IN THE SUPREME COURT OF FLORIDA

JAMES FLOYD,

Appellant,

v. **CASE NO. SC03-865**

STATE OF FLORIDA,

Appellee.
___________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

The facts of this case are outlined in this Court's opinion in the initial appeal of Floyd's judgments and sentences:

> James Floyd was indicted for the murder of Annie Bar Anderson. He was also charged with two counts of forgery, two counts of uttering a forged check, and two counts of grand theft.
>
> The victim was found dead in one of the bedrooms of her home on the evening of Tuesday, January 17, 1984. She was last seen alive on the afternoon of January 16, 1984, when she cashed a check at her bank. According to the testimony of the medical examiner, she had been killed sometime that afternoon or evening by a stab wound to her chest. When the police arrived at the victim's home on January 17, 1984, the back door was unlocked, and there were no signs of a forced entry. In the room in which they found the victim, there were fresh "pry marks" beneath the window, indicating that someone had attempted to exit from that window.
>
> On the afternoon of the victim's death (Monday, January 16), Floyd had cashed a check for $500 from the victim's account. He was arrested after attempting to flee from the police when he tried to cash a second check for $700 on the same account two days later (Wednesday, January 18). When questioned by the police, Floyd admitted forging the $700 check, explaining that he had found the checkbook on Tuesday near a dumpster. He subsequently revised his story when confronted with the police knowledge that he had cashed the $500 check on Monday. In addition, he admitted owning a brown jacket that was found outside the bank where he was arrested. A sock soaked with blood of the victim's blood type (which was not the defendant's blood type) was found in one of the jacket pockets.
>
> . . .
>
> At trial the state also presented the testimony of Greg Anderson, a cellmate of Floyd's who testified that Floyd told him that he had stabbed the victim when she surprised him in the course of the burglary.

Floyd v. State, 497 So. 2d 1211, 1212-13 (Fla. 1986), cert. denied, 501 U.S. 1259 (1991).

Floyd's trial was conducted Aug. 21-24, 1984 (DA V3-V6).[1] In addition to the evidence outlined above, the State presented testimony that tire tracks on the driveway at the victim's house were consistent with the tire tread on Floyd's motorcycle, and that ten Negroid hairs were found on or around the victim's body (DA V4/609; V5/678-80, 699-702). Floyd's initial alibi for the day of the murder was contradicted by his girlfriend and by Huie Byrd, and his explanation of finding the checkbook near a dumpster was rebutted by testimony from an employee of the store where Floyd claimed to have purchased beer at the time he claimed the checkbook was found (DA V4/593-600; V5/628-37, 642-51, 662-65). The victim, Mrs. Anderson, was an eighty-six year old woman who received multiple stab wounds, including one to her upper chest that penetrated her heart, eleven to her abdomen

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[1]Citations to the record will be as follows: "DA" will refer to the record in Floyd's direct appeal, FSC Case No. 66,088; "RS" will refer to the record in Floyd's appeal after his 1988 resentencing, FSC Case No. 72,207; "PC" will refer to Floyd's initial postconviction appeal, FSC Case No. 97,043; and "PC2" will refer to the record prepared in the instant appeal, FSC Case No. SC03-865, which includes twelve volumes (V1-V12) prepared for an interlocutory appeal as Case No. SC03-2, one volume (V13) and four supplemental volumes (SV1-SV4) prepared as Case No. SC03-865, an addendum volume (AddV) which contains the second Order denying relief subject to this appeal, and seven addendum volumes (AddV1-AddV7) containing the exhibits introduced at the second evidentiary hearing held below.

that were potentially fatal, and one defensive wound to her left wrist (DA V4/453-56).

The theory of defense was to acknowledge that, although Floyd had committed the thefts and forgeries, he did not kill Mrs. Anderson but had found her checkbook in an alley (DA V3/390-92). The jury rejected Floyd's defense and convicted him on all counts (DA V6/883-86). During the penalty phase, the defense called only one witness, the victim's daughter, to testify that neither she nor her mother believed in capital punishment, and neither would want Floyd to be sentenced to death for this murder (DA V6/901-11). Correspondence between Floyd and the daughter, Ann Anderson, was also admitted into evidence. Floyd wrote that he did not take or do drugs, and only drank beer now and then (DA V7/1016). He also expressed his love for his family and his concern for his alcoholic mother. He hoped that Miss Anderson would come and visit him in prison, as she had offered, and explained the visiting arrangements at the prison that she would have to negotiate (DA V7/1014-16).

The jury recommended death by a vote of seven to five (DA V6/940). The judge imposed a death sentence, finding five aggravating factors and no mitigation (DA V1/107-08). On appeal, this Court determined that two of the aggravating

factors should not have been applied, and that the jury was not properly instructed on mitigation; the case was remanded for resentencing. The resentencing commenced on Jan. 12, 1988 (RS V5-V7). The defense called six character witnesses in addition to Miss Anderson, the victim's daughter. Floyd was presented as an honest, nonviolent and dependable person, who had not been in trouble until his father died about a year before Mrs. Anderson's murder.

Eula Williams had known Floyd and his family as a neighbor for eight or nine years and thought of Floyd as a son (RS V6/848-49, 851). Floyd had worked on her yard and her car (RS V6/850). Mrs. Williams observed that Floyd's mother was an alcoholic since the time his family moved into the neighborhood (RS V6/850). The mother was always high on alcohol and had blackout spells. Floyd's father kept the family together, but he had died within a year of the murder (RS V6/850-51). Floyd and his brother had worked for the father's lawn service and managed to keep it up for awhile after their father's death (RS V6/851). Mrs. Williams testified that Floyd was always respectful to her and not violent to anyone (RS V6/851-52). She had believed him when he called her, after he had been arrested for the murder, and said that he had not done it (RS V6/852). She believed he was not the type of person that would do

anything like that (RS V6/852).

Rex Estelle testified that he had known Floyd for a year and a half before the murder, and had been his supervisor while Floyd worked at the First Baptist Church for over a year (RS V6/854-55). Floyd had been a good worker, easy going and even tempered, and progressed to a custodian (RS V6/855-56). Floyd had learned that Estelle was a recovered alcoholic and asked him to speak to his mother (RS V6/857). He and another female did so, but found that Floyd's mother was not interested in recovery, but believed life was easier for her when she drank (RS V6/857-58). There came a time when Estelle noticed a change in Floyd of extreme mood swings, as though he were high on something (RS V6/858-60). From his own experience, Estelle believed he recognized someone taking drugs, and spoke to Floyd about it (RS V6/859-60). He recalled that this was the only time that Floyd got mad at him (RS V6/859). Estelle also had to question Floyd about several instances of money and equipment missing from the church (RS V6/860). Floyd also began missing work, which Estelle believed to be another sign of a person taking drugs (RS V6/860-61). Estelle found out that Floyd's problems at the church job began at the time his father had died of cancer (RS V6/858-60). Floyd was terminated for coming to work late about a week before Christmas (RS V6/862).

Thomas Snell, a communications officer with the St. Petersburg Police Department, testified that he had known Floyd and his family as a neighbor for 15 years (RS V7/871). Snell testified that Floyd's mother had been an alcoholic as long as he knew her, and that this had an effect on Floyd (RS V7/872-73). He knew Floyd to be passive, nonviolent, even-tempered and never in trouble; Floyd had even babysat for his kids (RS V7/873). He knew Floyd to be dependable, doing the lawn at the A & P and all the yards in the neighborhood, and serving as the man of the house since his father became disabled before dying of cancer (RS V7/873-74).

Lela Richardson testified that she had known Floyd since he was four years old, and had known his mother and father for 27 years (RS V7/901-02). Floyd's mother was currently living with her after a recent hospital stay (RS V7/904). She knew Floyd's mother to have a serious alcohol problem, which had affected Floyd very much (RS V7/904). Floyd's father had kept him busy with the family's lawn service (RS V7/904-05). She knew Floyd to be industrious, hardworking and dependable (RS V7/902-03). His father's death had affected him, and he got in with a wrong crowd, but was not a violent kind of person (RS V7/905-06). She knew Floyd to have committed a prior crime, but that did not change her opinion of him (RS V7/907). She knew that he had a

son old enough to go to school, and that he helped to support him when he could (RS V7/906).

Floyd's mother, Pinky Floyd, testified that Floyd had worked with his father before he died of cancer in March of 1983, and that Floyd had a job of his own after his father's death (RS V7/909). She said that her son was a very nice boy, and asked the jury to spare his life (RS V7/910).

Ben Boykins testified that he had known Floyd for 15 years, through Floyd's father (RS V7/911). He knew Floyd to be industrious, dependable and a good worker with a good personality, and not violent (RS V7/911). Boykins knew that Floyd's mother had a drinking problem, but could not say whether that had an affect on Floyd (RS V7/915). Although he had less contact with Floyd after the death of his father, he did continue to see him once or twice a month after that, and did not notice any change in Floyd's personality during that time (RS V7/914).

The defense mitigation witnesses concluded with the victim's daughter, Ann Shirley Anderson, who had visited Floyd in prison and conveyed her belief that he should not receive the death penalty (RS V7/932-34). Following the testimony, the jury recommended a death sentence by a vote of eight to four (RS V7/1039).

The sentencing hearing was held Feb. 29, 1988 (RS V7/1044). Floyd addressed the court and spoke of his love for his family and his father (RS V7/1047). He accepted responsibility for his actions and expressed remorse (RS V7/1047-48). Annie Anderson also addressed the court, again expressing her resistence to the death penalty and her belief that Floyd could turn his life around in prison (RS V7/1049). Defense counsel argued against the aggravating factors submitted by the State, and recited the evidence about Floyd's character and nonviolent traits (RS V7/1050-60). Counsel also noted that Floyd had not caused any trouble while in prison, but had helped guards to calm down other prisoners; he stated that Floyd was not bitter and could still lead a constructive life (RS V7/1057). The prosecutor briefly addressed the court and then, following a recess, the court reconvened and announced the imposition of the death sentence, finding two aggravating factors (RS V7/1061, 1063, 1066-67). Although he rejected any statutory mitigating factors, the sentencing judge noted that Floyd was remorseful, desired to live within the confines of the rules while in custody, wanted to help others, and had a rapport with his children; however, the court determined that this mitigation was outweighed by the aggravating factors that applied (RS V7/1069-71).

In the appeal from the resentencing, Floyd's death sentence was affirmed. Floyd v. State, 569 So. 2d 1225 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991). Floyd filed an unverified motion to vacate his judgments and sentence in 1992, which was ultimately supplemented with a final, substantive motion for postconviction relief filed in 1998 (PC SV1/1-125). The motion was summarily denied; on appeal, this Court remanded for an evidentiary hearing on the ineffective assistance of counsel and withheld evidence claims. Floyd v. State, 808 So. 2d 175 (Fla. 2002).

Following the remand, Floyd filed an amended motion asserting that he is currently mentally retarded and that Florida's death penalty statute is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002) (PC2 V1/1-22). The State filed several responses and a case management conference was held on July 12, 2002 (PC2 V1/23-98; SV2/235-54). The court identified the claims remanded by this Court for hearing, and determined that the new motion required an evidentiary hearing on Floyd's allegation of mental retardation (PC2 SV2/238-40, 250).

The court decided that the mental retardation claim should be bifurcated, and acknowledged the need to appoint experts to

examine Floyd (PC2 SV2/250-51). Floyd’s counsel[2] stated her understanding that there are no mental retardation experts in Florida, and asked the court to use her expert from South Carolina (PC2 SV2/251-52). The judge disagreed with the comment that there were no experts in Florida, indicating he had observed such experts on this subject in the past, but agreed to consider lists from the parties suggesting up to five experts for the appointment (PC2 SV2/252). Defense counsel then advised the court that the standard test for intelligence, the WAIS-III, could only be given once every six months, and therefore if the court intended experts to conduct their own examinations, the testing would take years or be considered invalid (PC2 SV2/252-53). The court indicated that if it became necessary, he would consider rescheduling the evidentiary hearing on the mental retardation issue (PC2 SV2/253).

The parties filed lists suggesting mental health experts, and on Aug. 5, 2002, the court issued an Order appointing three experts: Dr. Michael Gamache, Dr. Sidney Merin, and Dr. Jethro Toomer (PC2 V1/101-06). The Order scheduled the evidentiary hearing for Oct. 28-29, 2002, advised the experts of the retardation issue, citing Section 921.137, Florida Statues, and

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[2]The transcript incorrectly reflects that the prosecutor expressed this concern.

directed them to the DSM-IV, the statutory definition of mental retardation in Section 916.106(2), Florida Statutes, and case law regarding retardation as mitigation (PC2 V1/105-06).

