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

REPLY BRIEF OF APPELLANT

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REPLY TO STATEMENT OF THE CASE AND FACTS

Mr. Arbelaez takes issue with a number of the generalizations offered by the Appellee in the guise of "facts" adduced during the testimony at the evidentiary hearing. While Mr. Arbelaez relies on the transcripts of the hearing as the best evidence of the specific testimony, he does submit the following in reply to the Appellee's view of the testimony.

Referring to trial attorney Diaz's testimony, the Appellee writes that "nothing" in Diaz's discussions with Mr. Arbelaez "indicate[d] mental retardation" (AB at 11).[1] It is correct that Diaz testified that Mr. Arbelaez was not "a rocket scientist" nor was he "an intelligent man" but that Diaz did not believe him to be "slow or retarded" (PCR974). On cross-examination, however, Diaz acknowledged that he was not a licenced psychologist or psychiatrist and that it is "entirely possible . . . that someone could have something wrong with them and I would not see it because I'm not a psychologist" (PCR976).[2]

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[1]References to the Appellee's Answer Brief shall be designated as (AB page number). All other references to the record shall be as set forth in Mr. Arbelaez's Initial Brief or otherwise will be self-explanatory.

[2]Diaz noted that in his experience as a criminal defense attorney, occasionally a defendant will do or say something that "prompts" him to "go and seek help" (PCR975). As examples, Diaz referred to clients exhibiting symptoms of schizophrenia and extreme depression (PCR975-76). These illnesses are, as Diaz acknowledged, involve symptoms that are more obvious (PCR976), unlike the

Citing page 502 of the record, the Appellee writes that "[b]y the time Diaz received Dr. Castiello's report, he had gathered a great deal of information which impacted the penalty phase strategy" (AB at 12). However, the "great deal of information" referred to by the Appellee consisted of "the facts of the case as reported by the police" and the "various admissions" that Mr. Arbelaez had made (PCR502). No other "mitigation"–mental health or otherwise–was mentioned by Diaz as part of the information he had "gathered" at the time.[3]

With respect to Dr. Merry Haber, the Appellee refers to her as a "retired clinical and forensic psychologist who testified mostly for defendants" (AB at 13). There is nothing in the record to demonstrate that Dr. Haber is retired. Moreover, the Appellee distorts Dr. Haber's experience. As Dr. Haber explained, in her over twenty-five (25) years of experience, she has performed forensic evaluations for

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issue of mental retardation.

[3]Diaz was appointed to represent Mr. Arbelaez on January 30, 1990. Contrary to Diaz's attempt to distance himself from the issue of Mr. Arbelaez's mental illness by passing off his request for the competency and sanity evaluation as something he does in a *pro forma* fashion in all capital cases (PCR978) ("I have–every single death case that I have had, I always ask for an evaluation whether I think the person is competent or not. It's just something I felt needs to be done"), the record actually reflects that Diaz sought the appointment of Dr. Castiello on December 4, 1990, based on specific allegations that Mr. Arbelaez has suffered from epileptic seizures and was under medication by the Dade County Jail, and that Mr. Arbelaez and his family "have suggested that he has suffered from some form of mental infirmity that must be investigated prior to trial."

courts and attorneys, both defense attorneys and prosecutors, and has been qualified to testify as an expert in clinical psychology over 300 times (PCR554-55). Regarding her experience in capital cases, Dr. Haber testified "[p]robably less than ten times" on behalf of criminal defendants (PCR555), and had never been asked by the State to do a forensic evaluation on behalf of the prosecution in a capital case (PCR663-64).

ARGUMENT IN REPLY

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.

The Appellee posits that this Court has not been consistent in applying one standard of review to address issues of disqualification motions (AB at 35). The Appellee does acknowledge, however, that the legal sufficiency of a motion to disqualify is a legal question to which a *de novo* standard of review applies (AB at 35). The Appellee also acknowledge that recent pronouncements from this Court have employed a *de novo* standard of review when looking at the legal sufficiency of allegations made in support of a motion to disqualify (AB at 35). Mr. Arbelaez agrees that this Court reviews *de novo* the allegations set forth in a motion to disqualify in order to determine whether, as a matter of law, disqualification is warranted.

