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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1233
LOWER TRIBUNAL NO. 2000-CF-368-A

NEIL KURT SALAZAR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court, Nineteenth Judicial Circuit, in and for Okeechobee County, Florida

Honorable Judge Sherwood Bauer, Jr.
Judge of the Circuit Court, Felony Division

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Salazar's motions for post-conviction relief under Florida Rule of Criminal Procedure 3.851.

Neil Salazar will be referred to as "Mr. Salazar," "Salazar," or "Appellant." The record on direct appeal will be referenced as "R" for citation purposes, preceded by the volume number and followed with the page number: (1 R 1.) The supplemental record on direct appeal will be designated as "SR. The record on appeal generated for 3.851 proceedings will be referenced as "PCR," and the supplemental record on postconviction appeal, will be designated as "SPCR."

STATEMENT OF THE CASE

On July 19, 2000, Neil Kurt Salazar and codefendant Julius Atari Hatcher were indicted for first degree murder of Evelyn Jean Nutter, attempted first degree murder of Ronze Cummings, burglary of a dwelling while armed, and grand theft of a motor vehicle. (1 R 14.) The crimes took place in Okeechobee County on or about June 26 and 27, 2000. (1 R 15.)

On July 26, 2000, Mr. Salazar was taken by U.S. Marshal from St. Vincent to Puerto Rico. (29 PCR 765-766.) The following day, Mr. Salazar was brought before a magistrate of First Instance in Puerto Rico who determined that there was probable cause for arrest and imposed a million dollar bond. (28 PCR 444; 27 PCR 283-288.) On July 31, 2001, Mr. Salazar was formally charged in Miami-

Dade County in an unrelated case, for which he had been extradited from Puerto Rico to the United States. In August 2000, the Governor of Florida requested the extradition of Mr. Salazar from the Governor of Puerto Rico. (1 R 58-59; 27 PCR 296; 29 PCR 788-789.) On August 7, 2001, Mr. Salazar was transported from Miami-Dade to Okeechobee and on August 8, 2001, Salazar was arrested and formally charged in the instant matter. (1 R 23-26.) On August 24, 2001, the Miami Dade State Attorney's Office declined to prosecute Mr. Salazar.

Salazar was found guilty as charged following his March 6 - 9, 2006 trial for the instant offenses. (4 R 609-11.) The jury recommended death 12 – 0 after a March 17, 2006 penalty phase. (4 R 612; 19 R 2224.) The court held a Spencer hearing on May 5, 2006. (20 R 2237.) The Court imposed a death sentence by Order on May 30, 2006 finding four aggravating factors and six mitigating factors. (4 R 656-663; 20 R 2325-2336.)

Mr. Salazar filed a direct appeal to the Florida Supreme Court. Salazar v. State, 991 So. 2d 364, 370-71 (Fla. 2008). The judgment and sentence were affirmed on appeal. Salazar, 991 So. 2d at 368-70. The United States Supreme Court denied certiorari review. Salazar v. State, 129 S.Ct. 1347 (2009).

On February 8, 2010, Salazar filed his initial 3.851 motion (4 PCR 595-687) contemporaneously with a Motion for Determination of Mental Retardation (3

PCR 592-594). The 3.851 Motion contained fourteen claims.[1] (4 PCR 595-672.)

[1] Claim I: Fla. Stat. § 119.19 and R. 3.852 are unconstitutional and violate Art. I § 24 of the Fla. Constitution and Mr. Salazar's Fifth, Sixth, Eighth and Fourteenth Amendment Right to the U.S. Constitution Because Access to public records in the possession state agencies has been withheld;
Claim II: The application of Fla. R. Crim. Pro. 3.851 to Mr. Salazar violates his rights to due process and equal protection as guaranteed by the Eighth and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of the Florida Constitution;
Claim III: Ineffective Assistance of Counsel (IAC) in the guilt phase of Mr. Salazar's trial proceedings resulted in violation of his rights to due process and equal protection under the Fourteenth Amendment and the Fifth, Sixth, and Eighth Amendments to the U.S. Constitution: (1) Failure to challenge Mr. Salazar's extradition; (2) Failure to challenge extradition on the basis of the Specialty Doctrine; (3) Failure to challenge extradition based on law of the case – i.e. discrepancies in dates of detainment in Trinidad; (4) Failure to investigate and present alibi defense; (5) Failure to effectively cross-examine Julius Hatcher; (6) Failure to effectively impeach Ronze Cummings; (7) Failure to call Shirleen Baker as a witness; (8) Failure to object to non-record evidence; (9) Failure to disclose conflict of interest;
Claim IV: IAC in penalty phase in violation of his rights to due process and equal protection under the Fourteenth Amendment and the Fifth, Sixth, and Eighth Amendments to the U.S. Constitution: (1) Failure to find and present mental mitigation; (2) Failure to find and present social and personal history; (3) Failure to object to improper/prejudicial testimony in Spencer hearing; (4) State committed a Brady violation in withholding impeachment material in violation of Salazar's rights to due process under the Fourteenth Amendment and his rights under the Fifth, Sixth, and Eighth Amendments of the U.S. Constitution and rendering defense counsel's representation ineffective;
Claim VI: Salazar was denied his rights under Ake v. Oklahoma in guilt and penalty phase where counsel failed to obtain an adequate mental health evaluation in violation of his due process and equal protection rights under the Fourteenth Amendment and rights under the Fifth, Sixth, and Eighth Amendments;
Claim VII: Mr. Salazar is ineligible for execution under the Eighth Amendment and Akins v. Virginia because he is mentally retarded;
Claim VIII: IAC in failing to have Mr. Salazar evaluated for competency and for allowing him to proceed to trial while incompetent;
Claim IX: Mr. Salazar's sentencing jury was misled by comments and

On September 1, 2010, Salazar filed an amended motion upon leave from the court. (5 PCR 817, 819.) The state filed its response to Salazar's amended motion to vacate judgments of conviction and sentence on September 17, 2010. (5 PCR 898.)

An evidentiary hearing on Salazar's 3.851 motions was conducted in several phases: a video hearing occurred in Stuart, Florida on March 24, 2011. (14 PCR 334-369.) On March 3, 2011 the parties took a deposition of J.C. Elso (incarcerated in Federal prison) for evidentiary hearing. (1 SPCR 6.) A hearing in Okeechobee, Florida occurred on March 28-30, 2011.[2] (15 PCR 386.) On October 10, 2011,

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instructions that unconstitutionally and inaccurately diluted the jury's sense of responsibility for the sentence in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution;
Claim X: Florida's rules prohibiting contact with jurors is unconstitutional;
Claim XI: Newly discovered evidence (NDE) demonstrates that Mr. Salazar's conviction and sentences violate the Eighth and Fourteenth Amendments of the U.S. Constitution;
Claim XII: Cumulative error;
Claim XIII: Actual innocence;
Claim XIV: Lethal injection is cruel and unusual in violation of the Eighth Amendment of the U.S. Constitution.

[2] Salazar presented the testimony of his lead trial attorney, Russell Akins (15 PCR 386); the testimony of his second chair trial attorney, Jeffrey Smith (15 PCR 474); Mr. Akins' investigator, Jackie Carmichael (15 PCR 535); Juan Pineda, an investigator with Capital Collateral Regional Counsel (CCRC)-South (15 PCR 551); Cultural anthropologist, Dr. Gayle McGarrity (16 PCR 580-635); Salazar's sister, Arleen Lambert (16 PCR 637); Attorney Barry Witlin, the third attorney to represent Mr. Salazar at the trial level. (16 PCR 658); Sergeant Patricia Williams of Kingstown Police in St. Vincent and the Grenadines via Skype (16 PCR 690); Inspector Sydney James with the Major Crimes Unit of the St. Vincent and the Grenadines Police (16 PCR 709); Attorney Mark Harlee, the Chief Assistant

Salazar discharged counsel and proceeded pro se. (18 PCR 941, 992, 1049.) The Court granted Salazar leave to file a pro se second amended motion limited to evidence newly discovered at the hearing on March 30, 2011. (18 PCR 1020, 1039, 1049.)

On June 12, 2012, Salazar filed a pro se second amended motion. (8 PCR 1393.) Capital Collateral Regional Counsel (CCRC)-South was reappointed to represent the Defendant. (7 PCR 1391) On July 12, 2012, CCRC-South withdrew due to conflict. (8 PCR 1562.) Undersigned counsel was appointed. (9 PCR 1608.) On August 21, 2012, at the case management hearing on the second amended motion, the Court denied several claims as unauthorized and untimely amendments. (9 PCR 1676.) The Court granted undersigned leave to amend legally insufficient claims XV and XVI by September 21, 2012, limited to the evidence newly discovered. On September 24, 2012, undersigned filed the third amended motion.[3] (9 PCR 1616.) The Court summarily denied the third amended claims. (11 PCR 1967.)

The last phase of the evidentiary hearing was conducted on January 28 through February 1, 2013. The trial court denied 3.851 relief on June 11, 2013. (11 PCR 1962.) Mr. Salazar timely filed a Notice of Appeal on July 9, 2013

Public Defender for Florida's Nineteenth Judicial Circuit (16 PCR 725); and FBI Agent Donovan J. Leighton. (16 PCR 746.)

[3] On November 15, 2012, at the case management hearing on the third amended motion, the parties stipulated to allow Salazar to file a proper oath. (9 PCR 1676.)

commencing the instant proceedings.

STATEMENT OF THE FACTS

Trial proceedings: The state's theory was that Shirleen Baker drove appellant and Julius Hatcher to the home of Evelyn Nutter and Ronze Cummings. Then, Mr. Salazar had Hatcher bind Nutter and Ronze Cummings with duct tape, put plastic bags over their heads, and shoot them. Cummings survived but Nutter did not. The defense theory was that Mr. Salazar was not present for the crimes.

The state called Deputies Chapman and Gonzalez who responded to the scene. (13 R 1318, 1345.) They testified that when they saw Cummings he had blood on his shirt, a plastic bag wrapped around his neck, and tape around his wrists. (13 R 1338.) He told them that Nutter was shot and killed and that they shot him, too. (13 R 1321-24.) He said it was three or four Jamaicans and a man named Neil, with whom he had worked. (13 R 1344-45, 1332.) He did not give Neil's last name. (13 R 1335.) A paramedic treating Cummings in the ambulance heard him tell the deputies that he knew the guy who shot him, and that he was from Fort Lauderdale and had stolen his wife's car. (13 R 1356.)

A crime scene officer testified as the condition of Ms. Nutter's body upon finding her dead. (14 R 1388.) The medical examiner testified as to Ms. Nutter's condition and cause of death. (15 R 1595.)

Ronze Cummings testified that he knew Mr. Salazar. (14 R 1457, 1461-62.)

Mr. Salazar showed up at his house on the night in question with a machinegun and a man he later learned was Julius Hatcher (14 R 1465-66.) He described the events that transpired on the night in question. (14 R 1473-84.) Cummings said he knew appellant's full name at the time, but did not tell police the full name. (14 R 1487.) He gave Det. Brock only the first name at the hospital and again when interviewed at the station after spending five days in the hospital. (14 R 1487-88, 1509-10.) Cummings had four felony convictions. (14 R 1490.) He made inconsistent statements during his trial testimony. (15 R 1544-45, 1511, 1558-60.)

Julius Hatcher testified as to his version of events in question, claiming that Mr. Salazar threatened him in various ways, that Shirleen Baker drove he and Mr. Salazar to Okeechobee (16 R 1653), that he shot the victims, but that he acted under the direction of Mr. Salazar. (16 R 1660.) He said he was pretty good at spinning yarns to keep people out of his face. (16 R 1701.) After a mistrial in his case, he made a deal with the state where he would get a jury of six and waiver of the death penalty in exchange for his testimony against Mr. Salazar. (16 R 1698-99.)

Det. Brock testified regarding his investigation of the instant crimes. He put together a photo lineup he thought contained a photo of Mr. Salazar, but Cummings did not identify Salazar. (17 R 1815.) Cummings provided Brock a video with Mr. Salazar in it, which was played for the jury. (17 R 1815-16.) Brock

interviewed Hatcher, Fred Cummings, and Shirleen Baker. (17 R 1825.) Brock testified that someone seated in the living room recliner could not have seen the porch light being unscrewed. (17 R 1875.) Cummings told him that both men were armed when they entered the house. (17 R 1876.) Cummings also said there were three or four males at the house, and then changed it to three males. (17 R 1876.) Cummings never changed it to two males and a female. (17 R 1876.) Brock got the name Neil from the statement at the hospital. (17 R 1877.)

Penalty phase proceedings: Mr. Salazar's penalty phase occurred on March 17, 2006. (17 R 2120.) The defense called two mitigation witnesses: Mr. Salazar's sister, Michelle Lambert Smith and (17 R 2130-43) Mr. Salazar's other sister, Arleen Lambert Smith. (17 R 2148-2157.) The jury recommended death by a vote of 12 – 0. (17 R 2224.)

Spencer hearing and sentencing: On May 5, 2006, the Court conducted a Spencer hearing, where the state, but not the defense, presented additional evidence. The Court entered its sentencing order on May 30, 2006, finding four aggravating factors [4] (4 R 121; 20 R 2325-31) and six mitigating factors[5] (20 R

[4] (1) Defendant was previously convicted of another capital felony or of a felony involving use or threat of violence to the person (some weight); (2) Capital felony was committed while the Defendant was engaged in the commission of or an attempt to commit . . . any burglary (some weight); (3) HAC (great weight); (4) the capital felony was a homicide and committed in CCP manner (great weight).

[5] (1) Mr. Salazar was not the actual shooter (some weight); (2) Mr. Salazar comes from a broken home and was devastated by his parents' divorce (little weight); (3)

2331-36) and imposed death. (20 R 2325-2336.)

3.851 evidentiary hearing:

Juan Carlos (J.C.) Elso was Mr. Salazar's first trial attorney, retained to handle both the Miami and Okeechobee charges.[6] (1 SPCR 12.) Mr. Elso stated that Dade County "no actioned" the charges there in late 2001, early 2002. (2 SPCR 15, 30.) He knew that Salazar was extradited on the Dade County case only. (1 SPCR 16.) He attempted to secure documents regarding the extradition. (1 SPCR 16.) Mr. Elso did not think they had the right to bring Salazar to Okeechobee County. (1 SPCR 18.) He felt that Dade and Okeechobee Counties were "playing games" with the rules of extradition (1 SCPR 24) and that the Okeechobee Court did not have personal jurisdiction over Mr. Salazar under the doctrine of specialty. (1 SPCR 27.)

Defense counsel Elio Vasquez testified that he took over the case from Mr. Elso. (22 PCR 116-5.) He stated did not think Mr. Salazar had any mental issues (22 PCR 1607) though he admitted that he was not an expert and was not sure

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Mr. Salazar was raised in an impoverished environment in a third world country (minimal weight); (4) Mr. Salazar is capable of, and has, good relationships with family members (minimal weight); (5) Mr. Salazar was a good student, attended school regularly, and obtained a vocational degree in wood working (little weight); and (6) Mr. Salazar was well-behaved at trial and the court proceedings (minimal weight). (20 R 2331-36.)

[6] At the time of his testimony for Mr. Salazar's hearing, Mr. Elso was incarcerated in federal prison for two counts of conspiracy to launder only and another count of money laundering based on payment by clients with drug proceeds. (1 SPCR 9-10.)

whether Mr. Salazar was mentally retarded or suffered from any neurological impairment. (22 PCR 1610-11.)

Defense counsel, Barry Witlin was Mr. Salazar's third trial attorney. (16 PCR 658.) He said it was his intent to immediately attack the court's jurisdiction over Mr. Salazar. (16 PCR 659, 662.) Mr. Witlin believed that Mr. Salazar should not have been transported to the United States for a crime other than that for which he was prosecuted. (16 PCR 663-64.) Mr. Salazar waived the jurisdictional issue but later withdraw his waiver. (16 PCR 664, 668.) Mr. Witlin discussed Mr. Salazar's active participation in his case (22 PCR 1586) and stated that he did not hire any mental health experts, even though it was a death case, because he did not think it was necessary. (22 PCR 1590.)

Trial counsel Russell Akins was Mr. Salazar's fourth attorney – he was appointed by the court. (15 PCR 390.) Mr. Akins was aware that there was a potential jurisdictional issue, but did not pursue the matter. Akins indicated that he and co-counsel Jeffery Smith (15 PCR 391) did not hire a mitigation specialist, but relied, in part, on an investigator and on Dr. Harry Krop's advice about how to proceed with mitigation. (15 R 394, 420.) Mr. Akins was familiar with the circumstances surrounding Mr. Salazar's apprehension in St. Vincent and eventual transfer to the United States. (15 R 406, 412.) Mr. Akins testified that their defense was that Julius Hatcher's story regarding the events in question was

"incredible." (15 PCR 416-17.)

Mr. Akins indicated that the mitigation theory was that Salazar had a "supportive family…cared for his children or child…that he [grew] up in an impoverished nation, but yet he had family support…a divorce that really took a toll on him, his mother and father divorced and I think that was somewhat traumatic for him." (16 PCR 419.) Trial counsel did not consider using any experts for the penalty phase aside from Dr. Krop. (16 PCR 420.)

