

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC13-1233

NEIL KURT SALAZAR

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

.....

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH  
JUDICIAL CIRCUIT, IN AND FOR OKEECHOBEE COUNTY, FLORIDA,  
(CRIMINAL DIVISION)

.....

ANSWER BRIEF OF APPELLEE

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## **PRELIMINARY STATEMENT**

Appellant, Nail Kurt Salazar, Defendant below, will be referred to as “Salazar” and Appellee, State of Florida, will be referred to as “State”. Reference to the appellate records will be:

Direct Appeal: “R” – Case #SC06-1381 - *Salazar v. State*, 991 364 (Fl. 2008)

Postconviction record: “PCR” – case #SC13-1233

Supplemental materials: “S” preceding the type of record referenced.

Each will be followed by the appropriate volume and page number(s). Salazar’s initial brief will be notated as “IB.”

## **STATEMENT OF THE CASE**

On July 19, 2000, Salazar and co-defendant, Julius Hatcher (“Hatcher”), were indicted for first-degree murder of Evelyn Jean Nutter (“Nutter”), attempted first-degree murder of Ronze Cummings (“Cummings”), burglary of a dwelling while armed, and grand theft of a motor vehicle. The instant crimes took place on or about June 26 and 27, 2000. (R.1 14-17) On August 8, 2001, Salazar was arrested and formally charged. (R.1 23-24) Opening statements commenced on March 6, 2006 and on March 9th, the jury returned guilty verdicts with special interrogatories, convicting Salazar of first-degree murder while carrying, displaying, or using a firearm under both the premeditated and felony murder theories; of attempted first-degree murder while carrying, displaying, or using a



firearm; burglary during which an assault was committed; and theft of a motor vehicle (R.4 609-11; R.13 23-24).

Following the penalty phase, the jury unanimously recommended a sentence of death (R.4 612). The *Spencer*<sup>1</sup> hearing was conducted on May 5, 2006 where the State presented evidence in an attempt to rebut claimed mitigation of good behavior. (R.20 2239-69) Upon the trial court's consideration, on May 30, 2006, Salazar was sentenced to death for Nutter's murder (R.4 658-63). The judgment and sentencing documents for the non-capital cases were entered on June 12, 2006 and showed Salazar received life sentences for the attempted first degree murder of Cummings and for the burglary. The court imposed a five year term for the theft conviction. The non-capital sentences were to run concurrently with each other, but consecutively to the death sentence (R.4 664-74). On June 22, 2006, Salazar appealed. (R.4 675). On July 10, 2008, this Court affirmed. *Salazar v. State*, 991 364 (Fl. 2008).

Subsequently, Salazar petitioned the United States Supreme Court for certiorari review. In his December 12, 2008 petition, Salazar raised two questions.<sup>2</sup> On February 23, 2009, certiorari review was denied. *Salazar v.*

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<sup>1</sup> *Spencer v. State*, 615 So.2d 688 (Fla.1993).

<sup>2</sup> (1) Whether the state prosecutor made argument that deprived petitioner of due process and the state court violated the Fourteenth Amendment by refusing to apply the harmless-beyond-reasonable-doubt standard of *Chapman v. California*,

*Florida*, 129 S.Ct. 1347 (2009).

During his collateral litigation, Salazar filed on or about February 8, 2010, a motion for post-conviction relief pursuant to Rule 3.851 Fla.R.Crim.P. and requested leave to amend. The State, on April 12, 2010, responded. Salazar was given leave to amend and such amendment was filed on September 1, 2010.

The court granted an evidentiary hearing on Claims III, IV(b) - (c), V, and VII of the first amended motion for relief. Due to problems with witness scheduling, the evidentiary hearing was held in three phases, consisting of a video hearing in Stuart on March 24, 2011, a hearing in Okeechobee on March 28 – 30, 2011, and a video hearing in Stuart on August 31, 2011. The first two hearing dates of 2011 addressed all issues save those regarding the penalty phase and Salazar presented the following witnesses: Sadie Francis, mother of one of Salazar's children; Russell Akins, guilt phase counsel; Jeff Smith, penalty phase counsel; Jackie Ray Carmichael, defense private investigator; Juan Pineda, Capital Collateral Counsel's investigator; Dr. Gayle McGarrity, cultural anthropologist; Arlene Lambert, Salazar's sister; Barry Witlin, prior defense counsel; and Mark Harlee, Assistant Public Defender with the 19th Judicial Circuit. The State

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386 U.S. 18 (1967) to the prosecutor's argument?; and (2) Whether the state court violated the Sixth, Eighth, and Fourteenth Amendments by giving the jury an instruction that relieved the prosecution of its burden of proving that petitioner had a careful plan of prearranged design to commit murder before the fatal incident in order for the jury to apply the cold, calculated and premeditated aggravating circumstance when rendering an advisory sentence of death?

presented Sergeant Patricia Williams and Inspector Sydney James of the St. Vincent Police from St. Vincent and the Grenadines, and Donovan Leighton, formerly the legal attaché for the United States Embassy in Barbados. The conclusion of the hearing was delayed when Salazar decided to proceed pro se and the court granted his motion to file a second amended motion for post-conviction relief based on newly discovered evidence.

Salazar filed that second motion on June 12, 2012 which the court summarily denied on August 21, 2012, but allowed newly appointed counsel to amend the legally insufficient newly discovered evidence claims. Salazar's counsel filed the third amended motion on September 24, 2012. The court held a case management hearing on it on November 15, 2012, then summarily denied all the new claims.

The last phase of the evidentiary hearing on the claims raised in the first amended motion was held on January 28 through February 1, 2013. During that hearing, Salazar presented mental health professionals, Drs. Harry Krop, Thomas Oakland, and Philip Harvey. The State called: Prior defense counsel, Barry Witlin and Elio Vasquez; Ritchie Fredrick and Kevin James Gray of the Department of Highway Safety and Motor Vehicles; Deputy Sheriff Ronnie White; Department of Corrections Sergeant Danielle Craig; court reporter, Margaret Douglas; State attorney Office Investigator, Edward Arens; and Dr. Greg Prichard. The court

denied all the claims in a written order dated June 11, 2013. This appeal followed.

### **STATEMENT OF THE FACTS**

On direct appeal, Salazar raised seven issues.<sup>3</sup> This Court made the following factual findings:

In the mid-1990s, Ronze “June Bug” Cummings and his girlfriend, Evelyn “Jenny” Nutter, moved from Fort Lauderdale to Fort Drum. The couple lived in a house adjacent to an orange grove where Ronze worked as the foreman. While living in Fort Drum, Nutter gave birth to two children. The children were ages two and six at the time of the killing.

Neil Salazar was a friend of Ronze Cummings. The two previously worked together in Fort Lauderdale at Smurfit Recycling Plant. Around May to June of 2000, Salazar, his girlfriend Monica, and their young child came to live with Ronze and Nutter in Fort Drum. But after a few weeks, they moved out at Ronze's request.

Subsequently, on June 26, 2000, Julius Hatcher, an associate of Salazar's, visited the Miami home of his cousin, Fred Cummings.FN1 Neither Fred nor his girlfriend, Shirleen Baker, was home. Instead, Salazar answered the door. Salazar invited Hatcher in and told him he had something to show him under an upstairs bed. Hatcher went

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<sup>3</sup> Salazar raised: (1) Whether the Court erred in denying the Defense motion for mistrial during the State's final argument when the State told jurors that it had made a deal with Hatcher so that Appellant would not “walk” lest there be another attempt on Ronze Cummings' life; (2) Whether the Court erred in letting the State present Det. Brock's testimony that he was “trying to find the truth” in his investigation; (3) Whether the Court erred in finding the cold calculated and premeditated (CCP) circumstance; (4) Whether the Court erred in allowing Appellee to Argue to the Jury that Cummings and Hatcher were terrorized during the burglary; (5) Whether the Court erred in overruling Appellant's objection to the jury instruction on the cold calculated and premeditated (CCP) circumstance on the ground that it failed to require that the State prove that Appellant intended to kill before the crime began; and (6) Whether Florida's death penalty statute is constitutional.

upstairs and looked under the bed, but saw nothing. When he turned around, Salazar confronted him, pointing a machine gun at him. Salazar accused Hatcher of being “too clean” and “a snitch” who was planning to turn him over to the FBI regarding his drug trafficking business. Salazar duct-taped Hatcher's arms and legs and shoved his head under the bed, where he remained for several hours. Subsequently, Fred and Baker arrived home, but they did nothing to help Hatcher. Several hours later, Salazar brought Hatcher outside and forced him into a green Buick which Baker had rented. Then, Baker drove north on Interstate 95 with Hatcher in the front seat and Salazar sitting behind Hatcher, holding the machine gun. When the trio passed through Pompano Beach, Salazar removed the duct tape that bound Hatcher.

FN1. Julius Hatcher, Fred Cummings, and Ronze Cummings are cousins. Hatcher was close with Fred. But at the time of the crimes, Hatcher and Ronze had not seen each other since early childhood and did not recognize each other.

Around 11 p.m., they arrived at the home of Ronze and Nutter in Fort Drum. Hatcher went with Salazar to the back door. Salazar twisted out the back porch light bulb and broke the lock on the back door. When they entered the house, Ronze and Nutter were sitting in the living room watching television with their two-year-old son.FN2 Salazar ordered the occupants to lie on the floor and had Hatcher bind their hands and feet with the duct tape he brought with him from Miami. For about fifteen to twenty minutes, Salazar ranted about how his business was falling apart and accused the couple of communicating with the FBI. Salazar said that before he left, “somebody die tonight.” Salazar also threatened to kill Hatcher if he refused to cooperate with Salazar's orders. Next, Salazar told Hatcher to retrieve some plastic shopping bags from a kitchen cabinet and a steak knife from a kitchen drawer. Salazar directed Hatcher to place the bags on Ronze's and Nutter's heads. Hatcher placed the bags on their heads but also poked a hole in Ronze's bag so he could breathe. Although Hatcher told Ronze that he would poke a breathing hole in Nutter's bag, no such hole was found when her bag was later recovered from the crime scene. Salazar then told Hatcher to \*369 duct-tape the bottom of the bags around the victims' necks, and Hatcher complied. Hatcher also

duct-taped Nutter's eyes and mouth near her nose. Then, Salazar instructed Hatcher to move Ronze and Nutter into separate bedrooms.

FN2. At the time of the shooting, the couple's six-year-old son was in the orange grove with some of the workers.

Finding that the victims had not yet suffocated, Salazar ordered Hatcher to cut their throats with the knife. Hatcher refused. Then, Salazar gave Hatcher a .38 caliber revolver and ordered him to hold a pillow over each victim's head and shoot through the pillow. Salazar first stood in the doorway to the room where Nutter was placed, holding the machine gun on Hatcher. Hatcher shot Nutter in the head through a pillow as ordered. He then moved to the room in which Ronze was placed and Salazar stood in the doorway with the machine gun. Hatcher told Ronze to play dead before shooting him in the head through a pillow as Ronze's two-year-old son sat beside him. Still alive, Ronze stood up. Salazar ordered Hatcher to shoot him again, and Hatcher complied. Although still alive, Ronze remained on the floor, pretending to be dead.

Then, Salazar gave Hatcher the keys to a white Buick which belonged to Ronze and Nutter and told Hatcher to follow him and Baker back to Miami. Salazar and Baker sped off without waiting for Hatcher, but Hatcher was able to catch up to them by following the taillights. Hatcher followed Salazar and Baker until they reached Interstate 95. Soon thereafter, Hatcher signaled that he was stopping to purchase gasoline. Later, Hatcher drove the car to Fred's house in Miami and spent the night in a motel.

After Salazar and Hatcher went outside, but prior to their departure, Ronze stood up, picked up his son, and checked on Nutter, finding her dead. Ronze then moved to the living room and looked out the window. He observed Salazar, Hatcher, and Baker standing near the vehicles. After the trio left the premises, Ronze attempted to call 911 from his home phone but found that the line was disconnected. Carrying his son, Ronze walked to the nearby orange grove office and called 911. Ronze told the 911 operator that three or four Jamaican men broke into his home, killed Nutter, and shot him.

Around 12:30 a.m., Deputies Joey Chapman and Javier Gonzalez of the Okeechobee County Sheriff's Department arrived at the home. They spotted Ronze in his pickup truck and followed him to the house. When they approached Ronze, he appeared nervous and was bleeding profusely from his face. A torn bag hung around his neck, and pieces of duct tape clung to his wrists, feet, and arms. Ronze's two-year-old son was with him. Ronze informed the deputies that Nutter, whom he referred to as his wife, had been killed. When the deputies asked who the perpetrator was, Ronze told them that "Neil" did it. Ronze was subsequently transported by helicopter to Holmes Regional Medical Center in Melbourne, Florida.

Detective T.J. Brock of the Okeechobee County Sheriff's Office obtained sworn statements from Ronze while he was in the hospital and upon his release. During both interviews, Ronze identified "Neil" as the perpetrator. Ronze told Brock that he had worked with Neil at a recycling plant when he lived in Fort Lauderdale and that Neil had come to live with him in the weeks prior to the crimes. Brock presented Ronze with several photographic lineups, but Salazar's photograph was not among those presented. To assist Brock, Ronze retrieved a videotape from his home which depicted Salazar, Monica, Ronze, Nutter, and their children at the beach during the time period that they lived together. Ronze informed Brock that Neil \*370 was not the actual shooter but ordered another man to carry out the killing.

About one week after Ronze was released from the hospital, Hatcher went to the Miami-Dade Police Department and gave a statement regarding the shooting. During a July 5, 2000, taped interview with Detective Brock, Hatcher confessed to the crimes. His confession was largely consistent with Ronze's description of the events surrounding Nutter's death.

On July 19, 2000, Hatcher and Salazar were charged by indictment with: (1) the first-degree murder of Evelyn Nutter; (2) the attempted first-degree murder of Ronze Cummings; (3) burglary of a dwelling while armed; and (4) theft of a motor vehicle. Hatcher's trial was postponed when he agreed to testify against Salazar in exchange for the State's promise not to seek the death penalty in his case.

Salazar's trial commenced on March 6, 2006. During the State's case,

Dr. Frederick Hobin, the medical examiner who performed Nutter's autopsy, testified that Nutter died as the result of "multiple episodes of violence," the more lethal of which was the bullet injury to her head. According to Dr. Hobin, had Nutter not been shot, she would have certainly died from asphyxiation as a result of the bag over her head and the duct tape on her face. Following the State's case, the defense rested without presenting any evidence or witnesses.

On March 9, 2006, the jury returned guilty verdicts with special interrogatories, convicting Salazar of: (1) the first-degree murder of Evelyn Nutter while carrying, displaying, or using a firearm under both the premeditated and felony murder theories; (2) the attempted first-degree murder of Ronze Cummings; (3) burglary during which an assault was committed; and (4) theft of a motor vehicle. After the penalty phase, the jury unanimously recommended death. Finding four aggravators,<sup>FN3</sup> no statutory mitigators, and six nonstatutory mitigators,<sup>FN4</sup> the trial court followed the jury's recommendation and sentenced Salazar to death.

FN3. The trial court found and weighed the following aggravators: (1) Salazar had a prior violent felony conviction, the contemporaneous attempted first-degree murder of Ronze Cummings, assigned some weight; (2) Salazar committed the murder while engaged in the commission of a burglary, assigned some weight; (3) the murder was committed in an especially heinous, atrocious, or cruel (HAC) manner, assigned great weight; and (4) the murder was committed in a cold, calculated, and premeditated (CCP) manner without any pretense of moral or legal justification, assigned great weight.

