IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2284

GUILLERMO OCTAVIO ARBELAEZ,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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

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

“PCR.” -- record on instant 3.850 appeal to this Court;

“S.R.” – supplemental record on instant 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Arbelaez has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Arbelaez, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Mr. Arbelaez was indicted by the grand jury in Dade County, Florida, on April 27, 1988, for first-degree murder and kidnapping (R. 1). Jury trial commenced February 11, 1991. The jury found Mr. Arbelaez guilty of both counts. The penalty phase took place on March 4, 1991. The jury rendered a sentencing verdict of death by a vote of eleven to one (R. 1056). On March 14, 1991, the trial court sentenced Mr. Arbelaez to death (2d Supp. R. 22). The trial court entered written findings (R. 246). A timely direct appeal was filed in this Court, and this Court affirmed.[1] *Arbelaez v. State*, 626 So. 2d 169 (Fla. 1993), *cert. denied*, 114 S. Ct. 2123 (1994).

Mr. Arbelaez thereafter sought postconviction relief pursuant to Fla. R. Crim. P. 3.850/3.851.[2] After the lower court summarily denied relief as to all issues

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[1]Mr. Arbelaez' appellate counsel, who was also trial counsel, filed an Initial Brief consisting of nine (9) pages of argument addressing two guilt phase issues. The Attorney General's Office moved to strike the brief as insufficient because it failed to raise any issues as to the death sentence. Appellate counsel objected to the request of the Attorney General's Office, but this Court ordered appellate counsel to file a supplemental brief addressing sentencing issues. Thereafter, appellate counsel filed a supplemental brief raising three (3) arguments totaling less than three and a half pages.

[2]Mr. Arbelaez was also the lead named party in litigation involving the funding issues of the CCRC office. *Arbelaez v. Butterworth*, 738 So. 2d 326 (Fla. 1999).

presented by Mr. Arbelaez, this Court reversed in part and remanded for an evidentiary hearing on the penalty phase ineffective assistance of counsel claim. *Arbelaez v. State*, 775 So. 2d 909 (Fla. 2000).

After jurisdiction returned to the lower court, Mr. Arbelaez filed a motion to disqualify the judge (S.R. ___). The motion was orally denied without a written order being entered by the court (PCR294; 303). The State subsequently moved for an order compelling the disclosure of Mr. Arbelaez's correctionsmedical records, as well as for the appointment of an expert to examine Mr. Arbelaez for the evidentiary hearing (PCR31-33; 34; 47; 38-50). The evidentiary hearing was conducted in two parts in January, 2002 (PCR419-1160; 1166-1239). Following the submission of post-hearing memoranda by the parties (PCR71-95; 98-205), the trial court entered an order denying relief on September 12, 2002 (S.R. ___).[3] Just prior to the court's entering the order denying relief, Mr. Arbelaez filed a supplemental Rule 3.850 motion, addressing aspects of the then-recent decisions in *Ring v. Arizona*, 122 S. Ct. 2428 (2002), and *Atkins v. Virginia*, 122 S. Ct. 2242 (2002) (PCR243). In an order signed on September 18, 2002, but not filed with the

[3]The order was inexplicably not included in the record, and Mr. Arbelaez is simultaneously filing a motion to supplement the record with this order, as well as the motion to disqualify, discussed above. For purposes of this brief, the order denying relief will be referred to as "Order" and the relevant page number.

clerk until September 25, 2002, the lower court denied the supplemental claims (PCR245-46). A timely notice of appeal was filed (PCR248-49).

STATEMENT OF THE FACTS

At the evidentiary hearing ordered by this Court, Mr. Arbelaez presented the testimony of his trial counsel, Reemberto Diaz, Dr. Merry Haber, Dr. Ruth Latterner, Amparo Arbelaez Alvarez, and . The State called Lisa Wiley, Dr. Sonia Ruiz, and recalled trial counsel Diaz. A summary of these witness' testimony is set forth below.

A. Defense Witnesses.

Reemberto Diaz. Mr. Diaz has been a licenced attorney since 1979 (PCR466-67). Mr. Arbelaez was originally represented by the Public Defender's Office, but he later was appointed to take over the case (PCR469). At the time he represented Mr. Arbelaez, Mr. Diaz had never represented a capital defendant as lead counsel in a case going to a penalty phase (PCR470). Mr. Diaz never sought the appointment of a second chair to assist him in Mr. Arbelaez's case (PCR471). He also never sought an order from the court to engage the services of an investigator (PCR472). Likewise, he never requested the appointment of a mental health expert to assist the defense in terms of investigating and developing a case for mitigation, although he did request that the court appoint an expert–Dr.

Castiello–to evaluate the issues of competency and sanity (PCR472-73). Mr. Diaz did not know if the Public Defender's Office had ever asked for a confidential expert to assist in investigating and developing a case in mitigation on behalf of Mr. Arbelaez (PCR473-74). He did not recall ever talking to a Dr. Merry Haber about Mr. Arbelaez's case or whether she had been involved with the case until the late 1990s, well after Mr. Arbelaez's trial (PCR474). He would have had no reason not to have spoken with Dr. Haber at the time of Mr. Arbelaez's trial (PCR475). If she had useful information to be considered in terms of potential mitigating circumstances for Mr. Arbelaez, "of course" he would have called her to testify at the penalty phase (*Id*.). He had no independent recollection of "what we did, if anything" with respect to Dr. Haber (*Id*.).

Mr. Arbelaez's family resided in Medellin, Colombia, and although he did have some contact with them he could not recall any specifics (PCR476). These contacts would have been by telephone, as he did not actually go to Colombia (*Id*.). He contacted them as a courtesy because they were family members of Mr. Arbelaez, and also to see if there was anything "to use from them or not use" (*Id*). Mr. Diaz recalled that there was an issue about law enforcement having had contact with members of Mr. Arbelaez's family–specifically his mother and brother–with respect to guilt phase issues (*Id*.). In fact, Mr. Arbelaez's mother, Margarita

Arbelaez, and brother, Jorge Arbelaez, were listed as witnesses at the guilt phase by the State (PCR477). A documentary exhibit established that these witnesses had been listed by the State, and that the previous attorney from the Public Defender's Office had requested the State to provide addresses for Mr. Arbelaez's mother and brother (PCR477-78).

With respect to Mr. Diaz's conversations with the family, Mr. Diaz would not classify their content as relating to do with "potential mitigation" but rather general issues about Mr. Arbelaez's background with an eye towards discovering what information the family had about why the family members were listed as guilt phase witnesses by the State and what communications they had had with Mr. Arbelaez after he left Miami, went to Puerto Rico, and then to Colombia after the crime (PCR478-79). He had no independent recollection of having informed the trial court of his intention of calling family members at the penalty phase, but trusted that the record would be correct in that regard (PCR479). Although he did ask the court for permission to bring family members to Miami to testify at the penalty phase, he asks for a lot of things but "[t]hat does not mean I'm actually going to do it" (PCR487). No family members from Colombia were ever called at the penalty phase (PCR480). He did not recall having received any written correspondence from Mr. Arbelaez's family members, and while he had some

information about Mr. Arbelaez's background in Colombia, he did not recall the sources of that information (PCR480-81). He recalled knowing that Mr. Arbelaez was an altar boy, had problems with acne, had trouble with epilepsy, and "some allegation that he attempted to kill himself once" (PCR481). He had no independent recollection of this information, only that these things "rang familiar" after reading documents provided to him at the evidentiary hearing (*Id*.). The information was in the form of a letter from Mr. Arbelaez's mother to Mr. Diaz dated February 20, 1991, which Mr. Diaz never recalled having seen before; the letter was introduced into evidence as Defense Exhibit F (PCR481-82).

Although he had been made aware that Mr. Arbelaez "had had some problems" in Colombia, he could not state that he had been specifically aware that Mr. Arbelaez had been hospitalized in mental hospitals in Colombia (PCR483). He acknowledged that somewhere in his file was a document from a mental hospital in Colombia indicating that there were no records but "maybe we will find something," which was an "odd response" (PCR483). Mr. Diaz remembered there was a conversation "along the line with somebody" about trying to find records not in the official but in the doctor's own files that were not made part of the public file from Colombia, which records may have been important in terms of mitigation (PCR484). He identified a note from his file dated April 2, which indicated that Mr.

Arbelaez's family in Colombia had contacted him and "are going to send you some records from here of when he was hospitalized in a mental hospital. They are trying as much as possible to help him" (PCR485). The note was introduced into evidence as Defense Exhibit F (PCR486-87).

On cross-examination, Mr. Diaz clarified that while he had not actually conducted a penalty phase, he had prepared for them in other cases (PCR489). Any attorney doing a capital case knows that you cannot completely separate out the preparation for the guilt phase and the penalty phase (PCR490). He explained that he did not ask for a second chair attorney because "no one was being appointed to do penalty phases" (PCR491). If you were appointed, "you did the whole case" (*Id*.). He did not seek the appointment for an investigator because of the detailed nature of the police investigation and he did his own "legwork" in terms of visiting the crime scene and go to people's houses (PCR492). He recalled having had communication with Mr. Arbelaez about the prior public defender and the possibility of a plea negotiation to avoid the death penalty, but Mr. Arbelaez did not want to discuss a plea negotiation (PCR495).

After reviewing the competency report from Dr. Castiello and speaking with him, Mr. Diaz did not feel the need to obtain a mental health expert of his own, although he did continue to pursue the issue of Mr. Arbelaez's epilepsy (PCR497-

98). Mr. Diaz also determined that Mr. Arbelaez had a "pretty good" recollection of the events surrounding the incident, and he concluded that if epilepsy had played a role, "he wouldn't have had a memory of it" (PCR499).

Dr. Castiello prepared a report, dated December 9, 1990, which, together with the information about the various admissions that Mr. Arbelaez had made about the incident, formed the basis for Mr. Diaz's strategy at the penalty phase (PCR502). Prior to trial, Mr. Diaz had discussed with Mr. Arbelaez the issue of him testifying at the guilt phase, and, as part of his preparation for the penalty phase, Mr. Diaz was not planning on calling Mr. Arbelaez at the guilt phase (PCR503). He told him he did not want him to testify (*Id*.). Mr. Arbelaez did in fact testify at the guilt phase (PCR506). He had provided more than one version of how the victim had died (PCR506-08). If Mr. Arbelaez had not testified at the guilt phase, his preparation for the penalty phase "[p]robably" would have been different in that Mr. Diaz would have been better able to stress Mr. Arbelaez's return to the United States and take responsibility for his actions and that it was an accident (PCR512).

At the penalty phase, Mr. Diaz did present evidence as to the fact that Mr. Arbelaez had no significant prior criminal background, as well as a co-worker who discussed that Mr. Arbelaez was a "good guy" and a "hard worker" (PCR509). He

also presented several members of the Salazar family about Mr. Arbelaez's positive attributes and remorse (PCR510-12). He also called Dr. Raul Lopez about his interactions with Mr. Arbelaez from 1984 to 1988 regarding Mr. Arbelaez's epilepsy (PCR514-15).

Mr. Diaz also testified that he recently was made aware that Dr. Merry Haber, whose services had been engaged by prior counsel, had not made a report (PCR517). Unless Dr. Haber had given prior counsel her notes, Mr. Diaz would have had no knowledge of her involvement in Mr. Arbelaez's case (*Id*.). If he had had information from Dr. Haber which essentially indicated that there was "nothing unusual" about Mr. Arbelaez, he would have written that off and "move[d] on to plan B, I guess" (PCR519).

Mr. Diaz recalled having discussed with Mr. Arbelaez the issue of bringing family members to Miami to testify, but Mr. Arbelaez did not want him to, although "it wasn't an outright no" (PCR521). By the time of the penalty phase, Mr. Diaz "made a determination that [the family members] really didn't want to be here or it wasn't a good idea for them to be here before the trial" (PCR521-22). Then, during the trial, the strategy changed due to Mr. Arbelaez's own testimony (PCR522). Moreover, the family had to get from Medellin to Bogota, where they would have to go to the American Embassy and speak to an Agent Munoz who had

elicited the incriminating statements from Mr. Arbelaez and of whom Mr. Arbelaez was "not very fond" (PCR522). Because the family would "have to" speak to Munoz in order to get a visa and "we know what would happen" if they went through Bogota (*Id*.). Mr. Diaz "quickly disregarded" the option of going to Colombia to depose the family because "you are not going to travel to Colombia without some protection" (PCR523). Moreover, Mr. Arbelaez was concerned about perceptions in Colombia about why his family would be coming to Miami to testify in a judicial proceeding (PCR524).

Moreover, issues about the "rough childhood" of the defendant is "tricky" when the victim is a child, and you have to be "very careful how a jury reacts to certain things" (PCR525-26). Mr. Arbelaez did not disagree with the determination not to call any family members at the penalty phase (PCR526).

Mr. Diaz recalled only speaking with one member of Mr. Arbelaez's family, his brother Jorge (PCR526). Jorge was the same person who spoke with Miami Detective Eddie Martinez (*Id*.). It was from these conversations that Mr. Diaz would have tried to get any information about Mr. Arbelaez (PCR527). There were no communication problems, as Mr. Diaz speaks fluent Spanish (*Id*.). This was the source of the note indicating that the family would be getting him some records about Mr. Arbelaez (PCR528). He never received any records from the family

(PCR529). He reiterated that he did have a letter from a social services department in Colombia indicating that there were no records about Mr. Arbelaez in their historical archives but that they would continue searching (PCR520). This was the "odd" response that Mr. Diaz had earlier discussed, as he had "never seen anything like this" (*Id*.). The document does not rule out the possibility that Mr. Arbelaez may have been treated by someone and those records not placed in this department's archives (PCR531). Mr. Diaz was not aware that the family made any efforts to locate any documents and send them to him (*Id*.).