On Sept. 17, 2002, the court issued an Order identifying an issue for the upcoming status hearing set for Sept. 27 (PC2 V1/109-110). The Order indicated that an independent defense expert, not licensed in Florida, was involved in the case and that the parties should be prepared to discuss the implications at the status hearing. At the hearing, defense counsel expressed concern with the Order, indicating that the court was relying on erroneous information and wanting to know the source of the court's knowledge that the defense had hired an expert from South Carolina that was not licensed in Florida. When Judge Downey[3] asked defense counsel what information was incorrect, counsel responded that she did not need to tell the court that information, as no one had directed her to file a witness list (PC2 SV2/259-260). Counsel stated that she had not made a decision about whether to call this expert as a witness, and the judge agreed that until she decided to use the expert, his information was confidential, but if she intended the expert to testify she needed to make sure the State received a copy of

[3]Judge Downey was sitting as a substitute for Judge Luce at this status hearing (PC2 SV2/258).

any report compiled at least thirty days before the hearing, or in sufficient time for deposition (PC2 SV2/261).

Prosecutor Marie King advised the judge of another potential problem: that the court's order indicated that there may be some hampering of the court's experts ability to prepare, as intelligence testing had already been conducted by the independent defense expert (PC2 SV2/261). Judge Luce had asked the experts to report to the court whether their testing would be compromised and whether the evidentiary hearing scheduled for October would need to be continued (PC2 SV2/261-62). The State had no knowledge as to whether any testing had been conducted at that point, but had been advised by the Department of Corrections that an expert from South Carolina had visited Floyd (PC2 SV2/261-62). The State was aware that Gamache had responded to Judge Luce that he would use a different examination and could be ready for the scheduled October hearing using that information (PC2 SV2/263). The State requested that the defense provide information to all court experts regarding what testing had been conducted and the scores obtained, as these doctors were now preparing for the hearing and needed this information as soon as possible (PC2 SV2/263). Defense counsel then indicated that she had sent a letter to all three court experts on August 30, letting them know that the Wechsler-

revised and the Woodcock Johnson tests had been administered to Floyd in the last two weeks, and that they needed to adjust their examinations accordingly (PC2 SV2/266). According to defense counsel, Merin and Toomer had already seen and tested Floyd, and Gamache intended to meet with him on Oct. 4 or 9 (PC2 SV2/267).

Judge Downey indicated that the court had received letters from all three experts indicating that testing had not been compromised at that point (PC2 SV2/268-69). A letter dated Sept. 17 from Merin to staff attorney Mark Chancey asked the court to provide raw data from any defense expert testing since Merin could not conduct another Wechsler exam (PC2 SV2/269). When the judge asked if defense counsel could release the raw data, counsel indicated her problem was that the court order of Sept. 12 "put up some roadblocks," questioning the use of her out-of-state expert; counsel stated once again her objection was to the fact the court had relied on inaccurate information, but again she declined to identify what information was not correct (PC2 SV2/269-71).[4]

Defense counsel expressed concern that Judge Luce had

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[4]Defense counsel continued to assert that the judge had used faulty and incorrect information over the course of the hearing, but never identified any erroneous information or related facts inconsistent with those discussed by the court (PC2 SV2/270-71).

already determined that her independent expert was not qualified, based on improper information and relying on some ex parte communication from someone; she again questioned the source of the court's information (PC2 SV2/269-71). However, Judge Downey did not read the Order to suggest that Judge Luce had reached any such conclusion, and noted that the information was included in Merin's letter (PC2 SV2/271). He also noted that qualifications were not an issue at this point since she had not decided if she was going to use the witness (PC2 SV2/270-74). The court, having reviewed Judge Luce's orders, concluded there was no basis to believe that Judge Luce had made up his mind or in any way indicated that defense expert was not qualified (PC2 SV2/274).

Judge Downey declined to order the defense to provide information to Merin at this point, but set a deadline of Oct. 18 for all reports and witness lists to be disclosed by all parties (PC2 SV2/275-77).

The evidentiary hearing on mental retardation was thereafter held as scheduled (PC2 V10-V11). On the morning of the first day, the defense did not have any witnesses present (PC2 V10/1727). The court recessed until the afternoon; at that time, there were still no defense witnesses, but the court recognized a court appointed expert, Dr. Merin, and asked to

hear his testimony (PC2 V10/1734). Both parties were given Merin's report (PC2 V9/1713-23) just before he testified (PC2 V10/1735).

Dr. Merin testified that he had reviewed the four volumes of materials that the defense had submitted and conducted some testing on his own but used the raw data obtained by Dr. Keyes' WAIS-III examination (PC2 V10/1738). Although Merin did not see any indication that Floyd was malingering, he suspected a lack of motivation from situational depression may have affected Floyd's scores (PC2 V10/1744). Merin determined that Floyd had a verbal IQ of 75, a performance IQ of 75, and a full scale IQ that varied 68-78 (PC2 V10/1750-51). Merin felt it was important to consider Floyd's results on particular subtests in order to properly assess his intellectual functioning (PC2 V10/1751). In this case, Floyd did well, scoring in the low-normal range, in verbal and vocabulary categories, and did very poorly in math and verbal comprehension (PC2 V10/1751-54).

Merin noted that, while in prison, Floyd reads books, newspapers and magazines, and Merin reviewed a letter Floyd had written to the victim's daughter in this case, concluding that it demonstrated Floyd was "fairly bright" (PC2 V10/1754-56). The letter, which opens, "I hope this letter finds you doing well," indicates a higher level of intelligence than revealed by

Floyd’s testing, more like an IQ in the range of 85 and up (PC2 V10/1757).[5] In determining that Floyd was not mentally retarded, Merin observed that Floyd was functioning, goal directed, and relatively coherent, without any severe damage to the brain (PC2 V10/1760). Merin testified that a diagnosis of mental retardation is only justified if the subject lacks adaptive functioning, but Merin was able to identify a number of adaptive capabilities which he determined precluded a finding of mental retardation (PC2 V10/1760-65). Specifically, Merin cited Floyd’s abilities to work, make friends, pay child support, and get married; he also noted the offense itself reflected adaptive functioning, in Floyd’s properly endorsing the victim’s checks and presenting them at the bank to be cashed (PC2 V10/1760-65). Merin’s opinion was that Floyd is not mentally retarded, having a full scale IQ of 73, which placed him in the borderline intellectual functioning range according to the DSM-IV (PC2 V10/1769-70).

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[5]Floyd’s brief asserts that the State “never authenticated” this letter, implying from Gregory Anderson’s trial testimony that Anderson drafted this letter on Floyd’s behalf (Appellant’s Initial Brief, p. 11, n.10). In fact, Anderson and Floyd were only together in jail a short time, and Anderson testified that he only wrote two letters for Floyd, directed to the Florida Bar, requesting a “street lawyer” (DA V5/749; PC2 AppV2/727). These letters, on the other hand, were admitted without objection at Floyd’s initial penalty phase, represented to be letters from the defendant to the victim’s daughter (DA V6/899, V7/1015-16).

On cross examination, Merin explained that he had not completed his report earlier because he had been waiting to receive the raw data from the defense expert, which Merin ultimately got from staff attorney Chancey on Oct. 23. Merin also acknowledged writing a letter to the court describing his concerns when he learned that a defense expert, Dr. Keyes, had violated Florida law by practicing in this state without a license (PC2 V10/1781-82).

The following morning, defense counsel presented the court with a motion to disqualify the judge (PC2 V10/1820; SV1/7-25). The motion alleged that the defendant had a reasonable belief that he would not get a fair proceeding because court expert Merin had discussed the defense expert with the court (PC2 V10/1820; SV1/7-25). The court recessed to consider the motion and then denied it as legally insufficient (PC2 V10/1820-21; SV1/26-27).

Court appointed psychologist Jethro Toomer testified next (PC2 V10/1821-70). Dr. Toomer was initially contacted in Aug. 1992 by the Office of Capital Collateral Regional Counsel and administered the Beta IQ exam to Floyd (PC2 V10/1825, 1830). The Beta reflected an IQ of less than 60, consistent with Beta testing that had been conducted by the Department of Corrections (PC2 V10/1830). When Toomer tested Floyd again in 2002 pursuant

to the court appointment on mental retardation, he determined Floyd to have an IQ of 75, and attributed the improved score to the structured environment Floyd had experienced on death row (PC2 V10/1831-32). Toomer acknowledged that this score placed Floyd in the borderline range of intelligence rather than the mentally retarded range, but noted that it was necessary to also consider Floyd's adaptive capabilities before concluding whether a diagnosis of mental retardation was proper (PC2 V10/1856-57). According to Toomer, Floyd lacked appropriate adaptive functioning (PC2 V10/1839). Toomer felt that the deficits in adaptive functioning were demonstrated from the notes of Floyd's teachers reflected in his school records, where teachers described an inability to master educational skills, and a lack of self-motivation (PC2 V10/1865).[6] Toomer did not speak with any correctional officers about Floyd's current level of functioning and acknowledged that Floyd also made some "A"s in school, had letter writing skills, a work history, and "of course" could take care of brushing his own teeth, getting dressed, etc., but did not believe these or Floyd's interaction

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[6]The school records make up five pages of the four volumes of background materials. They include a two page psychological report supporting a middle school team recommendation to promote Floyd to high school; a high school record reflecting grades of 2 Fs, 2 As, and 1 C; and two pages compiling elementary and middle school grades and teacher comments (PC2 V2/212-216).

and communication skills precluded a finding of mental retardation (PC2 V10/1858-63, 1866). He determined from the school records that Floyd's intellectual deficits were evident before he was 18 years old, and therefore Floyd was mentally retarded (PC2 V10/1839).

The last court expert was psychologist Dr. Gamache (PC2 V11/1876-1952). Gamache evaluated Floyd on Oct. 9, 2002, having reviewed the background materials provided by the defense (PC2 V11/1879). He chose to administer the Kaufman Adolescent Adult Intelligence Test, as he knew another expert had used the WAIS-III (PC2 V11/1882). Gamache formed the clinical impression as Floyd took the exam that Floyd may not have been giving his full and complete effort (PC2 V11/1885-86). The testing revealed a full scale IQ score of 73 (PC2 V11/1885).

Gamache also assessed Floyd's adaptive functioning, mostly using the background information provided by defense counsel (PC2 V11/1887). Gamache noted that the records did not suggest any marked impairment in multiple areas; he observed examples of work and manual maintenance, and DOC records reflected Floyd spent his time outside in the exercise yard, reading and doing correspondence in his cell, and watching TV, which all demonstrate adaptive domains of health, leisure, self-direction, communication and home living (PC2 V11/1887-88). Specifically,

Gamache noted that Floyd never needed a caretaker to clothe, bathe or feed him, could drive a car or motorcycle, read the Bible, write letters, hold jobs, etc. (PC2 V11/1888-89). He described Floyd's letters as well-written, reasonably articulate, and reflecting communication, social, and interpersonal skills (PC2 V11/1889-90). He also noted Rex Estelle's deposition testimony that Floyd was a willing and good worker, neat and pleasant (PC2 V11/1935).

Gamache concluded that Floyd was not mentally retarded: his intellectual ability did not exceed two standard deviations below the mean, which would be 70 or below (PC2 V11/1895). Gamache testified that borderline functioning did not fall within the mentally retarded range (PC2 V11/1891). He acknowledged that subjects with an IQ slightly above 70 can be properly diagnosed with mental retardation when there is persuasive evidence of poor adaptive behavior and convincing evidence that the person is grossly impaired from an intellectual standpoint, finding that not to be the case with Floyd (PC2 V11/1892-94).

On cross examination, Gamache discounted the 1981 Beta IQ score noted in the DOC records, asserting that the Beta was not a particularly reliable instrument for individual evaluations but was developed as a quick screening tool for group testing in

the military around World War II (PC2 V11/1904). He acknowledged the need to consider whether deficits existed prior to age 18, although he considered this to be a basis to exclude adults that had suffered loss of intellectual functioning due to illness or injury from the category of mental retardation; since Floyd's functioning was not so deficient as to put him in this range, the onset prior to age 18 was not an issue in this case (PC2 V11/1944-46).

The final witness at the mental retardation hearing was defense expert Dr. Denis Keyes, a professor of special education at the College of Charleston in South Carolina (PC2 V11/1957-2030). Keyes testified that a mental retardation diagnosis starts with an intellectual exam, usually the WAIS, and must also consider adaptive functioning and onset before age 18 (PC2 V11/1965-67). The Kaufman and Stanford-Binet are also acceptable, although the Stanford-Binet has limitations based on age (PC2 V11/1968-69). Keyes agreed with Gamache that the Beta is not a good instrument for this purpose and should not be used for individualized assessment (PC2 V11/1970). Keyes testified that, in a situation as that presented here, with three experts needing to do separate evaluations, the best way to proceed is just what was done, i.e., use different tests or share raw data (PC2 V11/1975).

