IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

ARBOLEDA A. ORTIZ,	)	
	)	
Movant,	)	
	)	
vs.	)	**Case No. 04-8001-CV-W-GAF**
	)	**Crim. No. 98-00311-03-CR-W-GAF**
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER DENYING MOVANT'S 28 U.S.C. § 2255 MOTION

In movant Arboleda Ortiz's motion under 28 U.S.C. § 2255, he alleges numerous grounds of error addressed herein as A. Mental Health Claims; B. Ineffective Assistance of Counsel Claims; and C. Other Claims.

On November 15, 16 and 19, 2007, an evidentiary hearing was held on Ortiz's claims of "mental retardation" or "mental incompetence to stand trial," and ineffective assistance of counsel.

A. MENTAL HEALTH CLAIMS

1. Mental Retardation

Ortiz first argues he is mentally retarded as defined by the American Association of Intellectual and Developmental Disabilities ("AAIDD"), formerly known as the American Association on Mental Retardation, and the American Psychological Association's ("APA") Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision ("DSM-IV-TR"). (Doc. #43 *citing Atkins v. Virginia*, 536 U.S. 304 (2002)). Ortiz contends his death sentences must be set aside because they violate the Eighth Amendment to the United States Constitution and 18 U.S.C. § 3596(c). *Id*. In opposing this Motion, the United States of

America (the "Government") contends Ortiz "was not, and is not, mentally retarded, and therefore was able to assist in his defense, understand the charges against him, and thus be subject to a death sentence." (Doc. #56). At the evidentiary hearing conducted herein, the Court heard, among other things, detailed testimony from Ricardo Weinstein, Ph.D. ("Weinstein") and Carmen Inoa Vazquez, Ph.D., ABPP ("Vazquez").

The admissibility of expert testimony is primarily governed by Fed. R. Evid. 702 ("Rule 702") which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993). Determining whether scientific testimony will assist the fact finder "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93. Thus, the Court must determine whether the proffered expert testimony is relevant and whether it has a sufficiently "reliable foundation" to permit it to be considered. *Daubert*, 509 U.S. at 587, 597. "Pertinent evidence based on scientifically valid principles will satisfy those demands." *Daubert*, 509 U.S. at 597.

In assessing whether a proffered expert theory or technique has sufficient scientific validity to be admitted in evidence, the Court must ordinarily consider (1) "whether it can be (and has been) tested"; (2) whether it "has been subjected to peer review and publication"; (3) as

to scientific technique, the "known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation"; and (4) general acceptance, which can have a bearing on the theory's "evidentiary reliability - that is, trustworthiness." *Daubert*, 509 U.S. at 590 n.9, 593, 594. "Widespread acceptance can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support within the community . . . may properly be viewed with skepticism." *Id*. at 594 (internal quotations omitted).

While these factors provide guidance, the *Daubert* Court emphasized that "the inquiry envisioned by Rule 702 is . . . a flexible one." *Id*. The Supreme Court did not "presume to set out a definitive checklist or test" by articulating these four factors, but rather intended to set forth some "general observations." *Id*. at 593. The proper inquiry into the admissibility of expert testimony must be guided by the facts of the particular case. *Id*. at 591.

Under *Daubert* and its progeny, it is possible for a proffered expert to have sufficient qualifications - the formal education, practical experience and trial experience but fail if his methodology is questionable. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 153 (1999). Such is the case here. Although Weinstein has qualifications that could allow him to testify as an expert in particular circumstances, the Court finds fundamental flaws in Weinstein's reasoning and methodology undermine his conclusions about Movant's mental status and make his testimony unreliable.

The AAIDD and APA, whose prior definitions of mental retardation were footnoted in *Atkins*, define mental retardation in similar ways. The AAIDD defines mental retardation as "a disability characterized by significant limitations both in intellectual functioning and in adaptive

behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." Mental Retardation: Definition, Classification, and Systems of Supports (10th ed. 2002) *available at* http://www.aamr.org/Policies/faq_mental_retardation.shtml. The AAIDD also lists five assumptions essential to applying the definition: (1) limitations in present functioning must be considered within the context of community environments typical or the individual's age peers and culture; (2) valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors; (3) within an individual, limitations often coexist with strengths; (4) an important purpose of describing limitations is to develop a profile of needed supports; and (5) with appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve. *Id.*

For a diagnosis of mental retardation under the DSM-IV-TR, the APA notes the following features: (1) significantly subaverage intellectual functioning (an IQ of approximately 70 or below); (2) concurrent deficits or impairments in present adaptive functioning (i.e., how effectively the individual copes with common life demands and how they meet the standards of personal independence expected of someone in their age group, sociocultural background, and community setting) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety; and (3) onset before age 18 years. Diagnostic and Statistical Manual of Mental Disorders, Text Revision 41-42 (4th ed. 2000).

Weinstein opines Ortiz falls within the mentally retarded category of cognitive abilities as described in these definitions based on Weinstein's interpretation of psychological and

intelligence tests he administered, including the Spanish version of the Wechsler Adult Intelligence Scales III ("WAIS III") and the Bateria Woodcock-Munoz-Revisada. (Weinstein Rept. p. 9). Weinstein found Movant has an intelligence quotient ("IQ") of 54 and exhibited purported adaptive deficiencies before reaching adulthood. *Id*. Weinstein further opines Ortiz's alleged impairments rendered him incompetent to stand trial, unable to assist his attorneys in his own defense, and incapable of knowingly and voluntarily waiving his *Miranda* rights.[1] *Id*.