Trial counsel Jeff Smith, was appointed as co-counsel in Mr. Salazar's case to handle the penalty phase. (15 PCR 476-77.) This was Smith's first capital case. (15 PCR 477.) He stated that "mitigation was difficult with Mr. Salazar because there…was a difficulty in obtaining records because he was from Trinidad—there wasn't a whole lot there." (15 PCR 482.) Smith continued, stating, "Dr. Krop's report back to us was that you know, there was no significant psychological testimony that he could provide that I could use as mitigation." (15 PCR 482.) According to Smith, Dr. Krop did not suggest any further investigation. (15 PCR 482.) Smith explained that his mitigation investigation consisted of speaking to Salazar's sisters, Michelle and Arleen Lambert, Salazar's mother and father, and a friend of the family. (15 PCR 483.)

Jackie Ray Carmichael was trial counsel's investigator. (15 PCR 535, 539.) He conducted the basic "50 hours" of investigation inclusive of both guilt

and penalty phase investigation. (15 PCR 538-39.) He needed more than 50 hours because there was so much material in the case, and asked for more time, but did not get it. (15 PCR 545.) The majority of his time was dedicated to guilt-phase investigation. (15 PCR 540.) The only member of Salazar's family that Mr. Carmichael spoke with was Michelle Lambert. (15 PCR 542.)

Juan A. Pineda, an investigator with the Ft. Lauderdale CCRC, investigated Mr. Salazar's guilt and penalty phase postconviction claims. (15 PCR 551-552.) He traveled to Puerto Rico to investigate the jurisdictional issues related to the extradition in Mr. Salazar's case; he retrieved documents there and had them translated into English. (15 PCR 552-55.) He traveled to Trinidad and interviewed approximately 20 people including Salazar's mother, father, uncle, sister, friends and neighbors. (15 PCR 560, 568.) Mr. Pineda also interviewed Mr. Salazar's brother, Kurt, and sisters, Arleen and Shanalla Lambert in Florida (15 PCR 568-569.)

Mark Harlee, the Chief Assistant Public Defender for Florida's Nineteenth Judicial Circuit, testified that he was lead counsel in Julius Hatcher's case and cannot specifically recall discussing the case with Mr. Akins or Mr. Smith who were employed with the Office. (16 PCR 735.) However, everyone within the PD's Office was aware of Julius Hatcher's case. (16 PCR 738.)

Dr. Harry Krop, a licensed neuropsychologist (21 PCR 1404-06), testified that he was retained by trial counsel, had only one conversation with counsel, and was provided only a probable cause affidavit. (21 PCR 1411, 1412.) Dr. Krop conducted a preliminary evaluation of Salazar. (21 PCR 1411.) Dr. Krop noted that Mr. Salazar had at least one potential head injury. (21 PCR 1428.) Dr. Krop communicated these findings to trial counsel in a January 18, 2006, report. (21 PCR 1430.) In the report, Dr. Krop informed Akins and Smith that he needed additional documents such as medical records, school records, jail records, and contact information to conduct family interviews. (21 PCR 1431.) Dr. Krop indicated that he wished to conduct further interviews and neuropsychological testing on Mr. Salazar. (21 PCR 1431-32.) Despite Dr. Krop's requests, he received no follow up from Mr. Akins or Mr. Smith. (21 PCR 1433.)

Sadie Francis, Salazar's ex-girlfriend and the mother of one of his children, (14 PCR 345, 348, 359) testified that Salazar was not a functional individual and was largely taken care of by others. (14 PCR 336.) Salazar gained employment as a taxi driver with his mother's assistance and was dependent on her. (14 CPR 336, 340, 343.) He never paid rent or utilities in the time that Ms. Francis knew him. (14 CPR 338, 349.) Francis said that he was unable to keep appointments and missed the birth of their daughter. (14 PCR 346-47). At some point, Salazar moved from Trinidad to the U.S. (14 PCR 351.) He planned to live with his

mother and sisters and had no work lined up in the U.S. (14 PCR 351.)

Francis describes Salazar's grammar as "horrible" and states that he speaks "broken English" even though English is his first language. (14 PCR 354-55.) Francis testified that Salazar did not keep up on current events and was unable to manage money. (14 PCR 356.) He never cooked or performed household chores. (14 PCR 357.) She said it was easy to take advantage of him—his friends used him to drive them around. (14 PCR 360-61.) He was a follower who always wanted to please people. (14 PCR 361.)

Arleen Lambert, Salazar's younger sister, testified that when they were children both of their parents were gone everyday and they had to look after themselves. (16 PCR 639-40.) The children were subjected to corporal punishment at the hands of their mother every three days or so. (16 PCR 641-42.) Their father was a gambler and womanizer who abandoned the family financially forcing their mother to take on multiple jobs. (16 PCR 642-43.) Sometimes they did not have enough to eat. (16 PCR 643-44.) When Arleen was six, Salazar fell from a roof onto concrete – he lost two teeth and there was a lot of blood. (16 PCR 642-43.) He was taken to the hospital. (16 PCR 643.)

Their parents divorced when Arleen was in her late teens, which was very stressful for the family—there was a lot of hostility and shouting in the house. (16 PCR 645-46.) Their mother moved to the U.S. and took the two younger siblings

with her. (16 PCR 646.) After the divorce, their brother Kurt changed his name to disassociate himself from his father, and Neil copied him, changing his name from Gary Lambert to Neil Salazar (his mother's maiden name). (16 PCR 647.)

Arleen explained that although she testified in penalty phase, she was not adequately prepared and met Salazar's trial attorney only once for 20 -30 minutes prior to her testimony in Salazar's penalty phase. (16 PCR 648, 651.) She said it would have helped if the attorneys had contacted her ahead of time, spent more time talking with her, and explained the process. (16 PCR 653-54.)

Gail McGarrity is a cultural anthropologist who spoke with Salazar, several family members and friends of the family in Trinidad. (16 PCR 587-588.) Salazar grew up in a Roman Catholic family; his father was a policeman and his mother worked for the Ministry of Agriculture in the Forestry Division. (16 PCR 591.) He was one of four children. (16 PCR 591.) His family was "lower middle class." (16 PCR 592.) His mother was responsible for most of the parenting. (16 PCR 593.) She regularly beat the children with belts and buckles. (16 PCR 596-7.) Due to his father's gambling and womanizing, his mother had to support the family financially, and was out of the home working much of the time. (16 PCR 594.) Money was scarce. (16 CPR 595.) The children were expected to look after one another, clean the house, and cook meals – if they failed to perform these tasks, they would be beaten. (16 PCR 597.) Salazar was beaten more often because he

was "slow" and had difficulties performing tasks that he was asked to do. (16 PCR 598.)

Salazar suffered a serious injury when he fell off his roof as a child and lost consciousness. (16 PCR 601.) He was taken to the local hospital for injuries sustained from that fall, and he had to be transported from the local hospital to a larger hospital in Port of Spain. (16 PCR 601-602.) Medical facilities are more primitive in Trinidad than in developed nations. (16 PCR 602.)

The divorce of Salazar's parents was very traumatic for Salazar – divorce was highly frowned upon because they were Roman Catholic, especially for someone with a position of status, like Salazar's father. (16 PCR 602.)

Salazar did not do well in school. (16 PCR 601.) After he completed his education, he did odd jobs until his mother helped him along by purchasing a taxi for him. (16 PCR 603.) Salazar did not have any stable relationships with women. (16 PCR 604.) Salazar's cousin Edgar helped Salazar move to the United States when he was in his early twenties. (16 PCR 606.)

Dr. Stephen Harvey is a clinical psychologist at the University of Miami and is the director of the Division of Psychology. (23 PCR 1709.) Dr. Harvey received his Ph.D. in 1982, was first licensed to practice psychology in 1984, and has been licensed in New York, Georgia, and Florida. (23 PCR 1709, 1711.) Dr. Harvey has published over 400 referenced journal articles, nine books, and at least

60 book chapters in the field of psychology. (23 PCR 1710.)

Dr. Harvey was hired by the postconviction team in 2008 to perform psychometric testing and screen Salazar for potential neuropsychological injury. (23 PCR 1730.) Dr. Harvey administered the battery of neuropsychological screening tests known as RBANS in December of 2008. (23 PCR 1731.) He conducted the WRAT4. (23 PCR 1733.) Dr. Harvey further administered Trail Making Exercises parts A and B, the most sensitive test to detect brain dysfunction. (23 PCR 1740.)

Dr. Harvey found that Mr. Salazar had considerable impairments, particularly in processing speed and spatial abilities. (23 PCR 1747.) He opined that "a more detailed neurological assessment could be performed and would likely find substantial deficits." (23 PCR 1748.) Dr. Harvey concluded that his results indicate possible brain damage, which could have been caused by falling from a moderate height or being struck by a car. (23 PCR 1748.) Mr. Salazar scored particularly low on the Trail Making A and B – he was in the bottom 1% on both tests. (23 PCR 1740.) Mr. Salazar put forth good effort and was not malingering. (23 CPR 1739, 1742.) The wide range of abilities demonstrated in Salazar's neuropsychological testing is common among people with brain injury. (23 PCR 1736.)

With respect to cognitive testing, Dr. Harvey conducted the Wechsler Adult

Intelligence Scale ("WAIS") III in December 2008 (23 PCR 1733) and the WAIS IV in June 2009. Dr. Harvey conducted the second exam because the WAIS IV came out after the initial testing and was better for testing subjects from other countries and backgrounds. (23 PCR 1743.) Mr. Salazar scored 67 on both tests. (23 PCR 1734, 1744.)

Dr. Frank Worrell is a professor and the director of the School of Psychology at the University of California Berkeley (UC Berkeley). (17 PCR 817.) Dr. Worrell is from Trinidad and Tobago and attended school there through the secondary level. (17 PCR 817.) He went on to get his Ph.D. at UC Berkeley. (17 PCR 817.) Worrell returned to Trinidad to teach and serve as a school principal. (17 PCR 820.) He focused his academic research on education in the English-speaking Caribbean, particularly Trinidad. (17 PCR 818.) Between 2002 and 2008, he worked to establish a program in Trinidad with the Ministry of Education to help schools identify students with various disorders, including mental health disorders. (17 PCR 819.) He is a member of the Society for Ethnic Minority Psychology and has published over 90 academic pieces related to his expertise in psychology. (17 PCR 820.)

Dr. Worrell was hired by postconviction counsel to review Mr. Salazar's educational records, offer an opinion on his functional academic skills, and determine deficits in adaptive functioning prior to age 18. (17 PCR 835.) Dr.

Worrell traveled to Trinidad for Salazar's case, gathered school records there, and conducted interviews with Mr. Salazar's father, mother, sister, and one of his sister's friends. (17 PCR 838.)

Dr. Worrell indicated that Trinidadian children typically begin school at age five and spend seven years in primary school. (17 PCR 843.) Before moving on to secondary school, students take a common entrance assessment examination. (17 PCR 843.) Based on Mr. Salazar's scores on this test he was placed in the lowest of the three tiers for secondary school. (17 PCR 846.) Third-tier schools included children with mild to moderate mental retardation. (17 PCR 847-49.) Dr. Worrell collected Mr. Salazar's grades from junior secondary school, which demonstrated that Salazar scored higher than a 50% in only one class – arts and crafts. (17 PCR 853.) Upon Salazar's completion of junior secondary school, he was assigned to the most basic level of senior secondary school. (17 PCR 849-51.) Dr. Worrell concluded that Mr. Salazar was functioning at the "lower ends of the academic…distribution" and was probably functioning in the bottom 5% of all students. (17 PCR 853.)

Dr. Worrell determined that Mr. Salazar's father and mother provided reliable and thorough background information. (17 PCR 855, 857-58.) When Mr. Salazar was young, his mother had to help him get a job, and she was "tremendous[ly]" concerned that he would be unable to take care of himself as an

adult. (17 PCR 854-55.) She told Dr. Worrell that Salazar was frequently taken advantage of and that he was unable to refuse the requests of others. (17 PCR 856.) Although Mr. Salazar's parents had been divorced for a long time when Dr. Worrell conducted his interviews, and the interviews were conducted separately, the accounts of Salazar's mother and father were consistent that Mr. Salazar demonstrated low academic functioning, an inability to exercise self care, and a naïveté and gullibility that hindered his functioning in society. (17 PCR 857.)

Dr. Worrell concluded that Mr. Salazar demonstrated onset of mental retardation prior to the age of 18 in functional academic skills and the social area of adaptive functioning. (17 PCR 858.) Dr. Worrell considered his findings from the criteria of both the DSM-IV-TR and AAIDD, and he found Mr. Salazar to have met the standard for onset of deficits in adaptive functioning prior to the age of 18 under both sets of criteria. (17 PCR 859.) Because Mr. Salazar's deficits were not identified and treated early on, it is unlikely that Mr. Salazar would have grown out of those deficits in adaptive functioning after reaching adulthood. (17 PCR 860.)

Dr. Thomas Oakland, who received his Ph.D. in psychology from the Indiana University, was a professor of psychology first at the University of Texas Austin and later at the University of Florida. (21 PCR 1455.) Dr. Oakland taught at the University of Texas in the department of Educational Psychology for 27 years and was instrumental in developing a learning disability center there, prior to being

made chair of the Department of Psychology within the College of Education at the University of Florida. (21 PCR 1456.) Dr. Oakland taught over 40 graduate courses on the administration of Wechsler and Stanford-Binet intelligence tests. (12 CPR 1459.) After leaving the University of Florida in 2010, Dr. Oakland taught in over 50 countries overseas. (21 PCR 1458.) Dr. Oakland worked in the Gaza Strip for 13 years to establish programs for individuals with mental retardation (MR). (21 PCR 1459.) Dr. Oakland worked with the Arab Council on Childhood and Development to develop MR programs in several countries. (21 PCR 1460.)

At the University of Texas at Austin, Dr. Oakland was affiliated with two schools for persons with MR, which prompted him to create the Adaptive Behavior Assessment Test, which is now widely used internationally to detect MR. (21 PCR 1461.) Dr. Oakland's test was carefully designed in line with the adaptive behavior model of the Diagnostic and Statistical Manual of Mental Disorders (DSM), and is the only test of its kind that accomplishes that. (21 PCR 1462.) Dr. Oakland also personally assisted in the revision of the latest version of the Stanford-Binet V. (21 PCR 1462-63.) In his clinical practice, Dr. Oakland has diagnosed 200-300 people as having mental retardation. (21 PCR 1460.) Dr. Oakland, the former president of the Division of Psychology within the American Psychological Association, (APA), was designated by the APA in 2003 as the psychologist responsible for the greatest advances the field of psychology internationally. (21 PCR 1464.) Dr.

Oakland currently sits on the editorial board of 20 academic journals, has published extensively, and is board-certified in school psychology and clinical neuropsychology. (21 PCR 1465.)

To form an opinion regarding whether Mr. Salazar was mentally retarded, Dr. Oakland reviewed the deposition transcript and both reports from Dr. Harvey, the letter written to trial counsel by Dr. Krop, the report of Dr. Worrell, the report of Dr. Keyes,[7] and the report and transcript of testing conducted by state expert Dr. Prichard. (21 PCR 1476; 22 PCR 1508, 1514.) Dr. Oakland provided a critique of Dr. Prichard's methodologies in administering the Stanford-Binet V intelligence test.[8] Dr. Oakland recommended that the Court disregard Dr. Prichard's results and instead to rely on the results of the two administrations of the WAIS by Dr. Harvey. (21 PCR 1484-86; 22 PCR 1503.) Dr. Oakland approved Dr. Harvey's testing methodologies and independently concluded that Mr. Salazar met the IQ requirement for mental retardation. (22 PCR 1505.)

Relying on the reports of Drs. Keyes and Worrell, Dr. Oakland provided further analysis of Salazar's adaptive functioning. (22 PCR 1508.) Dr. Oakland's opinion, upon reviewing the reports of Drs. Keyes and Worrell, is that Mr. Salazar

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[7] Dr. Keyes, who was hired by the postconviction counsel, conducted testing of Mr. Salazar with regards to deficits in adaptive functioning.

[8] Dr. Prichard found Mr. Salazar's IQ to be a 72, which would be narrowly outside the range, under current Florida law, for Mr. Salazar to qualify for mental retardation.

meets the criteria for deficits in adaptive functioning in three areas of adaptive functioning as set out in the DSM: functional academics, self-direction, and self-care. (22 PCR 1515.) The DSM, which is consistent with Florida law, finds that a person meets the criteria for deficits in adaptive functioning if deficits are found in at least two areas, regardless of whether a person is found to have strengths in other areas of adaptive functioning. (22 PCR 1518.) Accordingly, Dr. Oakland opined that Mr. Salazar qualifies for mental retardation under both the adaptive functioning criteria and intelligence prongs. (22 PCR 1529.)

Dr. Gregory Prichard was the state's only expert witness in the 3.851 evidentiary hearing. (24 PCR 1819.) Dr. Prichard received a Psy.D. at the Forest Institute of Professional Psychology, which was in probationary status for accreditation at the time of Dr. Prichard's testimony. (24 PCR 1820, 1989.) Dr. Prichard has never published or made any contribution to research or academics in the profession of psychology. (25 PCR 1986-1989.) Dr. Prichard conducted the Stanford-Binet V intelligence test on Mr. Salazar on July 28, 2011. (24 PCR 1833-35.) Mr. Salazar scored a 72. (24 PCR 1837; 25 PCR 1974.)

Dr. Prichard conducted malingering tests and determined that Mr. Salazar was "working hard," "trying his best, and "putting fort straightforward effort." (25 PCR 1978-79.) Nevertheless, Dr. Prichard stated his IQ test results were "invalid" and he guessed that Mr. Salazar's IQ is actually around 100. (25 PCR 1996.)