FN4. The trial court found and weighed the following nonstatutory mitigators: (1) Salazar was not the actual shooter, assigned little to some weight; (2) Salazar comes from a broken home and was devastated by his parents' divorce, assigned little weight; (3) Salazar was raised in an impoverished environment in a third world country, assigned minimal weight; (4) Salazar is capable of and has a good relationship with his family members, assigned minimal weight; (5) Salazar was a good student,



attended school regularly, and obtained a vocational degree in woodworking, assigned little weight; and (6) Salazar was well behaved during the court proceedings, assigned minimal weight.

Salazar v. State, 991 So.2d 364, 368-70 (Fla. 2008).

### **SUMMARY OF THE ARGUMENT**

Argument I - Salazar was never legally admitted to St. Vincent when he presented himself at the airport but, instead, was detained for having forged documents. The authorities later expelled him into the lawful custody of the United States. Given those facts, counsel was not ineffective for failing to challenge the “extradition” for violating international treaties.

Argument II - Salazar failed to prove that he was mentally retarded under the definition in the Florida Statutes where the evidence showed that he had adaptive functioning in the majority of the aspects of his life even though his IQ score fell below 70.

Argument III - Trial counsel was not ineffective in his cross-examination of Julius Hatcher when he employed a valid strategy to address that testimony and Salazar failed to show prejudice.

Argument IV - Salazar failed to show that there was an actual conflict of interest and, thus, failed to demonstrate any prejudice. Counsel’s performance was not deficient since he extensively discussed his previous appointment (the source of the potential conflict) with Salazar.

Argument V - Counsel did not render deficient performance for not investigating an alibi defense which would have rested on a mis-dated document that was not supported by any other evidence.

Argument VI & VII - While counsel was deficient for not preparing and presenting mental health mitigation evidence, Salazar did not prove the necessary prejudice when the additional mitigation evidence did not outweigh the significant aggravating circumstances.

Argument VIII - The summarily denied claims were either legally insufficient, refuted by the record, untimely, or unauthorized. The post-conviction court properly denied them.

Argument IX - There was no cumulative error.

## **ARGUMENT**

### **ARGUMENT ONE**

#### **THE TRIAL COURT PROPERLY DENIED THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR NOT CHALLENGING SALAZAR'S REMOVAL FROM ST. VINCENT WHEN IT FOUND THAT SALAZAR WAS EXPELLED RATHER THAN EXTRADICTED FROM THAT COUNTRY. (Restated)**

Salazar contends that his trial counsel was ineffective for not investigating and challenging how he was transported from St. Vincent to Puerto Rico, Miami, and eventually Okeechobee. Salazar asserts his counsel was ineffective for not challenging the allegedly improper extradition and in not relying upon an alleged violation of the “Specialty Doctrine.” All of Salazar’s allegations fail for lack of evidentiary proof, and thus, his claim of ineffectiveness likewise fails. He claims that the process was an “extradition” which did not comply with the relevant treaties and international law, thereby rendering the state trial court without jurisdiction to try him. Salazar argues that since the first three attorneys handling his case stated that each was going to pursue the jurisdictional issue, his actual trial counsel was ineffective for following a different course. Contrary to Salazar’s position, he was never admitted to St. Vincent and, therefore, could not have been extradited. The trial court properly found that Salazar had failed to prove either deficient performance or prejudice as required by Strickland when it denied relief.

The standard of review for ineffectiveness claims following an evidentiary hearing is *de novo*, with deference given the court's factual findings. "For ineffective assistance of counsel claims raised in post-conviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence, and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman v. State, 858 So.2d 319, 323 (Fla. 2003).

... we review the deficiency and prejudice prongs as mixed questions of law and fact subject to a *de novo* review standard but ... the trial court's factual findings are to be given deference. So long as the [trial court's] decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence.

Arbelaez v. State, 898 So.2d 25, 32 (Fla. 2005). See Reed v. State, 875 So.2d 415 (Fla. 2004); State v. Riechmann, 777 So. 2d 342 (Fla. 2000).

For a defendant to prevail on an ineffectiveness claim, he must establish (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688-89 (1984).

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive

the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla. 2001). At all times, the defendant bears the burden of proving not only counsel's representation fell below an objective standard of reasonableness, and was not the result of a strategic decision, but also actual and substantial prejudice resulted from the deficiency. See Strickland, 466 at 688-89; Gamble v. State, 877 So.2d 706, 711 (Fla. 2004).

In Davis v. State, 875 So.2d 359, 365 (Fla. 2003), this Court reiterated that the deficiency prong of Strickland requires the defendant establish counsel's conduct was "outside the broad range of competent performance under prevailing professional standards." (citing Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. In assessing the claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89 (citation omitted). The ability to create a more favorable strategy years later, does not prove deficiency. See Patton v. State, 784 So. 2d 380 (Fla. 2000); Cherry v. State, 659 So. 2d 1069

(Fla. 1995). Moreover, "[c]laims expressing mere disagreement with trial counsel's strategy are insufficient." Stewart v. State, 801 So.2d 59, 65 (Fla. 2001). "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on what efforts were undertaken and why a specific strategy was chosen over another. Investigation (even non-exhaustive, preliminary one) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 (stating "[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.").

Expounding upon Strickland, the Supreme Court cautioned in Wiggins v. Smith, 539 U.S. 510, 533 (2003):

In finding that [the] investigation did not meet *Strickland's* performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*.... We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." ... A decision not to investigate thus "must be directly

assessed for reasonableness in all the circumstances."

Wiggins, 539 U.S. at 533. From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on what efforts were undertaken and why a strategy was chosen. Investigation (even non-exhaustive, preliminary) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 ("[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.").

In addressing this issue, the post-conviction court found:

**Claim III b. -- Counsel failed to challenge Salazar's extradition from St. Vincent to Puerto Rico and then from Puerto Rico to Florida.**

Salazar contends that counsel was ineffective for failing to challenge Salazar's forcible abduction from Saint Vincent to Puerto Rico and extradition from Puerto Rico to Florida in contravention of an extradition treaty and in violation of the "Specialty Doctrine."

It is undisputed that Salazar is a native of Trinidad, and not a citizen of Saint Vincent and the Grenadines. At the evidentiary hearing, the State presented testimony that on July 21, 2000, and not on April 27, 2000, FN5 Salazar arrived in Saint Vincent at the E.T. Joshua Airport in disguise with a fraudulent passport; Salazar was detained by police but not admitted into the country; Salazar was identified and found wanted by Trinidad and United States authorities; Trinidad authorities gave way to United States authorities; and on July 26, 2000, Salazar was expelled from Saint Vincent by being handed over by Saint Vincent authorities to United States authorities who transported Salazar by plane to Puerto Rico. Salazar presented no evidence rebutting this testimony, or otherwise showing that he is entitled to relief under a valid extradition treaty. (PCR IV 363-97,

418-442.) Therefore, the Court finds that Salazar was expelled and not abducted or extradited from Saint Vincent.

FN5 The Puerto Rico arrest report stated that Salazar was arrested in Trinidad Tobago on April 27, 2000. (See arrest report in defense PCR exhibit 2.) In Puerto Rico Court proceedings contesting detainment and extradition, the various Courts stated that Salazar was detained in Saint Vincent (and not Trinidad Tobago) on April 27, 2000, incarcerated for three months, and arrived in Puerto Rico on July 27, 2000. (See pp. 2 & 8 of Puerto Rico notice of sentence in defense PCR exhibit 2; and writ of certiorari page 155 in defense PCR exhibit 4.) It is clear from a review of the Puerto Rico Court proceedings that there was other error in the Puerto Rico arrest report and that the dates of detainment in Saint Vincent were not material to granting the request for extradition from Puerto Rico to Florida for an unrelated Miami" homicide committed on November 24, 1999. (See pp. 8 & 9 of Puerto Rico notice of sentence in defense PCR exhibit 2.) Therefore, this Court finds the evidentiary hearing testimony of Saint Vincent law enforcement personnel more credible than the Puerto Rico arrest report concerning the dates of Salazar's detention in Saint Vincent.

On July 31, 2001, Salazar was extradited from Puerto Rico to Miami-Dade County pursuant to the Florida Governor's request for extradition on charges filed against Salazar for an unrelated Miami homicide that occurred on November 24, 1999. Salazar's extradition was litigated and affirmed on appeal in the Commonwealth of Puerto Rico in the Circuit Court of Appeals Regional Circuit of San Juan Panel III. At the evidentiary hearing, Salazar presented no evidence undermining this extradition process or the finality of the extradition appeal. Thus, the Court finds that Salazar was properly extradited from Puerto Rico to Miami-Dade County.

Lastly, because Salazar was expelled from Saint Vincent and then lawfully extradited from Puerto Rico to Miami-Dade County, the Court finds his subsequent transport to Okeechobee County for



prosecution on the charges in this case was proper pursuant to Florida Statutes, section 941.28. Consequently, the Defendant has failed to meet his burden to prove deficient performance and prejudice.

(PCR.11 1972-73) Those findings are supported by the record made at the evidentiary hearing and must be given deference by this Court. The court's legal conclusions were proper given the facts of this case and the law.

Salazar says he was entitled to certain protections for extraditions under a treaty between the United States and St. Vincent. However, Salazar failed to show that he was extradited from St. Vincent. Instead, the evidence established that he was **expelled** from St. Vincent and, therefore, is not entitled to any alleged protections under the treaty and the post-conviction court so specifically found. J.C. Elso's ("Elso") suspicions and conjectures offered nothing to challenge the sworn testimony of Donovan Leighton, Patricia Williams, and Sydney James that Salazar was first detained on July 21, 2000 when he tried to enter St. Vincent illegally, and that he was expelled from St. Vincent on July 26, 2000 after the Trinidadian authorities deferred to the claim the United States asserted for Salazar. All of the cases and argument Salazar relies on in analyzing an extradition under a treaty with a foreign country and the Specialty Doctrine are inapplicable here since there was no extradition from St. Vincent under a valid treaty.

As noted in United States v. Gardiner, 279 Fed.Appx. 848, 850, 2008 WL 2204590, 2 (11th Cir. 2008), "[a]bsent an express prohibition, even if a formal

extradition has been initiated, a **government may obtain custody of a defendant by other methods, including** abduction, **expulsion**, or surrender by the host country.” (citing Ker v. Illinois, 119 U.S. 436, 438, 442-43 (1886)) (emphasis supplied). In Gardiner, the federal court affirmed the denial of a defendant’s motion to dismiss reasoning:

Gardiner had to establish “by reference to the express language of a treaty ... that the United States affirmatively agreed not to seize foreign nationals from the territory of its treaty partner.” *Noriega*, 117 F.3d at 1213. Gardiner failed to establish that the treaty prohibited methods other than extradition to obtain custody, and the method by which Gardiner was brought into the United States did not deprive the district court of jurisdiction over Gardiner's criminal charges.

Gardiner, 279 Fed.Appx. at 850. Salazar has failed to show that his **expulsion** from St. Vincent and surrender of his person by St. Vincent authorities to the United States officials was improper. He has no basis to claim protections under a treaty.

Furthermore, the courts in Puerto Rico have reviewed thoroughly at the trial and appellate levels his challenges to his **interstate transfer** to Florida. (Defense-Exhibits 1 - 4). Any alleged scrivener’s error does not give Salazar a basis to complain here. In fact, the record establishes that Salazar was first detained on St. Vincent on July 21, 2000 when he tried to enter that country and that he was held there until July 26, 2000 when he was **expelled**, turned over to United State’s authorities, and the FBI agents flew Salazar and Donovan to Puerto Rico. As the

courts in Puerto Rico concluded, Salazar was properly sought by and was to be sent to Miami-Dade County to face charges. Salazar has offered no evidence calling into question the factual findings and legal resolution of the Puerto Rico courts. Elso's distrust of Detective Hoadley and his questioning of Dade County's executive decision to drop its murder charges against Salazar (SPCR.1 61-65) do not negate the fact that Salazar did not arrive on St. Vincent until July 21, 2000 and that he was expelled five days later. Elso could point to no document supporting his speculation and in fact his assumption of some conspiracy rested on the fact that there were no documents showing Salazar was extradited from St. Vincent by Okeechobee County. Further, Salazar cannot rely upon an alibi defense based on the timing of his detention on St. Vincent as he has offered no evidence challenging the testimony of Williams and James that Salazar was detained on St. Vincent from July 21, 2000 to July 26, 2000. Equally important, Salazar cannot claim the protection of a treaty as he was not extradited from St. Vincent, but was expelled.

Given the fact that Salazar was properly brought to Miami-Dade County based on his expulsion from St. Vincent and the ruling of the Puerto Rico courts, once in Miami-Dade County, any other Florida County with indictments or charges pending against Salazar could claim him. Section 941.28, Florida Statutes provides:

**No right of asylum; no immunity from other criminal prosecutions while in this state.** - After a person has been brought back to this state by, or after waiver of, extradition proceedings, the person may be tried in this state for other crimes which he or she may be charged with having committed here as well as that specified in the requisition for his or her extradition.

Under this provision and the fact that Salazar was **expelled from St. Vincent** and then properly transported from Puerto Rico to Miami-Dade via the **interstate compact and extradition proceedings**, Okeechobee County properly obtained custody of Salazar after Miami-Dade County no longer wished to pursue murder charges against him.

Salazar claims that on April 27, 2000, he was arrested on St. Vincent, but before he could be transported back to Trinidad to face charges there, the U.S. Marshalls forcibly took him into custody and transported him to Puerto Rico and eventually to Miami, Florida, following which the Miami charges were dropped and he was taken to Okeechobee, Florida to face indictment. Salazar argues that his alleged extradition via the U.S. Marshall's forced abduction violated the proper procedures under the extradition agreement the United States has with St. Vincent and with the Organization of Eastern Caribbean States. Salazar further claims that his prosecution in Okeechobee County violated the "Specialty Doctrine" under the treaty between the United States and St. Vincent because he was extradited to face Dade County charges, but instead was prosecuted under an Okeechobee County indictment after the Dade charges were dropped. Finally, Salazar alleges that he

was in custody in St. Vincent since April 27, 2000 as found by the Circuit Court of Appeals Regional Circuit of San Juan, and therefore, under the law of the case doctrine his conviction for a crime committed on June 26, 2000 is called into question.

From the March 2011 evidentiary hearing testimony, it is clear that Salazar was detained by the St. Vincent authorities on July 21, 2000, when he presented himself at the Joshua Airport on St. Vincent and sought entry into the country wearing a disguise and using a fraudulent passport and Florida driver's license. Sergeant Patricia Williams ("Williams") testified that Salazar was not detained on St. Vincent from April 27, 2000; instead, Salazar arrived at the Joshua Airport on St. Vincent near 6:00 p.m. on July 21, 2000. (PCR.16 692-93, 697) Upon Salazar's arrival on St. Vincent, Williams interviewed him because he looked suspicious. (PCR.16 692-93). Salazar presented Williams with a United States Passport in the name of Leonard Williams<sup>4</sup> of Georgia, but the passport felt as though it had been tampered with and when questioned, Salazar's unsatisfactory answers further aroused Williams' suspicions. (PCR.16 693-94). As a result, Williams did not allow Salazar to enter St. Vincent and asked her supervisor,

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<sup>4</sup> The transcription of Patricia Williams' testimony recorded that the passport was in the name of "Leonard Williams," however, the document contains a different spelling for "Leonard." Such does not undermine the essence of Williams' testimony or the actions taken by her in denying Salazar entrance to her country and his eventual expulsion for St. Vincent. (PCR.16 693-94).

Inspector Sydney James (“James”), to investigate Salazar. (PCR.16 694-95). Salazar was held in the custody of the St. Vincent Police until July 26, 2000 at 4:00 p.m. when he was expelled from the country and handed over to Donovan Leighton and FBI Agents and put on a plane leaving St. Vincent. (PCR.16 695-97).

