[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-11258

D.C. Docket No. 1:13-cv-24567-JAL

JUAN DAVID RODRIGUEZ,

Petitioner-Appellant

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Florida

(June 22, 2020)

Before WILLIAM PRYOR, Chief Judge, WILSON, and JILL PRYOR, Circuit Judges.

WILLIAM PRYOR, Chief Judge:

Juan David Rodriguez, a Florida prisoner under a death sentence for murder in the course of a robbery, appeals the denial of his petition for a writ of habeas corpus, 28 U.S.C. § 2254. After unsuccessfully pursuing state postconviction relief, Rodriguez filed a federal petition, which the district court denied. Rodriguez argues that his penalty-phase counsel was ineffective because he failed to investigate and present mitigating evidence of his mental health. He also argues that he is ineligible for the death penalty because he is intellectually disabled. Because Rodriguez cannot establish that he suffered prejudice from his trial counsel's performance, *see Strickland v. Washington*, 466 U.S. 668, 691–92 (1984), and the Supreme Court of Florida reasonably determined that he is eligible for the death penalty, *see Atkins v. Virginia*, 536 U.S. 304, 321 (2002), we affirm.

I. BACKGROUND

We divide the background of this appeal in three parts. First, we discuss the facts of Rodriguez's crime, trial, and direct appeal. Second, we describe his state postconviction proceedings. Third, we review Rodriguez's federal habeas proceedings.

A. Rodriguez's Crime, Trial, and Appeal.

In May 1988, shortly after he was released on bail in an unrelated case, 32-year-old Rodriguez led several teenage coconspirators on a two-day crime spree to obtain money to pay off a debt he owed to Ramon Fernandez, one of the

coconspirators. *Rodriguez v. State* (*Rodriguez I*), 609 So. 2d 493, 495–97 (Fla. 1992). The spree began when Rodriguez led Fernandez and Carlos Sponsa to the parking lot of a local shopping center and told them to remain in front while he went to the back. *Id.* at 495–96. Behind the shopping center, Rodriguez accosted one of the shop owners, Abelardo Saladrigas. *Id.* at 496. Rodriguez demanded that Saladrigas hand over his Rolex watch and briefcase before shooting Saladrigas four times while he pleaded, "Don't do this to me." *Id.* (internal quotation marks omitted). Rodriguez fired the first shot in Saladrigas's leg and the second in his stomach. *Id.* After being shot twice, Saladrigas gave up the briefcase, which contained a revolver and some cash, but he did not surrender the Rolex. *Id.* So Rodriguez shot Saladrigas a third time, and after Saladrigas ran behind a car, Rodriguez shot him once more and grabbed the Rolex. *Id.* Rodriguez then fled the scene. *Id.* Saladrigas died after being transported to the hospital. *Id.*

The next day, Rodriguez, Fernandez, Sponsa, and others attempted a home-invasion robbery. *Rodriguez v. State* (*Rodriguez II*), 919 So. 2d 1252, 1259 (Fla. 2005). Although Rodrigues anticipated that the residents would be home and planned to tie them up, he did not anticipate that the residents would be able to defend themselves. *Rodriguez I*, 609 So. 2d at 497. The robbery was foiled when one resident began firing his gun at the invaders. *Id.* As the men fled, Fernandez dropped the revolver that belonged to Saladrigas. *Id.*

Police arrested Fernandez three weeks later. *Id.* He confessed to his involvement in the crimes and told the police that Rodriguez had shot Saladrigas. *Id.* The authorities then arrested Rodriguez and charged him with first-degree murder, armed robbery, conspiracy to commit a felony, attempted armed robbery, armed burglary with an assault, aggravated assault, and attempted first-degree murder. *Id.* at 495, 497. While he was awaiting trial, Rodriguez offered a fellow inmate $3,000 in exchange for perjured testimony that Fernandez had confessed to the murder. *Id.* at 496–97. The fellow inmate instead testified at trial to the bribe. *Id.* The jury found Rodriguez guilty of all charges. *Id.* at 497.

After the jury returned its verdict, the trial court discussed scheduling the penalty phase with counsel. Rodriguez's trial counsel, Scott T. Kalisch, advised the trial court, "I am not in any way prepared to go forward in a death penalty phase in this case. I need at least two weeks to even understand what it is about." So the trial court deferred the penalty phase for two weeks. It later granted another two-week continuance on Kalisch's request. Kalisch explained he was busy working on another case, "[a]ll of [his] efforts [had been] addressed to demonstrating that [Rodriguez] was not the assailant in this case," and he "was unprepared for the outcome insofar as preparing for the death phase in advance of the verdict."

Kalisch also moved for the appointment "of an independent psychiatric examiner, namely Dr. Leonard Haber . . . to assist [the defense] in the death phase

of this case." The trial court granted the motion, and Dr. Haber met with Rodriguez twice.

Dr. Haber conducted a psychological interview, a mental status examination, and the Bender Gestalt Visual Motor Test. In conducting his evaluation, Dr. Haber elicited information from Rodriguez about his personal and medical history, but he received no documents from Kalisch about Rodriguez's background. Dr. Haber instead reviewed information that he received from the State about Rodriguez's prior convictions and the latest crimes. Dr. Haber described his examination and conclusions in a letter to the trial court and during a deposition that the State conducted and Kalisch attended.

Dr. Haber reviewed the information relevant to statutory mitigation and concluded that Rodriguez did not satisfy any of the criteria. *See* Fla. Stat. § 921.141(6) (1990). In considering Rodriguez's mental capacity, Dr. Haber found that Rodriguez demonstrated an "appreciation of the charges placed against him," "thought processes that were productive and goal oriented," and that he a "fund of general information [that] was adequate." Although Rodriguez reported becoming unconscious when he fell from a horse as a child, two suicide attempts because of unrequited love, and short term admissions to psychiatric hospitals in connection with the suicide attempts and nerves, Dr. Haber concluded this history did not establish "a significant . . . history of mental disorder or a[n] extreme mental

disorder." And Dr. Haber concluded that he had no significant history of drug or alcohol use to support mental impairment because Rodriguez denied abusing drugs or alcohol.

