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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

REPLY BRIEF OF APPELLANT

RICK A. SICHTA, ESQ.
Fla. Bar No. 0669903
301 W. Bay St., Suite 14124
Jacksonville, FL 32202
Phone: 904-329-7246
rick@sichtalaw.com
Attorney for Appellant

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ARGUMENT ONE IN REPLY

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

I. **Deficiency**: In order to establish this Strickland claim, Salazar must show both deficiency and prejudice. The Appellee's Answer Brief failed to respond to Salazar's theory of deficiency, i.e., that his attorney *failed to investigate* this potential claim, as argued in Salazar's Initial Brief. (IB 35-38.) The Appellee's Answer focuses solely on the legal strength of the extradition claim, which is a question of prejudice. First, it should be found that the trial court erred in failing to find deficiency in the trial attorney's instinctive rejection of this claim without conducting any investigation or analysis.

II. **Prejudice**: As to prejudice, it appears from the Appellee's Answer Brief that the Appellee does not object to the legal proposition that the Appellant is asserting, *i.e.*, that if the actions of the U.S. government in seizing Salazar from St. Vincent and transporting him to Puerto Rico did explicitly violate any U.S. treaty, then it would have been grounds for the charges against Salazar to have been dismissed, in support of which the Appellee cited to United States v. Gardiner, 279 Fed.Appx. 848, 850, 2008 WL 2204590, 2 (11th Cir. 2008). (AB 18-19.)

Impliedly, if the treaty had been violated and Salazar's attorney deficiently failed to have the charges dismissed on that basis, then prejudice exists against Salazar.

The Appellee contests that Salazar was not technically "extradited" (but rather "expelled"), so the treaty was not technically violated. However, the Appellee acknowledges that Salazar was transported to and held at a police station during his time in St. Vincent. (AB 24; 16 PCR 715.) Thus, Salazar indisputably entered St. Vincent territory, triggering the provisions of the treaty that the U.S. has with St. Vincent regarding the extradition of persons accused of crimes in the U.S., whether those persons are nationals of St. Vincent or not. Donovan Leighton, the U.S. legal attaché to Barbados, took the lead in attempting to legally transport Salazar from St. Vincent to the U.S. to face murder charges in Miami (not Okeechobee). Leighton coordinated with the governments of both St. Vincent and Trinidad, and convinced the Attorney General of Trinidad to agree to the U.S. taking custody of Salazar, despite Trinidad's charges of robbery against Salazar. (16 PCR 746-50.) Leighton acknowledged that his initial intent was to have Salazar officially extradited, but he claimed that he later changed his mind and decided to shortcut the process and to seek expulsion instead. FBI pilots flew Leighton and Salazar from St. Vincent to Puerto Rico. (16 PCR 754-55.)

Under Extradition Treaties With Organization Of Eastern Caribbean States (Aug. 15, 1996), the treaty applied, in this situation, to any crime committed by a

person in the U.S. that was punishable by one year or more in prison. Under the treaty, the Requesting State (the U.S.) should provide the Requested State (St. Vinent) with an official request through diplomatic channels and a copy of the warrant, charging document, or some other form of documentation to establish probable cause. The treaty also allows for provisional arrest through INTERPOL, such as what occurred with Salazar, while the documentation of probable cause is provided.

Under the treaty, there is an explicit provision under Art. 14, referred to as the Specialty Doctrine, that requires that if the Requesting State (the U.S.) represents that the extradition is for a specific crime, then that person may not be prosecuted for any other crime, with certain stated exceptions that do not apply to Salazar's case. In entering this treaty with St. Vincent, the two countries established certain legally-binding procedures and rights upon both parties. By engaging both the governments of Trinidad and St. Vincent in securing the person of Salazar to face the charges in Miami, Leighton bound the U.S. to follow the lawful commitment that the U.S. has with those nations, including the Specialty Provision.

To transport Salazar to the U.S. on Miami charges, and then to drop those charges and file new ones against Salazar in Okeechobee—without securing consent of the governments of St. Vincent or Trinidad for this additional

prosecution—explicitly violated the U.S. treaties and provided a lawful basis for Salazar to have these charges dismissed and have him transported back to his home country until lawful extradition occurred.

Had Salazar's attorney conducted a competent investigation and filed such a motion to dismiss, this particular trial never would have occurred. Thus, this Court must overturn the trial court's ruling and vacate Salazar's conviction and sentence.

ARGUMENT TWO IN REPLY

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

I. **Significantly Subaverage IQ**: The lower court found that Salazar, at the evidentiary hearing, had proven by clear and convincing evidence that he had established the first prong of mental retardation under Florida law—"significantly subaverage general intellectual functioning." (Order 22-23.) Before moving on the to the final two elements of establishing mental retardation that the trial court did not find, a brief note need be made about the Appellee's comment regarding the first prong, *i.e.*, challenging the trial court's finding because the State's expert conducted the Stanford-Binet with Salazar and found his IQ to be a 72, which the Appellee argued was above the bright-line cut-off established by Cherry v. State, 959 So. 2d 702 (Fla. 2007). (IB 47.) However, the U.S. Supreme Court invalidated Cherry's bright-line rule on May 27, 2014, in the case of Hall v. Florida, 134 S.Ct.