With regard to the allegations themselves, the Appellee argues that, in order to rise to the level of disqualification, the lower court had to have demonstrated a "specific" and "personal bias" toward Mr. Arbelaez himself as opposed to mere comments made which reflect a general bias toward defendants facing the death

penalty such as those which Mr. Arbelaez alleged were made by Judge Rothenberg in the *Manso* case (AB at 39).[4] Mr. Arbelaez submits that the State's focus is improperly narrow. While it is certainly correct that a court's comments which exhibit a personal bias toward the specific defendant can warrant disqualification, it is not accurate that only when a judge makes a comment exhibiting a specific bias personal to the defendant can that comment warrant disqualification. The proper focus 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).

The cases which the Appellee attempts–unsuccessfully–to distinguish are the most persuasive ones in support of the legal sufficiency of Mr. Arbelaez's allegations. For example, *Hayes v. State*, 686 So. 2d 694 (Fla. 4th DCA 1996), *rev. dismissed*, 691 So. 2d 1081 (Fla. 1997), and *Martin v. State*, 804 So. 2d 360 (Fla. 4th DCA 2001), provide direct support for Mr. Arbelaez's argument. *Hayes* and *Martin* involved cases arising out of Judge Barry Goldstein's criminal division in Broward County. *See also Gonzalez v. Goldstein*, 633 So. 2d 1183 (Fla. 4th DCA 1994); *Tyler v. State*, 816 So. 2d 755 (Fla. 4th DCA 2002); *Torres v. State*, 697 So.

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[4]Since ruling on Mr. Arbelaez's motion, Judge Rothenberg has resigned from the bench in order to again run for election as the State Attorney in Miami-Dade County.

2d 175 (Fla. 4th DCA), *rev. denied*, 703 So. 2d 477 (Fla. 1997). Judge Goldstein had given an interview to an online legal news service in which he was quoted as saying "My feeling is, if I'm going to sentence someone to state prison or county jail it should always be followed by probation." *Martin*, 804 So. 2d at 362. Based on this statement, Martin, who had been charged with a drug offense for which, if convicted, faced a sentence ranging from county jail and/or probation to thirty years in prison, sought to disqualify Judge Goldstein based on his non-defendant-specific "policy" of ordering probation following any jail or prison sentence. *Id*. Judge Goldstein denied the motion, noting that he had, since his public comments were made, sentenced at least eight defendants to prison or jail time without including a subsequent probationary sentence. *Id*. On a writ of prohibition, the Fourth District ordered Judge Goldstein's disqualification, concluding that although the public comment did not reflect a personal bias toward Martin himself, it was sufficient to establish a reasonable fear on Martin's behalf that "any argument that probation following a term of incarceration was unnecessary in his individual case would first have to overcome the judge's presumption to the contrary." *Id*. at 364. Indeed, in *Hayes*, *Tyler*, *Torres*, and *Gonzalez*, the very same non-defendant-specific comment from Judge Goldstein was found to warrant his disqualification based on the reasonable fear test. The situation addressed in the series of cases

involving Judge Goldstein is the most analogous to the instant case where, although the comments in question arose in another case, the very nature of the comments clearly demonstrate that a reasonable person facing a death sentence would be in fear that Judge Rothenberg could not be fair and impartial (particularly when considered cumulatively with the previous allegations involving Judge Rothenberg's bias).

The comments made by Judge Rothenberg to not reflect a mere "subjective fear" on Mr. Arbelaez's part based on the comments in the *Manso* case (AB at 40). Nor are the allegations at issue here like the situation addressed by the Court in two cases cited by the Appellee–*Wright v. State*, 857 So. 2d 861 (Fla. 2003), and *Maharaj v. State*, 778 So. 2d 944 (Fla. 2000). At issue in *Wright* was an allegation made in support of a claim for postconviction relief that the judge in that case had a "standard practice" of asking the State to draft his trial orders sentencing capital defendants to death. *Wright*, 857 So. 2d at 873. This Court concluded that Wright could not properly cite facts from another case to support his claim for postconviction relief. *Id*. *Wright* is clearly distinguishable, as it did not involve an issue of judicial disqualification but rather a merits claim for relief. Similarly, in *Maharaj*, the Court was faced with an allegation made in a motion for postconviction relief that trial counsel was ineffective for failing to move to recuse

the trial court, prior to trial, when counsel had been informed that the judge had allegedly solicited a bribe and that the assistant state attorney was involved. *Maharaj*, 778 So. 2d at 951. After an evidentiary hearing on the allegations, the lower court rejected the claim, and this Court on appeal affirmed, concluding that the claim "assumes facts that have not been proven." *Id*. Unlike the situation in *Maharaj*, Mr. Arbelaez's case does not involve a claim for postconviction relief based on allegations which have been subjected to the crucible of an adversarial testing. In the context of a motion to disqualify, the allegations must be accepted as true.