In making these determinations, however, Weinstein used questionable methodology and failed to adequately account for cultural differences. Although he claims to have accounted for culture, Weinstein's analysis does not reflect due consideration of the substantial limitations Ortiz's status and lack of acculturation placed on the intelligence tests administered in this case. Ortiz is a native of Colombia who emigrated to the United States illegally some time ago but has not adapted to this culture. Although there is evidence Ortiz speaks English reasonably well, his primary language in Spanish. Ortiz is unable to read or write in either language.

Weinstein's failure to adequately account for these limitations is demonstrated by his explanation of his administration of the Spanish version of the WAIS III. The version Weinstein administered was standardized in Mexico with a Mexican population. The test does not have appropriate Colombian norms against which Ortiz's results could be assessed. Despite Ortiz's Colombian background, Weinstein compared Ortiz's results to United States norms as suggested

[1]Weinstein reports he found frontal lobe dysfunction consistent with, though not diagnostic of, mental retardation as a result of a Quantitative Electroencephalogram ("QEEG") when compared to a rather elite sample. (Weinstein Topometric Rept. p. 8). Weinstein, who states he is one of the few in his field to use QEEG as a means to support neuropsychological findings, admits it is not a diagnostic tool for mental retardation or any other condition. To the extent admissible, the Court finds Weinstein's neuropsychological opinions of little value.

by the instructions for Spanish-speaking takers. According to Weinstein, this switch is an attempt to avoid the significant variation that results when Mexican norms are used with individuals in the lower range of intellectual abilities. The Government contends the Spanish version of the WAIS III is an inappropriate instrument to use in cases involving more than one culture. Vazquez testified the consensus of those working in cross-cultural psychology would not recommend using the test in this case because of cultural differences.

Whatever the value of the Spanish version of the WAIS III under appropriate circumstances, the Court finds Weinstein's administration of the WAIS III in this case and his conclusions derived therefrom unreliable. The Spanish version of the WAIS III does not appear to have norms that scientifically apply to someone of Ortiz's background and status. Ortiz has failed to show Weinstein's technique is an effective means of determining whether Ortiz is mentally retarded. The Court is not satisfied substituting norms based on a United States population is sufficient to make the WAIS III a reliable instrument for assessing Ortiz's intellectual capabilities given his lack of acculturation and his illiteracy.[2] The DSM-IV-TR suggests, "The choice of testing instruments and interpretation of results should take into account factors that may limit test performance," including the individual's sociocultural background, native language, and associated communicative handicaps. (DSM-IV-TR p. 42). Weinstein's failure to account for these factors in an appropriate manner renders his opinions unreliable.

Furthermore, in explaining how he reached his conclusions, Weinstein revealed other flaws in his methodology that may have biased his assessment. Weinstein testified he would not use Colombian norms, even if available, because his testing and evaluation in an *Atkins* case are

[2]Weinstein later normed the test to the Mexican population and obtained similar results.

determined by his interpretation of his purpose. In explaining his approach to accounting for culture, Weinstein admits he would change norms for a test based on the purpose of his evaluation. That is, U.S. norms would apply to legal proceedings such as this, but if Weinstein were to evaluate mental retardation for purposes of predicting Ortiz's performance in a Colombian university, U.S. norms would not be appropriate. Weinstein appears more concerned with legal culpability than with an objective assessment of intellectual capability.

According to Weinstein, his purpose in evaluating Ortiz was to compare him to the average person in the United States to see how he behaves and how much he can understand and conform to the laws of the United States as those are the laws under which he will be punished. Weinstein considers his role in a death penalty case to be to determine whether the person has the characteristics the United States Supreme Court describes as mental retardation. In his view, the population to which the Supreme Court wants the defendant compared is the population of the United States regardless of the defendant's individual circumstances or cultural background. However, in considering the relief Ortiz seeks, the issue is not whether Ortiz completely understands our culture but whether he is mentally retarded. The effects of culture are important in assessing intelligence and adaptive deficits, but that does not mean the culture of the society in which a criminal commits his crime determines if he is mentally retarded.

Weinstein appears to believe norms based on a stratified sample of the U.S. population which includes Colombians, Mexicans, Dominicans, Cubans and other nationalities adequately accounts for culture to the extent required by the Supreme Court regardless of Ortiz's unique circumstances. Because Weinstein has failed to adequately account for cultural and individual

differences, his diagnosis is based on dubious methodology and a test that suggests using norms of little value when applied to Ortiz in the manner employed by Weinstein.

The difficulty in deriving an accurate mathematical assessment of Ortiz's intelligence resulting from his sociocultural background and illiteracy increases the important of a thorough assessment of Ortiz's adaptive function. Unfortunately, Weinstein's suspect methodology carried forward to his analysis of Ortiz's relative strengths and limitations. In addition to downplaying or ignoring cultural differences pertinent to a reliable evaluation, Weinstein failed to consider all the available information relative to Ortiz's adaptive function in a social and practical environment. Although Weinstein admits reviewing statements by Ortiz's co-defendants or the victim near the time of the offense would have been helpful in assessing Ortiz's adaptive capability in society, Weinstein did not consider them, even though it would have been proper to do so at the time of his evaluation.