Dr. Haber also explored Rodriguez's family background. He stated that Rodriguez was born in "San German, Cuba" and "only attended school up until the 1st grade in Cuba" and then "had to work." Dr. Haber testified that Rodriguez said his parents divorced when he was two years old and described his four siblings. Rodriguez said he "came to this country in 1979 via the Mariel Boatlift" and spoke about his work and criminal history. Dr. Haber testified that he "asked if he was a happy or unhappy person and what kind of childhood he had," and Rodriguez said "he's an unhappy person and has always been unhappy" except that he "loved his wife" and when "he thinks about his child."

Although Rodriguez's test results and personal history did not support finding any statutory mitigation, Dr. Haber explained that Rodriguez's results from the Bender Gestalt Visual Motor Test raised the possibility that Rodriguez suffered "an organic brain syndrome." He opined that "[t]he presence or absence of such a disorder is best made following a complete neurological and neuropsychological test examination." In any event, Dr. Haber concluded that an "organic brain dysfunction would likely not provide the basis, in and of itself, for statutory mitigation." *See* Fla. Stat. § 921.141(6) (1990). Dr. Haber explained that the

"absence of a significant history of drug abuse symptoms, major mental disorder, treatment for the same or other evidence of significant impairment of mental or emotional functioning at the time of the alleged offense appears to preclude the applicability of an organic brain syndrome to statutory mitigation."

On the morning the penalty phase was to start, Kalisch moved to prohibit the State from questioning defense witnesses about Rodriguez's criminal record. Kalisch stated that he wanted to call Dr. Haber as a witness to testify about Rodriguez's background and childhood and the possibility that Rodriguez may be suffering from an organic brain disorder. But Kalisch was concerned that putting Dr. Haber on the stand would open the door for the State to question him about Rodriguez's previous felony convictions, which Kalisch believed would be detrimental given the "very, very difficult jury." The trial court denied Kalisch's motion.

The penalty phase started with the testimony of the State's only witness, paramedic Dante Perfumo. Perfumo testified that while he and other first responders transported Saladrigas to the hospital, the victim "was in extreme pain." Perfumo recalled that Saladrigas "asked . . . all the way into the hospital if he was going to make it," "stayed conscious all the way to the hospital," and "did not have an easy time." The State rested.

For the defense, Kalisch decided not to call Dr. Haber and instead called only Marlene Castellano, Rodriguez's wife. Castellano testified that she and Rodriguez had been married for nearly 11 years and had one child, who was almost two. When asked whether Rodriguez had been a supportive husband, she answered "yes." She testified that Rodriguez was a "very good father" who was "tender and loving" and had never been violent, but she conceded on cross-examination that Rodriguez had been in jail continuously since his son was two months old. Although Castellano said she never knew her husband to be violent, she admitted on cross-examination that she knew nothing about the facts of his crime, Rodriguez's past before their marriage, or his friends or associates. When asked about her husband's jealous and controlling nature, Castellano gave only a partial and indirect denial, saying he permitted her to leave the house to spend time with members of her family. She also told the jury she believed Rodriguez to be innocent.

The jury unanimously recommended a death sentence. *See* Fla. Stat. § 921.141(2) (1990). After the jury recommendation but before the trial court imposed sentence, Dr. Noble David, a neurologist and a professor in the Department of Neurology at the University of Miami School of Medicine, conducted a neurological evaluation of Rodriguez. Dr. David's examination revealed nothing "to suggest brain damage," but he ordered an

electroencephalogram of Rodriguez "before concluding that his neurological examination is entirely within normal limits." The electroencephalogram revealed "no abnormalities." The trial court received a copy of Dr. David's report.

Based on all the information presented, the trial court determined the aggravating and mitigating factors and imposed a death sentence. It found three statutory aggravating factors: Rodriguez had a prior violent felony conviction; the murder was committed during a robbery and for financial gain; and the murder was especially heinous, atrocious, or cruel. *See* Fla. Stat. § 921.141(5) (1990). Although the court identified no statutory mitigating factors, *see id.* § 921.141(6), it found that Rodriguez's good marriage and family life constituted one nonstatutory mitigating factor. After weighing these factors, the trial court adopted the jury's recommendation and imposed a death sentence. *See* Fla. Stat. § 921.141(2)–(3) (1990).

On direct appeal, the Supreme Court of Florida affirmed Rodriguez's "convictions and sentences, including the sentence of death." *Rodriguez I*, 609 So. 2d at 501. The Supreme Court of the United States denied his petition for certiorari. *Rodriguez v. Florida*, 510 U.S. 830 (1993) (Mem.).

B. Rodriguez's Motion for Postconviction Relief.

In 1994, Rodriguez filed a motion for postconviction relief, Fla. R. Crim. P. 3.850, which he thrice amended. *Rodriguez II*, 919 So.2d at 1260. His motion raised thirty claims for relief and requested an evidentiary hearing on each claim.