On redirect examination, Mr. Diaz acknowledged that the letter from the Colombian social services department was dated April, 1988, well before Mr. Diaz himself got involved in Mr. Arbelaez's case (PCR532). Once he took over the case, he personally never went to Colombia to search for any records, nor sent anyone such as investigator to search for records or locate any of Mr. Arbelaez's physicians (PCR534). He never looked for, or had anyone look for, any of Mr. Arbelaez's teachers (*Id*.). He could not state how many conversations he had with Mr. Arbelaez's family members, but it was certainly not daily contact (PCR 534-35). Mr. Arbelaez's family did not outright refuse to come to Miami, that was just "sort of" the conclusion that Mr. Diaz (PCR535). By saying that they were not coming to Miami, Mr. Diaz did not mean that the family did not care about Mr.

Arbelaez (PCR536). He then conceded that he had never even gotten to the stage of asking the family members to travel to Miami to testify at the penalty phase because he had decided "that was not going to happen" (PCR537).

Mr. Diaz explained that Mr. Arbelaez had a "general fear" with respect to his family having to go to Bogota and deal with Agent Munoz (PCR538). Mr. Diaz assumed that Munoz was not the only employee of the American Embassy, however, and acknowledged that that problem could have been resolved with a phone call to the embassy to try and have the family deal with someone else (PCR539). Mr. Diaz, however, did not want or need Agent Munoz to be fired (*Id*.).

The only specifics about Mr. Arbelaez's family that Mr. Diaz testified that "some of the things that come to my head" are that Mr. Arbelaez had been an altar boy, was poor, and did not have an adequate education (PCR541). He acknowledged that poverty can be a mitigating circumstance but only if you link it to "other facts"; on its own, poverty is not mitigation, and he would not say that "being poor is an excuse for killing somebody" (PCR542). Mr. Diaz "supposed" that issues of poverty and other matters relating to a defendant's background required a great deal of preparation (*Id*.). He reiterated his concerns about calling Mr. Arbelaez's mother due to statements she was aware of that Mr. Arbelaez had

made, but did not have any explanation for using other family members aside from the mother (PCR543-45).

As for Dr. Merry Haber, Mr. Diaz reiterated having no recollection of her involvement in the case, and did not recall making a decision not to call her since he did not remember ever speaking with her (PCR546). As for Dr. Castiello's involvement, Mr. Diaz acknowledged that there were differences between a competency/sanity evaluation and penalty phase mitigation evaluation (*Id*.). He had no recollection of how long Dr. Castiello spent with Mr. Arbelaez (PCR547). Mr. Arbelaez did provide Dr. Castiello with information about his background in Colombia as reflected in the report (*Id*.). Instead of obtaining the services of an investigator, Mr. Diaz instead believed it was "great lawyering" to himself speak to witnesses and review the crime scene (PCR548).

Dr. Merry Haber. Dr. Haber is a clinical and forensic psychologist qualified to testify as an expert on numerous occasions (PCR554-55). Without objection, Dr. Haber was admitted as an expert (PCR555).

In May, 1988, she was appointed to conduct an evaluation of Mr. Arbelaez at the behest of Rodney Thaxton, an attorney with the Public Defender's Office (PCR556). Her work on the case encompassed the time period of June, 1988, through May, 1989 (*Id*.). The purpose of her evaluation was essentially to assess

Mr. Arbelaez's competency (PCR558). She did have notes from her evaluations of Mr. Arbelaez (*Id*.). Her notes reflected, for example, that Mr. Arbelaez revealed to her his background in Medellin, including sleeping in a church where he worked, that he was unhappy there, that he drank poison two times, that he had five years of schooling, a medical history of epilepsy, his work as a dishwasher in Miami, and admitted use of marijuana in the past (PCR558-59). She did not classify this first evaluation as in-depth, but rather a "very brief" screening evaluation "to see if there was anything that was dramatic" and to see if he was competent (PCR559). Her standard procedure after the evaluation would be to talk with the attorney about the results (PCR560).

At some point during her involvement with the case, Dr. Haber's bill reflected that she had also reviewed Mr. Arbelaez's jail medical records, copies of which were in her file (PCR560-62). The records revealed notations that Mr. Arbelaez had a seizure disorder and a "psych disorder" (PCR561). The jail medical records also revealed that Mr. Arbelaez had two previous suicide attempts (PCR562).

Following her initial evaluation in June, 1988, Dr. Haber saw Mr. Arbelaez again in August of 1988 and May of 1989 (PCR563). She had no specific recollection of why she went to see him again, but believed that Mr. Thaxton had

requested follow-up evaluations due to continuing problems Mr. Arbelaez was having with seizures (PCR564). Following those visits with Mr. Arbelaez, she had no further involvement in the case until she had been contacted by collateral counsel (PCR566). She never spoke with attorney Reemberto Diaz about her work with Mr. Arbelaez's case (*Id*.). Based on her knowledge about Mr. Arbelaez in light of her evaluations, had she spoken with Mr. Diaz she would have recommended a neuropsychological and neurological evaluation due to his seizure disorder, as well as "complete personality testing and background evaluation with the family and educational history, all those kinds of things that one looks for in mitigation" (PCR566-67). Such evaluations in capital cases are "extremely complicated" and "extremely time-consuming" due to the fact that they must be thorough and detailed, involving family histories, interviews with family member and teachers, past medical records, educational records and "any information at all related to anyone is what you are looking for" (PCR568). In her experience, generally this information is provided to a mental health expert by an investigator hired by the lawyer, and then "hours and hours" are spent coordinating the information and "trying to piece together this person's life and all of the effects on the person's life" (*Id*.). She did not have any of this information in Mr. Arbelaez's case (*Id*.). Had Mr. Diaz asked her to do this in Mr. Arbelaez's case, she would

not have had any problem working with him (PCR569).

As a result of being contacted by collateral counsel, Dr. Haber received and reviewed numerous materials relating to Mr. Arbelaez, including an affidavit from one of his teachers in Colombia, an employer at Tony Roma's in Miami, a letter from a psychiatrist in Colombia, a letter from Mr. Arbelaez's mother, a letter from social services in Colombia, Mr. Arbelaez's sixth grade records, a report from Dr. Castiello, a deposition and of Dr. Ruth Latterner (an expert obtained by collateral counsel), Department of Corrections records, and some trial testimony (PCR572-73). All of these are records a mental health expert routinely relies upon in the course of practice (PCR577). The background materials were introduced into evidence as Defense Exhibit J (PCR581), and Dr. Haber's notes and file introduced as Defense Exhibit K (PCR585).

Based upon her evaluation and review of the additional materials, Dr. Haber would have been able to testify to extensive mitigation on behalf of Mr. Arbelaez. For example, she would have been able to explain his psychiatric history in Colombia, suicide attempts, and the fact that he received electroshock therapy while hospitalized in Colombia (PCR 586). Mr. Arbelaez's teacher, who remembered him from the time he was 13 years old, reported a poor educational performance and inability to complete assigned work (*Id*.). Mr. Arbelaez was

frequently alone and did not engage with other students, was sometimes nonresponsive and "looked sad" (*Id*.). The teacher believed that Mr. Arbelaez had mental problems, but that he was not a disciplinary problem (*Id*.). In fact, the teacher recommended to Mr. Arbelaez's sister that he be seen by a psychologist (PCR587). One of the documents she reviewed was from one of the actual doctors who treated Mr. Arbelaez in Colombia for suicide attempts and depression, and confirmed that he had received electroshock treatements (*Id*.). This information verifies what Mr. Arbelaez had told her regarding his past depression and suicide attempts (*Id*.). The fact that Dr. Haber now knows about Mr. Arbelaez having received shock treatment in Colombia further buttresses her recommendation that a neuropsychologist evaluate him (PCR589). She confirmed that back in 1989, she did have information that Mr. Arbelaez suffered from depression and had mental problems, and these records confirm this (*Id*.). While she could not speculate back to the time of trial about whether Mr. Arbelaez may have qualified for statutory mitigation, the information she has reviewed clearly qualified him for nonstatutory mental health mitigation (PCR590). For example, she clearly could have testified that Mr. Arbelaez suffered from depression and a depressive disorder (PCR602-03). Dr. Haber also confirmed that the Department of Corrections has diagnosed Mr. Arbelaez with a psychotic disorder, atypical

psychosis, and organic psychosis (PCR603). While Dr. Haber did not believe that at the time she saw Mr. Arbelaez he was actively psychotic in terms of hallucinatory behavior, he did clearly suffer from a depressive disorder which "impacts on judgment and insight" (PCR604). Moreover, Dr. Haber opined that if Mr. Arbelaez was not mildly mentally retarded, he certainly was "close" to that level of intellectual capacity (PCR605). Based on the testing she reviewed from Dr. Latterner and Dr. Sonia Ruiz (the expert appointed for the State in the postconviction proceedings), Mr. Arbelaez was functioning "at best on a borderline intellectual level and at worst on the level of mild retardation" with a full scale IQ of 67 (*Id*.). It is a "very close call" as to whether he is borderline or mentally retarded (PCR606). As to Dr. Ruiz's evaluation, the only thing that Dr. Haber relied on was the history she obtained from Mr. Arbelaez, not her testing results (PCR608). For example, had Dr. Haber performed the evaluation that Dr. Ruiz had, she would have used the testing instruments differently, would have scored the Bender Gestalt test (which Dr. Ruiz did not), and would not have used a Minnesota Multiphasic Personality Inventory Test [MMPI] because it is contraindicated for persons with less than an 8th grade reading level (PCR609-10). Moreover, none of the testing conducted by Dr. Ruiz was specifically geared toward testing Mr. Arbelaez's intelligence (PCR610).

On cross-examination, Dr. Haber explained that she has mostly appeared on behalf of the defense in capital cases (PCR623). She then explained the scope and content of the mental status examination she performed on Mr. Arbelaez during her first evaluation (PCR626-34). At the time she did not see a basis to conduct any IQ testing on Mr. Arbelaez (PCR635). The only information about the crime she was aware of at the time was given to her by Mr. Arbelaez (PCR636). She could not recall why she had gone back to see Mr. Arbelaez in May, 1989, other than that Mr. Thaxton must have asked her to go "for some reason or another" (PCR638). She could not recall when she learned that Mr. Arbelaez had been treated by a local physician, Dr. Lopez, for epilepsy (PCR639). This information would have been helpful for her to know from Mr. Arbelaez's attorney (*Id*.). She probably would have contacted the doctor and learned about Mr. Arbelaez's history of medical treatment (PCR639-40). Very often, noncompliance with medication is related to a person's limited intelligence and limited insight (PCR640-41). But Dr. Haber had no way to know why Mr. Arbelaez had not been taking his medications for epilepsy (PCR641). During the time of her involvement in the case, Dr. Haber did not recall having seen the videotaped interrogation of Mr. Arbelaez, and the tape was played in court (PCR644), although she later acknowledged that her bill reflected that she had in fact viewed it in 1988 (PCR650). Based on her observations of the tape, Dr.

Haber would probably not have thought that an IQ test was needed (PCR653). Nor did the tape reveal any overt signs of psychosis (PCR658). Based on her review of the case, Dr. Haber explained that, in terms of Mr. Arbelaez's adaptive behavior was only "within a borderline range" (PCR660). While the tape of the interrogation also revealed that Mr. Arbelaez was able to provide detail, Dr. Haber explained that retarded individuals sometimes have "incredibly great" memory ability for certain things like musical pieces, numbers, and specific dates and times (PCR662).

On redirect, Dr. Haber explained that her testimony in capital cases had been limited to defense testimony because the State had never requested her appointment in a capital case (PCR664). The evaluation she performed on Mr. Arbelaez was absolutely not a full psychological examination but rather only a screening (*Id*.). The questions she posed to Mr. Arbelaez all related to his competency to stand trial (*Id*.). She had no recollection of ever telling Mr. Thaxton that, based on her initial evaluation, there was no mitigation in the case; in fact she went back two more times to see Mr. Arbelaez at Mr. Thaxton's request (PCR666-67). The work she performed on the case in 1988 and 1989 was not what she would do had she been asked to do a full mitigation evaluation (PCR667). Had she been asked to do such an evaluation, she would have requested that the attorney or investigator find and

obtain all relevant records, including the records regarding Mr. Arbelaez's hospitalization in Colombia (PCR673). Even after having viewed the videotaped interrogation of Mr. Arbelaez, Dr. Haber still would be able to testify to extensive mitigation, including the history of depression, suicide attempts, past treatment with electroshock therapy, lack of education, and low literacy level (PCR675). She reiterated that Mr. Arbelaez falls within the range between mild mental retardation and borderline, which is the lower fourth of fifth percentile of the general population (PCR681-82).

Dr. Ruth Latterner. Dr. Latterner, a neuropsychologist, is board certified in the field of neuropsychology by the American Board of Professional Neuropsychology (PCR689). She is on the staff at various hospitals, including the Baptist/South Miami Hospital and Miami Children's Hospital (*Id*.). She has been an adjunct professor at Florida International University, and is a licenced school psychologist and, until recently, performed testing for the Dade County school system (*Id*.). In addition, Dr. Latterner has done forensic evaluations and testified in court, and without objection was qualified by the lower court to render opinions as an expert in the field of neuropsychology (PCR690).

On August 11, 1995, Dr. Latterner performed an evaluation of Mr. Arbelaez at the request of collateral counsel (PCR692). She prepared a report, which details

the various testing she conducted as part of the neuropsychological battery she administered over a period of many hours (PCR692-94). She also conducted an interview with Mr. Arbelaez to get some idea of his neurological and neuropsychological background (PCR694). He told her about his history of receiving electric shock treatments in Colombia, mental hospitalizations, and a family history of mental illness and seizure disorders (PCR695). He further detailed some hallucinatory behavior he experienced in the past (PCR696). Dr. Latterner observed that Mr. Arbelaez appeared oriented to his environment in a concrete level, and also exhibited hyper-religiosity and hyper-verbosity, traits which are often observed in people with certain types of epilepsy (PCR697-98). Based on the totality of her evaluation, Dr. Latterner came to two diagnostic conclusions: mental retardation and organic brain syndrome, mixed (PCR700).