Indeed, Weinstein testified he did not consider Ortiz's ability to navigate an airport to fly to Kansas City to commit the murder because in making his diagnosis Weinstein was interested in what Ortiz could not do as that is what leads to the diagnosis of mental retardation. Weinstein testified he was not concerned with what Ortiz could do as that would indicate a strength. Throughout his evaluation, Weinstein either ignored or discounted Ortiz's conduct that demonstrated Ortiz's ability to function independently in the real world, such as serving in the Colombian military in his youth, caring for himself and his children, cooking, purchasing jewelry and a firearm, and driving. Finding little significance in these events, Weinstein appears to have required a high level of sophistication to show adaptive functioning not demanded by the AAIDD or APA and ignored the need to examine strengths as well as limitations.

By contrast, Weinstein drew broad conclusions in favor of mental retardation based on speculation and anecdotal reports from family members without documentary support. For example, despite admitting little information is known about the type of care and nutrition Ortiz's mother received, Weinstein noted Ortiz's mother's failure to receive prenatal care as a risk factor for retardation and described Ortiz's mother as "low functioning" without providing any support for that conclusion. Weinstein also speculated Ortiz lacked proper nutrition and stimulation prenatally and perinatally and recounted an alleged bout with bacterial meningitis and other ailments without any documentary evidence to support such a diagnosis. Finally, Weinstein decried Ortiz's ability to interact socially and function in society without supporting these conclusions, despite evidence Ortiz had extended relationships with men and women in both Colombia and the United States and actively participated in an extensive drug conspiracy until his arrest. Unlike his dismissive approach to documented evidence of Ortiz's ability to function in society prior to his incarceration, Weinstein places great weight on unsubstantiated reports of childhood difficulties. In sum, Weinstein's failure to account for cultural differences and his broad conclusions based on scant anecdotal evidence render his methodology and opinions unreliable.

Even if the Court were to find Weinstein's opinions satisfied the standards for expert testimony set by *Daubert*, the Court finds they are not as reliable as those provided by Vazquez, who properly accounted for cultural differences. Ortiz's background and illiteracy, and his demonstrated ability to function. In addition to her examination on September 21, 2005, Vazquez administered a number of tests, including the Spanish version of the Woodcock-Johnson III Tests of Cognitive Abilities, known as the Bateria III Pruebas de Habilidades

Cognitivas-Extendida ("Bateria III") and the Mini Mental Status Examination, Spanish Version. (Vazquez Rept. p. 5-6).

While she found Ortiz's General Intellectual Ability-Extended standard score of 70 placed him in the low range and his overall test results reflected borderline intellectual functioning, Vazquez determined Ortiz's "variable performance, almost complete lack of schooling, depressed and anxious mood, and possible malingering" probably confounded the validity and accuracy of his level of cognitive functioning as assessed by the Bateria III. *Id*. at 11. Vazquez testified Ortiz's extremely low results on some tests and his lack of cooperation on others indicated he was not making an effort and could have done better. Comparing Ortiz's results on the tests she administered, Vazquez determined Ortiz's reasoning ability was adequate and that his poor performance resulted from his lack of engagement, his limited education, cultural background and malingering. Besides malingering, only profound mental retardation would explain some of Ortiz's low results; profound retardation is clearly not indicated by the evidence.

To the extent she could, Vazquez also administered the Adaptive Behavior Assessment System, Second Edition to acquire information to allow her to clinically assess Ortiz's adaptive skills as outlined by the AAIDD and demonstrated by the evidence of record. In concluding Ortiz is not mentally retarded, Vazquez considered Ortiz's ability to surreptitiously travel to the United States from Colombia on more than one occasion. Once here, Ortiz was able to evade detection and move around to carry out extensive criminal conduct despite his illiteracy. Ortiz was also able to drive and passed the test to acquire a Texas driver's license.

Ortiz was also able to navigate a complex airport environment, flying alone from Houston, Texas to Kansas City, Missouri to participate in the murder for which he was convicted. Vazquez also considered Ortiz's ability to learn English upon arriving in the United States without formal instruction and to care for himself hygienically. Vazquez also noted Ortiz's good social/interpersonal skills. While in the United States, Ortiz lived with and carried on extensive relationships with women who did not speak Spanish. In fact, he fathered children with at least two of those women and routinely cared for the children, cooked, and performed other domestic tasks. Ultimately, Vazquez concluded Ortiz was responding appropriately for his age and level of education and was functioning appropriately in comparison to the group he represents.

Vazquez's conclusions support the Court's independent observations of Ortiz's mental capabilities and demeanor at trial. Throughout the course of a trial lasting more than four weeks, the Court observed no indication of an inability to act in an appropriate fashion or to effectively interact with counsel or the Court. Ortiz's trial team likewise found a mental acuity inconsistent with any mental disease of deficiency. Ortiz's extensive videotaped interview also did not indicate any suggestion of mental retardation, much less the severe deficits Ortiz now claims. Additionally, in refusing to cooperate with trial counsels' efforts to investigate Ortiz's background and family history, Ortiz was alert to and concerned regarding the implications and safety of his family in Colombia.