Keyes' testing revealed Floyd's verbal and performance IQs were 75, with a full scale IQ of 73 (PC2 V11/1986, 2010). According to Keyes, the second deviation below the mean would be a score of 70, but there is a recognized margin of error that extends the range for possible mental retardation to 75 (PC2 V11/1995). While Floyd was testing, Keyes was surprised by the skills Floyd displayed (PC2 V11/1987). He was concerned that there was evidence of neurological deficit, and he noted a report by a Dr. Crown concluding that Floyd may have brain damage, although Keyes admitted he was not a neurologist and could not be more specific about any damage that existed (PC2 V11/1987).

Keyes assessed Floyd's adaptive functioning by reviewing the background materials and administering the Vineland test to Floyd's brother, Johnny (PC2 V11/1977-78, 1988-90). The Vineland is designed to gather information about a subject's individual development from birth through age 18, such as when the subject began to speak and walk, in order to identify significant impairments (PC2 V11/2016). He also interviewed Ben Boykins and Lela Richardson, family friends, but did not feel their information was very helpful because it was anecdotal in nature and much of it related to the family rather than to Floyd specifically (PC2 V11/1988, 2014-15, 2020). Keyes acknowledged

that he had difficulty obtaining accurate information, but his assessment of Floyd's adaptive skills "convinced" him that Floyd is mentally retarded (PC2 V11/1998, 2010).

Specifically, Keyes noted Johnny's memory that Floyd once picked up his father's bowling bag, but because the bag was not zipped, the ball fell out and hit Floyd's foot; Keyes felt this was absent-mindedness that showed Floyd was not adaptive (PC2 V11/1991). Keyes stated Floyd had trouble showing up at work on time and would have been fired if his father had not owned the lawn company (PC2 V11/1992). Keyes attempted to get information about Floyd's employment at a church, going by a house three times, but could not get the information (PC2 V11/1992).[7] He noted Floyd did not have a bank account and needed his brother's help to get a driver's license (PC2 V11/1992-93). Another concern was Johnny's recall of Floyd having burned his mouth on hot food a lot, which suggested to Keyes that Floyd did not learn from his mistakes (PC2 V11/2017). According to Keyes, the records reflected that Floyd needs help to do laundry or prepare meals (PC2 V11/2017). Keyes did not believe the DOC records

[7]Rex Estelle testified at Floyd's 1988 resentencing that Floyd had been a good worker for about a year, then began having difficulties which Estelle attributed to Floyd's use of illegal drugs (RS V6/854-64). Estelle's testimony was included in the background materials provided to Keyes by defense counsel (PC2 V1/149-59).

provided a good indication of adaptive skills, since they just revealed that Floyd is able to do as he is told (PC2 V11/1997).

On cross examination, Keyes attributed the "A"s which Floyd received to "social promotion" (PC2 V11/1008-09). Keyes admitted that he was assuming the teacher or teachers involved just wanted to get rid of Floyd or accommodate his needs, although Keyes acknowledged the teacher could have accomplished this by giving Floyd a C or D rather than an A; Keyes had wanted to speak with the teachers but did not (PC2 V11/2009, 2021). Keyes offered his opinion that an injustice had occurred in this case, because the jury did not know that Floyd was mentally retarded (PC2 V11/2012). He acknowledged that experts in his profession, with the same training and experience, may conclude that Floyd is not mentally retarded, but he believed that his diagnosis was better because he had devoted his career to studying mental retardation and the other doctors did not have the classroom experience that Keyes had accrued (PC2 V11/2018-19).

Following the evidentiary hearing, the parties filed written closing arguments, and the court entered a lengthy order denying Floyd's claims of mental retardation (PC2 V12/2032-2132). Thereafter, on Feb. 19-20, 2003, the court conducted another evidentiary hearing on the issues remanded by this Court in

Floyd's prior appeal (PC2 SV3-SV4). Floyd's original trial counsel, Martin Murry, was not available, but Floyd's resentencing counsel, Robert Love, testified (PC2 SV3/304-86); as did the prosecutor, Joe Episcopo (PC2 SV3/387-417); clinical psychologist Dr. Faye Sultan (PC2 SV4/483); family friends Lela Richardson (PC2 SV4/453-65) and Benjamin Boykins (PC2 SV4/466-75) and sister Agnes Floyd (PC2 SV4/476-482); and former CCRC employees Stephen Kissinger, Theresa Walsh, Odalys Rojas, and Pamela Izakowitz (PC2 SV3/417-41, 442-49; SV4/534-39, 539-44). The State presented former St. Petersburg detective Robert Engelke (PC2 SV4/546-69), and Pinellas County criminal defense attorneys Martin Rice (PC2 SV4/572-99) and Frank Louderback (PC2 SV4/601-32).

Robert Love was appointed to represent Floyd on Feb. 10, 1987, after the case had been remanded for resentencing (PC2 SV3/305). Love started practicing law in Pinellas County in 1979, and continued to accept court appointments in capital cases until July, 2002 (PC2 SV3/353, 366). He hired an investigator to talk to defense witnesses, gather information and get subpoenas, and tried to locate Floyd's trial attorney, Martin Murry, without success (PC2 SV3/307, 309, 353). He had the court file copied, talked to Floyd, and talked to other attorneys that had handled capital cases (PC2 SV3/310-14). He

received discovery but it did not include police reports (PC2 SV3/314-15).

He prepared and found witnesses by talking to Floyd and the family (PC2 SV3/342). He specifically recalled speaking with Floyd's mother, but was not as sure about the siblings; he was aware that Floyd's siblings had difficulties with the law (PC2 SV3/342, 346-47). He investigated Floyd's life up to the time of the murder; he talked with people about how Floyd did at school, problems he had, his work history, his use of drugs and alcohol, and the lack of parenting in the home (PC2 SV3/342-43). He talked to Floyd about his general background and how he lived (PC2 SV3/343).

Love described the penalty phase theme as showing Floyd to be a good and responsible person, relatively non-violent with a solid work record (PC2 SV3/351). He spent time talking with Floyd to develop the theme and talked to his witnesses to develop the theme in their testimony (PC2 SV3/351-52). He knew he could not retry the guilt issue, but hoped to help save Floyd's life with lingering doubt (PC2 SV3/352). He tried to incorporate innocence, but his focus was showing Floyd to be salvageable (PC2 SV3/353). He thought the testimony from the victim's daughter worked well within this theme (PC2 SV3/358-59). He put on testimony he thought would be beneficial (PC2

SV3/346).

Love testified that he recalled meeting with Floyd at the jail to discuss potential witnesses and defense strategy (PC2 SV3/363). Despite multiple conversations with Floyd over the year that Love worked on the case, it never occurred to him that Floyd was not understanding; nothing alerted him to any to the need to explore Floyd's intellect (PC2 SV3/365-66). Love noted that the theme of retardation has become much more prominent in recent years, and that it was very different in 1987 (PC2 SV3/366). If it had come to his attention that Floyd was suffering from any kind of mental disability, he would have pursued it, but he never suspected that Floyd was not understanding what he was saying (PC2 SV3/382-83).

Love recalled Rex Estelle's testimony about Floyd's mood swings, but it did not raise concerns about having Floyd tested for mental mitigation; Love was aware that Floyd had marijuana on him when he was arrested, and he had made comments about drinking (PC2 SV3/344). This would not compel him to have Floyd evaluated by a drug expert at that time (PC2 SV3/345). Love and Floyd had discussed his drug and alcohol use, but Love considered this a two-edged sword in mitigation as it could have a negative impact on a conservative Pinellas jury, especially back at the time this was tried (PC2 SV3/368).

Love acknowledged that he did not obtain Floyd's school records, and was not aware that Floyd was allegedly illiterate and could not write letters (PC2 SV3/337). In fact, he recalled issues about letters Floyd had written to the victim's daughter and acknowledged the letters demonstrated an ability to read and write (PC2 SV3/368, 372). He did not hire a mitigation specialist or mental health expert, and did not recall getting hospital or prison records (PC2 SV3/340). Love stated that it is a common practice today to hire mental health experts and investigators in every capital case, noting that tactics and the law have changed over time (PC2 SV3/345, 385).

Former Assistant State Attorney Joe Episcopo testified about the standard discovery practices in the Sixth Circuit State Attorney's Office during the time that he prosecuted Floyd's case in 1984 (PC2 SV3/388, 400-402). The office only provided what was required under current law (PC2 SV3/402). Episcopo reviewed the documents admitted as Def. Ex. 2 (PC2 AppV1/716) and identified them as notes generated by the state attorney investigation which would have been held prior to getting an indictment (PC2 SV3/391, 395). They are summarizes, dictated immediately, reflecting sworn statements from the witnesses responding to state attorney subpoenas (PC2 SV3/392). They were considered work product and not provided to the defense in

discovery (PC2 SV3/394).

Floyd presented three witnesses to testify to mitigation from his general character and background. Two of these witnesses, Lela Richardson and Benjamin Boykins, had testified for the defense at Floyd' resentencing, and primarily reaffirmed their prior testimony (PC2 SV4/453-64; 466-75). The third witness, Floyd's younger sister Agnes, corroborated that their mother was an alcoholic that drank every day, although she tried to be a good mother, and their father was a hard worker and good provider (PC2 SV4/476-78). Her dad sometimes hit her mother in frustration over the mother's drinking (PC2 SV4/479). At the time of Floyd's resentencing, she was in prison on a marijuana conviction (PC2 SV4/481).

The defense also presented the testimony of Dr. Faye Sultan, a clinical psychologist from Charlotte, North Carolina (PC2 SV4/483-84). Sultan examined Floyd at his postconviction counsel's request in 1994, assessing his overall functioning and potential mitigation (PC2 SV4/496). She conducted two extensive interviews, including psychological testing, over a total of ten hours in 1994 and met with Floyd again for about two hours in 2002 (PC2 SV4/497). She initially determined that Floyd was not functioning within normal limits and that his thought processes were slow (PC2 SV4/498). She administered a number of different

tests and concluded Floyd had a full scale IQ of 68 and was functioning in the mentally retarded range (PC2 SV4/499-500). She suggested to Floyd's attorneys that neuropsychological testing might reveal some brain damage; she had "a clinical hunch" that there was something else wrong with Floyd's brain than reduced intellect (PC2 SV4/501). She reviewed volumes of background materials and concluded the most significant was a public school record indicating low IQ and a serious learning problem (PC2 SV4/503-505). She also noted DOC records also showing low IQ and discussed the affect that Floyd's alcoholic mother and hard working but occasionally violent father had on the family (PC2 SV4/511-19).

Sultan concluded that in 1984 Floyd had been under an extreme emotional disturbance or distress, based on having suffered very serious depression for many years (PC2 SV4/525). In her opinion, the testing conducted by a Dr. Crown and by Dr. Merin indicated that Floyd had some organic brain damage (PC2 SV4/525-26). She believed that there were experts available in 1984 and 1988 that could have provided this same testimony (PC2 SV4/533).

Following the evidentiary hearing, the court entered a lengthy order denying all relief (PC2 AddV/641-661). This appeal followed.

SUMMARY OF THE ARGUMENT

I. The trial court properly denied Floyd's claim that the State withheld exculpatory, material evidence from the defense. As the court below found, there was no reasonable probability of a different result had the challenged information been provided to the defense prior to trial.

II. Floyd's related claim of ineffective assistance of guilt phase counsel is not sufficiently presented. In addition, the conclusory claim that counsel should have obtained the information alleged to have been improperly withheld is without merit. Counsel did not have access to this information, and even if it had been developed, there is no reasonable probability of a different result.

III. The trial court properly denied Floyd's claim of ineffective assistance of counsel at his 1988 resentencing. The court's factual findings are supported by competent, substantial evidence, and preclude relief on this issue.

IV. The trial court properly denied Floyd's claim of mental retardation. The court's findings are supported by the evidence, and no error has been demonstrated with regard to the procedures and standards used to determine this issue at the evidentiary hearing.

V. The trial court properly denied Floyd's motion to

disqualify Judge Luce from the postconviction proceedings. Floyd’s motion seeking disqualification was untimely and legally insufficient.

VI. The trial court properly denied Floyd’s claim that Ring v. Arizona, 536 U.S. 584 (2002), rendered Florida’s capital sentencing procedures unconstitutional. This Court has repeatedly rejected this claim, and Floyd has offered no reasonable basis for reconsideration of this issue.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING FLOYD’S CLAIM THAT HE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS WHEN THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED FALSE OR MISLEADING EVIDENCE.