With respect to intellectual functioning, Dr. Latterner performed the Wechsler Adult Intelligence Scale, which revealed a full scale IQ of 6, with the breakdown being 66 for the verbal part and 71 for the performance part (PCR701). A full scale score of 69 or below is classified as mentally retarded, or educable mentally retarded, meaning that while they can live independently, they still have deficits in cognitive functioning (PCR703). This level of retardation is consistent with Mr. Arbelaez's adaptive functioning abilities (PCR704). Dr. Latterner also

performed a series of additional tests to evaluate Mr. Arbelaez's neurological functioning (PCR704-28; 729-39). All of these tests are long established and relied upon by neuropsychologists (PCR715). Mr. Arbelaez was cooperative during the testing and was not malingering (PCR728). As a result of the extensive battery of testing she performed and her experience, Dr. Latterner opined that Mr. Arbelaez suffered from organic brain damage, mixed (PCR739). "Mixed" means that both intellectual and emotional functions are affected (*Id*.).

In Mr. Arbelaez's case, his organic brain damage is superimposed upon preexisting cognitive deficits, including his depressed cognitive profile revealed on the intelligence testing and memory difficulties (PCR740). This does not mean that Mr. Arbelaez cannot remember things at all, but rather has "more trouble than most" in concentrating on complex cognitive tasks and paying attention in an orderly way; he also has language problems (PCR740-41). While in ordinary conversation he would perform acceptably, it is in "more complex" areas where his impairments affect his abilities (PCR741). These deficits inhibit Mr. Arbelaez's ability to control inappropriate and perhaps violent impulses (PCR743). Dr. Latterner also confirmed that Mr. Arbelaez suffers from epilepsy, which is a symptom of organic brain damage (PCR744). In her opinion, Mr. Arbelaez's brain damage was preexisting in the sense that it was not suddenly something that

happened to him when she saw him in 1995 (*Id*.). At the time of Mr. Arbelaez's trial, Dr. Latterner was living and practicing in Miami (PCR747).

On cross-examination, Dr. Latterner explained that the symptoms of organic brain damage are discrete from Mr. Arbelaez's mental retardation (PCR748). It would not surprise her if Mr. Arbelaez's failure to comply with his medications was due to his impairments, but a lot of "normal" people do not comply either (PCR751). But the reasons behind his noncompliance would not affect her bottom line diagnoses of Mr. Arbelaez (PCR753). Her diagnostic conclusions were based on her evaluation of Mr. Arbelaez and her testing of him (PCR757). Even though she did not review the videotape of Mr. Arbelaez's interrogation, it would not change her diagnostic impressions which were based on her testing (PCR759). That Mr. Arbelaez was able to recall details of the incident for which he was arrested is not surprising given the horrific contextual background of that information, for example, a five-year old can remember with great clarity details of a highly charged event (PCR760-61). That Mr. Arbelaez held jobs, drove a car, and interacted with other people does not change her opinion, as those behaviors are perfectly consistent with someone with educable mental retardation (PCR763). The manner in which she administered the tests to Mr. Arbelaez comported with the manner in which she has administered the same tests thousands of times in the past

(PCR772).

Amparo Arbelaez Alvarez. Ms. Alvarez is one of Mr. Arbelaez's sisters, she was born in 1950 and lives in Medellin, Colombia (PCR1170). Their parents are Jorge Arbelaez and Margarita Alvarez Palacio (*Id*.). There were originally twelve siblings in total, but one passed away (PCR1171).

Their father lived in the "country" and was an ignorant man whose family married amongst themselves so as not to "stain their blood" (*Id*.). For example, their father's sister was married to a nephew, and their own father's parents were first cousins (*Id*.). Their parents met when they were living in the country, the mother was very pretty but also not educated (*Id*.). Their parents treated each other badly, the father mistreated both their mother and all the siblings (*Id*.). When the children were a little older, their father worked as an inspector far from home and was very mistrustful of their mother (PCR1171-72). When he would return to the house, he would perform witchcraft to see if their mother had been with another man during his absence (PCR1172). He would also call people at a store nearby to see if any men had come into the house while he was away (*Id*.). When he would return home, things were "horrible"; the children would be trembling, crying, and holding onto their mother's skirt because they were scared that he would kill their mother (*Id*.).

Their father initially worked int he fields, which is where he met their mother. He wanted the children to pick coffee, but their mother fought with him about that and they eventually moved into the city (*Id.*). He eventually got work as a police inspector and had a little place of his own in the countryside (PCR1173). He would spend a few days at the home with the family, then leave again; the children all preferred him to be away (*Id*.). Their father would also accuse their mother of being a prostitute (*Id*.). He would throw her down and hit her with whatever he had in his hands (PCR1174). Their father always had knives, pistols, and other guns in full view of the children (*Id.*).

Their father treated his children very badly as well, he never gave them any love, would insult them, and would never hug them (*Id*.). For punishment he would hit them with a belt and it did not matter where, sometimes on the head and in the face (*Id*.). These punishments would come "all of a sudden" when their father "would come in like a devil" (PCR1175). On one occasion, their father locked himself in a room and threatened to kill himself (*Id*.). The father could not be trusted to be alone with the girls. All the girls would sleep together in one room, and one night he tried to rape the oldest sister and they all began to scream (PCR1176).

As children they suffered a lot; they had no shoes or clothes, and they were

suffering from hunger until a time later when they began receiving food from the health centers which had been sent by the United States (PCR1176). Those times when they had the American food were happy times, and that is why they love the United States (*Id*.).

When the children became ill, they were never taken to the doctor (PCR1179). Rather, their mother would give them weeds and herbs and brew something for them to get better (*Id*.). Because they had no money, they did not go to the doctor when they were sick, and this is why is was scary when Guillermo started having seizures (PCR1180). The siblings would take rags and a ruler and put them into his mouth so he would not swallow his tongue (*Id*.).

Their parents had so many children because the Church told them it was a sin not to have many children, and when their mother did not assent to sex with their father she would have to go to Church to confess her sins (PCR1181). And when their mother would not "receive" their father, the father would accuse the mother of being with another man (*Id*.). "So it was a very sad situation with so many children" (*Id*.).

Of all the children, Guillermo got punished the most severely because he was stupid (*Id*.). He was doing very badly in his studies and he would get beaten up in school (PCR1182). When their father was not home, the oldest brother, Juan

Manuel, was in charge of administering the punishment. Juan Manuel would take out his belt and, when Guillermo was asleep, would wake him up and beat him, push and pull him by the hair until he learned his school lessons (*Id*.). Juan Manuel would never just talk with them, he only scolded them (PCR1183).

When they were not receiving American food from the health department, the food situation was very bad. For example, for lunch they were given some soup with potatoes and if one of the children complained about how bad the soup was, their mother would beat him or her with a belt (PCR1183-84).

Guillermo did very badly in school, and the teachers would hit Guillermo, even throwing him down the stairs one time (PCR1185). Guillermo would study with their brother, Oscar, and they were very good friends (*Id*.). Oscar has been in a mental hospital several times (*Id*.). But Guillermo was not able to do well in school, so they kicked him out, and he started staying with some boys on the street, smoking marijuana (PCR1186). After he left school, Guillermo was very sad, lonely, and anxious (PCR1187). He started spending a lot of time at the church, where he would care for the little children, and he became an altar boy (PCR1189). The family was very religious (*Id*.). Most of Guillermo's friends were children, but then he began hanging around with boys who would smoke marijuana (PCR1190).

When Guillermo was at the church, he fell in love with one of the nuns there (*Id*.). One day, Guillermo got very sad and drank some poison in an attempt to kill himself (*Id*.). He drank poison on several occasions, he would use Baca Seven, which was a rat poison (PCR1190-91). And one other time he cut his veins (PCR1191). He was hospitalized several times when he was working because earlier on they had no money (*Id*.). He was also put into mental hospitals (*Id*.). Guillermo was sad, depressed, "[h]e liked live in the moon, in the air" (PCR1192).

Through television, the family was aware of Guillermo's legal problems in Miami (PCR1192). A few weeks prior to that, they had received a call that Guillermo was going to marry a woman and the family was happy for him (*Id*.). She recalled speaking with Reemberto Diaz, she was trying to get reports from Colombia about Guillermo's mental problems and send them to him, but this was after the trial had occurred (PCR1194). Mr. Diaz never talked to them about coming to the United States to testify, and she "would have been very happy to come so my brother would not be alone . . . My brother was all alone" (*Id.*).

On cross-examination, Amparo testified that she lived in Medellin and was single, having given herself to God (PCR1195). She has no children, and lives with her mother and her brother Oscar (*Id*.). Her mother no longer beats her (*Id*.).

Amparo is a teacher at a teacher of religion at a public school (PCR1196-97).

The oldest sibling is 58 now, and the youngest is 41 (PCR1197). Guillermo is the eighth child from the youngest (PCR1197-98). Their father spent most of his time away from home when he was a police inspector, and only came home for a day or two at a time (PCR1198). They would tell their mother that they did not want to be alone with their father because he would do bad things, and she tried to watch him at night (PCR1202).

When Guillermo came to the United States, he did not call but would write sometimes (PCR1205). She did not remember exactly what he said, but he did indicate he was happy in the United States (*Id*.). They did not know much about what he was doing here, and he did not want to come back to Colombia (PCR1206-07). Amparo did not write back to Guillermo because she had little money, and also they were taught in their family to be cold, and that once a person left the home they were independent (PCR1208-09). She clarified that the letters she received from Guillermo were when he was already in jail (PCR1215). Before that, she did not know of his address (*Id*.). The only time she heard from him before he was in jail was when he called to tell them he was going to marry (*Id*.). Several of the siblings went on to study in college, but this was after they had worked to make some money (PCR1218-20). Their father died about five years ago (PCR1220).

After the murder in Miami, Guillermo came back to Colombia very suddenly, Amparo had no idea what had happened (PCR1223). She did not remember if anyone had spoken to the police in Miami (PCR1224). Mr. Diaz did not call her but she called him, and it was after the trial (PCR1226). She did not recall if Mr. Diaz had called the house (PCR1227).

Luz Marina Arbelaez Alvarez. Luz is 55 years old and has lived in Medellin all her life (PCR1245). She is Guillermo's sister (*Id*.). Luz explained that the relationship between their mother and father was "terrible" and they suffered a lot (*Id.*). Their father would beat their mother and threaten her with guns and knives (PCR1246). Their father worked and would travel quite a bit, but would come home every month and he would beat the children when he would come home (*Id*.). The beatings would often be for no reason (*Id*.). Their father would also go into a room and do witchcraft and then "come out with his eyes all red and if he saw us around, he would beat us. He came out like a demon" (PCR1246-47). He would hit them with belt buckles, and throw them against walls, hit them in the head and tear their clothes (PCR1247). Guillermo was treated "super badly" because he was "stupid" (PCR1247). If Guillermo was not home early, he would hit him with sticks, hit him against the wall, and throw him against the wall in the head (*Id*.). Their father would also pull up Luz's skirt and try to touch her; when

he would do this, he would laugh (*Id*.).

Their mother spent a lot of time at health centers in search of food that had been sent by the United States because they were suffering from a great deal of hunger (PCR1249). When their father was gone and their mother was not home, their brother Jose Manuel was left in charge to be the disciplinarian (PCR1250). Jose Manuel would beat Guillermo "for anything" particularly because Guillermo was doing so poorly in school (*Id*.). They ate mostly water and potatoes and water with sugar (PCR1251). They never got medical care, because if they had to spend money on a doctor they could not eat (PCR1252).

Their house was small. Jose Manuel got a room by himself, one room was for the parents, the boys would all share a room along with their grandmother, and the final room was shared by all the girls (PCR1252).

Guillermo did not look like a normal baby, he did not react (PCR1253). He was always nervous, and would tremble and cry a lot (PCR1254). As an older child, Guillermo would spend most of his time at the church (*Id*.). He also was in the hospital because he tried to take his life on three occasions, so they took him to a mental hospital (*Id*.).

Luz first learned that Guillermo was in trouble in the United States when someone from a televison station called them (*Id*.). She never spoke with

Reemberto Diaz. If she had been asked, she would have gone to Bogota to help, but Diaz never called (PCR1255).

On cross-examination, Luz testified that she has been married for thirty years (PCR1257). The last time she saw her brother was some 12 years earlier (*Id*.). Luz is a housewife and has never worked (*Id*.). She also did badly in school and would get sent home because of bad grades (PCR1258). Guillermo was "mischievous" in the sense that he had seizures and did not act like a normal person would (PCR1260-61). Her father never actually raped her because she tried to stay away from him (PCR1262). She told her mother about what her father was doing, and their mother would try to separate the girls from him (*Id*.). Their mother was not able to fight with the father, however, because he would beat her (PCR1263).

