IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC02-2284

GUILLERMO OCTAVIO ARBELAEZ,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****
*** ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA, (Criminal Division)
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ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Guillermo Octavio Arbelaez, was the defendant at trial and will be referred to as the “Defendant” or “Arbelaez”. Appellee, the State of Florida, the prosecution below will be referred to as the “State”. References will be as follows:

Direct appeal - “TR”

Postconviction record in case number SC 89375 - “PCR1”

Present postconviction appeal in case number SC03-2284 - “PCR2"

Any supplemental trial record will be identified by the letter “S” preceding the appropriate reference and

Arbelaez's initial brief - "IB"

Each will be followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE AND FACTS

On September 23, 1993, this Court affirmed Arbelaez's conviction and sentence for the kidnapping and first-degree murder of Julio Rivas finding:

> Arbelaez met Graciela Alfara at the Cafeteria Blanquita where she worked as a waitress. Over the period of several months, Arbelaez and Graciela became acquainted and sometime around January 15, 1988, Arbelaez moved into a house shared by Graciela, her two teenage daughters, five-year-old son, and nineteen- year-old cousin. Arbelaez paid Graciela $150 a month rent for a room he shared with her cousin. Shortly after moving into the home, Arbelaez and Graciela became intimate. This relationship, however, soon ended after Graciela accused Arbelaez of touching one of her daughters on the breast. According to Graciela, she told Arbelaez to move out of the house by February 15, 1988. In contrast, Arbelaez indicated that he and Graciela were to be married on February 15, 1988.
>
> On February 13, 1988 ... Graciela, however, had left [work] with another man. Arbelaez drank a beer and then went home to wait for Graciela to return. Close to midnight, Graciela returned home and kissed her companion good night as Arbelaez watched from a peephole in the door. As Graciela entered the house, Arbelaez grabbed her by the arm and started an argument. Graciela told Arbelaez that she did not love him and

that he should move out the next day....

That next morning around 7 a.m., Graciela went ... past Arbelaez without speaking to him. After waking Harlam, Graciela went back to sleep. ...Arbelaez and Julio Rivas, Graciela's five-year-old son, watched television in the living room. ... At approximately 7:30 a.m., while Graciela was sleeping in her room, Arbelaez took Julio and left the house.

Arbelaez drove his car to the Cafeteria Blanquita for a cup of coffee. While Julio remained in the car, Arbelaez ordered a cup of coffee from the waitress, Francisca Morgan. Morgan testified that Arbelaez appeared calm and normal. Arbelaez joined his friend Juan Londrian and drank the coffee. Londrian also testified that Arbelaez appeared calm and normal. As they drank their coffee, Arbelaez told Londrian that Graciela was seeing another man, and he stated that he was going to do something that would assure "that bitch is going to remember me for the rest of her life." Londrian understood that Arbelaez was referring to Graciela by that statement.

... At approximately 10:15 a.m., Arbelaez stopped his car at a convenience store in Key Biscayne and called Graciela to speak with her. ... but Graciela refused to speak with Arbelaez. Arbelaez then drove to the crest of the Powell Bridge on the Rickenbacker Causeway and stopped, exited his car, and lifted the hood, pretending that the car had broken down. He called to Julio, grabbed the boy by the arms, and threw the child off the bridge into the water seventy feet below. Arbelaez quickly closed the hood and fled the scene. He abandoned his car in a Coral Gables neighborhood and ran to the home of a friend, Pedro Salazar, and his family.

Arbelaez confessed to Pedro Salazar that he "shook" the child and "squeezed the boy's neck." He also told Pedro that he had thrown the child off a bridge because he wanted revenge against the child's mother. While Arbelaez was speaking with him, Pedro noticed a scratch on Arbelaez's neck. The Salazars loaned Arbelaez some money and drove him to the airport where he bought an airline ticket to Puerto Rico under an assumed name. After arriving in Puerto Rico, Arbelaez contacted his family in Colombia for money. His family wired him some money, and Arbelaez returned to Colombia.

On February 14, 1988, at approximately 3 p.m., a security officer for a high- rise located on Brickell Avenue spotted a child floating in the water. ... Graciela identified the dead child as her five-year-old son, Julio Rivas. At that time, Graciela also informed the police that Arbelaez could not be found.

On February 15, 1988, Martinez found Arbelaez's car abandoned in Coral Gables near the Salazars' home. ... The damage [inside the car] was consistent with something coming into contact with the panel. On February 18, 1988, an arrest warrant was issued for Arbelaez; however, the police could not find Arbelaez.

On March 16, 1988, Martinez asked Detective Cadavid to contact Arbelaez's family in Medellin, Colombia, because Cadavid was from Medellin and spoke the local dialect. Cadavid called [and] ... identified himself again as a detective in the City of Miami Police Department in the United States and stated that he needed to speak to Arbelaez about a problem in Miami. Arbelaez responded that he knew he was in trouble, but that he could not return to the United States because of a lack of documentation and money. Cadavid offered to

help with proper documentation through the American Embassy in Bogota, Colombia, and to provide Arbelaez airfare to the United States. ... Arbelaez gave Cadavid another phone number where he could be reached in the future.

... Cadavid called the American Embassy in Bogota. Cadavid spoke with Federal Bureau of Investigation Agent Rubin Munoz ... about arranging for Arbelaez to obtain the proper documentation in order to leave Colombia. After speaking with Munoz, Cadavid called Arbelaez back and spoke with Arbelaez's brother. ... Arbelaez's brother indicated that Arbelaez would return to the United States as soon as he could obtain proper documentation and a plane ticket. The brother also told Cadavid that Arbelaez suffered from chronic epileptic seizures and had been through psychiatric treatment in Colombia when he was eighteen to twenty years old. Cadavid then gave Arbelaez's brother a phone number for Arbelaez to call Munoz at the American Embassy in Bogota. ...

On March 24, 1988, Martinez contacted Arbelaez ... and told him that there was a warrant for his arrest for the homicide of Julio Rivas. ...

Arbelaez telephoned Munoz in Bogota following his conversation with Martinez. ... Arbelaez further told Munoz that he had caused the death of his girlfriend's son. He explained that he had been living with the mother of the child and that he and the woman had planned to get married. Arbelaez stated that he had an argument with the child's mother after seeing her kiss another man, and the mother told Arbelaez that she did not love him. Arbelaez then told Munoz, "As a Latin you would understand the best way to get to a woman is through her children." Thus, Arbelaez stated, he threw the woman's son off the bridge in order to

drown the boy.

...

... Finally, Arbelaez telephoned and stated that he had the proper documentation for the trip to the United States. Martinez purchased the ticket and arranged for it to be transferred to the airport in Colombia. Arbelaez picked up his ticket at the airport in Colombia and boarded the plane for Miami alone, unaccompanied by any law enforcement agents.

On April 11, 1988, at approximately 1 p.m., Arbelaez arrived in Miami. Martinez identified himself and assisted Arbelaez through customs. Upon exiting customs, Martinez arrested Arbelaez for the homicide of Julio Rivas and read him his *Miranda* rights in Spanish. Martinez ascertained that Arbelaez had a sixth-grade education.... Martinez asked Arbelaez if he had taken his medication for epilepsy that day and whether he felt any disorientation. Arbelaez indicated that he had taken the medication, but was not disoriented. Arbelaez also indicated that he wanted to make a statement and that he did not want an attorney present.

... During the car ride out of the airport, Arbelaez admitted to throwing the child off the bridge. Martinez asked Arbelaez to show him the exact location and Arbelaez agreed. ... Arbelaez directed Martinez to the Rickenbacker Causeway, told him to make a U-turn on the high bridge and count four posts and then stop. Arbelaez stated that on the day of the murder he had stopped there, raised the hood in order to pretend that he was stranded, and then threw the child off the bridge. Martinez then drove Arbelaez to the police station.

At the police station.... Following the

pre-interview, Arbelaez made an audio-taped sworn statement ... [after which] ... Martinez asked Arbelaez if he would consent to giving a videotaped statement. Arbelaez consented and immediately recorded a videotaped statement in which he again acknowledged his Miranda rights and waived them. In both statements, Arbelaez indicated that he killed the child as a plan of revenge against Graciela. Arbelaez was then jailed.

At trial, the State introduced into evidence Arbelaez's audio-taped and videotaped statements given to the police as well as his statements to Pedro Salazar, Munoz, and Martinez. The State further presented testimony from Graciela about her relationship with Arbelaez in which she disputed Arbelaez's claim that they were going to get married. The State also entered the expert testimony of an oceanographer who stated the currents and weather conditions on February 14, 1988, would have carried a body, like the child's body, from the Powell Bridge to the area where the child's body was found.

Finally, the State entered the medical examiner's testimony about the injuries he observed on the child's body. The medical examiner testified that the child's neck had a large bruise and a pinpoint hemorrhage in the left eye consistent with an attempted strangulation. Further, the child's lungs were not only hyperinflated and congested with blood, but the airways also had a considerable amount of frothy material, air mixed with fluid. The medical examiner concluded that the cause of death was asphyxia resulting from both strangulation and drowning. The medical examiner also testified that the child's body had a large bruise on the right leg and numerous bracket-shaped and rectangular-shaped bruises on the left side of the child's

body. The child's face and forehead also had numerous linear abrasions consistent with it being knocked or pressed into something. Finally, the medical examiner testified that the bruises and abrasions were recent and occurred while the child was alive, but sometime near the time of death. Graciela testified that the child did not have these injuries on the morning of his death.

Arbelaez testified on his own behalf that he was thirty-three years old at the time of trial, that he was from Medellin, Colombia, and that he worked at a hotel as a dishwasher. He also testified that he was an epileptic and that he sometimes took medication for his condition. According to Arbelaez, he moved in with Graciela and her family and he provided her with financial support because he loved her and wanted to marry her. He testified in conformity with his statements given to the police that he had an argument with Graciela on February 13, 1988, because she kissed another man.

Arbelaez's testimony differed from his statements given to the police about the events on the date of the murder. He testified that he left Graciela's house on February 14, 1988, with the child and went to inform his boss at the hotel that he would not be working that day. He admitted to telling Londrian that Graciela would be sorry, but that he meant he would "beat" Graciela and her male friend if they were together again. He testified that after he left the cafeteria he started to go to work but he turned the car around and decided to return the child home. On the way back to the house, the car developed mechanical problems on the bridge and stopped. He got out of the car, raised the hood and "forgot" about the child. As he looked under the hood, he heard a scream and saw the child floating in the water. He stated that he fled because he thought, "Since I had the

problem with her the previous night, they're going to think that I did it." Arbelaez testified that after he left the bridge he drove to Coral Gables and abandoned the car. He stated that before he abandoned the car he tore the dashboard of the car apart because he was "disgusted with it all."

On cross-examination, Arbelaez testified that Martinez "lied" and tricked him into confessing to the murder by promising him work in jail. Arbelaez also testified that Pedro Salazar and Munoz lied about his statements that he killed the child. After Arbelaez's testimony, the defense rested.

On February 19, 1991, the jury found Arbelaez guilty of kidnapping and the first-degree murder of Julio Rivas.

At the penalty phase of the trial, the State presented no additional witnesses and made argument based upon the evidence from the guilt phase of the trial. The defense first presented testimony by Martinez that Arbelaez had no significant history of prior criminal activity and that he returned to the United States voluntarily. The defense also presented the testimony of Arbelaez's friends, Juan Londrian, Pedro Salazar, Adelfa Salazar, and Marta Salazar. Londrian and the Salazars testified that Arbelaez was an honest and hard-working individual who never took narcotics or drank alcohol excessively. Finally, the defense presented the medical testimony of Dr. Raul Lopez, a neurologist who treated Arbelaez for an epileptic attack in 1984. Dr. Lopez testified that Arbelaez suffered from chronic epileptic seizures .... Tests run on Arbelaez indicated that he had not been taking his medication as instructed. Dr. Lopez specifically testified that the medication that he had prescribed did not have the side effect of depression. Following Dr. Lopez's testimony, the defense

rested.

> The jury recommended a death sentence by a vote of eleven to one. The trial judge found the following aggravating circumstances: 1) the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; 2) the homicide was especially heinous, atrocious, or cruel; and 3) the homicide was committed while the defendant was engaged in a kidnapping. In mitigation, the trial court found that Arbelaez had no significant history of prior criminal activity and the nonstatutory mitigating circumstance of remorse. The trial judge weighed the aggravating and mitigating circumstances and sentenced Arbelaez to death.

Arbelaez v. State, 626 So. 2d 169, 170-75 (Fla. 1993) (footnotes omitted).

Following the direct appeal, Arbelaez sought postconviction relief. His original motion was filed on August 15, 1995. An amended motion was filed on July 31, 1996 with the State responding on August 12, 1996 (PCR1 V1 12-124, 136-262; SPCR1 V1 28-143). On October 18, 1996, the trial court denied relief summarily (PCR1 V1 346-79). This Court affirmed that ruling, including the rejection of Arbelaez's request for the discharge of Judge Rothenberg. However, the issue of penalty phase counsel's effectiveness was remanded for an evidentiary hearing:

> ... as to Arbelaez's claim that trial counsel was ineffective during the penalty phase of his trial for failing to present expert testimony as to his epilepsy and

> other mental health mitigation and for failing to introduce evidence of his family history of abuse.

Arbelaez v. State, 775 So. 2d 909, 912 (Fla. 2000).

In spite of the rejection of the recusal issue on appeal, on January 29, 2001, Arbelaez again sought to recuse Judge Rothenberg (SPCR1 V1 4-9). The State responded and the trial court denied the request (PCR2 V2 294). Subsequently, the initial part of the evidentiary hearing was conducted on January 7 through 9, 2002 during which, testimony was taken from Arbelaez's penalty phase counsel, Reemberto Diaz, and from mental health professionals, Dr. Merry Haber, Dr. Ruth Latterner, Lisa Wiley, and Dr. Sonia Ruiz. The matter was continued until January 29, 2002, in order to accommodate the defense in obtaining the presence of family members from Columbia. On January 29, 2002, Defendant's sisters, Amparo Arbelaez Alvarez and Luz Marina Arbelaez Alvarez, testified.

Reemberto Diaz ("Diaz"), was called by the defense and State to discuss his actions and strategy related to Arbelaez's mental health and family history. On January 30, 1990, Diaz was appointed Arbelaez's counsel after Rodney Thaxton withdrew over a disagreement with Arbelaez about plea negotiations (PCR2 V3 467-69, 493-96). Diaz pursued both guilt and penalty phase issues and did much of the investigation himself (PCR2 V3 470-

72, 490-92). There was a lengthy witness list, and Diaz made a point of meeting each witness before his deposition (PCR2 V3 492-93). Diaz spoke to Mr. Thaxton, a senior public defender, about his prior representation, although, 12 years later, Diaz could not recall what they had discussed (PCR2 V3 472).

Several times prior to trial, Diaz met with Arbelaez and felt he had talked to his client sufficiently to know the case facts. Diaz and Arbelaez discussed, in Spanish, what the case was about, possible ways to proceed, whether a plea was possible, the evidence and witnesses to be presented, and whether Arbelaez would testify. Diaz found his client responsive to the inquiries and none of the responses were inappropriate or incoherent (PCR2 V6 968-73). Arbelaez answered Diaz's questions regarding the events surrounding the murder and was able to recall past events clearly. There was nothing in those discussions to indicate mental retardation (PCR2 V6 971-75).

