parents' fights regularly got so far out of control that Johnson's older brother would run over to their neighbors' house and call the police.

A minimally adequate investigation would have led to the jury hearing about the physical and emotional abuse Johnson's mother inflicted on him, about how she beat him more severely than the other children—sometimes with her knuckles and sometimes with a leather strap—and how she would "single him out" for emotional torment.

If Jones had conducted an adequate investigation into his client's background, the jury would not have been left with the impression that Johnson's grandparents were caring and nurturing people. Instead, the jury would have learned from Johnson's brother that their grandparents inflicted "horrible" physical and emotional abuse on them in a home he described as "pure hell." The jury also would have learned that Johnson's grandparents targeted and psychologically tormented him by, among other things, rubbing his face in his own urine when he wet the bed.

The jury heard nothing about Johnson witnessing his mother's repeated suicide attempts. It was not told about how on one occasion Johnson, after witnessing the usual fighting between his parents, which ended with his father hitting his mother to "shut her up," found his mother lying in bed after 3 a.m. with a plastic bag over her head. Or about a family Christmas, which included the usual drunken fighting between their parents, that ended with the police coming to their home because their mother again had attempted to commit suicide, this time by taking an overdose of tranquilizers. Or about when Johnson's mother tried to slit her wrists, yet another one of her suicide attempts.

Although the jurors did hear about how Johnson blamed himself for his younger brother's death in Vietnam and for his mother's death, they did not hear how his mother and brother died. They did not learn that his mother killed herself the same way his brother died—with a drug overdose. And the jury was not told that Johnson found his mother's body, with a photograph of his dead brother clutched in her hands. Nor was the jury told that when recalling the events surrounding their deaths, Johnson would feel so guilty and grief-stricken that he would "fall apart."

Id. at 937. The Eleventh Circuit, relying on *Williams v. Taylor*, 529 U.S. 362 (2000), found prejudice because "[t]he evidence about Johnson's childhood and family that the jury did not hear is similar to that which the jury did not hear in *Williams*." The murders were no more brutal than the murder in that case and the "defendant's criminal record and other aggravating circumstances were as bad in that case as in this one." *Id*. at 937.

In *Williams*, the United States Supreme Court found the following facts relevant to its analysis of the prejudice prong.

> The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before the trial. *Id*., at 207, 227. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings,FN19 that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.
>
> FN19. Juvenile records contained the following description of his home:
>
> > "The home was a complete wreck.... There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash.... The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them.... The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey." App. 528–529.
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> Counsel failed to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade in school. *Id*., at 595. They failed to seek prison records recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison officials who described Williams as among the inmates

> "least likely to act in a violent, dangerous or provocative way." *Id*., at 569, 588. Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that Williams "seemed to thrive in a more regimented and structured environment," and that Williams was proud of the carpentry degree he earned while in prison. *Id*., at 563–566.

Given this mitigation, in consideration with the defense that was put forth during the penalty phase, the Court concluded:

> Williams turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that. While this, coupled with the prison records and guard testimony, may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability.[24]

Id. at 398.

Finally, in *Hardwick v. Sec'y, Dep't of Corr.*, 2015 WL 5474275 (11th Cir., Sept. 18, 2015), the Eleventh Circuit recently granted federal habeas relief on an ineffective assistance of penalty phase counsel claim because Mr. Hardwick showed prejudice on a pre-AEDPA standard of review. *Id*. at *11. During the penalty phase of Mr. Hardwick's trial, counsel did not call a single witness and did not establish any evidence in mitigation. *Id*. at *2. Nonetheless, the jury voted for death by only a vote of seven to five. *Id*. In postconviction, Mr. Hardwick was able to establish multiple statutory and non-statutory mitigators existed at the time of the penalty phase:

> The length and magnitude of Hardwick's substance abuse and dependency are

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[24] Virginia requires a unanimous vote for a death sentence. *See* Va. Code §19.2-264.4. Therefore, Mr. Williams would have only needed to move one juror to spare his life. A factual scenario similar to Mr. Johnson and Mr. Hardwick because although Florida requires only a simple majority; in their cases, the jury voted 7 to 5. Therefore, only a single juror would have had to have voted against death for a life sentence to be imposed. *See Parker v. State*, 904 So.2d 370 (Fla. 2005).

well-established. At the time of the murder, Hardwick had been sniffing, smoking, injecting, drinking, or otherwise ingesting a wide variety of drugs and alcohol on a regular basis for more than half of his twenty-five years. Hardwick had already begun his alcohol and drug use by age twelve. His mother neglected him and placed him in a boys' home at age seven, but he repeatedly ran away and returned to his physically abusive father who gave him drugs and alcohol to keep him occupied. By age thirteen, Hardwick was having alcohol-induced blackouts and contracted hepatitis from dirty intravenous needles. In 1974, at age fifteen, Hardwick attempted suicide twice; first by drug overdose, and then by slashing his wrists. Dr. Toomer opined at the evidentiary hearing that when substance abuse begins at such a young age and occurs for an extended period of time, it generally results in significant psychological and functional impairment. In his words, the end is result is "an individual who is unable to function effectively, i.e ., in terms of what we call executive functioning[:] weighing alternatives, projecting consequences, managing what we call high order thought...."

The record is also uncontroverted as to Hardwick's heavy intake of drugs and alcohol around the time of the murder. Several of his associates averred that they saw him taking quaaludes, smoking marijuana, and drinking vodka the day before the murder. At least one witness described him sweating heavily, shaking, and acting erratically shortly after the murder occurred; another recalled that his speech was incoherent and slurred. Correctional officer Mary Braddy saw Hardwick shortly after his incarceration, two days after the murder, and testified that he did not appear to be aware of her presence, his eyes were glassy and vacant, and he appeared to be either high or intoxicated.

* * *

Lay witness accounts, evaluations by mental health experts, and Hardwick's life-history records all tell a clear, consistent tale of abuse, neglect, and dysfunction. Hardwick's father was an alcoholic and physically abusive of both Hardwick's mother and Hardwick himself—to the point of wrenching Hardwick's shoulder out of its socket on one occasion. Another time Hardwick's father beat his son "with a belt so badly that the blood came up to the skin." Hardwick's father also would "take his shoe and kick [Hardwick] with it." Hardwick's family lived in poverty because his father, a severe alcoholic, spent much of his money on alcohol and could not maintain a job. Hardwick's family lived in substandard housing, moved frequently, and did not have adequate food and clothing. His father beat his mother, leaving cuts, bruises, and black eyes. His mother was emotionally detached and unable to provide the attention, discipline, and care Hardwick needed. After his parents divorced when he was four, Hardwick was frequently left to fend for himself during his pre-teen years, sometimes hitchhiking alone between his father's house in South Carolina and his mother and step-father's residence in Florida. Neither location was safe: his mother

> neglected him to avoid triggering her new husband's jealous rage, and his father would beat him. At age seven, Hardwick was placed in a boys' home because his mother was pregnant again and could not take care of him. Hardwick repeatedly ran away from the institution to return to his abusive father in South Carolina. Eventually, social services found the father's home unfit and placed Hardwick in a foster home. Hardwick's mother had a total of eleven children with three different husbands and never took care of Hardwick either. By the age of eleven, Hardwick had begun drinking alcohol, sniffing glue, and smoking marijuana. Over the course of his teenage years, Hardwick was in and out of juvenile institutions for a variety of theft and drug-related offenses. His institutional records include reports of depression, mood swings, and multiple suicide attempts. At one point, Hardwick was diagnosed with schizophrenia and the records show his medications included Thorazine, Sinequan, and Elavil. In sum, there is ample evidence of "the kind of troubled history [the Supreme Court] ha[s] declared relevant to assessing a defendant's moral culpability." *See Wiggins*, 539 U.S. at 535, 123 S.Ct. at 2542.

Id. at *12-13.

A cursory comparison of the similarities between the deficient[25] conduct of Mr. Rodriguez's counsel and the cases above could cause the Court to conclude that Mr. Rodriguez met the difficult burden imposed by *Strickland*. Indeed, there are many factual similarities. However, when the Court considers the facts relevant to a *prejudice* analysis and scrutinizes the factual differences, it becomes clear that Mr. Rodriguez has not satisfied the prejudice prong.

There is no question that the substance of the non-statutory mitigation provided by Mr. Rodriguez's family and friends in Cuba is troubling. Mr. Rodriguez did not have an idyllic childhood. The reports established that Mr. Rodriguez was the subject of abuse at the hands of his own family. He had been abandoned by his father and had no one to look out for him. He

[25] Counsel for Mr. Rodriguez failed to conduct any investigation into mitigation evidence (*See Hardwick*, 2015 WL 5474275 at *2), failed to review vital records where potential mitigation would have appeared (*See Johnson*, 643 F.3d at 920), and failed to investigate certain information based on the mistaken impression that he was unable to travel to Cuba (*See Williams*, 529 U.S. at 398). However, these similarities go to the deficiency prong rather than the prejudice prong.

was of low intelligence and failed at most things he tried to do. Mr. Rodriguez was often the subject of ridicule from both his family and peers.

However, Mr. Rodriguez left home when he was thirteen years old and, in 1979, immigrated to the United States. There is nothing in the record to suggest that Mr. Rodriguez was subject to subsequent abuse. While Mr. Rodriguez did engage in certain anti-social and criminal behavior once in the United States, Mr. Rodriguez also married, had a child, held various jobs as a taxi cab and tow truck driver, and attempted to assimilate by learning English, maintaining a bank account, and establishing relationships in the community. Further, Mr. Rodriguez did not suffer from a serious drug or alcohol addiction. Mr. Rodriguez had not been diagnosed with a major mental disorder (i.e.: schizophrenia, paranoia, bipolar disorders, major depressive disorders, schizoaffective disorders, pervasive developmental disorders, obsessive-compulsive disorders, panic disorders and post traumatic stress). Unlike Mr. Hardwick, on the day of the murder, Mr. Rodriguez did not exhibit erratic behavior nor was he under the influence of any mind-altering substance.

The facts of Mr. Rodriguez's adult life are vastly different from those of Terrell Johnson, Terry Williams, and John Hardwick. Mr. Johnson would drink "'[q]uite often' [which] caused him to black out, and [] it was 'typical' for him not to clearly remember events that took place while he was drinking." *Johnson*, 643 F.3d at 926. Mr. Williams is "borderline mentally retarded, had suffered repeated head injuries, and might have mental impairments organic in origin." *Williams*, 529 U.S. at 370. Mr. Hardwick, who was only twenty-five but with a life-long history of substance abuse at the time of the murder, was seen "taking quaaludes, smoking marijuana, and drinking vodka the day before the murder." *Hardwick*, 2015 WL 5474275 at *12.

Here, Mr. Rodriguez was 32 years old at the time of the crime. ([DE 15-17] at 49). He had lived and been away from his abusive family for at least ten years (perhaps longer given his time spent in the Merchant Marines and in a Cuban jail). His uncontradicted self-report was that he had not used drugs or alcohol for several years prior to the murder. Unlike Mr. Johnson, Mr. Williams, and Mr. Hardwick, Mr. Rodriguez's troubled childhood did not manifest itself in a direct and obvious manner in his adulthood. Whether truly absent or simply by failure to prove otherwise, Mr. Rodriguez has not shown a compelling link between his troubled childhood and his criminal conduct such that a reasonable probability exists that the mitigation would have produced a different result at sentencing. Moreover, the mitigation evidence of Mr. Rodriguez's childhood would have been substantially weakened by the chronological remove between his childhood and the murder. *See Rose v. McNeil*, 634 F.3d 1224 (11th Cir. 2011)(quoting *Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1369 (11th Cir. 2009) (finding petitioner Cummings's proposed penalty-phase testimony was weak and noting specifically as to his childhood evidence, "Cummings was 33 years old when he murdered Good, and the State would have stressed that his childhood was many years behind him")).