The postconviction trial court conducted a hearing pursuant to *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993), to determine which, if any, of Rodriguez's claims warranted an evidentiary hearing. During the hearing, the State preemptively agreed, out of "an abundance of caution," to a hearing on all issues raised under Claim VIII, including the "mental litigation" and "family history" claims. And in response to a request for clarification from Rodriguez as to whether it agreed to a hearing only on the mental-health claim, the State explained that Rodriguez could "litigate" "[w]hatever [he] put in [his] claim." So the postconviction trial court granted Rodriguez an evidentiary hearing on his claim that his counsel rendered ineffective assistance at the penalty phase of his trial by failing to investigate and present mitigating evidence. *See Rodriguez II*, 919 So. 2d at 1260–61 & n.3. Although the postconviction trial court initially limited the hearing to evidence about "mental retardation in the penalty phase only," it later clarified that it would permit Rodriguez to introduce evidence that his counsel failed to investigate and present evidence about his background, including his childhood in Cuba. The postconviction trial court also granted a hearing on Rodriguez's claim that his

counsel failed both to obtain an adequate mental health evaluation and to provide necessary background information to the mental health consultants.

Before the evidentiary hearing, Rodriguez's counsel submitted a list of 30 possible witnesses from Cuba and discussed the testimony of these witnesses at two preliminary hearings. During those hearings, the parties and the postconviction trial court also discussed the best method of obtaining the Cuban witnesses' testimonies. And the postconviction trial court granted extensions to allow Rodriguez to obtain their testimonies. Despite every opportunity to do so, Rodriguez offered none of this evidence about his childhood at the hearing. Instead, he called only his trial counsel, Kalisch, and a psychologist, Dr. Ruth Latterner.

Kalisch testified about his investigation and use of mental-health mitigation evidence at the penalty phase of Rodriguez's trial. He testified that he had arranged for Dr. Haber, the mental-health expert, to evaluate Rodriguez. But he decided not to call Dr. Haber because he "had nothing from Dr. Haber" to establish either "mental retardation" or "any statutory mitigators" and wanted to avoid having the State cross-examine Dr. Haber about Rodriguez's criminal history. Kalisch also testified that Rodriguez did not cooperate with him to develop mitigation evidence. In Kalisch's words, "[i]t was difficult to talk to [Rodriguez] about the case" because Rodriguez acted as if the case "ha[d] nothing to do with [him]."

In her testimony, Dr. Latterner described the results of the intelligence and neuropsychological tests that she administered to Rodriguez. Based on the results, she diagnosed Rodriguez with "mild mental retardation" and "characteristics of . . . brain damage." She testified that she followed the diagnostic guidelines in the ninth revision of the International Classification of Diseases, or ICD-9, instead of those in the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders, or DSM-IV. Dr. Latterner explained that the ICD-9 and the DSM-IV had different definitions of intellectual disability. She elaborated that "the only requirement" for establishing intellectual disability in the ICD-9 was an IQ score below 70, but the DSM-IV also required "concurrent difficulties or impairment in present adaptive functioning" and "onset before 18 years of age." Dr. Latterner also relied on Rodriguez's test results to find two statutory mitigating circumstances: that Rodriguez had a substantially impaired capacity to conform his conduct to the requirements of the law and that he was under extreme emotional disturbance when he committed the crime. *See* Fla. Stat. § 921.141(6)(b), (f) (1990).

Some of Dr. Latterner's testimony on direct examination undermined the credibility or mitigation value of her opinion. For example, she testified that when she met with Rodriguez for a clinical interview, his "social skills . . . seemed to be functioning at a higher cognitive level" than his low scores would suggest. She

testified that brain damage does not necessarily correlate with impairment; indeed, even having "a huge structural lesion" with "no neuropsychological impairment" would be "not that unusual." When she acknowledged that the diagnostic guidelines for intellectual disability in the DSM-IV required concurrent difficulties or impairment in present adaptive functioning in addition to a low intelligence quotient, she explained that, without reference to the included explanation, she had "difficulty understanding what [adaptive functioning] mean[t] in [her] language." And she testified that she found it "very difficult" to relate the findings of her evaluation of Rodriguez to the "legal definition[s]" of the statutory mitigating circumstances.

On cross-examination, Dr. Latterner admitted that her diagnosis of brain damage was based on "soft science," not "hard science," because she had not looked at a brain scan of Rodriguez. When the State challenged her about her preference for the ICD-9 over the DSM-IV, she "agree[d]" that to determine whether someone is "truly mentally retarded, it would be important to look and see how they conducted themselves in everyday life," even though her diagnosis of Rodriguez was based on "testing" and not on evidence "from his family" or others of his functioning "in his everyday life." She also admitted that her understanding of the statutory mitigating circumstances was based not on Rodriguez's emotions at the time of the crime but on her estimate of his permanent functional capacity.

Indeed, she admitted that she never asked Rodriguez about his crime, "how he felt that day," or "whether he had some problem controlling himself that day." And she agreed that Rodriguez knew it was wrong to kill and rob.

During Dr. Latterner's testimony, Rodriguez asked if she "had an opportunity to review [any] background" material before offering an opinion. She said she had reviewed "several boxes of papers," most of which "were not helpful." Rodriguez then requested these "background" materials be marked without further description. But the postconviction trial court wanted to know what this background material contained, so it asked for more information. Rodriguez replied again that "they are background materials"—"composite exhibits"—which included "some investigative reports from [some] people interviewed in Cuba, concerning Mr. Rodriguez's background, family members, teacher, etc."

Dr. Latterner made clear that these background materials were irrelevant to her diagnosis because, consistent with her adherence to the ICD-9, she believed that "mental retardation is diagnosed by an IQ test." She testified that she was not "happy about reviewing them" and that "[m]ost of them were not helpful." Although she testified that some of the background materials provided evidence that "through [Rodriguez's] childhood he was regarded by his teacher and various family members and people in the community as retarded," she emphasized that this evidence would support a diagnosis of intellectual disability only under the

diagnostic framework of the DSM-IV, which, she made a point of stating, "I don't use."