James corroborated Williams’s account and explained that photographs contained in the passport in the name of Leonard Williams from Georgia and on the Florida driver’s license in the name of Bernard Moss Keir were both of Salazar, however, the names and birthdays did not match. (PCR.16 710-11) Additionally, Salazar was wearing a disguise of glasses and a wig. (PCR.16 710-11) It was not until July 25, 2000 that Salazar’s identity was confirmed after the authorities from Trinidad and Tobago responded to an Interpol request for identity. (PCR.16 711) It was at that time that the authorities announced that Salazar was Gary Lambert a/k/a Neil Salazar, a Trinidad native. (PCR.16 711) Salazar was detained by the St. Vincent Police from July 21, 2000, the day he presented himself at the Joshua Airport. (PCR.16 711-12). On July 26, 2000, Salazar was released to the authorities from the United States; the decision to have Salazar go with the United States authorities instead of the Trinidadian authorities was a result of the Trinidad officials giving way to the United States. The procedure employed with Salazar is the procedure used when a person trying to enter St. Vincent is denied entry to the country. (PCR.16 712-13). Further, James testified that Salazar was not kidnapped

from St. Vincent by the FBI agents. Rather, Salazar was “handed over to the FBI agents” by the St. Vincent authorities. Previously, St. Vincent authorities had “handed over” other “undesirable” persons to other countries. (PCR.16 713-14).

James explained that Salazar was not booked or formally charged by the police in St. Vincent because they had not yet ascertained his identity. However, Salazar was held at the police station. (PCR.16 715). James was very clear that while Trinidadian officials came to St. Vincent with regard to Salazar, those officials opted not to take custody of Salazar because he was wanted by United States officials and the decision was made to “give way” to the United States. (PCR.16 716-17) The procedure used in Salazar’s case was typical of how these matters are handled. (PCR.16 717) James was present on the day Salazar was handed over to the FBI agents. (PCR.16 720).

In July 2000, Donovan Leighton (“Donovan”) was the legal attaché attached to the American Embassy in Barbados and helped coordinate with the Governments of Trinidad and St. Vincent for the return of Salazar to United States custody. (PCR.16 746-50). Knowing that both Trinidad and Miami-Dade County wanted Salazar to answer for crimes he committed, Donovan asked the Attorney General of Trinidad to defer to the Miami-Dade County murder charges because the Trinidad charges were for a 10-year old robbery. Donovan recalled that Salazar was detained on St. Vincent from July 21, 2000 to July 26, 2000. (PCR.16

750, 759).

Donovan explained that “Extradition” under a treaty between two countries is an extended process whereas “Expulsion” is an expedient process as it relies solely on a government having custody of a person deciding to expel that person under that country’s laws and turning the person over to the United States. (PCR.16 751-52, 761-62). Salazar never legally entered St. Vincent because he attempted to enter that country on a false/fraudulent United States passport. (PCR.16 752) It is standard practice for a person entering a country illegally under a fraudulent passport to be expelled by that country instead of proceeding under the extradition process. (PCR.16 752). In Salazar’s case, he was expelled from St. Vincent, not extradited. Likewise, Salazar was not kidnapped by FBI agents. (PCR.16 752)

While Donovan had initially planned to seek extradition of Salazar, St. Vincent authorities made the decision to utilize the expulsion procedure. In fact, the St. Vincent authorities were adamant that Salazar be expelled from St. Vincent and the Commissioner of the Royal St. Vincent Police demanded that Donovan take immediate custody of Salazar which took place on July 26, 2000. (PCR.16 753-54, 763) Donovan had been contacted by the St. Vincent Police after the Trinidadian authorities had confirmed Salazar’s identity and St. Vincent had checked Interpol to find that Salazar was wanted by the United States. (PCR.16



753-54)

On July 26, 2000, Donovan obtained custody of Salazar and the FBI pilots flew Donovan and Salazar to San Juan Puerto Rico. (PCR.16 754-55). On the flight, Salazar claimed he had gone to St. Vincent to broker a drug deal. (PCR.16 754). He also admitted that his life was over now that he was returning to the United States. Salazar stated that he was part of the Jamat Al Muslimeen (“JAM”) and was involved in the drug trade. He also asserted that when a person involved with JAM “messed up some money” he was required to take care of them and asked if he was being sent to United States regarding “some murders?” (PCR.16 755-57). During the 40-minute flight to San Juan, Donovan observed no signs indicating Salazar might be under the influence of drugs or alcohol. (PCR.16 768). However, when Salazar became aware that the plane was heading north, and not south to Trinidad, he became agitated and suicidal, trying to put his head through the plane window. (PCR.16 757).

Once in Puerto Rico, Salazar challenged his intrastate transfer to Florida. (Defense Exhibits 1-4 PCR.27 pg. 201 – PCR.39 pg. 708) (PCR.16 662-79, PCR.22 1590,1593). Barry Witlin (“Witlin”), counsel Salazar had for a period before trial, explained that he looked into Salazar’s court challenges in Puerto Rico. While Witlin believed Salazar had exhausted his remedies in Puerto Rico and that he did not think Salazar had a viable challenge to the extradition to the

United States, he thought there may be a basis to challenge Salazar's transfer to Okeechobee. (PCR.16 662-66). Discussions on possible claims that could be raised were noted pre-trial (SR.5 453-54, 469, 504-07; Court Exhibit 1, (PCR.26 pgs. 2-53) transcript of January 6, 2005 hearing). Witlin explained that Okeechobee County had never sought the Governor's warrant for extradition, but that Miami-Dade had sought such a warrant. After Miami-Dade had obtained custody of Salazar, they dropped their charges against him, and Salazar was taken by Okeechobee County. At no time had an extradition warrant been issued for acts committed in Okeechobee County (PCR.16 669-70).

In his perpetuated testimony deposition, J.C. Elso ("Elso") admitted that he was in federal prison for money laundering based on money he received from a client who was a drug dealer. (SPCR.1 9-11, 47-8). See, United States v. Elso, 422 F.3d 1305 (11th Cir. 2005) (affirming conviction); United States v Elso, 364 Fed.Appx. 595 (11th Cir. 2010) (denying collateral relief). Elso explained that he first appeared in Salazar's case on September 20, 2001 and withdrew on July 12, 2002 due to the personal problems he was facing. (SPCR.1 48-9, 69-71). He noted that he had some documents related to Salazar's "extradition issue," but these were not certified. While he researched the "extradition issue," he admitted that he never filed a motion to dismiss. His explanation for not filing the motion was that he did not have certified copies of the extradition paperwork from Puerto Rico,

although he had no concern about the authenticity of the documents provided by Salazar. It was Elso's claim that he did not have the funds to travel to Puerto Rico to obtain certified documents. However, he admitted that he never filed a motion to compel the State to provide such documents, and the record is devoid of a motion filed by Elso seeking to declare Salazar indigent for costs. (SPCR.1 16-17, 34-35, 52, 65-67, 69, 75)

Elso's understanding of the "extradition issue" and the "alibi defense" was based on what Salazar told him and what he read in the papers he had been supplied, however, he has no knowledge of how Salazar got from St. Vincent to Puerto Rico. (SPCR.1 24, 36-38, 44-45, 53-54). Although Elso said he believed the Okeechobee County had tried, but failed to extradite Salazar from St. Vincent, Elso had no documents establishing that fact. Elso persisted in this belief even though the prosecutor was informing the trial court that Okeechobee had never tried to extradite Salazar. (SPCR.1 34, 52-53, 67) Elso was suspicious that there was collusion between Dade and Okeechobee Counties to extradite Salazar, but this was based on Elso's distrust of Detective Hoadley and the fact that the Dade charges were dropped after Salazar had been brought to Florida. (SPCR.1 60-65)

The established facts fully demonstrate that defense counsel may not be deemed deficient in not pursuing the meritless claim of a treaty violation or violation of the Specialty Doctrine. Salazar cannot show he could have prevailed

under his claim of a treaty violation as he was not entitled to any protections under the treaty given that he was expelled from St. Vincent, not extradited. Having been brought to a United States territory properly, extradited via an interstate compact to Florida litigated through the Supreme Court of Puerto Rico, and transferred to Okeechobee County pursuant to section 941.28, counsel was not ineffective in not challenging the manner in which Okeechobee gained custody of Salazar. Salazar failed to show that he had a colorable claim or that had counsel challenged the expulsion from St. Vincent, interstate compact extradition to Miami-Dade County, and transfer to Okeechobee County that the result of the proceeding would have been different. Personal jurisdiction of Salazar was obtained properly by Okeechobee County, and this claim should be denied.

## **ARGUMENT TWO**

### **THE COURT PROPERLY DENIED THE CLAIM THAT SALAZAR IS NOT MENTALLY RETARDED SINCE SALAZAR FAILED TO PROVE THAT HE HAS CONCURRENT DEFICITS. (Restated)**

Salazar asserts that he is mentally retarded and, therefore, ineligible for the death penalty. Despite that assertion, he failed to carry his burden of proving each of the three prongs necessary under §921.137(1), Fla. Stat. and Fla.R.Crim.P. 3.203 and defined by Cherry v. State, 959 So.2d 702, 711 (Fla. 2007) to prove mental retardation. He did not show that his full scale IQ score was 70 or below

*concurrently* with deficits in his adaptive behavior which exists presently and had manifested before age 18. Salazar does not have significant sub-average general intellectual functioning since his Stanford-Binet testing resulted in an IQ above 70. Likewise, Salazar does not have current deficits in adaptive behavior as evidenced by the facts. For instance, Salazar has obtained a commercial driver's license, has traveled internationally on an independent basis, drove a taxi for a living, has argued legal motions/represented himself at trial and on post-conviction, explained a complex legal defense/extradition theory to counsel, and cared for and supported himself and other family members. The post-conviction court correctly found that Salazar failed to prove his allegations and this Court should affirm the denial of relief.

After the evidentiary hearing, the lower court found the following facts:

Claim VII - Salazar is ineligible to be executed because he is mentally retarded. Salazar claims that he is ineligible for the death penalty because he is mentally retarded.

For the reasons stated below, the Court finds that Salazar fails to prove two of the three prongs required to demonstrate that he is mentally retarded.

#### Manifestation of mental retardation before age 18

Salazar called Dr. Frank Worrell to establish the manifestation of mental retardation before age 18. Dr. Worrell is a professor at the University of California Berkeley trained as an educational and school psychologist. Dr. Worrell has experience conducting mental retardation assessments, developing aptitude measures to identify at-risk youth, and working with the Trinidad and Tobago education

system. (PCR Vol V pp. 459-470)

Dr. Worrell did a retrospective evaluation of Salazar's academic functioning and adaptive functioning prior to the age of 18. (I-“CR Vol V p. 478) This case was Dr. Worrell's first experience rendering an expert opinion in a Court and his first retrospective evaluation of mental retardation. (PCR Vol V pp. 508-511, 514)

Dr. Worrell concluded that Salazar was deficient in functional academic skills and social skills specifically with relationship to self-care, gullibility, naiveté, and inability to protect himself. (PCR Vol V p. 501)" Dr. Worrell did not conduct any standardized tests or administer any adaptive functioning instruments. (PCR Vol V p. 481) Dr. Worrell based his conclusions solely on general interviews with Salazar's mother and father, Worrell's personal experience with the Trinidad and Tobago education system, and three pages of Salazar's school records. (PCR Vol V pp. 481-482, 483-495, 517) Dr. Worrell did not interview Salazar, other relatives, school personnel, or community members. (PCR Vol V p. 482).

As to functional academic skills, it is uncontested that Salazar attended Trinidad and Tobago schools from 1972-1984. (PCR Vol V p. 514) Dr. Worrell explained that during this period only severely disabled students were identified for special education. Salazar was not identified for special education. (PCR Vol V p. 491) Dr. Worrell opined that Salazar demonstrated a consistent pattern of functioning at the lower end of the academic distribution, the bottom five percent of students, and thus was placed in lower tier schools. (PCR Vol V p. 496) Dr. Worrell testified the school records show that Salazar failed all but one of his classes and did not complete his final exams. This academic failure was not corroborated by Salazar's parents where the mother could not recall details of Salazar's academic performance and the father merely stated that Salazar was not "bookish." During cross examination on the meager three-page school record Worrell conceded that Salazar tested well enough to get into secondary school, that the explanation of grades showed that Salazar passed five of the six classes, that the principal of his junior secondary school noted that Salazar was an average student, and that the record provided no explanation why Salazar did not take all of his final exams. (PCRTR Vol V pp. 517-521, 523-532) This cross examination was un rebutted.

Consequently, the Court finds that Salazar fails to demonstrate subaverage intellectual functioning prior to age 18 by clear and convincing evidence.

As to adaptive functioning, Dr. Worrell opined that Salazar demonstrated deficits in lack of self-direction, in lack of self-care, and was prone to being taken advantage of by others. Dr. Worrell based these opinions on parental reports that as a young boy Salazar climbed trees that were too high, climbed on the house roof and fell off, did not do things that made sense, was very social and would never say “no” when asked to do things by others. (PCR Vol V pp. 497-502) On cross examination, Dr. Worrell conceded that neither parent explained why these activities were particularly unusual for young Salazar relative to other children his age; nor provided concrete examples of Salazar’s recklessness, dangers to Salazar, or the specific exploitation of Salazar by others. (PCR Vol V pp. 537-550) Consequently, the Court finds that cross examination rendered Dr. Worrell’s expert opinion incredible due to Worrell’s forensic and retrospective evaluation inexperience, the absence of any supporting concrete examples of adaptive functioning deficits, and the total lack of corroborating evidence. Therefore, the Court finds that Salazar fails to demonstrate significant deficits in adaptive functioning prior to age 18 by clear and convincing evidence, and thus cannot show the manifestation of mental retardation before age 18.

#### Significantly subaverage general intellectual functioning

Two clinical psychologists conducted three intelligence tests of Salazar. For the defense, Dr. Phillip Harvey administered the Wechsler Adult Intelligence Scale twice. In 2008 Salazar scored a full scale IQ of 68 on the WAIS III, and in 2010 scored a full scale IQ of 67 on the WAIS IV. For the state, in 2011 Dr. Greg Prichard administered the Stanford-Binet Intelligence Scale 5 on which Salazar scored a full scale IQ of 72.

Salazar called Dr. Thomas Oakland FN6 to critique the administration of the Stanford-Binet specifically with respect to Dr. Prichard’s deviations from the standard testing environment and instructions. (PCR 2013 Vol I 93 - Vol II 114) In turn, Dr. Prichard addressed the criticisms by describing the prison testing limitations

and the Court ordered attendance during testing, by explaining that the Stanford-Binet was more difficult for the examiner to administer and by admitting the deviations from the standard instructions; but by downplaying the effects of the deviations as neutral, irrelevant, or unknown. (PCR 2013 Vol IV 442-454)

FN6 Dr. Oakland is board certified in school psychology and clinical neuropsychology, has extensive international experience in mental retardation assessment and measures of intelligence assessment, and is a co-author of the Adaptive Behavior Assessment System.

Dr. Prichard's comments concerning the WAIS were limited to the relative scoring and the confidence intervals as compared to the Stanford-Binet. And Dr. Prichard's only real challenge was that the WAIS scores were inconsistent with his opinion that Salazar was not mentally retarded. (PCR 2013 Vol V 548-550 578-587)

The Court finds no evidence tending to undermine the WAIS administration, and the WAIS full scale IQ scores of 67 and 68; or to otherwise show that the Stanford-Binet score is more reliable than the WAIS scores. Consequently, the Court finds that Salazar has demonstrated significant subaverage general intellectual functioning by clear and convincing evidence.