Floyd’s first issue alleges the trial court erred in denying his claim of prosecutorial misconduct, including allegations that the State violated Brady v. Maryland, 373 U.S. 83 (1963), during the course of his prosecution. Specifically, Floyd asserts that relief is warranted because the State failed to disclose 1) police reports suggesting there were other possible suspects in the crime; 2) police reports offering inconsistent observations about the crime scene; 3) state attorney investigation reports indicating possible impeachment evidence;

and 4) letters written to the State by witness Gregory Anderson which allegedly could have been used to impeach Anderson at trial. Furthermore, Floyd claims for the first time in this appeal that the State violated Giglio v. United States, 405 U.S. 150 (1972), and Napue v. Illinois, 360 U.S. 264 (1959), by failing to correct false testimony from Anderson regarding his anticipated benefit for his testimony.

Floyd's Brady allegations were subjected to an evidentiary hearing below. The denial of his claim involves the application of legal principles to the facts as found below; this Court must review the factual findings for competent, substantial evidence, paying deference to the trial court's findings, and review of the legal conclusions is de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998). As will be seen, the lower court's rulings involved the proper application of law to factual findings which are supported by the record, and Floyd is not entitled to any relief on this issue.

A. Police Reports re: other suspects

Floyd's first two Brady claims assert that material exculpatory information existed within undisclosed police reports compiled during the investigation of Anne Anderson's murder. At the evidentiary hearing, Def. Ex. #1 was a composite

of 28 police reports generated at the time of the murder and investigation (PC2 AddV1/715).[8] As a preliminary matter, the court below noted that, during the time of this investigation and trial, the State Attorney's Office engaged in a practice called "Millerizing," routinely redacting police reports and providing to the defense in discovery only those portions containing verbatim statements of witnesses as authorized by Miller v. State, 360 So. 2d 46 (Fla. 2d DCA 1978) (PC2 AddV/654).

Floyd initially identifies two police reports, both dated January 19, 1984 and written by Det. Gatchel, as containing Brady information. Specifically, these reports relate that a neighbor of the victim's, Tina Glenn-Avant, told Gatchel that she had observed two white men enter the victim's house in the early afternoon on Monday, January 16. According to the reports, Glenn-Avant had seen the victim outside her home around 11:00 that day, and then a couple of hours later[9] a car pulled

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[8]In the record on appeal, neither the pages nor the reports of this exhibit are individually numbered. Reports within the exhibit will be referred to by date and author.

[9]Glenn-Avant's statements about the timing of her observations were vague. The first report relates that she thought the car arrived around 1:30 or 2:00, but the second report states she thought it was 1:00 to 1:30, noting that she saw the car was still there when she put her daughter down for a nap about 1:00.

up and two men got out and were let in the front door of the victim's house. Thirty minutes to an hour later, she heard the front door slam and saw the men going quickly to the car and speeding away.

In denying relief on this claim, the court below assumed that the defense did not have this information. However, the court did not find it to be exculpatory or material:

> Assuming that at the time of the investigation, Tina Glenn-Avant was not discredited as a witness by law enforcement,[12] CCRC-S has failed to show that the State was obligated to disclose this information as contained in Detective Gatchel's supplementary police report.[13] Carroll v. State, 815 So. 2d 601, 620 (Fla. 2002)("the prosecution is not required to provide the defendant all information regarding its investigatory work on a particular case regardless of its relevancy or materiality."); Hoffman v. State, 800 So. 2d 174, 181 (Fla. 2001)(noting that the State does not have to provide all of its investigatory information to satisfy the requirements of Brady; concluding, however, that a confession by another suspect must be disclosed); Spaziano [v. State], 570 So. 2d [289] at 291 [Fla. 1991]. Moreover, despite having known about this witness and her statement for nearly 10 years, CCRC-S has failed to show that this information is material or that it could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Way [v. State], 760 So. 2d [903] at 914 [Fla. 2000]; Rose v. State, 774 So. 2d 629, 634 (Fla. 2000)(expounding on the final prong of a legally sufficient Brady claim). Accordingly, this claim is denied.
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> [12] When Detective Gatchel observed an extremely large object under her t-shirt during his initial encounter with her, she informed him that she routinely carried around a 7" butcher knife under her shirt at all times in her residence to protect her daughter and herself

> against intruders. [See Supplementary Report in Defense Exhibit 1].
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> [13] Robert Engelke, a former detective for the St. Petersburg Police Department, testified that he did not recall any further investigation of Tina Glenn-Avant other than her initial statement and the follow-up interview. [T: 292-293].

(PC2 AddV/656).

Floyd has not identified any error in the legal standards or analysis applied below, he simply disagrees with the ultimate conclusion rendered by the trial judge. However, a review of the record clearly demonstrates that the trial judge's rejection of this claim was proper. There has been no showing that the two men observed by Glenn-Avant had any connection with Anderson's murder, only speculation provided by the fact that they were in the area on the day of the murder. Such speculation is legally insufficient to compel Brady relief, and this Court has upheld the denial of relief in similar claims. Carroll v. State, 815 So. 2d 601 (Fla. 2002); Spaziano v. State, 570 So. 2d 289, 291 (Fla. 1990).

Even assuming that Glenn-Avant was telling the truth, and was correctly remembering the day and the events she described,[10]

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[10]The police report account of the interview with Glenn-Avant sounds skeptical of her statements. For example, Det. Gatchel related:

> She further indicated while she was standing with her dog out underneath the north awning, carport area of her residence, she advised the neighbor was very quiet

all of the other evidence in this case refutes any suggestion that the men she saw were involved in the murder. According to both reports, Glenn-Avant advised Det. Gatchel that the men she saw get let into the house left very quickly through the front door. However, it is undisputed that both the front door and the front door screen were bolted from inside the house, and the unlocked back door was the point of exit. In addition, Glenn-Avant's vague and uncertain time frames are at odds with the other evidence. For example, Glenn-Avant believed that she had seen the victim outside at about 11:00 that morning, but other witnesses placed the victim at church from about 9:45 to 11:30, and although she thought the two men were there around 1:00 to

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> and she could hear a lot of things going on inside the residence of the victim describing them as "scrambling noises." Asking to define her description she stated "like looking through things." Further stating "like in the kitchen." Asking her to explain how she could hear noises of people looking thru things from inside the neighbor's residence she again just indicated it was very quiet while standing under the car area and it sounded like people were going thru drawers and other things inside the house.

(1/19/84, Det. Gatchel, p.2). Gatchel also noted that Glenn-Avant carried "an extremely large holster type object under her red t-shirt" and when asked about it, she pulled up her shirt, displaying "a large holstered 'buck type' knife having approximately 6-7 inch handle and extremely large blade." She explained that she carried the knife at all times around her residence to protect herself and her daughter from intruders. When Gatchel met with Glenn-Avant at the police station, he had the knife tested presumptively for blood, with negative results.

2:00, the victim cashed a check at her bank at 1:47 so the murder was clearly after that time. Finally, her account cannot explain the Negroid hair fragments and motorcycle tire track found at the crime scene or Floyd's inability to provide a reasonable explanation of how he obtained the stolen checkbook and bloody sock.

Thus, the court below properly concluded that Glenn-Avant's undisclosed account of having seen two men was not material information to which the defendant was entitled under Brady. Floyd has failed to demonstrate any error in the court's legal or factual analysis, and this Court must deny relief on this issue.

B. Police Reports re: crime scene

Floyd also asserts that the undisclosed police reports contained exculpatory information based on discrepancies between crime scene descriptions offered in the various reports. Floyd identifies three aspects of the crime scene in particular: the victim was found laying on a fully made bed; the bottom shelf of the nightstand appeared to have had something taken from it; and inconsistent notations about which window in the bedroom showed fresh pry marks. As the court below determined, none of these comments, individually, collectively, or cumulatively with other allegedly undisclosed information, demonstrate any Brady

violation in this case.

Floyd has failed to establish that the undisclosed comments were exculpatory or material. He claims that the fact that the victim’s body was on top of a made bed calls into question the credibility of the scientific evidence about Negroid hair fragments found on the sheet and bedspread. However, his apparent speculation that the hairs must have been inside the bed before the victim was attacked is contrary to common sense and insufficient to demonstrate exculpability or materiality. Nothing in any report provides any reasonable basis to believe that the unknown hairs were located “inside” the made bed, as presumed by Floyd (Appellant’s Initial Brief, p. 51).[11]

Similarly, Floyd’s concern with Det. Engelke’s comment about something appearing to have been moved from the bottom shelf of the nightstand can hardly be exculpatory. According to Floyd, the fact that he was only shown to have stolen a checkbook means that suspicion that something else may have been taken is exculpatory. The victim’s daughter was not able to recall anything that may have been taken from the nightstand. More importantly, however, even if something were known to be

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[11]The June 14, 1984 police report by Det. Crotty noted that the FDLE analyst related “concerning the sheet and the white bedspread in the victim’s bedroom - he was able to locate some negro body hair fragments.”

missing, this information does not exonerate Floyd. He was not arrested coming out of the house, but had two days to use or dispose of anything he may have taken from the house. It is clear that things were taken from the scene and never recovered, as the murder weapon itself was never located in this case. However, the failure to affirmatively link a weapon to Floyd does not exculpate him just as the failure to establish whether or not something else was taken that could be linked to Floyd does not exonerate him.

The same is true with regard to the various statements describing pry marks and fresh pry marks on the interior bedroom window. Floyd has offered no explanation as to how any possible conflicts in the report descriptions could have been used for any purpose by the defense. There is no dispute that there were in fact fresh pry marks observed, and whether the marks were on the north wall window or the west wall window does not seem as if it could possibly make any difference at trial. Even if defense counsel could have tried to use Engelke's report to improperly impeach him on a collateral matter, this information cannot be deemed exculpatory or material.

The court below addressed the allegations regarding the crime scene investigation in its cumulative error analysis:

> CCRC-S's recitation of other allegedly undisclosed material, as listed in its written closing argument,

> is an attempt to impermissibly expand this claim and convince this court that the "cumulative impact of all of this undisclosed evidence" merits a new trial. The court acknowledges that the cumulative effect of undisclosed evidence must be considered. Way, 760 So. 2d at 913. Here, however, the cumulative effect is far from such that it affected confidence in the verdict.[14] Moreover, the court has reviewed the additional allegedly undisclosed evidence (e.g., Officer Olsen's handwritten report, Officer Newland's supplementary report) and finds the subject matter of these police reports to be immaterial, such that CCRC-S has not shown that the nondisclosure of these reports undermines confidence in the outcome of either the guilt phase or the resentencing proceeding. In fact, the details in these reports, such as Officer Olsen's hand-drawn diagram of the victim's bedroom, were discoverable by either Murry or Love. [T: 289-290].
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> [14] Pursuant to the Florida Supreme Court's directive, this court afforded CCRC-S a hearing on the Brady claims. At the hearing, CCRC-S, aside from examining Love as to whether he received certain police reports, failed to adduce any probative evidence establishing a Brady violation, as the record from the evidentiary hearing will reflect.

(PC2 AddV/660).

Once again, Floyd has failed to identify any error in the lower court's legal or factual analysis. In light of the insignificance of any possible discrepancies in the crime scene descriptions provided in the various police reports, no serious Brady claim is presented on these facts. The court below properly rejected this argument, and no relief is compelled.

C. State Attorney Investigation Reports

Floyd next discusses the existence of several documents

compiled by the State Attorney's Office describing the pretrial investigation. Specifically, he identifies "green sheet reports" that represent attorney work product regarding the investigation. He asserts that prosecutor Joe Episcopo's notes of comments from the victim's daughter acknowledging that the victim's house had been painted in fall or winter of 1983 by a white male, and from Floyd's girlfriend indicating her belief that Huie Byrd rather than Floyd committed the murder, along with information that Byrd showed deception on a polygraph examination, amounted to exculpatory, material information to be disclosed under Brady.

Once again, Floyd has failed to demonstrate any error in the denial of his claim. The victim's daughter's statement that the house had been painted is insignificant. It was well known at trial that the house had been recently painted; evidence established that the windows had been painted shut, demonstrating the need for the pry marks. The details that the painting had been done in 1983 by a white male add nothing - they do not incriminate anyone else in the murder, and do not exonerate Floyd, and therefore cannot meet the exculpatory prong of Brady.

Similarly, Floyd's girlfriend's subjective belief to the police that Floyd was not the "type of person" that would commit

murder and she would suspect Huie Byrd before Floyd cannot meet Brady standards for several reasons. First of all, since it was his girlfriend's personal feeling, it was obviously readily available to the defense. See Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000). In addition, such feelings are not relevant and could not have been used by the defense at trial. Defense counsel Love did not consider this information significant (PC2 SV3/328).

As to the related allegation that Byrd provided answers on a polygraph examination that indicated some deception, the court below properly found that defense counsel Murry was well aware of these results.