1986 (2014), a critical case which will be addressed again later on in this section. At this junction, it is sufficient to point out that Hall was a postconviction case in which the Supreme Court ruled that Florida's bright-line rule did not follow the established medical definitions of mental retardation and that the requirement violated a person's 8th Amendment rights. As Hall was an appeal in the postconviction context, the constitutional principle it sets forth should be followed by this Court in ruling upon Salazar's motion. Thus, the Appellee's criticism of the trial court's finding on the basis of Cherry is invalid.

II. **Concurrent adaptive deficits**: As to the second of establishing mental retardation (concurrent adaptive deficits), which the trial court found had not been proven, the Appellee's answer brief made the same flawed analysis as the trial court's order, *i.e.*, thinking it the court's role to weigh Salazar's weaknesses in adaptive functioning against his strengths. As articulated cogently by Justice Pariente in her dissent in Dufour v. State, 69 So. 3d 235 (Fla. 2011), this balancing exercise is directly contrary to the established medical definition of mental retardation; rather, the court should only analyze whether two or more deficits exist, regardless of other perceived strengths. Following the recent guidance from the U.S. Supreme Court in Hall, this Court should embrace the position of Justice Pariente in her dissent and clarify the holding of Dufour in this minor but crucial respect in order to bring it into line with established medical definitions.

The trial court's order correctly cites the following standard for the adaptive deficit prong: the defendant "must show significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, community use, self-direction, health and safety, functional academics, and work." (Order 20, citing Hodges v. State, 55 So. 3d 515, 533-34 (Fla. 2010).) The trial court goes on to quote a section from Dufour that specifically instructs that a balancing test not be conducted: "During that hearing, the trial Court does not weight a defendant's strengths against his limitations in determining whether a deficit in adaptive functioning exists." While that quotation goes on to note that evidence of skills that rebuts a specific alleged deficit is admissible, this does not mean that a person gets a cumulative score on how well in general they are able to perform the tasks of daily life.

From the clear language of the standard, as articulated by Hodges, the sole issue for analysis is whether two or more shortcomings among those seven categories have been proven by the defendant. However, after quoting this standard, the trial court proceeded to analyze the case in a manner directly contradictory to that standard. The court outlined the three areas of deficits that Dr. Oakland found, *i.e.*, functional academics, self-care, and self-direction, and then set forth the strengths that the court thought would offset those deficits. (Order 24-25.)

As Justice Pariente stated in her dissent in Dufour (joined by Justices Quince and Perry)[1]:

> In my view, the trial court first erred by failing to focus on Dufour's established "deficits in adaptive behavior." In other words, the focus in evaluating adaptive behavior should be on the individual's limitations, rather than his or her demonstrated adaptive skills. This proposition is supported both by the American Association on Intellectual and Developmental Disabilities' (AAIDD) definition of mental retardation, as well as the language of section 921.137, Florida Statutes (2006), and Florida Rule of Criminal Procedure 3.203.
> …
>
> This approach to assessing adaptive behavior is at odds not only with the statutory definition itself but also with the current consensus within the scientific community as to the proper method for assessing adaptive behavior in the criminal justice context. Specifically, the AAIDD and the DSM-IV stress that the focal point of adaptive behavior should be on the individual's limitations rather than demonstrated adaptive skills. An important reason for this policy is that "[t]he skills possessed by individuals with mental retardation vary considerably, and the fact that an individual possesses one or more that might be thought by some laypersons as inconsistent with the diagnosis (such as holding a menial job, or using public transportation) cannot be taken as disqualifying." James W. Ellis, Mental Retardation and the Death Penalty: A Guide to State Legislative Issues, 27 Mental & Physical Disability L. Rep. 11, 21 n.29 (2003).

Dufour, 69 So. 3d at 256-58. Justice Pariente also noted that in the amicus brief of

[1] "In this case [Dufour], Dr. Keyes, a very qualified expert in mental retardation, explained that Dufour has numerous risk factors for mental retardation: traumatic brain injury before the age of 18, malnutrition, an impaired childcare giver (his alcoholic abusive father), lack of adequate stimulation, domestic violence, and child abuse." Dufour v. State, 69 So. 3d 235, 261 (Fla. 2011).

the AAIDD,

> [The AAIDD] explains that the significant limitations in adaptive behavior must be based on objective measurements and not weighed against adaptive strengths. The purpose of the adaptive functioning prong is to ascertain whether the measured intellectual score reflects a real-world disability, as opposed to a testing anomaly. Thus for this prong, the diagnostician's focus must remain on the presence of confirming deficits. Accordingly, the AAIDD has specifically noted that "assessments must . . . assume that limitations in individuals often coexist with strengths, and that a person's level of life functioning will improve if appropriate personalized supports are provided over a sustained period." Am. Ass'n on Intellectual & Developmental Disabilities, Definition of Intellectual Disability, http://www.aaidd.org/content_100.cfm?navID=21 (last visited Jan. 14, 2011). Further, as the AAIDD correctly explains, much of the clinical definition of adaptive behavior is much less relevant in prisons, and in fact, a person with mental retardation is likely to appear to have stronger adaptive behavior in a structured environment such as a prison than in society. The amicus brief of the AAIDD further points out that "[s]tereotypes and lay assumptions about people with mental retardation can cloud or distort individual assessment."

Id. at 258.