Although Dr. Prichard acknowledged that one should not administer tests of adaptive functioning on a defendant, personally, Dr. Prichard based his conclusions that Mr. Salazar has no deficits in adaptive functioning, in part, on Mr. Salazar's self-reports about his life and accomplishments. (24 PCR 1848, 1849-1854.) Dr. Prichard also reviewed various records provided by the prosecutor including: jail/prison records, court transcripts, driving records, and court recordings. (e.g. 24 PCR 1856, 1858, 1864, 1875 25 PCR 1942.) Dr. Prichard concluded that it would not be reasonable to find that Mr. Salazar is mentally retarded. (25 PCR 2025.) After his initial testing with Mr. Salazar and subsequent to his deposition in this case, Dr. Prichard conducted additional testing using Dr. Oakland's Adaptive Behavior Assessment Test with Mr. Salazar's ex-wife, Sheena Carter. (25 PCR 1945.) Ms. Carter indicated that she was guessing in her responses to many questions. (25 PCR 2028.)

Dr. Prichard conceded that there is "something happening [with Mr. Salazar] specific to the nonverbal domains" and assumes that Mr. Salazar suffers from brain damage. (25 PCR 1985.)

Sgt. Patricia Williams, of the St. Vincent Police testified for the state. (16 PCR 691.) On July 21, 2000 she was a corporal of police and was stationed in immigration, which is also a section of the police force. (16 PCR 692.) She came into contact with Mr. Salazar when he arrived on a Caribbean Star flight at 6:05

p.m. (16 PCR 693.) She wanted to speak to him because he looked suspicious. (16 PCR 693.) He had a fake-looking passport indicating that he was Leonard Williams of GA, USA. (16 PCR 693-94.) She questioned him and called Inspector James to "come check out Mr. Williams." (16 PCR 695.) Salazar was then held in custody until he was "expelled" from St. Vincent. (16 PCR 695.) He was released to the custody of an FBI attaché. Donovan Rand placed Salazar on the plane on July 26, 2000 at 4:00 p.m. (16 PCR 695-96.) Sgt. Williams indicated that she would have made "diary" entries in the Criminal Investigation Department (CID) – that is how she knows when Mr. Salazar arrived. (16 PCR 699.)

Sgt. Williams says that she thinks the process that occurred with Mr. Salazar was "something like an extradition." (16 PCR 703.) Typically, there would be paperwork involved in one of these processes. (16 PCR 703.) What happened with Salazar was different than what she had previously experienced. (16 PR 704.) Typically, people like Mr. Salazar would be sent back to where they came from. (16 PCR 705.)

Inspector James testified for the state regarding Mr. Salazar's arrival and detainment in St. Vincent. (16 PCR 709) He met Mr. Salazar on July 21, 2000 when Sgt. Williams summoned him. (16 PCR 710.) Mr. Salazar had an apparently fake passport and appeared to be wearing a disguise. (16 PCR 711.) He discovered that the individual's name was Neil Salazar on July 25, 2000. (16

PCR 711.) Salazar was taken into Trinidad to the Central Police Station. (16 PCR 715.) According to James, Mr. Salazar was "handed over" to U.S. Federal agents. (16 PCR 713.) Never in his experience has a person's country of citizenship refused to take custody of someone who was denied entry into St. Vincent; neither had a county of citizenship refused to transport its citizen back home. (16 PCR 717.)

Donovan Leighton is employed with the FBI and came into contact with Mr. Salazar in St. Vincent. (16 PCR 748.) He was a special agent at the time assigned as the legal attaché for the U.S. Embassy in Barbados. (16 PCR 747.) He flew to St. Vincent to meet with officials and determine how to return Mr. Salazar to U.S. jurisdiction. (16 PCR 750.) He was aware that Trinidad held warrants on Salazar, as well. (16 PCR 750.) The Attorney General of Trinidad allowed the U.S. to take Salazar. (16 PCR 759.) He thinks Salazar was detained in St. Vincent from July 21, 2000 to July 26, 2000. (16 PCR 751.) He explained that the difference between extradition and expulsion is that extradition can be a "much more extended process." (16 PCR 751.) St. Vincent authorities were "adamant that he be expelled." (16 PCR 753.) Mr. Leighton described "extradition" as "a process which did not require any documentation." (16 PCR 761.) A reason they might use expulsion over extradition is to avoid legal barriers and complications. (16 PCR 762.)

The state called various other witnesses: **Ritchie Frederick**, a "senior liaison officer" for the Department of Highway Safety and Motor Vehicles (DHSMV), a records custodian, to verify that Mr. Salazar had a commercial driver's license (CDL). (22 PCR 1622.) **Kevin Gray**, the supervisor of statistics from the DHSMV to testify as to the pass/fail rate of the CDL test that Mr. Salazar took (22 PCR 1660); **Ronnie White**, a jail administrator with the Okeechobee County Jail, to authenticate Mr. Salazar's inmate requests and to discuss those requests (23 PCR 1676-81.) Mr. White also testified as to his personal interactions with Mr. Salazar and Mr. Salazar's phone usage. (23 PCR 1682, 1684.) The state called **Sgt. Mahoney**, a property and laundry Sgt. with the Department of Corrections to testify about the inventory of Mr. Salazar's personal belongings, including twelve legal books (23 PCR 1697-98); **Ms. Craig**, a clerk and supervisor at the Okeechobee County Clerk's office who authenticated audio recordings of Mr. Salazar's court proceedings (23 (PCR 1700-02.); **Ms. Douglas**, a digital court reporter who was called by the state to authenticate a CD of transcripts made from the audio recordings (23 PCR 1704-5); and **Edward Arens, Jr.** an investigator with the Office of the State Attorney, to authenticate CDs of Mr. Salazar's phone calls. (23 PCR 1787-1809.)

STATEMENT OF THE ISSUES

I. Whether defense counsel was ineffective in failing to challenge Mr. Salazar's illegal transport from St. Vincent to Puerto Rico and Puerto Rico

to the United States?

II. Whether Mr. Salazar is mentally retarded where, in addition to meeting the intellectual functioning prong of Nixon with an IQ of 67, he also has at least two deficits in adaptive functioning and an onset prior age 18?

III. Whether trial counsel was ineffective in his cross-examination of co-defendant Julius Hatcher?

IV. Whether trial counsel was ineffective in failing to inform Mr. Salazar of his conflict of interest arising out of his prior employment with the Public Defender's Office that represented Julius Hatcher?

V. Whether trial counsel for Mr. Salazar was ineffective in failing to investigate and present an alibi defense that Mr. Salazar was detained in St. Vincent at the time of the crimes?

VI. Whether trial counsel's deficient performance in penalty phase prejudiced Mr. Salazar where the jury was unaware of significant mitigation including his IQ of 67, deficits in adaptive functioning, and neurological impairments?

VII. Whether Salazar's due process rights as explained in Ake v. Oklahoma were violated where counsel was ineffective in failing to secure an adequate mental health evaluation of Mr. Salazar prior to trial for both the guilt and penalty phase of trial?

VIII. Whether Mr. Salazar should have been afforded evidentiary hearing or the opportunity to amend several of his claims that are not conclusively refuted on the face of the record?

IX. Whether the countless errors that occurred in Salazar's trial were harmless when considered cumulatively or whether the errors rendered Salazar's trial proceedings meaningless under the Due Process requirements of the United States Constitution?

SUMMARY OF THE ARGUMENTS

I – Mr. Salazar was detained by St. Vincent officials in St. Vincent when he flew there from Trinidad in 2000. He was then picked up by a U.S. FBI agent and

transported to Puerto Rico. From Puerto Rico, he was brought to Miami, Florida via interstate extradition. There is a Treaty in place between the United States and St. Vincent dictating the procedures for extraditing an individual from St. Vincent to the United States. Despite this Treaty, U.S. and St. Vincent Officials ignored the Treaty, did not follow the extradition procedure, and now claim that Mr. Salazar was "expelled" from St. Vincent though there is no paperwork or documentation to substantiate this claim. Moreover, "expulsion" requires that the individual in question be returned to the country from whence they came or his/her country of citizenship, not a third-party country such as the U.S. Even if Mr. Salazar was "expelled," the expulsion was still improper where Mr. Salazar was not afforded any of his constitutionally required due process rights. Finally, where the United States gained possession of Mr. Salazar based on alleged crimes that occurred in Dade County, not Okeechobee County, his prosecution for crimes in Okeechobee County violated the Specialty doctrine in place by Treaty. Confidence in the outcome is undermined where the court would have found itself without jurisdiction over Salazar if counsel had investigated these issues and filed appropriate motions.

II – Mr. Salazar is mentally retarded under Florida Law. The trial court acknowledged that his IQ of 67 or 68 satisfies the first prong of mental retardation. Moreover, two experts testified that he has deficits in at least two areas of adaptive

functioning. Evidence was also presented that he had an onset of mental retardation prior to age 18.

III – Julius Hatcher was the State's main witness against Mr. Salazar. His testimony was particularly damaging to Mr. Salazar where defense counsel opened the door to testimony that Mr. Salazar held a gun to him, and forced him to remain under a bed for hours prior to driving to Okeechobee. Even more damaging was defense counsel's suggestion that a tape recording of Mr. Hatcher's statement, which otherwise would not have come into evidence, should be played at trial. Confidence in the outcome of Salazar's trial was undermined by trial counsel's deficient performance in cross-examining Mr. Hatcher where the state capitalized on the testimony regarding events that occurred prior to arriving in Okeechobee, and repeatedly referenced the taped statement, bolstering the otherwise shaky credibility of its two main witnesses.

IV – An actual conflict of interest existed in Salazar's case where lead defense counsel for Mr. Salazar was employed with the Public Defender's Office of Florida's Nineteenth Judicial Circuit for four years while his boss, Mark Harlee, Assistant Chief Public Defender, represented Julius Hatcher and worked out a deal that Mr. Hatcher would testify against Mr. Salazar in exchange for the state's waiver of the death penalty. Mr. Salazar was not aware of and did not waive this conflict.

V – Despite that Official Puerto Rican court documents and law enforcement records state that Mr. Salazar was detained in St. Vincent on April 27, 2000, serving as a complete alibi to the instant crimes, and that Mr. Salazar's defense was that he was not present when the crimes occurred, trial counsel failed to investigate or present this alibi at trial. Had the Puerto Rican documents been presented at trial there is a reasonable probability that the outcome of his trial would have been different.

VI – The trial court has already ascertained that defense counsel was deficient in failing to present mental mitigation in penalty phase. Mr. Salazar was prejudiced by this deficient performance where the jury was unaware, in recommending death, (in part) that Mr. Salazar has an IQ of 67, he was in the bottom 5% of his classmates academically, that he has neurological impairments likely caused by traumatic head injury(s), that his adaptive functioning is impaired, that his parents were often absent during his childhood, his father was a womanizer and gambler and his mother was a strict disciplinarian who frequently whipped Salazar with a belt and buckle. There is a reasonable probability that the outcome of his penalty phase would have been different had this information been presented to the jury.

VII –Salazar's due process rights as explained in Ake v. Oklahoma were violated where counsel was ineffective in failing to secure an adequate mental health evaluation of Mr. Salazar prior to trial for both the guilt and penalty phase of trial.

VIII – The trial court erred in denying several of Mr. Salazar's 3.851 claims where they were sufficiently pleaded, not procedurally barred, and the record does not conclusively refute the allegations. This case must be reversed for evidentiary hearing on these claims. Alternatively, if this court should find that the claims are not sufficiently pleaded, he must be given an opportunity to amend the claims and bring them to facial sufficiency.

IX – The countless procedural and substantive errors in Mr. Salazar's case cannot be considered harmless when considered cumulatively as they rendered his trial proceedings invalid under the Due Process requirements of the United States Constitution.

STANDARD OF REVIEW

I, III, V-VII: Strickland claims present mixed questions of law and fact, so this Court defers to the circuit court's factual findings that are supported by competent substantial evidence but reviews the circuit court's legal conclusions de novo. Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 1999); Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

II: In reviewing determinations of mental retardation, this Court examines the record for whether competent, substantial evidence supports the determination of the trial court. Nixon v. State, 2 So. 3d 137, 138 (Fla. 2009); Johnston v. State, 960 So.2d 757, 761 (Fla. 2006). To the extent that the circuit court decision concerns

any questions of law, the Court applies a de novo standard of review. State v. Herring, 76 So. 3d 891, 895 (Fla. 2011).

IV: Conflict of interest issues are mixed determinations of law and fact; the appellate court defers to the lower court's factual findings that are supported by competent substantial evidence and reviews the legal conclusions de novo. See Stephens, 748 So. 2d at 1032; U.S. v. Novaton, 271 F.3d 968,1010 (11th Cir. 2001).

VIII: Where the circuit court denies 3.851 claims without evidentiary hearing, this Court reviews the circuit court's decision de novo, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling only if the record conclusively shows that the movant is entitled to no relief. Howell v. State, 109 So. 3d 763, 777 (Fla. 2013).

IX: Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because "even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." McDuffie v. State, 970 So. 2d 312, 328 (Fla. 2007).

ARGUMENT ONE

THE TRIAL COURT ERRED IN DETERMINING THAT COUNSEL WAS NOT INEFFECTIVE IN FAILING TO CHALLENGE MR. SALAZAR'S ILLEGAL TRANSPORT FROM ST. VINCENT TO PUERTO RICO AND PUERTO RICO TO THE UNITED STATES RESULTING IN VIOLATIONS TO MR. SALAZAR'S FOURTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLA. CONSTITUTION

St. Vincent immigration officials detained Mr. Salazar upon his arrival in St. Vincent from Trinidad in 2000 because he was carrying what appeared to be a fake passport and he looked suspicious. From St. Vincent, Mr. Salazar was transported by U.S. authorities to Puerto Rico where he went before a judge of first instance and was eventually transported to Miami via interstate extradition to face pending charges there. The charges in Miami were dropped and Mr. Salazar was transported to Okeechobee to face the instant charges. Despite the curious circumstances of Mr. Salazar's initial detainment in St. Vincent and his suspicious delivery to Okeechobee, trial counsel failed to investigate or challenge the Okeechobee court's personal jurisdiction over Mr. Salazar.

I. ***Applicable law*:** Strickland v. Washington, 466 U.S. 668, 688 (1984) requires a defendant to plead and demonstrate both unreasonable attorney performance and prejudice. Id. at 669. Where, as here, counsel unreasonably fails in their duty to investigate, prepare, and perform effectively at trial, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered

unreliable. See Cordes v. State, 842 So. 2d 874, 875 (Fla. 2d DCA 2003) ("Mr. Cordes established his counsel was ineffective for failing to investigate or pursue a defense of statute of limitations").

II. ***Deficient performance*****:** Defense counsel was aware of the "extradition issue" and had a basic understanding of the same, stating, "it was always a bit sketchy as to how [Salazar] [came] into the custody of the FBI…" (15 PCR 405-406). Despite his basic understanding of the potential legal issues surrounding Salazar's detention in St. Vincent and eventual transport the United States, defense counsel never pursued this line of defense. Counsel did not go to St. Vincent or send anyone from the defense team there. (15 PCR 412.) He did not make any telephone calls to St. Vincent. (15 PCR 412.) He did not recall whether he attempted to get any documents from St. Vincent regarding the handling of Mr. Salazar. (15 PCR 412.) He did not recall speaking with the Director of Public Prosecution in St. Vincent, the Commission of Police, or any immigration personnel in St. Vincent. (15 PCR 413.) Counsel had some documents related to the extradition issue, but they were in Spanish and he does not speak Spanish. (15 PCR 408-10.)

Trial counsel attempted to excuse his failure to investigate and utilize the extradition defense by stating that a "conflict that occurred between Neil and his prior counsel… that he wanted the extradition challenged and prior counsel

decided not to." (15 PCR 407). However, prior counsel, **Mr. Witlin, negated trial counsel's claim, where he testified in evidentiary hearing that he fully intended to file a motion challenging the extradition** (16 PCR 664-665, 668, 672.) Additionally, trial counsel stated that he relied on a Spanish-speaking investigator's opinion to "stay away from [the extradition issue]" but he could not recall why the investigator said that. (15 PCR 407, 408.) Trial counsel implied that he chose not to pursue the jurisdictional issue, in part, because he had seen a report generated by FBI Agent Leighton and believed "we had some real bad statements that were going to come in from the FBI should they end up in court here in Okeechobee." (15 PCR 411-12.)

Where trial counsel did not reasonably investigate his options and make a meaningful choice between them, there can be no claim that he "stayed away" from the issue or that he avoided the matter because "some real bad" statements might have come in.[9] Strickland, 466 U.S. at 690-91; see also Wiggins v. Smith, 539 U.S. 510, 521 (2003); Rose v. State, 675 So. 2d 567, 573 (Fla. 1996) (Case law rejects the notion that a '"strategic" decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between

[9] Even if Mr. Akins had conducted a reasonable investigation, pursuit of the extradition issue would not necessarily have meant that the FBI "bad statements" would have been presented to the jury. As Mr. Akins admitted, the State had not been able to locate the FBI agent responsible for the transfer of Mr. Salazar to Puerto Rico (15 PCR 427). Moreover, Mr. Akins never determined whether he could file a motion to suppress the "bad statements." (15 PCR 414.)

them.)