Further, it is not inconsequential that Mr. Rodriguez's jury made a unanimous recommendation for a sentence of death. In Florida, the State need only convince seven jurors to vote for death in order for the jury to make a death recommendation. Here, because Mr. Rodriguez's jury was unanimous, he would have to show a reasonable probability that, absent his counsel's deficient performance, he could have convinced six of the twelve jurors to vote for

life.[26] This encumbrance is one that the Court can take into account when considering the reasonable probability of a different result at sentencing. "Given the jury's seven-to-five vote here, if only one additional juror had been persuaded to vote for a life sentence, the jury's advisory sentence would have been interpreted as a recommendation of life imprisonment, rather than the death penalty. *Hardwick*, 2015 WL 5474275 at *19, n. 16. Without doubt, it is more difficult to show prejudice here than when there is a single juror at issue. Taking this into consideration, as one of the many considerations at issue here, when re-weighing the mitigation and aggravation, the Court concludes that Mr. Rodriguez did not succeed in establishing that there is a reasonable probability that the jury would have returned a sentence other than death.

Even if Dr. Latterner had been called at the penalty phase to testify that Mr. Rodriguez had satisfied two statutory mitigators regarding his ability to appreciate the criminality of his actions and had an impaired ability to conform his conduct within the requirements of the law, Mr. Rodriguez still met four statutory aggravators. The trial court gave considerable weight to the four statutory aggravators. When re-weighing this mitigation against aggravation, the two statutory mitigators found by Dr. Latterner combined with the non-statutory mitigation in the witness summaries does not create a reasonable probability of a different result at sentencing. In addition, had Dr. Latterner testified during the penalty phase, Mr. Rodriguez's prior criminal convictions could have become known to the jury. *Wood v. Allen*, 542 F.3d 1281, 1313 (11th Cir.2008)("[W]e have rejected prejudice arguments where mitigation evidence was a 'two-edged sword' or would have opened the door to damaging evidence."). The Court must consider the

[26] "In Florida, a vote of six jurors for life constitutes a recommendation against the death penalty." *Cave v. Singletary*, 971 F.2d 1513, 1519 (11th Cir.1992).

effect that the prior felony convictions for drug trafficking or escape, which were otherwise inadmissible, would have had on the jury had they become aware of them.[27] *Jones v. Warden,* 753 F.3d 1171, 1187 (11th Cir. 2014)("Here, had Jones's counsel attempted to offer a more detailed presentation about his childhood and life history, it seems to us that there is "not just a reasonable probability, but a virtual certainty that [Jones's] 'good' mitigation evidence would have led to the introduction of 'bad' evidence, too.").

In totality, when considering the testimony of Marlen Castellano, the two statutory mitigating factors found by Dr. Latterner, and the non-statutory mitigation provided by the family and friends of Mr. Rodriguez in Cuba and re-weighing all mitigating evidence against the four aggravating factors proven at trial, Mr. Rodriguez's prior felonies, and a unanimous jury recommendation for death, the Court cannot say that, but for counsel's deficient performance, there is a reasonable probability that Mr. Rodriguez would have been sentenced to life as opposed to death. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Strickland*, supra, at 694, 104 S.Ct. 2052." *Woodford v. Visciotti*, 537 U.S. 19 (2002). While it is possible that the mitigation offered in postconviction might have resulted in a

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[27] In Florida, one of the enumerated aggravating circumstances is "[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Fla. Stat §921.141(5)(b). The statute has been interpreted by the Florida Supreme Court to mean "life-threatening crimes in which the perpetrator comes in direct contact with a human victim." *See Ford v. State*, 374 So.2d 496 (Fla.1979); *Lewis v. State*, 398 So.2d 432 (Fla. 1981)("two convictions of breaking and entering with intent to commit a felony, two convictions of escape, one conviction of grand larceny, and one conviction of possession of a firearm by a convicted felon. We hold that none of these crimes falls within the meaning of this aggravating circumstance as defined by the statute."). While the record is not clear as to whether the State thought that Mr. Rodriguez's prior convictions for drug trafficking and escape met the statutory criteria for a felony "involving the use or threat of violence to the person" - what is clear is that both parties believed that the convictions were inadmissible if Mr. Rodriguez did not open the door. (*See* [DE 15-32] at 38-39).

life sentence, the Court does not find that it is reasonably probable. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Harrington v. Ritcher*, 562 U.S. 86, 104 (2011)(citation omitted). Mr. Rodriguez has not established prejudice. Habeas relief is denied.

Claim IV. Factual Findings on Mental Retardation

Mr. Rodriguez's fourth claim for federal habeas relief is similar to Claim II. (*See* [DE 1] at 54-120). Here, Mr. Rodriguez is not focused on a misapplication of clearly established federal law but; rather, an unreasonable determination of the facts by the state court. ([DE 1] at 120). Mr. Rodriguez asserts three principle arguments in support of his claim: (1) Mr. Rodriguez has demonstrated that he has significantly subaverage intellectual functioning; (2) Mr. Rodriguez has significant limitations in adaptive functioning; and (3) Mr. Rodriguez has demonstrated that his adaptive deficits had an onset prior to age 18. All three arguments challenge the state courts' findings regarding expert testimony.

The Florida Supreme Court found that "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." *Rodriguez*, 110 So.3d 441 (Fla. 2013). Ultimately, the court concluded "that the trial court's finding that Rodriguez is not mentally retarded is supported by competent, substantial evidence and [we] affirm the denial of relief." *Id*.

Florida Rule 3.203 Hearing

On March 27, 2009, the trial court held an evidentiary hearing wherein Mr. Rodriguez and the State presented witnesses to testify to Mr. Rodriguez's intellectual quotient and adaptive

deficits. Mr. Rodriguez's expert, Dr. Ricardo Weinstein, found that he was mentally retarded. ([DE 15-256] at 2). The State's expert, Dr. Enrique Suarez, found he was not. ([DE 15-276] at 17).

In support of his claim that he is ineligible for the death penalty because he is mentally retarded, Mr. Rodriguez called twelve witnesses to testify. The vast majority of these twelve witnesses were Florida Department of Corrections employees called to rebut the findings of the State's expert witness. In forming his expert opinion, Dr. Suarez had each of these witnesses complete an adaptive behavior questionnaire about Mr. Rodriguez. The results of the questionnaires were used as one of the bases for Dr. Suarez's expert opinion. Mr. Rodriguez challenged the accuracy and validity of those questionnaires. The witness testimony is below.

First, Mr. Rodriguez called Jennifer Sagle. Ms. Sagle is a psychological specialist at Union Correctional Institution. ([DE 15-248] at 22). Ms. Sagle met and evaluated Mr. Rodriguez for a total of two hours and forty-five minutes. She assessed that Mr. Rodriguez was a S1 which is a psych-grade 1, meaning that she saw no immediate need for a referral to psychiatry for medication or intensive counseling. On one occasion, Mr. Rodriguez exhibited "abnormal sexual behavior" such that Ms. Sagle filed a disciplinary report. (*Id.* at 31). After she filed the report, Mr. Rodriguez refused to attend his psychological assessment appointments. Ms. Sagle communicated with Mr. Rodriguez in English and did not feel that there was a language barrier. (*Id*. at 30).

Second, Lisa Wiley testified. Ms. Wiley is also a psychological specialist at Union Correctional Institution. ([DE 15-249] at 13). She testified that Mr. Rodriguez has not voiced any complaints nor has he exhibited signs of depression. She attempted to conduct IQ testing but

Mr. Rodriguez refused to cooperate. In fact, Mr. Rodriguez has never had his IQ tested by the Department of Corrections. Ms. Wiley was aware that Mr. Rodriguez had previously worked as a mechanic, electrician, and carpenter. She testified that Mr. Rodriguez communicates in English. (*Id*. at 31). In her progress reports, Ms. Wiley reported that Mr. Rodriguez was "intelligent and verbally productive." (*Id*. at 4).

Third, Officer John Flaherty testified. Officer Flaherty was one of several officers from Union Correctional Institution who testified at the hearing. ([DE 15-250] at 20). Officer Flaherty completed an adaptive deficits questionnaire administered by the State's expert. (*Id*. at 35). On direct examination, Officer Flaherty testified that his answers on the questionnaire were largely guesses as he would not have personally witnessed Mr. Rodriguez answering the phone, starting conversations on topics of interest to others, repeating stories or jokes, ordering his meals in a restaurant, carrying money, packing his clothes for an overnight trip, mailing letters at the post office, using a public restroom or showing caution around hot or dangerous items. ([DE 15-251] at 11). However, the officer did observe Mr. Rodriguez watching TV and ordering from the prison canteen.

Fourth, Ms. Leonila Dale testified. Ms. Dale knew Mr. Rodriguez from when they both lived in Cuba. Ms. Dale has visited Mr. Rodriguez twice since he has been incarcerated on death row. ([DE 15-251] at 28). While on death row, Mr. Rodriguez corresponded with Ms. Dale in writing, including providing her instructions for how to have his son come to visit him and which items he would like purchased from Walmart. (*Id*. at 36). Ms. Dela testified that Mr. Rodriguez "is not stupid." (*Id*. at 40).

Fifth, Mr. Diogenes Navarro testified. Mr. Navarro knew Mr. Rodriguez from when they

were imprisoned in Cuba. ([DE 15-253] at 21). Later, both Mr. Navarro and Mr. Rodriguez both immigrated to the United States. They reconnected as friends. Mr. Navarro testified that Mr. Rodriguez would buy jewelry at an inflated price and then turn around and pawn it a much lower price. (*Id*. at 27-28). Mr. Navarro also testified that Mr. Rodriguez did not order from menus when they dined at restaurants. However, he also testified that Mr. Rodriguez likely had him order food when the ate together because Mr. Navarro was more familiar with the restaurants. (*Id*. at 40).

Sixth, Mr. Rodriguez called Ricardo Weinstein, PhD. ([DE 15-254] at 9). Dr. Weinstein is a psychologist. He earned his master's degree in clinic and humanistic psychology from Merrill Institute in Detroit, Michigan and his PhD from International College in Los Angeles, California (a tutorial institution). (*Id*. at 11). Neither of these institutions were still in existence at the time of the hearing. (*Id*. at 14). Dr. Weinstein interviewed Mr. Rodriguez extensively over a two day period. Dr. Weinstein spent approximately six hours a day conducting formal intelligence testing, including the WAIS III in the Spanish language. (*Id*. at 36). Dr. Weinstein administered the Mexican WAIS tests but "normed" it to United States standards. ([DE 15-258] at 11). Mr. Rodriguez tested 59-69 on verbal skills, 55-69 on performance with his full scale score being 55-65. ([DE 15-255] at 1). Dr. Weinstein also administered a Wood Cort Munaz at 45-51 and a C Tonny where Mr. Rodriguez scored 44. On four prior occasions, Mr. Rodriguez had tested below the cut-off for sub-average intelligence. In 1998, his full scale score was 59-69, later in 1998 his score was 53-64, in 2004 his score was 54-63 and in 2008, his score was 52-68. Dr. Weinstein found this consistency to show a lack of malingering on Mr. Rodriguez's part. Ultimately, Dr. Weinstein concluded that Mr. Rodriguez met the first criteria for mental

retardation. (*Id*. at 15).

Dr. Weinstein testified that he believes that an adaptive deficits test must be done as a retrospective evaluation. ([DE 15-255] at 32). The testing guidelines suggest that the evaluator should obtain school records, medical records, employment records, Social Security records, and driving records. Dr. Weinstein testified that the information he garnered from various sources of information in Cuba was that Mr. Rodriguez "had some delay" in acquiring developmental milestones. (*Id*. at 37). Further, he did not learn at school and was sent to special education programs. He "exhibited social limitations" and poor judgment. (*Id.* at 38). Dr. Weinstein did find that Mr. Rodriguez had "mild adaptive behavior" which "allows you to live in the community, society." (*Id*. at 39). Dr. Weinstein testified that criminal behavior "is not something you use to determine adaptive behavior." (*Id*. at 40). Dr. Weinstein testified that Mr. Rodriguez functions on a sixth grade educational level; he can do no more than basic addition and subtraction and cannot recite the alphabet. Ultimately, Dr. Weinstein concluded that Mr. Rodriguez met the second criteria for mental retardation and exhibited those adaptive deficits before the age of 18. ([DE 15-256] at 2).