The analysis in this dissent, particularly its attention to the scientific/medical definition of mental retardation, was corroborated by the U.S. Supreme Court's ruling in Hall of May of this year. In finding that Florida's bright-line rule on IQ was inconsistent with medical opinion and violated the 8th Amendment, the high court stated:

> That this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising. Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or

> psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue. And the definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty: for it is relevant to education, access to social programs, and medical treatment plans. In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions.

Hall, 134 S.Ct. at 1993. The medical community's opinion clearly supports the nuanced and precise analysis that Justice Pariente urged in Dufour, and this Court should explicitly embrace that position and find that the trial court performed an improper balancing test against Salazar.

The Appellee's brief never responded to the argument presented in Salazar's Initial Brief that this balancing of strengths versus weaknesses was legally improper. Rather, the Appellee pressed ahead with its own flawed analysis of this sort, by making a list of Salazar's "strengths" in its introduction to this claim (AB 30) and making an extensive bullet-point list of Dr. Pritchard's finding of Salazar's "achievements." (AB 48-53.) In Salazar's Initial Brief, a cite was made to the case of Sasser v. Hobbs, 735 F.3d 833 (8th Cir. 2013), which corrected the trial court for "offsetting limitations against abilities." Id. at 848. A case citing and following Sasser's reasoning that is strikingly similar in its facts to Salazar's case is Hill v. Anderson, 2014 U.S. Dist. LEXIS 86411, 2014 WL 2890416 (N.D. Ohio, June 25, 2014).

In Hill, the court found that the trial court unjustifiably disregards medical

practice when it "improperly focuses on an apparent adaptive strength of Hill's rather than analyzing his limitations as required," and thus embracing the "stereotypical view [of] mentally retarded individuals [as] utterly incapable of caring for themselves," rather than accepted medical practice. Id. Hill quoted Dr. Sparrow in stating:

> I think one of the fallacies . . . in the general public is that you can tell by talking to somebody or looking at them that they have mental retardation and you cannot. In mild mental retardation often you cannot tell by talking to somebody or looking at somebody that they have mild mental retardation. That's why we have to have tests.

Id.

Specifically, the court in Hill noted concern that the trial court focused too heavily on the defendant's statements in court, in that they appeared to have "assertiveness and composure, as well as his articulateness, measured by the fluidity of his prose, the organization of his story, the sophistication of the vocabulary, the complexity of his sentence structure, and the level of detail." Id. at 119.

Salazar's statement in court in asking that his former postconviction attorneys be discharged and articulating his position on the extradition issue was heavily cited by the State in challenging whether Salazar had concurrent deficits in adaptive functioning. According to Hill (and Justice Pariente), this is focusing too much on an apparent strength rather than questioning whether the deficit has been

rebutted. The court in Hill also noted that, "The evidence the Ohio court cites from Hill's prison records and the testimony of prison officials also is problematic. The AAMR prohibits the assessment of adaptive skills in atypical environments like prison." Id. This mistake was also made against Mr. Salazar.

III. ***Onset Prior to Age 18***: The trial court's misapplication of the adaptive deficits test also infected its finding that Salazar had not proven the third prong of mental retardation (onset prior to age 18). Although Salazar presented evidence, records, and testimony from his home country of Trinidad, and this evidence of mental retardation prior to age 18 was unrebutted by the State, the trial court found that Salazar had not carried his burden as to this claim. The trial court's ruling was not supported by the evidence and should be rejected.

However, the third prong as a legal doctrine raises multiple constitutional concerns regarding the demands it places upon a defendant to prove the existence of a condition prior to the age of 18. Mr. Salazar's case is a classic example of how this prong can function in a way that violates the U.S. Constitution. One of the challenges facing Mr. Salazar in attempting to prove this prong was that he grew up in an impoverished environment in a third world country. Although diligent efforts have now been made to secure all existing documentation and records to provide the court proof of Salazar's intellectual deficiency and deficits in adaptive functioning while he was a child, it cannot be denied that the arbitrary

circumstances of Mr. Salazar's birth make the existence and acquisition of such records immensely less likely than someone born into affluent circumstances here in the United States. For instance, for someone born in the U.S. and placed in an excellent school that catered towards students with disabilities, one would expect that records would be easy to access to document that child's mental disability, and thus to prove mental retardation and to avoid execution on that basis. The arbitrariness of whether one is able to prove such a historical fact—based on whether one's social group and institutions has the resources and inclination to carefully compile and retain records—is not tolerable under the Equal Protection clause of the 14th Amendment or the Due Process clause of the 5th Amendment. Further, this requirement violates the Cruel and Unusual Punishment clause of the 8th Amendment, as it dictates who will be executed and who will not be executed in an "arbitrary and capricious" manner and in a way that violates the "evolving standards of decency" of modern American society. Salazar respectfully asks this Court to find that the third prong of mental retardation under Atkins be found to be unconstitutional.

The trial court's order should be reversed and Mr. Salazar should be declared mentally retarded, and thus barred from being executed.