In denying relief on this claim, the court below stated:

> (b) Next, CCRC-S argues that the State failed to disclose evidence that Huie Byrd, the man who was with the defendant when he was arrested at the bank, provided deceptive responses on his polygraph. This claim was not developed at the evidentiary hearing or in CCRC-S's written closing argument. The court finds that the State's written closing argument succinctly states the reasons this claim must be denied. First, CCRC-S has failed to show that Murry did not know of this fact or that Love did not know of this fact. This much is required under the first prong of a successful Brady claim. Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2002)[sic]("a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant."). The record reflects that Murry took Detective Donald C. Crotty's deposition, during which Detective Crotty stated:

Crotty: He [Byrd] was later given a polygraph exam by Detective Fleeger (sic), which showed little signs of deception. I talked to him again, he remained with that story that he didn't know anything about the homicide or the checks.

Murry: Okay. Was the deception in the knowledge area or do you know?

Crotty: I don't know, it just showed some deception.

[Exhibit 2: Deposition of Donald C. Crotty].

Thus, Murry knew about the deception. Moreover, as evidenced by this deposition, Murry was in fact provided with discovery and certain police reports. Additionally, during this deposition, Murry exemplified his knowledge that the discovery practice at the time limited his access to certain information. The deposition transcript even reflects cooperation between Murry and the prosecutor concerning police reports.

. . .

Aside from Murry, Love testified that he copied the court file in preparation for the resentencing proceeding, which would have included Detective Crotty's deposition. [T: 25-26]. In sum, given the foregoing, CCRC-S is unable to show that the defendant was prejudiced by the nondisclosure of Detective Pflieger's police report, which contained information to the same effect. Detective Pflieger's report, dated February 6, 1984, is also included within Defense Exhibit 1.

Finally, this claim must also be denied because CCRC-S has failed to show that Byrd's deception could have been used during the guilt phase or the resentencing phase for impeachment purposes. Jones v. State, 709 So. 2d 512, 519 (Fla. 1998)("If the evidence could not have been properly admitted at trial or would not be admissible on retrial, there is no reasonable probability that the outcome of Jones' trial would have been different if the evidence had been provided to the defense."); Walsh v. State, 418 So. 2d 1000, 1002 (Fla. 1982)("Polygraph evidence is inadmissible in an adversary proceeding in this state.").

(PC2 AddV/656-58).

Floyd disputes the trial court's reasoning as unsupported by the record, citing the testimony of resentencing counsel Love that he did not think any deception could be considered minor and that he did not have this information and would have liked to pursue it. Such testimony is neither binding nor dispositive on the trial court, and where, as here, contrary evidence is submitted, the factual dispute is not an issue for this Court to resolve.

The trial court's recitation of defense counsel obtaining this information in Det. Crotty's deposition, especially in conjunction with counsel Love's testimony that he had indeed read this deposition prior to the resentencing but did not believe it to be anything important at that time, is clearly sufficient to support the lower court's findings. In addition, Floyd has never offered any explanation as to how this information could have been pursued further or used at trial. As noted below, any deception could not have been used as impeachment or otherwise admitted at trial. Simply relying on the testimony of a defense attorney that he would have liked to have been provided with information is insufficient to establish a Brady violation, particularly when contrary evidence was presented and accepted by the trial court.

The facts of this case clearly establish that there was no information included in the state attorney investigative records which was required to be disclosed to the defense under Brady. The trial court properly denied relief on this claim, and Floyd has offered no reasonable basis to disturb that ruling.

D. Gregory Anderson Letters

Floyd's final Brady allegation concerns two letters written by state witness Gregory Anderson to Detective Pfleiger and Assistant State Attorney Joe Episcopo. According to Floyd, these letters could have been used to impeach Anderson and establish that he was desperate to enter into a deal with the State for his testimony. However, the court below properly concluded that these letters were not material under Brady.

The court below concluded that the letters had not been disclosed to counsel and that they were exculpatory in nature because they could have been used to impeach Anderson; however, they were not material because Anderson was effectively cross examined and discredited by another letter he had written to his judge, showing he was a snitch and had received favorable treatment in other cases. In denying relief, the court stated:

> (c) Finally, CCRC-S asserts that the State failed to disclose certain evidence (i.e., letters written to Prosecutor Joe Episcopo and Detective Ralph Pflieger) that could have been used to impeach Gregory Anderson. Gregory Anderson was an inmate at the Pinellas County Jail in January 1984 who resided in a cell and later

in the same pod with the defendant. The undisclosed letters comprise Defense Exhibit 3.

The court finds that these letters were not disclosed. Moreover, the court finds that these letters did, in fact, possess exculpatory and/or impeachment value to the defense. However, as explained below, the court finds that the third prong of a Brady violation has not been established.

During his deposition testimony, Anderson stated that he contacted Detective Pflieger himself to report the defendant's confession. [Exhibit 3: Deposition]. Although his testimony indicated that he phoned Detective Pflieger, as opposed to writing a letter, Murry nevertheless heard that it was Anderson who first reached out to law enforcement.

During the guilt phase, Anderson testified that the defendant confessed to the murder, stating that he "stabbed the white bitch." [R1: 731-732]. Anderson then explained, on direct, that he contacted Detective Pflieger himself to report the defendant's confession. [R1: 733]. Anderson also explained that the defendant, after discovering that Anderson reported his confession to the authorities, accused him of being a "snitch." Anderson then offered the jury his definition of "snitch," after which he testified that he did not lie to the authorities concerning the defendant's confession. [R1: 735].

During a lengthy cross-examination, Murry aptly demonstrated to the jury that Anderson had lied to law enforcement by using different aliases in the past. [R1: 741-742]. Murry also elicited testimony from Anderson indicating he lied about his origin/whereabouts to law enforcement on a previous occasion. [R1: 742]. Additionally, Murry brought out on cross-examination that Anderson harbored a certain animus toward black people. [R1: 742]. Murry then impeached Anderson with prior inconsistent statements. [R1: 747]. Subsequently, Murry proceeded to quite effectively discredit Anderson by questioning him concerning his letter writing to Judge Walker (the judge assigned to Anderson's criminal cases at the time), his prior involvement as a "snitch" in other cases, and his apparent favorable treatment in prior cases. [R1: 750-784]. On his first recross, Murry accused Anderson of using derogatory language (i.e., white bitch), and imputing the use of such language to

the defendant, in an effort to inflame the predominantly white jury to find that he, Anderson, was telling the truth concerning the defendant's confession. [R1: 794].

At the resentencing proceeding, Anderson testified that the defendant confessed to him that he had "broken into this lady's house, and she came back in and scare him, and he killed her." [R2: 780-805]. On cross-examination, Love intimated that Anderson, a "snitch," was planted by the State. In response, Anderson testified: "He didn't have me in there as no kind of planned snitch, if that's what you're driving at. He said if I had heard something, to let him know." [R2: 798]. Love also inquired about Anderson's letter writing to the trial judge, which letters contained statements that Anderson would "do anything to get out of jail," which statements were similar to those contained in Anderson's letters to Prosecutor Joe Episcopo and Detective Ralph Pflieger. The entirety of this testimony, combined with the details of Anderson's extensive prior criminal record, was heard by the jury.

As such, this court concludes that CCRC-S has failed to show sufficient prejudice with respect to either the guilt phase or the resentencing proceeding, such that the letters were material or could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Way, 760 So. 2d at 914. The jury already heard that Anderson was a "snitch" who quite possibly fabricated the defendant's confession in order to curry favor with law enforcement. As an aside, to the extent that such has been intimated, the court finds that CCRC-S has not adduced any evidence to establish a Massiah or Henry violation. Massiah v. United States, 377 U.S. 201, 206 (1964); United States v. Henry, 477 U.S. 264 (1980). That is, there has been absolutely no evidence presented to suggest that the State actively participated in a scheme to plant Anderson as an informant in order to "deliberately elicit" the defendant's confession, such that the defendant's Sixth Amendment right to counsel was violated.

(PC2 AddV/658-60).

Floyd now asserts that the court's finding of immateriality overlooks the fact that courts have presumably relied on Anderson's testimony to sustain his conviction. However, the fact that a witness was impeached does not mean that his testimony must be disregarded. Even if Anderson's testimony is disregarded here, confidence in the verdict has not been undermined. In light of the strong evidence of Floyd's guilt completely untarnished in postconviction, there is no reason to lose confidence in the result of Floyd's trial.

Floyd claims that the State intentionally concealed a plan to reward Anderson once he had testified (Appellant's Initial Brief, p. 56). In a footnote, he claims Anderson's letters provide "hints of accuracy" to support a claim that U.S. v. Henry, 447 U.S. 264 (1980), was violated by improper contact between Anderson and law enforcement. Not only is the record in this case completely devoid of any evidence supporting a Henry violation, the court below specifically rejected such a claim, "to the extent that such has been intimated" (PC2 AddV/660).

Floyd's reliance on the testimony of resentencing counsel Robert Love as to the perceived importance of these letters in postconviction is misplaced. Once again, proof of a Brady violation requires more than a showing that prior defense counsel would have liked to have had further information. The

facts of this case fail to demonstrate any Brady violation, and the court below properly denied relief on this claim.

Floyd also asserts the need to consider all undisclosed information cumulatively, and cumulatively with other claims of constitutional error. However, he fails to acknowledge that the court below conducted a cumulative analysis and correctly determined that no relief was warranted (PC2 AddV/660).

Floyd remarks that Brady information does not have to be withheld in admissible form, but he fails to acknowledge that it must at least lead to something beneficial for the defense. Because none of the alleged Brady information in this case could have been used to lead to a different result, this Court must uphold the trial court's denial of relief.

E. False and/or Misleading Evidence

As a final subissue in this claim, Floyd asserts that the State also violated Giglio v. United States and Napue v. Illinois at trial, by allegedly presenting and failing to correct "false and/or misleading testimony" from witness Gregory Anderson. However, this claim is procedurally barred, as it was never presented to the court below for consideration. Since this issue was not included in Floyd's postconviction motion or otherwise argued to the court below, it is not subject to consideration in this appeal. See Shere v. State, 742 So. 2d

215, 219, n. 9 (Fla. 1999); Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988).

Even if this subissue is considered, Floyd has failed to demonstrate that he is entitled to any relief. In order to establish a Giglio violation, a defendant must show: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Guzman v. State, 29 Fla. L. Weekly S99, S101 (Fla. March 4, 2004); Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001). In this case, Floyd has identified the allegedly false testimony as Gregory Anderson's statement that he did not know if he would receive any consideration for his testimony against Floyd; that he had merely been told that his testimony would not hurt him, and he only came forward with information about Floyd's statements because he did not believe in killing people. However, Floyd has failed to show that this testimony was false or material.

Floyd asserts that the falsity of Anderson's testimony is demonstrated by the fact that Anderson had written a letter to the prosecutor on March 8, 1984, inquiring about getting a charge reduced. This letter is not inconsistent with Anderson's trial testimony. The fact that an inmate is seeking to negotiate a deal with the State for testimony in another case does not mean that the State has offered a deal to the inmate.

Anderson's testimony that he "did not know" about consideration is actually corroborated by his letter, which indicated that Anderson hoped for a deal in exchange for his testimony.

The record fails to support Floyd's claim as to the alleged falsity of Anderson's testimony. Floyd's brief does not offer any record evidence that Anderson had secured a deal from the State in exchange for his testimony at Floyd's trial. To the contrary, no such deal existed, despite Anderson's desire for one.

Although the court below did not assess this issue under the more defense-friendly materiality standard applicable to Giglio claims, see Guzman, 29 Fla. L. Weekly at S101, it is clear that this standard would not be met on the facts of this case. Under Giglio, false evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976). In this case, Floyd offers three letters written by Anderson for impeachment purposes. Even if the letter could have been used to suggest his testimony was false, Anderson was impeached by a similar letter at trial. The court below reviewed Anderson's testimony in its totality in concluding that these letters were not material for Brady purposes. Specifically, the court acknowledged that Anderson was cross

examined and impeached from a letter very similar to these letters that he had written to his trial judge. Since the letters to the prosecutor and the detective do not add anything to the information which both defense attorneys used to impeach Anderson at the trial and at resentencing, they do not establish that Anderson's testimony violated Giglio or improperly affected the verdict.

According to Floyd, Anderson's letters also demonstrate false statements provided by Det. Pfleiger and Det. Crotty. He claims that Pfleiger lied by stating that Anderson had only contacted him one time between Jan. 18 and Feb. 13, 1984, by calling him on the telephone on Feb. 10, 1984. In a footnote, Floyd states, "Of course, this was false," because Floyd wrote a letter to Pfleiger. However, the letter is undated and there was no testimony to indicate when it was written, so the mere existence of the letter hardly demonstrates that Pfleiger's comment about his only contact with Anderson before Feb. 13 to be false.