On cross-examination, Dr. Weinstein was questioned about disparities in Mr. Rodriguez's prior test scores wherein he showed above-average intelligence. Dr. Weinstein was also questioned as to whether or not Mr. Rodriguez's IQ score should be adjusted for his education level, and, if so, whether his IQ would be above 70. (*Id*. at 32). However, Dr. Weinstein rejected that assertion. The prosecution challenged whether or not Mr. Rodriguez should be able to communicate in both Spanish and English, been a tow truck and taxi-cab driver, been involved in a drug trafficking operation in New York, Virginia, and Florida, draft detailed letters to his

girlfriend and draw a watch that he wanted her to purchase if he indeed had an IQ below 70 and adaptive deficits. (*See* [DE 15-258] & [DE 15-259). Dr. Weinstein testified that "[t]here is, again, no relevance to what he can do. What is relevant is what he can not do, in order to diagnose mental retardation." ([15-257] at 22).

Following Dr. Weinstein, Mr. Rodriguez called to two well-qualified and experienced expert witnesses. However, neither opined on Mr. Rodriguez's intelligence level or his adaptive functioning; rather, they opined solely on how the American Association of Intellectual and Developmental Disabilities and Diagnostic and Statistical Manual of Mental Disorders (the "DSM") defines mental retardation. More importantly, they testified as to how experts in the field define and analyze adaptive deficits. (*See* [DE 15-261] at 1-12).

The first of those two experts was Dr. Marc Tasse. ([DE 15-261] at 12). Dr. Tasse is an associate professor at the University of South Florida. Dr. Tasse has a PhD in Psychology Research, Clinical from the University of Quebec and a postdoctoral fellowship at the Ohio State University. Dr. Tasse is a member of Division Five which is the "testing and measurement" division of the AAIDD. (*Id*. at 15). Dr. Tasse testified that the gold standard in testing for mental retardation is the "Wechsler scale [and] the Stanford Benay [sic]." (*Id*.). Dr. Tasse further testified that in his practice, "generally we diagnose mental retardation in children, school age children, that's probably where most people get diagnosed in mental retardation." (*Id*. at 31). However, should a child not be tested at an early age, then intellectual adaptive functioning is assessed and a determination must be made if such deficits were current before the age of 18. A retrospective analysis must be done. According to Dr. Tasse, this is the process used when making a benefits determination by the Social Security Administration. (*Id.* at 31). The current

testing for adaptive functioning was not normed nor developed in a prison setting nor were they normed or developed for prison guards to be the respondents. Dr. Tasse did an evaluation of and opined on the mental retardation of Darryl Atkins[28]. (*Id*. at 36). On cross-examination, Dr. Tasse testified that he does agree that prison records can be reviewed but that they should "get a lot less weight than in the community." (*Id*. at 40). Dr. Tasse testified that if a country is culturally and economically significant below the United States, the ABAS II should not be used.

Dr. Tasse further testified that he had never met Juan David Rodriguez and offered no final opinion on whether or not he is mentally retarded. ([DE 15-266] at 12). Initially, Dr. Tasse admitted that he had used the ABAS II with someone who was incarcerated but it was for the purpose of self-evaluation. (*Id*. at 40). However, he later testified that he had previously had prison guards complete ABAS evaluations and had testified as to the results during an *Atkins* hearing. ([DE 15-269] at 2).

Next, Dr. Thomas Oakland testified. Dr. Oakland is a licensed educational psychologist and professor from the University of Florida. ([DE 15-262] at 22). Dr. Oakland has a PhD from Indiana University. Dr. Oakland is a Fulbright scholar who has written and published on the subject of mental retardation domestically and internationally. Dr. Oakland testified that Florida law is consistent with the DSM's definition of adaptive deficits. ([DE 15-263] at 8-9). The DSM identifies ten adaptive skills; two or more will constitute a deficit in adaptive behavior. (*Id*. at 10). The clinical instrument used to assess adaptive behavior is called the Adaptive Behavior Assessment System ("ABAS"). Dr. Oakland co-authored this test. (*Id*. at 12). The test

[28] Darryl Atkins was the petitioner in *Atkins v. Virginia*, the seminal United States Supreme Court case on the constitutionality of executing mentally retarded persons.

has been normed based on age and nationality. It has not been normed for the prison population because adaptive behavior and decreased intellectual functioning must occur concurrently. (*Id*. at 23).

Wendy Herndon Hall also testified. Ms. Hall is a licensed practical nurse employed at the Union Correctional Institution. (*Id*. at 11). Ms. Hall makes daily rounds on death row and has occasionally spoken with Mr. Rodriguez. Ms. Hall was asked to complete an adaptive behavior questionnaire for Mr. Rodriguez but she declined because she "didn't feel comfortable that [she] had enough knowledge." (*Id*. at 17). However, she did complete a "mental health" questionnaire wherein she gave answers but should have also indicated if she was guessing. Counsel went through the form on direct examination and Ms. Hall admitted that there were many questions that she should have indicating that she was guessing but she did not do so. Ultimately, Ms. Hall testified that "I know I wouldn't give you a form to fill out for [an] incarcerated person." (*Id.* at 34).

On cross-examination, Ms. Hall testified that she also works part-time at a mental health clinic with people who are mildly mentally retarded. ([DE 15-270] at 12). Based on her experience, Ms. Hall testified that she has never seen Mr. Rodriguez have any problems in his adaptive behavior, does not believe that he would have a problem living independently, and has never expressed any delusions or hallucinations. (*Id*. at 13).

Next, Mr. Rodriguez called Marcus Sweat. (*Id*. at 17). At one time, Officer Sweat was a corrections officer at Union Correctional Institution and he was assigned to death row. Officer Sweat testified that he would come into contact with Mr. Rodriguez when he delivered the mail. However, Officer Sweat testified that he hardly ever spoke to Mr. Rodriguez because "it's not

professional." (*Id.* at 21). Similar to Ms. Hall, Officer Sweat answered a questionnaire regarding Mr. Rodriguez's adaptive behavior. Officer Sweat testified that he too "guessed" on certain questions but did not indicate that his answers were guesses. Officer Sweat testified that he answered some of the questions considering how he thought Mr. Rodriguez would have interacted "on the outside." (*Id*.)

Sergeant Robert Boone was called to testify. ([DE 15-271] at 14). At the time of his testimony, Sergeant Boone had worked at Union Correctional Institution for 14 years. Sergeant Boone testified that he did not have much interaction with Mr. Rodriguez. (*Id*. at 16). However, he also completed an adaptive behavior assessment on Mr. Rodriguez. Sergeant Boone was unable to complete the questionnaire in one sitting because of his work obligations so he answered it over a period of time. Sergeant Boone found the test "odd" because it asked lots of questions regarding things that there was no way he could have observed Mr. Rodriguez doing. (*Id*. at 23). Sergeant Boone testified that "it just didn't make any sense to me." (*Id*. at 24). As did the two witnesses before him, Sergeant Boone also testified that, upon reflection, he "guessed" on some of the questions but did not indicate that he was guessing. (*Id*. at 30-40). Sergeant Boone testified that he had family members who had intellectual disabilities and he has not ever noticed any adaptive deficits with Mr. Rodriguez. ([DE 15-272] at 7).

Finally, Sergeant Henry Walker testified. (*Id*. at 9). Sergeant Walker has been a sergeant at Union Correctional Institution since 2003. Sergeant Walker is only sometimes assigned to work on death row. He testified that he is "familiar" with Mr. Rodriguez. (*Id*. at 12). Sergeant Walker was asked to complete the ABAS II, Assessment form. Sergeant Walker testified that he was instructed to respond to the questions as though they were hypothetical questions. Sergeant

Walker "adapt[ed] the question to the custodial setting." (*Id*. at 21). Nonetheless, Sergeant Walker did testify that certain of his answers were "guesses" and should have been indicated as such. Following Sergeant Walker's testimony, the defense rested.

The State's first witness was Sergeant Mike Young. ([DE 15-273] at 6). Sergeant Young had previously testified regarding Mr. Rodriguez's mental health but at the time of the Rule 3.203 hearing, Sergeant Young had passed away. Without objection, his prior testimony was admitted into evidence. (*Id*. at 7). Sergeant Young testified that Mr. Rodriguez's "cognitive value seemed above average, probably, as far as verbal communication in English." ([DE 15-224] at 27). He further testified that in his six years working on death row with Mr. Rodriguez he has never seen anything which would indicate that he was intellectually impaired. (*Id.*) On cross-examination, Sergeant Young testified that he had no training in psychology or psychiatry. (*Id*. at 37).

The State's next witness was Andres Falcon. (*Id*. at 8). Detective Falcon is a homicide detective for the Miami-Dade Police Department. Detective Falcon testified that while Mr. Rodriguez was incarcerated, he contacted the Miami-Dade Police Department to advise them that he had information regarding an unrelated homicide investigation. (*Id*.). Thereafter, Detective Falcon and his partner went to interview Mr. Rodriguez at the Department of Corrections. Mr. Rodriguez implicated someone involved in the murder investigation and was seeking "leniency for the charges filed against him" and was inquisitive about an immigration hold. (*Id*. at 13). Detective Falcon testified that Mr. Rodriguez did not seem gullible or suffering from any adaptive deficits at the time he interviewed him. In fact, Detective Falcon testified that Mr. Rodriguez was "as cunning as anybody I've ever met." (*Id*. at 17).

The State's final witness was Dr. Enrique Suarez. (*Id*. at 19). Dr. Suarez is a psychologist licensed in the State of Florida. Dr. Suarez received his Master's degree and PhD from Baylor University. Dr. Suarez testified that he had done "hundreds" of mental retardation assessments in the forensic area. (*Id*. at 22). Dr. Suarez testified that when he looks at adaptive behavior as part of his assessment for mental retardation, he considers "the present time frame." (*Id*. at 26). Dr. Suarez testified that he had reviewed the entire record including depositions, department of corrections records, defense expert reports, police reports, and he conducted an in-person evaluation of Mr. Rodriguez on death row. The evaluation was conducted in Spanish and was video-taped. (*Id*. at 34). Mr. Rodriguez provided Dr. Suarez with factual information regarding his life prior to him turning age 18. For example, Mr. Rodriguez told Dr. Suarez that he joined the Merchant Marines in Cuba when he was only 13. Mr. Rodriguez told him that he had procured a fake identification so that he could enlist as a minor. (*Id*. at 37-38). While in the Merchant Marines, he traveled to Africa, Angola, Cape Town, Mexico, Spain and Canada. (*Id*. at 38). Dr. Suarez testified that Mr. Rodriguez "could write and communicate pretty effectively" in both English and Spanish. (*Id*. at 39). Mr. Rodriguez has a pen pal in Holland with whom he communicates with in English. Mr. Rodriguez completed an adult education program while in federal prison. ([DE 15-274] at 6). The federal authorities found that Mr. Rodriguez was of "average intelligence." (*Id*. at 9). Dr. Suarez testified that Mr. Rodriguez's prior employment history was significant to the assessment of adaptive behavior. Dr. Suarez found his involvement in drug trafficking to be of similar significance. According to Dr. Suarez, Mr. Rodriguez was a self-described drug mule who trafficked drugs to various states on the east coast. Dr. Suarez opined that this level of complexity and involvement showed adaptive behavior not consistent

with mental retardation.

In order to determine Mr. Rodriguez's intellectual functioning, he administered the Wexler Adult Intelligence Scale that is normed in Spain. ([DE 12-275] at 1). Mr. Rodriguez tested to be a full scale score of 60, verbal score of 70, and a non-verbal performance was the 58.3 percentile. (*Id.* at 4). Mr. Rodriguez tested very low on the TONI with a score of 63 which is below the score achieved by a six year old. Dr. Suarez found these results to be "incongruent." (*Id*. at 7). In addition, Dr. Suarez gave a Validity Indicator Profile test. Mr. Rodriguez tested as having an invalid profile, meaning that there was no correlation because he tested as poorly on items that could be answered by a five year old and those that were extremely challenging. (*Id*. at 8). Dr. Suarez also administered the dot counting test. (*Id*. at 10). Mr. Rodriguez was found to have not given "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." (*Id*. at 12). Dr. Suarez administered the MMPI-II test which is a test of psychopathology and personality. The test results were "invalid protocol evaluations over reporting of extreme symptoms." (*Id*. at 13). Dr. Suarez concluded that the test scores showed "competent in IQ level." (*Id*. at 15). Dr. Suarez testified that he did not have the respondents "guess" on the ABAS testing that was completed by the Department of Corrections staff. Overall, Dr. Suarez concluded that the ABAS results did not support a diagnosis of mental retardation. Dr. Suarez ultimate conclusion was that within a degree of medical certainty that Juan David Rodriguez is not mentally retarded. ([DE 15-276] at 17).