B. State Witnesses.

Lisa Wiley. Wiley is employed by the Florida Department of Corrections and works at Union Correctional Institution [UCI] as a "psychological specialist" (PCR836). Her responsibilities include delivery of mental health services to inmates, counseling, referrals to psychiatry, and confinement evaluations (PCR837). Her current assignment is to death row (*Id*.). Wiley has a master's degree in psychology, and her experience before obtaining her degree included a six-month stint at a center for the mentally retarded (PCR838-39). At that center,

her responsibilities entailed care and supervision, not counseling or diagnostics (PCR839). Part of her required responsibilities at UCI is to conduct confinement evaluations for the inmates (PCR840). On voir dire by Mr. Arbelaez's counsel as to her qualifications, Wiley acknowledged that her masters degree was in sociology (PCR842). The place where she worked prior to getting her degree was not a hospital or clinic, but rather a long-term residential care facility (PCR842-43). Although she was allowed to testify in a prior case in Panama City as a psychologist, she is not a licensed psychologist (PCR843). The judge allowed Wiley to testify and render opinions in the field of clinical psychology, but would not allow her to render any opinions on the issue of retardation since she did not have the appropriate training or experience (PCR845). Upon further voir dire by the State, Wiley explained that she is involved in a "treatment team" with a senior psychologist and offers her "impressions" and "opinions" about a particular inmate's diagnosis but her responsibilities did not include actually diagnosing (PCR846). She has never administered any testing to Mr. Arbelaez, but has referred her impressions to the senior psychologists at the prison (PCR851). The court deferred ruling on whether Wiley could offer opinions until her opinion was actually solicited by the State (PCR853).

Part of her responsibilities at UCI is counseling of inmates and case

management, including Mr. Arbelaez (PCR854-55). At the prison, Mr. Arbelaez has had several medical concerns which Wiley assisted him with (PCR855). In dealing with Mr. Arbelaez over about 13 years, she has made several psychiatric referrals with regard to him (*Id*.). During the team treatment meetings regarding Mr. Arbelaez's problems, the issue of mental retardation has not come up (PCR856). Since about April, 2001, Mr. Arbelaez has been refusing Wiley's services; prior to that, she would see him in her office approximately nine times a year (PCR859-90). These meetings in her office were face-to-face meetings where she spoke to him in English; her notes do reflect that there was a moderate language barrier in her dealings with him (PCR861). Over the years, Mr. Arbelaez's English skills have improved (PCR862). In terms of his verbal abilities, when Mr. Arbelaez would appear anxious and would stutter and have facial twitching (PCR864).

Shortly after Mr. Arbelaez arrived on death row, he became a participant in mental health services (PCR870). His problems included both depression and anxiety (PCR872). Mr. Arbelaez also suffers from epilepsy and was intermittently compliant with his medications (PCR872-73). He also intermittently signed the consent forms for medical treatment (PCR874). He has complained about the medical treatment, the rules of the Department of Corrections, and various medical staff (PCR875). He has also complained about having to wear a helmet, which he

is required to do to avoid harming himself when he has seizures (PCR875-76). Overall, however, Mr. Arbelaez has "adequately adapted" to his surroundings (PCR877). He did refuse IQ testing upon his arrival at death row (PCR878).

During her time at UCI she has observed inmates who were classified by the actual medical staff as being mentally retarded (PCR884). The criterial in the Diagnostic & Statistical Manual IV were used to make the determination as to those inmates (PCR890-91). To meet those criteria one must consider intellectual functioning, impairments in adaptive functioning, and the onset prior to the age of 18 (PCR894). One thing that would lead Wiley to question Mr. Arbelaez's intellectual capacity is his ability to learn a second language in adulthood (PCR895).

On cross-examination, Wiley acknowledged that she was appearing voluntarily as a State witness against Mr. Arbelaez (PCR898). She did speak with DOC's legal division about testifying and preparing for testifying against Mr. Arbelaez (PCR900). She never obtained any consent from Mr. Arbelaez himself to appear to testify against him about her observations of him (*Id*.). This was the third case in which she has testified for the State against defendants for whom she is also providing mental health services (PCR901).

Wiley has no training in assessing an individual's ability to speak a second language (PCR901). The language barrier she had with Mr. Arbelaez never ceased

(*Id*.). She denied that the last time she saw Mr. Arbelaez in April, 2001, when he had a seizure in her presence, she was encouraging him to drop his appeals (PCR902). She denied asking Mr. Arbelaez what he had to live for; rather, she asked "[w]hat he valued about his life still" (PCR903). At that point in time, Mr. Arbelaez probably knew that Wiley had testified against another death row inmate, Juan David Rodriguez (*Id*.). It was when she was asking him about what he valued in his life that Mr. Arbelaez began to have a seizure, and he thereafter refused to have any more dealings with her (PCR904).

Death row is a predominantly English-speaking environment, and it is not unusual for Spanish-speaking inmates to pick up some English in a decade or so on death row (PCR906-07). All the television programs are in English, and the majority of the staff speaks only English (PCR907). She is by no means suggesting that Mr. Arbelaez is fluent in English (PCR908).

During his time on death row, Mr. Arbelaez has in fact been diagnosed with a number of major mental disorders, such as a depressive disorder and psychotic disorder, both of which he has suffered from for many years (PCR909). He has also been placed on suicide watch (PCR910). Depression and psychosis are both classified as major mental disorders or diseases (*Id.*). He has been administered various antispsychotic medications over the years (PCR911). On a number of

occasions Mr. Arbelaez has reported internal stimuli including hallucinations over the course of years for which she referred him to the psychiatry unit (PCR912). Throughout her interactions with Mr. Arbelaez over the years, Wiley has also observe that his insight is marginal and that he exhibits concrete thought patterns (PCR917). He has reported seeing blood in his cell and seeing people and animals (PCR918-21). He has reported having intrusive memories of sexual abuse and related hallucinations (PCR922).

On redirect examination, Wiley opined that Mr. Arbelaez was not mentally retarded based on he had no impairment in his grooming, time management, socialization skills, and interview behavior (PCR949). She would not however be able to diagnose him or not with mental retardation without additional information (PCR950).

On recross examination, Wiley explained that she was opining that Mr. Arbelaez was not mentally retarded despite her inability to make the diagnosis because she did not have enough information and that these are "semantics" (PCR952-53). In terms of Mr. Arbelaez's adaptive functioning on death row, she opined that his ability to use the canteen was evidence of his ability to operate independently (PCR954). That he knows how to shave and shower is also evidence of his ability to operate independently (PCR956). He cannot decide when

to shower, however, because that is strictly controlled by the Department of Corrections (*Id*.). She has no information about Mr. Arbelaez's life in Colombia and has no IQ testing (PCR957). All of the information upon which she based her opinion that Mr. Arbelaez is not retarded was not available at the time of his trial in 1991 (PCR958).

Reemberto Diaz. After being recalled by the State during its case-in-chief below, Diaz testified that he met with Mr. Arbelaez "several times" before the commencement of trial (PCR969). He obtained the information from him that he thought he needed to know about the case (*Id*.). He had no problem conversing with Mr. Arbelaez, and they always spoke in Spanish (PCR970-71). Mr. Arbelaez was not intelligent but Mr. Diaz did not think he was retarded or slow (PCR974). The only mental illness that Mr. Diaz "came across" during his representation of Mr. Diaz was epilepsy (*Id*.).

On cross-examination, Mr. Diaz acknowledged that there certainly could have been something wrong with Mr. Arbelaez that he did not see because he himself was not a psychologist (PCR976). He did request a competency evaluation (*Id*.). Dr. Castiello did a competency evaluation, not a mitigation evaluation (PCR978).

Dr. Sonia Ruiz. Dr. Ruiz is a licenced clinical psychologist (PCR1004).

She obtained her masters degree at the Miami Institute of Psychology or the Carribean Center for Advanced Studies (*Id*.). From 1987 to 1988 she did her internship, but was not licenced until 1992 (PCR1005). She has testified numerous times in Dade County courts as a forensic psychologist (PCR1006).

On voir dire by Mr. Arbelaez's counsel, Dr. Ruiz explained that there are two parts of the licensing examination in Florida, the State portion and a national portion (PCR1008). The first time she took the test she did not pass the tests; the second time, she passed the State part but failed the national part (*Id*.). She passed the national portion on her third try (*Id*.). Although the letters sent to her by the Florida Department of Professional Regulation stated that she had failed both portions of the test, she denied that she failed both parts the second time she took the test notwithstanding what the letters said (PCR1010). At the time she attended the Carribean Center for Advanced Studies, it was not an institution accredited by the American Psychological Association (PCR1010). She acknowledged that in one case in Dade County in front of Judge Leesfield she was "excused" from testifying (PCR1012). And while she has testified in courts many times, in terms of actual trials there were only about four or five, and never in a death penalty case (*Id*.). She then indicated that she had in fact testified at a penalty phase (PCR1014). Over defense objection, Dr. Ruiz was admitted as an expert (PCR1015).

On November 5, 2001, Dr. Ruiz conducted a four hour evaluation of Mr. Arbelaez (PCR1016). He was lucid, clear, and exhibited no signs of major mental illness (*Id*.). She did not find any evidence of mental retardation (*Id*.). She was aware of Mr. Arbelaez's epilepsy, and that he had a history of questionable compliance with his medications (PCR1017). Prior to the evaluation, she had received documents from the State Attorney's Office including Dr. Latterner's report, Dr. Castiello's pretrial competency report, the 2000 opinion from this Court reversing for the evidentiary hearing, the police statement made by Mr. Arbelaez (PCR1017-18).

Dr. Ruiz explained that "on occasions" she performs testing, but she is not a person who does testing "just for the sake of testing" (PCR1019). Her decisions come from not just testing but from "good clinical judgment" and other information (PCR1020). During her clinical interview with Mr. Arbelaez, he discussed with her his background information, including personal data and educational history and experiences (PCR1023-24). He also discussed his work history, including a messenger for an airline company and that he sold sodas at a football stadium, he was a dishwasher, and a guard at a warehouse (PCR1-26-27). He was questioned about his medical history, and he acknowledged three suicide attempts by taking poison, slash his veins, and an attempted hanging (PCR1029). He also complained

about a "shameless psychologist" at UCI named Lisa Wiley, who would discuss sexual things with him (PCR1030). He discussed having experienced hallucinations in the past, but Mr. Arbelaez did not give her the answers she believed were complete (PCR1032-33). Accordingly she did not believe he was very credible (PCR1033). She also asked him about the circumstances of the crime, and Mr. Arbelaez responded to her questions (PCR1034). The clinical interview lasted about an hour (PCR1037). Based on the interview, Dr. Ruiz believed that Mr. Arbelaez was clear and stable and fully oriented (PCR1037-39). She did, however, believe that his thinking was concrete, which could be attributable to someone with mental retardation or low average intelligence (PCR1040).

Dr. Ruiz also administered a number of tests: the Ravens Progressive Matrices Standard Edition, the Bender Motor Visual Gestalt Test, and the Spanish version of the MMPI II (PCR1042). The Ravens is a nonverbal test of general intelligence which "accesses a person's clear thinking and reasoning process" (PCR1045). In essence it is "kind of like piecing together a puzzle" (*Id*.). It is not a timed test (*Id*.). His performance on the test was unusual in that he completed it too fast (PCR1047). He did poorly on the test, within the lower 25% of the population for his age (*Id*.). By itself this would put Mr. Arbelaez in the borderline level of mental retardation (*Id*.). On the Bender test Mr. Arbelaez did "fairly well"

(PCR1049). He also, however, performed a hasty and impulsive execution of the drawings (PCR1050). There were no indicators of "gross" organic impairment (*Id.*).

The last test she performed was the MMPI II; prior to administering the test, Dr. Ruiz did not make a determination about Mr. Arbelaez's reading level because she "was not really concerned" about that (PCR1052). In her opinion, "certain people" who score low on reading levels "are able to read better" when they have the test in front of them (PCR1053). Mr. Arbelaez asked her one question during the test (*Id*.). It took Mr. Arbelaez two hours to complete the test, which was in the expected range (PCR1055). When the test was scored, the computerized report indicated that the test was invalid (PCR1056). Mr. Arbelaez did appear to be trying to answer the test questions correctly (PCR1057). In the last series of questions on the test, Mr. Arbelaez tended to answer mostly true, which is an indication that he was tired (PCR1058). However, Dr. Ruiz believed that he was trying to "fake bad" on the test because he was a prisoner (*Id*.). In sum, Mr. Arbelaez did poorly on the Ravens test, fairly well on the Bender, and the MMPI results did not result in a valid profile (PCR1062).

Her conclusion that Mr. Arbelaez presented with no major mental disorder during the evaluation was based on her observations and interview of Mr. Arbelaez

(PCR1063). And despite the invalidity of the MMPI test, Dr. Ruiz believed that if Mr. Arbelaez were truly disturbed he would be in a crisis unit or a hospital (*Id.*). In terms of his lack of mental retardation, Dr. Ruiz used the DSM-IV criteria, which require substandard intellectual score, adaptive functioning, and onset before age 18 (PCR1064). Adaptive functioning is equated with independent living, and Mr. Arbelaez was "quite high" on this aspect (PCR1066). She did not perform any testing to arrive at a specific intelligence quotient, although the Ravens test indicated that Mr. Arbelaez was in the borderline range of around 70 to 75 (PCR100).

On cross-examination, Dr. Ruiz explained that she charges the county $300 for an MMPI test, and $100 each for a Bender and a Raven (PCR1081). She clarified that she has only testified in about four or five actual trials, and none was a death penalty case (PCR1082). She has never testified in a trial that a defendant is mentally retarded (PCR1084).