While Diaz did not seek the appointment of a mental health expert to develop mitigation, he obtained Dr. Castiello, a Spanish speaking psychiatrist, to evaluate Arbelaez's competency, as was his common practice with capital clients (PCR2 V3 472-73; V6 977-82). Dr. Castiello spoke to Arbelaez, completed a competency evaluation, and provided Diaz with

information relevant to Arbelaez's mental status (PCR2 V6 977-78). Absent from the December 19, 1990 report was any indication Arbelaez had a difficult/abusive childhood (PCR2 V1 146). In his report, Dr. Castiello opined that Arbelaez was "functioning at a **low average intelligence** capacity" and "at the present time the defendant possesses a factual, as well as a rational understanding of the proceedings against him, is capable of assisting counsel in his defense and of standing trial." There was a recommendation against in-patient treatment at a psychiatric facility as it was not clinically warranted. With respect to insanity, Dr. Castiello concluded, "On the basis of the description offered by the defendant as to his frame of mind at the time of the alleged offense, it is considered that he was sane." (PCR2 V1 147-48).

By the time Diaz received Dr. Castiello's report, he had gathered a great deal of information which impacted the penalty phase strategy (PCR2 V3 502). Dr. Castiello's report was reviewed by Diaz and discussed with the doctor. Had the doctor found something, Diaz would have used it. Diaz and Dr. Castiello had worked together before, and Diaz did not doubt the doctor's ability (PCR2 V3 546-47; V6 977-78). There was nothing which led Diaz to conclude there was a continuing need for a

mental health expert.[1] Had Dr. Castiello reported possible retardation, Diaz would have sought further inquiry, but that was not the case (PCR2 V1 145-48; V3 546-47). Based upon the doctor's findings, as well as other issues Diaz investigated personally, he developed his penalty phase strategy (PCR2 V1 145-48; V3 496-97, 546-47; V6 979-80).

Diaz pursued the epilepsy issue and discussed this condition with Arbelaez and his treating neurologist, Dr. Lopez (PCR2 V3 496-97, 514-15). The doctor reported Arbelaez did not take his medication consistently and noted those having epileptic seizures do not remember the events immediately proceeding the seizure (PCR2 V3 496-500, 514-15). This data impacted Diaz's strategy because Arbelaez had a good recollection of the events surrounding the murder as evidenced by his taped confession and discussions with counsel (PCR2 V1 151-73; V3 496-500). Also, Dr. Lopez had no records indicating Arbelaez was depressed within the relevant time frame. In an attempt to show Arbelaez suffered from epilepsy, Diaz presented Dr. Lopez, who testified

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[1]Diaz did not recall whether Mr. Thaxton had a mental health expert appointed, but recalled talking to Dr. Haber "after the fact." (PCR2 V3 473-74). Diaz had used Dr. Haber, and had he thought she had something to be considered he would have called her (PCR2 V3 475, 545-46). Dr. Haber did not prepare a report in this case and Diaz saw nothing in Mr. Thaxton's file (PCR2 V3 517-18, 545-46). Diaz admitted that had Dr. Haber reported unfavorable things, he would not have presented her testimony (PCR2 V3 519-20).

he had treated Arbelaez from 1984 to 1988 and that Arbelaez was resistant to taking his medication due to its side effects (PCR2 V3 514-15).

Retired clinical and forensic psychologist who testified mostly for defendants, Dr. Haber, was called by Arbelaez and her notes were admitted into evidence. (PCR2 V1 175-190; V3 554-55; V4 621-23, 663). She recalled rendering services to Mr. Thaxton and evaluating Arbelaez between June 1988 and May 1989 (PCR2 V3 554-59). Dr. Haber believed she was hired to complete a competency evaluation, however, if she had been asked to do a full mitigation work-up, she would have ordered psychological testing. In this case, no further testing was ordered (PCR2 V3 557-59; V4 623-26, 633-34, 667-68).

Dr. Haber's notes indicated she and Arbelaez discussed his history, work experience, suicide attempts, and epilepsy (PCR2 V3 557-59). From her notes, Dr. Haber found Arbelaez had a good remote memory, was cooperative and coherent with good eye contact. He was oriented to time, place, and person, with productive/goal oriented thought processes and had no lessening of association. He was not delusional, paranoid or suicidal and did not have "homicide ideations", hallucinations, or sleeping/eating disorders (PCR2 V3 557-59; V4 627-33, 671). During her evaluation, Dr. Haber saw no signs of depression,

however, the jail records indicated a history of suicide attempts and depression (PCR2 V3 560-63; V4 671). After May, 1989, Dr. Haber had no further contact with Arbelaez nor any way of knowing his mental state after that date (PCR2 V3 563-66, V4 669-70). She had not submitted a written report to the defense or trial court (PCR2 V4 626).

Although in 1988/1989 she did not order a neuropsychological evaluation as a matter of course, she now recommends such testing be done in all capital cases.[2] While she agreed a person's epileptic condition would show up on a brain scan, **such does not indicate the person is psychotic or suffering from organic brain damage** (PCR2 V3 610; V4 655, 682). Dr. Haber asserted that had Diaz called, she would have recommended a neuropsychological evaluation based upon the seizure disorder (PCR2 V3 566-68, 610; V4 682-83). Yet, other than completing an evaluation form, Dr. Haber conducted no tests on Arbelaez and

[2]With anyone suffering from a seizure disorder, Dr. Haber suspects organic involvement and suggested she would have asked for a neuropsychological examination to measure behavior, IQ, and discover family and educational history for possible mitigation. In 1989, she concluded Arbelaez had a history of depression and had electroshock treatments which could have affected his brain which would have led her to request a neuropsychological evaluation. However, she did not recall what she recommended to Mr. Thaxton, what he told her, or what happened here. Regardless, she found nothing that "required further evaluation." (PCR2 V3 566-70, 588-90, 608-10; V4 643, 671-73).

stated "... with a reasonable degree of psychological certainty ... **I did not find anything that I felt at that time required further evaluation**." (emphasis supplied). She admitted, "in general its my practice, if I do [require tests], to tell the attorney and then they and I will determine what will be done in the future." At the time of the 1988/1989 evaluation, Dr. Haber saw no reason to ask for an IQ test (PCR2 V4 633-35).

Dr. Haber knew Arbelaez suffered from epilepsy and had a history of being in the workforce with friends and acquaintances from his years in Miami. Included in Dr. Haber's notes was the fact Arbelaez asserted the victim died by accident. She recalled Arbelaez's videotaped confession and documents that he confessed to the intentional killing of the child (PCR2 V4 635-38, 650). After reviewing the videotape, Dr. Haber admitted that had she viewed the tape at the time she evaluated Arbelaez in 1988/89, she would not have thought about requesting an IQ test because his responses were coherent, productive, and readily understandable without any significant problems in understanding (PCR2 V4 652-53). While in 1988, Arbelaez reported mental problems, Dr. Haber did not believe Arbelaez was suffering from a psychotic disorder when she met him. (PCR2 V3 588-90, 604; V4 671).

Neither Arbelaez nor his jail records noted hallucinations.

Although there was evidence of a depressive disorder which impacted judgment, **Dr. Haber did not find the disorder rose to the level of statutory mitigation**. She opined that any psychotic disorder reported by the Department of Corrections ("DOC") developed while Arbelaez was on death row in response to the stress of incarceration and that his epileptic condition worsened during that time.[3] Any psychotic condition Arbelaez exhibited at the time of the evidentiary hearing was not known or observed by Dr. Haber in 1988/1989. Also, no psychotic condition was visible on the videotaped confession (PCR2 V3 603-05; V4 657-58).

Based upon her evaluation at the time of trial, **Dr. Haber reasoned no statutory mitigator could be established** (PCR2 V4 655-56). When asked what she would have done in 1988/1989, Dr. Haber stated that had she been asked to do an investigation, she would have obtained records from Columbia, reported her findings to Mr. Thaxton, documented Arbelaez's history of depression,

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[3]Dr. Haber noted death row causes "diatrogenic disorders" and she could not relate the death row records to what Arbelaez was like in 1988. What she reported was that Arbelaez had a seizure disorder which became worse on death row. While she could not extrapolate back from the DOC records, she noted Arbelaez suffered from a depressive disorder, which she could not specify. Depression is either major or minor or something fairly intermittent. Dr. Haber eventually stated she saw no signs of depression during her earlier exam (PCR2 V3602-03; V4 671).

suicide attempts, electroshock treatment, and lack of education. This documentation would have been used to support non-statutory mitigation (PCR2 V4 672-75).

Having been supplied with documentation generated some six years after trial, Dr. Haber reasoned Arbelaez was functioning, at best, on a borderline intellectual level, and at worst, on a mental retardation level with a 67 full scale IQ which could range +/- seven points or even up to a score of 77. However, she admitted the IQ test was conducted by Dr. Latterner, a defense mental health expert, while Arbelaez was on death row, “so it is a close call” and her review of videotaped confession would not have led her to consider IQ testing (PCR2 V3 605-06; V4 652-59, 680-81). Further, a person’s "adaptive behavior" must be taken into consideration when determining mental retardation.[4] Based upon what Dr. Haber reviewed, Arbelaez appeared to have "adaptive functioning" within a borderline range, but was "functioning behaviorally within an adequate range." Based upon his confession, Arbelaez functioned at an acceptable level (PCR2 V4 659-61, 677-79).

Neuropsychologist, Dr. Latterner, testified she conducted a neuropsychological examination of Arbelaez on August 11, 1995

[4]See section 916.106(12), Florida Statutes and section 921.137(1), Florida Statutes for the definition of “mental retardation.”

while he was incarcerated on death row (PCR2 V4 688, 691-92, 747). She administered a battery of tests, conducted an interview, and produced a report (PCR2 V1 176-77; V4 693-97, 745-46, 748, 787). Based upon the IQ and neuropsychological testing, the doctor concluded Arbelaez was mentally retarded with "organic brain syndrome mixed" (PCR2 V4 698-701). The mental retardation and organic brain syndrome are separate issues; Arbelaez's intellectual acts have nothing to do with his inability to control his impulses (PCR2 V4 748-49). She opined that mental retardation and organic brain damage are major mental diseases. It was her conclusion that the organic brain damage was causing epileptic seizures and Arbelaez's other impairments, but not his intellectual deficits. The intellectual deficits were innate. Continued seizures could cause additional brain damage (PCR2 V4 798-800).

Before conducting her exam, Dr. Latterner chose not to review any case information, confession,[5] or police reports. Instead, she rested her conclusion on her 1995 test results (PCR2 V4 745, 757-59, 785-86). She would not take into consideration Arbelaez's adaptive behavior, because she felt the

[5]Dr. Latterner noted Arbelaez's ability to describe in detail the murder, his motivation, and how he accomplished the killing had nothing to do with the memory tests administered or his cognitive function (PCR2 V4 767-68).

testing was adequate to form an opinion (PCR2 V4 762-63). Dr. Latterner explained Arbelaez's full scale IQ score of 67, with no malingering, placed him in the educatable, mentally retarded range, i.e., he is able to live independently, hold down a job, and be a responsible citizen (PCR2 V4 701-03, 785-86).

Dr. Latterner opined Arbelaez suffers from "organic brain syndrome, mixed" which means both his intellectual and emotional functions are affected and his brain damage is superimposed upon a preexisting cognitive deficit (PCR2 V4 739-40). While Dr. Latterner was aware of Arbelaez's epilepsy, a form of brain damage, **she saw no way to determine whether the test results were related to the epilepsy or some other factor** (PCR2 V4 743-44, 754).

Over defense objection, DOC psychological Lisa Wiley ("Wiley") testified.[6] She was responsible for assessment, counseling, case management, dealing with mentally retarded persons, and making medical referrals for death row inmates, including Arbelaez. Arbelaez arrived on death row as a "Psychiatric Grade One", which means he had no identifiable

[6]Although the trial court permitted Wiley to give an opinion on mental retardation, the court noted it would give it the weight it deserves and made no reference to Wiley in the order (SPCR2 V1 14-41; V5 941-51).

mental health concerns[7] (PCR2 V5 779-80, 836-38, 854, 870, 891-92). As part of her employment, Wiley attended treatment team meetings regarding Arbelaez. Mental retardation was never discussed as one of his problems. Prior to April 2001, Wiley saw Arbelaez weekly in general rounds and about nine times per year individually (PCR2 V5 856-66, 902). Wiley explained that one of the factors to be assessed in diagnosing mental retardation is adaptive behavior, i.e., the ability to function independently. Familiar with this concept, Wiley looks for impairments in functioning, excessive disciplinary reports, staff referrals, observations, and confinement reports. Over the ten years she observed Arbelaez, Wiley found he obeyed directions, cared for/groomed himself, followed the required pattern of death row activities, had appropriate time management, social, and interview skills, learned a second language as an adult, and showed no impairment in adapting to his environment. Based upon these observations, Wiley found Arbelaez was not mentally retarded (PCR2 V5 877-80, 892-98, 949-

[7]Since arriving on death row, Arbelaez has been treated for depression and anxiety and was diagnosed with serious mental disorders including "depressive disorder" and psychotic disorder. While incarcerated, Arbelaez has not attempted suicide, but was put on suicide watch, and was given antipsychotic and antidepressant medications. In 1994-1997 and 1999, he reported hallucination and was referred for a psychiatric evaluation (PCR2 V5 872, 908-12, 917-28, 937; V6 938).

52).

During her November 5, 2001 evaluation, Dr. Sonia Ruiz, a clinical psychologist, communicated with Arbelaez in Spanish. Finding him very clear, lucid, and stable, Dr. Ruiz reported no evidence of major mental disorder or mental retardation. She knew of his epilepsy and questionable compliance with his medication (PCR2 V1 191-203; V6 1003-04, 1016-18).

Before conducting her evaluation, Dr. Ruiz received Dr. Latterner's neuropsychological evaluation, Dr. Castiello's report, the Florida Supreme Court's July 13, 2000 opinion, and Arbelaez's April 11, 1988 confession. This information helped her assess whether his answers were consistent with prior examinations (PCR2 V6 1017-20). During the evaluation, Arbelaez related his life history and experiences, family relationships, education, interest in adventure, employment history, association with the victim's mother, and the murder. Arbelaez was able to tell a "good story" and had no difficulty in recalling details.[8] His thoughts were easily understood, coherent, and clear. He spoke readily of his epilepsy, neurologist, medications, and about being diagnosed as anxious

[8]He maintained the same speech pattern throughout the interview. His tone was not flat or devoid of emotion. Dr. Ruiz found Arbelaez was not depressed or uninvolved (PCR2 V6 1034-36).

and depressed. Suicide was discussed, and Arbelaez reported three attempts and explained why he had been put on suicide watch on death row. Arbelaez's answers were appropriate and given with adequate detail except when reporting hallucinations. Then his explanations were so vague, Dr. Ruiz found him not credible (PCR2 V6 1022-36, 1107-08).