Despite his expert's indifference to the background materials, Rodriguez offered these "composite exhibits" into evidence "as background materials that a mental health professional would reasonably rely on in rendering a diagnosis." He added that "any and all of these documents would be admissible in a penalty phase in Florida, because hearsay is admissible in a penalty phase." The State responded that it did not object to any of the background materials "coming in for what [Dr. Latterner] relied on." But it insisted that it "would object" to admitting "the actual substance" of the materials "for the truth of the matter asserted." The postconviction trial court then ruled that "[w]ith [the State's] limited objection, I will admit [the background materials] in that way." After Rodriguez asked it to repeat its ruling, the postconviction trial court confirmed that it "admitted them with [the State's] limited objection"—that is, as Rodriguez's counsel conceded at oral argument, background materials for Dr. Latterner's evaluation and not for their substance. *See* Oral Argument at 34:43–53 (Aug. 24, 2017) (agreeing that this evidence was only "presented as something for an expert to look at").

The State presented testimony from two experts, Dr. Haber and Lisa Wiley, a psychological specialist at the prison where Rodriguez was incarcerated. Both testified that in their opinion Rodriguez is not intellectually disabled. But Dr.

Haber acknowledged that Rodriguez's intelligence was probably below average. He considered Rodriguez's facility with language, his employment history, his ability to maintain a bank account, his understanding of financial transactions, his schemes to use false names and birthdates, the details of crimes in which he participated, his leading role in the home invasion as described by the other participants, his attempt to procure perjured testimony, and his leadership role in prison.

Dr. Haber maintained that Rodriguez did not meet the criteria for any statutory mitigation. He testified that, in his opinion, Rodriguez had the ability to conform his conduct to the law and that there was no information to indicate that Rodriguez was under extreme emotional disturbance when he killed Saladrigas. He also acknowledged that he received nothing from Rodriguez's trial counsel in preparation for his evaluation. The postconviction trial court accepted Rodriguez's request that Dr. Haber's original report and deposition, described previously, be admitted into evidence.

The postconviction trial court denied Rodriguez's petition. It discounted Dr. Latterner's testimony because "her diagnosis [was] incompatible with the facts of the crimes" and "[in]consistent with the DSM IV." And it found Dr. Haber's opinion that Rodriguez was not intellectually disabled to be "completely supported by the evidence." So in addition to finding Dr. Haber's evaluation adequate, it

concluded that Kalisch was not ineffective for failing to investigate further or to present additional evidence of mental-health mitigation. It also concluded that Kalisch could not be faulted for not traveling to Cuba for two independent reasons: "First, the defendant would not talk to Mr. Kalisch about his family in Cuba, and [s]econd, . . . Mr. Kalisch would not have been permitted entry to Cuba anyway."

Rodriguez appealed the denial of his motion to the Supreme Court of Florida. He argued that "the lower court erred in denying [him] a new penalty phase" because of his "trial counsel's failure to investigate and present mental health mitigation." The Supreme Court of Florida affirmed the denial of all postconviction relief. *Rodriguez II*, 919 So. 2d at 1288.

The Supreme Court of Florida rejected Rodriguez's argument that the postconviction trial court "erred in denying him a new penalty phase" based on the "mental health mitigation" presented at the evidentiary hearing. *Id.* at 1263. It held that "counsel did not render ineffective assistance to Rodriguez by failing to fully investigate mental health mitigation." *Id*. at 1264. It agreed with the postconviction trial court's finding that Rodriguez did not cooperate with Kalisch to develop mitigation evidence and "did not wish to involve his family," which supported Kalisch's decision not to travel to Cuba. *Id.* at 1263; *see also id.* ("Rodriguez's lack of cooperation undermines his allegations of ineffective assistance of

counsel."). But the Supreme Court of Florida disagreed with the finding that Kalisch could not have legally traveled to Cuba by law. *Id*. at 1264.

The Supreme Court of Florida also reviewed Dr. Haber's clinical findings and held that Kalisch could not "be faulted for not pursuing further testing" after Dr. Haber's findings proved unhelpful and an electroencephalogram "revealed no evidence of brain damage." *Id.* at 1265. So it upheld Kalisch's decision not to call Dr. Haber as a penalty-phase witness "[i]n light of the fact that Dr. Haber's report did not substantiate the statutory mental health mitigators or mental retardation." *Id*. And it determined that trial counsel made a reasonable strategic decision not to call Dr. Haber as a witness at the penalty phase because the potential mitigating effect of his testimony did not clearly outweigh the harm of permitting the State to question him about Rodriguez's criminal history. *Id*. It then agreed with the postconviction trial court's assessment that Dr. Latterner's testimony, which contained weaknesses, was insufficient to establish an intellectual disability in the light of the countervailing evidence. *See id.* at 1265–66.

The Supreme Court of Florida also concluded that Rodriguez failed to establish prejudice. *Id.* at 1266–67. It explained that any useful background information that Kalisch would have uncovered if he had traveled to Cuba was "substantially the same background information" already known to Dr. Haber. *Id*. at 1266; *see also id.* at 1264. In other words, any additional background

information would have added little to the presentation of mental-health-mitigation evidence. *Id*. at 1266–67. The Supreme Court of Florida affirmed the denial of Rodriguez's motion. *Id.* at 1288.

Rodriguez then filed a motion for a determination of intellectual disability under Florida Rule of Criminal Procedure 3.203 (2009), which required proof of an IQ score of 70 or below and concurrent adaptive behavioral deficits that onset before age 18. *See Rodriguez v. State* (*Rodriguez III*), 110 So. 3d 441 (Fla. 2013) (Table); *Jones v. State*, 966 So. 2d 319, 329 (Fla. 2007). The postconviction trial court held an evidentiary hearing on this issue. It considered testimony from a total of 16 witnesses. Rodriguez's star witness was Dr. Ricardo Weinstein, a psychologist who diagnosed Rodriguez with intellectual disability based on a battery of mental tests and his assessment of Rodriguez's adaptive behavior throughout his life. Another psychologist, Dr. Enrique Suarez, testified for the State and denied that Rodriguez was intellectually disabled. Dr. Suarez testified that Rodriguez's test scores were consistent with malingering and were questionable for methodological reasons, that Rodriguez's life activities were inconsistent with an intellectual disability, that he had no deficits in adaptive behavior, and that the evidence of manifestation before the age of 18 was thin.