As part of her evaluation of Mr. Arbelaez, Dr. Ruiz reviewed the medical records from the facility in Miami where he was being housed, and determined that he was taking a number of medications including Vistaril, which is an antidepressant and anxiety relief medication (PCR1087). When she rendered her opinion that Mr. Arbelaez had no major mental illness, this was confined only to the four hour

period when she was with him (PCR1087). She was not aware that Mr. Arbelaez had ever been diagnosed with a major mental disorder or disease, nor would it make any difference to her if he had been (PCR1088). She did not know whether a ten-year stint with a diagnosis of a psychotic disorder would affect her opinion either, or that he had been administered antipsychotic medications for many years (*Id*.). She had no indication of the credibility of the diagnoses made by the Department of Corrections (PCR1089). The State did not provide her with the Department of Corrections records (*Id*.). She also was shown documents that she had reviewed at the jail in Miami indicating major mental illnesses and a history of psycotropic medications (PCR1093-97). She agreed that long-term observation of a person is the best way to be able to accurately diagnose a major mental illness (PCR1100). There is no way for her to know whether Mr. Arbelaez suffered from a major mental disorder a the time of his trial or even 20 years ago (PCR1102). She did not review any of the jail records from when Mr. Arbelaez was awaiting trial (PCR1104). With respect to Mr. Arbelaez's claims of a history of hallucinations, Dr. Ruiz made no attempt to corroborate his claims (PCR1107). She likewise made no attempt to corroborate what Mr. Arbelaez told her about his previous attempts at suicide, although she did note that he told her he was in his 30s at the time of the attempts but he was already in prison by that age (PCR1108-09). She is

thus assuming that the suicide attempts all occurred while he was in prison (PCR1109). She had seen no documents during her evaluation which would indicate that the suicide attempts in fact had occurred while Mr. Arbelaez was still in Colombia (PCR1111).

During the clinical interview, Mr. Arbelaez also discussed a history of abuse between his parents, and that a priest in Colombia had once told him that if an animal bit him then he would have to make love (PCR1113). This meant that the priest was telling Mr. Arbelaez something that was not true in order to have sex with him (PCR1113). Mr. Arbelaez also told her about the priest touching him inappropriately, and also about a relationship with a nun in Colombia (*Id*.).

The Bender test is a scoreable test but she decided not to score it despite the fact that books had been written about how to score a Bender test (PCR1116-17). She uses the Bender as a screening test but "I don't necessarily have to score it" despite the fact that she draws conclusions from the test results (PCR1117-20). Without following the scoring criteria set forth in the literature, her conclusions are drawn from a subjective analysis of the drawings (PCR1120). Dr. Ruiz did not know what the reliability was of the Bender test as a screening device (PCR1121).

As to the Raven test, Dr. Ruiz testified that Mr. Arbelaez scored in the lowest 25% of the population within his age group (PCR1121). She had no idea

what the standard deviation on the Ravens, however, and "guessed" that his score could actually be lower (PCR1121-22). Mr. Arbelaez had more difficulty with the Ravens drawings the more difficult the various test sets became, and he did not have any correct answers in the last column (PCR1123).

Dr. Ruiz administered the MMPI II to Mr. Arbelaez despite its protocol which indicates it is not to be administered to an individual without at least and 8th grade reading level (PCR1128). She did know that he performed poorly on the Raven test but nonetheless administered the MMPI (PCR1129). She also admitted that the designers of the MMPI test indicated in their protocol that the average time to complete the test was between 36 and 90 minutes, not the two hours it took Mr. Arbelaez (PCR1130). If an MMPI comes back as an invalid profile, the protocol instructs psychologists not to render any interpretations based on the invalid test (PCR1131). Despite this, Dr. Ruiz nonetheless did reach conclusions about Mr. Arbelaez based on an invalid test (PCR1132). There are a number of reasons why someone could have an invalid MMPI profile, including malingering, insufficient reading skills, fatigue, and a host of other things (PCR1133-34).

Dr. Ruiz was relying essentially only on the adaptive functioning prong of the DSM-IV criteria for mental retardation (PCR1138). It is possible for someone with mild mental retardation to drive (PCR1139). According to the DSM manual, many

people with educable mental retardation can live successfully independently with support (PCR1142). She made no attempt to speak to any of Mr. Arbelaez's employers to verify the exact nature of his work experiences and the positions he held (PCR1144). Mr. Arbelaez also has "so many friends" which is inconsistent with mental retardation (PCR1145). There is, however, no standard number of friends that a mentally retarded person can or cannot have (PCR1146). The "many friends" were in actuality about five or six people, or possibly a few more (PCR1147).

SUMMARY OF ARGUMENTS

1. The lower court erred in denying Mr. Arbelaez's motion to disqualify the lower court judge, Judge Leslie Rothenberg. The motion alleged more than a sufficient basis for disqualification, namely comments that Judge Rothenberg had made in connection with another capital case following a reversal by this Court on appeal about that defendant's execution in the electric chair. These comments demonstrate a reasonable fear on Mr. Arbelaez's part that Judge Rothenberg could not provide him a full, fair, and unbiased consideration of his important claims relating to the propriety of his death sentence. Particularly in conjunction with the allegations of bias which had been raised in the prior appeal in this matter, Judge Rothenberg should have granted the motion as legally sufficient. This case should

be reversed and remanded with instructions to conduct the evidentiary hearing and to appoint an impartial tribunal.

2. Mr. Arbelaez was denied the effective assistance of counsel at the penalty phase. Applying the appropriate standard of *de novo* review and the law as set forth by the Supreme Court, particularly its most recent decision in *Wiggins v. Smith*, there can be no question that trial counsel, Reemberto Diaz, rendered deficient performance which undermines confidence in the outcome of Mr. Arbelaez's penalty phase. Mr. Diaz never hired an investigator nor a mental health expert to assist the defense in the investigation and preparation of a potential case for mitigation. Despite the fact that prior counsel on the case had in fact obtained a confidential expert to evaluate Mr.Arbelaez, Mr. Diaz never informed himself of this fact and thus had no idea that Dr. Haber had been in any way involved in Mr. Arbelaez's case. Mr. Diaz never went to Colombia to investigate Mr. Arbelaez's background, never had an investigator go to Colombia, and never hired an investigator in Colombia to assist in the investigation of available records in that country. The little that Mr. Diaz did do in terms of investigation and preparation fall far below the constitutional floor as discussed in *Wiggins v. Smith*. Had Mr.Diaz not performed deficiently, substantial mitigating circumstances could have been discovered and presented to the jury. Dr. Haber testified that, had Mr. Diaz

contacted her, she would have recommended neuropsychological testing of Mr. Arbelaez given his longstanding seizure disorder and epilepsy. Having reviewed materials discovered by Mr. Arbelaez's collateral counsel, Dr. Haber would have been able to testify to substantial and compelling nonstatutory mitigation at the penalty phase. Dr. Ruth Latterner, a board-certified neuropsychologist who performed testing on Mr. Arbelaez at the request of collateral counsel, testified to her opinion that Mr. Arbelaez had a full scale IQ of 67, placing him in the range of mild mental retardation, and also suffered from organic brain damage, both of which preexisted the time of trial. While the lower court credited the testimony of State's expert Dr. Sonia Ruiz over the testimony of Dr. Latterner, the issue is not whether the lower court believed or disbelieved the expert testimony, but rather whether a reasonable jury would have, and whether the expert testimony, the lay testimony, and the mitigation presented at the original penalty phase, undermine confidence such that prejudice is established. Mr. Arbelaez submits that he has satisfied his burden and a resentencing should be ordered.

3. The lower court erred in admitting the State to call Lisa Wiley to testify to her observations of Mr. Arbelaez while on death row and to her opinion that he was not mentally retarded. Wiley is employed by the Department of Corrections and is charged with the responsibility of providing mental health services to death

row inmates. Wiley does not administer *Miranda* warnings before questioning death row inmates about their mental status, nor does she obtain consent from them before testifying. In this case, Wiley appeared voluntarily as a witness for the prosecution against the person who she is supposed to be providing mental health treatment. This scenario violates the Fifth, Sixth, and Fourteenth Amendments.

4. The lower court erred in summarily denying, without the required *Huff* hearing, a supplemental Rule 3.850 motion filed by Mr. Arbelaez based on the recent decisions in *Ring v. Arizona* and *Atkins v. Virginia.* The lower court determined that the motion was untimely and procedurally barred, both of which are legally incorrect rulings. Moreover, Florida's statute is unconstitutional under the Sixth Amendment, as explained in *Ring*. Mr. Arbelaez is also entitled to a jury trial to determine his eligibility for the death penalty due to mental retardation, in light of *Atkins*. The Court should reverse the summary denial on the basis of the procedural rulings, and, at a minimum, reverse and remand for a *Huff* hearing.

5. Mr. Arbelaez preserves his right at this time to avail himself of the new rule presently under consideration by the Court as affecting the issue of mental retardation. While a rule and its accompanying procedural provisions has not yet been formally adopted, and Mr. Arbelaez would have the ability to avail himself of the rule's provisions once the rule is issued and becomes effective, Mr. Arbelaez

preserves this issue at this time in an abundance of caution.

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. ARBELAEZ'S MOTION TO DISQUALIFY, AND THIS CASE SHOULD BE REMANDED FOR NEW PROCEEDINGS BEFORE AN UNBIASED TRIBUNAL.

Following relinquishment to the lower court of Mr. Arbelaez's case, a timely motion to disqualify Judge Leslie Rothenberg was filed by Mr. Arbelaez (S.R. ___).[4] As grounds for disqualification, Mr. Arbelaez alleged that while his case was pending in this Court, his counsel became aware of comments made by Judge Rothenberg in the capital case of Gerardo Manso. *See Manso v. State*, 704 So. 2d 516 (Fla. 1998). Following the reversal in *Manso* (a case also involving Judge Rothenberg), a motion to disqualify was filed in that case alleging that Judge Rothenberg had stated that if Manso was found competent to proceed, he "would be getting a jolt of electricity," a comment which Manso's counsel took to mean a sentence of death, since, at that time, Florida still employed the electric chair. The motion filed by Manso further alleged that Judge Rothenberg's comments regarding Manso's prospective electrocution as a humorous matter reflect an animus toward

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[4]The motion to disqualify was omitted from the record on appeal, and Mr. Arbelaez is seeking to supplement the record with this motion .

Manso. Mr. Arbelaez's motion further alleged that he was aware that the motion to disqualify filed by Manso had been granted by Judge Rothenberg, noting that the judge had written that the statements attributed to her were "taken out of context" and "mis-represented [sic]." Based on the comments that were alleged to have been made in Mr. Manso's case which resulted in Judge Rothernberg's disqualification, Mr. Arbelaez submitted below that the comments also reflected a bias against a capital defendant such as Mr. Arbelaez, who would have more than a reasonable fear that a judge who would make such a comment–no matter what the "context–cannot provide him with an unbiased court proceeding. Any death-eligible or death-sentenced person would have such a fear based on the comments which were made by Judge Rothenberg and which in fact resulted in her disqualification in Mr. Manso's case. The judge orally denied the motion to disqualify without permitting Mr. Arbelaez's counsel to even argue the merits of the motion (PCR294). No written order was ever entered as the judge indicated she had written "denied" on her copy of the motion (PCR303). Despite indicating that she would do an order (PCR304), the court never did.

Mr. Arbelaez submits that the motion to disqualify Judge Rothenberg was legally sufficient to warrant her disqualification based on the comments made in Mr. Manso's case alone, and also when those comments are taken into consideration

with the previous allegations of bias he had alleged in the proceeding resulting in the initial summary denial of his Rule 3.850 motion.[5] Mr. Arbelaez was and is entitled to a full and fair resolution of his postconviction issues, including a fair determination by a neutral detached judge. The aforementioned circumstances are of such a nature that they are "sufficient to warrant fear on [Mr. Arbelaez's] part that he would not receive a fair hearing by the assigned judge." *Suarez v. Dugger*, 527 So. 2d 191, 192 (Fla. 1988). The proper focus of the inquiry is on "matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his [or her] ability to act fairly and impartially." *Chastine v. Broome*, 629 So. 2d 293, 294 (Fla. 4th DCA 1993). In a capital case, a judge must be "especially sensitive to the basis for the fear, as the defendant's life is literally at

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[5]In that motion, Mr. Arbelaez alleged that he had a reasonable fear that Judge Rothenberg could not be fair and impartial because in 1992, she ran for a vacancy on the Dade Circuit Court bench on the platform of being a "tough prosecutor" and "crime fighter." Because of her campaign tactics, the Florida Association of Criminal Defense Lawyers urged Chief Judge Rifkind to assign Judge Rothenberg to the civil bench because of the perception created that she could not be fair and impartial in criminal cases. Mr. Arbelaez also alleged in that motion that Judge Rothenberg had been formerly employed as a high ranking homicide prosecutor at the Dade State Attorney's Office at the time it prosecuted Mr. Arbelaez and had a working relationship with the prosecutor trying Mr. Arbelaez's case. In its last opinion, Mr. Arbelaez acknowleges that the Court affirmed the denial of the recusal motion based on these allegations. *Arbelaez v. State*, 775 So. 2d 909, 918 (Fla. 2000). However, he submits that these allegations, when considered with the new ones, more than support a reasonable fear by Mr. Arbelaez that Judge Rothenberg cannot be fair and impartial.

stake, and the judge's sentencing decision is in fact a life or death matter." *Id*. *Accord Porter v. State*, 723 So. 2d 191 (Fla. 1998). Because of the facts alleged in Mr. Arbelaez's motion, "a shadow is cast upon judicial neutrality so that disqualification is required." *Chastine, supra*. The appearance of impropriety violates state and federal constitutional rights to due process and to an impartial tribunal, and the motion to disqualify should have been granted. This Court should order that the motion should have been granted, and remand this case back for assignment to a truly impartial tribunal so that the evidence can be considered by a judge free of bias and taint towards capital defendants.

ARGUMENT II

MR. ARBELAEZ RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTIONS.