Floyd alleges that Det. Crotty testified falsely when he stated in deposition that a neighborhood canvass only turned up information about a black male having been seen in the area. Apparently Floyd believes that Crotty's failure to detail every piece of information garnered by every officer in the canvass

amounted to false and/or misleading testimony which the prosecutor should have corrected. This claim fails for several reasons. First of all, it does not appear that this statement in Det. Crotty's deposition has ever been alleged as a basis for any kind of relief prior to the filing of Floyd's initial appellate brief. Thus, the claim is barred.

In addition, a responsive answer to a vague question in a discovery deposition does not implicate Giglio. Rather, Giglio involves a prosecutor's knowing presentation at trial of false testimony against the defendant. See Giglio, 405 U.S. at 154-55; see also U.S. v. Bagley, 473 U.S. 667, at 682 (1985) (explaining that the defense-friendly standard of materiality is justified because the knowing use of perjured testimony involves prosecutorial misconduct and "a corruption of the truth-seeking function of the trial process") (citing Agurs, 427 U.S. at 104). A discovery deposition conducted by the defense is not testimony against the defendant but is a quest for information so that counsel may prepare for trial. Floyd has not cited any authority for applying Giglio to statements made during the course of a pretrial deposition.

Further, there has been no showing that Det. Crotty's statement was in fact a lie, was known to be a lie, or could have been material to the defense. In the deposition, Crotty

was asked about the crime scene, and then whether "you guys did a house-to-house in the neighborhood," to which Crotty responded that the uniformed officers were doing that prior to the detectives' arrival (DA V2/415; PC2 AddV/726). Counsel then asked, "Did anything immediately pop to light that would indicate who was about in the neighborhood?" Crotty responded, "I believe the next day some information was developed that there was a black male seen through the neighborhood by investigations done through other detectives. None of this proved out any farther than that." Floyd has not demonstrated that Crotty's statement was a lie. He has not even suggested a more appropriate answer, or any comment that he believes Giglio compelled the prosecutor to make.

In addition, as previously explained, the undisclosed information that a neighbor believed she had seen two white men around the victim's house on the day of the murder was not material for Brady purposes. On these facts, no Giglio violation can be discerned. No relief is warranted on this issue.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING FLOYD'S CLAIM THAT HE WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL.

Floyd's next issue alleges the trial court erred in denying his claim of ineffective assistance of counsel at the guilt phase of his trial. Floyd does not present any new allegations with this issue, he merely asserts that, should this Court reject his Brady claim based on a finding that defense counsel could have secured this information, his attorney was constitutionally ineffective. Such a boilerplate argument, absent any meaningful discussion or analysis of the facts involved, does not offer any reasonable basis for the granting of relief. This Court should find that this claim is not adequately presented and deny it as facially insufficient. See Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) (bare reference to argument made below is insufficient to preserve an issue for review, and claim will be deemed waived where a brief fails to support arguments to support the claim).

In addition, even if the claim is considered, no relief is warranted. Claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to show that (1) counsel's performance was deficient and fell below

the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. No deficient performance or prejudice can be seen on these facts. The court below did not reject Floyd's Brady claim due to a finding that defense counsel had this information available. Rather, the court assumed, as the State conceded, that the police reports and state attorney notes had not been provided to the defense.[12] Counsel cannot be deemed constitutionally deficient for failing to follow up on information which counsel never received.

In addition, Floyd clearly cannot meet his burden of establishing prejudice. As the court below properly concluded, the information which Floyd asserts should have been disclosed under Brady was not material for Brady purposes. The prejudice analysis for a claim of ineffective assistance of counsel is the same as the materiality analysis required for a Brady claim, i.e., the defendant must show a reasonable probability of a different result had he been represented by competent counsel. Guzman, 29 Fla. L. Weekly at S101. Since Floyd failed to

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[12]It is true that the court noted defense counsel did have the information about Byrd having shown some deception on his polygraph examination (PC2 AddV1/657-658); however, Floyd fails to identify any acts or omissions by counsel with regard to this knowledge which rendered counsel's performance constitutionally deficient.

establish materiality when this information was analyzed under Brady, these facts cannot support a finding of prejudice under Strickland.

It should be noted that this Court rejected a substantially similar claim in Floyd's last appeal. Floyd had presented a claim of ineffective assistance of counsel with regard to his postconviction claim of prosecutorial misconduct, premised on counsel's failure to object. This Court held the claim of prosecutorial misconduct to be procedurally barred, but addressed and rejected the related claim of ineffective counsel. Floyd, 808 So. 2d at 182, n. 9,10. Similarly, the claim of ineffective assistance of counsel offered in this issue is legally and factually insufficient, and therefore relief must be denied.

ISSUE III

WHETHER FLOYD RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL.

Floyd's next issue alleges that he received ineffective assistance of counsel at his 1988 resentencing. An evidentiary hearing was held on this claim below. This Court defers to the trial court's factual findings; legal conclusions are reviewed de novo. Stephens, 748 So. 2d at 1032-34; Guzman, 721 So. 2d at

1159. As will be seen, the lower court's rulings involved the proper application of law to factual findings which are supported by the record, and Floyd is not entitled to any relief on this issue.

As previously noted, the test set forth in Strickland requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695; Valle, 705 So. 2d at 1333; Rose, 675 So. 2d at 569.

Proper analysis of this claim requires that courts make

every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment; the burden is on the defendant to show otherwise. Strickland, 466 U.S. at 689.

Floyd asserts that his attorney was constitutionally deficient at his resentencing by failing to adequately investigate the case before developing his penalty theme that Floyd was a good, responsible, and non-violent person. He alleges ineffectiveness in voir dire by counsel's failure to object to the State's use of a peremptory challenge and to request additional peremptory challenges for the defense. These allegations do not compel the granting of any relief.

A. Investigation of Mitigation

Floyd's claim that his resentencing attorney, Robert Love, did not conduct an adequate investigation before settling on a defense theory to portray Floyd as a hard working, non-violent person is without merit. Initially, it bears noting that Floyd does not suggest an alternative theory that could or would have been selected had additional investigation been undertaken. The evidence which Floyd submits should have been presented is all consistent with, and to an extent cumulative to, the evidence

Love presented at the resentencing.

In denying relief on this issue, the court below stated:

> The second penalty phase/resentencing proceeding commenced after the undersigned judge denied approximately twenty-two pretrial motions filed by Love, including a request for additional peremptories and several motions in limine concerning witness testimony. [R2: 543]. A review of the entire proceeding reflects that Love presented testimony from seven different witnesses - Eula Williams, Rex Estelle, Thomas Snell, Lela Richardson, Pinky Floyd, Ben Boykins, and Ann Shirley Anderson, the victim's daughter. A review of their testimony reveals that Love presented a multifaceted picture of mitigation. In particular, Love presented the defendant as a responsible, nonviolent person who was a hard worker (i.e., worked at the church). [R2: 855, 902-903]. He elicited testimony concerning the defendant's troubled youth, and the fact that his mother was a serious alcoholic. [R2: 905]. He elicited testimony concerning the defendant's father, and how difficult his death proved to be for the defendant. [R2: 906]. Rex Estelle testified that the defendant may have turned to drugs and alcohol after his father's death. [R2: 859]. Thomas Snell, who was then a communications officer for the St. Petersburg Police Department, testified that the defendant was dependable, responsible, diligent, even-tempered, and that he became "the man of the house" when his father died. [R2: 873-874].
>
> At the evidentiary hearing conducted February 19-20, 2003, Love testified that he prepared for the penalty phase by speaking with other experienced attorneys in the community, including Tom McCoun, who was [sic] later became a magistrate judge in the U.S. District Court, Middle District of Florida, Tampa. [T: 24; 83-84]. He testified that he attempted to locate Martin Murry, original trial counsel, but that his efforts in this regard proved futile. [T: 22]. He also explained that he attempted to obtain Mr. Murry's file; however, his efforts were to no avail.[4] [T: 22]. He indicated that he spoke extensively with the defendant, James Floyd. [T: 23-24]. He explained that he conducted an investigation to pinpoint

evidence that could be used in mitigation, which included interviewing the defendant's family and friends, and discovering information concerning the defendant's background. [T: 57-64].

First, CCRC-S argues that Love was ineffective in failing to present evidence concerning the defendant's alleged mental deficiencies. On cross-examination, Love explained that he was never asked to present mental deficiency in mitigation, and that no evidence surfaced throughout his communications with, and observations of, the defendant which indicated the defendant was "slow" or mentally deficient. [T: 82-85, 93]. In concluding his testimony, Love specifically informed the court that he indeed would have presented "mental disability" in mitigation had any evidence to this effect presented itself. [T: 101-103].[5]

Second, in terms of other mitigation, CCRC-S called several witnesses in support. Leila Richardson testified that the defendant's mother was a chronic alcoholic and that she drank when she was pregnant with the defendant. She explained that the defendant, on one occasion, drank kerosene. [T: 178-182]. Benjamin Boykins testified that the defendant "didn't play with a full deck." [T: 192]. Agnes Floyd, the defendant's younger sister, testified that her mother was an alcoholic, and that, at times, her father was physically abusive to her mother. She explained, however, that only she witnessed the abuse. [T: 198-202]. She explained that she did not testify during the resentencing proceeding because she was incarcerated. [T: 203]. CCRC-S also presented the testimony of Dr. Faye Sultan, a clinical psychologist, who interviewed the defendant twice in 1994 and once in 2002. [T: 219]. She testified that the defendant exhibited below normal intelligence, that he had poor reading skills, that he suffered from depression throughout the years, and that he experienced difficulty in being a surrogate parent to his siblings. [T: 220-249].[6]

This court has thoroughly reviewed all of the evidence offered in mitigation, both that presented during the resentencing and that offered at the evidentiary hearing. Assuming without deciding that Love was deficient in failing to present the defendant's alleged mental deficiencies (or in failing

to request the defendant's school records or his DOC records in this regard), or that Love was deficient in failing to present any of the other mitigation mentioned above concerning the defendant's family background,[7] this court must conclude, based on the quantum and quality of the mitigation that was presented, and based on the evidence[8] and aggravating factors in this case, that any evidence that could have been presented to suggest the defendant was mentally deficient would not have changed the outcome of the proceedings, as is required under Strickland. See generally State v. Coney, 2003 WL 838149, 28 Fla. L. Weekly S201 (Fla. Mar. 6, 2003); see also Mendyk v. State, 592 So. 2d 1076, 1079 (Fla. 1992); Buenoano v. Dugger, 559 So. 2d 1116, 1119 (Fla. 1990). In short, the defendant has not shown that he was sufficiently prejudiced, which is only demonstrated if the deficiency was sufficient to render the result unreliable. Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

Moreover, much of the testimony presented at the evidentiary haring, such as that of Leila Richardson and Benjamin Boykins, was cumulative to that which the jury already heard. To the extent that any of the mitigation presented at the evidentiary hearing was not heard by the jury, the court finds that it would have only amounted to nonstatutory mitigation carrying little, if any, weight, and falling far short of outweighing the two statutory aggravators in this case. Gorby v. State, 819 So. 2d 664, 674 (Fla. 2002). Accordingly, this claim is denied.[9]

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[4] Stephen Kissinger, who was formerly employed by CCRC and who worked on this case, testified that he traveled to California to interview Murry. He explained that Murry told him that he did not know the location of his file. [T: 137-153].

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[5] As a separate matter, a review of the evidentiary hearing transcript at pages 97-105 will reflect that CCRC-S had Love's file in its possession at the hearing. CCRC-S said nothing about possessing his file until the conclusion of his testimony. Love

specifically testified, twice, that he asked CCRC for his file prior to the hearing. [T: 103-104]. At the hearing, CCRC-S had the burden of proving the claims raised. The court finds that CCRC-S is responsible to the extent that Love's testimony was hampered by the fact that he did not have his file to review.

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[6] Dr. Sultan's findings are of no moment to this proceeding, in part because this court has already decided the question of whether the defendant is mentally retarded, and in other part because her findings are based on her examination of the defendant in 1994 (twice) and 2002, obviously years after Love's representation of the defendant.

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[7] The court must note that the defendant took an entirely different position at his clemency proceeding on September 16, 1993. There, he testified that his family was "tight-knit," that his family would all sit around "and talk and laugh as we always did for years," and that his family had a "very strong foundation." [See State's Exhibit 3].