ARGUMENT THREE IN REPLY

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. ***Deficient Performance***: Salazar must establish both deficiency and prejudice to be successful on this Strickland claim. In regards to deficiency, the Appellee does not appear to contest Salazar's argument that co-defendant Hatcher's account of what occurred in Miami, prior to his arrival with Salazar, would not have been admissible at Salazar's trial, but for Salazar's own attorney opening the door. Salazar's attorney welcomed-in not only Hatcher's damning testimony, but he also created the necessity of playing the entire audio tape of Hatcher's earlier statement to law enforcement. Hearing this prior, (largely) consistent statement multiple times during the trial gave the State an unfair opportunity to have Hatcher vouch for his own credibility. The Appellee asserts that all this destruction of his own case was a justifiable long-shot attempt to undermine the credibility of Hatcher.

The trial court found credible the prior attorney's account that he made a conscious decision to open the door in this manner prior to the trial beginning, but a conscious decision is not enough to insulate an attorney's decision from being deficient under Strickland. See Light v. State, 796 So. 2d 610, 616 (Fla. 2d DCA 2001)("'patently unreasonable" decisions, although characterized as tactical, are not immune"). The trial attorney could have thoroughly impeached Hatcher, and

shown that he was manufacturing an implausible story, without having to put before the jury the damaging claims of what occurred prior to Hatcher and Salazar arriving in Okeechobee. For instance, the trial attorney could have drawn attention to the ludicrous aspects of his account of how the homicide in Okeechobee occurred, i.e., Hatcher's claim that he was "forced" into committing this murder against his will, despite the fact that Hatcher was in possession of a firearm that he could have used to escape or defend himself at any time, if he had truly been under threat. There was no true necessity of needing to delve into all of his accusations of criminal activity against Salazar in Miami. The attorney's decision in this case cannot be supported by reasoned consideration, and this Court should find that the trial court erred in not finding this approach deficient representation under the 6th Amendment.

II. ***Prejudice***: Further, it must be said that if this deluge of damning evidence had not occurred at his trial, there is a reasonable probability that the verdict would have been different, constituting prejudice. Mr. Salazar is entitled to a new trial and that his conviction and sentence be vacated upon this issue.

ARGUMENT FOUR IN REPLY

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

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). "Moreover, if the defendant can show that his attorney's previous representation of the witness adversely affected the adequacy of the defendant's representation, then the defendant need not demonstrate prejudice to obtain relief." Church v. Sullivan, 942 F.2d 1501, 1510 (10th Cir. 1991)(internal citations omitted).

I. ***Actual Conflict***: Salazar's attorney Akins was employed by the same public defender's office for four years while Akins' supervisor represented Salazar's co-defendant Hatcher. Further, Akins was employed there when his boss made a deal with the State to have Hatcher testify against Salazar in exchange for the State not seeking the death penalty against Hatcher. When Hatcher took the stand to testify against Salazar during Salazar's trial, Akins bore a duty of loyalty to Hatcher, given that Akins had been a member of the firm that represented Hatcher when he made his plea deal. It is intolerable that Salazar was never informed of this fact, and that he unknowingly went to trial with an attorney with such split duties and loyalties. Further, the fact that Akins' firm flipped Hatcher against Salazar also meant that the reverse could not happen, i.e., it stripped Salazar of the opportunity to secure a better sentence by providing testimony against Hatcher.

In order to show that an "actual conflict" existed between Akins' representation of Salazar in his trial and his former office's representation of Salazar's co-defendant Hatcher, Salazar needs to show that the facts between Hatcher and Salazar's cases were "substantially and particularly related to each other." Enoch v. Gramley, 70 F.3d 1490, 1496-97 (7th Cir. 1995)(citing Smith v. White, 815 F.2d 1401, 1405 (11th Cir.), cert. denied, 484 U.S. 863, 108 S. Ct. 181, 98 L. Ed. 2d 133 (1987)). Salazar has definitely shown that an actual conflict existed, as these two cases could not be more thoroughly intertwined. The State's theory in Salazar's trial was that these two men were working in concert when the murders were committed, and that Hatcher was being directed in his commission of the killing by Salazar's threats. Hatcher was one of the only two eyewitnesses that testified, but he not only testified regarding the events in Okeechobee, but he presented to the jury a story that began with an alleged aggravated assault and kidnapping against Hatcher by Salazar in Miami. Hatcher, being represented by Akins' boss, cut a deal with the prosecution to testify against Salazar while Akins was employed at the Public Defender's Office. As Hatcher was testifying in Salazar's trial, Hatcher's life was on the line, in that he had to fulfill his obligation to testify in order to preserve his plea deal with the State, even as Hatcher assisted the State in securing a death sentence against Salazar. The interests, down to the survival interest, of these two men could not be more entangled together, or more

opposed. This is not a case where the defense attorney formerly represented a state witness in an unrelated criminal proceeding and thus would be hindering from a vigorous cross-examination on the basis of privileged knowledge of the former client's prior record. See, e.g., Smith v. Dorsey, 1994 U.S. App. LEXIS 19752 (10th Cir. N.M., July 29, 1994). In this case, both of these men were facing the same charges for the same crime, but one cut a deal for life, while the other received a death sentence. This is the ultimate case of the existence of "actual conflict" between the former and current client.