#### Concurrent deficits in adaptive behavior

In 2010, Dr. Denis Keyes, Ph.D., administered the Adaptive Behavior Assessment System II to Salazar and his brother Neil Kurt Salazar to assess concurrent deficits in adaptive behavior. Despite the Court continuing the mental retardation phase of the evidentiary hearing for over seven months in 2011 to accommodate Dr. Keyes' [sic] unavailability due to medical treatment, Dr. Keyes' [sic] testimony was not presented at the mental retardation hearing. Nor was the testimony of Salazar's brother presented. Instead, Dr. Keyes' [sic] report was relied upon by Dr. Thomas Oakland to render an opinion concerning Salazar's concurrent deficits in adaptive behavior. Dr. Oakland did not interview or evaluate Salazar; did not interview Salazar's brother; nor review any trial, medical, or jail records. (PCR 2013 Vol II 142-147)



Based on Dr. Keyes' [sic] report, Dr. Oakland opined that Salazar had concurrent deficits in adaptive behavior in the areas of: functional academics, self-care, and self-direction. (PCR 2013 Vol II 124-128) The Court finds the following strengths that rebut these specific deficits. Consequently, the Court finds that Salazar fails to demonstrate concurrent deficits in adaptive behavior by clear and convincing evidence.

#### Functional, academics-strengths

- Comprehending the Commercial driver's license manual and passing the CDL test where only 40% of test takers pass the first time (PCR 2013 Vol II 226-278; Vol IV 467-473; Vol V 623-624)
- Understanding and using legal references (PCR 2013 Vol IV 485)
- Demonstrating competence to proceed pro se (PCR 2013 Vol V 550- 552)

#### Self-care - strengths

- Appearing well-groomed, dressed appropriately, and clean (PCR 2013 Vol IV 462 464; Vol V 567)
- Caring financially for himself, children, and family (PCR 2013 Vol IV 458, 459, 462; Vol V 667-668)
- Maintaining a bank account with \$1000 balance (PCR 2013 Vol IV 460-4.61, 517)
- Understanding the value of his personal assets (PCR 2013 Vol IV 506-515)
- Driving safely (PCR 2013 Vol IV 462)

#### Self-direction - strengths

- Moving to the U.S. for a better life (PCR 2013 Vol IV 463)
- Travelling internationally between the U.S. and Trinidad requiring a visa (PCR 2013 Vol IV 456-459; Vol V 625-626)
- Fleeing to Saint Vincent after the crime in disguise with a fake ID and passport (PCR 2013 Vol IV 465-466)
- Managing legal case strategy from jail, drawing a map of the crime area (PCR 2013 Vol IV 479-480, 503-504; Vol V 522-547)
- Masterminding the crimes and directing others (PCR 2013 Vol IV 473-479; Vol V 626-626)
- Representing himself in the Courtroom concerning discovery, delays, indigency, and consulate contacts (PCR 2013 Vol IV 486-503, 505; Vol V 550-552, 629-633)
- Purchasing, selling, and paying taxes on real estate (PCR 2013 Vol IV 460-461, 505-517; Vol V 568)
- Making inmate requests for case resources (PCR 2013 Vol IV 480-484; Vol V 629 - 630)
- Paying for legal representation (PCR 2013 Vol IV 510)

In sum, Salazar has failed to prove two of the three prongs required to demonstrate mental retardation. Therefore, Salazar is not ineligible to be executed.

(PCR.11 1981-86) The post-conviction court's factual findings are amply supported by the record and deserve deference. Arbelaez, 898 So.2d at 32; Freeman, 858 So.2d at 323.

With respect to review of claims of mental retardation, this Court has stated:

Florida law includes a three-prong test for mental retardation as a bar

to imposition of the death penalty. *See* § 921.137(1), Fla. Stat. (2009); Fla. R.Crim. P. 3.203; *Nixon v. State*, 2 So.3d 137, 141 (Fla. 2009); *Cherry v. State*, 959 So.2d 702, 711 (Fla. 2007). This Court has “consistently interpreted section 921.137(1) as providing that a defendant may establish mental retardation by demonstrating all three of the following factors: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen.” *Nixon*, 2 So.3d at 142. At trial, the defendant “carries the burden to prove mental retardation by clear and convincing evidence.” *Franqui v. State*, 59 So.3d 82, 92 (Fla. 2011); *see* § 921.137(4), Fla. Stat. (2009). “We review the circuit court's determination that a defendant is not mentally retarded for competent, substantial evidence, and we do not reweigh the evidence or second guess the circuit court's findings as to the credibility of the witnesses.” *Franqui*, 59 So.3d at 91 (internal quotations marks omitted). But “to the extent that the circuit court decision concerns any questions of law, we apply a de novo standard of review.” *Dufour v. State*, 69 So.3d 235, 246 (Fla. 2011).

Snelgrove v. State, 2012 WL 1345485, 7 (Fla. 2012).

Rule 3.203<sup>5</sup> provides that:

As used in this rule, the term “**mental retardation**” means **significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18**. The term “significantly subaverage general intellectual functioning,” for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65G-4.011 of the Florida Administrative Code. The term “**adaptive behavior**,” for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group,

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<sup>5</sup> *See also*, section 921-137(1), Fla. Stat. (2006).

and community.

(emphasis supplied).

In State v. Herring, 76 So.3d 891, 895 (Fla. 2011), this Court announced that in order for a defendant to be exempt from the death penalty under rule 3.203(b) and §921.137, he bears the burden of proving by convincing evidence all three criteria of the three-prong standard. See also, Franqui v. State, 59 So.3d 82, 92 (Fla. 2011) (holding that “[a] defendant who raises mental retardation as a bar to imposition of a death sentence carries the burden to prove mental retardation by clear and convincing evidence.”); Nixon v. State, 2 So.3d 137, 145 (Fla.2009) Jones v. State, 966 So.2d 319, 325 (Fla. 2007); Burns v. State, 944 So.2d 234, 245 (Fla. 2006). If a defendant fails to prove any of the three prongs under the rule or statute, he will not be found mentally retarded. Nixon, 2 So.3d at 142.

This Court has interpreted “**significantly subaverage general intellectual functioning**” to be an IQ of 70 or below. Nixon, 2 So.3d at 142; Jones v. State, 966 So.2d 319, 329 (Fla. 2007) (stating “under the plain language of the statute, ‘significantly subaverage general intellectual functioning’ correlates with an IQ of 70 or below.”); Zack v. State, 911 So.2d 1190, 1201 (Fla. 2005) (same). The IQ score is a bright-line rule and where some scores are above 70 although others are below, the defendant has not proven he has “significantly subaverage general intellectual functioning.” See Phillips v. State, 984 So.2d 503, 511 (Fla. 2008)

(rejecting mental retardation claim as the majority of defendant’s “IQ scores exceed that required under section 921.137.”); Jones v. State, 966 So.2d 319, 329 (Fla. 2007) (finding defendant failed to meet first prong as his scores on the WAIS-III ranged from 67 to 75, thus, they “did not indicate ‘significantly subaverage general intellectual functioning.’”).

This Court has explained the interplay between the IQ score and adaptive behavior as follows:

Both Florida law and our rule state that the exception to the death penalty applies to a defendant who “is mentally retarded” or “has mental retardation.” §921.137(2), Fla. Stat. (stating no person may be sentenced to death “if it is determined in accordance with this section that the defendant has mental retardation”); Fla. R.Crim. P. 3.203(e) (providing for an evidentiary hearing to consider “the issue of whether the defendant is mentally retarded”). Thus, the question is whether a defendant “is” mentally retarded, not whether he was. Both the statute and our rule define mental retardation as “significantly subaverage general intellectual functioning existing **concurrently with** deficits in adaptive behavior and manifested during the period from conception to age 18.” § 921.137(1), Fla. Stat. (2005) (emphasis added); Fla. R.Crim. P. 3.203(b). Jones does not dispute that the intellectual functioning component must be based on current testing. . . . What Jones argues is that the second prong is concerned solely with an individual's adaptive behavior as a child under age 18. The legal definition, however, states that the intellectual functioning component must “exist[] concurrently with” the deficient adaptive behavior. The word “concurrent” means “operating or occurring at the same time.” *Merriam Webster's Collegiate Dictionary* 239 (10th ed. 2001). Jones's analysis would require us to ignore the plain meaning of the phrase “existing concurrently with” that links the first two components of the definition. The third prong-“and manifested during the period from conception to age 18”-specifies that the present condition of “significantly subaverage general intellectual functioning” and concurrent “deficits in adaptive behavior” must have first become

evident during childhood.

Jones, 966 So.2d at 326.

At the evidentiary hearing, Salazar presented Drs. Worrell, Harry Krop, Thomas Oakland, and Philip Harvey each of whom offered testimony on a different prong of the mental retardation analysis showing the results of IQ and adaptive behavior testing along with reports of their interaction with Salazar. Salazar also called penalty phase counsel, Jeff Smith (“Smith”), former girlfriend, Sadie Francis, and sister, Arlene Lambert, who offered testimony touching on the mental retardation claim. For this claim, the State presented Salazar’s prior counsel Barry Witlin and Elio Vasquez. It also presented Department of Highway Safety and Motor Vehicles Officers Richie Frederick and Kevin Gray, Deputy Sheriff Ronnie White, Department of Corrections Sergeant Morris Mahoney, and Dr. Greg Prichard along with transcripts/recordings/writings of Salazar’s court hearings, jail telephone conversations, inmate requests, and driver’s license tests.

None of Salazar’s prior counsel saw any indication that Salazar had mental deficits consistent with mental retardation. Jeff Smith found Salazar to be a “normal fellow” to converse and deal with and recalled Dr. Krop did not report any significant psychological testimony. (PCR.14 482). Barry Witlin had several face-to-face meetings with his client where they discussed the case and possible defenses. Salazar was an active participant and was the first to present the defense

involving the “extradition” issue. It was Salazar who had to explain the defense to Witlin which was based on the paperwork surrounding how he came to be in the United States. (PCR.16 662-79). Witlin never thought Salazar was mentally retarded and Salazar never gave Witlin any concern that he could not assist in his defense. (PCR.22 1590, 1593). Likewise, Elio Vasquez averred his interactions with Salazar were helpful and he had no concerns regarding Salazar’s ability to understand the proceedings. Salazar appeared normal. (PCR.22 1604-07, 1611)

Ritchie Fredrick and Kevin Grey, both with the Division of Highway Safety and Motor Vehicles, offered evidence respecting Salazar’s Commercial Driver’s License (“CDL”). According to Mr. Fredrick, on November 22, 1996, Salazar applied and received for a Class A CDL which required him to pass written and practical tests. Later, Salazar took additional tests, which he passed, to permit him to drive a tanker truck hauling hazardous materials. Salazar passed the written test which requires a score of 80% or above. (PCR.22 1620-40; State’s Ex. 3, 4, 22 PCR.31 1027, 1109; PCR.33 1415-1424). Mr. Grey attested that the pass rate for these written exams is approximately 60%. (PCR.22 1659-61)

Ronnie White (“White”), an Okeechobee County Sheriff has had personal contact with Salazar over the years (PCR.23 1675-76, 1681) White identified State’s Ex. 10 as Salazar’s inmate letters and requests. Such included requests for such things as: (1) checks to be drawn on his account, (2) visitation, (3) a copy of

Model Jail Standards; (4) a Ramadan meal, (5) for phone access to call his attorney and family; (6) verification his “legal mail” was sent out; (7) inquiring about his property from Dade County. (PCR.23 1679-80; State’s Ex.10 PCR.33 1288-1408) These requests were written by Salazar and White was familiar with Salazar’s handwriting. (PCR.23 1681). Salazar submits an above average number of inmate requests and White has never had difficulty understanding Salazar’s requests which have been both oral and in writing (PCR.23 1681-82). Salazar has taken his complaints about the conditions of his incarceration to the Florida Department of Law Enforcement which included being in lock-down for 11 months without family visits, having his legal mail opened, and not getting mail. (PCR.23 1683).

Sergeant Morris Mahoney from the Department of Corrections inventoried Salazar’s cell on March 22, 2011 and listed the book found therein. (PCR.23 1697-98; State’s Ex. 8 PCR.31 1110-12) The list included several books, however, Mahoney never saw Salazar reading. (PCR.23 1699).

Dr. Krop, a clinical psychologist, was hired by Akins and Smith in January 2006 to do a psychological evaluation to assess Salazar’s competency and psychological status for exploring possible mitigation. (PCR.21 1403-04, 1410-11) During Dr. Krop’s interview, Salazar told the doctor enough about the charges to verify they were consistent with the police reports. Salazar noted that an alibi defense was being used based on his being in another country at the time of the



crime. Salazar showed Dr. Krop the Puerto Rico documents *which Salazar translated from Spanish* for him. Salazar discussed the "facts" of his alibi defense and that he felt the extradition was improper and voiced his dissatisfaction with counsel's alleged failure to interview the extradition witnesses. Salazar spoke of being a good student, going to trade school, and learning six different trades including masonry and plumbing. (PCR.21 1418-20) Also, Salazar spoke of first arriving in the United States in 1985 and of traveling back and forth to Trinidad since then. According to Salazar, such trips required embassy approval. Dr. Krop was told by Salazar that he mostly stayed in Miami, but that he moved around the country following work. Salazar spoke of living in Chicago and building houses in Trinidad and the Caribbean. (PCR.21 1421-22)

Dr. Krop testified that during the interview, it was difficult to get an assessment of Salazar's intellectual functioning, however, Salazar was articulate. (PCR.21 1430). No signs of a major mental illness were evident and based on the initial interview Dr. Krop did not feel there was mental retardation here. However, Dr. Krop had planned on doing more testing. Dr. Krop's entire interview with Salazar was an assessment of adaptive functioning in that it looked at whether Salazar was capable of independent functioning in life, making a living for himself, and other factors. Had a formal adaptive functioning assessment been conducted, the same information Dr. Krop learned in the January 16, 2006

interview would have been considered. Nothing stood out in the interview which caused Dr. Krop to think that Salazar may have adaptive functioning deficits or suggest that the mental retardation issue should be investigated for mitigation. (PCR.21 1446-48)

Dr. Oakland developed the Adaptive Behavior Assessment System (“ABAS”) for determining adaptive functioning as part of the determination if someone is mentally retarded. (PCR.21 1460) However, he never interviewed Salazar; Dr. Oakland did not give Salazar any intelligence tests, did not give Salazar the ABAS and never spoke to or met with him outside the courtroom. (PCR.14 369; PCR.22 1535-36) Nonetheless, Dr. Oakland relied on the reports of Dr. Keyes and Worrell to assess adaptive functioning.<sup>6</sup> Dr Keyes used the ABAS test, but Dr. Worrell did not use a standardized method for someone from Trinidad because one had not been developed by the time of his evaluation. Instead, Dr. Worrell obtained information from Salazar and went to Trinidad and collected data

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<sup>6</sup> Dr. Oakland reviewed the reports of Drs. Keyes, Worrell, Harvey and Prichard. He also viewed Dr Prichard's video evaluation, read the resulting transcript of his testing. Dr, Oakland read Dr. Harvey's deposition. However, Dr. Oakland did not read any trial depositions or testimony and he did not review any postconviction transcripts, medical records, or records from the Department of Corrections, Okeechobee County Jail or Martin County Jail records. (PCR.22 1536-38) Also of note, all of Dr. Oakland’s criticisms of Dr. Prichard’s administration of the Stanford-Binet came from the fact that such had been videotaped. Yet, none of Dr. Harvey testing or Dr. Keye’s administration of the ABAS was taped and Dr. Oakland admitted he just assumed the tests were administered properly. (PCR.22 1545-46, 1561-62).

from three sources in Trinidad. (PCR.22 1510) Dr. Oakland stated that the ABAS guidelines provide that self-reports should not be used as there may be a "cloak of competence" result meaning the person wants to appear more normal than how others perceive him. (PCR.22 1511-12).