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[8] For example, the refutation of the defendant's original alibi; the defendant's father's lawn service business card found in the victim's house; the motorcycle tracks found in the victim's driveway on January 17, 1984 that were consistent and similar to the tires on the defendant's Kawasaki motorcycle; the sock with bloodstains that were consistent with the victim's blood but not with the defendant's blood, which was confiscated from the defendant's jacket pocket at the time of his arrest; the eight Negroid hairs found from the sweepings of the victim's clothing and bed; the defendant's possession of the victim's checkbook, the defendant's arrest while cashing one of the victim's forged checks; and the defendant's admission of the robbery and murder to cellmate Gregory Anderson.

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[9] Robert Engelke, a former detective with the St. Petersburg Police Department, testified that the

> defendant, at the time of his arrest and subsequent interview in the stationhouse, was alert, intelligent, could read and write, had no hearing or speech problems, did not appear to be under the influence of drugs and medication, and that he had no impairment physically, mentally, or verbally. [T: 268-275]. The signed rights advisement form reflects Engelke's observations.

(PC2 AddV/644-646). The court's findings are supported by competent, substantial evidence, and clearly demonstrate that Floyd is not entitled to relief.

Floyd claims that counsel's failure to obtain school, hospital, and prison records and the services of a mitigation specialist or mental health expert rendered counsel's performance deficient. However, the only additional mitigating factors that could have been developed are low intelligence and depression. The court below found that counsel had no reason to investigate Floyd's mental abilities, as no one suggested counsel needed to explore this area and counsel's extensive contact with Floyd did not reveal any signs of mental mitigation (PC2 AddV/645). While resentencing counsel Love testified below that it is a standard practice *today* to hire mental health experts and mitigation investigators for capital defendants, there was no evidence presented that this was a standard practice in 1987, constitutionally compelled by the Sixth Amendment. To the contrary, this Court has recognized that

mental health is not an issue in every case. Mills v. State, 603 So. 2d 482, 485 (Fla. 1992); Blanco v. Wainwright, 507 So. 2d 1377, 1383 (Fla. 1987). Since no facts have been offered which should have reasonably alerted counsel to the need to further explore mental health issues, no basis of ineffectiveness has been demonstrated. Melendez v. State, 612 So. 2d 1366, 1368 (Fla. 1992) ("We find nothing in the record calling Melendez's sanity or mental health into question or alerting counsel or the court of the need for a mental health evaluation; accordingly, we do not find that counsel was ineffective in failing to investigate further and present additional evidence"), cert. denied, 510 U.S. 934 (1993).

Floyd's reliance on Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003), is misplaced. In that case, the United States Supreme Court found that Wiggins' penalty phase attorney was deficient in failing to thoroughly investigate possible mitigation. Counsel consulted few sources and ignored clear signs of other mitigation in the limited records he did obtain. The Court cited ABA guidelines and standards adopted in 1989 in finding that counsel had been inattentive, and his actions fell short of the prevailing professional standards. However, Floyd was tried and resentenced prior to promulgation of the ABA standards and guidelines discussed in Wiggins, and Floyd has

cited no authority which required counsel to obtain all records and explore possible mental mitigation with an independent expert in every capital case in 1987. To the contrary, Wiggins reiterated that "reasonableness" is context-dependent and requires consideration of the conduct from counsel's perspective at the time. Wiggins, 123 S. Ct. at 2536.

As previously discussed, Floyd's counsel was not on notice as to the need to investigate mental mitigation. He did not ignore, and was not inattentive to, any facts which would have led any reasonable attorney to investigate Floyd's mental health. Absent some indication alerting counsel to the need to explore mental health or a legal standard requiring investigation in every case, Floyd's attorney cannot be deemed deficient in this regard.

B. Voir Dire

Floyd also asserts that resentencing counsel was ineffective during voir dire, by failing to adequately challenge the State's use of a peremptory strike to excuse an African American from the venire, and by failing to request additional peremptory challenges for the defense. Once again, neither deficiency nor prejudice have been shown.

The court below denied this claim as follows:

(2) Ineffective Assistance of Counsel During Jury Selection

Next, CCRC-S contends that Love, during jury selection, was ineffective for failing to object to, and thereby preserve for appellate review, the State's explanation for using a peremptory challenge to remove from the panel prospective juror Edmunds, who was the sole remaining African-American individual.

On appeal, the Florida Supreme Court, based on the record and the State's concession at oral argument, found that the State's proposed race-neutral explanation for exercising a peremptory on Edmunds was simply *not* true. Floyd, 569 So. 2d at 1229-30. That State's explanation was that Edmunds purportedly stated that 25 years was a sufficient punishment for murder. However, the record reflects that Edmunds never made such a statement. Edmunds actually stated: "I believe in it to a certain extent and, like you say, it all depends on the crime." The prosecutor then replied: "The facts, evidence?" Edmunds responded: "Yes." [R2: 600]. In addition, at the time the State offered this explanation, the State also argued: "you have to show a systematic exclusion of blacks. I don't think one black being taken from the panel - you need to show a systematic exclusion . . . ." [R2: 671].[10] After the State finished its explanation, the trial judge remarked that he could not remember whether Edmunds made such a statement, but that the record would speak for itself. The trial judge then noted Love's objection for the record and overruled it. [R2: 671].

The issue arising here is that Love never challenged the State's explanation, and thus, the issue was not preserved for appeal. This resentencing proceeding occurred in January 1988. Although case law on this issue has evolved considerably within the past two decades, see State v. Neil, 457 So. 2d 481, 487 (Fla. 1984), clarified, State v. Castillo, 486 So. 2d 565 (Fla. 1986), clarified, State v. Slappy, 522 So. 2d 18 (Fla.), cert. denied, 487 U.S. 1219, 108 S. Ct. 2873, 101 L.Ed.2d 909 (1988), limited by, Jefferson v. State, 595 So. 2d 38 (Fla. 1992), modified by State v. Johans, 613 So. 2d 1319 (Fla. 1993), modified by Melbourne v. State, 679 So. 2d 759 (Fla. 1996), the law in existence at the time was Neil and Castillo, as well as Batson v. Kentucky, 106 S. Ct. 1712 (1986). In Neil, the Florida Supreme Court departed from Swain v. Alabama, 85 S. Ct. 824 (1965),

and enunciated a new test to be applied in Florida courts:

> A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decided that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue. On the other hand, if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.

Although employing a burden-shifting analysis, the Neil test did not require Love to make a second objection after the State offered its explanation. Neil, 457 So. 2d at 486-87. Neither did Castillo or Batson. Instead, Neil, the seminal case on point, required an initial objection, after which the burden was placed on the trial court to determine if the peremptories were bing used solely on the basis of race. Id. In fact, Slappy, decided after the

resentencing in this case, discusses at length the burden on the trial judge to determine if the State's reason is legitimate. Slappy, 522 So. 2d at 22. In Slappy, defense counsel lodged his first and only objection, after which the trial court conducted the appropriate inquiry and accepted the State's explanation as sufficient. On appeal, the Third District Court of Appeal reversed, finding that the record did not support the State's explanation. Slappy v. State, 503 So. 2d 350 (Fla. 3d DCA 1987). The Florida Supreme Court agreed with the district court's conclusion, finding "no record basis for the state's explanation." Slappy, 522 So. 2d at 24.

Consistent with this trend, the Florida Supreme Court, on the direct appeal from the resentencing here, extended this reasoning and stated: "[i]f the explanation is challenged by opposing counsel, the trial court must review the record to determine record support for the reason advanced." Floyd, 569 So. 2d 1229. Further, the court added " . . . the trial court cannot be faulted for assuming it [the explanation] is so [true] when defense counsel is silent and the assertion remains unchallenged." Floyd, 569 So. 2d at 1229-30.

It appears from this court's review of applicable case law that the direct appeal from the resentencing in this case is the first time the Florida Supreme Court determined that the complaining party must lodge a second or separate objection aimed specifically at the explanation if the explanation itself is to be challenged. See also State v. Fox, 587 So. 2d 464 (Fla. 1991). A review of cases where no second or specific objection was raised after the State offered its explanation (and thus the issue was not preserved for appeal) have all cited to the direct appeal from the resentencing in this case. Bowden v. State, 588 So. 2d 225, 229 (Fla. 1991); Fotopoulos v. State, 608 So. 2d 784, 788-89 (Fla. 1992); Ratliff v. State, 666 So. 2d 1008 (Fla. 1st DCA 1996); Carter v. State, 762 So. 2d 1024, 1026-27 (Fla. 3d DCA 2000); Rimmer v. State, 825 So. 2d 304, 320 (Fla. 2002).

Given the foregoing, this court is unable to conclude that Love rendered deficient performance in failing to lodge a second or separate objection aimed specifically at the State's explanation. See Strickland v. Washington, 466 U.S. 668 (1984); Blanco

> v. Wainwright, 507 So. 2d 1377, 1381 (Fla. 1987) (the reviewing court must attempt to eliminate the distorting effects of hindsight by measuring defense counsel's performance at the time of trial under the then-prevailing professional norms). At the time the resentencing was conducted in this case, the law was such that a single objection was sufficient to put the trial court on notice. Indeed, this is what Love thought at the time. [T: 63]. It was not until the appeal from this resentencing that the additional requirement of a second or separate objection was imposed in order to preserve the issue for appeal. Consequently, the defendant has not met his burden of proving deficient performance or prejudice under Strickland. This claim is therefore denied.
>
> Next, CCRC-S alleges that Love failed to request additional peremptories after the trial court improperly refused to strike prospective juror Hendry for cause. On appeal, the Florida Supreme Court concluded that this court erred in failing to remove Hendry for cause based on his "unqualified predisposition to impose the death penalty for all premeditated murders . . . ." Floyd, 569 So. 2d at 1230. That said, the Florida Supreme Court determined that this issue, like the previous, was not preserved for appeal. Id. Although Love used a peremptory to remove prospective juror Hendry from the panel and then exhausted all of his peremptories, he never requested an additional peremptory to replace that which he used on Hendry. Id.; [R2: 671].
>
> Here, under the guise of ineffective assistance of counsel, this claim must fail because the defendant fails to show prejudice under Strickland. Assuming without deciding that it was deficient to not request an additional peremptory, there has been absolutely no showing that Love needed an additional peremptory in that a juror, unacceptable to him, served on the jury. This court notes that this claim was not developed at the evidentiary hearing. Without more, this claim is speculative, and is therefore denied.

(PC2 AddV/646-649).

The trial court's resolution of this claim was proper. Floyd asserts that the counsel's failure to adequately object to

the State's peremptory strike was based on ignorance of the law, but the Order entered below thoroughly analyzes the applicable case law and concludes that counsel's actions were not deficient in light of the existing law. Floyd has not offered any contrary legal analysis or provided case law to be considered beyond that outlined by the judge below.

Floyd's assertion that counsel should have requested additional peremptories is similarly unpersuasive. Floyd relegates this allegation to a one sentence footnote, and the lack of any meaningful argument should preclude consideration of this claim. Duest, 555 So. 2d at 852. If considered, the claim must be denied as insufficient since Floyd does not attempt to explain why additional peremptory strikes should have been requested and how they could have been used.

C. Prejudice

On these facts, Floyd has failed to establish any attorney deficiency to warrant relief. However, Strickland states if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, it is not necessary to address whether counsel's performance fell below the standard of reasonably competent counsel. 466 U.S. at 697. In this case, even if deficient performance is presumed, the lack of prejudice is clear.

Floyd has not even attempted to identify prejudice in his claim that counsel was ineffective during voir dire. He has not asserted that he was denied a fair trial or that any objectionable juror was permitted to serve.

Nor can prejudice be found in the failure to obtain records or consult a mental health expert. Floyd does not directly discuss what the records or further investigation would reveal. The litany of supposed mitigation described in Floyd's brief (see p. 75) is taken entirely from the postconviction evidentiary hearing testimony of Dr. Sultan. But her conclusion of mental retardation was rejected below, and her suggestion of possible brain damage was not persuasive. She is not a neuropsychologist, and the report she reviewed from a Dr. Crown was not accepted into evidence or considered by the court below (PC2 V12/2120). Similarly, the claim that Floyd was sexually abused as a child is not supported by any credible evidence. Although Floyd made this claim at one time to Dr. Sultan, he has provided many varied descriptions of his childhood environment, and nothing beyond this conclusory allegation has ever been provided to establish this mitigation. The remaining assertions of low intelligence and depression are the only new mitigating factors proven in postconviction, and these are not compelling and clearly would not change the result in this case when

compared with the facts of this senseless crime.