The Appellee cites to McWatters v. State, 36 So.3d 613 (Fla. 2010) for support that Akins' relationship to Hatcher did not create an actual conflict of interest. (AB 59.) However, in McWatters, the potential conflict was with a witness who was going to testify that he had seen the victim on the night of the murder, not a co-defendant who claimed to be an eyewitness and participant in the murder. Hatcher's centrality to the prosecution's case makes this conflict much more volatile than the one in McWatters. The Appellee also looks for support to Mungin v. State, 932 So. 2d 986, 1001 (Fla. 2006), which deals with a witness that was formerly represented by the same public defender's office that represented the defendant. The court's decision in that case was based on Mungin's attorney's testimony that he did not know about his office's prior representation of the witness, or even that the witness had a criminal record. Whereas for Salazar,

although Mr. Akins denies any involvement in Mr. Hatcher's case, he admitted that he was aware of Julius Hatcher's case during his employment with the public defender's office. (15 PCR 448-49.) A third case cited by the Appellee, Hunter v. State, is in virtually the same posture as Mungin, i.e., the alleged conflict was between a state witness who had formerly been represented by the public defender's office, but Hunter's attorney was not aware that the witness even had a criminal record at the time of Hunter's trial. 817 So. 2d 786 (Fla. 2002). Again, this is a far cry from the situation with Hatcher. To assert that there was no actual conflict is absolutely incorrect, and the Appellee provides no argument to counter Salazar's assertion that Akins' actions in Salazar's trial breached his duty of loyalty, to one or both Salazar and Hatcher. (See IB 67.)

In Church, the circuit court found that the district court erred in not granting an evidentiary hearing in a successive representation case, finding that the defense had sufficiently established "actual conflict" in the habeas petition. The attorney who represented Church at his robbery trial had formerly represented a man named Green in drug smuggling charges. Green, who was never arrested for the robbery but who allegedly helped to plan the robbery and then later to divide the loot, was *not* called as a witness in Church's trial. Church's defense theory was that Green's drug smuggling charge, for which Church's attorney had formerly represented Green, had been bringing drugs to Green's girlfriend/Church's co-defendant in

exchange for the girlfriend's continued testimony against Church (and thus not inculpating Green). Although the court did not comment on the believability of Church's factual allegations against Green, the court found that Church had established that an "actual conflict" existed, reasoning as follows:

> In United States v. Bowie, 892 F.2d 1494 (10th Cir. 1990), we there explained that "when defense counsel has previously represented a government witness in a related case, the primary conflict-of-interest concern is that defense counsel may not be able to effectively cross-examine the witness for fear of divulging privileged information." Id. at 1501.
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> …
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> [I]n the context of successive representations, we find it difficult to envision circumstances more fraught with inherent conflict than where an appointed attorney representing a reluctant defendant must present a defense theory inculpating the attorney's former client, particularly where the former representation was factually intertwined with the criminal defendant's case. See, e.g., Bowie, 892 F.2d at 1502 (noting "the potential for conflict is great where there is a substantial relationship between the cases"). Here we feel that Church has demonstrated an actual conflict of interests.

942 F.2d at 1511. Salazar and Hatcher's cases were even more intertwined than Church and Green, and Salazar has also undoubtedly established the "actual conflict" prong of Culver v. Sullivan.

II. ***Adversely Affected the Trial***: In order to show that the "actual conflict" adversely affected Salazar, he "need not demonstrate prejudice -- that the outcome of [his] trial would have been different but for the conflict -- but only that some plausible alternative defense strategy or tactic might have been pursued but was

not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." Amiel v. United States, 209 F.3d 195, 199 (2d Cir. 2000); Moss v. United States, 323 F.3d 445, 466 (6th Cir. 2003).

In Salazar's case, two alternative courses of action were not thoroughly considered or taken due to the inherent loyalties and duties that Akins owed to Hatcher given his imputed prior representation of Hatcher: (1) not more vigorously cross-examining Hatcher during Salazar's trial, and (2) not seeking to have Salazar testify against Hatcher in exchange for a plea agreement with the State.

As was fully articulated in Claim III, Akins conducted a dismal cross-examination of Hatcher during Salazar's trial. He allowed Hatcher to delve into inadmissible testimony regarding what allegedly occurred in Miami in a way that Hatcher, while admitting that he pulled the trigger and committed the murder/attempted murder, to case the accusation that he only did so under duress as Salazar was threatening to kill him if he did not. Hatcher was not attempting to beat these charges at trial; rather, he merely wanted to save his life, and Akins aided him in accomplishing that by allowing Hatcher to paint a story that rendered him legally culpable but not deserving of the same sentence of death that Salazar deserved. As Church went on to as to how the cross-examination of Green revealed the effects of the actual conflict of interest in that case:

> In any event Ogden's cross-examination of Green was not sufficient to cure the conflicting representation of taint. As shown by our disposition in Bowie, the mere fact that cross-examination might appear "vigorous" does not necessarily expunge this aspect of the constitutional error. Rather, the dangers inherent in successive and multiple representations do not become apparent merely by scrutinizing what the attorney did: "representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing." Holloway v. Arkansas, 435 U.S. 475, 489, 55 L. Ed. 2d 426, 98 S. Ct. 1173 (1978). The apparent "vigor" of cross-examination is but a factor to be considered in determining whether a conflict adversely affected counsel's performance. Thus, Bowie created a test which holds that defense counsel's former, conflicting representation adversely affected his performance "if a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests." Id. at 1500.

942 F.2d at 1512 (some internal citations omitted). The lack of vigor and enabling nature of Akins' cross-examination of Hatcher is clear evidence of an "adverse effect" of the conflict that his duty of loyalty to both of these men created.