On cross examination, Dr. Suarez testified that he would not do a retrospective analysis unless Mr. Rodriguez met the second prong of the *Atkins* test, then he would conduct a retrospective analysis for the purposes of the third prong. ([DE 15-277] at 22). Dr. Suarez also

testified that while the ABAS was not normed using prison guards, Dr. Oakland's book does referenced prison and residential centers. However, Dr. Suarez did admit that the test manual contains an admonition "not to use Corrections Officers on this instrument." (*Id*. at 35). Dr. Suarez testified that he did not rely solely on the ABAS assessments done by corrections staff but rather considered it as one piece that came from the standardize instrument. During Dr. Suarez's testimony, Mr. Rodriguez had an outburst wherein he was removed from the courtroom. ([DE 15-278] at 11).

Shortly thereafter, the State rested its case. The parties submitted written closing arguments. On December 10, 2010, the trial court entered a thorough and detailed order denying Mr. Rodriguez's motion to vacate sentence and for a determination of mental retardation as a bar to execution. (*See* [DE 15-240, 15-241, 15-242]). The court found that the results obtained by Dr. Weinstein on the Mexican WAIS III were "not reliable" and that the results of the WAIS given by Dr. Suarez was also invalid due to the "Defendant's malingering." ([DE 15-242] at 2). The court concluded that "[t]here are no valid test results to establish that the Defendant's IQ is less than 70." (*Id*.) However, the court went further and analyzed whether or not Mr. Rodriguez exhibited adaptive deficits. The court concluded that "there is absolutely no evidence that Defendant exhibits deficits in his adaptive behavior and that they manifested before the age of 18." (*Id.*) Having failed to carry his burden of proving the three elements necessary to establish that he is mentally retarded, the court denied his motion. On appeal, the Florida Supreme Court affirmed finding that "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." *Rodriguez*, 110 So.3d at 441.

In order for Mr. Rodriguez to be granted federal habeas relief, he must show that these findings of fact resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding and Mr. Rodriguez must rebut, by clear and convincing evidence, the presumption of correctness given to the state court's factual findings. *See* 28 U.S.C. §§ 2254(d)(2) & (e)(1). He has not done so.

A determination as to whether a person is mentally retarded is a finding of fact. *See Holladay v. Allen*, 555 F.3d 1346, 1353 (11th Cir. 2009)(citation omitted). Here, the Florida Supreme Court found that no valid test results showed that Mr. Rodriguez has an IQ result below 70. The key being a "valid" test result. Dr. Weinstein performed an intelligence test designed for persons from Mexico. Mr. Rodriguez is from Cuba. Moreover, Dr. Weinstein normed the test to the version of the WAIS test used in the United States even though Mr. Rodriguez was not tested using the United States version of the test. Given the facts here, it is not unreasonable for the state court to have found that Mr. Rodriguez did not produce valid test results to support his claim. Stated differently, the state habeas court's denial of Mr. Rodriguez's mental retardation claim is not based on an unreasonable determination of the facts given the record that was presented. *See, e.g., Lewis v. Thaler*, 701 F.3d 783, 793–95 (5th Cir. 2012). Moreover, even if the Court were to disagree with this determination that is not enough to grant federal habeas relief because the standard is much higher. Indeed, Mr. Rodriguez would have to show that no "reasonable jurist could decide otherwise" based on the facts presented. Based on the testimony presented, he has failed to meet the burden as required by 28 U.S.C. §2254.

However, even if Mr. Rodriguez had shown significantly subaverage general intellectual functioning - regardless of the testing score defined by the State of Florida - he must still show

his subaverage intelligence to exist concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. On this requirement, the Florida Supreme Court found that "there is no evidence that Rodriguez exhibits adaptive behavior deficits." *Rodriguez*, 110 So.3d at 441. While this determination gives little information as to whether or not the Florida Supreme Court rejected testimony which may have shown adaptive deficits or if the court did not find that any evidence of adaptive deficits was ever presented, it matters little to the Court's conclusion. "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 131 S.Ct. at 784. "If this standard is difficult to meet, that is because it was meant to be." *Id*. at 786. Here, there was a multitude of evidence which showed Mr. Rodriguez's adaptive behavior both before and after his incarceration. As an immigrant to the United States, Mr. Rodriguez learned to speak and write in English, he obtained employment which qualified as more than menial and which required certain skills not consistent with someone who had even mild mental retardation, he understood the workings of the criminal justice system including posting bond and offering information to the police in order to receive more favorable treatment. As a juvenile, Mr. Rodriguez created a false identification so that he could join the Merchant Marines and travel internationally. During a previous incarceration within the federal bureau of prisons system, Mr. Rodriguez was accessed by prison staff and completed an adult education course without comment as to any intellectual or adaptive deficiencies. Quite the opposite, in that, staff found him to be of normal intelligence. All in all, there was certainly ample evidence which would support a finding by the Florida Supreme Court that Mr. Rodriguez had not met his burden of establishing adaptive deficits. The Florida

Supreme Court's determination is supported by the record and was not an unreasonable decision. Further, Mr. Rodriguez has not provided clear and convincing evidence to rebut the presumption this Court is to apply to factual findings of state court. Habeas relief is denied.

Claim V. Evidentiary Hearing

Mr. Rodriguez's fifth claim for relief requests an evidentiary hearing so that he may develop the factual basis for a *Brady* claim and an ineffective assistance of guilt phase counsel claim. ([DE 1] at 172). Mr. Rodriguez raised these claims in his Rule 3.851 motion. The circuit court held a *Huff* hearing.[29] The circuit court entered a summary denial of these claims without an evidentiary hearing. Having not been granted an evidentiary hearing at the state court level, Mr. Rodriguez seeks an evidentiary hearing here. For the reasons that follow, his request is denied.

It had long been that in order to be entitled to an evidentiary hearing in federal court, a habeas petitioner must show a reasonable attempt to pursue an evidentiary hearing in state court and that his request was refused. Further, such a hearing should assist in the resolution of his claim. As such, § 2254(e)(2) did not bar a district court from holding an evidentiary hearing. *See Breedlove v. Moore*, 279 F.3d 952, 960 (11th Cir. 2002). If a prisoner "alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim." *Holmes v. United States*, 876 F.2d 1545, 1552 (11th Cir. 1989) (internal quotations omitted). In 2011, the law changed.

[29] *Huff v. State*, 622 So.2d 982, 983 (Fla.1993) (requiring a hearing upon the filing of a postconviction motion and answer to determine whether an evidentiary hearing is needed and to hear argument on legal issues).

In *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011), the United States Supreme Court held that federal courts must first determine whether a petitioner satisfies §2254(d) before they may consider new evidence acquired during a federal hearing. Therefore, the Court must look at the state court record to determine, considering *only* the record before the state court, if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1)-(2). It is only if the Court makes such a determination that an evidentiary hearing can be held in federal court. Then a *de novo* review of the claim, including the newly presented evidence, can be conducted. "A federal court must then resolve the claim without the deference AEDPA otherwise requires." *Panetti v. Quarterman,* 551 U.S. 930, 953-54 (2007).

While Mr. Rodriguez's case differs slightly from *Cullen* in that no state evidentiary hearing was ever held, the rationale of the holding in *Cullen* is equally applicable. *Cullen* explicitly states that a district court cannot use evidence presented in federal court for the first time when making a §2254(d) determination where the state court did not have such evidence before it. *Cullen*, 131 S.Ct. at 1399. Accordingly, the Court must first review the record and the Florida Supreme Court's decision for reasonableness.[30]

Mr. Rodriguez argues that he is entitled to an evidentiary hearing to develop the factual

[30] In the petition, Mr. Rodriguez does not acknowledge the barrier *Cullen* created to his request for an evidentiary hearing in federal court. The Court finds that *Cullen* is applicable to Mr. Rodriguez's request for an evidentiary hearing.

basis for his claim.[31] One of the basis for this argument is that he is entitled to a hearing because his claim was summarily denied in "the Florida state court." ([DE 1] at 185). This statement is not entirely accurate. While the trial court summarily denied these claims without hearing, the Florida Supreme Court, the state's highest court, reviewed and denied the claims on their merits. Without doubt, the Court must give AEDPA deference to such a determination.[32] "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington*, 131 S.Ct. at 786 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

A. *Brady/Giglio* claim

Mr. Rodriguez's first sub-claim is that the State "failed to disclose material exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and presented false and/or misleading evidence in violation of *Giglio v. United States*, 405 U.S. 150 (1972)." ([DE 1] at 172-73). Specifically, Mr. Rodriguez alleges that the state "knew its theory of Mr. Rodriguez as

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[31] To the extent that Mr. Rodriguez's is arguing a freestanding claim for federal habeas relief based on the denial of an evidentiary hearing in state court, it is not cognizable here. "It is beyond debate that Petitioner is not entitled to relief on these grounds. We have held the state court's failure to hold an evidentiary hearing on a petitioner's 3.850 motion is not a basis for federal habeas relief." *Anderson v. Sec'y, Dep't of Corr.,* 462, F.3d 1319 (11th Cir. 2006)(*citing Spradley v. Dugger*, 825 F.2d 1566, 1568 (11th Cir. 1987); *see Carroll v. Sec'y, Dep't of Corr*., 574 F.3d 1354, 1365 (11th Cir.), *cert. denied*, 130 S.Ct. 500 (2009).

[32] Even if the Florida Supreme Court had also summarily denied these claims, Section 2254(d) applies even where there has been a summary denial. *See Richter*, 562 U.S. at 786. In these circumstances, Mr. Rodriguez could satisfy the "unreasonable application" prong of § 2254(d)(1) only by showing that "there was no reasonable basis" for the Florida Supreme Court's decision. *Id.* at 784. "[A] habeas court must determine what arguments or theories ... could have supporte[d] the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id*. at 786.

the mastermind and principal person responsible for the planning and carrying out of the crime was both factually inaccurate and misleading." (*Id*. at 177). The Florida Supreme Court rejected Mr. Rodriguez's argument.

> To establish a *Brady* violation, the defendant must show the following: (1) that the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the suppression resulted in prejudice. *Sochor v. State*, 883 So.2d 766, 785 n. 23 (Fla. 2004). Rodriguez has not, and cannot, demonstrate that the State suppressed the information in question. During closing argument of the guilt phase, Rodriguez's trial counsel argued that Tata was the mastermind behind the crime, had obtained "inside" information about the victim's schedule from a former employee of the victim, planned the crime with Fernandez, and had chosen Rodriguez as a scapegoat. This is the very information that Rodriguez now alleges the State withheld from him. Thus, the record refutes Rodriguez's *Brady* claim.
>
> Intertwined with the *Brady* claim, Rodriguez also argues that the State committed a *Giglio*FN9 violation by presenting testimony "it knew or should have known was false" regarding Rodriguez's role in the crime, including the testimony of Ramon Fernandez identifying Rodriguez as the shooter. A *Giglio* violation is established when a petitioner shows that (1) a witness gave false testimony; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *Sochor*, 883 So.2d at 785 n. 23. Rodriguez has not shown that the testimony presented was actually false or that the prosecutor had any knowledge of allegedly false testimony. In fact, Fernandez's testimony was consistent with other witnesses who testified at trial about Rodriguez's role in the crime.
>
> FN9. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).
>
> Thus, we conclude that the summary denial of Rodriguez's *Brady/Giglio* claim was proper. *See Gorby v. State*, 819 So.2d 664, 676 (Fla. 2002) (rejecting *Brady* and *Giglio* claims as insufficiently pled or wholly conclusory).