While the Appellee would have the Court evaluate the motion to disqualify as a successive motion and thus encourages the Court to consider Judge Rothenberg's "explanation" for the comments that she offered in the *Manso* litigation (AB at 38 n.13), Mr. Arbelaez submits that such would violate due process. As noted in his Initial Brief, when the motion to disqualify came on to be heard at a hearing, Judge Rothenberg refused to permit Mr. Arbelaez's counsel to argue the motion:

> THE COURT: . . . This is the case of Guillermo Arbelaez, Case Number 88-5446. Note for the record counsel for the State, counsel for the defendant.
>
> This is here before the Court, first of all, on the defendant's

> motion to disqualify. I have reviewed the motion and it is hereby denied as it is legally insufficient.
>
> I'm trying to find the original court file. It appears I have the original. I will also submit it to the Court file.
>
> MR. SCHER: Is the Court going to allow any argument on the motion?
>
> THE COURT: I don't believe argument is appropriate, do you? Usually, that should be done prior to the motion.

(PCR294). To now consider Judge Rothenberg's attempt to explain her comment in *Manso* when Mr. Arbelaez was not permitted to address the merits of his motion below would violate due process. Thus, the State's attempt to have the Court consider Judge Rothenberg's "explanation" for her comment in *Manso* should be rejected. Based on the foregoing arguments and those set forth in his Initial Brief, Mr. Arbelaez submits that this case should be remanded for a new evidentiary hearing before an impartial tribunal.

ARGUMENT II

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

In discussion the appropriate standard for analyzing Mr. Arbelaez's claim, the Appellee argues that this Court should adopt the standard employed by the Eleventh Circuit in *Chandler v. United States*, 218 F. 3d 1305 (11th Cir. 2000) (en banc) (AB at 45-46). This Court has never adopted the ineffectiveness test as set forth in *Chandler*, which Mr. Arbelaez submits is at odds with *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny. This Court is obligated to follow the law emanating from the Supreme Court, not the Eleventh Circuit. *See generally Cave v. State*, 529 So. 2d 293, 296 (Fla. 1988). Mr. Arbelaez would note that in the four years since *Chandler* was decided, this Court has not cited or relied on its version of the *Strickland* test in addressing a claim of ineffective assistance of counsel.

Because the Eleventh Circuit's formulation of the *Strickland* test departs from Supreme Court precedent, the Appellee's attempt to persuade this Court to employ that standard should be rejected. The thrust of the Eleventh Circuit's view of *Strickland* as set forth in *Chandler* focuses on the deficient performance prong.

Despite paying lip-service to the notion that the appropriate test for assessing counsel's performance "is an objective inquiry," *Chandler*, 218 F. 3d at 1315, the *Chandler* court, sitting *en banc*,[5] held that in order to overcome the presumption of attorney competence, a federal habeas petitioner must establish that "no competent counsel would have taken the action that his counsel did take." *Chandler*, 218 F. 3d at 1314-15). In other words, in the view of the Eleventh Circuit, "[w]e look at the acts or omissions that the petitioner alleges are unreasonable and *ask whether some reasonable lawyer could have conducted the trial in that manner.*" *Id*. at 1316 n.16 (emphasis added). "If some reasonable lawyer might have not pursued a certain defense or not called a certain witness, we fail to understand why we would order a new trial on the ground that the *actual lawyer* had not used the defense or witness in the first trial. . . " *Id*. at n.17 (emphasis added). In the view of the majority of the *en banc* court in *Chandler*, these are the principles which "guide the courts on the question of `reasonableness,' the touchstone of a lawyer's performance under the Constitution." *Id*. at 1319.