Based upon the interview, Dr. Ruiz was of the opinion Arbelaez's mental status was clear, stable, with "no indication of any psychopathology" because Arbelaez was alert, maintained good eye contact, was cooperative, with an appropriate/normal mood. Dr. Ruiz saw no evidence of depression, anxiety or gross memory deficits; he "established rapport easily." "His speech was clear. He was highly verbal. He was lucid at all times. His thought process was organized and relevant." Dr. Ruiz reported no psychotic content in Arbelaez's discussions. He "was fully oriented and had good insight and judgment. He knew what his surroundings were. He knew why he was there." (PCR2 V6 1037-40).

Dr. Ruiz administered several tests including the Bender-Gestalt and MMPI evaluations[9]. Arbelaez completed the Bender-

[9]While the MMPI requires an eighth grade reading ability, and Arbelaez tested in the fourth grade level, Dr. Ruiz has found many people read above the tested level. Arbelaez completed the test in the normal time frame (PCR2 V6 1051-59).

Gestalt test in a hasty fashion, with impulsive execution. The test was not scored, but revealed no gross organic impairment or mental retardation. (PCR2 V6 1049-51, 1116-20, 1150-51). The computer reported an invalid MMPI score and the test was used to determine whether Arbelaez was malingering (PCR2 V6 1051-59, 1131-32, 1154-55). The invalid score was based upon the test's "F Scale" which indicated classic malingering (PCR2 V6 1051-59, 1133-34). Although recognizing that an invalid MMPI score could be due to a patient's insufficient reading skills, Dr. Ruiz concluded Arbelaez was "faking" his test based upon other validity scales. She reasoned, "[t]he fact that he scored so high on every single scale, which has elements of psychopathology in them, it was inconsistent with any observations of the defendant and things that [she] had reviewed and read about the defendant." The validity scales confirm malingering (PCR2 V6 1135-38, 1154-55).

On the Ravens test, Arbelaez scored an 18 which equates to a 70 to 75 on the IQ scale, but Dr. Ruiz did not obtain an IQ score. Considering the tests and interview together, Dr. Ruiz found the interview did not corroborate the tests. (PCR2 V6 1062-63, 1069).

With respect to mental retardation, Dr. Ruiz averred that IQ, adaptive functioning, and an onset before age 18 must occur

before a person is labeled mentally retarded. This is based upon the DSM-IV book and Florida Statutes.[10]. When determining a person's adaptive behavior, Dr. Ruiz compares the person's level of functioning to others with similar "socioeconomic status, culture, background, and age." She looks for independent living. Here, Dr. Ruiz found Arbelaez's adaptive level of functioning quite high and reasoned he could not be labeled mentally retarded. Arbelaez was living and traveling on his own before he was 18 years old. He established friends, worked, and lived independently in the United States without family support. Arbelaez was responsible in his jobs, holding the keys to one hotel and distributing supplies to co-workers. Such responsibility would not have been given a mentally retarded person. Arbelaez held down two or three jobs and painted homes on weekends. He purchased his medication, clothes, and toys for his girlfriend's children. He was able to drive himself to work, and the children to school (PCR2 V6 1064-

[10]Both sections 916.106(12) and 921.137(1), Florida Statutes define "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." Adaptive behavior is defined as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of the individual's age, cultural group, and community." See sections 916.106 (12) and 921.137(1), Florida Statutes.

67). Arbelaez's history is inconsistent with mild mental retardation because he left one job for a better paying one, ran errands, provided for a household, and had friends. Typically, mentally retarded persons do not have many friends (PCR2 V6 1144-48). A diagnosis of mental retardation must not be based solely upon test results. Even if a person's IQ is low, but adaptive functioning normal, the person should not be labeled mentally retarded. Based upon everything Dr. Ruiz observed and reviewed, there was no evidence of mental impairment due to low cognitive functioning (PCR2 V6 1064-68, 1071).

While Dr. Ruiz was unaware Arbelaez had been diagnosed with major mental disorders, such would not alter her conclusions as it is not uncommon for inmates to suffer from episodes of depression and anxiety. She saw no evidence of any major thought disturbance or psychosis. Even if she had Arbelaez's psychiatric records from Columbia, her opinion would not have changed because Arbelaez seemed to have been functioning well, adequately before the crime and functioning adequately when they met. (PCR2 V6 1088, 1102-03).

During the January 29, 2002 proceeding, Arbelaez called two of his sisters. Amparo Arbelaez Alvarez ("Amparo") testified

her family was very poor[11] and their parents did not have educations, but could read and write. The family did not have enough money for food and medical care, but there was an American food and medical clinic where they could go to for help. Her parents mistreated each other, and their father, mistreated his children by punching them and not showing them love; he also used "witchcraft." When the family moved to the city, their father could not find steady work. Eventually he became a police officer in the countryside and was away from home for weeks at a time, returning one weekend a month (PCR2 V7 1170-77, 1179-84, 1199-201).

Arbelaez was punished often because he did not do well in school (PCR2 V7 1181-86). Juan Miguel Arbelaez, the eldest son was in charge of disciplining the other 11 children; he too, would beat his siblings. After leaving school, Arbelaez was given a job selling marijuana, and began smoking marijuana and taking drugs, but Amparo never saw Arbelaez smoke marijuana (PCR2 V7 1181-83, 1186-88, 1212-14, 1228-30).

When Arbelaez was not selling drugs, he visited the local church and cared for the young boys in return for food and

[11]Even though as the children got older they started to work and bring money to the family, it was not enough. However, six out of the eleven children obtained college educations by working their way through college (PCR2 V7 1217-20)

clothing (PCR2 V7 1189-90, 1212). While working in the church, Arbelaez fell in love with a nun. One day he became sad and drank rat poison, after which, he was hospitalized in a psychiatric ward. Amparo related that her brother was depressed and attempted suicide on more than one occasion (PCR2 V7 1190-92).

Amparo admitted she spoke to Diaz twice after the trial, but he did not give her much information. She claimed she would have come to the United States to testify (PCR2 V7 1193-94), yet confessed that once Arbelaez moved to America at the age of 18 or 19, he had no further contact with his family until he returned home after the murder. Because her family was taught to be very cold and independent, Amparo did not write to her brother, although she could have written (PCR2 V7 1204-09, 1214, 1225-32, 1242-44).

Arbelaez's older sister, Luz Marina Arbelaez Alvarez ("Luz"), reported that their parents had a bad relationship and the children suffered. Her father was home one weekend a month, and when home, would beat his children. Their family was very poor and had to seek food from health centers and ate badly. When the parents were away, the eldest siblings beat the younger ones (PCR2 V7 1245-52).

Luz averred Arbelaez could not learn in school; he would not

apply himself. While in his teens, Arbelaez thrice tried to commit suicide (PCR2 V7 1250-54). On one occasion he was working for Coca Cola and the company's insurance paid for the hospital and when there, Arbelaez was treated for epilepsy. Luz admitted that the centers where the family received food also offered medical care. (PCR2 V7 1254, 1260, 1264-68, 1271-72).

In his January 8-9, 2002 testimony, Diaz reported that on several occasions, pre-trial, he contacted the family residing in Medellin, Columbia, both by telephone and letter in order to see if the family members had anything the defense could use in the guilt and/or penalty phases (PCR2 V3 476-81, 520). Diaz spoke to the family about mitigation and tried to learn about the individuals, the facts, why each was listed as a witness, and his involvement with Arbelaez. The possibility of bringing family members to testify was considered (PCR2 V3 478-79, 520, 981-82).

Diaz had information about Arbelaez's background, including that he came from a poor family, without an adequate education, had been an altar boy, who was medicated for epilepsy, had attempted suicide, and had been in a mental hospital. The correspondence from the Columbian Government was that there were no medical records for Arbelaez, thus, Diaz had asked, he believed, Jorge Arbelaez to try to obtain any available records,

as they may contain potential mitigation. Though Jorge Arbelaez indicated he would try to get the requested records, Diaz received nothing (PCR2 V3 480-84, 526-31, 541-42).

Based upon his investigation, Dr. Castiello's report, discussions with the family, and conferences with Arbelaez, Diaz formed his penalty phase strategy. The scheme was to show Arbelaez had returned to Miami voluntarily, had no criminal history, confessed in detail, and had been very emotional/upset at the time of the murder due to his girl friend's actions (PCR2 V3 515-17).

Diaz had not planned on calling Arbelaez to testify during the guilt phase. In fact, Diaz told Arbelaez he did not want him to testify because of the defense penalty phase strategy. Nonetheless, Arbelaez testified. This was significant, as he had given more than one version of the criminal events. Arbelaez's trial testimony differed from his confessions to the police, Rubin Munoz, the Salazar family, and Arbelaez's Columbian family. This caused Diaz problems because the State's case was strong and the victim was a five year old boy who was killed out of revenge. As explained by Diaz, had Arbelaez not testified at the guilt phase, the penalty phase would have been different in that Diaz could have stressed further, Arbelaez's efforts to face justice, take responsibility, and the death was

accidental. By testifying at the guilt phase, Arbelaez altered what could be done in the penalty phase (PCR2 V3 503-08, 512-14). Even though his client testified, Diaz endeavored to show as mitigation that Arbelaez had no significant criminal history, was a "hard worker" and "good guy" who suffered from epilepsy, held down two jobs, was remorseful, confessed in detail, and had been emotionally upset at the time of the murder (PCR2 V3 508-17).

Besides having to deal with Arbelaez's decision to testify, and the fact the victim was a five year old boy, Diaz explained his rationale in not bringing the Columbian family members to Miami. While he and Arbelaez discussed calling family members, Arbelaez did not want them to testify. Although he was not adamant about it, Arbelaez's position was that the family should not come to Miami nor should the parties go to Columbia for deposition due to safety concerns in part because of the social/political climate of the area. Arbelaez feared for his family's safety, because the FBI and police had been in contact with the family previously. Also, the drug cartel might have questioned why the family was talking to the police or involved with a United States criminal trial, which could have had repercussions for their safety. He did not want to put his family through that (PCR2 V3 520-24, 535-40).

Arbelaez's decision to testify in the guilt phase and switch his defense to "it was an accident", put the defense in a difficult position.[12] If the family were to testify in the penalty phase and reveal Arbelaez lied, the jury may question why the family was not presented in the guilt phase when that issue was open to resolution. What most troubled Diaz about the family members, was what they would say in light of Arbelaez's trial testimony. Diaz was concerned because Arbelaez had confessed to his family and this would create a problem should Arbelaez's mother testify it was an accident when Arbelaez killed the child as it was Diaz's belief the mother would be untruthful in that respect. Diaz was concerned about presenting Arbelaez's difficult childhood because the victim was a child. He reasoned the defendant's difficult childhood does not carry the same weight as when the victim is an adult. Diaz stated, "[t]o lose sight of that, you would really do a disservice to your client...." He admitted poverty could be mitigation, but believed he had to be careful as it is important to link the poverty to the case facts. It was Diaz's position, poverty

[12]A defendant's decision to testify is a fundamental right that belongs solely to him and does not fall under the purview of an attorney's strategic decision. United States v. Burke, 257 F.3d 1321, 1323 (11th Cir. 2001); White v. State, 559 So. 2d 1097, 1099 (Fla. 1990); Morris v. State, 557 So. 2d 27, 29 (Fla. 1990).

works only as mitigation if it can be said the defendant was poor, thus, he lacked adequate medical treatment, education, and proper upbringing. This strategy was discussed with and agreed to by Arbelaez (PCR2 V3 521-26, 540-44).

On September 9, 2002, some nine months after the evidentiary hearing on the remanded issue of penalty phase counsel's effectiveness, Arbelaez filed Defendant's Supplement to Amended Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend challenging the consitutionality of the death sentence under Ring v. Arizona, 536 U.S. 584 (2002) and Atkins v. Virginia, 122 S.Ct. 2242 (2002). This was denied on the grounds Arbelaez had his 1995 postconviction motion remanded for an evidentiary hearing on specific issues, that the hearing was held in January 2002, and the supplemental motion raised nothing which could not have been raised in 1995. The matter was found procedurally barred and untimely. (PCR2 V2 211-47).

Postconviction relief was denied on September 12, 2002. (SPCR2 V1 41). The trial court found that penalty phase counsel did not render ineffective assistance regarding the decision not to present expert testimony about Arbelaez's epilepsy because counsel investigated the issue, offered it as non statutory mitigation, and "even after over 10 years post conviction"

Arbelaez has failed to offer "any evidence relating to the Defendant's epileptic disorder which could have been presented and was not." (SPRC2 V1 19).

With respect to the claim of ineffectiveness for allegedly not investigating and presenting other mental health mitigation, the court likewise rejected the claim. In so doing, the court assessed the testimony of Doctors Ruth Latterner, Merry Haber, and Sonia Ruiz, in conjunction with the actions of penalty phase counsel in preparing for and presenting mitigation. The court credited Dr. Ruiz's findings, relied upon Dr. Haber's pre-trial evaluation which "found no reason to suggest that any additional testing be done" on Arbelaez at that time, and rejected Dr. Latterner's conclusions because she was unwilling to consider other relevant information, ignored the requirements of the Florida Statutes, and the DSM IV Manual of Mental Disorders guidelines (SPCR2 V1 320-36).

The court considered defense counsel's efforts respecting Arbelaez's mental heath issue noting counsel had obtained the assistance of a mental heath professional to evaluate Arbelaez's pre-trial, assessed the case based upon his interaction with Arbelaez and the information disclosed, considered the opinions of mental health professions, and put before the jury epilepsy as mitigation. Counsel contacted Arbelaez's Columbian family

members in attempts to discover mitigation and gathered background information on Arbelaez's mental health and inadequate education. Diaz endeavored to obtain medical records from Columbia with the assistance of family members. Hence, counsel was found to have rendered constitutional assistance respecting the investigation and presentation of mental health evidence. (SPCR2 V1 16-36).

Also rejected, based upon the evidentiary hearing proof, was the claim of ineffectiveness for failing to call members of Arbelaez's family to discuss mitigation. (SPCR2 V2 36-40). The court noted Diaz spoke to Arbelaez and family members about testifying about mitigation. Arbelaez objected because he believed, given the political and criminal events in Columbia, his family would be in danger if they testified either by traveling to the United States or by having depositions taken in Columbia. This formed the basis for not presenting the family (SPCR2 V1 36-37). Further, the fact Arbelaez confessed to his family, then took the stand and refuted his confession of guilt, militated against calling family members. The court noted Diaz's concern that the family would conflict with Arbelaez's testimony of an accidental killing or, if they agreed with Arbelaez, they would be impeached with their pre-trial statements, thus, calling into question the entire presentation

(SPCR2 V1 37-40). The court found “Mr. Diaz had a reasonable basis for not presenting [the family] mitigation evidence” and he rendered effective assistance (SPCR2 V1 40).

SUMMARY OF THE ARGUMENT

Issue 1 - The court properly denied the request for recusal as legally insufficient. Arbelaez did not present a claim that would put a reasonable person in fear of not receiving a fair trial.

Issue II - The court's factual and legal conclusions related to the claim of ineffective assistance of penalty phase counsel are supported by the record and law. Penalty phase counsel rendered effective assistance by investigating the case and making reasoned strategic decisions based upon that investigation. Counsel's performance was professional and no prejudice has been established.