The Court finds Weinstein's methodology does not satisfy the standard for expert testimony established by *Daubert*. Even if Weinstein's opinion was deemed to meet *Daubert*, his methodology and conclusions are not as reliable as those of Vazquez because Vazquez

adequately considered Ortiz's adaptive capabilities as demonstrated by the other evidence of record. Ortiz has failed to prove he is mentally retarded or incompetent, his Motion to Vacate Convictions and Sentences of Death based on alleged mental deficiencies are denied.

2. Mental Incompetence

Ortiz next claims that he was incompetent to stand trial, in violation of his due process rights. It is the petitioner's burden of persuasion, by a preponderance of the evidence, when he makes a claim that he was tried and convicted while being mentally incompetent. *Vogt v. United States*, 88 F.3d 587, 591 (8th Cir. 1996). "Retrospective determinations of whether a defendant is competent to stand trial . . . are strongly disfavored." *Id.* (quoting *Weisberg v. Minnesota*, 29 F.3d 1271, 1278 (8th Cir. 1994)). Although Ortiz did not raise a competency issue at trial or on appeal, he is not precluded from raising a competency issue through his post-conviction proceedings. *Vogt*, *id.* at 590.

Neither of Ortiz's attorneys or the Chief Investigator for the Federal Public Defender, Ron Ninemire, observed any deficiency in Ortiz that would indicate he was incompetent to stand trial. Assistant Federal Public Defender Larry Pace testified that Ortiz denied any mental problems and was adamant that he would not submit to a mental examination and he would not proceed in any way with an attempt to claim that he had a mental disease or defect. Ortiz's other attorney, Cenobio Lozano, Jr., confirmed that throughout his representation of Ortiz, he did not exhibit any signs of incompetence, Ortiz acted normal and discussed the evidence with Mr. Lozano, and that the communications Mr. Lozano had with Ortiz in Spanish indicated a mental acuity inconsistent with mental disease or deficiency.

Dr. Vazquez found that Ortiz exhibited good judgments, a certain level of insight and appropriate adult-like behavior. Dr. Vazquez believed that Ortiz understood the gravity of his situation, commented on feeling upset and wanting to be in a better situation. Dr. Vazquez, whose testimony the court has found to be reliable, as discussed above, did not find Ortiz incompetent or unable to understand his circumstance and assist with his defense. Additionally, Dr. Weinstein's opinions on Ortiz's mental health are not deemed to be reliable or credible for the reasons stated above.

Additionally, as noted above, the court had the opportunity to observe Ortiz throughout the entirety of these proceedings. Ortiz interacted with counsel, the court, and court personnel, including the Marshals providing security, in an appropriate fashion at all times. It is noteworthy again that Ortiz understood the gravity of his situation and wanted to protect his family from others involved in his criminal activity by hiding their identity. Mr. Ortiz has not borne his burden or persuasion that he was mentally incompetent to stand trial.

B. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Mr. Ortiz must satisfy a heavy burden to successfully establish an ineffective assistance of counsel claim:

> A claim of ineffective assistance of counsel under § 2255 must be scrutinized under the two-part test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, in order to prevail on a claim of ineffective assistance of counsel, a convicted defendant must prove both that his counsel's representation was deficient and that the deficient performance prejudiced the defendant's case. The first part of the test is met when the defendant shows that counsel "failed to exercise the customary skills and diligence that a reasonably competent attorney would [have] exhibit[ed] under similar circumstances. The second part is met when the defendant shows that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Cheek v. United States, 858 F.2d 1330, 1336 (8th Cir. 1988) (citations omitted).

Counsel's performance will not be deficient if the performance was one of "reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). For a defendant to show otherwise, he must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's ineffective assistance, there is a "reasonable probability" that the result would have been different. *Id*. at 694. "Reasonable probability" means a probability sufficient to undermine the confidence in the outcome of the trial. *Id*.

In the inquiry of assistance of counsel, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id*. at 689. There is a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance which is a barrier that the defendant must overcome. *Id.; see also Blankenship v. United States*, 159 F.3d 336 (8th Cir. 1998). The defendant bears the burden to affirmatively prove the prejudice aspect of the claim which requires proof of a Reasonable probability that the result would not have been different but for counsel's deficient performance. *French v. United States*, 76 F.3d 186, 188 (8th Cir. 1996) (citing *Strickland*, 466 U.S. at 694). In evaluating counsel's conduct, the court should avoid "the distorting effects of hindsight," and concentrate on the circumstances as they appeared to counsel at the time of trial. *Strickland*, 466 U.S. at 689.

The failure to establish "prejudice" is dispositive of a § 2255 claim, and the court does not have to then address the reasonableness of the attorney's performance. *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996); *see also United States v. Montanye*, 77 F.3d 226, 230 (8th Cir. 1996); *Sanders v. Trickey*, 875 F.2d 205, 222 n.8 (8th Cir. 1989).

1. Investigation and Presentation of Evidence of Mental Deficiencies Prior to Trial

The record reflects that Ortiz's attorneys inquired into his mental state prior to trial. However, Ortiz refused to discuss and cooperate with his attorneys on the issue of his mental capacity. Trial counsel, Assistant Public Defender Larry Pace, stated that he raised the issue of a mental examination for competence or mental disease at the earliest stages of representation, but Ortiz adamantly and consistently denied any claim of mental problems and refused to cooperate or assist in any way with a mental examination. Although counsel endeavored to investigate and seek a mental examination, Ortiz was insistent that he had no deficiencies and would not cooperate in order for any testing to occur. Furthermore, neither attorney Pace, co-counsel Cenobio Lozano, Jr., or their investigator Ron Ninemire, observed any behavior by Ortiz in the course of their representation which caused concern about his mental health.