Moreover, trial counsel's performance with respect to the extradition issue otherwise fell below the "norms of professional conduct,"[10] where three other attorneys who represented Mr. Salazar identified and intended to litigate the jurisdictional issue: J.C. Elso, who represented Mr. Salazar in his Miami-Dade case and the Okeechobee case, prior to withdrawing in 2002, researched the issue and attempted to get certified records documenting the extradition(s). (1 SPCR 15-16). He stated "Dade County and Okeechobee were playing games and basically trying to play fast and loose with the rules and extraditing him for one case when they actually wanted to try him for another." (1 SPCR 24). During his representation of Salazar, Mr. Elso repeatedly informed the Court that he intended to file a motion based on the Specialty Doctrine. (1 SPCR 25-26.)

Upon withdrawing, Mr. Elso gave Elio Vasquez, Salazar's next attorney, his files and informed Mr. Vasquez, that there were "unique issues dealing with the Rule of Specialty" that he felt should be pursued. (1 SPCR 41). Mr. Vasquez in turn withdrew from the case in 2004 and Barry Witlin took over. (16 PCR 658.) For the period that Mr. Witlin represented Salazar, he focused on the extradition issues. (16 PCR 659-60, 662.) He intended to attack the extradition issue as his

[10] Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000)

first line of defense. (16 PCR 660, 662) He discussed waiving the jurisdictional issue with Mr. Salazar and made representations to the Court regarding the issue of waiver, Mr. Salazar subsequently decided he wanted to go forward with the issue and the court permitted him to withdraw his oral waiver of that issue. (16 PCR 664-665, 668, 672.) Mr. Witlin was replaced by – and turned over his legal files to – trial counsel. (16 PCR 674). Despite the fact that each of Mr. Salazar's predecessor counsel identified Salazar's "extradition issue," as critical to his defense, trial counsel failed to do anything with it. As such, his conduct cannot be considered "reasonable" under prevailing professional norms.

III. *Prejudice*:

1. Extradition Versus Expulsion

First, Mr. Salazar was prejudiced by his counsel's failure to challenge his removal from St. Vincent. There is a Treaty in place between St. Vincent and the United States that details the requirements for a valid extradition. [11] See Extradition Treaties With the Organization Of Eastern Caribbean States, Art.6, Art.

[11] For purposes of analyzing the legality of an extradition the focus is upon the requirements/procedures contained in an extradition treaty between the surrendering country and the requesting country. Nevertheless, even if the focus were upon the country of citizenship of the individual being extradited and the requesting country, Mr. Salazar would still have standing to challenge his extradition. Currently there is an extradition treaty between Trinidad and Tobago and the United States, which is identical to the extradition treaty in place between St. Vincent and the United States.

14, Aug. 15, 1996. The federal agent(s) who removed Mr. Salazar from St. Vincent purposefully, intentionally, and without regard to Mr. Salazar's due process rights, failed to follow the proper procedures of the extradition treaty.

The prosecution has characterized the process of Mr. Salazar's capture and eventual transport to United States soil, as an "expulsion" rather than an extradition. However, Salazar's removal from St. Vincent by U.S. agents was never called an "expulsion" until Salazar brought up the issue in 3.851 proceedings. Then, the only evidence the State produced to verify that this was an "expulsion" came during FBI Agent Donovan Leighton's testimony during the evidentiary hearing, suspiciously years after-the-fact. (16 PCR 761).

Interestingly, Leighton's testimony, that Mr. Salazar was properly "expelled," was refuted by Inspector James and Sgt. Williams who confirmed that when a person is "expelled" from a country, the person is immediately returned to the country from whence they came or their country of citizenship. Never in Inspector James' experience had a country of citizenship refused to take custody of their citizen who had been denied entry into St. Vincent; neither had a county of citizenship refused to transport one of their citizens back home in such an instance. (16 PCR 717.) Sgt. Williams testified that what happened with Salazar was "something like an extradition" (16 PCR 703) and the process was unusual – she had never before "expelled" an individual to a country other than the country from

which they arrived. (16 PR 704.) She affirmatively agreed that there normally would be paperwork involved in one of these processes (16 PCR 703) although the state has not produced a single document confirming Salazar's "expulsion," or whatever the prosecution now calls this process.

Even if Mr. Salazar was expelled from St. Vincent as Agent Leighton testified, the process by which he arrived in Puerto Rico was still a violation of Salazar's rights. Regardless of the purpose for which an individual is being expelled, a particular country is always required to meet basic procedural human rights requirements such as due process in reaching the expulsion decision. William Thomas Worster , International Law and the Expulsion of Individuals with More Than One Nationality, The Hague University, UCLA Journal of International Law and Foreign Affairs, Vol. 14, No. 2, p.423, 2009. Mr. Salazar was not afforded his procedural rights during his transport to the United States. In fact, FBI agent Leighton stated that he purposely avoided the extradition process because extradition can be a "much more extended process" (16 PCR 751); expulsion is "a process which [does] not require any documentation" (16 PCR 761) and that they use expulsion over extradition is to avoid "legal barriers" and complications. (16 PCR 762.) In other words, St. Vincent and Mr. Leighton used "expulsion" as a means of conveniently sidestepping international law and avoiding Mr. Salazar's due process rights. Mr. Salazar was not arrested, or

processed in St. Vincent. He was simply held against his will. (16 PCR 715.) Mr. Salazar was detained in St. Vincent because they had seen a "Wanted" notice for Mr. Salazar on Interpol. (16 PCR 754.) Although agent Leighton claims that he provided St. Vincent authorities with copies of the arrest warrant, fingerprints, and photographs, (16 PCR 763) Inspector James indicated that no documentation was provided to his knowledge. (16 PCR 721.) Then, the issuance of probable cause for the arrest by the Judge of First Instance in Puerto Rico was based only "documents sent by the State" and bond was set at one million dollars. (27 PCR 283-84, 285-86.)

Moreover, despite the fact that Mr. Salazar was a Trinidadian national, St. Vincent turned him over directly to the U.S. in direct contradiction to standard international practice in expulsions. Typically, when an individual is "expelled" from a country, as agreed by both Inspector James and Sgt. Williams, (16 PR 704, 717) that individual is forced to return to the location from which they have come, or the individual is permitted to request return to their country of native citizenship. Mr. Salazar was provided neither option. Instead, armed U.S. Officials forcibly took him to Puerto Rico.

If a defendant's presence were acquired by "government conduct of a most shocking and outrageous character" which was "perpetrated by representatives of the United States Government," then "due process would bar conviction." LaFave

and Israel, Criminal Procedure, 3.1 at 156, quoting United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir.1975), cert. denied, 421 U.S. 1001 (1975); United States v. Lira, 515 F.2d 68 (2d Cir.1975), cert. denied, 423 U.S. 847 (1975); United States v. Russell, 411 U.S. 423 (1973); Elliott v. Johnson, 816 S.W.2d 332, 339 (Tenn. Crim. App. 1991). Courts have found that where government agents have employed means that are outrageous, illegal, and shocking to the conscience, a defendant has standing to challenge his extradition.

Due process requires a court to divest itself of jurisdiction over a defendant brought from "[a] country when the government ha[s] acquired his presence by deliberate, unnecessary [and] unreasonable invasion of…constitutional rights." Id.

2. **Specialty Doctrine**

In addition to violating the established guidelines and protocols of the extradition treaty in place between the United States and St. Vincent regarding the **manner** of Mr. Salazar's removal from St. Vincent, Mr. Salazar's prosecution in the Okeechobee County also violates the **Specialty provision** contained in the Treaty regarding the stated purpose of Mr. Salazar's required presence in the U.S. See Extradition Treaties With Organization Of Eastern Caribbean States, art.14, Aug. 15, 1996, p.14-15.

At the time of Mr. Salazar's transfer from St. Vincent to Puerto Rico, then Puerto Rico to the United States, the U.S. was seeking Mr. Salazar for his alleged

involvement for Miami crimes. See (16 PCR 748; 29 PCR 785-86.) Indeed, FBI Agent Leighton stated in evidentiary hearing that the "Metro-Dade Police Department" requested his assistance in locating Mr. Salazar in reference to a homicide that occurred in Dade County. (16 PCR 748.) In purportedly requesting that Trinidad "give way" to the United States, the U.S. Embassy requested the Attorney General of Trinidad to "defer to Dade County in prosecution of the murder case." (16 PCR 750.) Despite that the U.S. used the Miami charges as reason to transport Mr. Salazar to U.S. soil, and an International Treaty with a provision on Specialty existed between both the U.S. and Trinidad and the U.S. and St. Vincent, Mr. Salazar was transported, tried, convicted and sentenced to death for crimes which occurred in Okeechobee, Florida.

The State and the trial court's reliance on Fla. Stat.§ 941.28, to find that Mr. Salazar is validly prosecuted in Okeechobee County is misplaced (11 PCR 1973) – this statute relates only to **interstate** extradition proceedings and cannot override a valid International Treaty. Florida Statute Title 47 Criminal Procedure and Corrections, Chapter 41 Corrections: Interstate Cooperation, Part I. Uniform Interstate Extradition, Section 941.28. In United States v. Rausher, 119 U.S. 407 (1986) the United States Supreme Court held that a defendant cannot be prosecuted in violation of the terms of an [international] extradition treaty. One of the general requirements of the current extradition treaty in place between the United States

and St. Vincent is the doctrine of specialty. See Extradition Treaties With the Organization of Eastern Caribbean State, Art. 14, Aug. 15, 1996. Specialty is a doctrine that dictates that a requesting state securing the surrender of a person cannot prosecute that person for any offense other than the one for which he or she was surrendered or else it must allow that person an opportunity to leave the prosecuting state to which he or she had been surrendered. See Gallo-Chamorro v. United States, 233 F.3d 1298, 1305 (11th Cir. 2000).[12] [13] In the instant case, U.S. officials promised both Trinidadian officials and St. Vincent Officials that Mr. Salazar was wanted for prosecution in the United States on charges in Miami-Dade. As such, the Specialty Doctrine of the United States' Treaty with St. Vincent was further violated and Mr. Salazar's due process rights with respect to Specialty were ignored.

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[12] see also United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986); United States v. Rauscher, 119 U.S. 407 (1886) (recognizing specialty doctrine for the first time); United States v. Valencia-Trujillo, 573 F.3d 1171, 1174 (11th Cir. 2009) ("preservation of the institution of extradition requires that the petitioning state live up to whatever promises it made in order to obtain extradition.") (citing Gallo-Chamorro, 233 F.3d at 1305.

[13] Standing is based on the rendering country's power to object, so Mr. Salazar has standing here. Valencia-Trujillo, 573 F.3d at 1174 (citing Gallo-Chamorro, 233 F.3d at 1305); see also United States v. Puentes, 50 F.3d 1567, 1571-72 (11th Cir. 1995) ("We hold that a criminal defendant has standing to allege a violation of the principle of specialty. We limit, however, the defendant's challenges under the principle of specialty to only those objections that the rendering country might have brought.").

Confidence in the outcome of Mr. Salazar's proceedings are undermined by trial counsel's deficient performance in failing to investigate and litigate Mr. Salazar's "extradition issues" where, had trial counsel filed the appropriate motions challenging the court's personal jurisdiction over Mr. Salazar, the motion(s) would have, at very least, properly preserved the issue for direct appeal and subsequent federal habeas corpus review. At best, the Court would have found itself without jurisdiction to prosecute Mr. Salazar and Mr. Salazar would have been allowed to return to Trinidad.

ARGUMENT TWO

THE TRIAL COURT ERRED IN DETERMINING THAT MR. SALAZAR IS NOT MENTALLY RETARDED, RESULTING IN CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Mr. Salazar is mentally retarded pursuant to Fla. Stat. 921.137 and Atkins v. Virginia, 536 U.S. 304 (2002), as he has demonstrated: "(1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen" by clear and convincing evidence. Cherry v. State, 959 So. 2d 702 (Fla. 2007); Nixon, 2 So. 3d at 138; Herring, 76 So. 3d at 895, reh'g denied (Dec. 20, 2011), cert. denied, 133 S. Ct. 28, (2012) ("A defendant must prove each of the three elements by clear and convincing evidence.") The trial court below agreed that Mr. Salazar's full-scale IQ of 67 or 68 satisfies the intelligence prong. (11 PCR 1983.)

I. ***Intellectual functioning*****:** The trial court below found that Mr. Salazar, with a full scale IQ of 67 or 68, meets the first prong for mental retardation where it found "no evidence" undermining the defense expert's administration of the WAIS. (11 PCR 1984) (emphasis added.)

II. ***Concurrent deficits in adaptive behavior*****:** To establish this prong, a defendant must demonstrate "significant limitations in adaptive functioning **in at least two of the following skill areas**: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." Phillips v. State, 984 So. 2d 503, 511 (Fla. 2008) (internal citations omitted). Mr. Salazar, in evidentiary hearing, has demonstrated that he suffers from significant limitations in at least two areas of adaptive behavior.

A. Dr. Oakland: Dr. Oakland opined that Mr. Salazar has deficits in at least three of the ten areas of adaptive functioning. Dr. Oakland used the testing of Dr. Keyes and Dr. Worrell in reaching this conclusion.[14] (22 PCR 1508, 1514.) Dr. Keyes administered the Adaptive Behavior Assessment System (a test developed by Dr. Oakland) in interviewing Mr. Salazar and his brother. (22 PCR 1510-11.) Dr. Keyes' determined, upon his interview with Mr. Salazar's brother,

[14] It is standard practice in the field of psychology to rely on the testing of other doctors in forming an opinion on mental retardation. (22 PCR 1504, 1576.)

that Mr. Salazar's adaptive behavior assessment score is 67.[15], [16] (22 PCR 1511.)

Dr. Oakland also carefully studied the results of the interviews conducted by Dr. Worrell in Trinidad and Tobago. (22 PCR 1513.) Because both of Mr. Salazar's parents separately explained similar deficits of Mr. Salazar to Dr. Worrell, and the information was confirmed by Dr. Keyes' testing of Mr. Salazar's brother, **Dr. Oakland concluded that Mr. Salazar meets the criteria for concurrent deficits in adaptive functioning in the skills of functional academics, self-direction, and self-care**. (22 PCR 1515.)

Dr. Oakland's opinion is corroborated with testimony of those who were

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[15] In the administration of the test with Mr. Salazar himself, Dr. Keyes arrived at a 106.[15] (22 PCR 1511.) Dr. Oakland explained that the severe discrepancy in scores is attributable to Mr. Salazar's self-reports; typically, as indicated in the test manual, the adaptive functioning test **should not be administered to the person who may be mentally retarded**. (22 PCR 1512.) Unlike Dr. Keyes, Dr. Worrell chose **not** to interview Mr. Salazar for this very reason. (17 PCR 839) This theory best explains the inflated results from Mr. Salazar's test, and suggests that the results of the testing based on the report of Mr. Salazar's brother should be adopted. (22 PCR 1512.) Dr. Oakland explained that people suffering with mental retardation frequently exhibit a "cloak of competence," describing themselves and their accomplishments in grandiose terms in an effort to fit in. (22 PCR 1512.) Due to this inaccurate self-reporting, the tests should be administered to relatives and friends, rather than the subject himself. (22 PCR 1512.)

[16] Mr. Salazar's high adaptive functioning scores upon self-reports also tends to disprove Dr. Prichard's conclusion that Mr. Salazar malingered on the IQ tests for the purpose of establishing mental retardation – it is illogical that Mr. Salazar would malinger so as to score poorly on the IQ tests only to bolster his abilities (or give an honest account of his abilities, depending on whether you believe Dr. Prichard, Keyes, or Oakley) in adaptive functioning tests. The more logical is that Mr. Salazar tried to emphasize his abilities in both areas of testing, but that one cannot feign intelligence on an IQ exam as one can feign adaptive functioning.

aware of Mr. Salazar's social and personal skills while he was living in Trinidad. Sadie Francis, the mother of his child, testified that Mr. Salazar could not function on his own and was largely taken care of by others. (14 CPR 343) Mr. Salazar's mother owned the taxi that he drove (14 PCR 340), and he did not pay for rent or utilities when living with his mother or father as an adult. (14 CPR 338, 349); Francis further testified that Mr. Salazar was unable to keep appointments (14 PCR 346-47), had horrible grammar in his writing, and spoke broken English, despite it being his first language. (14 PCR 354-55.) Francis also noted that Mr. Salazar was perpetually unable to manage his money, and that others frequently took advantage of him, including getting taxi rides for free. (14 PCR 356, 360-61.) Dr. Oakland's opinion is also consistent with the findings of Dr. McGarrity, who conducted interviews with people close to Mr. Salazar in his native Trinidad. (16 PCR 587-588.)

Critically, Dr. Oakland also opined that Mr. Salazar suffers with mild mental retardation under the legal definition. (22 PCR 1529.) Dr. Oakland cautioned against layperson stereotypes of mental retardation, and suggested that people with Mr. Salazar's level of mental retardation can fit in quite well into society without their deficiencies being readily apparent. (22 PCR 1528.)

Dr. Oakland further explained that a mentally retarded person's apparent ability to undertake certain tasks, such as Salazar's legal work and international

travel, is not truly indicative of average adaptive functioning. (22 PCR 1522.) For instance, Dr. Oakland questioned whether Mr. Salazar acted independently with respect to his legal abilities, or whether he has been assisted by other inmates in the law library and has learned the law in the 10+ years since his trial. (22 PCR 1522-23.) Dr. Oakland also explained Bloom's Taxonomy as it relates to cognitive abilities, and outlined the graduated steps of critical thinking: knowledge, comprehension, application, analysis, synthesis, and finally evaluation. (22 PCR 1524-27.) Dr. Oakland suggested that Mr. Salazar's activities—woodworking, attaining a driver's license, driving a taxi, and even his legal knowledge—would actually appear very low on the scale of Bloom's Taxonomy, and they should not be considered evidence of advanced abstract thought. (22 PCR 1527.)