Rodriguez, 919 So.2d at 1269-70. As the Court reviews the decision of the Florida Supreme Court for reasonableness, it must first determine if the court applied the appropriate legal standard. Below is the clearly established federal law governing this claim.

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

In *Brady*, the Supreme Court established three criteria a criminal defendant must prove in order to establish a violation of due process resulting from the prosecution's withholding of evidence. Specifically, the defendant alleging a *Brady* violation must demonstrate: (1) that the prosecution suppressed evidence, (2) that the evidence suppressed was favorable to the defendant or exculpatory, and (3) that the evidence suppressed was material. *United States v. Severdija*, 790 F.2d 1556, 1558 (11th Cir. 1986). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Stewart*, 820 F.2d 370, 374 (11th Cir. 1987) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

***Giglio v. United States*, 405 U.S. 150 (1972)**

Giglio claims are a "species of *Brady* error" and exist "when the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew or should have known of the perjury." *Ventura v. Att'y Gen.,* 419 F.3d 1269, 1276-77 (11th Cir. 2005). A prosecutor has a duty to disclose evidence of any promise made by the state to a prosecution witness in exchange for his testimony. *See Giglio v. United States*, 405 U.S. 150 (1972). This is especially true when the testimony of the witness is essential to the state's case. *See Haber v. Wainwright*, 756 F.2d 1520, 1523 (11th Cir. 1985). To make out a valid *Giglio* claim, a petitioner "must establish that (1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material - i.e., that there is any reasonable likelihood that the false testimony could have affected the judgment." *Davis v. Terry*, 465 F.3d 1249, 1253 (11th Cir. 2006) (per curiam) (quotation marks, alterations, and citation omitted).

Here, the Florida Supreme Court correctly identified clearly established federal law and made a reasonable application to the facts. In order to be granted habeas relief, Mr. Rodriguez must show that the court made an "unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2). The two principle factual determinations at issue here that were made by the Florida Supreme Court were: (1) information was not suppressed and (2) the testimony was not false. The Court considers the facts that were before the state court.

opening statements

When the trial of Juan David Rodriguez began, the State told the jury about a twenty year old "kid" named Ramon Fernandez. ([DE 15-20] at 12). Mr. Fernandez was friends with Carlos Sponsa.[33] Mr. Sponsa asked Mr. Fernandez to put up his car as collateral to a bail bondsman for Mr. Rodriguez. Mr. Fernandez agreed. According to the State, Mr. Fernandez never saw his car again. (*Id*.). The State argued that in order for Mr. Rodriguez to get Mr. Fernandez's car returned from the bail bondsman, Mr. Rodriguez plotted to rob Abelardo Saladrigas. Mr. Sponsa and Mr. Fernandez rode with Mr. Rodriguez and waited while he robbed the victim. However, Mr. Fernandez did not stay in the car; rather, he went to the second floor of the shopping center. At the time of the murder, Mr. Fernandez was able to see the victim fall after being shot and beg for his life. Mr. Fernandez was able to clearly identify Mr. Rodriguez as the shooter. (*Id*. at 17). The State argued that Mr. Rodriguez may have gotten away with murder had it not been for his "greed." (*Id*. at 18). The State contended that Mr. Rodriguez's downfall was the robbery which

[33] There are portions of the record which lists Carlos Sponsa's last name as "Ponce." To be consistent, the Court will identify him as "Sponsa" in congruence with the Florida Supreme Court.

occurred the next day. Mr. Rodriguez was said to be the ringleader of a group of younger men all of whom were going to rob Ralph Leiva. (*Id*. at 21). However, things did not go as planned and Mr. Leiva ended up shooting back at the men. According to the State, as they were fleeing the scene, Mr. Fernandez dropped the gun that Mr. Rodriguez had stolen from Mr. Saladrigas onto the front lawn of the Leiva's home. The police eventually traced the gun back to Mr. Saladrigas and the police located a fingerprint in the stolen car to a George Hernandez. George Hernandez told the police to speak with Ramon Fernandez. Once the police interviewed Ramon Fernandez, he confessed as to his role in the robbery and implicated Mr. Rodriguez as the shooter. (*Id*. at 23). The State informed the jury that Mr. Fernandez confessed before any "deals are made with the police." (*Id*.).

The facts alleged in the defense's opening statement is unknown. It was never transcribed was not part of the record considered by the state courts.[34] (DE 33] at 1).

trial testimony

During the State's case, twenty-one witnesses testified. One of those witnesses was Ramon Fernandez. [DE 31-1]. Mr. Fernandez was with Mr. Rodriguez on the night of the murder of Abelardo Saladrigas. Mr. Fernandez was also a participant in the failed robbery attempt of Ralph Leiva along with Mr. Rodriguez. This testimony was consistent with the

[34] When reviewing the state court transcripts, it was apparent that the opening statement was not located chronologically in the record. As it was unclear as to whether the statement was transcribed but located elsewhere else in the record or if the transcription did not exist, the Court ordered the State to "produce a transcript of defense counsel's opening argument. If no transcript is produced, the State of Florida must certify that an exhaustive search was undertaken but it has been unable to locate the transcript." ([DE 32] at 2). The State responded that "it does not have a copy of the transcript of Petitioner's counsel's opening statement at the guilt phase" and that "[t]he opening statement was never made a part of the state court record." ([DE 33] at 2-3).

State's opening statement to the jury. Mr. Fernandez's trial testimony is the subject of the instant *Brady/Giglio* claim.

At trial, Mr. Fernandez testified that he was introduced to Mr. Rodriguez by a mutual friend. ([DE 31-1]). Mr. Fernandez allowed Mr. Rodriguez to put his car up as collateral with a bail bondsman. In fact, Mr. Fernandez and Mr. Rodriguez were first introduced to each other at the bail bondsman's office. Mr. Rodriguez was supposed to return within two hours, give the bondsman cash, and Mr. Fernandez's car would be returned. However, Mr. Rodriguez never returned. Mr. Fernandez never saw his car again. Mr. Fernandez testified that, on the night of the murder, he had ridden to the Central Auto Parts Shopping Center with Mr. Sponsa. When they arrived, Mr. Sponsa told Mr. Fernandez that Mr. Rodriguez was going to rob a store owner for the cash needed to pay the bondsman so that Mr. Fernandez would have his car returned. (*Id*. at 145). Mr. Fernandez waited in the car with Mr. Sponsa while Mr. Rodriguez went to rob the store owner. At a certain point, Mr. Fernandez got out of the car and walked to the second floor of the shopping center. It was there that he heard shots fired. Mr. Fernandez then exited the stairs and saw Mr. Rodriguez running behind Mr. Saladrigas yelling for him to give up his Rolex watch. (*Id*. at 151). When Mr. Saladrigas was being chased, Mr. Rodriguez had a briefcase and a gun in his hands. Mr. Fernandez testified that he saw Mr. Rodriguez shoot Mr. Saladrigas and then steal his watch. Mr. Rodriguez and Mr. Fernandez both ran and drove away in Mr. Rodriguez's car.

The following day, Mr. Fernandez met up with Mr. Rodriguez and several others at a local cafeteria. Another robbery was planned. Mr. Fernandez testified that Mr. Rodriguez and Mr. Sponsa were the two who orchestrated the robbery. (*Id*. at 174). The robbery did not go as

planned and, eventually, Mr. Fernandez was arrested by police on June 3, 1988. Mr. Fernandez testified that at the time of his arrest, the police "did not make [him] any deals or promises." (*Id.* at 184). Mr. Fernandez testified that he confessed his involvement in the murder and attempted robbery to the police without any promises or deals. Mr. Fernandez further testified that he was not threatened "in any way to make [him] confess to something [he] did not do." ([DE 15-22] at 5). Mr. Fernandez later testified that he had entered into an agreement to testify truthfully and that the State would recommend a sentence of seventeen to twenty-seven years to the sentencing judge. (*Id.*). Mr. Fernandez testified that prior to making the plea agreement, he had told several lies to the police. Mr. Fernandez corrected those falsehoods once he entered into the plea agreement. Primarily, the lies that Mr. Fernandez told concerned his level of involvement or facts that he made up to protect his friends who were also involved in the attempted robbery. (*Id.* at 9).

On cross-examination, Mr. Fernandez admitted to having lied in his deposition, which was taken after he had entered into the plea agreement. One specific area of testimony which was relevant was that Mr. Fernandez testified in deposition that it was Mr. Sponsa's idea to rob Mr. Leiva. Mr. Fernandez did not testify that it was also Mr. Rodriguez's idea to commit the robbery until trial. However, at trial, Mr. Fernandez was adamant that it was both Mr. Sponsa and Mr. Rodriguez's idea to rob Mr. Leiva. The two knew that drugs and money were present in the home. Mr. Fernandez's testimony that Mr. Rodriguez was the shooter of Mr. Saladrigas has not changed over time and was consistent from the time he was arrested until trial.

Further, Jose Arzola, a former employee of Mr. Saladrigas identified Mr. Rodriguez as the person who came to the auto parts store just before it had closed on the night Mr. Saladrigas was murdered. ([DE 15-22] at 83). Mr. Arzola picked Mr. Rodriguez out of a line-up at the Dade

County jail. Mr. Arzola testified at trial that Mr. Rodriguez was the person he saw and spoke with at the auto parts store the day of the murder. (*Id*. at 99).

The State also presented the testimony of Sergio Valdez. ([DE 15-24] at 36). Mr. Valdez was also present during the robbery of Mr. Leiva. Mr. Valdez testified that he first met Mr. Rodriguez the night that Mr. Saladrigas was murdered. At that time, Mr. Rodriguez and Mr. Sponsa came over to discuss a robbery they were planning for the next day. Mr. Valdez, along with three other friends, discussed going to stake out the house beforehand with Mr. Sponsa and Mr. Rodriguez. Mr. Rodriguez told everyone where and what time to meet the next day. (*Id*. at 48-49). At the meeting point, Mr. Rodriguez told everyone which car to ride in when they left for the Leiva home. Further, Mr. Rodriguez told Mr. Valdez that his role was to tie up the occupants of the home. Mr. Valdez also testified that on the drive to the Leiva home, Mr. Rodriguez confessed to having "done a job the day before, and that he had stolen a thousand dollars and a Rolex watch." (*Id.* at 54). Mr. Rodriguez said he had shot "an elder person." (*Id*. at 54). Mr. Valdez was arrested on June 9, 1988. At that time, the police made no promises to Mr. Valdez nor did they threaten him. Mr. Valdez made a full confession and served fifteen months in jail prior to his testifying at Mr. Rodriguez's trial.

Next, Francisco Reyes testified. ([DE 15-25] at 110). Mr. Reyes was incarcerated at the same time as Mr. Rodriguez and Mr. Fernandez. Mr. Reyes testified that while Mr. Rodriguez did not specifically confess to the murder of Abelardo Saladrigas, Mr. Rodriguez had told him that if he "could get rid of Ramon Fernandez, they would never know he [Mr. Rodriguez] was the one that killed or murdered." (*Id*. at 117). Mr. Reyes also testified that Mr. Rodriguez had offered him "$3000, if I would speak to his lawyer over the phone and say that Ramon had told

me that he was the one that committed the crime." (*Id*. at 119). Mr. Reyes testified that he was not promised anything, including reduced jail time, for his testimony.

The State called Detective Frank Castillo to testify. ([DE 15-23] at 102). Detective Castillo is a homicide detective with the City of Miami Police Department. (*Id*. at 103). Detective Castillo was the first police officer to interview Mr. Fernandez when he was arrested. Without the promise of any plea deal or reduced sentence, Mr. Fernandez inculpated himself in the murder of Mr. Saladrigas and the home invasion of the Leiva home. Detective Castillo testified that Mr. Fernandez described, in detail, the events that occurred during the murder of Mr. Saladrigas. (*Id*. at 118-19). Mr. Fernandez had identified Mr. Rodriguez as the shooter. It was not until after Mr. Fernandez was arrested and charged that he was offered a reduced sentence in exchange for his testimony.

closing arguments

During closing argument, defense counsel argued to the jury that because Ramon Fernandez dropped Mr. Saladrigas' gun on Mr. Leiva's lawn, he knew that the police would eventually find him. Mr. Fernandez knew he would be facing the electric chair so he "got together with his teenage buddies and they decided they were going to pin everything on Juan David Rodriguez." ([DE 15-30] at 74). Indeed, counsel argued that "[t]his man has been selected by this little gang of teenagers, including [Carlos Sponsa] who was never arrested, as their scapegoat." Moreover, counsel argued that Mr. Fernandez had a motive to lie because he wanted Mr. Rodriguez to take "the rap for an entire gang of teenagers." (*Id*. at 78).