Issue III - The decision to permit mental health professional Lisa Wiley to testify was proper. Because Arbelaez's conviction and sentence were final, he no longer had a Fifth Amendment privilege with regard to the first-degree murder and related charges. Furthermore, Arbelaez put his mental health at issue postconviction, therefore, the State was permitted to seek out and present testimony relevant to that issue including testimony from those persons who were in a position to observe and interact with Arbelaez in prison. However, should this Court find the testimony was inadmissible, such was harmless beyond a reasonable doubt as the court did not

rely upon Wiley's testimony in denying relief.

Issue IV - The supplemental postconviction motion addressed to Ring v. Arizona, 536 U.S. 584, 620-21 (2002) was denied properly as procedurally barred and untimely. Moreover, Ring does not apply to Florida's capital sentencing scheme as death is the statutory maximum for first-degree murder and Ring does not qualify for retroactive application. None of the United States Supreme Court cases upholding Florida capital sentencing have been overruled. Furthermore, because Arbelaez has a contemporaneous felony conviction for kidnapping, the sentence is appropriate under Ring.

Issue V - Arbelaez's request to have the case abated is inappropriate as Atkins v. Virginia, 122 S. Ct. 2242 (2002) has not been held to be retroactive and Arbelaez has had a determination that he is not mentally retarded in connection with the resolution of his ineffective assistance of counsel claim.

ARGUMENT

ISSUE I

THERE WAS NO ABUSE OF DISCRETION IN DENYING ARBELAEZ'S MOTION TO DISQUALIFY (restated)

Arbelaez asserts the trial judge, the Honorable Leslie Rothenberg, should have granted the defense motion for disqualification (IB 52-55). This is based upon Arbelaez's reference to an alleged comment made by the judge in Geraldo Manso's case and interpreted by Manso's attorney as referencing the electric chair and treating it in a humorous manner. Arbelaez suggests those comments, in conjunction with a previously rejected basis for recusal, were sufficient to support recusal here. The State submits the court resolved the issue properly finding the motion legally insufficient. This Court should affirm.

This Court's most recent pronouncement set the standard of review of an order denying a motion for disqualification as *de novo*. Barnhill v. State, 834 So.2d 836, 842-43 (Fla. 2002), citing MacKenzie v. Super Kids Bargain Store, 565 So. 2d 1332, 1335 (Fla. 1990) (stating legal sufficiency of a motion to disqualify is purely a question of law). However, in Arbelaez v. State, 775 So. 2d 909, 916 (Fla. 2000), this Court applied the abuse of discretion standard to a motion to disqualify and

found that the trial judge had not "abused her discretion in denying Arbelaez's motion to disqualify". Federal courts also review a judge's decision not to recuse himself for abuse of discretion. U.S. v. Bailey, 175 F.3d 966, 968 (11th Cir. 1999); U. S. v. Bremers, 195 F.3d 221, 226 (5th Cir. 1999).

As noted in Arbelaez, 909 So. 2d at 916:

> A motion to disqualify will be dismissed as legally insufficient if it fails to establish a well-grounded fear on the part of the movant that he will not receive a fair hearing. *See Correll v. State*, 698 So. 2d 522, 524 (Fla. 1997). To determine if a motion to disqualify is legally sufficient, this Court looks to see whether the facts alleged would place a reasonably prudent person in the fear of not receiving a fair and impartial trial. *Id.*

See Correll v. State, 698 So. 2d 522, 524 (Fla. 1997); Dragovich v. State, 492 So. 2d 350, 352 (Fla. 1986); Hayes v. State, 686 So. 2d 694 (Fla. 4th DCA 1996), rev. dismissed, 691 So. 2d 1081 (Fla. 1997). “The question of disqualification focuses on those matters from which a litigant may reasonably question a judge’s impartiality rather than the judge’s perception of his ability to act fairly and impartially.” Livingston v. State, 441 So. 2d 1083 (Fla. 1985). “[S]ubjective fears...are not 'reasonably sufficient' to justify a 'well-founded fear' of prejudice." Fischer v. Knuck, 497 So.2d 240 (Fla. 1986). "The fact that the judge has made adverse rulings in the past against the

defendant, or that the judge has previously heard the evidence, or 'allegations that the trial judge had formed a fixed opinion of the defendant's guilt, even where it is alleged that the judge discussed his opinion with others,' are generally considered legally insufficient reasons to warrant the judge's disqualification." Rivera v. State, 717 So. 2d 477, 481 (Fla. 1998) (quoting Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992)). Under either the *de novo* or abuse of discretion standards, the denial of the request for recusal was proper.

During litigation of Arbelaez's 1995 postconviction motion, he sought Judge Rothenberg's recusal on the grounds she was a former prosecutor who had run for her judgeship as tough on crime. (SPCR1 V1 162-74). This Court found "there was nothing in Arbelaez's allegations to show that Judge Rothenberg had a personal bias or prejudice against him. Neither her 'tough-on-crime' stance nor her former employment as a prosecutor was legally sufficient for disqualification." Arbelaez, 775 So. 2d at 916.

Prior to the issuance of the Mandate in that appeal, Arbelaez filed another motion seeking Judge Rothenberg's recusal. In the second motion (SPRC2 V1 4-9), he alleged that during the pendency of the appeal, counsel had learned of a comment made by Judge Rothenberg in the case involving Manso,

also a death penalty case on remand. Manso v. State, 704 So. 2d 516 (Fla. 1998). The alleged comment contained in Manso's motion and quoted by Arbelaez was "that if found competent to proceed, [Manso] would be getting a jolt of electricity." (SPCR2 V1 4-5). In resolving the issue in Manso's case, the court accepted the allegations as true, and recused herself, but in so doing, noted the statements were "taken out of context and were mis-represented"[13] Arbelaez recognized the court's actions in his motion to recuse (SPCR2 V1 6).

On February 27, 2001, the State responded (SPCR2 V2 45-49)

[13]It must be noted, the trial court did not make such statements here, such were merely acknowledged and repeated by Arbelaez in presenting his request for disqualification. As such, Judge Rothenberg did not violate the bar against refuting the facts in deciding the issue. See Bundy v. Rudd, 366 So. 2d 440, 442 (Fla. 1978) (noting judge must not pass on the facts alleged and "[w]hen a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and on that basis alone established grounds for his disqualification"). Initially, Arbelaez alleged the sentencing judge and then presiding jurist, Judge Kornblum, had had an *ex parte* discussion with the State and the State had written the sentencing order. Judge Kornblum recused himself and Judge Rothenberg was assigned. (PCR1 V1 12-135; SPCR1 V1 89-91, 162-78; V2 326-33, 345-52, 387-89). Given the posture of the case, the instant motion, could be treated as a successive motion under Florida Rule of Judicial Administration 2.16(g) to permit the trial court to refute the allegations and permit this Court to consider the statement that the court's comments were "taken out of context and mis-represented." See, Nassetta v. Kaplan, 557 So.2d 919 (Fla. 4th DCA 1990) (finding judge's response that allegations in support of recusal were taken out of context did not violate prohibition on passing on truth of allegation).

and without hearing argument, on March 21, 2001, the court ruled:

> This is here before the Court, first of all, on the defendant's motion to disqualify. I have reviewed the motion, and it is hereby denied as it is legally insufficient.
>
> I'm trying to find the original court file. It appears I have the original. I will also submit it to the Court file.

(PCR2 V2 294).[14]

Arbelaez presents nothing in the judge's statements or actions which established the court "had any personal bias or prejudice against him." The use of the "tough on crime" and "former prosecutor" claims offer no support as they were found by this Court to give Arbelaez no basis to fear the judge. Arbelaez, 775 So. 2d at 916. Likewise, those statements cannot be used to support the request based upon comments made in another case. Those comments must stand by themselves and show bias here. Arbelaez must not be permitted to stretch comments "taken out of context and mis-represented" in Manso's case to permit forum shopping.

A review of the comments allegedly made in Mr. Manso's case

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[14]Based upon the representations of the Dade County Clerk, that a written order had been filed, the State had requested that the record be supplemented with the trial court's written order. However, the Clerk has advised that he searched the files and was unable to locate such an order. (PCR2 V2).

do not establish a personal bias toward Arbelaez nor a predisposition by the trial court to impose or treat the death penalty lightly. This case is distinguishable from Suarez v. Dugger, 527 So. 2d 190, 191-92 (Fla. 1988) wherein the trial judge commented upon the Governor's signing of **Suarez's** death warrant by saying he was pleased with the decision and "it's fine with me if this one is the first they actually do impose (immediately)." No such specific, personal bias was offered in Arbelaez's case. Likewise, the instant facts are not like those in Hayes v. State, 686 So. 2d 694 (Fla. 4th DCA 1996), rev. dismissed, 691 So.2d 1081 (Fla. 1997) or Martin v. State, 804 So.2d 360 (Fla. 4th DCA) where the judge announced he makes particular sentencing rulings in every case.

Further, the trial judge did not give advise or comment upon the prosecutor's actions in Arbelaez's case as decried in Chastine v. Broome, 629 So. 2d 293, 294 (Fla. 4th DCA 1993). Clearly, Chastine is distinguishable and does not support Arbelaez's claim here. Nothing in the Manso case establishes a bias which would impact the court's ability to be fair in Arbelaez' case. Also, Porter v. State, 723 So. 2d 191 (Fla 1998), is not at all similar to the instant matter. In Porter, the court commented directly upon how he would have killed **Porter** had he murdered the judge's family and indicated the

sentence **Porter** would receive. Such events are not evident here.

There was neither a personal bias shown nor any indication given of the rulings to be made in the instant case. Arbelaez has not shown there was an abuse of discretion in denying recusal based upon comments made in an unrelated case. All he puts forward are subjective fears gleaned from and interpretation by another defendant's counsel of comments allegedly made in the other case. See Arbelaez,775 So. 2d at 916; Rivera, 717 So. 2d at 481; Cf. Wright v. State, 857 So. 2d 861 (Fla. 2003) (rejecting defendant's attempt to rely upon evidence developed in an unrelated case to prove allegations in defendant's case); Maharaj v. State, 778 So.2d 944 (Fla. 2000) (finding counsel not ineffective in declining not to seek recusal of judge charged with bribery in another case even where defendant claimed an assistant state attorney offered to secure a bond for Maharaj through that judge for a price). This Court should affirm.

ISSUE II

THE TRIAL COURT CORRECTLY FOUND THAT PENALTY PHASE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE (restated)

It is Arbelaez's position the evidentiary hearing established he received ineffective assistance from penalty

phase counsel, Diaz. He asserts counsel was deficient for not investigating mental health issues (IB 61-62, 67-68). Arbelaez argues counsel's presentation of Dr. Lopez was insufficient as such testimony went to the issue of epilepsy and was stale. Also, counsel's reliance upon Dr. Castiello's competency evaluation could not support the trial investigation because competency and mitigation standards are different. (IB 62). Arbelaez also challenges counsel's performance for not knowing former defense counsel, Mr. Thaxton, had hired Dr. Haber, and that she had interviewed the Defendant. (IB 63-65). In an attempt to call into question the trial court's factual findings, Arbelaez claims the conclusion Dr. Haber saw nothing to warrant further investigation and that she would have offered no useful evidence had Diaz contacted her was not supported by the record. (IB 66-67). Also challenged is the court's reliance upon Dr. Ruiz to support rejection of the defense expert, Dr. Latterner because Dr. Ruiz was not licensed at the time of Arbelaez's trial and because she did not consider the record from Arbelaz's incarceration on death row. (IB 74).

Arbelaez asserts the death recommendation was based upon the jury's lack of understanding of his history because the following evidence was not presented: (1) mental health history from Columbia; (2) suicide attempts; (3) depressive disorder;

(4) "organic brain damage and its interaction with his epilepsy; (6) mild mental retardation; (7) history of electric shock therapy from Columbian mental hospital; and (8) family history of: (a) poverty; (b) malnutrition; (c) abusive home environment; (d) lack of parental love/affection; (e) drug usage; and (f) lack of adequate medical care as a child (IB 75-76). Contrary to Arbelaez's position, the trial court's factual findings are supported by the record and the legal conclusion that counsel was not ineffective comports with the dictates of Strickland v. Washington, 466 U.S. 688 (1984). This Court should affirm.

"For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman v. State, 858 So. 2d 319, 323 (Fla. 2003). See Davis v. State, 28 Fla. L. Weekly S835, S836 (Fla. November 20, 2003); Stephens v. State, 748 So. 2d 1028, 1033-34 (Fla. 1999) (requiring de novo review of ineffective assistance of counsel, but recognizing and honoring "trial court's superior vantage point in assessing credibility of witnesses and in making findings of fact"); State v. Riechmann, 777 So. 2d 342 (Fla. 2000); Cherry v. State, 781 So.2d 1040, 1048 (Fla. 2000); Sims v. State, 754 So. 2d 657, 670

(Fla. 2000); Rose v. State, 675 So. 2d 567 (Fla. 1996). "The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo." Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001).

In order to be entitled to relief on an ineffective assistance claim, Arbelaez must demonstrate "that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment" and "that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687. Continuing, the Court discussed deficiency:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, 466 U.S. at 689 (citation omitted). Recently, this Court re-affirmed the two-prong Strickland analysis in Davis, 28 Fla. L. Weekly at S836. This Court also noted that prejudice must be established by the defendant by showing the result of the trial would have been different absent counsel's errors. See Rutherford v. State, 727 So. 2d 216, 219 (Fla. 1998) (agreeing "[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.") (quoting Strickland, 466 U.S. at 686).

The ability to create a more favorable or appealing strategy several years after the fact, does not translate into deficient performance at trial. Patton v. State, 784 So. 2d 380 (Fla. 2000) (precluding appellate court from viewing issue of counsel's performance with heightened perspective of hindsight); Rose, 675 So. 2d at 571 (holding disagreement with counsel's choice of strategy does not establish ineffective assistance); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)(concluding standard is not how current counsel would have proceeded in hindsight); Rivera v. State, 717 So. 2d 482, 486 (Fla. 1998); Occhicone v. State, 768 So. 2d 1037 (Fla. 2000).

The United States Supreme Court made clear in Williams v.

Taylor, 529 U.S. 362 (2000) that the focus is on what efforts were undertaken in the way of an investigation of the defendant's background and why a specific course of strategy was ultimately chosen over a different one. The inquiry into a trial attorney's performance is not an analysis between what one counsel could have done in comparison to what was actually done. The Eleventh Circuit Court of Appeals recounted the law regarding this issue:

> I. The standard for counsel's performance is "reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *accord Williams v. Taylor*, --- U.S. ----, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000) (most recent decision reaffirming that merits of ineffective assistance claim are squarely governed by *Strickland*). The purpose of ineffectiveness review is not to grade counsel's performance. *See Strickland*, 104 S.Ct. at 2065; *see also White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir. 1992) ("We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately."). We recognize that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something

> different. So, omissions are inevitable. But, the issue is not what is possible or "what is prudent or appropriate, but only what is constitutionally compelled."[12] *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)(emphasis added).
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> [12] "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 what they did was within the 'wide range of reasonable professional assistance.' " *Wate*rs, 46 F.3d at 1518 (en banc) (citations omitted)(emphasis added).

Chandler v. United States, 218 F.3d 1305, 1313 n. 12 (11th Cir. 2000). It is always possible to suggest further avenues of defense especially in hindsight. Rather, the focus is on what strategies were employed and was that course of action reasonable in light of what was known at the time.