Ineffective assistance of counsel claims are governed by the two-step analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish a Sixth Amendment violation of the right to the effective assistance of counsel, a defendant must establish both deficient performance and prejudice. *Id*. at 687. The standard of proof necessary to establish a Sixth Amendment violation under *Strickland* is less than a preponderance of the evidence. *Williams v. Taylor*, 120

S. Ct. 1495, 1519 (2000) ("[i]f a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of the criminal proceeding would have been different, that decision would be `diametrically different,' `opposite in character or nature,' and `mutually opposed' to our clearly established precedent . . ."). This Court reviews a claim of ineffective assistance of counsel *de novo*, as both the deficient performance and prejudice prongs of the *Strickland* test are mixed questions of law and fact. *See Stephens v. State*, 748 So. 2d 1028 (Fla. 1999). Underlying findings of fact are only due deference to the extent they are supported by competent and substantial evidence. *Id*. Under no circumstances, however, is a reviewing court obligated to accept a credibility determination made by a lower court. *See Miller-El v. Cockrell*, . *See Miller-El*, 123 S. Ct. 1029, 1041 (2003) ("A federal court can disagree with a state court's credibility determination . . .").

In order to properly evaluate Mr. Arbelaez's entitlement to relief, this Court must view this matter though the lens of what the constitution requires, and analyze this case from the fundamental principle that Mr. Arbelaez "had a right–*indeed a constitutionally protected right*–to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *Williams*, 120 S.Ct. At

1513. As with any waiver of a constitutional right, for Mr. Arbelaez to have relinquished this constitutional right to provide the jury with mitigating evidence, such relinquishment must be knowing, voluntary, and intelligent in order to be valid. *Faretta v. California*, 422 U.S. 806 (1975); *Deaton v. Dugger*, 635 So. 2d 4 (Fla. 1994); *State v. Lewis*, 838 So. 2d 1102 (Fla. 2002). Thus, for Mr. Arbelaez to be deemed to have relinquished his constitutional right to present mitigation to the jury, counsel must discharge his own concomitant constitutional duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigating evidence. *Williams*, 120 S. Ct. at 1524. *See also id.* at 1515 ("trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"). Indeed, an attorney has a "strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." *State v. Riechmann*, 777 So. 2d 342, 350 (Fla. 2000). *Accord Wiggins v. Smith*, 123 S. Ct. 2527 (2003).

In evaluating the deficient performance prong of *Strickland*, "[t]he failure to investigate and present available mitigating evidence is of critical concern along with the reasons for not doing so." *Riechmann*, 777 So. 2d at 350. The assessment of a putative tactical decision asserted by counsel is a "context-dependent consideration" of the challenged conduct and whether "the investigation supporting

counsel's decision not to introduce mitigating evidence of [the defendant's] background *was itself reasonable*." *Wiggins*, 123 S. Ct. at 2536 (emphasis in original). In assessing the reasonableness of the investigation into potential mitigation, the Supreme Court recently recognized that the standards set forth by the American Bar Association [ABA] standards provide the constitutional floor for a reasonable investigation. *Id*. at 2537-37. For example, obtaining a thorough social history report of the defendant's background is required in order for counsel in a capital case to perform within reasonable professional norms. *Id*. As the Supreme Court explained:

> The ABA Guidelines provide that investigation into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4(C), p. 93 (1989) (emphasis added). Despite these *well-defined norms*, however, counsel abandoned their investigation of petitioner's background after having acquired only a rudimentary knowledge of his history from a narrow set of sources. *Cf. id.* 11.8.6, p.133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p.4-55 ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing . . . . Investigation is essential to fulfillment of these functions").

Wiggins, 123 S. Ct. at 2537. Because of the overarching importance attached to a defendant's constitutional right to present mitigation evidence to a jury, "there would be few cases, if any, where defense counsel would be justified in failing to investigate and present a case for the defendant in the penalty phase of a capital trial." *Riechmann*, 777 So. 2d at 351.

In addition to deficient performance, Mr. Arbelaez also needs to establish, by less than a preponderance of the evidence, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In order to properly assess prejudice, the Court must consider the "totality of available mitigating evidence" offered both at the penalty phase and the postconviction hearing. *Wiggins*, 123 S. Ct. at 2542. *See also Williams*, *supra* (court is required to conduct an "assessment of the totality of the omitted evidence" and then to "evaluate the totality of the available mitigation evidence–*both* that adduced at trial, *and* the evidence adduced in the habeas proceeding"). If "the available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] moral culpability," *Wiggins*, 123 S.Ct. at 2544, then prejudice has been shown.

Because a proper prejudice analysis focuses on the impact that the unpresented mitigation, along with that presented at the penalty phase, might have had on the jury hearing the case, this Court's focus is on "whether the nature of the evidence is such that a reasonable jury may have believed it." *Light v. State*, 796 So. 2d 610, 617 (Fla. 2d DCA 2001). The Supreme Court has similarly explained that, in the related context of a materiality analysis attendant to a *Brady* claim,[6] the issue is whether *the jury* "would reasonably have been troubled" by the withheld information and whether "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." *Kyles v. Whitley*, 514 U.S. 419, 441-43 (1995). Indeed, in *Kyles*, the lower court which heard the evidence found the *Brady* material unworthy of belief. *See Kyles*, 514 U.S. at 471 (Scalia, J., dissenting). The *Kyles* majority, however, determined that this credibility finding was not fatal to the *Brady* analysis because the lower court's post-trial credibility determination "could [not] possibly have effected *the jury's appraisal* of [the witness'] credibility *at the time of Kyles's trials*." *Id*. at 450 n.19 (emphasis added). As the materiality test for a *Brady* claim is identical to the prejudice test for a *Strickland* claim, *see Strickler v. Greene*, 527 U.S. 263 (1999), the *Kyles* analysis applies with equal force to a *Strickland* prejudice analysis. Thus,

[6]*See Brady v. Maryland*, 373 U.S. 83 (1963).

the lower court's capacity to determine witness credibility–and this Court's deference thereto–is much more proscribed when the issue under review is examining whether particular testimony would have had an effect *on a jury*. Unlike, example, a situation of a recantation, the question to be addressed in a proper prejudice or materiality analysis is *not* whether the judge in postconviction "believes the evidence presented . . . but whether the nature of the evidence is such that a reasonable jury may have believed it." *Light*, 796 So. 2d at 617.

At the evidentiary hearing, Mr. Arbelaez established the allegations on which this Court ordered an evidentiary hearing. *See Arbelaez v. State*, 775 So. 2d 909, 912-13 (Fla. 2000). With respect to counsel's failure to investigate and present mental health evidence at the penalty phase, including expert testimony explaining his epileptic condition, the fact that Mr. Arbelaez has organic brain damage, and mental retardation, including a full scale IQ of 67, Mr. Arbelaez submits that the evidence adduced below demonstrates that counsel failed to comport with the norms of reasonable performance as explained in *Wiggins*. At the penalty phase, Mr.Diaz called only one "expert" witness, Dr. Raul Lopez (R1005-16). Dr. Lopez was not retained as an expert for the purpose of a penalty phase mitigation evaluation, and was never asked to do any such evaluation. Instead, he was a medical doctor and neurologist who had previously treated Mr. Arbelaez for

epilepsy (R1006). He had not had direct contact with Mr. Arbelaez since 1984, some seven years before the penalty phase proceeding (R1015). The evidentiary hearing testimony of Dr. Merry Haber, Dr. Ruth Latterner, and even Lisa Wiley, demonstrates counsel's deficiency in failing to seek a mental health evaluation of Mr. Arbelaez.

Despite counsel's clear duty to investigate, Mr. Diaz never asked for and failed to retain the services of a competent mental health expert for purposes of conducting a mitigation evaluation. Instead, he determined that based on the competency evaluation performed by Dr. Castiello and conversations with Dr. Castiello, that inquiry outside the area of epilepsy did not need to be pursued. However, the law is clear that the focus of a competency evaluation and a mitigation evaluation is distinct. *See Rutherford v. State*, 727 So. 2d 216, 222 n.3 (Fla. 1998) ("We of course recognize that competency evaluations are different from mitigation evaluations, and in now way mean to imply here that one can necessarily take the place of the other"). Indeed, a mental health evaluation focusing on mitigation "is fundamental in defending against the death penalty." *Bruno v. State*, 838 So. 2d 485 (Fla. 2002) (Anstead, J., concurring in part and dissenting in part). *Accord Wiggins*, *supra*.

What makes Mr. Diaz's failure to obtain a mental health evaluation for

purposes of mitigation even more unreasonable is that prior counsel, Assistant Public Defender Thaxton, *had* in fact retained an expert for the penalty phase, Dr. Merry Haber. At the evidentiary hearing, Dr. Haber explained that in May, 1988, she was appointed to conduct an evaluation of Mr. Arbelaez at the behest of Mr. Thaxton (PCR556). Her work on the case encompassed the time period of June, 1988, through May, 1989 (*Id*.). The purpose of her evaluation was essentially to assess Mr. Arbelaez's competency (PCR558). She did have notes from her evaluations of Mr. Arbelaez (*Id*.). Her notes reflected, for example, that Mr. Arbelaez revealed to her his background in Medellin, including sleeping in a church where he worked, that he was unhappy there, that he drank poison two times, that he had five years of schooling, a medical history of epilepsy, his work as a dishwasher in Miami, and admitted use of marijuana in the past (PCR558-59). She did not classify this first evaluation as in-depth, but rather a "very brief" screening evaluation "to see if there was anything that was dramatic" and to see if he was competent (PCR559). Her standard procedure after the evaluation would be to talk with the attorney about the results (PCR560).

At some point during her involvement with the case, Dr. Haber's bill reflected that she had also reviewed Mr. Arbelaez's jail medical records, copies of which were in her file (PCR560-62). The records revealed notations that Mr.

Arbelaez had a seizure disorder and a "psych disorder" (PCR561). The jail medical records also revealed that Mr. Arbelaez had two previous suicide attempts (PCR562).

Following her initial evaluation in June, 1988, Dr. Haber saw Mr. Arbelaez again in August of 1988 and May of 1989 (PCR563). She had no specific recollection of why she went to see him again, but believed that Mr. Thaxton had requested follow-up evaluations due to continuing problems Mr. Arbelaez was having with seizures (PCR564). Following those visits with Mr. Arbelaez, she had no further involvement in the case until she had been contacted by collateral counsel (PCR566). She never spoke with Mr. Diaz about her work with Mr. Arbelaez's case (*Id*.). Based on her knowledge about Mr. Arbelaez in light of her evaluations, had she spoken with Mr. Diaz she would have recommended a neuropsychological and neurological evaluation due to his seizure disorder, as well as "complete personality testing and background evaluation with the family and educational history, all those kinds of things that one looks for in mitigation" (PCR566-67). Such evaluations in capital cases are "extremely complicated" and "extremely time-consuming" due to the fact that they must be thorough and detailed, involving family histories, interviews with family member and teachers, past medical records, educational records and "any information at all related to

anyone is what you are looking for" (PCR568). In her experience, generally this information is provided to a mental health expert by an investigator hired by the lawyer, and then "hours and hours" are spent coordinating the information and "trying to piece together this person's life and all of the effects on the person's life" (*Id*.). She did not have any of this information in Mr. Arbelaez's case (*Id*.). Had Mr. Diaz asked her to do this in Mr. Arbelaez's case, she would not have had any problem working with him (PCR569). Mr. Diaz, however, conceded that he had not even known of Dr. Haber's involvement in Mr. Arbelaez's case, a fact which speaks volumes about the intensity of his efforts to investigate potential mitigation issues; Mr. Diaz had spoken with Mr. Thaxton about the case, obtained his file, and clearly could and should have at least inquired of Mr. Thaxton about what efforts, if any, had been made with respect to the issue of potential mitigation.

Mr. Diaz's failure to even have the knowledge that prior counsel had obtained the services of a mental health expert who had seen his client on several occasions is itself deficient performance. As noted above, Dr. Haber had plenty of information to share with Mr. Diaz about his client, and also would have made further recommendations to him had she been asked to continue working on the case and prepare a penalty phase mitigation case. Indeed, Mr. Diaz himself acknowledged that he would have had no reason not to have spoken with Dr.

Haber at the time of Mr. Arbelaez's trial (PCR475), and that if she had useful information to be considered in terms of potential mitigating circumstances for Mr. Arbelaez, "of course" he would have called her to testify at the penalty phase (*Id*.). He had no independent recollection of "what we did, if anything" with respect to Dr. Haber (*Id*.).

The lower court's view of the evidence that Dr. Haber "saw nothing to warrant further investigation" (Order at 16), is simply not supported by Dr. Haber's complete testimony. As noted above, based on her knowledge about Mr. Arbelaez in light of her evaluations, had she spoken with Mr. Diaz she would have recommended a neuropsychological and neurological evaluation due to his seizure disorder, as well as "complete personality testing and background evaluation with the family and educational history, all those kinds of things that one looks for in mitigation" (PCR566-67). Thus, the lower court's conclusion that trial counsel's failure to contact Dr. Haber was meaningless because it would have borne no useful information is simply not supported by competent and substantial evidence.