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[5]The *en banc* court was sharply divided, however. The majority opinion was authored by Judge Edmondson. Judge Tjoflat concurred in part and dissented in part, voicing his view that the claim should be remanded to the district court for an evidentiary hearing. Dissenting were Chief Judge Anderson, and Judges Birch, Barkett, and Wilson.

Mr. Arbelaez submits that *Chandler*'s test for determining deficient performance is contrary to *Strickland* and its progeny, and certainly cannot survive the Supreme Court's subsequent decision in *Wiggins v. Smith,* 123 S. Ct. 2527 (2003), where the Court held that the test for assessing the performance of counsel is *not* one which requires a defendant to establish that "no competent counsel" would have made the decision under review. Instead, the Supreme Court made it clear that the proper test is a "*context-dependent* consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins*, 123 S. Ct. at 2536 (quoting *Strickland,* 466 U.S. at 689) (emphasis added). Because the appropriate standard requires a "context-dependent consideration," the "no reasonable lawyer" test employed by the Eleventh Circuit in *Chandler* is wholly inconsistent with *Strickland* and its progeny and the Appellee's attempt to employ that standard should be rejected by this Court.

The *Chandler* standard is also at odds with language by the Supreme Court in *Williams v. Taylor*, 529 U.S. 362 (2000). In rejecting the Fourth Circuit's interpretation of 28 U.S.C. §2254(d)(1), which viewed the "unreasonable application" inquiry as an "all reasonable jurist" standard, the *Williams* Court explained that such test "would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than an objective one." *Williams*, 529

U.S. at 409-10 (opinion of O'Connor, J.). Likewise, a review of counsel's performance under a "no reasonable attorney' standard transforms the *Strickland* test from one demanding a "context-dependent consideration" into a context-less subjective test.

With respect to the deficient performance prong, the Appellee argues that Diaz "did much of the investigation himself, visiting the crime scene, talking to witnesses, and consulting with Arbelaez" (AB at 47). All of these actions, however, were taken in furtherance of the preparation for defending the case at the guilt phase and had nothing to do with the requisite, diligent investigation into Mr. Arbelaez's background for potential mitigating evidence. Indeed, "the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated--this is an integral part of a capital case." *State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002).

The Appellee next argues that "Diaz discussed mitigation with Arbelaez's Columbian [sic] family members via the telephone and correspondence and asked that they try to get documentation of Arbelaez's illnesses" (AB at 48). This statement must be narrowed and placed into context. In reality, Diaz's own testimony established that he recalled having spoken only to one of Mr. Arbelaez's family–his brother, Jorge (PCR526). Jorge was the brother who had spoken with Miami detectives when Mr. Arbelaez went to Colombia after the crime occurred in

Miami, and thus was a potential guilt phase witness. Mr. Arbelaez's sister Amparo testified that she spoke with Diaz about attempting to locate records in Colombia, but this was *after* the trial had occurred (PCR1194). Mr. Arbelaez's other sister, Luz, testified that she never spoke with Diaz (PCR1255). While records introduced during the hearing indicate that Mr. Arbelaez's family *was* attempting to assist in providing information and documents about Mr. Arbelaez's background in Colombia, these efforts, through no fault of the family, came too late. A letter from Mr. Arbelaez's mother to Diaz, which provided a wealth of information and leads to be followed up by a diligent investigation, was dated February 20, 1991 (Defense Exhibits F; G); Mr. Arbelaez's trial commenced on February 10, 1991, and the penalty phase on March 4, 1991. This letter, translated by a certified translator, provided as follows:

> Medellin, February 20/91
>
> Well Respected Mr. Humberto [sic] Diaz
>
> First of all I respectfully greet you and hope you are in perfect health.
>
> I am very sad because of my son Guillermo's problem. I do not blame him because he is not normal. The proof is that he turned himself in having had the opportunity of remaining with his family and in his homeland. I saw him on the TV, they showed the whole case.
>
> When he was small, they flung him down a staircase since he

was rather mischievous and he suffered from headaches for a while.

When he was a little older he ran away from home because they didn't love him. Later he began to go around following the priests with mystical craziness, filled with [illegible] and religious ballads. When he was older, he showed up at home and told me that he drank a bottle of [illegible]. I asked him why he had done that and he told me that he wanted to die. He was taken to Policlinic and they saved his life.