Here, Mr. Rodriguez argues that the State failed to disclose material exculpatory evidence in violation of *Brady v. Maryland* and presented false and/or misleading evidence in violation of

Giglio v. United States. (*See* [DE 1] at 173). In support of these arguments, Mr. Rodriguez asserts that the State "failed to disclose evidence" and that the State "knew or should have known" that testimony given by its witnesses "was patently false." Yet, Mr. Rodriguez does not assert a factual basis for these assertions other than he believes that he was not the "mastermind" or "principal person" behind these crimes; rather, it was Mr. Sponsa. (*See* [DE 1] at 177). The only factual support for this assertion in his federal habeas petition is an argument made by postconviction counsel during the *Huff* hearing. (*See id.* at 178). Counsel's argument was equally as vague as the allegations made in the instant petition. Essentially, counsel told the court that Mr. Fernandez "would testify at an evidentiary hearing that what he testified to in front of the jury is not what happened and Mr. Fernandez is probably the most important witness in the trial." ([DE 15-80] at 63). Counsel concluded his argument by stating that "we haven't been able to fully plead this because we don't have all the records." (*Id*. at 368).

Here, Mr. Rodriguez asserts that the Florida Supreme Court erred because his assertions were not "merely a rendition of the same information argued by defense counsel at trial." ([DE 1] at 180). However, the record reflects, that defense counsel argued to the jury in closing argument that Ramon Fernandez and Carlos Sponsa killed Abelardo Saladrigas. ([DE 15-30] at 70). Counsel asserted that because Mr. Fernandez dropped Mr. Saladrigas' gun on the front lawn of Mr. Leiva's house during the home invasion robbery, he knew he would be discovered as a participant in the crimes. Therefore, he already planned what he would say when Detective Castillo interviewed him knowing that he would be facing the electric chair. (*Id*. at 72). "The boy knows he is looking at the electric chair. He knows his days are numbered because he dropped the gun." (*Id*. at 73). Defense counsel alleged that "Ramon Fernandez got together with

his teenage buddies and they decided they were going to pin everything on Juan David Rodriguez." (*Id*. at 74).

Now, Mr. Rodriguez argues the information that Mr. Fernandez testified to was critical in several respects. ([DE 1] at 180). Mr. Rodriguez asserts that Mr. Fernandez was " coerced by state agents" and "was being pressured to testify consistent with the State's theory of the crime." ([DE 1] at 180.). Mr. Rodriguez has not offered any evidence to support these statements.

Even accepting those allegations as true, the Florida Supreme Court found that because "defense counsel argued that [Carlos Sponsa] was the mastermind behind the crime" and because "Fernandez's testimony was consistent with other witnesses who testified at trial about Rodriguez's role in the crime" the summary denial of "Rodriguez's *Brady/Giglio* claim was proper." *Rodriguez,* 919 So.2d at 1270. The Court does not find this determination to be unreasonable.

In order to establish a *Brady* violation, Mr. Rodriguez must establish that the evidence that was withheld was material. Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Stewart*, 820 F.2d 370, 374 (11th Cir. 1987). At trial, defense counsel argued that, in order to avoid a death sentence, Mr. Fernandez lied to the police during his interrogation and on the stand during trial. Mr. Rodriguez's current argument that Mr. Fernandez did so at the urging of the police as opposed to his own self-preservation does not make the Florida Supreme Court's determination that information was not suppressed unreasonable. Moreover, Mr. Fernandez was not the only witness to testify that Mr. Rodriguez was the shooter in the robbery of Mr. Saladrigas. Therefore, even if Mr. Fernandez had not testified, there was

sufficient evidence to support a guilty verdict absent the "withheld" evidence. Mr. Rodriguez alleged that Mr. Fernandez was coerced and pressured to testify. Yet, the State also presented the testimony of Francisco Reyes, Jose Arzola, and Sergio Valdez. These witnesses all inculpated Mr. Rodriguez in some fashion whether it be by direct or circumstantial evidence. Further, Detective Castillo testified that Mr. Fernandez freely and voluntarily confessed and made inculpating statements regarding Mr. Rodriguez.

Therefore, it was not unreasonable for the Florida Supreme Court to have determined that "Fernandez's testimony was consistent with other witnesses who testified at trial about Rodriguez's role in the crime." *Rodriguez*, 919 So.2d at 1270. Under these circumstances, Mr. Rodriguez can only satisfy the "unreasonable application" prong of § 2254(d)(1) by showing that "there was no reasonable basis" for the Florida Supreme Court's decision. *Harrington*, 131 S.Ct. at 784. He has not done so. Habeas relief must be denied.

B. Ineffective Assistance of Counsel at the Guilt Phase

Mr. Rodriguez's second sub-claim is that his counsel was ineffective for: (I) failing to investigate and prepare for trial, (ii) failing to request a severance, and (iii) failing to object to an in-court identification. During the Rule 3.850 postconviction proceedings, the trial court summarily denied these claims without an evidentiary hearing. *Rodriguez*, 919 So.2d at 1270. However, the Florida Supreme Court reviewed and denied the claims on the merits. The Court reviews each argument below.

I. failure to investigate and prepare for trial

Within this sub-claim, Mr. Rodriguez alleges three specific deficiencies. Mr. Rodriguez contends that counsel "failed to list Jose Montalvo as a witness and procure his appearance at

trial." ([DE 1] at 184). Second, he contends that counsel "failed to refute the State's theory that Mr. Rodriguez planned the crime." (*Id.*). Finally, he asserts that counsel "failed to discuss the plea agreement with Mr. Rodriguez prior to trial." (*Id.*). The Florida Supreme Court found that Mr. Rodriguez either failed to show deficiency and prejudice or the claims were disputed by the record and meritless. The Court does not find that the Florida Supreme Court's determination was unreasonable.

Jose Montalvo

Jose Montalvo worked in a cafeteria in the same shopping center complex as Mr. Saladrigas. When Mr. Montalvo heard gun shots on the night of the murder, Mr. Montalvo ran to aide Mr. Saladrigas. Mr. Montalvo testified during deposition that when he spoke to Mr. Saladrigas, he told Mr. Montalvo that he was shot by "a little fat one." ([DE 15-27] at 18). This testimony was contradictory to the testimony of the detective who testified that Mr. Saladrigas described his assailant as "tall and thin." (*Id.* at 15). At the time of trial, despite being under subpoena, Mr. Montalvo left the United States and went to Honduras. When defense counsel sought to introduce his deposition testimony into evidence, the State objected arguing that his deposition testimony was hearsay and that defense counsel had failed to list Mr. Montalvo on their witness list. The court agreed. Defense counsel was not permitted to admit Mr. Montalvo's testimony into the record. Here, Mr. Rodriguez asserts that this failure prejudiced him at trial. The Florida Supreme Court found no prejudice.

> In his deposition testimony to defense counsel over a year after the shooting, Montalvo testified that the victim described his shooter as little and fat, adjectives which are not descriptive of Rodriguez who is tall and thin. Rodriguez asserts that Montalvo's testimony would have contradicted that of a police officer who testified that the victim described his assailant as tall and thin. Rodriguez contends that trial counsel was unable to present Montalvo's testimony at trial because

> counsel failed to list Montalvo as a witness as required by Florida Rule of Criminal Procedure 3.220(d)(1)(A). While it is true that trial counsel failed to list Montalvo as a trial witness, this failure in and of itself does not mean that Montalvo would have been excluded from testifying at trial had he been present. *See Tomengo v. State*, 864 So.2d 525, 529 (Fla. 5th DCA 2004) ("Excluding a defense witness because the defense failed to disclose the witness, or to timely disclose the witness, is a 'severe sanction' that 'should be a last resort reserved for extreme or aggravated circumstances.' ") (quoting *Livigni v. State*, 725 So.2d 1150, 1151 (Fla. 2d DCA 1998)). Counsel did subpoena Montalvo and attempted to procure his testimony for trial. Montalvo left town before being called to testify and could not be located despite counsel's efforts to do so. Finally, even if counsel's performance was deficient in this regard, Rodriguez cannot show prejudice. Montalvo gave contradictory accounts to the police and prosecutor shortly after the crime, stating that the victim gave him no description of his assailants. Additionally, even if Montalvo had testified at trial and had testified consistent with his deposition statement, his testimony would have been contradicted by a number of witnesses who either described the shooter as tall and thin or identified Rodriguez as the assailant and contradicted by Rodriguez's own admissions about committing the crime.

Rodriguez, 919 So.2d at 1270-71. Mr. Rodriguez argues that the Florida Supreme Court employed a prejudice analysis which "runs afoul of clearly established federal law." ([DE 1] at 189). Specifically, Mr. Rodriguez asserts that the court erroneously considered credibility which "is a matter strictly within the province of a jury" and that the court should have speculated on the effect that the testimony would have had on the jury and "not to discount it to irrelevance because it may have contradicted other testimony provided at trial." (*Id*.).[35]

To show prejudice, Mr. Rodriguez would need to establish that his counsel's conduct rendered his trial "fundamentally unfair." *Devier v. Zant*, 3 F.3d 1445, 1451 (11th Cir. 1993)*;*

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[35] Mr. Rodriguez also contends that the Florida Supreme Court erred in concluding that counsel's performance was not deficient. However, because the Court does not find the court's prejudice analysis unreasonable, it need not consider deficiency. *See Hall v. Head*, 310 F.3d 683, 699 (11th Cir. 2002) ("[A]lthough there is evidence in the record to support the district court's finding of deficient performance, we need not and do not 'reach the performance prong of the ineffective assistance test [because we are] convinced that the prejudice prong cannot be satisfied.'").

Strickland, 466 U.S. at 694. Prejudice exists if ''there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Rompilla v. Beard,* 545 U.S. 374, 390 (2005) (citations omitted). Mr. Rodriguez failed to show a reasonable probability that the result of his trial would have been different had his counsel called Mr. Montalvo to testify.

Even if counsel did procure Mr. Montalvo to testify during the guilt phase, at best, he would have offered testimony which differed from the State's witnesses regarding Mr. Saladrigas' identification of his assailant. The Florida Supreme Court took that fact into account when it determined that Mr. Rodriguez was not prejudiced. This analysis was not an unreasonable application of clearly established law. Indeed, the court is required to consider all the testimony (including the testimony which was not presented due to counsel's deficiency) and determine whether there was a reasonable probability that the result of the proceeding would have been different. The Florida Supreme Court considered all of the testimony and found it to be conflicting. This was neither an unreasonable application of federal law nor was it an unreasonable determination of the facts. Habeas relief is denied as to this sub-claim.

Refute the State's Theory

Mr. Rodriguez's second argument is that his counsel's performance was deficient for failing to refute the State's theory that Mr. Rodriguez planned the crime. ([DE 1] at 184). Mr. Rodriguez asserted this sub-claim on appeal from the denial of his Rule 3.850 motion. The Florida Supreme Court found the argument to be without merit.

> Rodriguez also claims trial counsel was ineffective for failing to refute the State's theory that Rodriguez planned the crime. However, trial counsel aggressively cross-examined the State's witnesses, pointed out inconsistencies in prior statements made by key witness Fernandez, and emphasized Fernandez's plea

> agreement with the State. During closing argument, counsel also argued that Rodriguez had nothing to do with this crime and that Tata and Fernandez were the true perpetrators. Thus, trial counsel vigorously litigated these issues and his performance was not deficient in this regard. Rodriguez's real claim appears to be that counsel did not prevail on this defense at trial. This does not constitute ineffective assistance and relief was properly denied. *See Teffeteller v. Dugger*, 734 So.2d 1009, 1020 (Fla.1999).