B. Dr. Prichard: According to the DSM, which tracks with Florida law, a person need only have two skills areas in which deficits are shown in order to qualify for mental retardation under this prong. (22 PCR 1518.) Dr. Prichard ignored this principle of his science in repeatedly asserting that certain abilities – such as obtaining a CDL, making a real estate deal, attaining a woodworking certificate, or traveling internationally – could decisively prove that someone was not mentally retarded. (e.g. 24 PCR 1849-51, 1857-59.) However, during cross examination, Dr. Prichard, was forced to admit, contradicting his earlier testimony, that according to the DSM a person with mild mental retardation (IQ between 55 to

70) can "acquire vocations skills for self maintenance," "can be integrated into general society," and "can travel alone." (5 EHII 2029-30.)

C. The trial court misapplied the law in determining that Mr. Salazar's apparent strengths outweigh his deficits in adaptive functioning

The trial court's determination that Mr. Salazar does not meet the second prong of MR because his strengths in certain areas "rebut these specific deficits [found by Dr. Oakland]" (11 PCR 1984), is contrary to the law. As aptly explained by the Eight Circuit in Sasser, where the trial court committed the same error as the circuit court here,

> [In evaluating the defendant's adaptive functioning] [t]he district court also **held Sasser to the wrong legal standard by improperly offsetting limitations against abilities, even across skill areas**. **For example, the district court found it "clear Sasser struggled with job duties which involved labeling and grouping" (i.e., work skills), but balanced this limitation against Sasser's ability to "get along with co-workers" and be at work on time (i.e., social/interpersonal skills)**….
>
> **This balancing approach was inconsistent with Arkansas law, which required Sasser to prove only two significant limitations in the *DSM–IV–TR* adaptive skill areas**. See Jackson, 615 F.3d at 962. **Under the district court's approach, even an individual with a prototypical case of mild mental retardation could not prove it**. For example, although Sasser "was described as 'slow' by some," the district court emphasized "no person who knew Sasser in the developmental period, even those trained in special education, regarded Sasser as mentally retarded." Yet as the DSM–IV–TR explains, individuals with mild mental retardation "often are not distinguishable from children without Mental Retardation until a later age," supra, at 43. **As another example, the district court highlighted Sasser's ability to perform a job "within his abilities ... reliably well." Again, the *DSM–IV–TR* explains that "[d]uring**

> **their adult years, [mildly mentally retarded individuals] usually achieve social and vocational skills adequate for minimum self-support**." Id.
>
> These legal errors mean the district court has not answered the question Akins required it to answer: under Arkansas law, did Sasser prove by a preponderance of the evidence that he had "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety"? DSM–IV–TR, supra, at 41; see Jackson, 615 F.3d at 961–62. **Answering this question does not involve balancing strengths against limitations. It simply requires deciding whether the evidence establishes significant limitations in two of the listed skill areas**. See DSM–IV–TR, supra, at 41.

Sasser v. Hobbs, 735 F.3d 833, 848 (8th Cir. 2013) (emphasis added). Florida employs a nearly identical rule as Arkansas with respect to adaptive functioning. [17] The trial court below, like the district court in Sasser, balanced facts that it perceived as strengths against Mr. Salazar's limitations, to conclude that Ms. Salazar had not met his burden as to this prong of the MR standard:

> 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…

(11 PCR 1985.) As explained by the Eighth Circuit in Sasser and by Dr. Oakland in evidentiary hearing, a person qualifies under the adaptive functioning prong for

[17] Arkansas's second prong for a determination of mental retardation, like Florida, requires that a defendant exhibit at significant limitations in at least two areas of adaptive functioning. Sasser, 735 F.3d at 848; Cherry, 959 So. 2d 702.

mental retardation if that person has deficits in two or more areas out of the ten possible areas, **regardless of whether that person was strong in other skill areas.** (22 PCR 1519, 1527.) Certainly, an individual may be an apparent savant in one area of his adaptive functioning and qualify for MR, nonetheless. (22 PCR 1519.) Therefore, in listing points that the court perceived as strengths to "rebut" or otherwise cancel-out the deficits found by Drs. Worrell, Keyes and Oakland, the court misapplied the law. Sasser, 735 F.3d at 848; Phillips, 984 So. 2d at 511.

III. ***Onset prior to age 18*:**

A. Dr. Worrell: postconviction counsel hired Dr. Worrell, in part, to determine whether Mr. Salazar manifested subaverage intellectual functioning and deficits in adaptive functioning prior to age 18 (17 PCR 835.) Dr. Worrell traveled to Trinidad and Tobago for Salazar's case, gathered school records there, and conducted interviews with Mr. Salazar's father, mother, sister, and one of his sister's friends. (17 PCR 838.)

1. Intelligence prior to age 18: Dr. Worrell discussed that Trinidadian children take a common entrance assessment examination before moving from primary school to secondary school. (17 PCR 843.) Based on Mr. Salazar's scores on this test he was placed in the lowest of the three tiers for junior secondary school. (17 PCR 846.) Third-tier schools would have included children with mild to moderate mental retardation. (17 PCR 847-49.) Dr. Worrell collected Mr.

Salazar's grades from junior secondary school, which demonstrated that Salazar scored higher than a 50% in only one class – arts and crafts. (17 PCR 853.) Mr. Salazar was assigned to the most basic level of senior secondary school upon his completion of junior secondary school. (17 PCR 849-51.) Dr. Worrell concluded that Mr. Salazar was clearly functioning at the "lower ends of the academic…distribution" and was probably functioning in the bottom 5% of students. (17 PCR 853.)

The court relied on the state's cross-examination of Dr. Worrell to wholly refute his findings. (11 PCR 1982.) However, where Dr. Worrell is a professor and the director of the School of Psychology at the University of California Berkeley; he grew up in Trinidad and attended school there through the secondary level (17 PCR 817) and went on to teach and be a principal in the Trinidadian school system, he is highly qualified to render opinions as to a Trinidadian student's achievements. Moreover, contrary to the trial court's assertions (11 PCR 1982), information gleaned from Salazar's family members did support Dr. Worrell's findings that Salazar did not perform well as a child. Cultural anthropologist, Gail McGarrity testified that upon her interviews with family members, she learned that although Salazar's siblings did well in school, he did not. (16 PCR 601.) She also indicated that Mr. Salazar was "slow" as a child and was unable to perform tasks that the other children could. (16 PCR 598.)

2. Deficits in adaptive functioning prior to age 18: Dr. Worrell interviewed Salazar's parents and determined that they provided reliable and thorough background information. (17 PCR 855, 857-58.) When Mr. Salazar was young, his mother had to help him get a job, and she was "tremendous[ly]" concerned that he would be unable to take care of himself as an adult. (17 PCR 854-55.) She told Dr. Worrell that Salazar was frequently taken advantage of and that he was unable to refuse the requests of others. (17 PCR 856.) Based on his investigation of Mr. Salazar's background, he found that Mr. Salazar demonstrated low academic functioning, an inability to exercise self care, and a naïveté and gullibility that hindered his functioning in society. (17 PCR 857.)

Dr. Worrell concluded that Mr. Salazar demonstrated an onset of mental retardation prior to the age of 18 in functional academic skills and the social area of adaptive functioning. (17 PCR 858.) Dr. Worrell considered his findings from the criteria of both the DSM-IV-TR and AAIDD, and he found Mr. Salazar to have met the standard for onset of deficits in adaptive functioning prior to the age of 18 under both sets of criteria. (17 PCR 859.) Because Mr. Salazar's deficits were not identified and treated early on, it is unlikely that Mr. Salazar would have grown out of those deficits in adaptive functioning after reaching adulthood. (17 PCR 860.)

The trial was unimpressed with Dr. Worrell's findings because they were based on "general interviews with Salazar's mother and father" his experience with

the school system, and three pages of school records. (11 PCR 21) However, the trial court failed to mention that Dr. Worrell's findings, including a finding that Mr. Salazar would not have grown out of his childhood deficits in adaptive functioning, were corroborated by Dr. Oakland, an even more impressive expert in the field of mental retardation, who found that Mr. Salazar, as an adult, suffers with deficits in adaptive functioning and Dr. Keyes' report which indicated, upon performing an adaptive behavior assessment test on Mr. Salazar's brother, that Mr. Salazar has an adaptive functioning score of 67. (22 PCR 1511.)

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The defense, through the expert testimony cited above, has established all three elements of mental retardation as required by the Florida Supreme Court under Cherry and Nixon by clear and convincing evidence. Accordingly, this Court should determine that the execution of Mr. Salazar is barred by the Eighth and Fourteenth Amendments of the U.S. Constitution prohibiting cruel and unusual punishment and vacate Mr. Salazar's death penalty.

ARGUMENT THREE

THE TRIAL COURT ERRED IN DETERMINING THAT COUNSEL WAS NOT INEFFECTIVE IN FAILING TO EFFECTIVELY CROSS-EXAMINE CO-DEFENDANT JULIUS HATCHER RESULTING IN VIOLATIONS UNDER THE FOURTH, SIXTH, EIGHTH, AND FOURTHEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLA. CONSTITUTION

I. ***Applicable law*:** Florida courts have applied Strickland in ascertaining whether a defense attorney's performance in cross-examining a witness amounted

to a deficient performance resulting in prejudice to a defendant's case. See Adams v. Balkcom, 688 F.2d 734, 744 (11th Cir. 1982).

II. Defense counsel was deficient: Julius Hatcher was one of the state's two main witnesses against Salazar and was a co-defendant in the case. Salazar's convictions could not have been achieved without Hatcher's testimony. (18 R 1969.) The prosecutor, in direct examination of Hatcher, limited his questioning to events that allegedly occurred after Hatcher, Salazar, and Baker arrived in Okeechobee. (16 R 1651.) However, on cross-examination, defense counsel embarked in a line of questioning that was highly damaging to Salazar and totally inconsistent with his defense theory, that Salazar was not involved in the case:

> DEFENSE: Did you previously tell somebody that you had a gun held to your head down in Miami?
>
> HATCHER: I did, because I walked out to the car with my hands tied behind my back.
>
> ***
>
> DEFENSE: Okay. And you got your hands – how did you get your hands tied behind your back?
>
> HATCHER: Because when I got to the house, Neil answered the door and he told – we was all right at that moment and he told me – I seen nobody was there, he told me "Go upstairs, I got something to show you." When I looked under the bed, he told me it was under the bed, when I looked under the bed, there was nothing. When I cam from under the bed, he had a gun pointed at me.

(16 R 1675-76.) Defense counsel proceeded with this line of questioning drawing

additional damaging testimony from Hatcher that:

- Salazar bound and duct taped Hatcher's arms and legs then forced him under a bed at gunpoint – the gun was a machine gun (16 R 1676, 1679);

- Salazar kept Hatcher's head under the bed for a period of hours (16 R 1677, 1678);

- Salazar threated Hatcher stating, "you're too clean and you got to do something for me." (16 R 1677);

- Salazar was bragging about how much money he was making running drugs (16 R 1678);

- Salazar then forced Hatcher out of the house in Miami and into a car at gunpoint where they traveled to Okeechobee (16 R 1682-83);

- Salazar kept Hatcher taped and at gunpoint for the duration of the drive to Okeechobee (16 R 1683-84)

Counsel even read back portions of Hatcher's taped statements (16 R 1703-04) and agreed to allow the state to play Hatcher's taped statement to police (16 R 1705) where he went into great detail about the alleged events that transpired in Okeechobee. (16 R 1746-1777.)

The lower court reasoned that because trial counsel claimed that his misstep was a "strategic" attempt to demonstrate that Hatcher's story "was completely incredible" (15 R 418), his performance was not deficient. (11 R 1974-75.) The trial court's logic fails. As in Adams, a claim of strategy does not preclude deficient performance where the questioning employed by defense counsel was "utterly devoid of common sense." Adams, 688 F.2d at 744. The Eleventh Circuit

in Adams explained, in a situation very similar to that which occurred here, that where the marginal benefit of eliciting testimony was far outweighed by the damaging effect to the defendant, claimed strategy does not shield the trial attorney from a deficient performance:

> **Adams argues that the benefit, if any, of showing this purported slight inconsistency in Arie Mae's testimony was far outweighed by the damaging impact of her statement…** Nevertheless, he believed that impeachment on this point was important to show that Arie Mae recognized the discrepancy in her testimony and that she was making excuses to cover up her motives for so doing. **Thus, the district court found that defense counsel made a reasoned, tactical choice to bring out the statement**.
>
> **The state argues on appeal that tactical decisions do not constitute ineffective assistance merely because in hindsight it is apparent that counsel chose the wrong course**…
>
> **We believe that counsel's trial strategy in eliciting the damaging statement was utterly devoid of common sense, especially in view of the fact that the prosecutor neglected to bring this inflammatory statement on direct-examination**. **Since counsel's question was totally inconsistent with his defense theory that the shooting was an accident or self-defense, this strategy undermined the merits of Adams's defense.**

Id. (emphasis added). Here, as in Adams, counsel cannot claim strategy where his performance brought out damaging information that was beyond the bounds of reason where, among other problems, it corroborated other witnesses' testimony that Mr. Salazar had a machine gun and bolstered Hatcher's testimony. Id. see also Light v. State, 796 So. 2d 610, 616 (Fla.2d DCA 2001)("'patently unreasonable" decisions, although characterized as tactical, are not immune."); see also Collins v.

State, 855 So. 2d 1160, 1163 (Fla. 1st DCA 2003) ("We cannot simply assume a reasonable set of circumstances under which a defense attorney would ask a police detective whether the person shown committing a crime on a surveillance tape was the defendant, when such testimony was not elicited by the State…")

III. Prejudice: The trial court did not consider the devastating impact of trial counsel's errors in cross-examining Hatcher and allowing Hatcher's taped statement into evidence. (11 PCR 1974.) Counsel's errors in this regard undermined confidence in the outcome where the jury was given a much fuller description of the day in question beginning when Salazar allegedly duct-taped Hatcher, held him at gunpoint, and abandoned him under a bed for several hours.

Additionally, due to trial counsel's missteps, the jury heard Hatcher's story as to the events in Okeechobee, not just once, through the state's direct examination, but **four times** through cross-examination, the tape-recorded statement (that would not have come before the jury but-for counsel's suggestion and stipulation), and the state's closing argument significantly bolstering Hatcher's credibility. Hatcher had every reason to lie and implicate Salazar – his testimony against Salazar literally saved Hatcher's life. (16 PCR 731.) Thus, his credibility, (which was crucial for the state's case) while initially shaky, appeared drastically more reliable given information drawn out by defense counsel on cross-examination and in the taped statement. For instance, Hatcher claimed, in

testimony elicited on cross-examination that Salazar was carrying a machine-gun which was verified by Ronze Cummings' testimony (and Hatcher's testimony in turn validated Cummings'). (14 R 1466; 16 R 1676, 1679)

The damaging testimony elicited by defense counsel and the devastating taped statement also became a feature of the trial. Undeniably, the State's closing argument referenced portions of Hatcher's testimony brought out by counsel in cross-examination that otherwise would not have come to light.

- "There are two questions that are asked in this court…First one is "The Defendant did or did not carry, display or use a firearm." This – and you've heard the testimony and Mr. Akins has referred to this machine gun…I think Julius Hatcher said it was about this long (indicating)…" (18 R 1952-53);

- "You have a defendant who has presented himself to people as a drug dealer, 'I'm a drug dealer,' seems to have said that fairly easily to people…" (18 R 1957);

- "You've heard Julius Hatcher say he was very paranoid, down in Miami he was paranoid, always had a gun on him…Consistent with people involved in doing something illegal." (18 R 1957);

- "The Defendant tells Julius Hatcher – after he duct tapes him, you know, interesting, duct tapes him, just what he did up here…" (18 R 1958).

The prosecutors capitalized on defense counsel's request for Hatcher's taped statement to come before the jury, repeatedly referencing the tape, suggesting that the jury listen to it in deliberations, and commenting on the consistency of Hatcher's various statements:

- **"Julius Hatcher said in his statement, which was played here. . . As far as**

the tape is concerned, you're more than free to listen to the tape again. And I believe you're going to hear Julius Hatcher saying "The last time we saw each other we were about three years old, I don't remember." (18 R 1942);

- "July 5th, Julius Hatcher is questioned in Miami and Julius Hatcher tells the same story." (18 R 1944);

- "Julius Hatcher said in his statement, in his testimony, or maybe it was the statement that was played here – **and again you have the right to come out her and re-play that statement**…And he said 'Ronze looked like he was coming for the door and Neil forced the door open and Ronze jumped back and that's when everything started happening.'" (18 R 1948);

- You heard Julius Hatcher…And they got him in, they talked to him and about halfway through the statement and he's saying 'I was there' and he's saying 'Neil was there' **and that [taped] statement was in evidence, it was played here and you have the right to go back and play it again if you want**." (18 R 1964);

- "And they [T.J. Brock] asked him [Hatcher] roughly halfway through the [taped] statement 'but Ronze says…" (18 R 1964);

- "**You need to go back and listen to that tape** and remember the voice. Nobody is hard-nosing him, nobody is overbearing with him or raising their voice and saying 'Come on, you know, come clean with us here, tell us the truth.' The Voices were, you know, T.J. Brock saying to him, 'You know, Ronze and the guy with the .38 was the one that shot them…" (18 R 1965)

- "And Hatcher gives it up. And Hatcher has testified, I think you've heard there was a proffer to us, there was a deposition by two attorneys, there was testimony in court, that's at least four statements, transcripts in the hands of lawyers, and again, **you have not heard a single suggestion in this courtroom that Julius Hatcher ever varied from that from the first time on July 5 of the year 2000, the he ever varied from what he said on the at date to T.J. Brock**." (18 R 1966);

- "**The [taped] statement came first [before the offer for a plea deal], the statement came on July 5th of the year 2000**." (18 R 1968);

- "In six year there have been some discrepancies over little things, **but the one thing that has never varied in either of those men's statements** [Hatcher and Cummings] is that Neil Salazar was the one that came up here with Julius Hatcher…" (18 R 1980);

- "But he [Hatcher] goes to law enforcement, he goes to T.J. Brock and he tells T.J. Brock…'This is what happened, I shot two people in the head and that man (indicating) helped me do it.'" (18 R 1986).