Even in refusing a mental examination, Ortiz assisted counsel in his case by sign[ing] waivers to obtain information, selectively provid[ing] names, dates and locations for further investigation, discussing the evidence with counsel, and show[ing] a clear understanding of the proceedings against him. Counsel's observations and interactions with Ortiz during pre-trial, trial and post-trial, are consistent with Dr. Vazquez's finding and conclusions that Ortiz was not and is not mentally retarded. Mr. Ortiz's counsel attempted to pursue a mental deficiency or disease defense, and acted in a manner consistent with reasonable representation expected of counsel. Counsel was not ineffective in this regard.

2. Investigation and Utilization of Mental Health Evidence in Motion to Suppress Statements

Second, Ortiz contends his counsel provided ineffective assistance in not using mental health evidence in Ortiz's claim that his statements to authorities should be suppressed. As discussed above, Ortiz would not cooperate with his counsel in order to explore or seek any defense relating to Ortiz's mental health. Ortiz would not submit to any examination for the purpose of determining mental capacity.

Further, the examination of Ortiz by Dr. Vazquez indicated that Ortiz could understand and knowingly waive his *Miranda* rights when he gave a statement to law enforcement regarding the murder of Julian Colon. Ortiz responded appropriately to questions posed by Dr. Vazquez, understood the gravity of his situation and his reasoning ability was adequate. Additionally, the videotape of Ortiz's statement to law enforcement did not exhibit a lack of understanding or inappropriate behavior on his part.

The legal representation provided by Ortiz's counsel was reasonable, particularly in light of Ortiz's attitude and refusal to pursue a mental deficiency defense. His counsel, therefore, provided effective assistance as set forth under *Strickland* standards.

3. Investigation Of Ortiz's Background, Social and Medical History, and Mitigating Evidence at Trial and During Death Penalty Phase

Ortiz's third claim relating to ineffective assistance of counsel is that his counsel failed to investigate Ortiz's background, social and medical history, and failed to present such evidence at trial and during the death penalty phase. In this regard, the record reflects that trial counsel endeavored to investigate Ortiz's background and social history. Attorney Larry Pace as well as

investigator Ninemire, both from the office of the Federal Public Defender, spent weeks investigating Ortiz's background, personal history, medical history and his relationship with others. However, Ortiz endeavored to conceal the identity of his family by telling counsel and the investigator that his parents were deceased. Further, counsel attempted to contact Ortiz's relatives in Colombia, but the telephone number given proved to be invalid and the letters sent to contact family members went unanswered. As Mr. Pace surmised, it is apparent that Ortiz was concerned regarding the implications and safety of his family in Colombia. Regardless of his reasons, Mr. Ortiz was adamant with his attorneys, Pace and Lozano, that he did not want his family involved.

Nonetheless, without cooperation from Ortiz, without valid family contact information, and little, if any, background information to utilize, trial counsel made a concerted effort by conducting as thorough of a background check as reasonably possible under the circumstances. Mr. Ortiz would not assist counsel in identifying possible witnesses and in spite of counsel's efforts to reach family in Colombia, counsel received no response. Travel to Colombia would have been futile given Mr. Ortiz's refusal to cooperate in identifying his family and counsel's lack of any response from those identified through counsel's investigation as potential family in Colombia.

However, as a result of counsel's considerable efforts to investigate, counsel did locate and meet with three witnesses counsel subpoenaed to testify during the death penalty phase. Once again, in spite of this effort, it was later determined that the testimony of these witnesses had changed from when they initially spoke with trial counsel and would have been detrimental, rather than helpful, to Ortiz's defense. Once Mr. Ortiz was convicted, these witnesses advised

counsel they would testify about additional criminal acts and violence committed by Ortiz. Ortiz, after discussion and consultation with his counsel about the impending testimony, concurred that none of these witnesses should testify during the death penalty phase.

Counsels' actions and duties were in accordance with the standard set forth in *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), in that they knew and attempted to exercise their duty to investigate Ortiz's medical, family, social and educational history. Counsel followed up with Ortiz's family, friends and medical history to the extent possible. While Mr. Ortiz may be forthcoming in relaying familial information to post-conviction counsel, such was not the case with his trial counsel team.

The record reflects that the visitation log at CCA-Leavenworth indicated that prior to trial, Attorney Pace visited Ortiz twice between January 1999 and April 2000. However, the visitation log further indicates that members of the defense team made 26 visits to Ortiz during that same time frame. Additionally, contact not made at the CCA-Leavenworth facility, specifically contact before and after court appearances, are not reflected in the CCA logs. Counsels' visits with Ortiz, and their requests for names of persons to provide mental background and mitigating information from Ortiz reflects that counsel provided effective assistance. Mr. Ortiz refused to cooperate with counsels' efforts to discuss a mental health defense and to obtain background information. When Mr. Pace persisted, Mr. Ortiz refused to even talk with him further. Mr. Pace was not ineffective because Mr. Ortiz refused to cooperate with him.