Based on the reports of Drs. Worrell and Keyes, Dr. Oakland found that Salazar had deficits in adaptive functioning in the areas of functional, academics, self-direction, and self-care. (PCR.22 1514-15). Dr. Oakland admitted that Salazar had been living in Trinidad primarily up to the age of 18, and because Salazar's adaptive behavior prior to 18 years of age was the focus of the inquiry, the ABAS should have been normed to the Caribbean culture. However, Dr. Oakland does not know whether the ABAS has been so normed to the Caribbean culture; in fact, there are no measures of adaptive behavior developed for the Caribbean and there are no measures of adaptive behavior designed for retroactive application as was called for here. (PCR.22 1567-68)

Dr. Harvey gave Salazar the WAIS-III which yielded a corrected full scale score of 68 and the WAIS-IV which resulted in a full scale score of 67 (PCR.23 1733-35, 1743-47). These results were consistent with Dr. Worrell's report. However, Dr. Harvey admitted the WAIS-III has been criticized for not being culturally sensitive enough for those born and raised outside the United States. As such, the same criticism leveled against the WAIS-III could be leveled against the

WAIS-IV as it was not normed for persons of the Caribbean. (PCR.23 1759). Dr. Oakland agreed that the WAIS-IV is normed for those from similar cultures to the United States such as Canada, Britain, Australia, and New Zealand. However, Dr. Oakland did not have enough information about Trinidad to make a decision on norming. Yet, he noted there is a strong British influence in Trinidad, that English is spoken widely there and that people readily travel between the United States and Trinidad. However, Dr. Oakland could not give a definitive answer and admitted it depended upon the person rather than the population. (PCR.22 1526-27) In Dr. Harvey estimation, Salazar was putting forward his best effort on the tests. (PCR.23 1745) With respect to adaptive behavior, Dr. Harvey admitted he is not an expert in that assessment of a person with mental retardation and as such, did nothing regarding adaptive behavior assessment. (PCR.23 1755).

Although Dr. Worrell concluded that Salazar had early onset of substantial deficits (PCR.23 1745), Dr. Oakland stated that he did not have information from studies and reports to say that Salazar had an onset of both a deficiency of intellectual ability and adaptive functioning before 18 years of age. All Dr. Oakland could say was that currently Salazar had a deficiency in intellectual ability and adaptive functioning in order to support a mental retardation diagnosis. (PCR.22 1527-28). However, the ABAS upon which Dr. Oakland relied for his opinion was given to family members only including Salazar's brother who is a

convicted felon.<sup>7</sup>

It was Dr. Oakland's opinion that the best way to assess adaptive behavior is to observe the person in his natural setting. Adaptive behavior measures actual performance/behaviors not a person's capability because capability is a judgment. Watching a person in a naturalistic setting is a good way of determining whether the person has any deficits in adaptive behavior. Yet, Dr. Oakland did not observe Salazar, did not undertake any efforts to talk to anyone who knew Salazar currently, i.e., while incarcerated or before he went to prison. Dr. Oakland merely relied on the information from other Doctor who did evaluations. (PCR.22 1559-60). Dr. Oakland offered that he was confident in his assessment based on the information he had even though he did not look at anything about Salazar's crime or his recent interactions with the court system or the jail/prison officials. In essences, it was Dr. Oakland's testimony that he was confident in his opinion because he chose not to look at anything which might disabuse him of his opinion. As such, Dr. Oakland's blind reliance upon the defense experts and discounting of

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<sup>7</sup> Dr. Oakland agreed that a family member's concern for a loved one on death row may inject a bias into his/her performance on the ABAS. In order to assess the possible bias, one would look to see if there were any documents which could provide to support/confirm the reliability of the family member's report. However, Dr. Oakland did not review any such confirming docs. Likewise, Dr. Oakland offered that in selecting persons to complete the ABAS should take into account the frequency and "in depth" nature of the observer contact with Salazar, yet, Dr. Oakland did not know the answer to such question when it case to the family members Dr. Keyes selected to complete the ABAS. (PCR.22 1568-70).

Dr. Prichard's opinion should result in this Court rejecting Dr. Oakland's criticism and opinion that Salazar has a deficiency in intellectual ability and adaptive functioning in order to support a mental retardation diagnosis.

Unlike the defense experts, Dr. Prichard assessed each of the three prongs of the mental retardation assessment under Florida law. He administered the Stanford-Binet test to Salazar under conditions which were not ideal in that there were other people in the testing room including two attorneys, a videographer, and court reporter. (PCR.21 1485) However, as this Court will recall, such was at the request of the defense and was by court order. More important, Salazar obtained an IQ score of **72**,<sup>8</sup> **a score above the bright-line cut off score announced in *Cherry***. Likewise, Dr. Harvey admitted that a person cannot do better on a test than he is capable of doing and Dr. Oakland admitted that such alleged distractions in Dr. Prichard's testing would not increase Salazar's scores. (PCR.21 1492-97; PCR.22 1502-03, 1538-41; PCR.23 1758)

According to Dr. Prichard, Salazar is not mentally retarded under the

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<sup>8</sup> Dr. Prichard could not determine what effect the "non-sterile" environment had on Salazar's scores and admitted that such could be distracting, however, it could never cause a person to score better on an IQ test than the person was capable of scoring. The non-sterile environment only could have a negative effect as a person cannot "fake intelligence" (PCR.24 1834-35). Additionally, any deviation from the instructions on how to administer the test likewise did not suggest the answers to Salazar, and on one occasion an erroneous instruction caused Salazar to fail a section. As such, Dr. Prichard found that any alleged errors on his administration certainly did not attribute to a higher score for Salazar, but in fact, may have reduced his full scale IQ test score. (PCR.24 1840-45)

standard defined in Florida. When he gave Salazar the Stanford-Binet Salazar scored a 72. (PCR.24 1828, 1836-37, 1839). The lower court, however, found that Salazar did, in fact, prove that his IQ score fell around 67 or 68 based on all the testing. Although Dr. Prichard did not administer the standardized adaptive functioning test, he evaluated Salazar for adaptive ability looking at anecdotal evidence of his accomplishments based on Salazar's admissions, court hearings/testimony, jail/prison records, reviewing the testimony of family members, and other relevant information such as independent international travel and obtaining a commercial driver's license. The Florida Supreme Court has stated that a "trial court does not weigh a defendant's strengths against his limitations in determining whether a deficit in adaptive behavior exists," but rather, after considering the experts's findings and evidence, the trial court should determine whether a defendant has deficits in adaptive behavior by examining evidence of defendant's limitations and evidence which may rebut those limitations. Based on talking with Salazar and reviewing materials, Dr. Prichard found Salazar does not have current deficits in adaptive functioning and he showed abilities/accomplishments that a mental retarded person would not be able to match.

Dr. Prichard's review revealed the following facts and opinions supporting a determination that Salazar did not have deficits in adaptive abilities and was

performing beyond that of a mentally retarded person.

1. Salazar attended school and obtained a certificate in woodworking (PCR.24 1849-52);
2. He was a taxi driver in Trinidad and made change for his fares and solicited carpentry work from those fares (PCR.24 1849-52);<sup>9</sup>
3. Salazar earned his own income from taxi driving and carpentry work (PCR.24 1849-52);
4. Salazar was a carpenter and did framing work - worked for sub-contractors (2013EH.4 458-61);
5. He moved to United States on his own and other family members followed later indicating Salazar planning, independence and goal setting. This indicates Salazar was leading his own life which is beyond the ability of a mentally retarded person (PCR.24 1854-55);

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<sup>9</sup> Sadie Francis (“Francis”) testified that Salazar was educated in Trinidad through high school. He drove a taxi in Trinidad, obeyed all traffic rules, was a safe driver, and navigated well. They were involved romantically for five years and he fathered her daughter. Francis knew Salazar to have many friends, and did not use good judgment in choosing his friends. Salazar lacked punctuality, and failed to take Francis to the hospital as promised when she was about to give birth. He did not pay for her child as Francis was able to do this and stopped seeing Francis until after she began dating another man. Although Salazar did not support Francis and his child, Salazar did provide food and clothing for his wife, Pamela Cedanio, and their children together and he provided financially for his father. Eventually, Salazar moved to the United States and from there he purchased a car for his father still living in Trinidad. According to Francis, Salazar like to “dress up.” Francis implied Salazar’s friends came first and that he was a follower. (PCR.14 335-38, 344, 346-50, 352, 357-58, 361, 363-68). Francis’ testimony was significant for Dr. Prichard as it showed Salazar had adaptive abilities above that of a mentally retarded person. Salazar provided for his children, drove a taxi, was a safe driver, exchanged money, was neat/clean, took care of himself and although he had irresponsible behaviors, “all in all” Salazar was a normal person working and taking care of his family. (PCR.24 1852-56)



6. Salazar always dressed appropriately – he dressed himself and was well groomed. Such shows he has adaptive abilities under the personal hygiene behaviors (PCR.24 1855);

7. He traveled internationally and accomplished all of the related acts necessary for international travel. This was very relevant and important to Dr. Prichard's evaluation as it shows independence on Salazar's part. A mentally retarded person is very dependent on others and "doesn't have the cognitive wherewithal to negotiate what it would take to do international travel in an airport, checking luggage, getting tickets, paying for tickets, all of the things that would be necessary for that (PCR.24 1850);

8. Salazar traveled to St. Vincent using fictitious papers and a disguise which is "extremely significant" because it again demonstrates an ability to travel internationally and the wherewithal to use a disguise and obtain false papers, i.e., driver's license and passport. It also shows planning and forethought which are higher order behaviors which mentally retarded persons cannot accomplish as their thinking is concrete (PCR.24 1857);

9. He contributed income to/supported his family by buying food and clothing (PCR.24 1850);

10. Salazar purchased real estate in Miami and Fort Lauderdale – the Miami triplex was purchased with three other family members for \$87,000 of which Salazar contributed \$4,000 for a down payment and on his own, Salazar purchased a Fort Lauderdale duplex for \$17,000 cash and now is worth \$35,000 (PCR.24 1850, 1896-1908);

11. He maintained savings accounts;

12. He had a long term romantic relationship with,

Sadie Francis, a person of obvious average intelligence and married Pamela Cedanio;

13. Salazar made multiple and sophisticated requests and complaints while in jail/prison;

14. Salazar obtained a commercial driver's license (CDL) passing all, but one written test on the first attempt, and then passing that sub-test on the next attempt the same day. The CDL had a 60% pass rate and the study manual contained very complicated formulas and information which a mentally retarded person would not be able to understand. (PCR.24 1858-64);

15. His activities during the crime indicate Salazar was taking charge, directing the action, and his independence. By announcing he had a drug business and was there to get answers, Salazar was showing he had an agenda; he planned and had forethought which are contraindicative of the mentally retarded. Salazar's ability to pick a lock shows ability beyond that of a mentally retarded person (PCR.24 1864-69);

16. The written request forms from the Okeechobee County Jail and Department of Corrections (State Exhibits 9 and 10) show Salazar was filing grievances, making requests of the authorities, asking for counsel, and seeking to address problems he identified. All show Salazar was functioning independently and taking care of his own needs; he was trying to address problems and was goal-directed. Salazar displayed higher cognitive ability when he requested addresses for specific courts, a court reporter to translate papers from Spanish to English, and sought identified legal rule books. These were sophisticated requests. While Dr. Prichard noted that Salazar's grammar and spelling were not perfect, those are not necessarily an indication of cognitive deficiency. However, what was important in the analysis was the complexity of what Salazar was reading and the things he was planning all of which demonstrated his

independence. (PCR.24 1870-75);

17. The inventory of Salazar's prison cell (State's Ex. 8; PCR.31 1110-12) lists law books and rules of court. The fact Salazar was able to obtain such items through the prison system is significant and shows he was directing his case. According to Dr. Prichard, Salazar's ability was "way outside the bounds of what a mentally retarded person would be doing." (PCR.24 1875-76);

18. The audio tapes of court hearings where Salazar pressed his position show he had no difficulty comprehending normal court dialog, responding appropriately, and representing himself in court. Salazar asked the appropriate questions and made requests; he "did extremely well in court" in terms of "comprehending, understanding, and asking the right questions and behaving appropriately." Salazar showed he could process information rapidly unlike what a mentally retarded person could accomplish. (PCR.24 1877-82).

19. Salazar's pre-trial hearings show him complaining about counsel, delays in his case and being barred/denied access to a consulate member from his home country, discovery materials, and to make phone calls to his family in Miami as the number was blocked. In those hearings, Salazar used words such as "indigent" and "consulate" which a mentally retarded person would not be able to do. (PCR.24 1882-93);

20. Salazar drew a map of the crime scene including the roads such as I-95 and Route 441 which were labeled properly. This was a sophisticated act above the ability of a mentally retarded person. (PCR.24 1894-96);

21. The State Ex. 17 October 6, 2011 taped telephone calls between Salazar and family members reveal Salazar talked about the "extradition" issue raised in his post-conviction case, sought evidence to counter the State's

evidence, and discussed accusing witnesses of lying. Salazar voiced that he wanted documents and the FBI materials in order to counter that testimony, how his had a conflict with his collateral counsel, and that he was moving to have them discharged. He attempted to contact family so they might obtain those materials for him. Salazar identified the problems he was having and that the phone calls he made are recorded. Dr. Prichard testified such indicated Salazar was strategizing and that it was “really complex,” intelligent, “a sophisticated understanding of the legal process”; something a mentally retarded person would not be able to do. (PCR.25 1912-25);

22. Salazar’s ability to explain how a person could visit him, what that person would have to do within the Department of corrections rules, or how to make phone calls using a throw-away phone are things which could not be done by a mentally retarded person. (PCR.25 1925-27) Similarly, his telephone conversation with a family member voicing his disagreement with collateral counsel over the extradition and mental retardation issues and his directing the caller to get certain affidavits/documents shows Salazar has initiative & self-direction. He is steering his case, and is instructing others what to do. This is average cognitive functioning; not mental retardation. (PCR.25 1927-32)

(PCR.24 1849-55) While Dr. Prichard identified other examples of Salazar’s behavior which showed his abilities were higher than those of a person with mental retardation, those noted above readily prove the point. Salazar does not have deficits in his adaptive behavior currently. As such, Salazar has failed to meet the definition of mental retardation under Florida law.

Under §921.137(1), Fla. Stat. and Fla.R.Crim.P. 3.203 there must be a

showing that the full scale IQ score was 70 or below concurrently with deficits in his adaptive behavior which exists presently and had manifested before age 18. In light of Salazar's well documented abilities identified above, the post-conviction court properly found that Salazar is not mentally retarded under Florida law. This Court should affirm.

### **ARGUMENT THREE**

#### **THE LOWER COURT PROPERLY DENIED THE GUILT PHASE INEFFECTIVE ASSISTANCE CLAIM THAT COUNSEL FAILED TO ADEQUATELY CROSS-EXAMINE HATCHER. (Restated)**

In his next point, Salazar asserts that counsel was ineffective in his failure to cross-examine Julius Hatcher ("Hatcher") regarding the events which took place in Miami and for permitting Hatcher's confession to be played to the jury. The post-conviction court found that guilt phase counsel, Rusty Akins ("Akins"), offered a reasoned strategy for his decisions with respect to his examination of Hatcher and Salazar has failed to prove prejudice.