He was at the house for some additional time, always with his craziness, he lived on his knees praying. When he was about 17 years old, he showed up telling me he had ingested rat poison. We took him to the clinic and he was hospitalized there for several days. They gave me an appointment to take to the mental hospital. I did not hospitalize him; I took [him] for treatment daily until he refused and didn't want to continue going. I tried to get his medical records from the hospital and I was not able to obtain them.[6]

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[6]Demonstrating the importance of having competent investigation rather than reliance on family members, Mr. Arbelaez's collateral counsel was able to locate one of the physicians who treated Mr. Arbelaez following this incident. The doctor provided a sworn statement attesting to the incident:

To Whom It May Concern:

I, Luis Alfonso Arango Tobon, Physician Surgeon by profession, Identified by CC No. 8264434, from Medellin and Medical Licence 1643 from the Ministry of Health, certify that in 1976 at the Adult Emergency Unit of Clinica Leon XII of Instituto de Seguros Sociales de Medellin, Mr. Guillermo Arbelaez, who was admitted with a diagnosis of attempted suicide and who had a history of frequent episodes of depression, was treated and it was discovered that he suffered from epileptic episodes, finding which was noted on his chart. He was referred to the psychiatrist on duty, Dr. Ernesto Botero Ramirez,

> Later, a brother helped him to see if he was capable of working. He worked until he [illegible] the boss. After that he left for Miami where I imagine he was working two shifts.
>
> ---
>
> > who, because of the patient's clear history of mental illness, determined that hospitalization was indicated, and had him admitted.
> >
> > Epileptic fits may be convulsive (tonic-clonic_ or the non-convulsive types (of [illegible] absences; partial; complex; etc.). Basic information about epilepsy is attached.)

(Defense Exhibit J Composite).

Collateral counsel also was able to locate Dr. Ernesto Botero Ramirez, who confirms this incident:

> Certification.
>
> (1) during the decade spanning from 1970-1980, I worked in the Emergency Unit of Clinica Leon XIII I.S.S., Medellin, Colombia, as a psychiatrist.
>
> (2) During that period of time, I worked with Dr. Luis Alfonso Arango.
>
> (3) During that period of time, I provided medical services to Mr. Guillermo Arbelaez and had him admitted into the hospital. Diagnosis: Authentic Suicide Attempt. Cause: Severe and Complex psychic difficulties. Place admitted: Psychiatric ward of Bello-Hospital Mental de Antioquia. Objective: Intensive therapy using drugs, psychotherapy, and electroshock. Therapy electro [illegible].

(Defense Exhibit J Composite).

> When that problem came up, he was, I imagine, tired and he was not in a state of mind to put up with what that girl that lived with him did to him. What he did tell me was that he [illegible] a child. He showed up here like a mad man; he didn't tell me anything. He was very sad until he left to go over there.
>
> /s/ Margarita Alvarez de Arbelaez

(Defense Exhibit G).

It is clear that despite the efforts of the family,[7] important and independent information was available in Colombia to document Mr. Arbelaez's longstanding and documented problems. However, Mr. Arbelaez and his family abroad did not have the constitutional obligation to investigate and prepare–Mr. Diaz did. *See, e.g. Washington v. Smith*, 219 F. 3d 620, 631 (7th Cir. 2000) (telling a client in custody to produce his own witnesses falls short of conducting a reasonable investigation). Rather than employing the services of an investigator to travel to Colombia to locate records as to Mr. Arbelaez's documental mental illnesses and

[7]Mr. Diaz's secretary also had left him a message dated February 2 in which it was indicated that Mr. Arbelaez's family were attempting to locate and send some records from when Mr. Arbelaez was hospitalized in a mental hospital. The message also indicated that "[t]hey are trying to help as much as possible to help him" (Defense Exhibit H). This latter quoted passage, corroborated by Mr. Arbelaez's sisters, establishes that the family was willing to not only assist in a long distance fashion, but actually travel to Miami to testify. But they were not asked.

mental health treatment at Colombian mental health facilities,[8] counsel simply made a few phone calls and shifted the burden to Mr. Arbelaez's family to investigate and prepare mitigation. This establishes deficient performance.[9] The assistance of an investigator to look into available mitigation witnesses and any available documentation is a minimal requirement to discharge the Sixth Amendment duty to investigate in a capital case. *See Wiggins v. Smith*, 123 S. Ct. 2527 (2003).