Rodriguez, 919 So.2d at 1271. In his federal habeas petition, Mr. Rodriguez made only a passing reference to this assertion in the overall summary of his claim. (*See* [DE 1] at 184). In the substantive argument portion of the petition, Mr. Rodriguez did not assert this as a basis for federal habeas relief. Instead, he limited his sub-claims to "failure to procure witness Montalvo" and "failure to discuss plea agreement." ([DE 1] at 184-190). Therefore, this argument has been abandoned and is waived. *See Cole v. Att'y Gen*., 712 F.3d 517 (11th Cir. 2013).

Plea Offer

Mr. Rodriguez's third argument for federal habeas relief is that his counsel failed to "effectively" relay the terms of a plea offer to Mr. Rodriguez. ([DE 1] at 193). Mr. Rodriguez also asserts that counsel "abdicated his duty to the State and literally left Mr. Rodriguez without effective assistance while listening to the State's rendition of the plea." (*Id*.). Mr. Rodriguez acknowledges that he was made aware of the plea offer but asserts that because this "all occurred within a two hour window" and must be taken in the context of his "limited cognitive functioning, his limited education, possible language barriers, and additional mental health issues which have been pled throughout his postconviction appeals." Therefore, he did not fully understand the "implications of rejecting the offer and proceeding to trial." (*Id*. at 195). The record reflects a different set of facts.

On the day before trial, the State announced that it had conveyed a plea offer to defense

counsel which would be resolved with a "plea to second-degree murder, life-imprisonment with a three year minimum mandatory" with the sentence to run concurrent with any sentence given for several pending probation violations ([DE 15-18] at 6). The court then asked defense counsel if he wanted to talk with Mr. Rodriguez. Counsel advised the court that "Your honor, I have communicated that plea offer to Mr. Rodriguez just two hours ago. It is the first time that the plea offer has been made to me." (*Id*. at 7). Counsel then stated that "Mr. Rodriguez just told me that he would refuse that plea." (*Id*.) Counsel further remarked that "[h]e is listening to Mr. Kastrenakis as far as the content of the plea. Perhaps he has something else to say." (*Id*.) At which point, Mr. Rodriguez advised the court that he refused the plea offer "because I did not kill him and I want them to condemn the one that did the killing, and they know I didn't do it." (*Id*. at 8). In turn, the court advised that "[a]ll I want you to know is that you are playing with your life." Mr. Rodriguez responded "[e]xactly." (*Id*.)

Based on this record, the Florida Supreme Court found the claim to be without merit.

> Rodriguez's claim that trial counsel did not discuss the plea agreement with him is also refuted by the record. The State informed the trial court about its plea offer and trial counsel indicated that Rodriguez had refused the offer. When questioned by the court, Rodriguez stated that he had refused the plea because he did not commit the crime. Additionally, Dr. Haber's deposition testimony specifically notes his discussion with Rodriguez about the proffered agreement. Rodriguez told Dr. Haber that he had discussed the plea offer with his attorney, but refused it because he did not commit the crime and would rather be dead than go to prison. Thus, this claim is without merit and was properly denied.

Rodriguez, 919 So.2d at 1271. Mr. Rodriguez's claim is not that counsel failed to discuss the plea agreement with him. Rather, his claim is that counsel failed to "effectively" discuss the plea offer. Nonetheless, it does not change the result here. The Florida Supreme Court reasonably determined that the claim was without merit because Mr. Rodriguez clearly stated that he would

not accept a plea offer because he did not commit the crime for which he was accused. This determination was reasonable and factually supported by the record. Habeas relief is denied.

ii. failure to request a severance

Mr. Rodriguez next claims that counsel was ineffective for failing to request a severance. ([DE 1] at 195). Mr. Rodriguez was initially charged with five counts related to the home invasion of the Leiva family. Mr. Rodriguez was also charged with the first degree murder of Abelardo Saladrigas. Mr. Rodriguez asserts that his counsel was constitutionally ineffective for failing to seek severance of the home invasion charges from the first degree murder charges. ([DE 1] at 196). Had counsel done so, Mr. Rodriguez asserts, "that would have drastically altered [the] outcome of this case." (*Id*.). Mr. Rodriguez argues that he was prejudiced by his counsel's failure because joinder of the offenses resulted in "evidence from each crime" bolstering the proof of the other and "by relying upon evidence from both separate criminal events, the State was able to tip the scales in its favor in front of the jury to argue that Mr. Rodriguez was guilty of both crimes." (*Id*. at 203). The Florida Supreme Court found otherwise.

> Rodriguez also claims ineffectiveness based on counsel's failure to request a severance of the homicide charges from the charges related to the home invasion robbery and shooting. Rodriguez alleges that the jury was contaminated by the consideration of the home invasion evidence. Florida Rule of Criminal Procedure 3.150(a) provides for the joinder of offenses when the offenses are "based on the same act or transaction or on [two] or more connected acts or transactions." The offenses here were interconnected. Rodriguez used the gun taken from the murder victim during the home invasion the next day. In fact, the gun was recovered from that scene. The two crimes involved common participants. On the way to the home invasion, Rodriguez admitted his involvement in the events of the previous day and told his companion that the Rolex watch on his arm had been stolen from the victim at the auto parts store. The crimes were also part of a common scheme to obtain money so that Rodriguez could pay money he owed to a bondsman. The two crimes were also connected by temporal and geographic proximity. Thus, even if counsel had requested a severance of the crimes, he was not likely to prevail. *See Livingston v. State*, 565 So.2d 1288, 1290 (Fla.1990) (finding no error

> in consolidating burglary and murder-robbery charges in same trial because the crimes were connected in "an episodic sense because they occurred only hours apart in the same small town and because the pistol stolen in the burglary became the instrument for effecting the armed robbery and murder"). Therefore, this claim is without merit and was properly denied.

Rodriguez, 919 So.2d at 1271-72. The Florida Supreme Court considered whether or not counsel's performance was deficient by analyzing state law. Therefore, this Court's determination of whether or not counsel's performance was deficient as required by *Strickland* will be based on the presumption that the state court's decision on whether or not counsel should have objected to joinder or argued for severance pursuant to state law is correct. It is not this Court's role to re-examine the underlying merits claim applying state law. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (reiterating that "it is not the province of a federal habeas court to re-examine state-court determinations on state-law questions").

While a failure to sever could amount to a due process violation, Mr. Rodriguez has made no such argument. Instead, he argues that his counsel's failure to request a severance constituted ineffective assistance of counsel - not because of any federal constitutional right - but because any such request would have been granted pursuant to state law. This does not raise a cognizable federal habeas claim. *See* § 2254(a) ("[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitutional or laws or treaties of the United States." Therefore, the Court does not consider the actual merits of the underlying claim.

The Court's role is to only consider whether or not the Florida Supreme Court's resolution of the ineffective assistance of counsel claim pursuant to the Sixth Amendment was an unreasonable application of clearly established law. It was not. Having found that if counsel had

asked for a severance, Mr. Rodriguez would not have prevailed precludes a finding of deficiency pursuant to *Strickland*. This is consistent with federal law. It is axiomatic that counsel cannot be deficient for raising a non-meritorious objection. *Owen v. Sec'y for Dep't of Corr.*, 568 F.3d 894, 915 (11th Cir. 2009) ("As the underlying claim lacks merit, [] counsel cannot be deficient for failing to raise it."). Habeas relief is denied.

iii. failure to object to in court identification

Mr. Rodriguez's final argument is that his attorney failed to object when the State called Mr. Saladrigas' sister-in-law, Lupe Saladrigas, to identify Mr. Saladrigas' photograph on his driver's license. ([DE 1] at 205). Mr. Rodriguez argues that counsel's "failure to provide a specific contemporaneous objection to the introduction of the improper identification testimony was deficient performance that fell below acceptable standards for counsel at a capital trial."[36] (*Id*. at 210). Further, Mr. Rodriguez argues that he was prejudiced because the "jury[] heard testimony designed to inflame them and evoke sympathy for the victim and his family." (*Id*.). The Florida Supreme Court disagreed.

> Rodriguez also complains that counsel should have objected when the deceased victim's sister-in-law was permitted to give identification testimony. As a general rule, members of a victim's family should not identify a victim at trial where nonrelated, credible witnesses are available to make such identification. *See Welty v. State*, 402 So.2d 1159 (Fla.1981). This rule prevents the interjection of matters

[36] Mr. Rodriguez's assertion is misleading. The record shows that counsel objected when the driver's license was shown to Mrs. Saladrigas for identification based on relevancy grounds. ([DE 15-20] at 85). The objection was overruled. When the State sought to move Mr. Saladrigas' driver's license into evidence, counsel again objected. (*Id*. at 86). The objection was again overruled. Therefore, to title this claim as one for a "failure to object" is inaccurate. Rather, Mr. Rodriguez's claim is that counsel failed to make a *proper* objection pursuant to "the well-established provision in Florida prohibiting a member of the deceased victim's family from testifying for purposes of identifying the victim where other non-related, credible witnesses are available." ([DE 1] at 206).

> not germane to the issue of guilt and ensures that the sympathy of the jury is not evoked by the emotional testimony of a family member. *Id*. However, the sister-in-law's testimony related to matters beyond identification of the victim, including identification of property on the victim's person at the time of the shooting and a recounting of the victim's statements to her immediately after he was shot. Therefore, counsel was not deficient in failing to object to this testimony. *See Mills v. State*, 462 So.2d 1075, 1079 (Fla.1985) (finding no error in allowing victim's father to testify to identify stolen property). Furthermore, the record does not indicate that this testimony had the underlying purpose of gaining the sympathy of the jury or of prejudicing it against Rodriguez. *Id*. Thus, the claim was properly denied by the trial court.

Rodriguez, 919 So.2d at 1272. Mr. Rodriguez argues that this determination "is an unreasonable determination of facts in light of the record." ([DE 1] at 209). However, the record supports the court's factual determination that Mrs. Saladrigas testified to information other than the identification and the Court must give it deference. State court findings of fact, as opposed to mixed determinations of law and fact, are subject to the presumption of correctness; the petitioner may only rebut this presumption with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). This presumption of correctness applies equally to factual determinations made by state trial and appellate courts; it is applicable to both explicit and implicit factual determinations. *Marshall v. Loneberger*, 459 U.S. 422 (1983); *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991); *Bui v. Haley*, 321 F.3d 1304, 1312 (11th Cir. 2003). Mr. Rodriguez has not provided any clear and convincing evidence to rebut the Florida Supreme Court's findings. Moreover, similar to his prior claim for habeas relief, this claim also relies on a state court's determination of state law. State courts are the arbiters of state law. *See Estelle v. McGuire*, 502 U.S. 62 (1991).

Nonetheless, the Court has reviewed the testimony and does not find the Florida Supreme Court's interpretation to be an unreasonable determination of facts. At trial, Mrs. Saladrigas

testified that she had seen the victim wearing the same Rolex watch that was in the possession of Mr. Rodriguez after the murder. ([DE 15-20] at 80). Mrs. Saladrigas also testified about the statements made by Mr. Saladrigas after he had been shot but before he died wherein he identified his assailants as "two mulattos." (*Id*. at 89). Mrs. Saladrigas' testimony was less than sixteen pages of the transcript. The Court agrees with the Florida Supreme Court that there is no indication in the record that Mrs. Saladrigas' testimony was used to garner sympathy from the jury or prejudice Mr. Rodriguez. As the testimony was not objectionable, trial counsel's performance cannot be deemed deficient. "[T]he failure to raise nonmeritorious issues does not constitute ineffective assistance." *Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994). Habeas relief must be denied.