The postconviction trial court denied Rodriguez's motion. It accepted Dr. Suarez's testimony and found that "no valid test results" established an IQ below

70. It also found that Rodriguez had failed to establish adaptive-behavior deficits and manifestation before the age of 18. The Supreme Court of Florida affirmed the denial of Rodriguez's Rule 3.203 motion in 2013. *Rodriguez III*, 110 So. 3d at 441. It concluded that the trial court's ruling was "supported by competent, substantial evidence" and that no evidence supported a reliable IQ score of 70 or below or that Rodriguez exhibited adaptive-behavior deficits. *Id.*

C. Rodriguez's Federal Petition for a Writ of Habeas Corpus.

After he exhausted his state remedies, Rodriguez filed a petition for a writ of habeas corpus in the district court. He reasserted several claims he had made in his postconviction motion, including his claims of ineffective assistance of penalty-phase counsel and ineligibility for the death penalty. Although the district court concluded that the Supreme Court of Florida unreasonably applied *Strickland v. Washington*, 28 U.S.C. § 2254(d), the district court, on *de novo* review, determined that Kalisch's deficient performance did not prejudice the outcome of the penalty phase. The district court also concluded that the denial by the Supreme Court of Florida of the *Atkins* claim did not involve an unreasonable application of clearly established law or an unreasonable determination of the facts. As a result, the district court denied Rodriguez's petition.

The district court granted Rodriguez a certificate of appealability on his claim of ineffective assistance of penalty-phase counsel and on his claim that the

Supreme Court of Florida rejected his *Atkins* claim based on an unreasonable determination of the facts. This Court then expanded the certificate of appealability to include his argument that the Supreme Court of Florida's rejection of Rodriguez's *Atkins* claim was an unreasonable application of clearly established law.

II. STANDARDS OF REVIEW

"When reviewing a district court's grant or denial of habeas relief, we review questions of law and mixed questions of law and fact *de novo*, and findings of fact for clear error." *Reaves v. Sec'y, Fla. Dep't of Corr.*, 717 F.3d 886, 899 (11th Cir. 2013) (internal quotation marks omitted). A claim of ineffective assistance of counsel "presents a mixed question of law and fact that we review *de novo*." *Pope v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 1254, 1261 (11th Cir. 2014).

The Antiterrorism and Effective Death Penalty Act governs our review of the decision of the Supreme Court of Florida. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1191–92 (2018). The Act bars federal courts from granting habeas relief on a claim that was adjudicated on the merits in state court unless the relevant decision "was contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d). The Act requires us to review the decision based on the record developed in the state court. *See* 28 U.S.C. § 2254(d); *Cullen*

v. Pinholster, 563 U.S. 170, 180–81 (2011). Section 2254(d) sets a "highly deferential standard for evaluating state-court rulings," *Pinholster*, 563 U.S. at 181 (internal quotation marks omitted), with all factual findings accorded "substantial deference," *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1259 (11th Cir. 2016) (internal quotation marks omitted).

"[C]learly established Federal law," 28 U.S.C. § 2254(d)(1), refers to "the governing legal principle or principles set forth by the Supreme Court at *the time the state court renders its decision*," *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003) (emphasis added). "That statutory phrase refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). To obtain relief under this subsection, a petitioner must show a conflict with those holdings so clear that it is "beyond any possibility for fair-minded disagreement." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011).

When evaluating whether a state court made "an unreasonable determination of the facts," 28 U.S.C. § 2254(d)(2), we presume its factual findings are correct unless rebutted "by clear and convincing evidence." *Conner v. GDCP Warden*, 784 F.3d 752, 761 (11th Cir. 2015) (citing 28 U.S.C. 2254(e)(1)). We must be careful not to "characterize . . . state-court factual determinations as unreasonable merely because we would have reached a different conclusion in the first instance."

Brumfield v. Cain, 135 S. Ct. 2269, 2277 (2015) (alteration adopted) (internal quotation marks omitted). "If 'reasonable minds reviewing the record might disagree about' the state court factfinding in question, 'on habeas review that does not suffice to supersede' the state court's factual determination." *Daniel*, 822 F.3d at 1259 (alteration adopted) (quoting *Rice v. Collins*, 546 U.S. 333, 341–42 (2006)).

III. DISCUSSION

We divide our analysis in two parts. First, we conclude that, even under *de novo* review, Rodriguez failed to prove prejudice sufficient to establish his claim of ineffective assistance of penalty-phase counsel. Second, we conclude that the Supreme Court of Florida reasonably concluded that Rodriguez was eligible for the death penalty.

A. Rodriguez's Claim of Ineffective Assistance Fails Even on De Novo *Review.*

We affirm the denial of relief on Rodriguez's claim of ineffective assistance of counsel because there is no reasonable likelihood that the postconviction evidence would have led to a different sentence, even under *de novo* review. *See Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) ("Courts can . . . deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review." (citing

28 U.S.C. § 2254(a))). To prevail on his claim of ineffective assistance of penalty-phase counsel, Rodriguez "must establish both that trial counsel's performance was deficient, and that the deficiency prejudiced the defense during the penalty phase." *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1326 (11th Cir. 2013) (en banc) (internal quotation marks omitted). The Supreme Court has advised that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which . . . will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. We follow that course here.