The post-conviction court found the following facts when it determined that Salazar had failed to prove his ineffective assistance of counsel claim:

**Claim IIIId. - Counsel failed to effectively cross examine co-defendant Julius Hatcher eliciting damaging information concerning events that occurred before Salazar, Hatcher, and Baker arrived in Okeechobee.**

Salazar claims that counsel was ineffective for eliciting

damaging information during the cross examination of co-defendant Julius Hatcher concerning events that occurred before Salazar, Hatcher, and Baker arrived in Okeechobee; and for permitting the Court to play the tape of Hatcher's confession for the jury. Hatcher claimed that he was kidnapped by Salazar in Miami, bound in duct tape, placed under a bed for hours without the knowledge of others in the house, and later forced at gunpoint to travel to Okeechobee to shoot Ronze Cummings and kill Evelyn Nutter.

At the evidentiary hearing, Attorney Akins testified that the strategy in admitting these facts and the tape of Hatcher's confession was to show that Hatcher's story was completely incredible. Akins believed that the confession tape demonstrated Hatcher's totally unaffected demeanor only a few days after these seemingly disturbing events further undermining the credibility of Hatcher's story. (PCR Vol II pp. 89-91) The Court finds Akins' testimony credible and this trial strategy reasonable; consequently the Defendant fails to demonstrate deficient performance.

(PCR.11 1974-75). The court's factual findings are supported by the record and deserve deference by this Court.

During the evidentiary hearing, Akins explained that he had done three capital cases while he was an assistant public defender and four others in addition to Salazar's case while in private practice. (PCR.15 386-89, 422-24). Akins revealed that Salazar "absolutely did not want to mount a theory of defense that would put him at the scene." Salazar's defense was that Fred Cummings ("Fred") was the person who the surviving victim, Ronze Cummings ("Ronze") was identifying as Salazar and that Salazar was not present at the murder scene. (PCR.15 402-03). This defense was supported by evidence of a relationship between Ronze, Fred, and Shirleen Baker ("Baker") as well as Ronze's various

versions of events. (PCR.15 402-05).

With respect to Hatcher, Akins's plan was to impeach Hatcher with what Akins considered an "incredible" story. As Akins described it, Hatcher's story involved an "elongated kidnapping" where he was duct taped, placed under a bed in Miami and later, while still duct taped, was taken at gun point and driven to Okeechobee where he was then given a gun and told to shoot Ronze and his girlfriend, Evelyn Nutter ("Nutter"). (PCR.15 416-17) It was Akins' estimation that Hatcher's story regarding the Miami events was not credible given the length of time, people around to witness the Miami events, the drive to Okeechobee at gun point, only once there to be given a gun and after the shooting to be allowed to return to Miami alone. Further cutting against Hatcher's version of events was the fact that he stopped for gas on the way back to Miami, but never reported anything amiss. (PCR.15 417-18).

Akins testified that he permitted certain details about Hatcher's statement to be presented because he believed Hatcher's account to be "incredible." It was his strategy to present Hatcher's statement on cross examination to highlight those aspects of Hatcher's story which did not make any sense. (PCR.15 438-39). He also permitted the State to play Hatcher's taped statement because in his estimation, Hatcher's demeanor on the tape and the sound of his voice "actually increased [the defense] argument that his story was absolutely incredible."

(PCR.15 418, 438) Akins also wanted the jury to learn that Hatcher, the trigger man, was getting a “better deal” than Salazar, who was facing the death penalty. (PCR.15 439) Akins argued in closing that Hatcher’s testimony was not believable given Hatcher’s story of what “happened” in Miami. (R. 2008).

From the foregoing, it is clear that Akins investigated Hatcher’s statements and reviewed them in light of the other evidence in the case. Further, Akins developed a strategy given Salazar’s chosen defense and Akins’s estimation of the strength of Hatcher’s testimony. Akins tried to highlight those facts to use Hatcher’s own words against him, which Akins reasoned would undercut his testimony. Akins then argued his impeachment of Hatcher to the jury. This is the epitome of constitutional representation. See Strickland, 466 U.S. 690-91 (opining that “Strategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.”). “Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.” Brown v. State, 894 So.2d 137, 147 (Fla. 2004); see also Kenon v. State, 855 So.2d 654, 656 (Fla. 1st DCA 2003) (“Absent extraordinary circumstances, strategic or tactical decisions by trial counsel are not grounds for ineffective assistance of counsel claims.”), *review denied*, 868 So.2d 523 (Fla. 2004). See Cherry v. State,



659 So.2d 1069 (Fla. 1995) (concluding standard is not how current counsel would have proceeded in hindsight).

Furthermore, Salazar did not show that had counsel not cross examined Hatcher in the manner he did and had precluded use of Hatcher's statement, that the result of the trial would have been different and that confidence in the outcome was undermined. Had counsel not proceeded as he did, Hatcher's testimony would still have been presented to the jury and the same damaging evidence of Salazar's solicitation and direction of Hatcher in the commission of the murder and attempted murder would have been left unchallenged. Salazar failed to carry his burden under Strickland to show both deficiency and prejudice. This Court should affirm the denial of relief.

#### **ARGUMENT FOUR**

##### **SALAZAR FAILED TO PROVE AN ACTUAL CONFLICT OF INTEREST SO THE COURT'S DENIAL OF THIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM WAS PROPER. (Restated)**

Salazar next argues that Akins failed to disclose a conflict of interest arising from his employment with the Public Defender's Office at a time when the Office represented Hatcher. Contrary to Salazar's allegations, the evidence established that no conflict of interest existed. Furthermore, Salazar failed to prove the necessary prejudice required by Strickland. The post-conviction court's denial of relief should be affirmed.

The lower court determined the following on this issue:

**Claim IIIi. - Counsel failed to disclose conflict of interest where Attorney Akins formerly worked at the Office of the Public Defender when the office represented co-defendant Julius Hatcher.**

Salazar claims that Attorney Akins failed to disclose as conflict of interest where he formerly worked at the Office of the Public Defender during a period when the office represented co-defendant Julius Hatcher. Notwithstanding Akins' [sic] testimony that he did not have Salazar either orally or in writing execute a formal waiver of any conflict, the Court finds no prejudice where it is unrebutted that during Akins' [sic] public defender employment he had no access to privileged information, and where pre-trial Judge Makemson informed Salazar in open Court of Akins' [sic] former public defender employment. (PCR Vol II pp. 121-123, 139) Consequently, Salazar is not entitled to relief.

(PCR.11 1976) That determination is supported by the record.

Initially, an actual conflict of interest exists where it adversely affects counsel's performance in the defendant's trial. Larzelere v. State, 676 So.2d 394, 403 (Fla.1996). However, in the instance where an attorney formerly worked for a Public Defender's Office which represented a witness in a separate case, but the attorney knew nothing about the State's witness's case and had no confidential information about the witness, there was no actual conflict. McWatters v. State, 36 So.3d 613, 634 (2010). See, e.g., Mungin v. State, 932 So.2d 986, 1001 (Fla.2006) (concluding there was no actual conflict where nothing in record supported conclusion that assistant public defender knew that State witness had been represented by his office); Hunter v. State, 817 So.2d 786, 793 (Fla.2002) (holding

there was no actual conflict where defense counsel was unaware of his public defender office's previous representation of State witness and did not know witness's criminal background).

The evidentiary hearing showed that no actual conflict existed and that counsel was not ineffective since he did actually disclose his former employment at the Public Defender's Office to Salazar. Akins testified that before going into private practice he had been with the Public Defender's Office at a time when it represented the co-defendant, Hatcher. (PCR.15 448) After Akins left the office, he was appointed to represent Salazar. It was Akins's sworn testimony that he had had no role in Hatcher's representation and that he had had no discussion with anyone at the Public Defender's Office regarding any strategy for representing/defending Hatcher. Akins averred that he possessed no privileged information regarding Hatcher. (PCR.15 448). All he knew of Hatcher's case was the public knowledge about the difficulty the parties had selecting a jury for Hatcher's case due to Detective Brock's standing in the community, prompting consideration of moving the case outside Okeechobee County. (PCR.15 449). Akins reiterated that he obtained no privileged or confidential information about Hatcher's case and that he had no conversations with Hatcher's counsel regarding strategy/privileged information. In fact, Akins was not appointed to Salazar's case until a year after he had left the Public Defender's Office and Salazar's case was

the first or second case he had in Okeechobee County a Jimmy Ryce case may have been the first. (PCR.15 449-50). Moreover, Akins reported that Salazar knew of his prior employment with the Public Defender and that he and Salazar had discussed the matter extensively when Akins was first appointed. (PCR.15 450) In fact, Judge Makemson informed Salazar of Akins's prior employment. (R.8 539-41; PCR.15 450)

Salazar offered nothing to refute Akins's testimony on this subject. The record reflects that Salazar knew of Akins's prior employment and that there was no objection to Akins continuing on the case. Moreover, Akins discussed the matter with Salazar extensively. Akins fulfilled his ethical and constitutionally required obligations. Salazar presented no evidence that Akins's alleged conflict of interest adversely affected the trial. Salazar failed to prove that an actual conflict existed and, thus, failed to prove either the deficiency or prejudice prongs required by Stickland arising from such an alleged conflict. The denial of relief must be affirmed.

#### **ARGUMENT FIVE**

**THE TRIAL COURT PROPERLY FOUND NO INEFFECTIVE ASSISTANCE OF COUNSEL FOR NOT PURSUING AN ALIBI DEFENSE WHEN THE BASIS OF IT WOULD HAVE RESTED ON SOLE DOCUMENT THAT WAS MIS-DATED. (Restated)**

In addition to the previous argument regarding counsel's purported

ineffectiveness for failing to challenge the “extradition” from St. Vincent, Salazar also here claims that his counsel was ineffective for not investigating and presenting an alibi defense based on the date on one document from Puerto Rico indicating that he was in custody at St. Vincent the day the crimes were committed. Salazar simply ignores the evidence established at the evidentiary hearing which plainly proved that the one document was mis-dated. Salazar failed to prove either deficient performance or prejudice so the trial court’s denial of relief was appropriate.

As mentioned above, this claim was presented at the evidentiary hearing, after which the court made the following findings:

**Claim IIIc. - Counsel failed to investigate and present an alibi defense.**

Salazar claims that counsel failed to investigate date discrepancies in the Puerto Rico extradition proceedings that show he was in custody from April 27, 2000, until he was transferred from Saint Vincent to Puerto Rico on July 26, 2000; and therefore not in Okeechobee County on or about June 26 and 27, 2000, when the offenses were committed in this case. Alternately, Salazar contends that three witnesses would place him in Trinidad at the time of the Okeechobee offenses.

At the evidentiary hearing, Salazar presented no evidence to show that he was actually in custody in Saint Vincent on or about June 26 and 27, 2000; or incarcerated in Saint Vincent for three months. Salazar merely relied on what this Court construes as a scrivener’s error in the Puerto Rico extradition proceedings referring to the Saint Vincent arrest date as April 27, 2000. Consequently, the Court adopts its analysis in Claim IIIb. above to find that the postconviction hearing evidence establishes that Salazar arrived in

Saint Vincent on July 21, 2000, and not on April 27, 2000, as referenced in the Puerto Rico extradition proceedings. Consequently, the Court finds no prejudice to the outcome of the trial where Salazar has not shown that he was in custody in Saint Vincent or Puerto Rico, on or about June 26 and 27, 2000, when the offenses were committed in this case.

As to the Trinidad alibi, evidentiary hearing testimony of trial counsel Russell Akins showed that counsel investigated the alibi before trial, found it to be false, and made a strategic decision not to present the Trinidad alibi defense. (PCR Vol II 105-109) Salazar did not present postconviction testimony of original Trinidad alibi witnesses - Candace Cedano (aka Monica), James Briggs, Adolph Aguilera, or Dr. Stephen Bogdens to rebut the reasonableness of counsels [sic] trial strategy. (TR Supp I 1-49.) Salazar did not otherwise undermine Akins' [sic] postconviction testimony that this Court finds credible. Therefore, the Court finds no prejudice where Salazar did not show that he was in Trinidad on or about June 26 and 27, 2000, when the offenses were committed in this case.

(PCR.11 1973-74) The court specifically found the witnesses who contradicted the date on the document credible and found that Salazar failed to prove either deficient performance or prejudice. The court's finding that the date was a scrivener's error was supported by the evidence and should be given deference.

The State respectfully incorporates the facts detailed in Argument One previously into this argument since they cover this issue as well. Williams and James both testified that they detained Salazar on July 21, 2000 and Salazar presented no evidence to contradict their testimony. Based on the evidence and testimony set forth above, Salazar failed to show that he was in custody, and not in Okeechobee County, on June 26, 2000. Salazar failed to show that counsel was

ineffective for not pursuing an alibi defense based upon the date of detention cited in a Puerto Rico document. Further, he also did not prove prejudice since even if his counsel had investigated this alibi defense, it would not have altered the outcome since he could present nothing in support of it and the wealth of evidence of his guilt. The denial of relief should be affirmed.

### **ARGUMENTS SIX & SEVEN**

**THE TRIAL COURT PROPERLY CONCLUDED THAT SALAZAR FAILED TO PROVE PREJUDICE FROM COUNSEL'S FAILURE TO PRESENT MENTAL HEALTH MITIGATION AND FROM THE ADDITIONAL MITIGATING EVIDENCE ABOUT SALAZAR'S HISTORY GIVEN THE STRONG AGGRAVATING FACTORS. (Restated)**

In his final claims regarding ineffective assistance of counsel, this time in the penalty phase trial, Salazar contends that the trial court erred when it found no prejudice after it found counsel's performance deficient for failing to investigate mitigation evidence and for failing to properly prepare his mental health expert with the time, resources, and documentation required. He also alleges that the court erred in finding that Salazar had failed to prove prejudice regarding his claim that his counsel was ineffective for not investigating and presenting "additional" evidence about his upbringing. Salazar ignores, however, the limits of the evidence he presented and how it failed to materially differ from that which was presented at trial. The post-conviction court properly denied these claims.

As noted above, in order to prevail on a Strickland ineffective assistance of counsel claim, the defendant must demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different meaning that confidence in the result of the trial is undermined. *Strickland*, 466 U.S. at 687-89. Expounding upon *Strickland*, the Supreme Court cautioned in *Wiggins v. Smith*, 539 U.S. 510, 533 (2003):

In finding that [the] investigation did not meet *Strickland's* performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*.... We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." ... A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances."

Wiggins, 539 U.S. at 533.

After the hearing, the lower court found the following:

**Claim IVb. - Counsel failed to investigate and present mitigating evidence - mental health, and social and personal history.**

**Claim IVc. - Counsel failed to investigate cultural and religious factors to present in mitigation.**

In Claims IV c. and b., Salazar contends that counsel failed to



investigate and present mitigating evidence related to mental health, social history, personal history, and cultural and religious factors.