Arbelaez asserts he has established penalty phase counsel did not conduct a proper investigation of possible mitigation. However, the record reflects Diaz investigated both the mental health and family history aspects in search for mitigation. Penalty phase counsel presented testimony and argument in an attempt to prove mitigation consisting of Arbelaez's age (TR V-II 261STR V-VII 1043), "no significant history of prior criminal activity", was remorseful, returned to Miami voluntarily, and

confessed (TR V-II 261; STR V-VII 978-981, 983, 992, 995, 998-99 1045), that he suffered with epilepsy (STR V-VII 983-85, 996, 1006-15), and the three statutory mental mitigators of extreme mental/emotional disturbance, extreme duress/substantial domination of another (due to the actions of the victim's mother), and "did not appreciate the criminality of his conduct (proven through Arbelaez's confession) (TR V-II 260, STR V-VII 1041-43).

During the postconviction evidentiary hearing, Diaz noted he did much of the investigation himself, visiting the crime scene, talking to witnesses, and consulting with Arbeleaz (PCR2 V3 488-93, 546-47; V6 968-71).[15] At no time did Diaz find Arbelaez's conversation inappropriate, incoherent, or indicative of mental retardation; Arbeleaz was able to recall facts clearly and was responsive. (PCR2 V6 968-75). Because it is his practice to request a competency/sanity evaluation for his capital cases, Diaz consulted with Dr. Castiello,[16] knowing that

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[15]Diaz explained that at the time of the trial, it was not the practice in Dade County to appoint a second chair. (PCR V3 490).

[16]Dr. Castiello, a psychiatrist, evaluated Arbelaez for competency and produced a report (PCR2 V3 472-73, 496-97; V6 978-79; PCR2 Exhibits V4 of 4 472-76). This report revealed that Arbelaez described suffering from epilepsy since he was 18 years old, alternately denied then admitted to alcohol/drug usage, revealed suicide attempts by drinking rat poison, and hospitalization in a mental institution. The doctor's report

if mitigation were discovered it could be used. (PCR V3 472, 496-97, 500-02). However, in his interaction with Arbelaez, Diaz saw no signs indicating the need for professional mental heal assistance. (PCR V6 973-78, 981-82).

Also, Diaz discussed mitigation with Arbelaez's Columbian family members via the telephone and correspondence and asked that they try to get documentation of Arbelaez's illnesses (PCR V3 476-87, 520, 526-31, 541-42). However, the family was not visited or called to testify due to the social and political situation in Columbia at the time and Arbelaez did not want to put his family in danger. (PCR V3 521-24, 526, 535-40).

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contained a detailed account of Arbelaez's anger at the victim's mother and the death of the victim in this case based upon Arbelaez's recounting the incident as an accident. Arbelaez self-reported having "great difficulties in school;" although he learned to read and write, he did not make good grades. His travel to different countries and residence in the United States for 13 years before the interview was reported (PCR2 Exhibits V4 of 4 473-74).

The mental status exam conducted by Dr. Castiello disclosed Arbelaez conversed in Spanish, that "his speech was over-elaborated and rather slow, although clear, coherent and relevant." Arbelaez was "oriented and displayed no gross memory deficits." Dr. Castiello opined Arbelaez was "functioning at a low average intellectual capacity" and that the "reality testing capacity was not impaired." "Insight and judgment showed a definite tendency to be inadequate." Arbelaez was found competent to stand trial. Dr. Castiello opined that involuntary hospitalization was "not clinically warranted" and the convulsive disorder was being treated at Jackson Memorial Hospital. With respect to insanity, the doctor stated: "[o]n the basis of the description offered by the defendant as to his frame of mind at the time of the alleged offense, it is considered that he was sane." (PCR2 Exhibits V4 of 4 474-76).

Moreover, Arbelaez's insistence at testifying in the guilt phase against the advice of counsel, changed the strategy Diaz had developed for the penalty phase. Diaz could no longer argue that the death was an accident or be more forceful in arguing Arbelaez was remorseful. It also altered how Diaz could use the family due to Arbelaez's conflicting trial testimony and confession; Diaz feared what the family members would say (PCR V3 512-14, 521-24, 540-41, 543-44). Diaz, was concerned with the fact the victim was a five year old boy killed for revenge and such weighted heavily in all the penalty phase decisions (PCR V3 524-26). Argument was made that Arbelaez was very emotional at the time of the murder because of the victim's mother's actions (PCR V3 515-17). Diaz presented Arbelaez's Miami friends to show he was a hard worker who was not in criminal trouble before (PCR V3 480). Also pursued was the epilepsy issue (PCR V3 498-500; V6974-75).

As stated in Wiggins v. Smith, 123 S.Ct. 2527 (2003):

> [O]ur principal concern in deciding whether [counsel] exercised "reasonable professional judgmen[t]" is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence ... was itself reasonable. In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," which includes a

> context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time."

Wiggins, 123 S.Ct. at 2536 (citations omitted). Also, the test is not what a new mental health expert will report, but whether defense counsel made a reasonable, professional investigation and appropriate decisions given the information he had at the time of trial. Elledge v. Dugger, 823 F.2d 1439, 1446 (11th Cir.) (opining "[m]erely proving that someone--years later--located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort"), modified on other grounds, 833 F.2d 250 (11th Cir. 1987). Asay v. State, 769 S. 2d 974, 985-86 (Fla. 2000)(reasoning first expert's evaluation is not less competent merely because defendant can produce a conflicting evaluation from a new expert).[17]

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[17] See Jones v. State, 732 So. 2d 313, 320 (Fla. 1999) (reasoning mental health expert's evaluation is not rendered inadequate or incompetent merely because the defendant had found an expert who would provide testimony conflicting with the original expert); Rose v. State, 617 So.2d 291, 293-94 (Fla. 1993) (finding counsel was not ineffective in the penalty phase where counsel decided to forego additional mental health evidence when expert found defendant suffered from antisocial personality disorder and ruled out the possibility of an organic

The mental health evidence offered at the evidentiary hearing was contested. The State's mental health witnesses found no evidence of mental retardation given Arbelaez's adaptive functioning (PCR2 V5 877, 880-81, 890-97, 908-11, 949-59; V6 1064-71, 1139, 1144-48, 1156). Furthermore, Dr. Ruiz[18] found no evidence of major mental disorders, "no indications of psychopathology", and no psychotic content or psychosis;[19] she discounted his claim of hallucinations because he was so vague in his explanations, thus indicating fabrication[20] (PCR2 V6 1016-17; 1031-33, 1037-40, 1088, 1107-08, 1150-51). While Dr. Ruiz was unaware Arbelaez had been diagnosed with major mental disorders, such would not alter her opinion as it is not

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brain disorder); Correll v. Dugger, 558 So. 2d 422, 426 (Fla. 1990).

[18]Arbelaez argues that the trial court erred in relying upon Dr. Ruiz because she was not licensed at the time of trial (IB 74). However, it must be pointed out that Dr. Ruiz was a licensed clinical psychologist at the time of the evidentiary hearing (PCR2 V6 1003-14) and that such practitioners were available in 1991.

[19]When Arbelaez arrived on death row, he was classified as a "Psychiatric Grade One" meaning he had no identified mental health concerns. (PCR2 V5 870-71). Since then, he has been treated for depression and anxiety which were noted in 1993. (PCR2 V5 872)

[20]Those with hallucinations are readily able to describe the content of the discussion, the sex of the voice, and where they heard the sound (PCR2 V6 1016-17; 1031-33, 1037-40, 1088, 1107-08, 1150-51).

uncommon for inmates to suffer from depression and anxiety brought on by incarceration on death row. Likewise, the Columbian mental health history would not change Dr. Ruiz's opinion, because based upon her evaluation and review of the records and discussion with those involved at the time of the crime, Arbeleaz was functioning well before the homicide and adequately at the time she evaluated him. (PCR2 V6 1088-1104).

Diaz was unaware Dr. Haber had been hired by Arbelaez's former counsel and that she had conducted a competency evaluation between June 1988 and May 1989 (no written report was generated) (PCR2 V3 473-77, 554-59; V4 623-26, 633-34, 667-68). Although Dr. Haber was called by the defense, she does not support Arbelaez's claim that Diaz did not conduct a professional investigation. Her notes and evidentiary hearing testimony established she considered Arbelaez's background, work experience, suicide attempts, epilepsy, and jail records (PCR2 V3 557-59) in determining he was not suffering from a psychotic disorder or depression; he was not delusional, paranoid or suicidal, and he did not have "homicide ideations", hallucinations, or sleeping/eating disorders (PCR2 V3 557-63 588-90, 602-04; V4 627-33, 671). Given his competency interview and account of the murder on the videotaped confession, Dr.

Haber saw no reason to ask for an IQ test[21] and "with a reasonable degree of psychological certainty" found nothing in 1988/1989 which required further evaluation.[22] (PCR2 V4 633-38, 650). Dr. Haber's testimony refutes completely Arbelaez's assertion (IB 66-67) that the trial court's finding of this fact was not supported by the record.

Further, Dr. Haber agreed that a person's "adaptive behavior" must be taken into consideration when determining mental retardation and based upon what she reviewed, Arbelaez

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[21]This was based on his coherent, productive, and readily understandable responses to the police interrogation. Taking into consideration Arbelaez's six years on death row and recent IQ score of 67, which could have been as high as 77, Dr. Haber reasoned Arbelaez was functioning, at best, on a borderline intellectual level, and at worst, on a mental retardation level. However, she recognized **Arbelaez's time on death row** made this a "close call", and given the videotaped confession, she was not led to consider IQ testing (PCR2 V3 605-06; V4 652-59, 680-81).

[22]Although in 1988/1989 she did not order a neuropsychological evaluation as a matter of course, Dr. Haber **now** recommends such testing be done in all capital cases. With anyone suffering from a seizure disorder, Dr. Haber **suspects** organic involvement and suggested she would have asked for a neuropsychological examination to measure behavior, IQ, and discover family and educational history for possible mitigation. In 1989, she concluded Arbelaez had a history of depression and had electroshock treatments which could have affected his brain which would have led her to request a neuropsychological evaluation. However, she did not recall what she recommended to Mr. Thaxton, what he told her, or what happened. Dr. Haber agreed a person's epileptic condition would show up on a brain scan, **but such does not indicate psychosis or organic brain damage**. **Regardless, in 1988/1989, she found nothing that "required further evaluation."** (PCR2 V3 566-70, 588-90, 608-10; V4 633-35, 643, 655, 671-73, 682).

appeared to have "adaptive functioning" within a borderline range, but was "functioning behaviorally within an adequate range." Arbelaez's confession showed he functioned at an acceptable level (PCR2 V4 659-61, 677-79). Any psychotic condition Arbelaez exhibited in 2002 was not known/observed by Dr. Haber in 1988/1989 and no psychotic condition was visible on the videotaped confession (PCR2 V3 603-05; V4 657-58).[23] Dr. Haber noted neither Arbelaez nor the jail records reported hallucinations and she refused to characterize the evidence of a depressive disorder as statutory mitigation. (PCR2 V3 603-05; V4 657-58). In fact, **based upon her 1988/1989 evaluation, Dr. Haber found no statutory mitigators** (PCR2 V4 655-56).

After obtaining the Defendant's history and conducting tests, Dr. Latterner concluded Arbelaez was mentally retarded and had "organic brain syndrome mixed." (PCR2 V4 698-703, 739-40). Dr. Latterner admitted that there was no way to tell whether the results she obtained from the battery of tests were due to Arbelaez's epilepsy or some other cause. (PCR2 V4 743-44). In drawing her conclusions, Dr. Lattner used nothing except her 1995 tests and interview; she did not consider any

[23]Any psychotic disorder noted in the prison records developed while Arbelaez was on death row due to the stresses of incarceration. (PCR2 V3 602-03; V4 671).

outside information (PCR2 V4 758-59).[24]

As the trial court found, Dr. Latterner's opinion was refuted by other mental health experts and was "otherwise wholly unbelievable." This conclusion was based on the report from Dr. Castiello and testimony of Arbelaez's witness, Dr. Haber, both of whom evaluated the Defendant near the time of the crime. Also relied upon for support was the testimony of Dr. Ruiz. (SPCR2 V1 23-36). Based upon the court's outline of the evidentiary hearing testimony, the following was reasoned:

> In conclusion, Dr. Haber, who was appointed prior to trial and requested by the Defendant's initial trial attorney,

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[24]Arbelaez points to the trial court's discussion of drawings shown to Dr. Latterner as error because these drawings were never admitted into evidence. (IB 73 n.8; PCR2 V4 779-80. The inference the defense draws here is too attenuated to support of finding of trial court error. First, the trial court acknowledges that the drawings were alleged to have been Arbelaez's. Second, the court was merely recounting the events which transpired during the evidentiary hearing. Third, in determining that Dr. Latterner's testimony was "of little if any evidentiary value", was refuted by other mental health professionals and evidence, and was "otherwise wholly unbelievable," the trial court focused on Dr. Latterner's refusal to consider other empherical data and evidence, including Arbelaez's videotaped confession, the effects of incarceration on death row, the lack of outside stimuli/communications, and effects of the numerous epileptic seizures. Clearly, the trial court did not place reliance upon the drawings as supporting rejection of Dr. Latterner's opinion. However, if this Court finds differently, any reliance, given the drawings was insignificant and insufficient to negate the trial court's conclusions as the defense witness, Dr. Haber, alone undermines any credibility Dr. Latterner may have had. (SPCR2 V121-22).

Rodney Thaxton to evaluate the Defendant, did so and found no reason to suggest that any additional testing be done. Mr. Diaz, the Defendant's subsequent trial attorney additionally had the Defendant evaluated by Dr. Castiello, who found the Defendant competent to proceed to trial and suggested no further testing. Mr. Diaz communicated with the Defendant, reviewed his taped confession, reviewed Dr. Castiello's evaluation (someone who he had worked with in the past and still relies upon) and considered the Defendant's history which included his adaptive behavior and found no indication that any further testing was warranted.

This decision cannot be said to even come close to falling below the "standard of care" in Mr. Diaz's representation of the Defendant as it appears that there is no competent record evidence to suggest that the decision is faulty. No witness has testified that the Defendant suffered from a major mental illness prior to trial. The only witness who has testified that he Defendant is mentally retarded is Dr. Latterner who only relies on her testing of the Defendant in 1995 and who has based her opinions upon a faulty and legally unacceptable standard and one which defies common sense.

In evaluating Mr. Diaz's performance as the Defendant's attorney, as to whether or not he provided ineffective assistance of counsel by not offering any additional mental health evidence at the penalty phase, one must consider all to the efforts he took in investigating this issue. Mr. Diaz testified that on several occasions prior ro trial, he contacted the Defendant's family in Medellin, Columbia in order to learn if they were aware of any mitigation evidence which might be useful. [T. 1/7/02, Pgs. 58-60, 62-63, 102]. He learned from

these inquiries that the Defendant had attempted suicide while living in Columbia, that he had been hospitalized as a result, and that he had not received an adequate education. [T. 1/7/02, Pgs. 62-63, 123-24]. Mr. Diaz asked the family to try to obtain any medical records which might contain potential mitigation evidence. The person Mr. Diaz believes he made this request to is the Defendant's brother Jorge Arbelaez. [T. 1/7/02, Pgs. 65-66, 108-10]. Mr. Diaz, however, never received any records from the Defendant's family. [T. 1/7/02, Pg.s 111-13].