To establish prejudice, Rodriguez must prove that "there is a reasonable probability that, but for [Kalisch's] unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. Indeed, "the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Id.* (quoting *Strickland*, 466 U.S. at 697). In the context of a challenge to a sentence of death, the question is whether "there is a reasonable probability that [the judge and jury] would have returned with a different sentence." *Wiggins v. Smith*, 539 U.S. 510, 536 (2003). To answer that question, "we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation." *Porter v.*

McCollum, 558 U.S. 30, 41 (2009) (alteration adopted) (internal quotation marks omitted).

We review only the evidence actually admitted during the state trial or postconviction proceedings. *See Pinholster*, 563 U.S. at 180–81; *Pope v. Sec'y for Dep't of Corr.*, 680 F.3d 1271, 1289 (11th Cir. 2012). The statements of his family and friends describing Rodriguez's upbringing were admitted only as evidence of what an expert might look at in evaluating mental health. *See* Oral Argument at 34:43–53 (agreeing the statements of the Cuban witnesses were only "presented as something for an expert to look at"). Because these statements were not admitted into evidence for their substance, they were not mitigation evidence in their own right. And Rodriguez is not entitled now to present this evidence even on *de novo* review, *see* 28 U.S.C. § 2254(e)(2), because he did not take advantage of the opportunity to present the evidence during the postconviction proceedings. *See Pope*, 680 F.3d at 1289 ("[W]here a petitioner was granted an evidentiary hearing or other means of presenting evidence to the state court on the particular claim, and the petitioner failed to take full advantage of that hearing, despite being on notice of and having access to the potential evidence and having sufficient time to prepare for the hearing, that petitioner did not exercise diligence in developing the factual foundation of his claim in state court.").

Nobody doubts that the evidence presented at trial was unfavorable to Rodriguez. He "was convicted of first-degree murder, armed robbery, conspiracy to commit a felony, attempted armed robbery, armed burglary with an assault, aggravated assault, and attempted first-degree murder." *Rodriguez I*, 609 So. 2d at 495. The State proved that Rodriguez robbed and murdered Saladrigas. *See id.* at 495–96. Indeed, Rodriguez shot Saladrigas four times after he begged for his life—twice before he surrendered his briefcase, once after he surrendered his briefcase, and once more after he ran away to hide. *See id.* at 496. And when Rodriguez rejoined his teenage coconspirators, he split the money in the briefcase but kept the Rolex watch for himself. *Id.*

The next day, Rodriguez, wearing the Rolex, joined Fernandez, Sponsa, Sergio Valdez, and two others in an attempted armed home invasion. *Id.* at 497. When they arrived, he told Valdez that the two of them and a third co-conspirator were "to tie up the people in the house and search for money and drugs" after Fernandez and two other confederates forced their way in. *Id.* This scheme was foiled only because the homeowner opened fire on the would-be invaders. *Id.* And after Rodriguez was arrested for these crimes, he attempted to bribe another inmate to perjure himself by framing Fernandez for the murder. *Id.* at 496–97. The jury heard all of these facts. *Id.*

At the penalty phase, the jury heard from Perfumo, the paramedic who helped transport Saladrigas to the hospital. Perfumo testified that although he had "been in this business 10 years" and the shooting happened two years before he testified, Saladrigas's "case st[ood] out in [his] mind." He testified that Saladrigas seemed to be "in more agony than most" shock victims, "was conscious all the way to the trauma room," "did not have an easy time," and asked "more than three or four times" on the way to the hospital if he was going to survive. Perfumo told him he had "a good chance" even though he "personally did not think he was going to make it," and he "held [Saladrigas's] hand most of the way into the hospital." On cross-examination, he also testified that one of Saladrigas's wounds could "very well have been through the heart."

Based on this evidence, the jury recommended a sentence of death. *Rodriguez I*, 609 So. 2d at 497. At the time, Florida law required only 7 of the 12 jurors to agree to recommend a death sentence. *See Capehart v. State*, 583 So. 2d 1009, 1012, 1015 (Fla. 1991). But the recommendation for Rodriguez was unanimous. *Rodriguez I*, 609 So. 2d at 497.

The trial court adopted the jury's recommendation and sentenced Rodriguez to death. *Id.* It found three statutory aggravating factors: Rodriguez had a prior conviction for a violent felony; Rodriguez had murdered Saladrigas during a robbery and for financial gain; and the murder was especially heinous, atrocious,

or cruel. *Id.*; *see also* Fla. Stat. § 921.141(5) (1990). The trial court found "great relevance in" Rodriguez's participation in the home invasion, explaining that it "show[s] the kind of person he is and the despicably bad and dangerous behavior he has exhibited." The trial court found only one nonstatutory mitigating factor, that "Rodriguez had a good marriage and family life." *Rodriguez I*, 609 So. 2d at 497. But it discounted this factor based on Castellano's admission that she knew nothing about her husband's friends or his criminal activities.

To the evidence "adduced at trial," we must add that "adduced in the habeas proceeding." *Porter*, 558 U.S. at 41 (internal quotation marks omitted). In the postconviction proceedings, Rodriguez called only one mitigation witness, Dr. Latterner. "[W]e have held more than once that the mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial." *Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997). That admonition could make it difficult for Rodriguez to establish prejudice from Dr. Latterner's testimony alone, even if its mitigation value had not been severely compromised on cross-examination. But it was.

The State's cross-examination left the mitigation value of Dr. Latterner's testimony in tatters. She admitted that she diagnosed Rodriguez with brain damage without ever looking at a brain scan of Rodriguez. She "agree[d]" that her testing-

only approach to diagnosing intellectual disability conflicted not only with the DSM-IV but also with "the common sense standpoint in determining whether someone is truly impaired." Dr. Latterner admitted that she based her conclusions concerning the statutory mitigating circumstances on her estimate of Rodriguez's permanent mental disabilities instead of his emotions at the time of the crime. She admitted to not even questioning Rodriguez about the murder, his emotions on that day, or "whether he had some problem controlling himself that day." She acknowledged that Rodriguez knew, even at the time of the murder, that it was wrong to kill and rob. And even on direct examination, Dr. Latterner confessed to struggling with the "legal definition[s]" of the mitigating factors.