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Confidence in the outcome of Mr. Salazar's case is undermined given the devastating and insidious nature of the damaging testimony elicited on cross-examination and through Mr. Hatcher's taped statement, and where the testimony of Hatcher and Ronze Cummings, the only people linking Salazar to the crime, were significantly bolstered with the information brought into evidence by defense counsel.

ARGUMENT FOUR

THE TRIAL COURT ERRED IN DETERMINING THAT COUNSEL WAS NOT INEFFECTIVE IN FAILING TO INFORM MR. SALAZAR OF HIS CONFLICT OF INTEREST RESULTING IN VIOLATIONS TO MR. SALAZAR'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLA. CONSTITUTION

The Public Defender's Office of Florida's Nineteenth Judicial Circuit employed Mr. Salazar's lead trial attorney, Russell Akins from 1997 to 2004. (15 PCR 386-87.) Mr. Salazar was indicted in this case, along with Julius Hatcher, on July 19, 2000. (1 R 14.) Mr. Atkin's supervisor, Mark Harlee, represented Julius

Hatcher.[18] (15 CPR 387; 16 PCR 729-731). **As such, Mr. Akins was employed by the PD's office for approximately four years while Mr. Hatcher's case was being handled by the same PD's office.** As conceded by the trial court, Mr. Salazar was never informed of this conflict of interest and never waived it. (11 PCR 1976.) However, the trial court denied this claim citing Mr. Salazar's knowledge that Mr. Akins formerly worked at the PD's Office (even though there is no indication that Salazar knew that the PD's office represented Hatcher). (11 PCR 1976.)

I. ***Applicable law***: An actual conflict of interest arises when counsel "actively represented conflicting interests" and "an actual conflict of interest adversely affected the lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348-49 (1980). "On the other hand…a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693.

As explained by the USSC in Strickland in analyzing whether a defendant is entitled to relief as a result of his attorney's conflict of interest due to multiple representation:

In Cuyler v. Sullivan, 446 U.S., at 345-350, the Court held that

[18] Whose testimony against Mr. Salazar was so critical to the state's case that the state conceded in closing argument that Mr. Salazar would have probably "walked" without the testimony. (18 R 1969.)

> prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e. g., Fed. Rule Crim. Proc. 44(c), **it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.**

Id. at 692 (emphasis added).

II. ***Trial counsel actively represented conflicting interests***: Mr. Akins, Mr. Salazar's trial attorney, was employed primarily in the Port Pierce division of the 19th Judicial District Public Defender's office for approximately 4 years. (15 PCR 386-87.) During his employment there, Mark Harlee, was his supervisor. (15 PCR 387.) Mr. Harlee also worked out of the Fort Pierce Office. (16 PCR 732.) Mr. Harlee also "did all the work" in Okeechobee, and in this capacity represented Julius Hatcher. (16 PCR 729-732.) **There were only ten to twelve attorneys in the Fort Pierce felony unit at the time of Mr. Hatcher's case.** (16 PCR 732.) **At the time of Mr. Hatcher's case, the PD's office was only handling one or two capital cases**. (16 PCR 736.) All of the attorneys within the PD's office would have been aware of the Julius Hatcher case. (16 PCR 736.)

Mr. Salazar initially hired private counsel but was ultimately represented by court appointed counsel, Russell Akins, "sometime in '05." (15 PCR 390.) Mr. Hatcher's case was still pending at the time of Mr. Salazar's trial, meaning that Mr.

Harlee, Mr. Atkin's boss at his former place of employment, was **still** representing Mr. Hatcher at the time of Mr. Salazar' trial. (16 R 1698-99.) Critically, **Mr. Akins was employed at the PD's office when Mr. Hatcher worked out a deal with the state to testify against Mr. Salazar** on January 7, 2002. Okeechobee County Case No. 47-2000-CF-000368-CFBXMX. The Rules of Professional Conduct are clear that "A lawyer who has formerly represented a client in a matter shall not thereafter: (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent." Rules Regulating the Florida Bar R. 4-1.9. "A lawyer who has formerly served as a public officer or employee of the government: (1) is subject to rule 4-1.9(b)." Rules Regulating the Florida Bar R. 4-1.11(a).

Although Mr. Akins denies any involvement in Mr. Hatcher's case, he was aware of Julius Hatcher's case during his employment with the PD. (15 PCR 448-49.) And regardless of whether Mr. Akins personally worked on Mr. Hatcher's case, the conflict of Mr. Harlee is imputed on Mr. Akins. Rules Regulating the Florida Bar R. 4-1.10; Turner v. State, 340 So. 2d 132, 133 (Fla. 2d DCA 1976)(PD's office of a given circuit is a "firm" for construing rules governing conflict of interest and imputed disqualification.") Monson v. State, 443 So. 2d 1061, 1061 (Fla. 1st DCA 1984) (U.S. Const. Amend. VI guaranteed legal

representation that was unimpaired by the existence of conflicting interests being represented by a single attorney. Because assistant public defenders in the same circuit represented both defendant and a co-defendant, a conflict of interest was inherent.)

Not only was Mr. Hatcher Mr. Salazar's co-defendant, he was the state's main witness against Mr. Salazar. (16 R 1650- 1747.) According to Mr. Harlee, the state ultimately entered into an agreement with Mr. Hatcher to testify against Mr. Salazar in exchange for a waiver of the death penalty because "the State was having a little difficulty in proving up its case against Mr. Salazar." (16 PCR 731.) Even the prosecutor admitted that that Mr. Salazar would have probably "walked" had Hatcher not testified:

> STATE: [I]f Hatcher is not available to the State as a witness, the person who did this act, who directed this act, who had it done and who not only took the life of one person, tried to take the life of another person…would walk. [Salazar] could have walked out of here.

(18 R 1969.) There could be no interests that conflict more than those of Mr. Hatcher and Mr. Salazar. Despite this blatant conflict of interest, Salazar was not informed of the dual representation issue did not waive it. (11 PCR 1976.)

III. ***The conflict of interest adversely affected the lawyer's performance***: Mr. Hatcher gained significantly from his testimony in Mr. Salazar's case– he literally saved his life by flipping on Mr. Salazar. (16 PCR 731) Salazar, in turn, would

have walked, but-for, Mr. Hatcher's testimony. (18 R 1969.) Defense counsel was working at the same, small public defender's office that represented Julius Hatcher during the time that the public defender's office negotiated a waiver of the death penalty for Hatcher in exchange for testifying against Salazar. In so doing, Salazar was precluded from entering into a similar plea bargain against Hatcher, the actual triggerman. See Ruffin v. Kemp, 767 F.2d 748, 751 (11th Cir. 1985); Burden v. Zant, 24 F.3d 1298, 1306 (11th Cir. 1994). Then, defense counsel went on to represent Mr. Salazar in a private, court-appointed capacity.

Not only was the immunity deal with Hatcher reached while defense counsel was employed by Hatcher's attorney's office, but trial counsel's representation of Salazar was further compromised where he had a continuing duty of loyalty to Hatcher as a former member of the PD's Office at the time of Salazar's trial. Rules Regulating the Florida Bar R. 4-1.9, 4-1.11; Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom, 428 So. 2d 1383, 1385 (Fla. 1983) (recognizing the continuing nature of an attorney's duty of loyalty and confidentiality to his client.) Trial counsel here sought to impeach Hatcher, his old office's client, in cross-examination (and did a highly ineffective job as described in the preceding claim). Here, as in Ruffin, defense counsel was forced to "'resolve[] the conflict of interest by breaching his duty of loyalty to one client in favor of another." Ruffin, 767 F.2d at 751; see also Burden, 24 F.3d at 1306.

Where counsel acted under an actual conflict of interest in his representation of Mr. Salazar, and Mr. Salazar did not waive that conflict, he was denied the right to counsel as guaranteed under the Sixth Amendment. As such, this case must be reversed for a new trial.

ARGUMENT FIVE

THE TRIAL COURT ERRED IN ITS DETERMINATION THAT TRIAL COUNSEL FOR MR. SALAZAR WAS NOT INEFFECTIVE IN FAILING TO INVESTIGATE AND PRESENT AN ALIBI DEFENSE RESULTING IN VIOLATIONS UNDER THE FOURTH, SIXTH, EIGHTH, AND FOURTHEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLA. CONSTITUTION

I. ***Applicable law*****:** Strickland v. Washington, 466 U.S. 668, 688 (1984) requires a defendant to plead and demonstrate both unreasonable attorney performance and prejudice. Id. at 669.

II. ***Counsel was deficient in failing to investigate and present and alibi defense in Salazar's case*****:**

Official Puerto Rican court documents, produced during Salazar's extradition proceedings, plainly state that Salazar was incarcerated in St. Vincent on the date of the crimes in the instant case. (27 R 295). The date was based on official police records. (27 R 284.) Despite this clear defense to the charges in the instant matter, counsel did not investigate or present this information to the trial court or to the jury in determining Mr. Salazar's guilt.

As Salazar and his defense team prepared for trial, Salazar informed his attorneys that witnesses from Trinidad and Puerto Rico would aide in his defense

and should be subpoenaed. Salazar noted on the record that his attorney had not spoken with the requested witnesses nor prepared the subpoenas despite that these witnesses had been listed for almost five months. (17 R 709-710.) Salazar repeatedly attempted to alert the trial court that the dates listed on the extradition paperwork and Puerto Rico Court findings contained dates, which, if true, would have been a complete defense in his pending case. (19 R 1275-77.) Trial counsel stated that he did obtain some Spanish language documents from the Puerto Rican courts that reflected that Mr. Salazar was in custody at a date "that would have conflicted with him being able to do the crime." (15 PCR 408). These documents were obtained by a Spanish-speaking investigator hired by Michelle Lambert (Mr. Salazar's sister). However, trial counsel dismissed this information as a "scrivener's error" and did not investigate further. (15 PCR 408.) He did not have the Spanish language documentation translated, even though he does not speak Spanish. (15 PCR 408-409.) He did not attempt to secure official documents from St. Vincent reflecting the actual dates of Mr. Salazar's detainment there. Although trial counsel traveled to Trinidad, upon Salazar's insistence, to investigate a possible alibi defense there, counsel never traveled to St. Vincent to verify or rule out the alibi plainly corroborated in the Puerto Rican court documents. (15 PCR 412.) Nor did he did not make any telephone calls to St. Vincent. (15 PCR 412.) In Code, the Eleventh Circuit found that counsel was ineffective in failing to

investigate its chosen alibi defense:

> Under these circumstances we conclude that a competent attorney relying on an alibi defense would have asked Code's mother if she could corroborate the alibi; would have subpoenaed a reluctant witness whom he thought could provide an alibi and would have asked either the witness or the defendant if there were other alibi witnesses.

Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir.1986). In this case, as in Code, where trial counsel theory of defense was that the defendant was not present at the crimes, but did nothing to establish the alibi, counsel is deficient. Moreover, as discussed in the preceding claim, where an attorney fails to conduct an investigation he cannot claim that his decision not to act was strategic. See Rose, 675 So. 2d at 573.

III. ***Prejudice*****:** The trial court erred in determining that the Puerto Rican Appellate Court's finding that Salazar was detained in St. Vincent on April 27, 2000 was a "scrivener's error" where there was no evidence, except testify of two St. Vincent police **10 years after the fact**, to support that conclusion. The Puerto Rican Appellate court's findings that Mr. Salazar was arrested and detained in St. Vincent on April 27, 2000, transported to Puerto Rican authorities on July 27, 2000, for a crime which occurred on November 24, 1999 are entitled to legal deference.[19] See e.g. This That and the Other Gift and Tobacco, Inc. v. Cobb Co.,

[19] Under law of the case doctrine, findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same

439 F.3d 1275, 1283 (11th Cir. 2006). Where the Puerto Rican Appellate Court determined that Mr. Salazar was detained in St. Vincent at the time of the instant crimes, that decision should not be rehashed by later courts and Salazar was prejudiced by his trial counsel's failure to use this information to his advantage.

Confidence in the outcome of Mr. Salazar's trial exists from trial counsel's failure to investigate and develop evidence relating to the alibi substantiated in Puerto Rican Court documents indicating that Salazar was arrested in St. Vincent on April 27, 2000. (27 R 284, 295.) Notwithstanding the testimony of Patricia Williams and Sydney James to the contrary – testimony which has no supporting documentation to verify it – this judicial finding would have supported the defense theory at trial that Mr. Salazar was not involved in the June 26, 2000 Okeechobee murder and cast reasonable doubt on his identity as the perpetrator. As it stood, defense counsel had no support for the defense theory that Mr. Salazar was not present, except his attempt at trial to demonstrate that Julius Hatcher's story was "incredible." (15 R 404.)

Counsel's failure to effectively draw the trial court (or the jury's) attention to the Puerto Rico Court of Appeals determination that Mr. Salazar had been incarcerated from April 27, 2000 until June 27, 2000, severely prejudiced Mr.

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case in the trial court or on a later appeal. Heathcoat v. Potts, 905 F.2d 367, 370 (11th Cir.1990). The doctrine mandates that a court follow what has been decided explicitly, as well as by necessary implication, in an earlier proceeding. In re Justice Oaks II, Ltd., 898 F.2d 1544, 1550 n. 3 (11th Cir. 1990).

Salazar in his ability to establish his absence from the state of Florida at the time of the crime. Confidence in the outcome of the trial is undermined where, had trial counsel drawn the court and jury's attention to the April 27, 2000 date, Mr. Salazar could have effectively challenged the testimony of Julius Hatcher (who had significant motivation to lie) and Ronze Cummings. Code, 799 F.2d at 1482, 1484 ("In his evidentiary hearing in the federal district court, Code presented alibi testimony placing him in Macon throughout the day of the crime….As in Nealy, Code argues that the testimony of an alibi witness "might have affected" the jury's comparison of the alleged accomplice's testimony with the defendant's…The state distinguishes Nealy arguing that because two victims identified Code, the jury did not have to rely solely on a credibility choice between Code and his alleged accomplice. Accordingly, unlike Nealy, it is less certain that alibi witnesses might have swayed the jury. Nonetheless, Code's defense was sufficiently prejudiced by Stacy's ineffectiveness to the extent that our "confidence in the [trial] outcome" is undermined….") (internal citations omitted).

ARGUMENT SIX

THE TRIAL COURT ERRED ITS DETERMINATION THAT SALAZAR WAS NOT PREJUDICED BY HIS COUNSEL'S DEFICIENT PERFORMANCE IN PENALTY PHASE, RESULTING IN VIOLATIONS UNDER THE FOURTH, SIXTH, EIGHTH, AND FOURTHEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLA. CONSTITUTION

The trial court correctly found trial counsel deficient for failing to

investigate and present mental mitigation.[20] (11 PCR 1979, 1986.) However, contrary to the trial court's findings, Mr. Salazar was prejudiced by his counsel's gross failure in penalty phase, where Mr. Salazar presented an abundance of unrebutted, new mitigation in evidentiary hearing including (but not limited to) evidence that he has an IQ of 67 (better than only 1.39% of the population);[21] that he had numerous head injuries and suffers from frontal lobe impairment and brain damage; that he did better than only 5% of other students while in school; that he was subject to excessive corporal punishment as a child; and that his father was a gambler and womanizer. This evidence undermines confidence in the outcome where much of it is precisely the type of mitigation that Courts consider the weightiest. Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" that was "essentially unrebutted")

I. ***Deficient performance*****:** As to Strickland's deficiency prong, the United States Supreme Court (USSC) has long referred to the ABA Standards "as guides to determining what is reasonable." Wiggins, 539 U.S. at 524 quoting Strickland, 466 U.S. at 688. The ABA guidelines in place at the time of Salazar's trial stated

[20] It appears, that for brevity's sake, the trial court discussed mental mitigation only in its analysis of 3.851 Claim V. However, for the purposes of this appeal, Mr. Salazar will address his Claim IV (that trial counsel was ineffective in penalty phase) and Claim V (that counsel failed to secure an adequate mental health evaluation under Ake v. Oklahoma for his guilt and penalty phases) separately.

[21] IQ Percentage and Rarity Chart. http://www.iqcomparisonsite.com/IQtable.aspx. (accessed May, 2014.)

that investigations into mitigating evidence "**should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence** that may be introduced by the prosecutor." Id. quoting 1989 ABA Guideline 11.14.1.C. (emphasis added).