Mr. Diaz even wrote the Columbian Government to obtain these records and received a response from them that there were no medical records for the Defendant. [State Exh. #3].

Therefore, this Court finds that Mr. Diaz conducted a reasonable investigation as to the Defendant's mental status. This Court further finds that based upon the expert testimony already addressed by this Court, there is no evidence to suggest that Mr. Diaz's investigation was faulty as there was no competent evidence submitted after further review by the Defendant's post conviction attorney that the Defendant suffered from any major mental illness (other than epilepsy which was presented and which did not contribute to the killings), or that the Defendant is mentally retarded.

The Supreme Court of Florida has repeatedly affirmed denial of ineffective assistance claims where the attorney declined to do additional mental health investigation or to forgo a mental health defense under similar circumstances. In Rutherford v. State, 727 So. 2d 215, 222 (Fla. 1998) the Court affirmed denial of an ineffective assistance claim where trial counsel's discussions with the Defendant,

> his family, and mental health experts did not uncover mental impairment. In Bush v. State, 505 So. 2d 409, 410 (Fla. 1988) the Court accepted counsel's decision to forego a mental health defense in light of his familiarity with the Defendant in conjunction with no discernable evidence of mental infirmities.
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> Since the Defendant has not established either deficient performance or prejudice from his trial counsel's decision to forego further mental health testing or presentation of a mental health defense to the jury, this Court rejects the Defendant's request for Post Conviction Relief as to this issue. [citations omitted]

(SPCR2 V1 32-36).

While Diaz made his penalty phase decision based upon Drs. Lopez and Castiello and Arbelaez's guilt phase testimony, and his direction not to call family members, such was not deficient performance. Rutherford v. State, 727 So. 2d 216, 22s (Fla. 1998) (relying upon pre-trial competency evaluations, even though they were not migration evaluations, as support for counsel's penalty phase strategy, was not ineffective assistance). Arbelaez suggests that Diaz's sole reliance upon Dr. Lopez was deficient. However, the Defendant has not presented a reliable witness to refute Dr. Lopez nor to support new mitigation in this area. Moreover, extensive investigation was conducted, thus, Diaz's performance was not like that of counsel in Wiggins, 123 S.Ct. at 2536. Unlike counsel in

Wiggins, Diaz delved into Arbelaez's background, and solicited the assistance of mental health professionals and family members. Counsel conducted a proper investigation of possible mitigation, made reasonable decisions based upon the results of his inquiry, and did not overlook matters which required further probing. Diaz's performance was well within the professional norm.

For the same reason, Diaz's utilization of Dr. Castiello as an indicator of whether further mental health investigation was required is not deficient. Diaz was ever mindful of how mitigation would play to the jury which heard and rejected Arbelaez's reason/explanation for killing the child. (PCR2 V1 151-73; V3 480-84, 496-500, 503-17, 526-31, 541-42). Consequently, Arbelaez has failed to carry his burden of showing counsel's performance fell below professional standards.

Arbelaez has not carried his burden of showing that Diaz's decisions (1) not to hire a private investigator, (2) not to travel to Columbia to meet Arbelaez's family, and (3) to rely upon the family members to supply mitigation (IB at 67-68) were ineffective assistance. Arbeleaz fails to direct this Court to a case requiring the appointment of a private investigator or that face-to-face interviews must be conducted. The evidence produced at the hearing was that Diaz did his own investigations

and met with all the witnesses in person; only the Columbian family members were contacted by telephone and written correspondence. (PCR2 V3 488-93, 546-47; V6 968-71). This led to investigation of mental health issues, but nothing, except the epileptic condition could be developed which Diaz could present in light of the age and reason for killing the victim. The decision not to present the family was in consultation with Arbelaez and based upon concerns for the family's safety given the political and criminal climate in Columbia at the time. (PCR V3 521-26, 535-40).

Here, as the trial court found, penalty phase counsel, Reemberto Diaz, did not render ineffective assistance of counsel. Contrary to Arbelaez's suggestion otherwise, Diaz considered and presented evidence related to epilepsy, investigated other mental health issues, and discussed mitigation with the Columbian family members and strategy/basis for not calling them to testify. Arbeleaz has not proven that the decision and strategies developed based upon the evidence and investigation conducted fell below the professional standard as defined in Strickland.

It is Arbelaez's claim that his jury was deprived of evidence related to his: (1) mental health history from Columbia; (2) suicide attempts; (3) depressive disorder; (4)

"organic brain damage and its interaction with his epilepsy; (6) mild mental retardation; (7) history of electric shock therapy from Columbian mental hospital; and (8) family history of: (a) poverty; (b) malnutrition; (c) abusive home environment; (d) lack of parental love/affection; (e) drug usage; and (f) lack of adequate medical care as a child (IB 75-76). These factors, he maintains, prove counsel's penalty phase performance was prejudicial.

As this Court opined in Occhicone v. State, 768 So. 2d 1037 (Fla. 2000):

> In order to obtain a reversal of his death sentence on the ground of ineffective assistance of counsel at the penalty phase, [the defendant] must show "both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different."

Occhicone, 768 So. 2d at 1049 (quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996)). Such has not been shown here. Given the fact that the mental health experts at the evidentiary hearing did not establish statutory mitigation, did not prove a link between organic brain disorder and epilepsy beyond that which was developed at trial, could not opine that Arbelaez was suicidal or had mental deficiencies at the time of the crime,

and that the balance of the alleged mitigation would have come from the Columbian family members for whom there was a valid and reasonable basis for not calling at the time of the trial, Arbelaez has not shown that his new mitigation would alter the balance of the mitigation and aggravation. The information presented by Arbelaez now, even if such should have been developed and presented to the jury, does not establish that the result of the proceedings would have been different. Confidence in the sentence is not undermined.

Because Dr. Haber and Dr. Ruiz could not opine that Arbelaez had any major mental deficiencies at the time of the crime, and Dr. Latterner's testimony was "wholly unbelievable", no prejudice has been established. Specifically, Dr. Haber did not find Arbelaez suffering from a psychotic disorder, depression, delusions, or paranoia, nor did he have suicidal tendencies when she evaluated him near the time of the crime (PCR2 V3 557-63, 588-90, 602-04; V4 627-33, 671). Moreover, Dr. Lopez had no records indicating Arbelaez was depressed within the relevant time frame. (PCR2 V3 514-15). Hence, Dr. Lopez did not supply proof of a mental disorder, and even had Diaz known of and utilized Dr. Haber at trial, she would not have established mitigation sufficient to outweigh the strong aggravation of "heinous atrocious, and cruel" ("HAC"), "cold, calculated, and

premeditated' ("CCP"), and "felony murder" for the revenge killing of the five year old child of the woman who spurned Arbelaez.

Likewise, while the family members testified about Arbelaez's mental health history in Columbia, his suicide attempts, and family history of poverty, malnutrition, abusive home environment, lack of parental love/affection, drug usage, and inadequate medical care as a child, these witnesses were not available at the time of the trial due to Arbelaez's decision not to call them. This was based upon his concern for their safety given the social and political atmosphere at the time. Moreover, Diaz was concerned with what the family members would say and how the jury may react to them and the evidence should the family contradict Arbelaez's trial testimony or confirm his trial testimony that the murder was an accident. Such would contradict the sworn statements from the family and Arbelaez's confession. The family's testimony may have damaged the defense especially in light of Arbelaez's decision to testify in the guilt phase against counsel's advice, thus, such entered into Diaz's defense strategy/reason for not calling the family members. (PCR2 V1 151-73; V3 476-84, 496-500, 503-17, 520-31, 535-44; V6 968-75, 981-82).

From this, it is clear all of the possible mitigation was

developed through discussions with mental health professionals and family members and presented by Diaz during the penalty phase. Further, there were valid, strategic reasons not to call the family members. Given Arbelaez's intent not to have his family called to the United States, he cannot complain that the witnesses were not presented. Also, due to Arbelaez testifying in contradiction to counsel's advise and that such necessitated a change in defense, Arbelaez cannot assert counsel was ineffective. The fact that the family members were not called, was the direct result of Arbelaez's actions and directions to counsel. It is improper to impute error to counsel under these circumstances.

Like with the Strickland deficiency prong, prejudice has not been established; it cannot be said that the result of the proceeding was undermined by counsel's performance given the strong aggravation, HAC, CCP, and "felony murder" in the revenge killing of a five year old boy. Strickland, 466 U.S. at 686. See Cummings-El v. State, 863 So. 2d 246, 251-53 (Fla. 2003) (rejecting ineffectiveness claim where penalty phase counsel presented family members at trial and in postconviction, Cummings-El was unable to produce an expert to support a claim of brain damage or further mitigation from family members, who would not have opened the door to more damaging testimony);

Jones v. State, 855 So. 2d 611, 617-19 (Fla. 2003) (rejecting ineffectiveness claim as counsel investigated mitigation and made reasonable strategic decisions based upon the result of that investigation); Hodges v. State Of Florida 2003 WL 21402484, 5 (Fla., June 19, 2003) (noting counsel's investigation and decisions impacted by uncooperative defendant and unwilling, absent, or recalcitrant witnesses were not ineffective); Breedlove v. State, 692 So. 2d 874, 877-78 (Fla. 1997) (holding counsel was not ineffective for failing to present testimony of family and friends where such "would have allowed cross-examination and rebuttal evidence that would have countered any value Breedlove might have gained from the evidence"); Valle v. State, 581 So. 2d 40, 49 (Fla. 1991); Medina v. State, 573 So.2d 293, 298 (Fla.1990) (finding no ineffectiveness in not presenting witnesses where they would have opened the door for the State to explore defendant's violent tendencies). This Court should affirm the trial court's denial of postconviction relief.

ISSUE III

PRISON PSYCHOLOGICAL SPECIALIST WILEY'S TESTIMONY WAS ADMITTED PROPERLY (restated)

On three grounds Arbelaez claims that the testimony of prison mental health professional, Lisa Wiley ("Wiley") should have been excluded. The first is that Wiley did not warn him of

his Fifth Amendment rights under Miranda v. Arizona, 384 U.S. 436 (1966) before talking to him in what Arbelaez terms a custodial interrogation (IB 79-80). The second is that Arbelaez was not permitted to have his own representatives observe him in prison to the extent the State's representatives could, thus, the State was in a unfair position (IB at 80-81). The third is that Arbelaez's Sixth Amendment rights were violated because he was not provided his right to counsel during the periodic prison mental health services (IB at 81).

It is the State's position that the Sixth Amendment claim is not preserved as such was not raised before the trial court. Further, because Arbelaez's convictions have been rendered and sentences fixed, neither the Fifth nor Sixth Amendment is implicated. Likewise, the fact that Arbelaez is serving his prison time during which he partakes in offered mental health services or is in a position to be observed does not create a custodial setting implicating the Fifth Amendment. The denial of the motion to exclude Wiley from testifying was proper and should be affirmed.

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State,

753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845, 854 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling and such will be upheld unless it "is arbitrary, fanciful, or unreasonable." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). See Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

Arbelaez failed to present his Sixth Amendment argument to the trial court. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So.2d 446 (Fla. 1993). See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). The Sixth Amendment claim is not before this court properly as it was not presented to the trial court. Because of Arbelaez's failure, this Court should reject the claim.

Turning to the merits of Arbelaez's Fifth Amendment claims, such are without legal support. Upon Arbelaez's conviction becoming final and sentence being fixed, there can be no further incrimination, and therefore, the Fifth Amendment privilege no

longer applies. "[T]he ordinary rule is that once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime... " Reina v. United States, 364 U.S. 507, 513 (1960) (citing United States v. Romero, 2 Cir., 249 F.2d 371; 8 Wigmore, Evidence (3d ed. 1940), s 2279; Cf. Brown v. Walker, 161 U.S. 591, 597-600 (1896)). Recently, the United States Supreme Court explained that this general rule applies once the sentence has become fixed and the conviction final. Mitchell v. United States, 526 U.S. 314, 326 (1999) (concluding Fifth Amendment privilege no longer applies once "sentence has become fixed and the judgment of conviction has become final").

Based upon this well settled case law explained in Mitchell and Reina, the prison employees did not have to provide Arbelaez with Miranda warning before talking to him or observing his behavior. This situation is vastly different from Estell v. Smith, 451 U.S. 454 (1981) where there had yet to be a sentencing determination and the pre-trial competency discussion were utilized to give the maximum sentence. Here, Arbelaez's conviction and sentence were settled and he faced nothing further arising from the criminal conviction. Hence, Wiley was not required to Mirandize Arbelaez nor was she barred from revealing her discussions with and observations of him.

The State's ability to present witnesses from the prison, including mental health professional, to discuss a defendant's actions related to mental health irrespective of Fifth Amendment concerns is especially true where the defendant puts his mental health at issue. It was Arbelaez's postconviction claim that he was mentally retarded, suffered from epilepsy, and had other mental health problems which trial counsel failed to discover and present. Probative of the claim of mental retardation was Arbelaez's adaptability. See sections 916.106 and 921.137, Florida Statutes. Also relevant was the impact death row had on Arbeleaz given the fact that his new expert did not examine him until some six years after his incarceration on death row. Wiley, having had contact with Arbelaez since he was placed on death row, was in the position to observe his behavior/adaptability and to compare his initial condition upon arrival on death row with his current condition. Cf. Arbelaez, 775 So. 2d at 916-17 (reaffirming defendant waives attorney/client privilege when he alleges ineffective assistance of counsel) (citing Reed v. State, 640 So. 2d 1094, 1097 (Fla. 1994); LeCroy v. State, 641 So. 2d 853 (Fla. 1994); Turner v. State, 530 So. 2d 45, 46 (Fla. 1987)); Buchanan v. Kentucky, 483 U.S. 402 (1987) (finding no Fifth or Sixth Amendment violations, even in pre-conviction/pre-sentence setting, where a defendant

puts his mental health at issue, the state may rebut the evidence with other psychiatric evidence); Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994) (holding defendant who puts his mental status at issue may be compelled to submit to exam by state psychiatrist or psychologist).

Moreover, Arbelaez had the right to refuse to participate in mental health discussions with Wiley, hence, there were no compelled disclosures, and again, no Fifth Amendment implications. Cf. McKune v. Lile, 536 U.S. 24 (2002) (holding Fifth Amendment was not implicated when defendant's refusal to participate in sexual abuse treatment program, including the required disclosure of all prior sexual activities irrespective of whether they were uncharged criminal offenses and no immunity had been offered, resulted in loss of privileges and possible transfer to a more dangerous prison). Most of Wiley's testimony was related to her observations of Arbelaez on a weekly basis and his adaptability to his environment as reflected in his ability to: (1) obey directions, (2) care/groom himself, (3) follow required death row activities, (4) have appropriate time management, (5) exhibit social and interview skills, and (6) learn a second language as an adult. Based upon this, and her understanding of the criteria for mental retardation, Wiley would not classify Arbelaez as mentally retarded. (PCR2 V5 877-

80, 892-98, 949-52). Wiley's testimony did not touch upon the criminal events, and thus, further distinguishes the instant matter from Estelle, 451 U.S. 464-65.