Ortiz is now portraying himself in a light directly in contrast to the state of mind and mental capabilities he portrayed to his trial counsel and the Court both pre-trial, during trial and

post-trial. Certainly, if either the magistrate court or this court had observed any "readily apparent" deficiencies in Ortiz, as his current counsel claims, a mental evaluation would have been ordered. No such observation was made. To the contrary, Ortiz appeared to interact with counsel appropriately at all times in the presence of this court. Ortiz's own behavior and demeanor impeded his counsel from successfully pursuing a request for a mental examination or being able to contact Mr. Ortiz's family in Colombia. Neither counsel's representation fell below the standard of reasonable representation expected to be provided by competent and effective counsel.

4. Failure to Preserve and Raise the Government's Failure to Charge Statutory Aggravating Factors in the Indictment

Next, Ortiz makes the claim that his counsel provided ineffective assistance based on *Ring v. Arizona*, 536 U.S. 584 (2002) - an opinion which was decided two years after Ortiz's trial. The Supreme Court has held that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schiro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 2526 (2004). Even if counsel had been able to foresee this issue and raised it on direct appeal, the Eighth Circuit has stated that although *Ring*, did not "address whether the Fifth Amendment also requires capital aggravating factors to be found by the grand jury and included in the indictment" the Court found that "*Ring* necessarily implies such a Fifth Amendment requirement." *United States v. Allen*, 406 F.3d 940, 942 (8th Cir. 2005). However, the Eighth Circuit has held that the failure to charge at least one statutory aggravating factor in the indictment is not, as Ortiz claims, a structural error. *Allen*, *id.* at 945. Thus, the inquiry for the appellate court would have been whether the defect in the indictment was harmless beyond a reasonable doubt. *Id.*

Although Ortiz did not contest the aggravating factors presented to the petit jury, co-defendant Sinisterra did, and the Eighth Circuit found that the aggravating factors were correct and the jury, as the rational trier of the facts, properly found the aggravating circumstances beyond a reasonable doubt. *See United States v. Ortiz*, 315 F.3d 873, 900-02 (8th Cir. 2002).

Ortiz's counsel were not ineffective in not preserving this issue and raising in on appeal.

5. Evidence During Guilt and Penalty Phases

Ortiz next alleges trial counsel Lozano did not present any "coherent theory of defense to the jury," claiming that a different theory of defense should have been posed. It is easy to second guess someone else's trial strategy, but it is another matter to be in the heat of the battle during trial. While Ortiz may now criticize both his counsels' defense approach and posture during the guilt and penalty phases of trial, counsels' decisions were based on what they believed was the best strategy to present a viable defense for Ortiz.

Attorney Lozano reasonably believed the best strategy was the "deliberate-miss" defense - that Ortiz and Tello chose to spare victim Herberth Andres Borjia-Molina's life by missing him when one of them shot into the basement floor. This defense theory was drawn out during Lozano's cross-examination of Molina and the deceased victim Julian Colon's widow.

Just because a defense theory or strategy does not convince a jury of a defendant's innocence does not mean that defense counsel provided ineffective assistance. Generally, defense counsel provides a defense strategy based on perceived weaknesses of the Government's case and the evidence counsel has obtained based on the assistance from the defendant. However, Ortiz impaired his defense by not fully cooperating with his counsel. Ortiz's counsel

did their part to provide reasonably objective and competent representative for Ortiz under difficult circumstances.

6. Opening Statement and Closing Argument During Penalty Phase

The next ineffective assistance of counsel claim Ortiz alleges is that his counsel failed to give an opening statement and gave an allegedly substandard closing argument during the penalty phase of trial. Attorney Pace handled the penalty phase at trial. The decision to not present an opening statement was a strategic one as explained by counsel. Mr. Pace states that Ortiz had not yet decided whether he was testifying, so the decision was made that counsel would not make an opening statement to allow Ortiz to make that decision without it being inconsistent with anything said during the opening statement. Rather than just "going through the motions," as claimed by Ortiz, Mr. Pace made a strategic decision to not make an opening statement. Mr. Pace allowed Ortiz additional time to ponder his decision on whether he wished to testify while ensuring that he made a consistent presentation before the jury rather than making statements that would not be consistent with testimony or would not come to fruition during the penalty phase. Such actions are those of competent counsel acting reasonably within the scope of effective representation.

Defense counsel's closing argument was based on counsel's observation and intent to distinguish Ortiz from his co-defendant, Sinisterra, who had just received a death sentence recommendation from the jury. Sinisterra's counsel had already observed and experienced the fact that the pictures of Colombia and videoed statements from Sinisterra's family members did not prevent the jury from recommending death. Furthermore, the witnesses counsel had subpoenaed to testify on Ortiz's behalf had changed their position after Ortiz had been convicted

and now advised counsel that their testimony would be detrimental to Ortiz . Attorney Pace therefore attempted to distinguish Ortiz from Sinisterra so that Ortiz would not experience the same fate. Despite counsel's concerted effort, the jury also recommended a death sentence for Ortiz based on his role in the offense. Counsel's assistance was not ineffective because of the election to not make an opening statement during the penalty phase or as a result of the closing argument given under the circumstances presented.

7. Constitutionality of the FDPA

Ortiz claims his attorneys were ineffective in not preserving the contention that the Federal Death Penalty Act (FDPA) is unconstitutional in that the evidentiary standards are relaxed in the death penalty phase. Ortiz cites *United States v. Fell*, 217 F.Supp.2d 469 (D.Vt.2002), rev'd by 360 F.3d 135 (2nd Cir. 2004) to support this claim. However, when the *Fell* case was reversed, the Second Circuit ruled that the FDPA does not impair the reliability of the evidence submitted during the penalty phase. *Fell*, 360 F.3d at 145-146. Thus, *Fell* offers no support to Ortiz's claim.