Further, Akins' former firm, while he was still employed there, managed to cut a deal with the State to save Hatcher's life at the expense of securing his testimony against Salazar. The existence of the deal with Hatcher definitively prevented Akins from considering pursuing a deal for Salazar's benefit against Hatcher. In Moss, the court noted:

> Several unpublished decisions of this Court impliedly have indicated that a conflict of interest may arise where defense counsel's competing loyalties prevent the exploration of plea negotiations with the government. See Newman v. United States, No. 96-6326, 1998 U.S. App. LEXIS 20565 (6th Cir. August 19, 1998) (remanding for a evidentiary hearing where counsel failed to communicate the

> defendant's willingness to cooperate with government authorities); United States v. Holt, No. 95-5173, 1996 U.S. App. LEXIS 15631 (6th Cir. May 15, 1996) (reviewing claim that defense counsel failed to explore plea negotiations because of a conflict of interest arising from co-defendant's payment of the defendant's legal fees). These decisions are consistent with the Supreme Court's statements in Holloway that, "in this case [a conflict of interest] may well have precluded defense counsel . . . from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable." Holloway, 435 U.S. at 489-90 (emphasis added). Therefore, it is a reasonable expansion of prior precedent to hold that a conflict of interest arises where, as a result of joint representation of co-defendants, or successive representation of co-defendants in the same proceeding, defense counsel fails to explore possible plea negotiations.

323 F.3d at 464-65. The same harm was caused to Salazar as a direct consequence of his attorney's ethical duty of loyalty to Hatcher. There is no question that for Akins to have sought a deal in exchange for Salazar's testimony against Hatcher would have been inconceivable because Akins never attempted to secure a waiver of conflict from Hatcher. This is a second example of Salazar being adversely affected by his attorney's actual conflict of interest.

The Appellee tries to emphasize that Akins and the trial court talked with Salazar about Akin's prior employment, so as to constitute a quasi-waiver argument. According to this Court, "For a waiver to be valid, the record must show that the defendant (1) was aware of the conflict of interest, (2) realized the conflict could affect the defense, and (3) knew of the right to obtain other counsel."

McWatters, 36 So. 3d at 635. Although Akins and the trial court did inform Salazar that Akins had at some point been employed by the Public Defender's Office, no one ever informed Salazar that Akins worked for the same Public Defender's Office for four years while the office represented Hatcher, let alone that it was Akins' boss who was his attorney. (15 PCR 386-87, 449-50; 16 PCR 729-731; 8 R 539-41.) No one ever mentioned Hatcher's name to Salazar in connection to Akins, so Salazar certainly was not capable of weighing the potential danger of that conflict and waiving it.

Salazar's counsel acted under an actual conflict of interest which adversely affected his representation of Mr. Salazar, and Mr. Salazar did not waive that conflict; therefore, Salazar was denied the right to counsel as guaranteed under the Sixth Amendment. This case must be reversed for a new trial.

ARGUMENT FIVE IN REPLY

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. ***Deficient Performance***: As to the deficiency claim, the Appellee's Answer Brief contains a similar to flaw as to the extraditon claim, in that the Appellee failed to appreciate that Salazar's argument is not that his prior attorney's deficiency was strictly in a poor strategic decision, but that that the decision was

cannot be strategic because of counsel's failure to investigate. Appellee's Answer contains not a shred of analysis to rebut Salazar's argument that, citing numerous investigatory tasks that his attorney should have conducted but neglected (IB 68-69), his attorney failed to investigate this potential alibi claim. This Court should find that the trial court erred in not finding deficiency.

II. ***Prejudice***: As to the prejudice prong, Salazar proved at the evidentiary hearing that an official St. Vincent police document authored by Agent Diaz states that Salazar was under arrest in St. Vincent at the time when this homicide in Okeechobee occurred. (27 R 284; 8 PCR 1474; 9 PCR 1670.) The Appellee has argued that contrary evidence was presented at the evidentiary hearing, but the question is whether it should undermine our confidence in the verdict that a jury was permitted to make a finding of guilt without ever hearing this exculpatory piece of evidence, due to Salazar's counsel's neglect on this defense. This claim should be granted and the case returned to the trial level so that a jury can properly evaluate this evidence and render its verdict.

ARGUMENT SIX IN REPLY

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

I. ***Deficient performance*:** The evidence elicited at the postconviction hearing

clearly established that Salazar's counsel were ineffective in *failing to investigate* the obvious red flags for potential mitigation in the penalty phase, and the trial court properly found that Salazar had proven deficiency.

The trial court found deficiency in investigating and presenting mitigation evidence in the following areas: (1) Mental health, (2) Social/personal history, and (3) Cultural/religious factors. (11 PCR 1979, 1986.)

The Appellee unconvincingly argues against the trial court's finding of deficiency in investigation. As to the attorney's failure to conduct any serious investigation into the cultural/religious background of Salazar, the Appellee asserts that this failure to investigate was "strategic" because the Appellee did not want to emphasize that Salazar was not from Okeechobee. (AB 72-75.) First of all, that fact was clearly established before the jury with the witnesses that the defense did call. Second, defense counsel made the decision not to put on this type of evidence before ever consulting with an expert to determine what factors from Salazar's specific background in Trinidad might have helped to humanize Salazar or to explain what allegedly occurred in Okeechobee. The defense counsel's reliance on a conversation with Salazar's relatives is a far cry short of the type of careful analysis that an expert such as a cultural anthropologist like Dr. Gail McGarrity could have provided the attorney, or a psychologist who grew up in Trinidad such as Dr. Frank Worrell.