With respect to the Sixth Amendment challenge, Estelle offers Arbelaez no support.[25] Again, this is a postconviction setting where the conviction and sentence are final, thus, the Sixth Amendment is not implicated and a defendant's activities in prison are not critical stages of a "prosecution" necessitating the offer of legal counsel as Arbelaez suggests. See Texas v. Cobb, 532 U.S. 162, 167-68 (2001) (holding "defendant's statements regarding offenses for which he had not been charged were admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses"); Smith v. State, 699 So.2d 629, 639 (Fla. 1997) (stating "right to counsel under either the Sixth Amendment or Article I, section 16, [Florida Constitution,] is offense-specific"). As recognized in Nivens v. U.S., 139 F.2d 226, 228 (5th Cir. 1943), "[t]he right to counsel afforded by the Sixth Amendment is expressly limited to 'criminal prosecutions.'" Bradley v. United States, 410 U.S. 605, 609

[25]Estelle v. Smith, 451 U.S. 454 (1981) involved a pre-trial competency exam ordered without the defense counsel's knowledge and was used to support the imposition of the death penalty. Here, we have no such compelled examination. The contacts Wiley had with Arbelaez were subject to his discretion to refuse.

(1973) provides that "final judgment" is defined as "sentence" and that the prosecution terminates with the imposition of the sentence. Here, Arbelaez's convictions and sentences were affirmed on appeal and his right to counsel for the "prosecution" of the homicide and kidnapping had terminated. As such, he did not have a right to have counsel present during routine contacts with mental health professionals which only became relevant once Arbelaez filed his postconviction motion challenging penalty phase counsel's representation. The State should not be deprived of relevant evidence, especially where no Sixth Amendment right has attached.

However, should Wiley's testimony be deemed improper, such was harmless beyond a reasonable doubt. The trial court did not reference Wiley's testimony in her denial of relief. Further, the determination that Arbelaez was not mentally retarded was supported by the testimony of Drs. Haber and Ruiz. As such, the finding that Arbelaez is not mentally retarded and that defense counsel rendered effective assistance is supported by substantial, competent evidence independent of Wiley's observations. The denial of postconviction relief should be affirmed.

ISSUE IV

THE SUMMARY DENIAL OF ARBELAEZ'S SUPPLEMENTAL 3.850 MOTION WAS PROPER

(restated)

Arbelaez asserts it was error to deny summarily his supplemental motion addressed to Ring v. Arizona, 536 U.S. 584 (2002) and Atkins v. Virginia, 122 S.Ct. 2242 (2002) without obtaining a response from the State and without conducting a hearing pursuant to Huff v. State, 622 SO. 2d 982 (Fla. 1993). The denial was proper as Arbelaez's attempt to supplement was unauthorized given the limited nature of the remand. Also, the Ring issue was procedurally barred as it could have been raised in prior litigation. However, if oral argument should have been permitted, the denial remains proper as the claim is procedurally barred and challenges to the death penalty statute under Ring have been rejected repeatedly. This Court should affirm.

The standard of review for a trial court's determination regarding a motion to amend a Rule 3.851 motion is whether there was an abuse of discretion. Huff v. State, 762 So. 2d 476, 481 (Fla. 2000). The summary denial was correct because the postconviction claim was before the trial court based upon a remand from this Court on the specific issue of holding an evidentiary hearing on the claim of ineffective assistance of penalty phase counsel. A new issue could not be added to the well defined claim, thus, the matter was denied properly. In

remanding the case, this Court found it was error not to grant an evidentiary hearing "as to Arbelaez's claim that trial counsel was ineffective for failing to present expert testimony as to his epilepsy and other mental health mitigation and for failing to introduce evidence of his family history of abuse", but affirmed the balance of the summarily denied claims. Arbelaez, 775 So. 2d at 912. The parameters of the evidentiary hearing were set by this Court.

On September 9, 2002, almost nine months after the evidentiary January 2002 evidentiary hearing concluded, Arbelaez filed a supplement to his amended postconviction motion (PCR2 V1 211-44). The motion was based upon Ring and Atkins. Under either case, the motion was unauthorized and untimely as new factual allegations or claims may not be added unless the defendant meets the test for successive or untimely motions. Cf. Vining v. State, 827 So. 2d 201, 212-13 (Fla. 2002) (opining "defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by refining his or her claims to include additional factual allegations after the postconviction court concludes that no evidentiary hearing is required); Moore v. State, 820 So. 2d 199, 205 (Fla. 2002) (affirming court's refusal to consider third amended postconviction motion which was not based upon public records received after second amended

motion); Pope v. State, 702 So. 2d 221, 223 (Fla. 1997) (holding defendant may not raise claims on piecemeal basis). The trial court did not abuse its discretion in denying relief.

The denial was also proper because Arbelaez was procedurally barred from challenging the death penalty statute under Ring or Atkins. The issues arising under Ring or a variation of it have been known prior to Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing). See Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984). Likewise, challenges to the execution of the mentally retarded under the Eighth Amendment are procedurally barred. See Brown v. State, 755 So. 2d 616, 621 n.7 (Fla. 2000) (postconviction claim that Eighth Amendment forbids execution of mentally retarded was procedurally barred); Woods v. State, 531 So. 2d 79 (Fla. 1988). As such, the basis for the claim of constitutional error in the imposition of the death penalty has been available since Arbelaez was sentenced to death. Yet, he did not raise the claim until now.[26] Arbelaez

[26]Any issue which was or could have been raised in the prior collateral pleading is procedurally barred. See Lambrix v. Singletary, 641 So. 2d 847, 848 (Fla. 1994) (opining "[b]ecause ineffective assistance of counsel claims have been considered and rejected in a previous petition, Lambrix is procedurally barred from raising such claims again in a subsequent habeas petition"); Aldridge v. State, 503 So. 2d 1257 (Fla. 1987) (defendant procedurally barred from raising claim when such claim was raised previously even though current claim is based

has not given an explanation for his failure to raise this issue earlier.

Moreover, in his 1995 postconviction litigation, Arbelaez challenged aspects of the death penalty statute and instruction on constitutional grounds. (PCR1 V1 86, 84, 99, 107, 111, 113, 118; 136-204). See Arbelaez, 775 So. 2d at 912, 915, 919, n.8 (finding constitutional challenges to death penalty statute and/or instructions procedurally barred and meritless). The trial court correctly found that the instant challenge to the death penalty statute was procedurally barred and relief should be denied.

However, should this Court find that a hearing was required, relief is not warranted. The trial court's decision should be affirmed based upon the following arguments as the ruling was right even if the wrong reason was announced. See Robertson v. State, 829 So. 2d 901 (Fla. 2002) (recognizing doctrine that "matter will be affirmed even if the trial court ruled for the

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on different issue). This Court has consistently and repeatedly stated collateral review does not constitute a second appeal. Issues that were or could have been raised on direct appeal or in prior collateral proceedings may not be litigated anew. See Teffeteller v. Dugger, 734 So. 2d 1009, 1025 (Fla. 1999) (holding habeas petition claims were procedurally barred because claims were raised on direct appeal and rejected or could have been raised on direct appeal); Johnson v. Singletary, 695 So. 2d 263, 265 (Fla. 1996); Medina v. State, 573 So. 2d 293 (Fla. 1990)(stating it is inappropriate to use different argument to re-litigate same issue).

wrong reasons, as long as the evidence or an alternative theory supports the ruling"); Muhammad v. State, 782 So. 2d 343, 359 (Fla. 2001); Caso v. State, 524 So. 2d 422, 424 (Fla. 1988). The issues raised under Ring and Atkins will be addressed separately.

1. Ring v. Arizona - Ring is not retroactive and the United States Supreme Court has not overruled any of its cases upholding Florida's capital sentencing scheme. Moreover, the statutory maximum for first-degree murder is death upon conviction, thus, Ring does not apply to Florida's capital sentencing. Because Arbelaez has a contemporaneous felony conviction, even under Ring the sentence is proper. The trial court correctly denied relief even though this Court may find it was for the wrong reason.

Under the dictates of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980) and New v. State, 807 So. 2d 52 (Fla. 2001), Ring is retroactive.[27] A new decision is entitled to retroactive application only where it is of fundamental significance, which so drastically alters the underpinnings of the sentence that "obvious injustice" exists. Witt, 387 So. 2d at 929-30. The

[27]In DeStefano v. Woods, 392 U.S. 631 (1968), the Supreme Court held a violation of the right to a jury trial is not to be applied retroactively. See Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing)

Supreme Court rejected retroactive application of Apprendi v. New Jersey, 530 U.S. 466 (2000) in U.S. v. Cotton, 535 U.S. 625, 631-33 (2002) (finding Apprendi error is not plain error); U.S. v. Sanders, 247 F.3d 139, 150-151 (4th Cir 2002) (emphasizing finding something to be structural error would seem to be necessary predicate for new rule to apply retroactively, thus, concluding Apprendi is not retroactive); McCoy v. U.S., 266 F.3d 1245 (11th Cir. 2001)(holding Apprendi not retroactive). Other federal courts have reached the same conclusion respecting Ring which was an application of Apprendi.[28] See Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003) (finding Ring not subject to retroactive application); In re Johnson, 334 F.3d 403, 405 n.1 (5th Cir. 2003) (noting Apprendi is not retroactive, thus, logically Ring is not retroactive); Trueblood v. Davis, 301 F.3d 784, 788 (7th Cir. 2002);[29] State v. Lotter, 266 Neb. 245 (Neb.

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[28]See Ring v. Arizona, 536 U.S. 584, 620-21 (2002) (noting Ring's impact would be lessened by the non-retroactivity principle of Teague v. Lane, 489 U.S. 2888 (1989))(O'Connor, J. dissenting)

[29]See Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002), cert. denied, 153 L.Ed.2d 865 (2002); Sustache-Rivers v. U.S., 221 F.3d 8 (1st Cir. 2000); Forbes v. United States, 262 F.3d 143, 145-146 (2d Cir. 2001); In re Turner, No. 00-2660, 2001 WL 1110349 (3d Cir. 2001); In re Tatum, 233 F.3d 857, 859 (5th Cir. 2000); In re Clemmons 259 F.3d 489, 493 (6th Cir. 2001); Talbott v. Indiana, 226 F.3d 866, 868-870 (7th Cir. 2000); Rodgers v. U.S., 229 F.3d 704, 706 (8th Cir. 2000); Browning v. U.S., 241 F.3d 1262, 1264 (10th Cir. 2001); In re Joshua, 224 F.3d 1281, 1283 (11th Cir. 2000).

2003); Arizona v. Towery, 64 P.3d 828 (Ariz. 2003); Colwell v. State, 59 P.3d 463 (Nev. 2002).

Arbelaez's claim that Ring invalidated Mills v. Moore, 786 So. 2d 532 (Fla. 2001) such that death eligibility occurs in the penalty phase is not well taken. Also unpersuasive is his reliance upon Sattazahn v. Pennsylvania, 123 S. Ct. 732 (2003) and assertion that the finding of (1) an aggravator, (2) of sufficient weight to support the death penalty, and (3) the finding that the mitigation does not out weigh the aggravation are elements of the crime.

Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002), and the myriad of cases[30] which followed have disposed of the challenges to Florida's

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[30]See Henry v. State, 28 Fla. L. Weekly S753 (Fla. October 9, 2003); Duest v. State, 855 So. 2d 33, 49 (Fla. 2003); Hodges v. State, 28 Fla. L. Weekly S475, n.8 and 9 (Fla. June 19, 2003); Jones v. State, 855 So. 2d 611 (Fla. 2003); Pace v. State, 854 So. 2d 167 (Fla. May 22, 2003); Blackwelder v. State, 851 So. 2d 650, 653-54 (Fla. 2003) (rejecting contention aggravators "must be alleged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict") Chandler v. State, 848 So.2d 1031, 1034 n. 4 (Fla. 2003); Lugo v. State, 845 So. 2d 74, 119 n.79 (Fla. 2003); Conahan v. State, 844 So. 2d 629 (Fla. 2003); Butler v. State, 842 So. 2d 817 (Fla. 2003); Spencer v. State, 842 So. 2d 52 (Fla. 2003); Grim v. State, 841 So. 2d 455, 465 (Fla. 2003); Anderson v. State, 841 So. 2d 390 (Fla. 2003); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Fotopoulos v. State, 838 So. 2d 1122 (Fla. 2002); Bruno v. Moore, 838 So. 2d 485 (Fla. 2002); Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003); Cox v. State, 819 So. 2d 705 (Fla. 2002).

capital sentencing based upon Ring. Mills remains good law and reference to how other states interpret their death penalty statutes does not call into question Florida's sentencing scheme. A state supreme court's interpretation of its statute is the controlling factor. As affirmed in Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) "state courts are the ultimate expositors of state law ... and that [the Supreme Court is] bound by their constructions except in extreme circumstances." (citing Murdock v. City of Memphis, 22 L.Ed. 429 (1875); Winters v. New York, 333 U.S. 507 (1948)). The mere fact a supreme court from a sister state announced that its statute sets death eligibility at a particular time does not foreclose the Florida Supreme Court from interpreting its statute and announcing death eligibility occurs upon conviction.[31]

[31]The same situation arose when the Supreme Court characterized Walton v. Arizona, 497 U.S. 639 (1990) in Apprendi v. New Jersey, 530 U.S. 466 (2000). Later, the Arizona Supreme Court announced when death eligibility occurs under Arizona's capital sentencing statute. Ring v. State, 25 P.3d 1139, 1150 (Ariz. 2001). This new interpretation had to be accepted by the Supreme resulting in Ring v. Arizona, 122 S.Ct. 2242, 2248 (2002) and the overruling of Walton. Consequently, Arbelaez's reference to Johnson v. State, 59 P.3d 450, 460 (Nev. 2002); State v. Whitfield, 2003 WL 21386276 (Mo. June 17, 2003); Esparza v. Mitchell, 310 F.3d 414 (6th Cir. 2002), State v. Fetterly, 52 P.3d 875 (Idaho 2002); State v. Gales, 658 N.W.2d 604, 624 (Neb. 2003); and Woldt v. People, 64 P.3d 256 (Colo. 2003) is nothing more than a listing of how other states interpret and apply their capital sentencing statute. Such does not establish that setting death eligibility at time of conviction is unconstitutional.

This Court has expressly and repeatedly held that the statutory maximum for first-degree murder is death, and that determination is made at the guilt phase of trial when a person is convicted of first-degree murder. Mills, 786 So.2d at 536-38. Recently, this Court stated:

> Under section 921.141, Florida Statutes (1987), a defendant is eligible for a sentence of death if he or she is convicted of a capital felony. This Court has defined a capital felony to be one where the maximum possible punishment is death. ... The only such crime in the State of Florida is first-degree murder, premeditated or felony.