To be sure, Rodriguez introduced evidence other than Dr. Latterner's testimony, but that evidence was also weak. He introduced a two-page report and a summary of test results by another psychologist, Dr. Denis Keyes, whose findings mirrored Dr. Latterner's and were open to all of the same criticisms. Indeed, Rodriguez did not call Dr. Keyes as a witness at the evidentiary hearing because "[h]is evidence would have been substantially the same as Dr. Latterner's." Rodriguez also introduced Dr. Haber's report and deposition, in which Dr. Haber referred to Rodriguez's two suicide attempts; his childhood injury from falling off a horse; his first-grade formal-education level; his parents' divorce when he was two; his admission for treatment "for nerves" to a Cuban psychiatric hospital,

which he voluntarily left on the same day after deciding "he was really okay and didn't really belong there"; and his statement that he had "been unhappy all of his life." The mitigation value of Dr. Haber's report and deposition was slender in the light of Dr. Haber's opinion—expressed in the report, the deposition, and his postconviction testimony—that no statutory mitigators applied to Rodriguez. Indeed, in his deposition, Dr. Haber opined that Rodriguez's history did not raise any significant nonstatutory mitigators either.

The State also presented powerful rebuttal evidence at the postconviction hearing. Its most important witness was Dr. Haber himself. He testified that Rodriguez had been "oriented," "pleasant," "cooperative," and "responsive" when he interviewed him before the penalty phase of his trial. He testified that he had recommended testing for possible brain damage but that an electroencephalogram came back normal. He offered an expert opinion that Rodriguez was "clearly not mentally retarded." He testified that mental deficiency was inconsistent with multiple aspects of Rodriguez's life history, including his facility with language, his employment history, his understanding of financial transactions, his past criminal activities, his leading role in the home invasion, and his preeminent social position in jail.

Dr. Haber also contradicted Dr. Latterner's testimony. He explained that IQ tests alone, which is all that Dr. Latterner relied upon, could not diagnose

intellectual disability. And he disagreed with Dr. Latterner's findings that any statutory mitigating circumstances existed. Dr. Haber explained that, in his opinion, Rodriguez had the ability to conform his conduct to the law and that there was no information to indicate that Rodriguez was under extreme emotional disturbance when he killed Saladrigas.

The State's other witnesses—Sergeant Mike Young, a death-row prison officer; George Morin, a homicide investigator for the City of Miami Police Department; and Wiley, the prison psychologist—also provided compelling testimony. Sergeant Young testified that he saw Rodriguez virtually every day, that his verbal abilities "seemed above average," and that he was a "leader" of the Hispanic inmates. Morin testified that when he interviewed Rodriguez in prison to investigate a murder, Rodriguez gave Morin valuable details about a conversation he had a year earlier with one of the suspects. And Wiley gave her opinion that Rodriguez "is not retarded" based on her years of monthly interviews with him. She also testified that the DSM-IV was "the bible of diagnostic criteria," and when asked if Rodriguez showed any adaptive-behavior deficits that would support a diagnosis of intellectual disability under the DSM-IV, she replied that he showed "[n]one whatsoever."

Even if Rodriguez's jury and sentencing judge had heard the evidence from the postconviction proceedings, "[t]he likelihood of a different result" would not

have been "substantial," *Richter*, 562 U.S. at 112. Rodriguez's postconviction mental-health evidence "was not clearly mitigating." *Evans*, 703 F.3d at 1327. Dr. Latterner's testimony was seriously undermined on cross-examination, and the State's witnesses thoroughly rebutted every important point in her testimony.

Not only was the postconviction evidence weak, it was also "a two-edged sword [that] would have opened the door to damaging evidence." *Wood v. Allen*, 542 F.3d 1281, 1313 (11th Cir. 2008) (internal quotation marks omitted), *aff'd*, 558 U.S. 290 (2010). The postconviction evidence would have apprised the jury of Rodriguez's criminal history, including his federal conviction for drug trafficking and his use of aliases. The same jury that unanimously concluded Rodriguez was guilty beyond a reasonable doubt would have heard Dr. Haber say that Rodriguez showed "no remorse" but rather "stated that he was a victim himself" because he was innocent. And it would have heard Dr. Haber's tentative but still unfavorable opinion that nothing in his interview with Rodriguez suggested the possibility of rehabilitation. *See Pinholster*, 563 U.S. at 201 ("The new evidence relating to Pinholster's family . . . is also by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation.").

When Rodriguez's weak postconviction mitigation evidence is weighed against the aggravation evidence it would have invited and the lopsided evidence adduced at trial, there is no substantial likelihood that it would have persuaded six

of 12 jurors to vote against a recommendation of death. Nor does it create a substantial likelihood that it would have convinced the judge to impose a different sentence.

B. The Supreme Court of Florida Reasonably Determined that Rodriguez Is Eligible for the Death Penalty.

Rodriguez next argues that he is ineligible for the death penalty because of intellectual disability. But this argument too fails. The rejection of this claim neither involved an unreasonable application of then-existing Supreme Court precedent nor was based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d).

To establish intellectual disability, Rodriguez needed to present clear and convincing evidence to prove "(1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen." *Rodriguez III*, 110 So. 3d at 441; *see also* Fla. R. Crim. P. 3.203 (2009); *Atkins*, 536 U.S. at 318. At the time, Florida law equated "significantly subaverage general intellectual functioning" with an IQ score of 70 or below. *See Jones*, 966 So. 2d at 329 (internal quotation marks omitted). "The term 'adaptive behavior'" refers to "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." Fla. R. Crim. P. 3.203(b) (2009). The Florida Supreme Court concluded that Rodriguez failed to

present evidence establishing either a sufficiently low IQ or deficits in adaptive behavior. *Rodriguez III*, 110 So. 3d at 441.