The trial court's finding of deficiency was well-supported and should be affirmed by this Court.

II. **Prejudice**: Despite finding deficiency, the trial court's analysis goes awry as it turns to analyze whether a competent investigation and mitigation presentation, such as was presented at the postconviction hearing, undermines confidence in the sentence of death that was pronounced.

At the original sentencing hearing, which lasted one day on March 17, 2006, the defense called only Salazar's two sisters for purposes of presenting mitigation evidence, essentially attempting to show that Salazar was a "good guy."

On the other hand, the evidence that was available and that should have been presented gives a qualitatively different picture of Mr. Salazar's life. The jury heard virtually nothing about the earlier years of Mr. Salazar's life or his upbringing in an atmosphere of poverty, abuse and neglect. They heard nothing about the cultural, historical and other influences that pervaded Mr. Salazar's early life in Trinidad. And most importantly, the jury heard nothing about the intellectual deficiencies, the deficits in adaptive functioning, and the potential brain injury that affected Mr. Salazar's life and his behavior.

In finding that the powerful mitigation evidence presented at the postconviction hearing was not substantially different than the meager evidence

that was heard at the original sentencing hearing, the court errantly concluded that the new evidence had largely not been proven or was cumulative.[2]

In the Appellee's brief, it notes that the defense attorney testified at the postconviction hearing that he believed that Salazar came from a happy family with no history of abuse. (AB 70.) This is starkly opposed to the theory and testimony that were presented at the evidentiary hearing. When his prior attorney's own view of Salazar and his past are so radically different from the picture that was presented at the evidentiary hearing, it is not sound to conclude that the second presentation was cumulative of the first.

To the evidence that the trial court did acknowledge had been proven and was not cumulative, such as the decisive mental health mitigation, the court unreasonably discounted it to insignificance and assigned it little weight. The Appellee argued in its brief that the only new mitigating evidence that Salazar presented in the postconviction hearing was that Salazar has a low IQ and that he fell from a roof and it is possible that he has brain damage. (AB 79.) Both the trial court and the Appellee failed to perceive the radical way in which the postconviction evidence presents the picture of the life and experiences of Neil

[2] The defense attorney testified at the postconviction hearing that he believed that Salazar came from a happy family with no history of abuse. (AB 70.) This is starkly opposed to the theory and testimony that were presented at the evidentiary hearing. When his prior attorney's own view of Salazar and his past are so radically different from the picture that was presented at the evidentiary hearing, it is not sound to conclude that the second presentation was cumulative of the first.

Salazar. Every bit of evidence related to mental retardation, whether or not this Court reverses the trial court's ruling on Salazar's claim of mental retardation as an absolute bar to execution, is relevant as mitigation of intellectual deficiency. See, e.g., Cooper v. State, 739 So.2d 82, 85–86 (Fla.1999) (treating defendant's IQ as a significant mitigating factor that weighed against imposition of the death penalty); Downs v. State, 574 So.2d 1095, 1099 (Fla.1991) (concluding that jury's recommendation of life sentence was not unreasonable in light of borderline mental retardation and other significant mitigating evidence presented); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" that was "essentially unrebutted").

However, as this Court learned during the evidentiary hearings, Mr. Salazar has a very low IQ, as acknowledged by all the experts, including Dr. Prichard, and multiple experts opined that Mr. Salazar is mentally retarded. During childhood, Mr. Salazar experienced several traumatic head injuries, which neuropsychological testing conducted in preparation for this postconviction hearing indicates may have caused frontal lobe brain damage. Mr. Salazar was born in the developing country of Trinidad and Tobago, where he experienced a rough childhood. His parents were frequently absent, necessitating the children's self-care and later Mr. Salazar's sisters working odd jobs to help make the ends meet. Mr. Salazar himself, being slow intellectually, struggled to complete the chores assigned to him

by his mother—chores that were beyond the capability of any of the children—resulting in him frequently being beaten on the buttocks and hands. As a child, Mr. Salazar was described as a follower, a people-pleaser, and a pushover. In school, he hovered around the very bottom of the class at each level, in a school system that had no programs for children that were slow learners, or training for identifying children who were struggling. Mr. Salazar was particularly traumatized, given his devout religious background and the cultural expectations upon his father's role as a police officer, that his father was known as a gambler and womanizer, vices which ultimately contributed to his parents divorce.

In light of all of this additional evidence, this Court should overturn the trial court's finding that prejudice had not been proven, in order that Mr. Salazar receive a new sentencing hearing that a fair and nuanced picture of his life may be presented to a jury before they decide whether society should end that life.

ARGUMENT SEVEN IN REPLY

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

I. ***Deficient performance*****:** Similarly to the claim above relating to ineffective assistance of counsel in the penalty phase, the trial court found deficiency for the

defense attorney's failure to investigate and present documentation to Dr. Krop so that he could conduct a thorough mental health investigation. However, the trial court did not find that the additional evidence that should have been discovered would have prejudiced Salazar, either as to the guilt (necessary mental ability to form the requisite intent to commit this first-degree murder) or to the penalty phase.