The Appellee touts the "reasonableness" of Diaz's preparation for the penalty phase, yet offers no explanation for Diaz's ignorance of the fact that prior counsel had begun preparation for potential mitigation through the appointment of Dr. Merry Haber. The Appellee and Mr. Diaz seem to justify this ignorance by the fact that Dr. Haber had not generated a report (AB at 51). However, the simple fact is that the order appointing Dr. Haber was in the court file in Mr. Arbelaez's case

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[8]It is undisputed that Mr. Arbelaez had a history of mental illness (above and beyond his diagnosed epilepsy) which was corroborated by documents located by collateral counsel in Colombia. These documents were introduced into evidence at the evidentiary hearing.

[9]This is *not* a situation like that addressed in *Marshall v. State*, 854 So. 2d 1235 (Fla. 2003). There, the Court rejected the argument that trial counsel was deficient for not employing the services of an investigator and for not going to the Liberty City area of Miami to look for potential mitigation witnesses because "[t]rial counsel [] explained that he had no information leading him to Liberty City." *Id*. at 1247. Here, there is no dispute that trial counsel had "information leading him" to potential witnesses and documentary evidence in Colombia.

(Defense Exhibit D), and should have put a reasonably diligent attorney on notice of the court appointment. *Compare Porter v. State*, 653 So. 2d 374, 378 (Fla. 1995) ("Of course, the deposition as well as the court records which reveal Widmeyer's representation of Schapp are public records and have been continually available in Charlotte County throughout all post-conviction proceedings. We therefore conclude that Widmeyer's representation of Schapp was information available to Porter upon diligent search and thus cannot serve as a basis for relief"). No imaginable reason can exist (much less a reasonable one) for an attorney in a capital case to not know that his client had been evaluated on several occasions by a mental health expert retained by prior counsel.

With respect to Dr. Haber, the Appellee focuses on what she was not able to testify based on her initial screening evaluations of Mr. Arbelaez as opposed to what she could have testified to had Diaz contacted her and provided her with sufficient time and the requisite background information (AB at 51). It is clear that Dr. Haber would have been able to provide the jury with important mitigation evidence. 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).

The Appellee notes that the mental health testimony below was contested by the State (AB at 50), but overlooks that had Dr. Ruiz been available and competent to testify at Mr. Arbelaez's 1991 penalty phase,[10] Dr. Haber would have been able to explain the inadequacies of her evaluation. 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). Thus, even assuming that Dr. Ruiz, an unlicenced person, would have been

[10]At the time of Mr. Arbelaez's penalty phase, Dr. Ruiz was not a licenced psychologist, and only became licenced in 1992 after having failed the licencing boards on several occasions (PCR1006-1010). She even denied having failed both portions of the test notwithstanding a letter from the Florida Department of Professional Regulation indicating that she had (PCR1010).

employed by the State to testify at the penalty phase, her credentials and testing methodology would have been severely impeached. And, of course, it would not have been up to a court to determine the credibility and weight of the expert testimony, it would have been up to the jury.

Moreover, aside from Dr. Haber's testimony about Dr. Ruiz's methodology, competent counsel would also have been able to subject Dr. Ruiz to vigorous cross-examination. For example, 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). Dr. Ruiz 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 psychotropic 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).[11]

Dr. Ruiz would also have been subjected to cross-examination on the testing instruments she employed. 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

[11]Documents obtained by Mr. Arbelaez's collateral counsel, however, demonstrate these incidents in Colombia.

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). Thus, based on the above, the mere fact that the mental health evidence was "contested" below does not mean that a jury would not have been exposed to serious flaws and bias on part of Dr. Ruiz when assessing Mr. Arbelaez's moral culpability and determining a recommendation for sentence.

As to prejudice, the State cites a number of cases and makes the general statement that no prejudice exists given the aggravating circumstances (AB at 62).