Rodriguez argues that the decision of the Supreme Court of Florida involved an unreasonable application of *Atkins* because the then-existing standards for determining intellectual disability conflicted with the "basic principle" of *Atkins* "that state courts must defer to scientific understandings of intellectual disability." To prove that *Atkins* "clearly established" this principle, 28 U.S.C. § 2254(d)(1), he directs us to two footnotes in *Atkins*, *see* 536 U.S. at 308 n.3, 317 n.22, and relies heavily on the decisions in *Hall v. Florida*, 572 U.S. 701 (2014), *Brumfield v. Cain*, 135 S. Ct. 2269, and *Moore v. Texas*, 137 S. Ct. 1039 (2017).

The Supreme Court of Florida did not unreasonably apply *Atkins*, which held only that the intellectually disabled cannot constitutionally be executed, 536 U.S. at 307, 321, not that states must "defer to scientific understandings" in any specific way. The footnotes cited by Rodriguez do nothing more than say that the "state statutory definitions of mental retardation at the time . . . 'generally conformed to the clinical definitions'" adopted by the American Association on Mental Retardation and the American Psychiatric Association. *Shoop v. Hill*, 139 S. Ct. 504, 507 (2019) (first alteration adopted; second alteration rejected) (citing *Atkins*, 536 U.S. at 308 n.3, 317 n.22)). These footnotes did not "clearly establish" that states had to defer to scientific understandings. 28 U.S.C. § 2254(d)(1).

Indeed, the *Atkins* Court expressly "le[ft] to the States the task of developing appropriate ways to enforce th[is] constitutional restriction." 536 U.S. at 317 (alteration adopted) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416 (1986) (plurality opinion)).

Rodriguez's argument about the decisions that postdate *Atkins* also cannot establish an unreasonable application of clearly established law. His argument is exactly the kind of argument foreclosed by the Antiterrorism and Effective Death Penalty Act, which limits habeas relief based on legal error to violations of "*clearly established* Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1) (emphasis added). *Hall*, *Brumfield*, and *Moore* had yet to be decided when the Supreme Court of Florida affirmed the finding that Rodriguez is not intellectually disabled. So none provided legal principles that were "clearly established" when the Supreme Court of Florida rendered its decision. *See Shoop*, 139 S. Ct. at 507; *Lockyer*, 538 U.S. at 71–72; *Williams*, 529 U.S. at 412.

Rodriguez also argues that the finding that he is not intellectually disabled was an unreasonable factual determination in the light of the evidence. *See* 28 U.S.C. § 2254(d)(2). Because that determination was a finding of fact, *see Fults v. GDCP Warden*, 764 F.3d 1311, 1319 (11th Cir. 2014), it is presumed correct in federal habeas proceedings unless rebutted by clear and convincing evidence, *see* 28 U.S.C. § 2254(e)(1). Rodriguez has produced no such evidence, and the

evidence in the state-court record supported the finding that he is not intellectually disabled.

Although Dr. Weinstein diagnosed Rodriguez with an intellectual disability, Dr. Suarez testified that Rodriguez is not intellectually disabled "within a reasonable degree of medical certainty." And "[r]easonable minds reviewing the record," *Collins*, 546 U.S. at 341, could agree with the decision to trust Dr. Suarez's judgment instead of Dr. Weinstein's. Dr. Suarez testified that Dr. Weinstein's use of the Mexican version of the Wechsler Adult Intelligence Scale, or WAIS-III, was questionable because of cultural differences between Mexico and Cuba. He explained that Dr. Weinstein's method of norming the Mexican WAIS-III to United States IQ levels was likely to underestimate the IQ of a subject without a high school education.

Dr. Suarez also testified that he suspected Rodriguez of malingering on tests because of his obvious motive for underperformance, the conflict between his low scores and his everyday functioning, his lack of cooperation with evaluation, and his antisocial personality traits. Dr. Suarez explained that he tested Rodriguez for malingering by administering the Validity Indicator Profile and a dot-counting test, and the results from both suggested malingering. For example, Dr. Suarez testified that Rodriguez did no better on extremely easy questions on the Validity Indicator

Profile than on extremely hard ones, which strongly suggested that Rodriguez was answering at random.

Dr. Suarez testified that a finding of adaptive-behavior deficits was undermined by many aspects of Rodriguez's life history. Dr. Suarez pointed to Rodriguez's enlistment in the Cuban Merchant Marines as a teenager, his ability to carry on correspondence in English with a pen pal in Holland, his employment history, his use of aliases, his ability to negotiate and organize a large-scale drug transaction, his interest in and ability to monitor his medical treatment, and his detailed correspondence with his girlfriend. Dr. Suarez explained that some intellectually disabled people might be able to engage in any one of these behaviors, but the likelihood of an intellectually disabled person being able to engage in all of them was minimal.

Other witnesses' testimony supported Dr. Suarez's opinion. For example, Wiley testified on cross-examination that when she told Rodriguez she would be testifying in his postconviction proceedings, he replied that his lawyers had told him to lean back with a blank look on his face. This testimony was consistent with Rodriguez's intent to malinger.

Faced with conflicting expert testimony, the Supreme Court of Florida credited Dr. Suarez's opinion instead of Dr. Weinstein's and determined that Rodriguez is eligible for the death penalty. We are bound to respect that

determination because it was reasonable in the light of the evidence before the state court, and Rodriguez has failed to rebut it by clear and convincing evidence.

IV. CONCLUSION

We **AFFIRM** the denial of Rodriguez's petition for a writ of habeas corpus.

JILL PRYOR, Circuit Judge, concurring in result:

I concur in the result only.