B. Counsel was deficient in failing to investigate and present mental mitigation

The trial court has determined that trial counsel was deficient in failing to find and present mental mitigation (11 PCR 1979) where trial counsel retained Dr. Krop to perform an evaluation of Mr. Salazar but never spoke to him again – despite getting a report from Dr. Krop specifically requesting additional collateral documentation, and requesting neurological testing of Salazar because of potential head injuries (21 PCR 1428-31),

1. Dr. Harry Krop is a licensed neuropsychologist. (21 PCR 1404-06.) Mr. Akins retained him for Salazar's case on January 12, 2006. (21 PCR 1409-10.) The only document given to Dr. Krop by defense counsel was the probable cause affidavit. (21 PCR 1411, 1412.) Dr. Krop had only one conversation with defense counsel regarding Mr. Salazar. (21 PCR 1411.) Following that conversation, Dr. Krop conducted a preliminary evaluation. (21 PCR 1411.) During the evaluation, Salazar indicated that his trial was set to begin the very next week; Dr. Krop was surprised that nobody else had evaluated him by then. (21 PCR 1414.) Mr. Salazar told Dr. Krop that he was frustrated with his attorneys.

(21 PCR 1414.) Dr. Krop explained that his evaluation of Salazar was "certainly preliminary" and that he "had very little information other than the police report." (21 PCR 1428.) Dr. Krop noted that Mr. Salazar had at least one potential head injury. (21 PCR 1428.) Dr. Krop communicated these findings to trial counsel in a January 18, 2006, report. (21 PCR 1430.) In the report, Dr. Krop informed Akins and Smith that he needed additional documents such as medical records, school records, jail records, and contact information to conduct family interviews. (21 PCR 1431.) Dr. Krop indicated that he wished to conduct further interviews and neuropsychological testing on Mr. Salazar after he received the requested information from counsel. (21 PCR 1431-32.) Despite Dr. Krop's requests, he never heard from Mr. Akins or Mr. Smith again except about billing. (21 PCR 1433.)

2. Dr. Stephen Harvey, a highly qualified clinical psychologist (23 PCR 1709-10) performed psychometric testing on Salazar to determine potential neuropsychological injury, given the two potential head injuries Salazar reported to Dr. Krop in 2006. (23 PCR 1730.) Dr. Harvey administered the battery of neuropsychological screening known as RBANS[22] in December of 2008. (23 PCR

[22] The RBANS (Repeatable Battery for the Assessment of Neurological Status) is a brief neurocognitive battery with four alternate forms, measuring immediate and delayed memory, attention, language, and visuospatial skills. The RBANS was developed for two primary applications: 1) As a stand-alone "core" battery for the detection and neurocognitive characterization of dementia. 2) As a brief

1731.) He conducted the WRAT4.[23] (23 PCR 1733.) Dr. Harvey further administered Trail Making Test parts A and B.[24] (23 PCR 1740) Dr. Harvey found that Mr. Salazar had considerable impairments, particularly in processing speed and spatial abilities. (23 PCR 1747.) Dr. Harvey concluded that his results indicate possible brain damage, which could have been caused by falling from a moderate height or being struck by a car. (23 PCR 1748.) Mr. Salazar put forth good effort and was not malingering. (23 CPR 1739, 1742.) The wide range of abilities demonstrated in Salazar's neuropsychological testing is common among people with brain injury. (23 PCR 1736.) With respect to cognitive testing, Dr. Harvey conducted the Wechsler Adult Intelligence Scale ("WAIS") III in December 2008 (23 PCR 1733) and the WAIS IV in June 2009. Dr. Harvey conducted the second exam because the WAIS IV came out after the initial testing and was better for testing subjects from other countries and backgrounds. (23 PCR 1743.) Mr. Salazar scored 67 on both tests. (23 PCR 1734, 1744.)

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neurocognitive battery for the detection and tracking of neurocognitive deficits in a variety of disorders. http://www.rbans.com (accessed May 2014.)

[23] The WRAT4 (Wide Range Achievement Test, 4th Ed.) is a brief achievement test measuring reading recognition, spelling, and arithmetic computation. http://en.wikipedia.org/wiki/Wide_Range_Achievement_Test (accessed May 2014).

[24] The TMT (Trail Making Test) A and B "is one of the most popular neuropsychological tests and is included in most test batteries. The TMT provides information on visual search, scanning, speed of processing, mental flexibility, and executive functions." Tom N. Tombaugh, Trail Making Test A and B: Normative data stratified by age and education, Archives of Clinical Neuropsychology, Vol. 19, Issue 2, pp 203–214 (Mar. 2004).

3. Dr. Frank Worrell a highly qualified psychologist from Trinidad with specialization in the Caribbean and Trinidadian education in particular (17 PCR 817, 818) served as an educational expert for Mr. Salazar. (17 PCR 835.) Dr. Worrell traveled to Trinidad for Salazar's case, gathered school records there, and conducted interviews with Mr. Salazar's parents, sister, and friend. (17 PCR 838.) Upon review of Salazar's school records Dr. Worrell determined that Salazar was always in the lowest tier level in his schools. (17 PCR 846, 849-51.) Records demonstrated that Salazar scored higher than a 50% in only one class in junior secondary school – arts and crafts. (17 PCR 853.) Dr. Worrell concluded that Salazar was probably functioning in the bottom 5% of all students. (17 PCR 853.) Dr. Worrell explained that Mr. Salazar's suffered with deficits adaptive functioning demonstrated by his low academic functioning, an inability to exercise self care, and a naïveté and gullibility that hindered his functioning in society. (17 PCR 857.)

4. Dr. Thomas Oakland, a highly qualified psychologist and esteemed expert in mental retardation (21 PCR 1455-65) testified that Mr. Salazar qualifies for the intelligence and adaptive functioning prongs of mental retardation and suffers with deficits in functional academics, self-care, and self-direction.[25] (22 PCR 1505, 1508, 1515, 1518.)

[25] As under Fla. Stat. 921.137.

5. Dr. Gregory Prichard conducted the Stanford-Binet V intelligence test on Mr. Salazar on July 28, 2011. (24 PCR 1833-35.) Mr. Salazar scored a 72, which is nearly within the confidence interval of Dr. Harvey's IQ testing of 67. (24 PCR 1837; 25 PCR 1974.) Dr. Prichard conducted testing for the specific purpose of identifying malingering and determined that Mr. Salazar was "working hard," "trying his best, and "putting fort straightforward effort." (25 PCR 1978-79.) Dr. Prichard conceded that there is "something happening [with Mr. Salazar] specific to the nonverbal domains" and **admitted that that Mr. Salazar likely suffers from brain damage**.[26] (25 PCR 1985.)

C. Counsel failed to adequately investigate Mr. Salazar's background

Not only was counsel deficient in failing to investigate Mr. Salazar's case for mental mitigation, counsel was deficient in failing to conduct a sufficient background investigation and present evidence of the same in penalty phase.

1. Sadie Francis, Salazar's ex-girlfriend and the mother of one of his children, was not contacted by defense counsel at the time of Salazar's trial. (14 PCR 345, 348, 359.) Ms. Francis testified that Salazar did not function on his own and was largely taken care of by others; he drove a taxi and lived with his mother when she met him (14 PCR 336); Salazar was dependent on his mother (14 CPR 343); He did not pay rent or utilities (14 CPR 338); his mother owned the car that

[26] However, Dr. Prichard emphatically denied that Mr. Salazar is mentally retarded.

he used in his work as a taxi driver. (14 PCR 340.) Francis said that he was unable to keep appointments: he missed the birth of his daughter (14 PCR 346); he was never on time, he never showed up when he was supposed to; and his lack of punctuality affected his work as a cab driver. (14 PCR 347.) She testified that when Salazar lived with his father, he paid neither rent nor utilities. (14 PCR 349.) At some point, Salazar moved from Trinidad to the U.S. (14 PCR 351.) He planned to live with his mother and sisters and had no work lined up in the U.S. (14 PCR 351.) Salazar wrote Francis two letters from the States. (14 PCR 354.) She describes his grammar as "horrible." (14 PCR 354-55.) She indicated that you "really have to know him—because of the way he speaks"—to understand his writing. (14 PCR 354.) Although his primary language is English, Ms. Francis indicates that he speaks "broken English." (14 PCR 355.) He did not communicate well with others; he did not look people in the eye when he spoke; and he stopped abruptly in the middle of conversations. (14 PCR 354-55.)

Francis testified that Salazar did not keep up on current events and was unable to manage money. (14 PCR 356.) He never cooked or performed household chores. (14 PCR 357.) She said it was easy to take advantage of him—his friends used him for transportation. (14 PCR 360-61.) He was a follower who always wanted to please people. (14 PCR 361.)

2. Arleen Lambert, Salazar's younger sister, testified that when they were

growing up, their father was gone every day due to his work as a police officer and that their mother also worked every day. (16 PCR 639-40.) The children were responsible for getting themselves off to school. (16 PCR 640.) They received "spankings" from their mother that involved "four slams on the butt with a belt" or the arms "if you try and run away." (16 PCR 641.) These "spankings" occurred every three days or so to each child. (16 PCR 641-42.) When Arleen was six, Salazar sustained a head injury when he fell from a roof onto concrete – he lost two teeth and there was a lot of blood. (16 PCR 642-43.) Their mother took Salazar to the hospital. (16 PCR 643.)

Their father was a gambler and womanizer. At some point, he stopped supporting the family due to his gambling and affairs so their mother had to take on multiple jobs. (16 PCR 642-43.) The family struggled. They had nothing to eat but "bake," a dish made solely of flour and sugar for two weeks straight. (16 PCR 643-44.) Their mother took out a loan for a taxi, and she began working a second job as a cab driver. (16 PCR 643.) Their parents divorced when Arleen was in her late teens, which was very stressful for the family—there was a lot of hostility and shouting in the house. (16 PCR 645-46.) Their mother moved to the U.S. and took the two younger siblings with her. (16 PCR 646.) After the divorce, their oldest brother changed his name because he did not wish to be associated with his father, and Neil followed suit, changing his name from Gary Lambert to

Neil Salazar (his mother's maiden name). (16 PCR 647.)

Arleen explained that she met Salazar's trial attorney only once for 20 -30 minutes prior to her testimony in Salazar's penalty phase. (16 PCR 648, 651.) She explained that any facts she did not mention in penalty phase were likely omitted because she was very emotional and nervous, she had never met Salazar's attorneys before, and they only prepped her 20 minutes. She described everything as "a blur." (16 PCR 648.) She indicated that it would have helped if the attorneys had contacted her ahead of time, spent more time talking with her, and explained the process. (16 PCR 653-54.)

3. Gail McGarrity is a cultural anthropologist retained by postconviction counsel in Salazar's case to perform a cultural background evaluation about his life in Trinidad, interview the people who knew him, and find out how Trinidadian culture affected him in terms of his behavior and attitude. (16 PCR 580-587.) She spoke with Salazar, his sisters, Michelle and Arleen Lambert, Sadie Francis, his mother, Pamela Salazar, an uncle Franklin Lambert, his brother Kurt, and friends of the family in Trinidad. (16 PCR 587-588.)

Mr. Salazar is Afro-Trinidadian with some mixture of Spanish and Portuguese. (16 PCR 591.) Dr. McGarrity discovered that Salazar grew up in a Roman Catholic family; his father Aldwin Lambert was a policeman and his mother worked for the Ministry of Agriculture in the Forestry Division. (16 PCR

591.) He had three sisters and one brother; Kurt was the oldest. (16 PCR 591.) His socioeconomic status growing up was "lower middle class." (16 PCR 592.)

Salazar's father was often gone due to police activities, so his mother was responsible for most of the parenting. (16 PCR 593.) Police officers in Trinidad are highly esteemed and the public has very high expectations of police officers in terms of personal behavior. (16 PCR 594.) Salazar's father was a gambling addict and womanizer whose habits would have been frowned upon in Trinidadian society given his position. (16 PCR 593-4.) Salazar's sisters explained that their mother had to work very hard and pick up odd jobs to compensate for money their father lost. (16 PCR 594.) Regardless of their mother's efforts, money was very tight, food was scarce, and they were unable to buy things they needed. (16 PCR 595.)

Salazar's mother was the disciplinarian who regularly beat the children with belts and buckles. (16 PCR 596-7.) Because she worked outside the home, the children were expected to look after one another, clean the house, and cook meals – if they failed to perform these tasks, they would be beaten. (16 PCR 597.) Dr. McGarrity explained that this practice was unfair because the children were beaten for failing to do things that were beyond their abilities. (16 PCR 597.) Salazar was beaten more than the other children because he was "slow" and had difficulties performing tasks that the other children could do. (16 PCR 598.) Additionally, he

was punished more than his siblings because he did not lie to conceal information to avoid beatings. (16 PCR 599.)

Dr. McGarrity explained that in the Trinidadian school system, children are streamed into either an academic or vocational track. (16 PCR 600.) Special education was not available in Trinidad when Salazar was in school. (16 PCR 600.) Although Salazar's siblings did well in school, he did not. (16 PCR 601.)

Salazar suffered a serious injury when he fell off his roof as a child and lost consciousness. (16 PCR 601.) He was taken to the local hospital for injuries sustained from that fall, and he had to be transported from the local hospital to a larger hospital in Port of Spain. (16 PCR 601-602.) Medical facilities are more primitive in Trinidad than in developed nations. (16 PCR 602.)

The divorce of Salazar's parents was very traumatic – divorce was highly frowned upon because they were Roman Catholic, especially for someone with a position of status, like Salazar's father. (16 PCR 602.) Salazar's mother was ostracized from her church, much to the embarrassment of the children. (16 PCR 602-603.) Salazar's mother left Trinidad for the United States while the divorce proceedings were still pending. (16 PCR 603.)

After Salazar completed his education, he did odd jobs until his mother purchased a taxi for him. (16 PCR 603.) Salazar's starting dating quite late by Trinidadian standards – he did not have any stable relationships with women. (16

PCR 604.) Salazar's cousin Edgar helped Salazar move to the United States when he was in his early twenties. (16 PCR 606.) Dr. McGarrity explained that Trinidadian immigrants usually do quite well in the United States, but Salazar did not. (16 PCR 607.)

II. *Prejudice*:

A. Meager evidence presented in penalty phase: Despite that the state was seeking four aggravators, trial counsel presented only two witnesses in penalty phase, Salazar's sister Michelle Lambert (via video deposition (19 PCR 2130)) and other sister, Arleen Lambert. The trial court found only six mitigators: (1) Mr. Salazar was not the actual shooter (some weight); (2) Mr. Salazar comes from a broken home and was devastated by his parents' divorce (little weight); (3) Mr. Salazar was raised in an impoverished environment in a third world country (minimal weight); (4) Mr. Salazar is capable of, and has, good relationships with family members (minimal weight); (5) Mr. Salazar was a good student, attended school regularly, and obtained a vocational degree in wood working (little weight); and (6) Mr. Salazar was well-behaved at trial and the court proceedings (minimal weight). (20 R 2331-36.)

The trial court found that two other mitigators requested by counsel were not proven: (a) the victim's body was not sexually molested, tortured, dismembered or disfigured in any way; (b) the homicide was not especially torturous or cruel. (20

PCR 2332-33.) Indeed, trial counsel knew so little about their client that one of the six requested mitigators, that Salazar was a good student, was not even accurate as demonstrated with Dr. Worrell's testimony in postconviction.

The mitigation presentation at trial was so paltry, the state decline to even comment on it in penalty phase closing arguments: "The Defense has presented some mitigation. I'm not going to comment further about that. You've seen the video, you heard the testimony of the sister here, and you can decide for yourself how much weight, if any, that's to be given to that testimony." (19 PCR 2189.) Defense counsel did not present any additional mitigation at the Spencer hearing.

B. The story of Salazar and his background presented in evidentiary hearing was a far cry from that presented at trial:

In Salazar as in Porter v. McCollum:

> This is not a case in which the new evidence "would barely have altered the sentencing profile presented to the sentencing judge." Strickland, supra, at 700, 104 S. Ct. 2052, 80 L. Ed. 674. The judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability. They learned about Porter's turbulent relationship with Williams, his crimes, and almost nothing else.

Porter v. McCollum, 558 U.S. 30, 41 (2009). In Salazar's case, all the jury heard was that Salazar's parents got a divorce and they were raised in Trinidad. The jury did not learn that Salazar had an IQ of 67, was in the bottom 5% of students in school as a child (17 PCR 853); was beaten with a belt and buckle because he was "slow" and could not perform tasks required of him by his mother; suffered deficits

in adaptive functioning (17 PCR 857; 22 PCR 1505, 1515, 1518), had significant impairments in brain function (23 PCR 1740, 1747), and likely suffered from brain damage as a result of a fall or getting hit by a car (23 PCR 1748.) Even the state's expert admitted that Salazar likely has brain damage. (25 PCR 1985.)

The court here acknowledged that Salazar presented some additional background information, but assigned it little weight; with respect to mental mitigation the trial court noted only that Mr. Salazar proved "low IQ and cognitive deficiencies" but assigned these factors little weight. (11 PCR 1977, 1979.) As in Porter, the trial court here "unreasonably discounted to irrelevance" the additional mitigation presented by Salazar in his 3.851 proceedings, especially with respect to the mental mitigation that was greatly underreported by the trial court in its Order. Id. at 43. The testimony of Salazar's experts in postconviction put on substantially more mental mitigation than an "IQ of 67 and cognitive deficiencies."