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.

The trial court's finding of deficiency under Ake is more-than-adequately supported from the record.

II. Prejudice: The prejudice analysis in this claim is similar to the analysis of the claim relating to the previous claim, but it must be noted that these are two

independent claims relying on individual constitutional support. The Appellee's grouping of the two claims together in its Answer Brief somewhat obscures this fact.

As to the substantive analysis of prejudice as to the Ake claim, the Appellant again asserts that the trial court and the Appellee are underestimating the critical importance of this new mental health evidence, relating both the intelligence and to potential brain damage, in providing powerful mitigation which this Court has repeatedly seized upon as decisive. E.g., Phillips, 608 So. 2d at 783 (prejudice established by "strong mental mitigation" that was "essentially unrebutted").

ARGUMENT EIGHT IN REPLY

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

There are five different claims that the trial court summarily denied that Salazar argued in his Initial Brief that should have been granted an evidentiary hearing. The Appellee's Answer Brief fails to recognize each of those types of claims under the light of this Court's strong preference for an evidentiary hearing on facially sufficient claims in the capital postconviction setting. 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).

I. ***Claims related to the extradition issue (Claims XV & XVI)***: The trial court summarily denied Salazar's claim that his counsel was ineffective for not catching the fraud committed by the State (Claim XV) and his claim that the State knowingly committed fraud when it presented the testimony and evidence of St. Vincent officers Patricia Williams and Sydney James (Claim XVI). The Appellee asserts that the trial court was correct in summarily denying these claims because the trial court did not have authority to grant the relief that Salazar requested, i.e., that the State produce the complete police documentation from St. Vincent related to the handling of Salazar's detention and surrender to the U.S. government, or that testimony of Williams and James be stricken. While the Appellee is correct that the State has no authority to command the production of documents from a foreign government (St. Vincent), the circumstances surrounding the testimony of the State's witnesses at the evidentiary hearing give rise to suspicion, and Salazar's requested relief, while unusual, is entirely rational and reasonable in this situation. For these two officers of St. Vincent to have appeared to testify against Mr. Salazar, and in preparation for that testimony—ten years after the incident itself—to have created a document that details the events surrounding Salazar's detention/surrender, is far from orthodox police work and prosecution. During their testimony, both officers referenced police "diaries" that they reviewed in

preparing to testify, and the trial court erred in not granting an evidentiary hearing on this claim to determine whether these unique circumstances justified awarding Mr. Salazar this unique remedy of demanding that the State coordinate with St. Vincent to produce these documents at the risk of losing the suspect testimony of these two officers.

II. ***Claim that trial counsel was ineffective for not providing Dr. Krop with sufficient documentation to conduct an adequate competency evaluation (Claim VIII)***: Salazar alleged a legally-cognizable Strickland claim, alleging both defiant performance (inadequate investigation of mental health documentation and not providing those to Dr. Krop prior to competency evaluation) and prejudice (if that investigation had been done and those documents provided to Dr. Krop, there is a reasonable probability that the outcome of the competency determination would a been a finding of the absence of competency and the inability to proceed to trial). The Appellee asserts that Salazar's suggestion that prejudice would have occurred is "conclusory," but the very point of the requested evidentiary hearing would be that Salazar be given the opportunity to provide evidence and testimony to support his contention that proper documentation would have revealed that he in fact was incompetent to proceed to trial at that point. The trial court should be reversed for not allowing that evidentiary hearing to occur.

III. ***Claim that counsel was ineffective for failing to hire a ballistics expert (Claim XVII) and Claim that counsel was ineffective for not calling Fred Cummings as a witness (Claim XVIII)***: The Appellee urges that the trial court properly denied these two claims without an evidentiary hearing because they were not sufficiently tied thematically to the original 3.851 motion and were outside the scope of the permitted amendment. (9 PCR 1613.) These are two valid and legally-sufficient Strickland claims, and the trial court erred in finding that they were not sufficiently tied to Salazar's claim in his original 3.851 motion relating to ineffectiveness of his counsel at the guilt phase of his trial. See Bryant, 901 So. 2d 810 (Fla. 2005); Florida Rule of Civil Procedure 1.190(c).

ARGUMENT NINE IN REPLY

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 Appellee strangely asserts that no cumulative analysis need be conducted because none of the claims individually had merit. However, even the trial court did find some of the claims to have some merit, including finding deficiency as to both the penalty phase and Ake claims. The court determined in the end that for each claim, although Salazar did show some harm to him occurring

because of his attorney's deficiency, on each individual claim, the court found that this did not rise to the level of a reasonable probability of a different result *on its own*. It is now legally necessary to analyze whether the combined prejudice rises to that level, and the state cannot dodge that analysis by noting that no single claim carried the day. This Court should also consider the combined prejudice of any other claims that it finds, contrary to the trial court, should also have been deemed

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,
THE SICHTA FIRM, LLC.,

/s/ Rick Sichta
RICK SICHTA, ESQUIRE
Fla. Bar No.: 0669903
301 W. Bay St. Suite 14124
Jacksonville, FL 32202
904-329-7246
rick@sichtalaw.com
Attorney for Appellant

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 27th day of September, 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