Shere v. Moore, 830 So. 2d 56 (Fla. 2002) (citations omitted). See Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (opining, "we have repeatedly held that maximum penalty under the statute is death and have rejected the other Apprendi arguments" that aggravators need to be charged in the indictment, submitted to jury and individually found by a unanimous jury). While Arbelaez argues Mills is no longer good law in light of Ring,[32]

[32]Subsequent to Ring v. Arizona, 536 U.S. 584 (2002) the Florida Supreme Court rendered Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002). Therein, three justices expressly reiterate the fact that death is the statutory maximum in Florida. Bottoson, at 696 n.6 (Wells, J., concurring); Id. at 893 (Quince, J., concurring); id. at 699 (Lewis, J., concurring). Justice Harding's concurring opinion did not call into question any prior holdings of the Florida Supreme Court, which would necessarily include its prior determination that death was the statutory maximum for first-degree murder in Florida. Id. at 695. As such, the determination that death is the statutory maximum remains good law and recent decisions bear this out. See

neither Ring nor Apprendi call into question Florida's capital sentencing scheme and the Supreme Court has not overruled its prior decisions upholding the constitutionality of Florida's capital sentencing statute.[33] Hildwin, 490 U.S. at 640-41; Spaziano, 468 U.S. at 447; Proffitt, 428 U.S. at 253. The law is clear, Ring is inapplicable to Florida's capital sentencing and Arbelaez's assertion otherwise is meritless.

In arguing that the finding and weighing of aggravators and mitigators are elements of the crime as outlined in Missouri Supreme Court's decision in Whitfield, Arbelaez confuses elements with sentencing selections factors. Aggravators are not elements of the offense, but are capital sentencing guidelines. Poland v. Arizona, 476 U.S. 147, 156 (1986) (explaining aggravators are not separate penalties or offenses, but are standards to guide sentencer in choosing between death

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Conahan v. State, 844 So.2d 629, 642 n.9 (Fla. 2003); Spencer v. Crosby, 842 So.2d 52, 72 (Fla. 2003); Cole v. State, 841 So. 2d 409, 429-30 (Fla. 2003); Anderson v. State, 841 So. 2d 390, 408-09 (Fla. 2003); Lucas v. Crosby, 841 So. 2d 380, 389-90 (Fla. 2003); Bruno v. Moore, 838 So.2d 485, 492 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002); Marquard v. Moore, 850 So. 2d 417, 431 n.12 (Fla. 2002); Chavez v. State, 832 So. 2d 730, 766-67 (Fla. 2002); Mills v. State, 786 So. 2d 532, 537 (Fla. 2001); Brown v. State, 803 So. 2d 223 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001); Looney v. State, 803 So. 2d 656 (Fla. 2001); Card v. State, 803 So. 2d 613 n. 13 (Fla. 2001).

[33]Rodriquez De Quijas v. Shearson/American Express, 490 U.S. 477 (1989) (noting only Supreme Court can overrule its precedent - other courts must follow case which directly controls issue).

or life imprisonment). Section 921.141, Florida Statutes, affords the sentencer the guidelines to follow in determining the various sentencing selection factors related to the offense and offender by providing accepted statutory aggravating factors and mitigating circumstances to be considered. Given the fact a convicted defendant faces the statutory maximum sentence of death upon conviction, Mills, 786 So. 2d at 538, the employment of further proceedings to examine the assorted "sentencing selection factors", including aggravators, mitigators, and the sufficiency of these factors, does not violate due process. In fact, a sentencer may be given discretion in determining the appropriate sentence selection, so long as the jury has convicted the defendant of a crime for which the selected sentence is within the statutory maximum. As such, Arbelaez's "three factors" are not increasing the penalty.[34] Instead, they are constitutionally mandated guidelines created to satisfy the Eighth Amendment and protect against capricious and arbitrary sentences.

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[34]In Harris v. United States, 122 S.Ct. 2406 (2002), the Supreme Court explained: "Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights." In light of this statement, which explains Ring, no action taken following a Florida jury verdict increases the penalty faced, as the statutory maximum is death.

These factors are limitations on the sentencer; they are not enhancers or elements of the crime. Although the death penalty cannot be imposed in the absence of an aggravator proven beyond a reasonable doubt, the aggravator narrows the class of defendants subject to the death penalty.[35] It does not increase the punishment and for this reason special verdicts and unanimity[36] are not required. See Blackwelder v. State, 851 So. 2d 650, 653-54 (Fla. 2003) (rejecting contention aggravators "must be alleged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict"); Porter, 840 So.2d at 986; Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003); Sweet v. Moore, 822 So. 2d 1269, 1275 (Fla. 2002); Cox v. State,

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[35]In fact, it is the absence of aggravation that narrows the sentence to life. While the statutory maximum is death, and remains so regardless of the sentence found appropriate, it is the aggravators in light of the mitigators which determine whether the maximum or some lesser sentence will be imposed. See Tuilaepa v. California, 512 U.S. 967, 979-80 (1994) (reasoning "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment").

[36]Even in the context of guilt, jury unanimity is not required. Cf. Johnson v. Louisiana, 406 U.S. 356 (1972) (finding nine to three verdict was not denial of due process or equal protection); Apodaca v. Oregon, 406 U.S. 404 (1972) (holding conviction by non-unanimous jury did not violate Sixth Amendment). Schad v. Arizona, 501 U.S. 624, 631 (1991) (plurality opinion) (addressing felony murder and holding due process does not require unanimous determination on liability theories).

819 So. 2d 705, n.17 (Fla. 2002); Way v. State, 760 So. 2d 903, 924 (Fla. 2000) (Pariente, J., concurring) (noting jury's recommendation need not be unanimous); Thomson v. State, 648 So. 2d 692, 698 (Fla. 1984) (holding simple majority vote constitutional); Alvord v. State, 322 So. 2d 533 (Fla. 1975), receded from on other grounds, Caso v. State, 524 So. 2d 422 (Fla. 1988).[37]

However, even in light of Ring, Arbelaez's death sentence is proper as he was convicted of the contemporaneous felony of kidnapping. Arbelaez, 626 So. 2d at 175, 178 (finding sentence proportional and affirming convictions for first-degree murder and kidnapping). Under Ring and Almendarez-Torres v. U.S.. 523 U.S. 224 (1998), a reviewing court may look to the fact a defendant has a prior violent felony conviction to confirm the constitutionality of the death sentence post-Ring. A contemporaneous felony conviction is a unanimous jury finding supporting the aggravator. This Court has affirmed capital cases in the wake of Ring where a contemporaneous felony was found. See Duest v. State, 855 So. 2d 33, 49 (Fla. 2003); Lugo v. State, 845 So. 2d 74, 119 n. 79 (Fla. 2003)(noting rejection

[37]Likewise, unanimity with respect to mitigation has been rejected. McKoy v. North Carolina, 494 U.S. 433 (1990) (determining requirement of unanimous findings of mitigators unconstitutional); Mills v. Maryland, 486 U.S. 367 (1988).

of Apprendi/Ring, claims in postconviction appeals, unanimous guilty verdict on other felonies and existence of prior violent felonies); Doorbal, 837 So. 2d at 963(same); Cf. Kormondy v. State, 845 So. 2d 41, 54 n. 3 (Fla. 2003) (concluding simultaneous convictions of felonies which then form basis for aggravating factor is sufficient to satisfy requirements of Ring); Jones v. Crosby, 845 So. 2d 55, 74 (Fla. 2003) (same).

2. Atkins v. Virginia - Turning to Arbelaez's suggestion that Ring must be applied to Atkins requiring that the issue of mental retardation is an element of the crime which must be determined by a jury and that the State bears the burden of proof under the Sixth Amendment must be rejected. This assertion could have been, but was not, presented in prior proceedings. As such, it must not be considered here. Defendants cannot wait until postconviction proceedings to assert a purported right to a jury trial as to a particular issue. Furthermore, as explained above, this Court has rejected the argument that Ring created a right to a jury determination on this issue. See Bottoson, 833 So. 2d at 695. Bottoson had presented a mental retardation issue in postconviction litigation. Following an evidentiary hearing, the trial court determined Bottoson had failed to establish retardation. Bottoson's subsequent claim of entitlement to a jury

determination on this issue under Ring was rejected by this Court.

Moreover, the claim is meritless because a finding with respect to mental retardation does not "increase" the maximum sentence for first degree capital murder which remains at death. See Mills, 786 So. 2d at 538. Nothing in Ring or Atkins supports Arbelaez's position that a jury must make a finding on retardation or that he is not death eligible absent such a finding. Criminal defendants are presumed competent and to have the mental agility to proceed to trial. A defendant's mental state is not an aggravating factor making him death eligible, rather it is only a mitigating factor which may or may not rise to the level of mitigation in a given case. Analytically, it is no different than a pretrial determination of competency under Florida Rules of Criminal Procedure 3.210-3.212. The law is well settled; a determination of competence to proceed is made by the trial judge, and is subject to review on appeal. See Hunter v. State, 660 So. 2d 244 (Fla. 1995). There is no arguable basis upon which to suggest a defendant claiming incompetency is entitled to a jury resolution of the issue, and there is no "right" to a jury's determination of mental retardation in the context of a capital trial. The suggestion that a jury must decide the issue of mental retardation is

meritless. Because this Court has already rejected the issue, rejection here is warranted.

ISSUE V

ARBELAEZ'S REQUEST FOR AN ABEYANCE UNDER A PROPOSED RULE SHOULD BE REJECTED (restated)

Arbelaez seeks an abeyance and permission to file another motion under Florida Rule of Criminal Procedure 3.851 to seek a determination of his claim of mental retardation under Atkins v. Virginia, 122 S. Ct. 2242 (2002) should proposed rule 3.203 be approved. (IB at 88-89). This request should be denied as Atkins has not been held to be retroactive and, in connection with his ineffective assistance claim, there has be a determination Arbelaez is not mentally retarded.

In Atkins, the United States Supreme Court noted a legislative consensus was evident based on the fact a significant number of states had concluded death was not a suitable punishment for the mentally retarded. Refusing to disagree with the "consensus", the Court opined "construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." Atkins, 122 S.Ct. at 2252. Atkins expressly left the implementation of a constitutional

restriction with regard to imposing the death penalty on mentally retarded individuals to the states. Id. at 2250.[38] There is nothing in Atkins which expressly makes it retroactive. Without an express finding of retroactivity, retroactive application is not appropriate.[39] Tyler v. Cain, 121 S.Ct. 2478, 2482 (2001) (reaffirming only United States Supreme Court may make new rule retroactive).

Those defendants who failed to present the retardation claim at the appropriate time are procedurally barred from asserting the issue collaterally. The claim that a person is mentally retarded, and thus, should not be executed, has been available and litigated for many years. See Penry v. Lynaugh, 492 U.S. 302 (1989). The pursuit of a new mental status theory should not be permitted as it could have been pursued at trial and on direct appeal. In addition, those who have previously been found not to be retarded cannot now relitigate the question anew.

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[38]Moreover, the Florida Legislature enacted a procedure by which prospectively death row inmates may assert ineligibility for the death sentence in a post-guilt phase **but prior to** the penalty phase of their trials. Atkins offers nothing more.

[39]As noted in Bottoson v. Moore, 833 So.2d 693, 694-95 (Fla. 2002) under a similar situation, "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (quoting Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989)).

As the record reflects, Arbelaez, in his claim of ineffective assistance of penalty phase has had his mental status reviewed. The trial court found mental retardation unproven reasoning:

> Dr. Haber, on the other hand examined the Defendant in 1988 and 1989, prior to his trial at which is (sic) relevant to the Defendant's mental state and mental capacity at the time in question, and Dr. Haber saw nothing to indicate further investigation including an I.Q. test. Dr. Haber did consider many factors in reaching her conclusions, including the Defendant's adaptive functioning, his work experience, and what she observed in his taped confession. Dr. Haber not only considered the stress incarceration on death row had had upon him, she concluded that any of the disorders noted on his prison records, developed after his incarceration on death row. ...
>
> ...
>
> Dr. Ruiz found no evidence of a major mental disorder and concluded that the Defendant was not mentally retarded. In reaching the conclusion that the Defendant was not mentally retarded, Dr. Ruiz considered the guidelines and criteria listed in the DSM(4) (sic) and the Florida Statutes which required a finding that:
>
> > (1) the Defendant had substandard scores on intelligence tests
> >
> > (2) that he had a low level of adaptive functioning (emphasis added), and
> >
> > (3) that the onset was present prior to age 18.

§916.106(12) Florida Statutes.

In evaluating a person's adaptive behavior, the evaluator must compare the subject's level of functioning with that of other people. In doing this, Dr. Ruiz found the Defendant's adaptive functioning to be quite high. The Defendant has lived alone since age eighteen. He traveled to the United States alone, worked independently for a number of years, made friends, was given responsibilities at work, received no support from others, was working 2-3 jobs at a (sic) time of the homicide, was supporting his girlfriend's family, took her children to school and in fact encouraged his girlfriend to quit working claiming he could support them himself, and drove a car. These facts; Dr. Ruiz stated, are not typical of a retarded person, [T: 1/9/02: pgs. 640-647].

Dr. Ruiz also disputed Dr. Latterner's methodology in reaching her conclusion. Dr. Ruiz argued that the experts who conducted these tests, say that the tests employed by Dr. Latterner are merely "tools" which must be considered along with other factors and not relied upon exclusively in forming an opinion. She also noted that the DSM(4) (sic) and the Florida Statutes §916.106(12) and §921.131(1) require a person's I.Q. level to be consistent with the person's adaptive level of functioning before that person can be declared to be mentally retarded.

In this regard, Dr. Ruiz found that the Defendant's test results did not correspond to the Defendant's adaptive behavior which was found to be quite high and normal.

Dr. Ruiz testified that based upon her review of the Defendant's test scores (those performed by Dr. Latterner and by Dr. Ruiz herself), her interview with the Defendant,

a review of the Defendant's jail records, the Defendant's taped statement taken after his arrest and a consideration of the Defendant's history and adaptive behavior, she concluded that the Defendant was not mentally retarded and unequivocally did not meet the criteria to be labeled as such pursuant to the Florida Statutes and the DSM(4). (sic)

Unlike Dr. Latterner, who refused to consider other relevant information besides the test scores, thereby ignoring the requirements of the Florida Statutes and the DSM(4) (sic), Dr. Ruiz stated several times that she would consider anything presented....

...

In conclusion, Dr. Haber, who was appointed prior to trial and requested by the Defendant's initial trial attorney, Rodney Thazton to evaluate the Defendant, did so and found no reason to suggest that any additional testing be done. Mr. Diaz, the Defendant's subsequent trial attorney additionally had the Defendant evaluated by Dr. Castiello, who found the Defendant competent to proceed to trial and suggested no further testing. Mr. Diaz communicated with the Defendant, reviewed his taped confession, reviewed Dr. Castiello's evaluations ... and considered the Defendant's history which included his adaptive behavior and found no indication that any further testing was warranted.

... The only witness who has testified that the Defendant is mentally retarded is Dr. Latterner who only relies on her testing of the Defendant in 1995 and who has based her opinions upon a faulty and legally unacceptable standard and one which defies common sense.

(SPCR2 V1 29-33).

Clearly, the issue of Arbelaez's claim of mental retardation has been rejected and he should not be afforded a second opportunity to litigate the matter. The request to hold the case in abeyance should be denied.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Todd G. Scher, Esq. Law Office of Todd G. Scher, P.L., 555 NE 34th Street, #1510, Miami, FL 33137 and Marian Garcia Perez, Esq. Capital Collateral Regional Counsel-South, 101 N.E. Third Avenue, Suite 400, Fort Lauderdale, FL 33301 on April 12, 2004.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on April 12, 2004.

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