The type of information withheld from the jury due to counsel's failure to conduct a constitutionally sufficient mitigation investigation is precisely the type of information that finders of fact find useful in gauging a defendant's moral culpability. See generally Abdul-Kabir v. Quarterman, 550 U.S. 233, 240-241 (2007) Certainly, where Mr. Salazar has an IQ within the bottom 1.38% of the population and suffers with neurological deficits likely caused by brain damage (a point even admitted by the state's expert), Salazar was not the criminal

mastermind, and cool, calm, calculated killer that the state made him out to be. e.g. (19 R 2187, 2193)

Also applicable to this case is Blackwood, where this Court found trial counsel ineffective in failing to consult with and present testimony of a mental health expert. Blackwood v. State, 946 So. 2d 960, 971 (Fla. 2006). In Blackwood, the court found that the defendant "was denied the effective assistance of counsel because trial counsel failed to adequately investigate and prepare mitigation evidence and because he was deprived of the adequate assistance of a mental health expert." Id. Just like Salazar, Blackwood's attorney retained a mental health expert and a competency evaluation was conducted. Id. However, the FSC found that where, as in Salazar's case, there was no evidence that trial counsel had discussed non-statutory mental health mitigation evidence with an expert, this was ground for reversal. Id. at 971-973.

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Where the trial court has already found that trial counsel was deficient in penalty phase, this court should determine that the trial court unreasonably discounted the powerful mitigation set forth in Salazar's evidentiary hearing and find that there is a reasonable probability that the outcome of the penalty phase would have been different but-for counsel's deficiency.

ARGUMENT SEVEN

THE TRIAL COURT ERRED ITS DETERMINATION THAT SALAZAR WAS NOT PREJUDICED WHEN COUNSEL FAILED TO OBTAIN AN

ADEQUATE MENTAL HEALTH EVALUATION UNDER AKE v. OKLAHOMA IN VIOLATION OF MR. SALAZAR'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS

The trial court correctly determined that Mr. Salazar failed to receive, as demanded by the due process and equal protection clauses of the U.S. Constitution as interpreted by Ake v. Oklahoma, 470 U.S. 68 (1985), a competent mental health evaluation, which was necessary to preserve his right to adequately present a defense in both the guilt and penalty phases. (11 PCR 1797). However, the trial court erred when it ruled that the absence of a competent mental health evaluation, such as that presented in the evidentiary hearing on Mr. Salazar's postconviction motion, did not raise a reasonable probability that the outcome would have been different had such testimony been presented. (11 PCR 1797).

I. Facts: As discussed in the preceding claim, Dr. Harry Krop was appointed prior to Mr. Salazar's trial to evaluate Mr. Salazar for purposes of a psychological evaluation. (21 PCR 1409-10.) Following the evaluation, Dr. Krop prepared a report for defense counsel to review indicating that while Mr. Salazar was competent to proceed to trial, he required numerous specific records and family interviews, and he would need to conduct neuropsychological testing to explore potential mitigating factors, including possible organic brain damage. (21 PCR 1431-32.) Defense counsel failed to address any of these requests (21 PCR 1433)

and the trial court correctly found this to constitute deficient performance on the part of the attorney as related to this Ake claim. See, e.g., Rodriguez v. State, 919 So. 2d 1252, 1270 (Fla. 2005) (analyzing deficiency of counsel under Ake).

II. Argument: The trial court erred when it concluded that Salazar was not prejudiced by the fact that his jury was deprived of hearing this substantial mental health evidence in both the guilt and penalty phases of his trial. Again, this case is on point with Blackwood, 946 So. 2d 960, where this Court found that trial counsel's failure to secure the additional neurological testing recommended by the clinical psychologist constituted prejudice under a violation of due process under Ake *and* a violation of right to counsel under Strickland.

Based upon the reports and evaluations of Mr. Salazar conducted during postconviction, Mr. Salazar has presented to the Court a competent and accurate picture of his mental health. The evaluation conducted by Dr. Harvey establishes that Mr. Salazar possesses an IQ that classifies him within the psychological and legal definitions for mental retardation. The reports completed by Dr. Harvey and Dr. Worrell establish that as a result of prior trauma suffered during early childhood Mr. Salazar also likely suffers from organic brain damage. This abundance of compelling mental health mitigation that was never effectively investigated and presented to the jury charged with the responsibility of making a recommendation as to Mr. Salazar's fate.

Further, this Ake claim extends not only to the validity of the penalty phase but also to the guilt phase of the trial, given the relevance of mental retardation and potential brain damage to Mr. Salazar's ability to form the specific intent to commit the crimes for which he was convicted.

The fact that a full presentation of the compelling mental health evidence was never presented in this case, due to the prior attorney's failure to secure a competent evaluation, undermines confidence in the outcome reached. The trial court should be reversed for its failure to find prejudice as to both the guilt and penalty phases.

ARGUMENT EIGHT

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. SALAZAR'S CLAIMS WITHOUT EVIDENTIARY HEARING RESULTING VIOLATIONS OF MR. SALAZAR'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLA. CONSTITTUION

I. ***Applicable law*:** "As a general proposition, a defendant is entitled to an evidentiary hearing on any well-pled allegations in a motion for postconviction relief unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim…. However, in cases where there has been no evidentiary hearing, the court must accept the factual allegations made by the

defendant to the extent that they are not refuted by the record." Parker v. State, 904 So. 2d 370, 376 (Fla. 2005) (citations omitted).

This Court has expressed a preference that evidentiary hearings are granted on fact-based claims 3.851 postconviction proceedings. See, e.g., Mordenti v. State, 711 So. 2d 30, 33 (Fla. 1998)(Wells, J., concurring); Floyd v. State, 808 So. 2d 175, 183 (Fla. 2002). In fact, the Florida Supreme Court promulgated Rule 3.851(f)(5)(A)(i), applicable here, requiring an evidentiary hearing on all initial postconviction claims requiring a factual determination.

II. Claim XV and Claim XVI – Regarding defense counsel's failure to discover extradition fraud and the state's knowing presentation of false testimony in Salazar's evidentiary hearing regarding his removal from St. Vincent:

Salazar addressed these issues in his June 18, 2012 Second Amended 3.851 motion, (8 PCR 1472, 1485) and again in a Third Amended 3.851 motion filed on November 8, 2012 (9 PCR 1663) upon permission of the trial court, (9 PCR 1613.)

Salazar explained that a document authored by Agent Diaz plainly states that he was in custody in St. Vincent from April 27, 2000 through July 27, 2000, and that it was thus, impossible for Salazar to have committed the instant crimes. (8 PCR 1474; 9 PCR 1670.) Salazar further stated that the state failed to disclose the alleged involvement of St. Vincent police officers Williams and James, who were called by the state to rebut the April 27, 2000 date at evidentiary hearing. (9 PCR 1670.) Moreover, aside from a "memorandum" manufactured in 2010 (10 years

after the events took place) that outlined the events of Mr. Salazar's removal from St. Vincent by U.S. Officials, the state has produced no records documenting Mr. Salazar's removal from St. Vincent, or the dates of Mr. Salazar's detainment by St. Vincent officials. (9 PCR 1671.) Based on the surprise testimony of Officers Williams and James, the suspicious "memorandum" generated 10 years after Mr. Salazar was removed from St. Vincent, and the state's utter failure to provide Mr. Salazar with any documentation relating to his removal from St. Vincent, Mr. Salazar requested: (1) the trial court order production of documents regarding Mr. Salazar's detainment and "expulsion" from St. Vincent; (2) permission to supplement and/or amend his 3.851 motion(s) should any new, relevant information become available; (3) permission to reply to any response by the state; (4) a case management conference following briefing on the issues; (5) evidentiary hearing on this and his other claims; (6) for his convictions and sentences be vacated. (9 PCR 673-74.)

The trial court erred in summarily denying these claims without first ordering the state to produce the records requested by Mr. Salazar or without evidentiary hearing to allow Mr. Salazar the opportunity to refute the surprise testimony and of Officers James and Williams. (9 PCR 1676.) Where the record does not conclusively refute Mr. Salazar's claims that the testimony of the above-individuals was false, an opportunity to conduct discovery and present evidence at

evidentiary hearing was necessary. Floyd, So. 2d at 182. Where the trial court did not grant Mr. Salazar an opportunity to address the false testimony of these individuals, the trial court should have struck the testimony. See e.g. State v. Eaton, 868 So. 2d 650, 653 (Fla. 2d DCA 2004)(exclusion of evidence can be a permissible sanction when the trial court determines there has been a discovery violation). To the extent that the trial court found that the testimony of Officers Williams and James was not surprise testimony (11 PCR 1967), the trial court should have allowed Mr. Salazar to present evidence of prior postconviction counsel's ineffectiveness in failing to find and depose the Officers James and Williams prior to evidentiary hearing and/or conduct additional investigation to refute the testimony thus preserving the matter for further appeal. Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012) (finding that a capital defendant may overcome a procedural default where he can show that postconviction counsel was ineffective).

III. Claim VIII – Trial counsel was ineffective in failing to provide Dr. Krop with sufficient collateral documentation to render a reliable competency determination at the time of trial:

This Court denied evidentiary hearing on Claim VIII of Mr. Salazar's Amended Motion to Vacate Judgments of Conviction and Sentence filed in August of 2010, which alleged that prior counsel was ineffective in not providing sufficient information to Dr. Krop for his competency evaluation of Salazar on the

eve of trial. Records from Okeechobee, discovered by counsel during postconviction proceedings, and records from Martin County Jail revealed that Salazar was housed in solitary confinement for an extended period of time prior to trial and that he requested mental health treatment because his mind was "cracking open" due to the stress brought on by prolonged isolation. However, prior counsel failed to learn and/or communicate these crucial facts to Dr. Krop.

An ineffective assistance of counsel claim based on counsel's failure to secure a reliable competency evaluation for trial is cognizable in postconviction appeal. Peede v. State, 955 So. 2d 480, 487 (Fla. 2007); Ake, 470 U.S. 68. Salazar argues that he has sufficiently pleaded both the deficiency and prejudice prongs of Strickland in alleging this claim. As to the deficiency prong, Salazar stated that counsel performed below the constitutionally mandated standard when he failed to conduct a sufficient investigation to discover and present Dr. Krop with collateral records suggesting that he was not competent at the time of trial due to his prolonged imprisonment in solitary confinement. As to prejudice, Salazar alleged that Dr. Krop did not have access to this pertinent information due to prior counsel's deficient performance, thus calling Dr. Krop's competency evaluation into question. These circumstances undermine confidence in a proceeding that may have stripped Mr. Salazar of his federal due process right not to be prosecuted for these crimes while he was incompetent. Bishop v. United States, 350 U.S. 961

(1966).

Nothing in the record refutes that counsel failed to provide Dr. Krop with this critical information; likewise nothing on the record suggests that Dr. Krop would have found Salazar competent even with the mental health records. In fact, the record tends to support the claim where Dr. Krop testified in postconviction evidentiary hearing that trial counsel failed to provide him with **any** documentation relating to Salazar except a probable cause affidavit.

Based on Salazar's allegations, and because this claim cannot be refuted on the face of the record, this court should have granted evidentiary hearing so that Salazar could have presented testimony of Dr. Krop that the documents would have altered his competence determination. Rivera v. State, 995 So. 2d 191, 197 (Fla. 2008); see also Floyd, So. 2d at 182.

IV. Claim XVII – Ineffective assistance of counsel for failure to retain a ballistics expert at trial:

Salazar raised this claim in his June 18, 2012, Amended motion for postconviction relief as "Claim XVII." (8 PCR 1498.) The trial court denied it, stating, "new claims XVII and XVIII are beyond the scope of the amendment authorized by the court. These claims are summarily denied as unauthorized and untimely." (9 PCR 1613.)

Contrary to the trial court's finding, this claim is timely raised as it is an expansion of Initial 3.851 Motion Claim III, that counsel was ineffective in the

guilt phase for failing to investigate and present a defense at trial. The Florida Supreme Court has previously noted in Bryant, 901 So. 2d 810, that Florida Rule of Civil Procedure 1.190(c) applies to postconviction cases. Florida Rule of Civil Procedure 1.190(c) provides that "[w]hen the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment shall relate back to the date of the original pleading." Here, Salazar's assertion that trial counsel was ineffective in failing to retain and present testimony of a ballistics expert is an expansion of his prior Claim III that counsel was ineffective in failing to properly investigate and present an available alibi defense.

Salazar sufficiently pleaded this claim, stating that because the victim was shot with a .38 caliber revolver handgun, and the state presented expert testimony establishing this, defense counsel was deficient where it failed to present a ballistics expert to prove that the bullets were fired from a weapon owned by Ronze Cummings. Salazar argued in his amended 3.851 that where this testimony would have proven that the murder weapon belonged to Ronze Cummings, not Salazar, there is a reasonable probability that the outcome would have been difference where the jury would have believed his argument that Cummings and his cousins set Salazar up to take the fall for their crimes.

The trial court erred in failing to grant an evidentiary hearing on this claim

where the record does not conclusively refute Mr. Salazar's allegations. Floyd, 808 So. 2d at 183. Moreover, the court did not attach or cite to any portion of the record refuting the claim. Id. As such, where this claim is not procedurally barred, this case must be remanded to the trial court for evidentiary hearing.

V. Claim XVIII – Ineffective assistance of counsel for failure to call Fred Cummings as a defense witness at trial:

Salazar raised this claim in his June 18, 2012 Second Amended motion for postconviction relief as "Claim XVIII." (8 PCR 1500.) The trial court denied the same in its Huff Order, stating, "new claims XVII and XVIII are beyond the scope of the amendment authorized by the court. These claims are summarily denied as unauthorized and untimely." (9 PCR 1613.)

Contrary to the trial court's finding, this claim is timely raised as it is an expansion of Initial 3.851 Motion Claim III, that counsel was ineffective in the guilt phase for failing to investigate and present a defense at trial under Bryant, 901 So. 2d 810 and Florida Rule of Civil Procedure 1.190(c) as discussed in the preceding sub-section. (Argument VIII(4).) Again, Salazar's assertion that trial counsel was ineffective in failing to call Fred Cummings as witness at trial is an expansion of his timely raised Claim that counsel was ineffective in failing to properly investigate and present an available defense.

This claim was sufficiently pleaded where Salazar asserted that counsel was deficient in failing to investigate and present testimony at trial of Fred Cummings,

one of the only individuals who could directly rebut Julius Hatcher and Ronze Cummings' versions of events that occurred at the residence of Mr. Cummings and Shirleen Baker. (8 PCR 1502-04.) Salazar stated that Cummings was listed as a state witness, but was not called at trial. (8 PCR 1500.) Salazar also stated that there is a reasonable probability that the outcome of his trial would have been different but-for trial counsel's failure to investigate and present this critical witness (8 PCR 1504-05) and identified significant, specific testimony/statements of Julius Hatcher and Ronze Cummings that would have been rebutted by Fred Cummings. (8 PCR 1502-04); Nelson v. State, 875 So. 2d 579 (Fla. 2004). The trial court erred in failing to grant an evidentiary hearing on this claim where the record does not conclusively refute Mr. Salazar's allegations. Floyd, 808 So. 2d at 183. Moreover, the court did not attach or cite to any portion of the record refuting the claim. As such, where this claim is not procedurally barred, this case must be remanded to the trial court for evidentiary hearing. To the extent this court should find that Mr. Salazar's claim was not sufficiently pleaded because he did not state that Mr. Hatcher was available to testify at trial, he should have been given an opportunity under Spera to bring the claim to facial sufficiency. Spera, 971 So. 2d at 758.

VI. Conclusion: Mr. Salazar presented legally sufficient arguments for each of the fact-based claims above. Therefore, Salazar should have been granted

evidentiary hearing on these issues. To the extent that this Court determines that the claims were not sufficiently pleaded, the trial court was required, under Spera, 971 So. 2d at 758, to give Mr. Salazar one opportunity to amend his insufficient claims within a reasonable period of time. See also, Bryant, 901 So. 2d at 818.

ARGUMENT NINE

MR. SALAZAR'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE VIEWED AS HARMLESS WHEN VIEWED AS A WHOLE. THE COMBINATION OF ERRORS DEPRIVED MR. SALAZAR OF HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The Supreme Court in Woodson determined that because death is such a unique penalty and is irrevocable, greater caution and safeguards have to be utilized to ensure the constitutional validity of this ultimate sentence. Woodson v. North Carolina, 428 U.S. 280 (1976) (holding that it is vital importance to the defendant and to the community that any decision regarding the guilt and subsequent death imposition be, and appear to be, based on reason rather than caprice and emotion). Because of the uniqueness and severity of the death penalty, the United States and Florida Supreme Courts have held that when errors viewed as a whole, even if they would not require a reversal if viewed individually, can amount to cumulative error that requires a reversal in convictions. See Berger v. U.S., 295 U.S. 78, 88-89 (1935)("[W]e have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one

where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. "); Jones v. State, 569 So. 2d 1234 (Fla. 1990)(remanding for new penalty phase due to "cumulative errors"); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990); Martinez v. State, 761 So. 2d 1074, 1082-83 (Fla. 2000);

It is Salazar's position that the 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. As such, he requests his convictions and sentence be reversed and remanded, and a new trial granted.

CONCLUSION

WHEREFORE, based on the foregoing, Mr. Salazar respectfully requests this Honorable Court reverse and remand the trial court's denial of his 3.851 Motion for Postconviction relief for a new trial and/or penalty phase.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been delivered via email to the Office of the Attorney General at capapp@myfloridalegal.com and Leslie.Campbell@myfloridalegal.com on this 7th day of May, 2014.

/s/ Rick Sichta_____
A T T O R N E Y

CERTIFICATE OF COMPLIANCE AND AS TO FONT

I **HEREBY CERTIFY** that this brief is submitted by Appellant, using Times New Roman, 14-point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure Rule 9.210(a)(2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

/s/ Rick Sichta_____
A T T O R N E Y