This is not the correct prejudice analysis under *Strickland*. *First*, to determine prejudice from the unreasonable failure to investigate and present mitigating evidence, "we reweigh the evidence in aggravation against the *totality* of available mitigating evidence." *Wiggins* 123 S. Ct. at 2542 (emphasis added); *see also Williams*, 529 U.S. at 397-98 (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") (emphasis added). If "the available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] moral culpability," *Wiggins, supra*, 123 S.Ct. at 2544, then prejudice has been shown. *Second*, every defendant has "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*, 529 U.S. at 393,, regardless of the strength of the state's case, the heinous nature of the offense, or the severity of the aggravators. *Id*. at 396. *Third*, mitigating evidence is not limited to mental health testimony. 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.

The cases relied on by the Appellee to establish no prejudice in Mr.

Arbelaez's case are inapposite (AB at 62-63). In *Cummings-El v. State*, 863 So. 2d 246 (Fla. 2003), this Court concluded that no prejudice had been established because the mitigation evidence presented at the evidentiary hearing was essentially cumulative to that which had been presented at the penalty phase; moreover, there was a danger that presentation of the additional mitigation would have opened the door to more damaging evidence through cross-examination. *Id*. at 252. Here, there is nothing in the mitigation adduced at the evidentiary hearing that could be classified as "cumulative" to that which was presented at the penalty phase, as no evidence about Mr. Arbelaez's background was presented at the penalty phase. Moreover, there was never any indication here that there was a reasonable concern about opening the door to damaging information since the jury already heard rather damaging information at the guilt phase, including Mr. Arbelaez's videotaped statement to law enforcement, his own testimony, and the State's vigorous cross-examination of same. The remaining cases cited by the Appellee (AB at 63), all related to a decision made by counsel borne out of an articulated and reasonable fear of opening the door to damaging testimony.[12] Again, here, no such reasonable fear is at issue. Certainly, during cross-examination of Mr. Arbelaez's family

[12]The Appellee cites *Hodges v. State*, 2003 WL 21402484 (Fla. June 19, 2003). That case is still pending on rehearing and is not yet final. In any event, Mr. Arbelaez's case not involve unwilling, absent, or recalcitrant witnesses (AB at 63).

members at the evidentiary hearing, the State elicited no such "parade of horribles" in terms of "damaging information," thus refuting the Appellee's arguments.

Based on the foregoing arguments and those set forth in his Initial Brief, Mr. Arbelaez submits that the order of the lower court should be reversed and this case should be remanded for a resentencing.

ARGUMENTS III & IV

Mr. Arbelaez relies on the arguments set forth in his Initial Brief in reply to the Appellee's arguments as to these points.

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.

The Appellee argues that Mr. Arbelaez should not be permitted to file a new motion for postconviction relief pursuant to *Atkins v. Virginia*, 122 S. Ct. 2242 (2002), because *Atkins* has not been held retroactive and there has already been a determination that Mr. Arbelaez is not mentally retarded (AB at 84). Both of these arguments are meritless.

On May 20, 2004, subsequent to the filing of the Appellee's Answer Brief, this Court issued its decision on the mental retardation rule of criminal procedure. In that rule, provisions are set forth which establish that Mr. Arbelaez would be able to file a new motion in accordance with the applicable time frames and other provisions set forth therein.[13] Contrary to the arguments of the Appellee, nothing in that rule indicates that a defendant who has had an evidentiary hearing on a penalty

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[13]Citing *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Appellee argues that Mr. Arbelaez's Eighth Amendment claim is procedurally barred since the claim "has been available and litigated for many years" (AB at 85). This argument is fatuous. *Penry*, of course, *rejected* the Eighth Amendment issue as to mental retardation, and was decided long before Mr. Arbelaez's trial.

phase ineffective assistance of counsel claim during which mental retardation was at issue is somehow precluded from filing a motion pursuant to the new rule and *Atkins*. Such an argument would render meaningless the *Atkins* decision and the new rule. The procedures and burdens of establishing retardation under *Atkins* are not the same as the procedures and burdens for establishing mental retardation as a mitigating circumstance under the rubric of a penalty phase prejudice analysis. Even the State below conceded that the issue of whether Mr. Arbelaez was mentally retarded for Eighth Amendment purposes "is not an issue right now" and "might be important later only" (PCR600-01).

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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