Not only did trial counsel fail to even have knowledge of the rudimentary and easily-discoverable fact that his client had been seen three times by a mental health expert, his efforts at independent investigation were likewise constitutionally lacking. He failed to even engage the services of an investigator to assist him in

Mr. Arbelaez's case. The only specifics he knew about Mr. Arbelaez's background that he could recall knowing included the general facts that Mr. Arbelaez had been an altar boy, was poor, and did not have an adequate education (PCR541). Mr. Diaz recalled only speaking with one member of Mr. Arbelaez's family, his brother Jorge (PCR526). Jorge was the same person who spoke with Miami Detective Eddie Martinez with respect to guilt phase issues. It was from these conversations that Mr. Diaz would have tried to get any information about Mr. Arbelaez (PCR527). He never went to Colombia himself, nor engaged the services of an investigator in Miami to go to Colombia, or attempt to find an investigator in Colombia to assist him. He relied solely on Mr. Arbelaez's family to find mitigation for him, including records regarding previous psychiatric treatments and hospitalizations in Colombian mental hospitals. (PCR531). This too establishes deficient performance. Mr. Arbelaez's family had no constitutional duty to investigate, but Mr. Diaz did. To the extent that the little effort that Mr. Diaz made can be classified as "investigation," the knowledge he had gained through discussions with Mr. Arbelaez was no more than "rudimentary" and no further efforts by him were undertaken to investigate potential mitigating circumstances in either the mental health arena or background and social history. *Wiggins*, 123 S. Ct. at 2537 ("Despite these well-defined norms, however, counsel

abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources"). Mr. Diaz had a constitutional duty to investigate and provide all available records to a mental health expert in order to render reasonably professional assistance. *Id*. *See also Wallace v. Stewart*, 184 F. 3d 1112, 1116 (9th Cir. 1999) ("Does an attorney have a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request? The answer, at least at the sentencing phase of a capital trial, is yes"); *Bean v. Calderon*, 163 F. 3d 1073, 1079 (9th Cir. 1998) ("When experts request necessary information and are denied it, when testing requested by expert witnesses is not performed, and when experts are placed on the stand with virtually no preparation or foundation, a capital defendant has not received effective penalty phase assistance of counsel"); *Glenn v. Tate*, 71 F. 3d 1204, 1210 n.5 (6th Cir. 1995) ("defense counsel should obviously have worked closely with anyone retained as a defense expert to insure that the expert was fully aware of all facts that might be helpful to the defendant").

The evidence below clearly established that an independent and persistent investigation into potential mitigation in Colombia would have borne fruit with respect to Dr. Haber's ability to be useful at Mr. Arbelaez's penalty phase (had

counsel known that Dr. Haber had even evaluated his client three times). For example, collateral counsel was able to obtain numerous records from Colombia establishing, *inter alia*, Mr. Arbelaez's history of mental problems (above and beyond epilepsy), mental hospitalizations where he would receive electroshock therapy, three suicide attempts, and depression. These records were provided to Dr. Haber, who testified unequivocally that while this information might not have led to to be able to conclude that statutory mitigation existed, the records, along with her evaluation, provided her with more than an ample basis to find nonstatutory mitigation. Dr. Haber received and reviewed numerous materials relating to Mr. Arbelaez, including an affidavit from one of his teachers in Colombia, an employer at Tony Roma's in Miami, a letter from a psychiatrist in Colombia, a letter from Mr. Arbelaez's mother, a letter from social services in Colombia, Mr. Arbelaez's sixth grade records, a report from Dr. Castiello, a deposition and of Dr. Ruth Latterner (an expert obtained by collateral counsel), Department of Corrections records, and some trial testimony (PCR572-73). All of these are records a mental health expert routinely relies upon in the course of practice (PCR577). The background materials were introduced into evidence as Defense Exhibit J (PCR581), and Dr. Haber's notes and file introduced as Defense Exhibit K (PCR585). Based upon her evaluation and review of the additional

materials, Dr. Haber would have been able to explain Mr. Arbelaez's psychiatric history in Colombia, suicide attempts, and the fact that he received electroshock therapy while hospitalized in Colombia (PCR 586). Mr. Arbelaez's teacher, who remembered him from the time he was 13 years old, reported a poor educational performance and inability to complete assigned work (*Id*.). Mr. Arbelaez was frequently alone and did not engage with other students, was sometimes nonresponsive and "looked sad" (*Id*.). The teacher believed that Mr. Arbelaez had mental problems, but that he was not a disciplinary problem (*Id*.). In fact, the teacher recommended to Mr. Arbelaez's sister that he be seen by a psychologist (PCR587). One of the documents she reviewed was from one of the actual doctors who treated Mr. Arbelaez in Colombia for suicide attempts and depression, and confirmed that he had received electroshock treatments (*Id*.). This information verifies what Mr. Arbelaez had told her regarding his past depression and suicide attempts (*Id*.). The fact that Dr. Haber now knows about Mr. Arbelaez having received shock treatment in Colombia further buttresses her recommendation that a neuropsychologist evaluate him (PCR589). She confirmed that back in 1989, she did have information that Mr. Arbelaez suffered from depression and had mental problems, and these records confirm this (*Id*.). While she could not speculate back to the time of trial about whether Mr. Arbelaez may

have qualified for statutory mitigation, the information she has reviewed clearly qualified him for nonstatutory mental health mitigation (PCR590). For example, she clearly could have testified that Mr. Arbelaez suffered from depression and a depressive disorder (PCR602-03). Dr. Haber also confirmed that the Department of Corrections has diagnosed Mr. Arbelaez with a psychotic disorder, atypical psychosis, and organic psychosis (PCR603). While Dr. Haber did not believe that at the time she saw Mr. Arbelaez he was actively psychotic in terms of hallucinatory behavior, he did clearly suffer from a depressive disorder which "impacts on judgment and insight" (PCR604). Because Mr. Diaz conducted no independent and reasonable investigation, nor did he even know that Dr. Haber had been appointed as an expert in the case, none of this information was discovered, provided to an expert, and presented to Mr. Arbelaez's jury.

Dr. Haber's testimony also unequivocally established that, had she been contacted by Mr. Diaz, she would have requested a neuropsychological evaluation of Mr. Arbelaez in light of his seizure disorder.[7] At the evidentiary hearing, Mr.

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[7]Contrary to the lower court's conclusion that Dr. Haber would not have requested such an evaluation back in 1988 or 1989 (Order at 12), her testimony reveals otherwise (PCR566-67). The work she performed on the case in 1988 and 1989 was not what she would do had she been asked to do a full mitigation evaluation (PCR667). Had she been asked to do such an evaluation, she would have requested that the attorney or investigator find and obtain all relevant records, including the records regarding Mr. Arbelaez's hospitalization in Colombia

Arbelaez presented the testimony of Dr. Ruth Latterner, who performed a battery of neuropsychological tests at the request of collateral counsel, tests which Dr. Haber recognized as the type of testing she would have requested had Mr. Diaz contacted her. Dr. Latterner testified that, based on her evaluation of Mr. Arbelaez, including an extensive battery of tests, Mr. Arbelaez suffered from organic brain damage and mild mental retardation. While the lower court's order goes to great lengths to discredit Dr. Latterner–limited exclusively to her conclusions of mental retardation, however, not her conclusions about organic brain damage–the issue here is not whether the postconviction court believed or disbelieved Dr. Latterner. The issue is that Dr. Haber recognized that the testing conducted by Dr. Latterner was very thorough and reliable testing, and is the type of testing that she would have recommended. And based on Dr. Latterner's testing–and even the testing conducted by the State's expert Dr. Ruiz–Dr. Haber would have been able to testify at a penalty phase that Mr. Arbelaez was functioning "at best on a borderline intellectual level and at worst on the level of mild retardation" with a full scale IQ of 67 (*Id*.). It is a "very close call" as to whether he is borderline or mentally retarded (PCR606).

As noted above, the vast majority of the lower court's order was dedicated

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(PCR673).

to assaulting Dr. Latterner and her testing, relying on the State's expert, Dr. Ruiz, to establish Dr. Latterner's lack of credibility.[8] However, a review of the record does not provide a competent basis for extolling the opinions of Dr. Ruiz to the exclusion of Dr. Latterner's opinions. Of course, it must be first noted that all of Mr. Arbelaez's witnesses were available to testify at the penalty phase had counsel conducted the requisite diligent investigation. Assuming that trial counsel had noticed his intention to put on mental health mitigation at the penalty phase and the State sought an expert of its own, Dr. Ruiz was not a licensed psychologist at the time of Mr. Arbelaez's penalty phase, and thus would not have been available. Just as a defendant must establish the availability of witnesses in order to establish a claim of ineffectiveness, so must the State if it chooses to argue that a defense mitigation case would have prompted a rebuttal case from the State. Aside from

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[8]Indeed, Mr. Arbelaez would note that in its efforts to discredit Dr. Latterner, the lower court judge relied on evidence which the court itself had not ruled admissible. The State attempted to introduced some documents downloaded off of a computer which the State believed were drawings made by Mr. Arbelaez while on death row (T775). Mr. Arbelaez's counsel objected that no predicate had been laid for the introduction of the documents (*Id*.). The State represented to the lower court that it would link up by another witness the fact that Mr. Arbelaez has access to a computer in his death row cell (PCR778). The court expressly ruled that if the State did not lay the proper predicate with a subsequent witness she would disregard the testimony about these documents (PCR779). At no time did the State provide the testimony it promised, yet the lower court discussed the inadmissible documents as support for her conclusion that Dr. Latterner was not credible (Order at 8).

her lack of availability, Dr. Ruiz had questionable educational credentials (matters which would have been brought to a jury's attention through cross-examination had she testified at the penalty phase). The criticisms leveled by the lower court at Dr. Latterner apply with equal or greater force to Dr. Ruiz. For example, the lower court discredited Dr. Latterner for not considering information other than her testing, likewise it was of no import to Dr. Ruiz to know about the extensive Department of Corrections documents revealing a consistent diagnosis of major mental disorders and administration of antipsychotic medication. Dr. Ruiz was unaware that Mr. Arbelaez has a long history of documented hallucinations. When asked about these diagnoses, Dr. Ruiz simply stated that she saw no signs of any disorders at the time she saw him. Of note is the fact that Dr. Ruiz is the only person who testified who found no evidence whatsoever of any disturbance or disorder, in contradiction to Drs. Haber and Latterner, as well as Lisa Wiley and the Department of Corrections mental health staff (as set forth in the documentary evidence introduced below).

As this Court cannot but conclude based on a *de novo* review of the facts adduced at the evidentiary hearing, there was an absence of the requisite diligent investigation into mitigation that the Constitution commands. And although the lower court's order essentially addresses only deficient performance, not prejudice,

Mr. Arbelaez asserts that counsel's deficiencies meet the appropriate standard for prejudice under *Strickland*. Had counsel investigated, substantial evidence of mitigation was available and there is more than a reasonable probability that confidence is undermined in the result of the penalty proceeding. To combat the terrible factual scenario presented at the guilt phase, trial counsel presented only feeble evidence that Mr. Arbelaez was a "good guy," that he had been treated for epilepsy in the past, and that he had no significant prior criminal history. This evidence pales in comparison, both quantitatively and qualitatively, to the compelling mitigation presented at the evidentiary hearing. Certainly, in conjunction with that evidence, the mitigation presented below establishes prejudice. The jury could and should have been presented with evidence regarding, *inter alia,* Mr. Arbelaez's extensive mental health history in Colombia, his unrefuted suicide attempts by poisoning and hanging, his unrefuted depressive disorder, his organic brain damage and its interaction with his epilepsy, his mild mental retardation,[9] his unrefuted history of receiving electric shock therapy while in Colombian mental hospitals, his unrefuted family history including significant poverty, malnutrition, an

[9]Even if the lower court's conclusion rejecting Dr. Latterner's opinion that Mr. Arbelaez is mildly mentally retarded due to his adaptive functioning, the unrefuted evidence of his low IQ of 67 is still mitigation regardless of whether Mr. Arbelaez meets or does not meet, in the view of the lower court, the definition of mental retardation.

abusive home environment, a lack of parental love and affection, drug usage, and lack of adequate medical care as a child. Mr. Diaz's errors "had a pervasive effect, altering the entire evidentiary picture [at the penalty phase of Mr. Arbelaez's trial]." *Coss v. Lackawanna County District Attorney*, 204 F. 3d 453, 463 (3d Cir. 2000). Any of "the diverse frailties of humankind," *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), which might counsel in favor of a sentence less than death, *Lockett v. Ohio*, 438 U.S. 586 (1978), are mitigating, and, in this case, the lack of a true adversarial testing resulted in a jury recommendation of death based on a complete lack of understanding of Mr. Arbelaez and his history. Relief in the form of a resentencing is warranted.

ARGUMENT III

THE LOWER COURT ERRED IN PERMITTING LISA WILEY TO RENDER OPINIONS ON THE ISSUE OF MR. ARBELAEZ'S MENTAL RETARDATION, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

Prior to the evidentiary hearing, the State noticed Mr. Arbelaez of its intention of calling as a witness Lisa Wiley, who is employed by the Florida Department of Corrections as a "psychological specialist" assigned to the death row unit. Prior to

her testimony, Mr. Arbelaez moved[10] to exclude Wiley's testimony on several grounds, the relevant one for purposes of appeal being that under the Fifth Amendment, her testimony should be excluded on grounds of privilege, that her opinions and observations of Mr. Arbelaez's behavior on death row were the result of a custodial interrogation without administration of *Miranda* warnings,[11] and that Mr. Arbelaez did not consent to her testimony.

At a hearing on the motion, Mr. Arbelaez argued, among other things, that under *Estelle v. Smith*, 451 U.S. 454 (1981), Wiley's testimony should be excluded because she never, by her own admission, administers *Miranda* warnings when engaging death row inmates in conversations related to mental health treatment, and never informs them that what they say and what she observes and opines about their mental health can and will be used against them in court (PCR828-29). The environment in which Wiley engages capital defendants is certainly a custodial setting in which every movement, from yard time to showers, is strictly monitored by the Department of Corrections (PCR831). While Mr. Arbelaez does have the ability to refuse to speak with Wiley, Mr. Arbelaez argued that his refusals to speak

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[10]The motion to exclude Wiley's testimony was likewise omitted from the record, and is one of the documents that Mr. Arbelaez will seek to have the record supplemented with.

[11]*Miranda v. Arizona*, 384 U.S. 436 (1966).

with her were also being elicited by the State and used by Wiley as a basis for her opinion that Mr. Arbelaez is not mentally retarded (PCR829). In terms of Wiley's ability to testify to her observations of Mr. Arbelaez, counsel also argued that Mr. Arbelaez certainly could not refuse to be kept in a cell where he had no choice but to be "observed" by correctional staff as well as Wiley (PCR831).