Furthermore, the Eighth Circuit Court of Appeals agreed with Second Circuit that "[r]ather, the admission of more rather than less evidence during the penalty phase increases reliability by providing full and complete information about the defendant and allowing for an individualized inquiry into the appropriate sentence for the offense." *United States v. Lee*, 374 F.3d 637, 645 (8th Cir. 2004) (citing *Fell*, 360 F.3d at 143). In *Lee*, the Eighth Circuit held "that the FDPA standard provides a level of protection that ensures that defendants receive a fundamentally fair trial and that it is not unconstitutional." *Lee, id.* (citing *Fell, id*. at 145). Since the relaxed FDPA evidentiary standard is not unconstitutional, there was no legal basis for

counsel to make an objection. (*See* Pace Aff. ¶ 8.) Ortiz's counsel, therefore, was not ineffective in not raising the issue at trial or on appeal.

C. OTHER CLAIMS

1. Vienna Convention

Ortiz contends that the Government's failure to comply with the Vienna Convention on Consular Relations violated his right to consular consultation. As Ortiz acknowledges, the Eighth Circuit has already addressed this issue and found that "this record contains no evidence that violations of the Vienna Convention in this case of defendants prejudiced them in any way." *United States v. Ortiz*, 315 F.3d 873, 887 (8th Cir. 2002), cert. denied, 538 U.S. 1042 (2003). In fact, the Eighth Circuit disagreed with the contention that a violation of the Vienna Convention renders a defendant's statements inadmissible. *Id*. at 886. The Court stated that:

> Even if we assume for present purposes that the Convention creates an individually enforceable right, it would not follow, on this record, that the statements should be excluded merely because the Convention has been violated. The reason is that appellants are unable to establish a causal connection between the violation and their statements. The District Court found: "No credible evidence suggests that had defendants been advised of their right to have their Colombian consul notified of their arrest, they would not have made the statement." Opinion Of Magistrate Judge at 33. This finding is not clearly erroneous.

Id.

The Court went on to address the defendants' other contention that a violation of the Convention should prohibit the Government from seeking the death penalty. In denying this aspect of the argument, the Court found, again assuming the Convention creates individually enforceable rights, "no causal or logical connection at all between the penalty imposed on defendants and violation of the Vienna Convention. The death penalty is provided by statute."

Id. at 887. The defendants' "own incriminating statements, potent evidence supporting the conviction, would have been made even if consular contact had occurred. The Convention itself says nothing about the appropriateness of penalties, and certainly does not provide that the death penalty is excluded if the Convention is violated." *Id*.

2. Death Sentence Disproportionately Harsh

Ortiz claims that his death sentence is disproportionately harsh based on 18 U.S.C. § 3595 and the Fifth and Eighth Amendments.

In 2000, Ortiz was convicted and sentenced to death for the murder of Julian Colon, which resulted from the actions of a four-person drug conspiracy of which Ortiz was a member. According to Ortiz, the murder was actually carried out by two other members of the conspiracy including Edwin Hinestroza. Ortiz alleges that he was not directly involved in the murder. However, the jury believed otherwise and found all defendants guilty.

At the initial trial, co-conspirators Sinisterra and Ortiz received a death sentence, while Tello received life imprisonment. Hinestroza was apprehended at a later date, and was tried in 2005 before a different jury. Hinestroza's jury failed to recommend the death sentence because it was deadlocked. Given these varying sentences, Ortiz asserts his death sentence was arbitrarily imposed in violation of 18 U.S.C. § 3595 and the Fifth and Eighth Amendments.

In pertinent part, 18 U.S.C. § 3595 authorizes the reviewing court "to consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor and whether the evidence supports the special finding of the existence of an aggravating factor." 18 U.S.C. § 3595. In his motion on this claim, Ortiz focuses on the alleged arbitrariness of his sentence in light of co-defendant Hinestroza's sentence of life imprisonment,

after a separate trial before a different jury. Though § 3595 fails to specifically authorize a proportionality review, Ortiz suggests such a review pursuant to the statute's "arbitrariness" language. For support, Ortiz cites *United States v. Llera-Plaza*, 179 F.Supp.2d 444 (E.D. Pa. 2001), to the extent that court indicated that there is nothing in the FDPA to preclude reviewing courts from considering proportionality issues in evaluating the propriety of death penalty verdicts. *Id*. at 457.

The Fourth and Fifth Circuits have examined the proper scope of review under the statute. The Fifth Circuit in *United States v. Webster*, 162 F.3d 308 (5th Cir. 1998), viewed § 3595(c)(1) as establishing a two-part test. First, the court reviewed the evidence to determine if it supported the jury's finding under a sufficiency of the evidence standard. *Id*. at 353. Assuming this is satisfied, "[its] next responsibility is to ensure that the sentence was not handed down under the influence of passion, prejudice, or some other arbitrary factor." *Id*. at 354. Though the court declined to articulate the standard of review, it concluded that "[t]he death sentence [was] warranted by the jury's specific findings" in that case. *Id*.