At the evidentiary hearing, cultural anthropologist, Dr. Gayle McGarrity, testified that Salazar: was adversely affected by his father's gambling, womanizing, and absence from the home; was disciplined by his mother who beat him with belts with buckles; was left in the care of his older sibling to care for his 'younger siblings; was embarrassed by his father's philandering and was traumatized by his parents' divorce; was forced to eat "bake" made from flour, water, and sugar when money was lacking; was the only one in his family that was not academic; fell off a roof, injured his head, lost consciousness, and was hospitalized; stopped going to church because he was embarrassed by his parents' break-up; was not a dominant male as was normal in his culture; was left behind with his father when his mother moved to the United States with his two of his sisters; and experienced culture shock when he moved to the United States as an adult. (PCR Vol III pp. 261, 266-276, 282)

Arlene Lambert, Salazar's sister, explained that the order of the siblings starting with the oldest is Kurt, Neil, Arlene, Michelle, and Shanelle. Arlene testified that their father gambled and was absent most of the time; she was cared for by her older siblings; their mother spanked them with a belt; Salazar fell off the roof on his face, was hospitalized, and doesn't remember it, but that she told Attorney Akins about it; they had to eat "bake" for about one or two weeks; after the divorce their mother moved to the United States with her two younger sisters; her brothers changed their name from Lambert to Salazar when their parents divorced; and Neil was 23 years old and already had a child when his parents divorced. (PCR Vol III pp. 311-325)

At the sentencing hearing, the Court already considered evidence that Salazar came from a broken home and was devastated by his parents' divorce. The Court assigned little weight to this non-statutory mitigator and in light of Salazar's age at the time of the divorce the Court finds no reason to reweigh this mitigator.

As to the additional mitigating evidence, Salazar did not establish the nature or frequency of the childhood spankings or

beatings; did not prove childhood malnourishment but merely showed the lack of nourishing food for one or two weeks; and showed only possible brain injury from falling off of the roof. Further, it is now clear that Salazar was an adult when his parents divorced and he was not an abandoned child when his mother moved to the United States. Therefore, the Court assigns this additional mitigating evidence minimal weight, and finds that when combined with the mitigating evidence found in Claim V (below) and the mitigating evidence found in the sentencing order, the aggravating circumstances still far outweigh the totality of the mitigating circumstances. Thus, the Defendant fails to demonstrate prejudice to the outcome of the penalty phase and is not entitled to relief.

**Claim V - Counsel failed to obtain an adequate mental health evaluation at the guilt and penalty phases of the trial.**

Neuropsychologist, Dr. Harry Krop, testified that less than two weeks before trial Attorney Akins asked him to evaluate Salazar's competency to proceed to trial. The assessment was done without any records other than the probable cause affidavit. Salazar complained of: depression after already having been confined for about five years, trouble sleeping, and claustrophobia. Salazar emphasized he was not suicidal and that he would not take psychotropic medication because it might have an adverse effect on his thinking. Salazar reported that he had been having migraine headaches for several years and that he was taking Tylenol daily. Salazar reported no formal psychiatric history. Salazar denied any history of sexual abuse or substance abuse. Salazar told Krop that he suffered from asthma since he was young and was currently using an asthma pump whenever he needed it. Salazar reported involvement in a bicycle/auto accident resulting in loss of consciousness and injuries to his foot, back, arms, and head, requiring him to spend three months in the hospital; and another accident at age 21 where he had his left ear sliced and had a loss of consciousness. Dr. Krop found Salazar competent to proceed to trial but felt further evaluation of possible organic brain damage should be considered because the two head injuries could have adversely affected Salazar's impulse control. No further evaluation was requested by trial counsel. Dr. Krop explained the neurological tests and formal assessment he would have performed had he been asked and provided relevant records by trial counsel. (PCR 2018 Vol II pp. 12, 20-52) On cross

examination, Dr. Krop testified that during the competency evaluation he observed no signs of major mental illness or heard nothing that would indicate adaptive functioning deficits indicating possible mental retardation. (PCR 2013 Vol II pp. 55-58)

Clinical psychologist, Dr. Phillip Harvey testified that he performed the following tests on Salazar to screen for possible neurological impairment - Repeatable Battery for the Assessment of Neurological Status (RBANS), and Trail Making Tests-A & B. These tests indicated some cognitive deficiency in processing speed and visual-spatial performance indicative of possible brain damage. However, no neuropsychological testing or neuroimaging was performed as the result of Dr. Harvey's findings. (PCR 2013 Vol III pp. 337-364)

The Court finds that Salazar has proved low IQ and some cognitive deficiencies but the Court adopts its reasoning in Claim VII below to find that Salazar has not proven mental retardation. Further, the Court finds this insufficient evidence to demonstrate prejudice to the outcome of the guilt phase. As to the penalty phase, the Court assigns little weight to the low IQ and cognitive deficiencies. And although counsel was deficient in failing to offer this mitigating evidence, the Court finds that when combined with the mitigating evidence found in Claim IV (above) and the mitigating evidence found in the sentencing order, the aggravating circumstances still far outweigh the totality of the mitigating circumstances. Therefore, the Defendant fails to demonstrate prejudice to the outcome of the penalty phase and is not entitled to relief.

(PCR.11 1977-78) The court's findings were fully supported by the record. As it noted, much of the information regarding non-mental health mitigation was either cumulative or not proven and, thus, Salazar failed to establish deficient performance in that area. See Gudinas v. State, 816 So.2d 1095, 1106 (Fla. 2002) (finding that trial counsel was not ineffective for failing to present evidence in mitigation that was cumulative to evidence already presented in mitigation);

Cherry v. State, 781 So.2d 1040, 1051 (Fla. 2000) (determining that "even if trial counsel should have presented witnesses to testify about Cherry's abusive background, most of the testimony now offered by Cherry is cumulative.... Although witnesses provided specific instances of abuse, such evidence merely would have lent further support to the conclusion that Cherry was abused by his father, a fact already known to the jury.").

The post-conviction court granted an evidentiary hearing on these claims which was held initially on March 24 and March 28-30, 2011 during which Salazar presented: Sadie Francis, mother of one of Salazar's children, Russell Akins, guilt phase counsel, Jeff Smith, penalty phase counsel, Jackie Ray Carmichael, defense private investigator, Juan Pineda, Capital Collateral Counsel's investigator, Dr. Gayle McGarrity, cultural anthropologist, Arlene Lambert, Salazar's sister, and Mark Harllee, Assistant Public Defender with the 19th Judicial Circuit.

Salazar also presented mental health professionals Drs. Harry Krop, Thomas Oakland, and Philip Harvey. The State called prior defense counsel, Barry Witlin and Elio Vasquez, Ritchie Fredrick and Kevin James Gray of the Department of Highway Safety and Motor Vehicles, Deputy Sheriff Ronnie White, Department of Corrections Sergeant Danielle Craig, court reporter, Margaret Douglas, State attorney Office Investigator, Edward Arens, and Dr. Greg Prichard. The evidence detailed below was adduced at the hearing.

Jeff Smith (“Smith”) was Salazar’s penalty phase counsel and he started working on the case as soon as he was appointed. While this was his first capital case, he attended both death penalty seminars and was familiar with Wiggins and the ABA Guidelines. Furthermore, he worked with Rusty Akins in preparing the case for trial and penalty phase. (PCR.15 474-78, 488-90, 494). They employed a private investigator, Ray Carmichael (“Carmichael”), to look into mitigation and develop a social-personal history for Salazar.<sup>10</sup> (PCR.15 478-79, 494-95). The psychological workup Carmichael developed showed that Salazar came from a happy household/family of seven members. (PCR.15 497) Carmichael was informed that Salazar had a normal upbringing in a middle class family. This information was confirmed with Salazar’s two sisters and his mother. (PCR.15 497). There was no indication of physical abuse in the home. (PCR.15 497-98)

The defense also hired a psychologist, Dr. Harry Krop, who traveled to Trinidad and spoke to Michelle Lambert (“Michelle”) who offered insight into her brother’s background. (PCR.15 478-79, 494-95). The defense team had difficulty developing a mitigation theory because they had trouble getting records from Trinidad nor were there many records available. While Smith looked for school and medical records, he had not been told they contained anything mitigating. However, the school records could not be found. Smith recalled that Dr. Krop

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<sup>10</sup> See State’s Ex. 1 (PCR.26 55-57) for an example of the worksheet Ray Carmichael used to develop mitigation.

reported he had found no significant psychological evidence to present and found no statutory mental mitigators. (PCR.15 482, 496-98, 505-06). As a result, the defense chose to present Salazar's family history as loving and to show Salazar's upbringing in order to humanize him. Smith explained to Salazar and his family members what may count as mitigation and the evidence needed to prove Salazar was not the shooter. (PCR.22 499-500). The strategy was to show he was not the shooter and that the account given by the co-defendant, Julius Hatcher, was not credible. Smith was trying to save Salazar's life. (PCR.15 482, 486).

Michelle was the conduit for much of the mitigation developed because she seemed to be the best historian. However, Smith talked to Salazar's other sister, Arlene Lambert ("Arlene"), and his mother, both of whom were present for the trial, and Salazar's father Aldwin Lambert ("Aldwin"). (PCR.15 483-84). Smith and co-counsel Rusty Akins ("Akins"), travel to Trinidad, stayed there two or three days, and met with Salazar's friend for whom he had done small jobs. While in Trinidad, Smith took pictures of Salazar's old school. (PCR.15 487) Counsel did not meet with Salazar's brother, Kurt Salazar ("Kurt"), because he was incarcerated and there was no indication that he had helpful evidence to offer. Although now Kurt claims there was abuse in the home, Salazar's sisters, Michelle and Arlene specifically denied any abuse. While there was corporal punishment, it was not outside the normal bounds of punishment (PCR.15 483-85, 501-03, 523-

25). Smith saw nothing positive for Salazar coming from Kurt. (PCR.15 484).

Smith inquired of the family and sought information about traumatic events in Salazar's life. He uncovered nothing remarkable and Salazar denied that there was anything remarkable in his life. (PCR.15 499-500) Smith found nothing related to a trauma or brain injury to report to Dr. Krop that could be used to develop a traumatic brain injury; Smith recalled nothing about Salazar falling from a roof. (PCR.15 499-01). The only traumatic event the family reported was the divorce of their parents and the psychological toll that took on Salazar since he was a Catholic. (PCR.15 502-03) All family members denied any abuse or anything unusual in Salazar's history to use as mitigation. (PCR.15 502).

Salazar's mother did not report that her son started to speak at a late age or that he was bullied in school. Smith noted that Salazar's mother was present during the guilt phase and that he had planned on calling her in the penalty phase. However, after the verdict, she left town and Smith could not find her. Had Smith known the mother would be leaving town he would have perpetuated her testimony as he did for Michelle's testimony. (PCR.15 503-04)

Smith did not hire a Trinidadian specialist, because having grown up in a small town and being familiar with Okeechobee County residents, he strategized it was better not to highlight that Salazar was not from the 19<sup>th</sup> Circuit as that may be viewed by some jurors as a negative aspect. Smith believed that Trinidad would be

viewed as a negative in the jurisdiction. (PCR.15 488)

In the penalty phase, Michelle testified via videotape as she was going to be in Europe. (PCR.15 491-92). Nonetheless, she humanized Salazar, offered his family history, and noted the sacrifices Salazar made for his family and children. She also discussed some of the traumatic events in Salazar's life, including the divorce of his parents which damaged him psychologically. (PCR.15 491-92). Michelle explained that Salazar had changed his name as an insult to his father over the divorce. (R 2139) Arlene, who was closer in age to Salazar than Michelle, testified about Salazar's schooling, vocational track, athleticism, and soccer play. (PCR.15 492-93). The non-statutory mitigation developed was that Salazar took care of his younger siblings, took his siblings to church, and to the beach. Salazar went to work full time so Michelle could go to school full time and he helped pay for tuition and gasoline. Michelle testified that she would not have been able to graduate without Salazar's assistance (R 2134-36 2139; PCR.15 512-13).

Salazar was described by Michelle as a compassionate, loving person and a "best friend" to her and a father for her three children. According to Michelle, Salazar always took care of her children; he had a nurturing relationship with them. (R 2140-42; PCR.15 513-14) Smith showed the jury that Salazar grew up in a three-bedroom home with six family members, they did not have air conditioning, and his life in Trinidad was considered middle class although it would be



considered poverty in Miami. Trinidad is a poor country. (R 2150-52; PCR.15 514-15). Arlene informed the penalty phase jury that Salazar went to a vocational school for wood working. He was very athletic and serious about soccer, playing three times a week. (R 2154-55; PCR.15 515).

Smith explained that he presented the above non-statutory mitigation because he did not have any statutory mitigation. This decision was made after consideration of the evidence; it was the best path to follow in Smith's estimation. (PCR.15 515-16, 521-22). He did not want to highlight too much of Salazar's status as a foreigner because he did not think it would play well to an Okeechobee jury. Smith was familiar with Okeechobee juries as he had done some work for the Public Defender in Okeechobee and had some private cases there. Okeechobee is a small community; the jury pool had three married couples on it. Complicating matters, the State's case was that Salazar came up from Miami, which is a "foreign country" to Okeechobee jurors, and committed a murder in the community. Hence, Smith did not see a benefit arising from having a Trinidad expert remind an Okeechobee jury that Salazar was a foreigner who killed an Okeechobee resident. (PCR.15 515-18) Also, Smith is familiar with homes in Okeechobee and Fort Pierce, and in comparison, Salazar's home in Trinidad would be considered average to above average to many local residents. (PCR.15 518-20) Also significant to Smith, none of Salazar's family members told him anything about the

Trinidadian culture which, in and of itself, appeared to be mitigating. (PCR.15 520) Smith was not shown that there were any societal differences which demanded further investigation or were mitigating. (PCR.15 520-21)

Ray Carmichael has investigated 10 to 12 capital cases in the last 10 years; he has specific training for capital case investigation and knowledge of what mitigation is and what to look for. He prepared a report on Salazar's family history after investigating the case and speaking to Michelle Lambert. In preparing the case, Carmichael uses a form developed by the Public Defender's Office which covers family history and other matters which are intended to lead to mitigation. (PCR.15 537, 542-43, 546-47; State's Ex 1 PCR.26 55-57)

Dr. Gayle McGarrity is a cultural anthropologist and did a culturally determined social history for Salazar's post-conviction litigation. By talking to family members, Dr. McGarrity set out Salazar's family structure. She reported Salazar was a Catholic so that the parents' divorce was a "traumatic event for the family" and embarrassing to them. The family became dysfunctional. (PCR.16 580-84, 587, 591, 602-03, 610). The doctor stated that Salazar's family would be considered middle class in socioeconomic terms and outlined some of Salazar's father's vices, such as gambling and womanizing. (PCR.16 592-94) While corporal punishment in moderation is accepted in Trinidad society, the punishment Salazar experienced was excessive. Salazar did not report experiencing beating

from his parents, only Salazar's mother and sisters offered that information. Conveniently though, Dr. McGarrity posited that a person from Trinidad would deny being beaten if the punishment was not excessive or even if it were excessive, like being beaten with a belt buckle. Also, Salazar was beaten by other children to the point where he was resigned to it. (PCR.16 597-99, 618-19, 630-33) Salazar went to a trade school and was considered "slow" but there were no special education classes. (PCR.16 599) Salazar fell from his roof and sustained a head injury and loss of consciousness requiring hospitalization. (PCR.16 601). Salazar's parents purchased a taxi for him and he also did odd jobs and carpentry work. (PCR.16 604)

Although Salazar waited until his late teens to become sexually active, he then took up with two women, Pamela Cedanio and Sadie Francis. Both women lived together for a period of time under Salazar's roof. (PCR.16 605-06). Eventually, Salazar moved to the United States where he continued to do carpentry work and worked as a security guard. However, he did not seem to be upwardly mobile. (PCR.16 608)

Arlene Lambert testified in the evidentiary hearing that she and her siblings were spanked one to three times per week. No child was spanked more than any other. (PCR.16 641-42) She also reported that Salazar had suffered a head injury when he fell from the roof. There was much blood and Salazar had to be

hospitalized. (PCR.16 642-45) Her parents divorced when Salazar was 23 or 24 years old and no longer living in the house after which his mother moved to Texas with his two sisters and Salazar changed his name. (PCR.16 645-49)

As can be seen from the record, Salazar's sisters said that all the children were spanked by their mother; contrary to Salazar's contentions, he was not singled out for excessive beatings because he was "slow." As the court noted, Salazar did not prove excessive corporal punishment. The jury heard about his schooling and that Salazar focused on vocational education rather than academic. (R.19 2163) The sisters also testified about their father's absences and the trauma the divorce caused Salazar. Both the jury and the sentencing court knew that Salazar worked full time, supported his sister, and gave her money, clearly showing that he could operate in society. (R.19 2135-36) The court was also aware of the evidence brought in for the mental retardation claim that Salazar could, in fact, handle money as detailed earlier. The defense specifically chose to focus on Salazar's good behavior and dedication to helping his family. The post-conviction court did not simply discount the mitigation evidence but considered it in light of all of the evidence when it assigned the additional information little weight.