The State argued that the death row setting was not a coercive atmosphere and that Wiley was not obligated to administer *Miranda* warnings because she is not a law enforcement officer and was not eliciting any statements about the crime (PCR826-27). The State also argued that any issue had been waived because Mr. Arbelaez had put his mental health at issue in his postconviction proceedings (PCR826).

The Court denied Mr. Arbelaez's motion, concluding that Mr. Arbelaez had waived any privilege by putting his mental health at issue (PCR832). Additionally, the court ruled that *Miranda* warnings were not required because Wiley's interactions with Mr. Arbelaez were not interrogations despite the fact that he is "arguably" in custody and therefore in a coercive environment, and that he had a right not to speak with her (PCR833).

Mr. Arbelaez submits that the lower court erred in denying his motion. In *Miranda*, the Supreme Court acknowledged that "the Fifth Amendment privilege is

available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda*, 384 U.S. at 467. Hence, *Miranda* held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id*. at 444. Thus, a person in custody must receive certain warnings before any official interrogation, including that he has a "right to remain silent" and that "anything said can and will be used against the individual in court." *Id*. at 467-69.

The "considerations calling for the accused to be warned prior to custodial interrogation apply with no less force" to the testimony eventually admitted from Wiley in this case. *Estelle*, 451 U.S. at 467. Here, when Wiley appeared *voluntarily* for the State in a proceeding against Mr. Arbelaez, her "role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." *Id.* During all his interactions with Wiley, including his refusals to meet with her which she later employed as a basis for her opinions about Mr. Arbelaez's mental state, Mr. Arbelaez was "assuredly . . . `faced with a phase of the adversary system' and was 'not in the

presence of [a] [person] acting solely in his interest.'" *Id*. (citation omitted). Moreover, Mr. Arbelaez did not "voluntarily consent" to being required to be placed in a position where he could be continually observed, and because he was never "informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to [Wiley] to establish [that he was not mentally retarded]." *Id*. at 468. Because the safeguards of the Fifth Amendment were not satisfied here, Wiley's testimony should be excluded, and as a result, Mr. Arbelaez's due process rights were violated.

Due process was also violated in this situation because Mr. Arbelaez is not able to have his own representatives observe and communicate with him in the same fashion as Wiley, who then can become an agent of the State when the State so chooses.[12] By virtue of its exclusive custody and control of Mr. Arbelaez, the State reaps an unwarranted windfall in this situation. This violates due process and skews the balance of fairness in the proceedings toward the State and against the defendant. *See Dillbeck v. State*, 643 So. 2d 1027, 1030 (Fla. 1994) ("No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved").

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[12]The State did seek and obtain a mental health expert to conduct an evaluation of Mr. Arbelaez, thus the State was certainly not disadvantaged in its ability to present evidence to refute Mr. Arbelaez's mental health evidence.

Finally, the Sixth Amendment here was violated because at no time when Wiley was conducting her interviews with Mr. Arbelaez, without any of the Fifth Amendment protections described in *Miranda*, was Mr. Arbelaez's counsel notified, nor was Mr. Arbelaez told he had the right to the assistance of counsel during his interactions with Wiley. "'Because [a] layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege,' the assertion of that right `often depends upon legal advice from someone who is trained and skilled in the subject matter.'" *Estelle*, 451 U.S. at 471 (citation omitted). Mr. Arbelaez should therefore not have been "forced to resolve such an important issue without the `guiding hand of counsel.'" *Id.* (citation omitted). Relief is warranted.

ARGUMENT IV

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. ARBELAEZ'S SUPPLEMENTAL RULE 3.850 MOTION

On September 9, 2002–subsequent to the evidentiary hearing and before the lower court entered its order denying relief following the hearing–Mr. Arbelaez filed a supplemental Rule 3.850 motion raising claims pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002), and *Atkins v. Virginia*, 122 S. Ct. 2242 (2002), which had just been released by the Supreme Court a few months earlier (PCR211-243). Without

a response from the State, and without conducing Mr. Arbelaez the opportunity to argue his motion, *see Huff v. State*, 622 So. 2d 982 (Fla. 1993), the lower court entered an order denying the motion as untimely and procedurally barred (PCR245-50).

The lower court erred in denying Mr. Arbelaez's motion without providing him an opportunity to argue his motion, in violation of *Huff, supra*. Moreover the lower court erred in denying the motion as untimely and procedurally barred. Both cases on which Mr. Arbelaez relied had been decided only a few months earlier, and instead of waiting a year to file a new motion–as the law entitles him to do–he chose to file his claims earlier given that the case was still pending before the lower court and the court had not yet issued an order after the evidentiary hearing. Thus, Mr. Arbelaez's motion was neither untimely nor procedurally barred. This Court has never procedurally barred such claims in the time since both *Ring* and *Atkins* were decided, and application of such a bar to Mr. Arbelaez would not be adequate or consistent. *See See Johnson v. Mississippi*, 486 U.S. 578, 587 (1988).

On the merits, Mr. Arbelaez argued below and argues here that Florida's capital sentencing statute is unconstitutional and that his Sixth Amendment right to trial by jury was violated in accordance with the reasoning set forth in *Ring* (PCR219 *et. seq.*). Florida's statute does not require that the facts used to render a

defendant death-eligible be included in the indictment, nor does the statute require that those facts be found beyond a reasonable doubt by a unanimous jury. Under the reasoning of *Ring* and the subsequent decision in *Sattazahn v. Pennsylvania,* 123 S.Ct. 732 (2003), where the Supreme Court "clarified what constitutes an "element" of an offense for purposes of the Sixth Amendment's jury-trial guarantee," *United States v. Acosta-Martinez*, 2003 U.S. Dist. LEXIS 9161 at *6 (D. C. Puerto Rico May 23, 2003), Mr. Arbelaez submits that the holding of *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001), cannot stand, and Florida's statute suffers from the same constitutional flaw as Arizona's statute.

In *Ring*, the Supreme Court noted that Arizona was one of five states that committed sentencing factfinding and the ultimate sentencing decision to judges. *Ring*, 536 U.S. at 609 n. 6 (the other four were identified as Colorado, Idaho, Montana, and Nebraska). The Supreme Court further noted that four additional states had hybrid capital sentencing schemes. *Id.* (Alabama, Delaware, Florida, and Indiana). Subsequently, it has been recognized that additional hybrid states were overlooked by the United States Supreme Court. *See Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002)(under Nevada law, the judge determines the sentence in a capital case if the jury is unable to return a unanimous verdict imposing either a death or a life sentence); *State v. Whitfield*, 2003 WL 21386276 (Mo. June 17,

2003)(under Missouri law, the judge determines the sentence in a capital case if the jury is unable to return a unanimous verdict imposing either a death or a life sentence). Even in a state with jury sentencing in capital cases, error has been found. *See Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002)

Not surprisingly, the states labeled by the United States Supreme as being in the same category as Arizona have generally recognized that Sixth Amendment error pervades their capital sentencing schemes. *State v. Fetterly*, 52 P.3d 875 (Idaho 2002)(in light of *Ring*, death sentence vacated and remanded for further proceedings); *State v. Gales*, 658 N.W.2d 604, 624 (Neb. 2003)("It is clear that the jury made no explicit determination that any of the statutory aggravating circumstance existed in this case. Instead, that determination was made by a judge."); *Woldt v. People*, 64 P.3d 256 (Colo. 2003)(death sentences vacated in consolidated direct appeal for two of the three individuals sentenced to death under 1995 scheme providing for three-judge panel to conduct capital sentencing factfinding and cases remanded for the imposition of life sentences); *State v. Ring*, 65 P.3d 915 (Ariz. 2003)(in a consolidated case involving those on Arizona's death row, Arizona Supreme Court established parameters for evaluating each case for

harmless error analysis).[13] Each of these states has found that the necessary facts under *Ring* to render the defendant death eligible were not made by the jury at the guilt phase of the capital case.

The Missouri Supreme Court has recently found that its death sentencing scheme was a "hybrid" scheme because the judge imposed the sentence whenever the jury could not return a unanimous verdict. That Court explained that in those circumstances *Ring* was violated because the first three steps of the Missouri procedure for determining death-eligibility had not been decided beyond a reasonable doubt by a jury. *State v. Whitfield*, 2003 WL 21386276 (Mo. June 17, 2003). The three steps in Florida's statute, like the steps in Missouri, also "require factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible." Step 1 in the Florida procedure requires determining whether at least one aggravating circumstance exists. As in Missouri, Colorado, Indiana, Delaware, Arizona, and Nevada, this step involves a factual determination which is a prerequisite to rendering the defendant death-eligible. Step 2 in the Florida procedure requires determining whether "sufficient" aggravating circumstances exist to justify imposition of death. Missouri's Step 2 is

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[13]These opinions show disparity in application of harmless error analysis to the Sixth Amendment violation defined by *Ring*. *See also Esparza v. Mitchell*, 310 F.3d at 421.

indistinguishable, requiring a determination of whether the evidence of all aggravating circumstances "warrants imposing the death sentence." This step is obviously not the ultimate step of determining whether death will or not be imposed because other steps remain. Rather, in Florida as well as Missouri, this step involves a factual determination which is a prerequisite to rendering a defendant death-eligible. Step 3 in the Florida procedure requires determining whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Missouri's and Colorado's Step 3, as well as Nevada's and Arizona's Step 2, are identical, requiring a determination of whether mitigating circumstances outweigh aggravating circumstances. Again, this step is not the ultimate determination of whether or not to impose death because an additional step remains. Rather, in Florida as well as these other states, this step involves a factual determination which is a prerequisite to rendering a defendant death-eligible. In Florida, as in Missouri and the other states discussed in *Whitfield*, the sentencer does not consider the ultimate question of whether or not to impose death until the eligibility steps are completed. After the first three steps, the Florida statute directs the jury to determine, "[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." Section 921.141(2)(c), Fla. Stat. The structure of the statute clearly establishes that the steps which occur

before this determination are necessary to make the defendant eligible for this ultimate determination, that is, to render the defendant death-eligible. *See Bottoson*, 813 So. 2d at — (Pariente, J., concurring in result only) ("The death penalty for first-degree murder cannot be imposed unless and until additional factual findings are made as to the existence of aggravators that outweigh the mitigators–just as in Arizona"). Because Mr. Arbelaez submits that *Ring* is applicable to him, *see Witt v. State*, 387 So. 2d 922 (Fla. 1980), his death sentence should be vacated.

Mr. Arbelaez also argued below and argues now that under a proper application of *Ring* to *Atkins*, the issue of mental retardation is an element of capital murder on which the State bears the burden of proof and which must be submitted to a jury. Under *Ring*, the Sixth Amendment requires that any finding of fact that makes a defendant eligible for the death penalty must be found beyond a reasonable doubt. *Atkins* held that the Eighth Amendment prohibits a mentally retarded defendant from being sentenced to death. Thus, a mentally retarded defendant is constitutionally ineligible to be sentenced to death. Because mental retardation is now a factual issue upon which a defendant's death eligibility turns, "that fact ... must be found by a jury beyond a reasonable doubt." *Ring*, 122 S. Ct. at 2439. Based on the forgoing arguments, Mr. Arbelaez submits that he is entitled to relief, and in terms of the mental retardation issue, a jury trial should be ordered to

comport with the requirements of the Sixth Amendment in accordance with *Atkins* and *Ring*. In the alternative, this Court should reverse the erroneous summary denial by the lower court and remand for a *Huff* hearing.

ARGUMENT V

MR. ARBELAEZ ASSERTS HIS RIGHT TO AN ABEYANCE IN ORDER TO PROPERLY ASSESS HIS MENTAL RETARDATION IN LIGHT OF PROPOSED RULE OF CRIMINAL PROCEDURE 3.203

This Court is presently considering a new proposed Rule 3.203 to provide a procedure for defendants to raise issues of mental retardation in light of the recent decision in *Atkins v. Virginia*, 122 S. Ct. 2242 (2002). *See* Case No. SC03-685. Part of the proposed rule includes a mechanism by which a defendant like Mr. Arbelaez can avail himself of the *Atkins* decision. One of the provisions of proposed Rule 3.203 allows a defendant with an issue of mental retardation whose Rule 3.850 motion was denied and is on appeal may file, within 60 days of the effective date of the new rule, a motion to relinquish jurisdiction for a mental retardation determination in accordance with the procedures that the Court will outline in the final rule. This Court is presently considering numerous arguments from interested parties as to the proper procedure for such retardation hearings, including provisions for appointment of experts, burden of proof, allocation of the

burden of proof, and whether the determination should be made by a judge or a jury. While he recognizes that the rule is still a proposed one, Mr. Arbelaez at this time preserves any right to request such a determination, with a proper motion as detailed in the rule, once the Court issues a final rule and it becomes effective.[14]

CONCLUSION

Based upon the record and the arguments presented herein, Mr. Arbelaez respectfully urges the Court to reverse the lower court, remand for a new evidentiary hearing before an impartial tribunal, remand for a *Huff* hearing as to the merits of his supplemental Rule 3.850 motion, and/or vacate his unconstitutional death sentence.

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[14]While mental retardation was at issue at the evidentiary hearing below, it was addressed solely in terms of mitigation, with the burden of proof resting with Mr. Arbelaez and without any of the procedural protections for both sides that the Court is presently considering. The issue of retardation in terms of potential mitigation as opposed to the Eighth Amendment issue is distinct, and even the State below conceded that the issue of whether Mr. Arbelaez is mentally retarded for Eighth Amendment purposes "is not an issue right now" and "might be important later only" (PCR600-01). These arguments were correct, as *Atkins* had not been decided at that time.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Leslie Campbell, Office of Attorney General, 1515 North Flagler Drive, Suite 9000, West Palm Beach, Florida, this 10th day of September, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is typed in Times New Roman 14 point font, in compliance with Fla. R. App. P. 9.210(a)(2).

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