As in *Webster*, the Fifth Circuit took a decidedly jury-centered analysis in *United States v. Hall*, 152 F.3d 381 (5th Cir. 1998), abrogated on other grounds by *United States v. Martinez-Salazar*, 528 U.S. 304 (2000). The *Hall* decision was noted in *Webster*, stating that "[w]e have found nothing in the record indicating that the jury's recommendation of a death sentence was motivated in any degree by passion, prejudice, or any other arbitrary factor." *Webster, id.*, 162 F.3d at 354 n. 68 (quoting *Hall*, 152 F.3d at 426).

The Fourth Circuit similarly adopted a jury-centered approach in *United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000). The court stated,

> There is no indication that the jury did not weigh the evidence, and it had sufficient evidence to reach its particular findings on the aggravating factors, even if the defense is correct that the above allegations were errors, which we do not hold. We recognize that while the proceedings must be free from passion, prejudice, and other arbitrary factors, a death penalty case will not be emotionless. The errors alleged by the defense did not rise to a level that overwhelmed the proceedings and created an improper basis for the verdict.

Barnette, id. at 821.

These precedents provide a well-reasoned basis for evaluating whether or not a sentence of death is improperly based on "passion, prejudice, or other arbitrary factor." On this question the courts take a jury-centered approach. That is for the court to consider if *this jury in this case* was filled with passion, prejudice, or otherwise acted arbitrarily. The case law does not support reading a proportionality review into the statute and the record here does not reflect that the jury was filled with passion, prejudice or that it otherwise acted arbitrarily.

3. Eighth Amendment Claim

In addition to his statutory claim, Ortiz also asserts that his sentence is unconstitutional under the Eighth Amendment. This argument again rests on the disparity in sentences between Ortiz and Hinestroza. Ortiz acknowledges that proportionality review is not required by the Eighth Amendment. *See Pulley v. Harris*, 465 U.S. 37 (1984). However, Ortiz attempts to distinguish his case from that of *Harris*. He notes that *Harris* concerned "inter-crime" proportionality whereas this appeal is one of "intra-crime" proportionality. *Harris* makes a distinction between "an abstract evaluation of the appropriateness of a sentence for a particular crime" and the appropriateness of the punishment given "punishment imposed on others convicted of the same crime." *Id*. at 42-43. It is the latter type of review that concerned the *Harris* Court. *Id*. Unlike Ortiz's assertion, the Court's language does not appear to be limited to

"inter-crime" comparisons. Additionally, different juries sat in judgment of Ortiz and Hinestroza making the comparison more akin to "inter-crime" rather than a true "intra-crime" in which one jury would sit in judgment of all defendants. Thus, a proportionality review is also not required in the instant case.

Furthermore, the Court in *Harris* emphasized that proportionality review may be "constitutionally superfluous" given the "safeguards of the . . . statute." *Harris, id.* at 49. The Fifth Circuit in *United States v. Jones*, 132 F.3d 232 (5th Cir. 1998), *upheld in* 527 U.S. 373 (1999), spoke directly to this issue. The court held that the statute "is not so lacking in other checks on arbitrariness that it fails to pass constitutional muster for lack of a proportionality review." *Id*. at 240.

Finally, *Harris* recognized that "[a]ny capital sentencing scheme may occasionally produce aberrational outcomes . . . . As we have acknowledged in the past, 'there can be 'no perfect procedure for deciding which cases governmental authority should be used to imposed death. '" *Id.* at 54 (quoting *Zant v. Stephens*, 462 U.S. 862, 844 (1983) (quoting *Lockett v. Ohio*, 438 U.S. 586 (1977) (plurality opinion)). Juries are not exact duplicates of one another and they are entitled to take into consideration all facts and circumstances properly presented in a given case. The fact that Hinestroza's jury failed to unanimously recommend the death sentence does not alter the fact that the jury in Ortiz's case acted properly under the statute.

4. Substantive Due Process and Equal Protection

Ortiz's substantive due process and equal protection claims are a further attempt to present his proportionality argument.

For his substantive due process argument, Ortiz recites the standard tests of "shocks the conscience" and "arbitrarily and capriciously." However, Ortiz fails to apply these standards to this case other than merely asserting the different sentences, given the facts, fail to satisfy these long-held standards. The many protections and safeguards of the statute and the Eighth Amendment alleviate the concern over an arbitrary imposition of the death penalty. *See Jones*, *id.*, 132 F.3d at 240.

In a similar vein, Ortiz asserts that the "disparate treatment' of his two co-conspirators deprives him of equal protection of the law. To support his proposition, Ortiz cites the Ninth Circuit's decision in *Myers v. Ylst*, 897 F.2d 417 (9th Cir. 1990). In that case, however, the court was concerned with uneven application of rules of procedure and law. *Id*. at 421. There is no such concern here. Ortiz makes no allegation that the federal courts have applied different rules to similar cases. Ortiz's equal protection clause is without merit.

5. Cumulative Effect

Ortiz alleges that the cumulative effect of the claims he raised resulted in an unfair trial and sentence. Given that none of Ortiz's claims have merit, his claim of cumulative effect fails as well.

WHEREFORE, for the reasons stated herein, Ortiz's 28 U.S.C. § 2255 motion is denied.

s/ Gary A. Fenner
GARY A. FENNER, JUDGE
UNITED STATES DISTRICT COURT

DATED: December 14, 2007