Dr Krop testified at the evidentiary hearing and reported that he was the first contacted by the defense in January 2006 and sent the public probable cause affidavit. Dr Krop was asked to do a psychological evaluation to assess

competency and psychological status for exploring possible mitigation. (PCR.21 1410-12) From the 2006 evaluation, Dr. Krop found Salazar's depression was legitimate and situational. (PCR.21 1416). In his report, Dr. Krop said "there was no current evidence of a psychotic process or bipolar disorder or some of the things I would consider major mental illness." Dr. Krop opined that Salazar was competent to proceed based on the interview. (PCR.21 1430-32) Dr. Krop asked to review additional documents; however, neither Jeff Smith nor his investigator got back to Dr. Krop. (PCR.21 1436-37). Defense counsel did not put any limits on Dr. Krop's initial evaluation and during such an evaluation he looks for signs of major mental illness, mental retardation, and other things which may stand out to him. In 2006, Dr. Krop saw no signs of a major mental illness and, based on the initial interview, he did not feel there was mental retardation. Dr. Krop, nor any other mental health expert, has done a full neurological testing on Salazar.

Even so, Salazar failed to prove prejudice. Salazar did not present any doctor who could report organic brain damage or other mental health issue which would rise to the level of statutory mitigation. The lower court accepted that Salazar fell from the roof and lost consciousness, but found that there was only a possibility of brain damage. Salazar did not present any evidence of such damage. The court also accepted that he has a low IQ. Even given those two, the result of the sentencing proceeding would not be different. Salazar had a unanimous

recommendation for death and the court found four aggravating factors: (1) prior violent felony conviction, the contemporaneous attempted first-degree murder of Ronze Cummings; (2) felony murder for the burglary; (3) HAC; and (4) CCP. This Court has deemed all but the felony murder weighty aggravators. See Rivera v. State, 859 So.2d 495, 505 (Fla. 2003) (finding HAC and prior violent felony aggravators are weighty factors); Porter v. State, 788 So.2d 917, 925 (Fla. 2001) (announcing that the prior violent felony and cold, calculated, and premeditated aggravators are weighty). The addition of non-statutory mitigation such as falling from a roof which did not result in a diagnosis of long term brain damage and a low IQ score to the existing six non-statutory mitigators<sup>11</sup> would not undermine confidence in the sentencing proceeding.

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<sup>11</sup> As the Florida Supreme Court recognized:

FN.4 The trial court found and weighed the following nonstatutory mitigators: (1) Salazar was not the actual shooter, assigned little to some weight; (2) Salazar comes from a broken home and was devastated by his parents' divorce, assigned little weight; (3) Salazar was raised in an impoverished environment in a third world country, assigned minimal weight; (4) Salazar is capable of and has a good relationship with his family members, assigned minimal weight; (5) Salazar was a good student, attended school regularly, and obtained a vocational degree in woodworking, assigned little weight; and (6) Salazar was well behaved during the court proceedings, assigned minimal weight.

Salazar, 991 So.2d at 370, n.4.

Salazar points to Blackwood v. State, 946 So.2d 960 (Fla. 2006) to support his claim for relief. However, Blackwood is distinguishable on its facts. Strickland requires both deficiency and prejudice to be shown, which was done in Blackwood. There, not only did counsel, due to time and financial constraints, fail to act on his expert's advise to conduct additional testing, but Blackwood established undiscovered mental health issues including major depression, low IQ, inability to make decisions, a history of head injuries supporting neurological impairment, thus, showing additional statutory (both statutory mental health mitigators) and non-statutory mitigation. This mitigation was described as "significant in nature, noncumulative, and unrefuted by the record." Blackwood, 946 So.2d at 975-76. When this "significant" mitigation was considered against the fact that only one aggravator was found and the jury had considered only non-statutory mitigation, the Court's confidence in the sentence was undermined and Strickland ineffectiveness was proven.

In Salazar's case however, the court found four aggravators: (1) prior violent felony (contemporaneous attempted murder); felony murder (burglary); HAC; and CCP. It found no statutory mitigation but six non-statutory mitigators. In his collateral litigation, Salazar was able to establish only low IQ and a head injury, but no resulting organic brain damage, as non-statutory mitigation not presented to the jury previously. In light of the unanimous death recommendation, highly

aggravated case and little new mitigation, confidence in the sentence was not undermined. Salazar, unlike Blackwood, could not show Strickland prejudice.

Furthermore, no prejudice has been shown for each sub-claim individually or in combination. There was exceedingly strong aggravation and an unanimous jury recommendation for death. There was a contemporaneous attempted murder conviction, HAC, and CCP. Salazar drove from Miami to Okeechobee County with his co-defendant with the intent to confront and kill the victims in this case based on his belief they were interfering with his drug business. Confidence in the sentencing proceeding has not been undermined. This Court should affirm the denial of penalty phase relief.

## **ARGUMENT EIGHT**

### **THE COURT PROPERLY SUMMARILY DENIED CLAIMS THAT WERE LEGALLY INSUFFICIENT AND UNTIMELY. (Restated)**

Salazar next claims that the lower court erred in summarily denying several of his claims, specifically: counsel's failure to discover "extradition fraud" and the State's knowing presentation of false testimony on that "extradition"; counsel's failure to provide Dr. Krop with sufficient documentation to render a reliable competency determination; and counsel's failure to hire a ballistics expert and for not calling Fred Cummings as a witness. The court's summary denial was proper given when and how these claims were raised.



To reiterate, in order to demonstrate that counsel was ineffective, Salazar must establish a prima facie case that defense counsel's performance was deficient and that the deficient performance affected the outcome of the trial. A court's summary denial of a post-conviction motion will be affirmed where the law and competent, substantial evidence support its findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998). In Lucas v. State, 841 So.2d 380, 388 (Fla. 2003), this Court stated that: "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." See State v. Coney, 845 So.2d 120, 134-35 (Fla. 2003); Peede v. State, 748 So.2d 253, 257 (Fla. 1999). Also, "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." McLin v. State, 827 So.2d 948, 954 (Fla. 2002) (quoting Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993)).

For a defendant to prevail on an ineffectiveness claim, he must establish (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. 688-89.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla. 2001). At all times, the defendant bears the burden of proving not only counsel's representation fell below an objective standard of reasonableness, and was not the result of a strategic decision, but also actual and substantial prejudice resulted from the deficiency. See Strickland, 466 at 688-89; Gamble v. State, 877 So.2d 706, 711 (Fla. 2004).

## II. Claims XV & XVI

Salazar raised the issues of ineffective assistance of counsel for not discovering "extradition fraud" and the State's presentation of allegedly false testimony from St. Vincent officers Williams and James. The post-conviction court summarily denied this claim for being legally insufficient with respect to the issue concerning the newly discovered reports of Officers Williams and James. It determined that "[a]ll other issues raised in these claims are beyond the scope of the amendment authorized by the court. The other issues are summarily denied as unauthorized and untimely." (PCR 9:1613)

Salazar claims that: (1) counsel failed to pursue an “extradition defense” and an “alibi defense” based upon the court records of his interstate extradition from Puerto Rico following his “extradition” from St. Vincent; (2) the State did not disclose St. Vincent officers, Williams and James, prior to the evidentiary hearing; (3) the State did not disclose other documents from St. Vincent relied upon by Williams and James to refresh their memory of the events surrounding Salazar’s arrival on and subsequent expulsion from St. Vincent; (4) the testimonies of Williams and James and FBI Agent, Donovan Leighton (“Leighton”) were “incredible” and should have been stricken.

The “extradition” and “alibi” defenses – As the trial court determined, to the extent that Salazar points to records in his possession before his 2010 post-conviction motion was filed, his attempt to amend here is untimely and beyond the scope of the court’s order. For example, the confusion as to the date Salazar was detained based on the Puerto Rico extradition court and appellate record or the timing of the Miami-Dade warrant and indictment were issues which could have been raised in the initial motion or in the post-hearing memorandum as those records were admitted into evidence. Salazar’s complaint here did not arise solely from the testimony offered at the March 2011 evidentiary hearing, but was pre-existing and, therefore, untimely.

Disclosure of State witnesses Patricia Williams, Sydney James and Donovan

Leighton – These witnesses were disclosed prior to the hearing as evidenced by the State’s witness list filed November 12, 2010 listing Williams and James as well as the court’s order, dated March 15, 2011, permitting Salazar to depose Leighton. (PCR V:988-89, VI:1033-34) Clearly, Salazar had notice that these witnesses would be testifying and, as a result, Salazar’s complaint was refuted from the record.

Disclosure of documents – Here, Salazar asserts that given Williams and James statements that prior to their testifying they reviewed “records,” such as a diary from the “Criminal Investigations Department” of St Vincent and a written statement stored on a computer. Williams and James were law enforcement officers from the sovereign nation of St. Vincent and the Grenadines. The documents to which Salazar refers appear to be documents of that country’s police force. St. Vincent is a sovereign nation over which the State has not authority. Salazar failed to proffer any legal support for his request for the State to be compelled to obtain and then turn over those documents to him. Those documents<sup>12</sup> were from a foreign government which citizens of that government

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<sup>12</sup> Salazar did not allege that these documents are exculpatory as defined by *Brady v. Maryland*, 373 U.S. 83 (1963). In order to establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence-either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. *See Strickler v.*

used to refresh his or her recollections of duties carried out for that government about which the citizen is called upon to give testimony. Furthermore, the State did not have possession of and did not attempt to introduce such documents into evidence. Salazar did not explained why he could not request copies of such documents from St. Vincent directly. The court properly denied the request to compel the State to disclose that which it does not have.

Request to strike the testimony of Williams, James, and Leighton - With respect to Salazar's challenge to the evidentiary hearing testimony of Williams, James, and Leighton, Salazar offers nothing to bring into question or impeach those testimonies. Salazar only offered conclusory statements that these witnesses made false representations. Claims which are conclusory or are refuted from the record are subject to summary denial. See, Freeman v. State, 761 So.2d 1055, 1061 (Fla. 2000) (opining "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden.")

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*Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *see also Way v. State*, 760 So.2d 903, 910 (Fla. 2000). "Brady requires the State to disclose material information within its possession or control that tends to negate the guilt of the defendant." Sochor v. State, 883 So.2d 766, 785 n. 23 (Fla. 2004). Likewise, "[t]he Brady rule requires that the prosecution not suppress evidence favorable to an accused where that 'evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' Brady, 373 U.S. at 87, 83 S.Ct. 1194." *Boyd v. State*, 910 So.2d 167, 179 (Fla. 2005). Although Salazar alleges a *Brady* violation, he has pointed to no exculpatory evidence which the State suppressed.

Furthermore, assertions that their testimonies were false could have been argued in the post-hearing memorandum. Striking a witness's testimony is not the proper remedy where the moving party merely dislikes what the witness conveyed or believes the testimony was false. Here the record supports the testimonies of Williams, James, and Leighton; they corroborated each other and nothing Salazar offered undercut their credibility. The court properly denied the request to strike these witnesses.

### III Claim VIII

Salazar asserts he was incompetent to stand trial and counsel was ineffective for not seeking a competency determination "*from the Court*" and for not providing his mental health expert with documentation from the jail showing incompetency. However, Salazar admitted that his counsel obtained the assistance of a mental health expert who determined Salazar was indeed competent to stand trial. Salazar failed to plead that expert, who had found him competent before trial, would now determine, based on the claimed previously undelivered records, that he would have found Salazar incompetent to stand trial. Salazar's claim was also properly denied since he failed to plead prejudice. Under Strickland, both deficiency and prejudice must be alleged; where a conclusory claim is presented or where the defendant fails to plead both Strickland prongs, summary denial is proper. Freeman, 761 So.2d at 1061 (opining "defendant bears the burden of

establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden.”); Ragsdale, 720 So.2d at 207 (stating that although courts are encouraged to conduct evidentiary hearings, a summary/conclusory claim “is insufficient to allow the trial court to examine the specific allegations against the record”); Kennedy, 547 So. 2d at 913 (opining “defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing”). Given these pleading deficiencies, Salazar insufficiently pled the claim and, the court properly summarily denied it.

#### IV & V Claims XVII & XVIII

The post-conviction court found these claims beyond the scope of the amendment authorized by the court. It denied them as unauthorized and untimely. (PCR 9:1613)

Salazar sought to add two new claims of ineffective assistance of counsel when he filed his amended motion. Those claims related to counsel failing to (1) conduct ballistics testing on a handgun belonging to the surviving victim, Ronze Cummings and (2) present Fredrick Cummings as a witness. As these issues were not part of the post-conviction ineffectiveness claims raised by CCRC-S and exceeded the scope of the court’s order permitting Salazar to amend his post-conviction motion on the limited issue of the expulsion/St. Vincent matter arising

from the March 2011 evidentiary hearing testimony, the claims were unauthorized and properly denied.

## **ARGUMENT NINE**

### **THERE WAS NO CUMULATIVE ERROR. (Restated)**

Finally, Salazar contends “various errors in his trial individually and cumulatively resulted in a violation of his right to a fair trial under the United States and Florida Constitutions and are sufficient to require reversal of his guilt and penalty phase”. IB, 100. This contention must likewise be rejected as it is also without merit.

As explained by this Court in Hurst v. State, 18 So. 3d 975, 1015 (Fla. 2009):

Where multiple errors are found, even if deemed harmless individually, “the cumulative effect of such errors” may “deny to defendant the fair and impartial trial that is the inalienable right of all litigants.” *Brooks v. State*, 918 So.2d 181, 202 (Fla.2005) (quoting *Jackson v. State*, 575 So.2d 181, 189 (Fla.1991)); see also *McDuffie v. State*, 970 So.2d 312, 328 (Fla.2007). Where several errors are identified, the Court “considers the cumulative effect of evidentiary errors and ineffective assistance claims together.” *Suggs v. State*, 923 So.2d 419, 441 (Fla.2005). However, where the alleged errors urged for consideration in a cumulative error analysis are individually “either procedurally barred or without merit, the claim of cumulative error also necessarily fails.” *Israel v. State*, 985 So.2d 510, 520 (Fla.2008) (quoting *Parker v. State*, 904 So.2d 370, 380 (Fla.2005)); see also *Rogers v. State*, 957 So.2d 538, 555 (Fla.2007); *Wright v.*



*State*, 857 So.2d 861, 871 (Fla.2003); *Downs v. State*, 740 So.2d 506, 509 n. 5 (Fla.1999).

Although, in his 3.851 motion, Salazar alleged a multitude of errors, these allegations, as explained above, were either procedurally barred or simply devoid of merit. As Salazar has failed to prove any error individually, it follows then that his claim of cumulative error must also fail. The trial court's order must be sustained.

**CONCLUSION**

Based upon the foregoing, the State requests respectfully this Court affirm Salazar's convictions and death sentence.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic service to Rick A. Sichta, Esq., at [rick@sichtalaw.com](mailto:rick@sichtalaw.com) this 15<sup>th</sup> day of August, 2014.

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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