Claim VI: Ineffective Assistance of Appellate Counsel

Mr. Rodriguez's final claim for federal habeas relief is that he was denied effective assistance of appellate counsel on direct appeal. ([DE 1] at 211). Mr. Rodriguez argues there were constitutional violations that occurred during his trial which were "'obvious on the record' and 'leaped out upon even a casual reading of the transcript.'" (*Id*. at 211-12). Mr. Rodriguez also contends that "[t]he lack of appellate advocacy on [my] behalf is identical to the lack of advocacy present in other cases in which the Supreme Court of Florida has granted habeas corpus relief." (*Id*.). Mr. Rodriguez summarizes his argument as one where he "was denied his right of confrontation and a fair and impartial trial." Specifically, he asserts that "the court erroneously failed to allow trial counsel to ask questions of the lead detective as to the arrest status of a key participant, Carlos Sponsa..." (*Id*. at 213). In conjunction with this argument, Mr. Rodriguez also asserts that "[a]ppellate counsel was ineffective for failing to ensure that the record on appeal

was complete and that all pretrial proceedings were transcribed for the purposes of the appeal." (*Id*. at 214).[37] Mr. Rodriguez first raised this claim in his state habeas corpus proceeding.[38] The Florida Supreme Court rejected his argument.

> Rodriguez argues the State improperly painted the picture that he was the mastermind of the crime and that he was unable to rebut this perception because trial counsel was not allowed to question Detective Frank Castillo regarding Carlos "Tata" Sponsa, who allegedly was a principal in the crimes. Rodriguez also argues that appellate counsel was ineffective for failing to raise this claim on direct appeal.
>
> At trial, the State explained that it intended to call Detective Castillo as a witness several times during the trial. Initially, the State explained, it would limit questioning to prior consistent statements made by coparticipant and key State witness Ramon Fernandez before he was offered a plea deal by the State. During this questioning, Detective Castillo also testified that Fernandez named the defendant Rodriguez and Tata as conspirators and participants in the robbery and murder. During cross-examination, trial counsel attempted to ask Detective Castillo whether Tata had been arrested. The State objected to the line of questioning, arguing that is was beyond the scope of the direct examination, and the trial judge sustained the objection.

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[37] The Florida Supreme Court denied this portion of the claim as insufficiently pled. *Rodriguez*, 919 So.2d at 1287. ("Rodriguez has not sufficiently pled this claim as he has not explained what issues he was unable to raise as a result of any missing or inaccurate record. Thus, Rodriguez is not entitled to relief on this claim.").

[38] Mr. Rodriguez raised the following claims in his petition for a writ of habeas corpus: (1) appellate counsel was ineffective for failing to raise numerous issues, including improper prosecutorial argument, improper jury instructions, the unconstitutionality of Florida's death penalty statute, the improper admission of opinion testimony, the introduction of gruesome and misleading photographs, the improper exclusion of testimony regarding [Carlos Sponsa] non-arrest, and an incomplete record on appeal; (2) the Florida Supreme Court failed to conduct a meaningful harmless error analysis when considering the effect of improper prosecutorial argument and inadmissible hearsay testimony in the direct appeal case; and (3) the constitutionality of the first-degree murder indictment must be revisited in light of the United States Supreme Court's decisions in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Here, Mr. Rodriguez has only raised a claim of ineffective assistance of appellate counsel regarding the improper exclusion of testimony regarding [Carlos Sponsa] non-arrest, and an incomplete record on appeal.

> While the trial court may have erred by not allowing defense counsel to pursue this line of questioning during the detective's initial testimony, any error in this regard was harmless beyond a reasonable doubt. *See State v. DiGuilio*, 491 So.2d 1129 (Fla.1986). Later in the State's case, Detective Castillo was recalled by the State and testified that Tata had not been arrested despite a search for him by law enforcement and an outstanding probation violation warrant. On cross-examination, defense counsel was able to elicit that there was no warrant for the arrest of Tata for the murder of Saladrigas, despite Tata's involvement as a principal in the crime. Further, Detective Castillo could offer no explanation why a warrant had not been issued for Tata. During closing argument, defense counsel pointed out Tata's alleged role in the murder, the lack of an arrest warrant against him, and his absence from the proceedings. Because Rodriguez would not have prevailed on this claim on direct appeal, appellate counsel cannot be deemed ineffective for failing to raise the claim. *Freeman*, 761 So.2d at 1070-71.

Rodriguez, 919 So.2d at 1286-87. In order for the Court to grant Mr. Rodriguez federal habeas relief, the Florida Supreme Court's determination on his ineffective assistance of appellate counsel claim would have to satisfy the "unreasonable application" prong of § 2254(d)(1) only by showing that "there was no reasonable basis" for the decision. *Harrington*, 131 S.Ct. at 784. After a thorough review of the state court record, Mr. Rodriguez has failed to meet that high threshold.

> In assessing an appellate attorney's performance, we are mindful that "the Sixth Amendment does not require appellate advocates to raise every non-frivolous issue." *Id*. at 1130-31. Rather, an effective attorney will weed out weaker arguments, even though they may have merit. *See id.* at 1131. In order to establish prejudice, we must first review the merits of the omitted claim. *See id.* at 1132. Counsel's performance will be deemed prejudicial if we find that "the neglected claim would have a reasonable probability of success on appeal." *Id.*

Philmore v. McNeil, 575 F.3d 1251, 1264-65 (11th Cir. 2009).

In analyzing Mr. Rodriguez's claim, the Florida Supreme Court presumed that the trial court erred when it did not allow defense counsel to pursue this line of questioning but found that "any error in this regard was harmless beyond a reasonable doubt." *Rodriguez*, 919 So.2d at 1286-87. The court determined that if the underlying claim would not have been a meritorious

claim because the error was harmless[39], appellate counsel cannot be found ineffective for failing to assert that claim. The record does not support granting Mr. Rodriguez relief.

During the initial cross-examination of Detective Castillo, defense counsel could not inquire about whether he had ever arrested Carlos Sponsa. ([DE 15-23] at 141). When defense counsel asked the question, the State objected.

> MR. KASTRENAKIS: Objection, Judge. Beyond the scope of my direct examination.
>
> THE COURT: Sustained.
>
> MR. KALISCH: We went over this pretrial, and Your Honor gave me specific permission to go into it. It's cross examination.
>
> THE COURT: No, sir. You can't go into it. Perhaps at another time, limiting you to the testimony, the specific subject matter of this particular witness.
>
> MR. KALISCH: May I approach the bench?
>
> THE COURT: No. Go ahead.
> Sir, I am ordering you to go on with your cross-examination.

(*Id*. at 142).

However, when the State recalled Detective Castillo to testify, defense counsel was permitted to inquire about Mr. Sponsa. Specifically, defense counsel asked if Mr. Sponsa was "a principal in this case" to which the detective responded "yes, he is" ([DE 15-26] at 68). Counsel also asked, "[t]o this day, Detective Castillo, do you have a warrant out for the arrest of Carlos Sponsa for the murder of Abelardo Saladrigas?" (*Id*. at 69). The detective replied, "No, I don't."

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[39] "Florida courts apply the more petitioner-friendly *Chapman* standard of whether the constitutional error is "harmless beyond a reasonable doubt." *See Pittman v. State*, 90 So.3d 794 (Fla. 2011); *Guzman v. State*, 868 So.2d 498, 507–08 (Fla. 2003)." *Trepal v. Sec'y, Dep't. of Corr.*, 684 F.3d 1088, 1111 (11th Cir. 2012). "The standard *Chapman* set for harmlessness of constitutional trial error was whether the reviewing court was "able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Id.* at 1112.

(*Id*.). The detective also testified that he did not know and could not tell the jury why there was no warrant out for Carlos Sponsa's arrest.

During closing argument, defense counsel argued to the jury that "[Carlos Sponsa], according to Detective Castillo, has never been arrested in connection with this case. As a matter of fact, they haven't even [sic] an arrest warrant out for him for the murder of Abelardo Salidrigas. [sic]" (*Id*. at 57-58). Counsel further argued that "[Mr. Rodriguez] has been selected by this little gang of teenagers, including [Carlos Sponsa] who has never been arrested, as their scapegoat." (*Id*. at 78).

Given the record, the Court does not find that the determination of the Florida Supreme Court to be unreasonable. Defense counsel was able to cross-examine the detective on this issue, albeit at a later point in the trial. Given the law, the Court does not find the harmless error analysis unreasonable. As the error was harmless, the Court is unable to find the state court's determination on deficiency unreasonable. Here, reasonable professional judgment supports appellate counsel's decision to not pursue this claim on direct appeal. Even if the wisdom of counsel's decision was questionable, fairminded jurists could disagree about the reasonableness of this decision. Accordingly, habeas relief must be denied.

VI. CONCLUSION

For all the reasons set forth above, it is:

ORDERED AND ADJUDGED that Juan David Rodriguez's Petition for Writ of Habeas Corpus [DE 1] is **DENIED**. All pending motions are denied as moot. A Certificate of Appealability is **GRANTED** as to Claim III and Claim IV:

> Whether the district court erred in the *de novo* determination of Juan David Rodriguez's ineffective assistance of penalty phase counsel claim?

and

> Whether or not the Florida Supreme Court's determination of Juan David Rodriguez's claim that he is mentally retarded pursuant to *Atkins v. Virginia* was an unreasonable determination of facts as required by the AEDPA?

The undersigned is persuaded that Mr. Rodriguez has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)(citation omitted). The Clerk of the Court is instructed to **CLOSE** the case.

DONE AND ORDERED in Chambers at Miami, Florida this 4th day of January, 2016.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record

219 So.3d 751
Supreme Court of Florida.

Juan David RODRIGUEZ, Appellant,

v.

STATE of Florida, Appellee.

No. SC15–1795
|
[April 20, 2017]

Synopsis

Background: After defendant 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, and was sentenced to death, 1990 WL 10551261, defendant's convictions were affirmed by the Supreme Court, 609 So.2d 493, on direct appeal. Defendant subsequently filed a second successive postconviction relief petition, seeking vacatur of his death sentence. The Circuit Court, Miami-Dade County, No. 131988CF018180B000XX, Nushin G. Sayfie, J., summarily denied petition. Defendant appealed.

Holdings: The Supreme Court held that:

postconviction court did not make credibility findings that conflicted with medical standards;

postconviction court sufficiently evaluated manifestation before age 18 in considering intellectual disability claim; and

evidentiary hearing was not warranted on defendant's postconviction intellectual disability claim.

Affirmed.

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

Attorneys and Law Firms

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

Opinion

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 ***753** 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.

Rodriguez filed his initial postconviction motion on September 12, 1994, and filed amended motions in October 1995, April 1997, and July 1997.[2] ***754** 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.

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 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, —— U.S. ——, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014). Order Denying Petition, ***755** 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, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (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 ***756** 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, —— U.S. ——, 137 S.Ct. 1039, 1049, 197 L.E.2d 416 (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 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 ***757** 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 ***758** 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, —— U.S. ——, 135 S.Ct. 2269, 2278–82, 192 L.Ed.2d 356 (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 ***759** 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.

***760** 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, 210 So.3d 1, 7 (Fla.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.

All Citations

219 So.3d 751, 42 Fla. L. Weekly S483

Footnotes

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 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, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), overruled by Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); and 6) Florida's death penalty statute is unconstitutional.

Id. at 500, 107 S.Ct. 2529.

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 [373] U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] (1963)] violation based on the State's failure to disclose information concerning Tata, an Ake[v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (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 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).

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, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (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, 122 S.Ct. 2242, 153 L.Ed.2d 335 (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.

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, 137 S.Ct. at 1045.

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Supreme Court of Florida.

Juan David RODRIGUEZ, Appellant(s)

v.

STATE of Florida, Appellee(s)

CASE NO.: SC15–1795

JUNE 15, 2017

Lower Tribunal No(s).: 131988CF018180B000XX

Opinion

***1** 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.

All Citations

Not Reported in So. Rptr., 2017 WL 2598492

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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 behavior," for the purpose of this definition, means the 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

110 So.3d 441 (Table)
Unpublished Disposition
(The decision of the Supreme Court of Florida is referenced in the Southern Reporter in a table captioned 'Florida Decisions Without Published Opinions.')
Supreme Court of Florida.

Juan David RODRIGUEZ, Appellant(s)

v.

STATE of Florida, Appellee(s).

No. SC11–202.
|
Feb. 6, 2013.

Opinion

***1** 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. We also deny Rodriguez's claim that Florida's scheme for the assessment of mental retardation in post-conviction death penalty cases is unconstitutional.

It is so ordered.

POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

All Citations

110 So.3d 441 (Table), 2013 WL 462069

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