Comparable cases support the judge's conclusion below that no possible prejudice could be discerned from counsel's performance in this case, even if deficiency could be proven or presumed. In Rutherford v. State, 727 So. 2d 216, 226 (Fla. 1998), the jury had recommended death by a vote of seven to five; the judge had found three aggravating factors (during a robbery/pecuniary gain; HAC; and CCP) and the statutory mitigator of no significant criminal history. There was trial testimony of Rutherford's positive character traits and military service in Vietnam. Additional testimony in postconviction revealed that Rutherford suffered from an extreme emotional disturbance and had a harsh childhood, with an abusive, alcoholic father. This Court unanimously concluded that the additional mitigation evidence would not have led to the imposition of a life sentence in light of the substantial aggravating circumstances. Rutherford, 727 So. 2d at 226. See also Breedlove v. State, 692 So. 2d 874, 878 (Fla. 1997) (aggravating factors of during a burglary, HAC, and prior violent felony overwhelmed the mitigation testimony of family and friends offered at the postconviction hearing); Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997) (no reasonable probability of different outcome had mental health expert

testified, in light of strong aggravating factors); Tompkins v. Dugger, 549 So. 2d 1370, 1373 (Fla. 1989) (postconviction evidence of abused childhood and drug addiction would not have changed outcome in light of aggravating factors of HAC, during a felony, and prior violent convictions); Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990), (evidence of impoverished childhood and psychologically dysfunction would not change result); Mendyk v. State, 592 So. 2d 1076, 1080 (Fla. 1992) (asserted failure to investigate and present evidence of mental deficiencies, intoxication at time of offense, history of substance abuse, deprived childhood, and lack of significant prior criminal activity "simply does not constitute the quantum capable of persuading us that it would have made a difference in this case," given three strong aggravators); Routly v. State, 590 So. 2d 397, 401-402 (Fla. 1991) (additional evidence as to defendant's difficult childhood and significant educational/behavioral problems did not provide reasonable probability of life sentence if evidence had been presented); Provenzano v. Dugger, 561 So. 2d 541, 546 (Fla. 1990) (cumulative background witnesses would not have changed result of penalty proceeding). This is clearly not a case where the postconviction hearing revealed substantial mitigation that had not been presented at trial.

In order to establish prejudice to demonstrate a Sixth Amendment violation in a penalty phase proceeding, a defendant must show that, but for the alleged errors, the sentencer would have weighed the balance of the aggravating and mitigating factors and find that the circumstances did not warrant the death penalty. Strickland, 466 U.S. at 694. The aggravating factors found in this case were: committed for pecuniary gain, and committed in a heinous, atrocious or cruel manner. Floyd has not and cannot meet the standard required to prove that his attorney was ineffective when the facts to support these aggravating factors are compared to the purported mitigation now argued by collateral counsel. Therefore, this Court must deny relief on this issue.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING FLOYD'S CLAIM THAT, BECAUSE OF HIS MENTAL RETARDATION, HIS DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS WELL AS THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Floyd's next issue alleges that the trial court erred in denying his claim that his death sentence is unconstitutional because he is mentally retarded. An evidentiary hearing was held on this claim below. This Court defers to the trial

court's factual findings; legal conclusions are reviewed de novo. Stephens, 748 So. 2d at 1032-34; Guzman, 721 So. 2d at 1159.

Floyd challenges several aspects of the mental retardation ruling rendered below. He asserts that he is entitled to a jury determination of retardation; that the procedures used below to litigate this issue were flawed and improper; and that the lower court erred in relying on experts that did not have sufficient knowledge and experience about mental retardation. As will be seen, none of these allegations provide any basis to disturb the conclusion reached by the court below, and Floyd is not entitled to any relief on this issue.

A. Jury Trial

Floyd's claim of entitlement to a jury trial pursuant to Ring v. Arizona, 536 U.S. 584 (2002), on the issue of his alleged retardation must be denied. It must be noted initially that the request for a jury determination has been waived; a defendant cannot wait until postconviction proceedings to assert a purported right to a jury trial as to a particular issue. In addition, this Court has rejected the argument that Ring created a right to a jury determination on this issue. See generally, Bottoson v. Moore, 833 So. 2d 693, 695 (Fla.), cert. denied, 537 U.S. 1070 (2002). Bottoson had presented a mental retardation

issue in litigation during an active death warrant, and the trial court held an evidentiary hearing, ultimately ruling that Bottoson had failed to establish retardation. This Court rejected Bottoson's later plea that he was entitled to a jury determination on this issue.

A finding as to mental retardation does not "increase" the maximum sentence for first degree capital murder. Nothing in Ring or Atkins v. Virginia, 536 U.S. 304 (2002), supports Floyd's claim on this issue. A mental state is not an aggravating factor that makes a defendant death eligible, it is only a mitigating factor which may or may not be deserving of weight in a given case. Analytically it is no different than a question of competency to stand trial or sanity to be executed, which are properly determined by a judge. See, e.g., Hunter v. State, 660 So. 2d 244 (Fla. 1995) (competency to proceed is matter for judge). The suggestion that a jury must decide the issue of mental retardation is meritless.

B. Procedures

Floyd's attack on the procedures employed below is similarly unpersuasive. According to Floyd, the court erred in "ignoring the protocol" by appointing three experts rather than two, as required in Section 921.137, Florida Statutes, and in failing to provide standards for the appointed experts to apply. Of

course, Section 921.137 does not apply to postconviction proceedings, and Floyd has not offered any authority to support the suggestion that a trial judge has no discretion to appoint additional experts to assist with a factual determination when desired. Rather, he urges the conclusory claim that he was denied due process because the court "stacked the deck" against him in its selection of experts.

The record does not reflect that Floyd objected below to the number of experts appointed or the manner by which the court appointments took place. A discussion about the appointment of experts took place at the hearing held on July 12, 2002 (PC2 SV2/235-254). Floyd did have other concerns about the court's actions and procedures in litigating the mental retardation issue, but his current complaint about the appointed experts has not been preserved for appellate review and therefore any possible due process violation has been waived.

In addition, this is a matter clearly within the discretion of the trial judge, and Floyd has not offered any basis to support a conclusion that the judge abused his discretion in this regard below.

Floyd's assertion that the trial court failed to provide sufficient guidance to the court appointed experts is also easily dismissed. As the court below noted in addressing

Floyd’s allegations on this point in his written closing argument submitted after the evidentiary hearing, Floyd did not dispute the court’s actions until after the experts had completed testing and written their reports (PC2 V12/2129). In addition, Floyd “never once directed this court’s attention to any written standards that should have been used, nor has CCRC-S suggested standards other than those employed by the court or the experts in this case” (PC2 V12/2129).

The court below also recited the testimony from the experts indicating that they did not feel any need to contact the court for more guidance or to clarify the standards, and specifically found that the experts knew their roles and what standards to apply in their evaluations (PC2 V12/2130). Notably, Floyd’s attack on the experts whose findings were accepted by the court below does not contest their definitions or standards, but asserts that they failed to comply with their own standards when they did not address the definitional prong of onset prior to age 18.

The court below alerted the experts to the relevant issue to be litigated, the date of the hearing, the need to coordinate efforts to insure that testing was not compromised, and the definition of mental retardation, the DSM-IV, and relevant case law (PC2 V1/105-06). No further direction was needed. <u>See</u>

Bottoson v. State, 813 So. 2d 31, 33-34 (Fla. 2002) (rejecting claim that there was no definition of mental retardation in place in Florida).

C. Floyd's Alleged Retardation

In denying relief on this claim, the court below entered an extensive order (PC2 V12/2118-32). After summarizing the evidence presented, the court found:

> As explained below, the court finds that the defendant is *not mentally retarded.* In short, the defendant has not met his burden of showing either that he has significant subaverage general intellectual functioning or that he has significant deficits in adaptive functioning.
>
> As explained earlier, the test is whether the individual exhibits significantly subaverage general intellectual functioning, defined as an I.Q. of about 70 or below on a standardized achievement test, which is approximately 2 standard deviations below the mean, and exhibits significant deficits in adaptive functioning. If the defendant achieves a significantly subaverage intellectual score and exhibits significant deficits in adaptive behavior, one then looks to determine if these symptoms presented themselves before age 18. In the court's view, one does not begin with school records to determine if an adult is mentally retarded. Although at all times pertinent, these records become significant only if the defendant's general intellectual functioning is significantly subaverage and his current level of adaptive functioning is significantly impaired.
>
> Here, Dr. Gamache obtained a score of 73 on the Kaufman, Dr. Merin relied on the WAIS-III full-scale score of 73 obtained by Dr. Keyes, and Dr. Toomer obtained a score of 75 on the Kaufman Brief. The lowest of these scores is only 1.8 standard deviations below the mean. This does not meet the statutory criteria of 2 standard deviations below the mean. Moreover, both Dr. Gamache and Dr. Merin found no

evidence of any significant deficits in adaptive functioning. To the contrary, Dr. Gamache and Dr. Merin highlighted numerous specific examples of positive adaptive behaviors. The court is not convinced, based on the testimony of Dr. Toomer and Dr. Keyes, that the defendant has any gross impairment in adaptive functioning.

This court is at liberty to find one expert more credible than the next, provided that determination is supported by objective evidence found in the record. Porter v. State, 788 So. 2d 917, 923 (Fla. 2001)(giving deference to the trial court's acceptance of one mental health expert's opinion over another expert's opinion and stating "[w]e recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact").

As for a credibility determination, the court finds the testimony of Dr. Gamache and Dr. Merin to be highly credible. Dr. Merin and Dr. Gamache, both of whom are qualified experts who regularly practice in the field, and both of whom have been hired by both the prosecution and defense, found that the defendant was not mentally retarded. In particular, the testimony of Dr. Gamache was of great assistant to the court. He was articulate and precise in his responses, knowledgeable in mental retardation and in the field of psychological testing and assessment as a whole, professional in his demeanor, and he accurately defined his role in the process. His testimony on cross-examination was particularly credible. CCRC-S's attempt to discredit him on cross-examination failed in all respects. The court affords Dr. Merin's and Dr. Gamache's testimony great weight.

Conversely, for the reasons explained below, the court finds Dr. Toomer and Dr. Keyes to be less credible. As such, the court affords their testimony less weight.

Dr. Toomer concluded that the defendant was mentally retarded, not based on his administration of the Kaufman Brief, which yielded a score of 75, but on the defendant's current level of adaptive functioning. However, as he himself stated on direct-examination, his opinion on the defendant's level of adaptive functioning was based almost entirely on "background materials" that were selected and provided by CCRC-S.

Additionally, he obtained a raw intelligence score of less than 60 in 1992. Ten years later, he obtained a raw intelligence score of 75. Aside from the fact that he administered different tests (and that the Beta-R test administered in 1992 scores "slightly" lower), Dr. Toomer failed to account for the marked difference in the scores. During cross-examination, Dr. Toomer testified that I.Q. can improve "slightly;" however, he admitted that his opinion in this regard "goes against the grain [of other experts in the profession]." He conceded that any improvement is "usually motor or some improvement in the adaptive function as opposed to the I.Q."

Moreover, Dr. Toomer, on cross-examination, was vague and inspecific when asked to list the deficits in the defendant's adaptive skills that contributed to his finding of mental retardation. Essentially, Dr. Toomer stated that it was the defendant's deficits in school and employment. Yet the school records themselves show that the defendant excelled in Science and Language, and the evidence indicated that the defendant worked as a dishwasher, a custodian, and a landscaper. Finally, the court finds that Dr. Toomer's ability to remain objective during present-day testing is suspect, considering his prior affiliation with CCR in this case from 1992, and considering the fact that [he] has been hired by CCRC 3 to 4 times per year for the past 10 years, approximately.

Dr. Keyes, like Dr. Toomer, concluded that the defendant was mentally retarded. However, Dr. Keyes admitted that the raw testing data from the intelligence tests reflected borderline intellectual functioning at best, and did not render the defendant mentally retarded. It was only <u>after</u> he administered the Vineland that he came to the conclusion that the defendant was mentally retarded. However, the court questions the reliability of the Vineland test. As previously mentioned, this is a test that is given to the subject's relatives. Here, it was administered to Johnny Floyd (Junior), the defendant's brother, who clearly has reason to color his responses in an effort to save his brother's life. As noted by Dr. Merin, there is considerable room for coloring responses in the Vineland test.

Although the court found him to be a knowledgeable

expert in the area, Dr. Keyes gave inconsistent responses regarding the number of times he was qualified as an expert in a court of law. And, he conceded that he has only been qualified as an expert in Florida on two occasions. The record is silent as to the number of times Dr. Keyes has been qualified as an expert in mental retardation. Although Dr. Keyes exhibited a thorough academic knowledge of mental retardation, the details of his experience in working with mental retardation in a clinical or practical setting was noticeably absent from his testimony.

Finally, although Dr. Keyes' testimony concerning the "cloak of competency" (i.e., wanting to appear normal) was instructive, the court rejects its application here. In the context of an individual facing the death sentence, the stigma associated with being labeled "mentally retarded" would not cause such an individual to "hide" his mental retardation, when, clearly, he has much more to gain (i.e., avoiding execution) by "revealing" his retardation. If anything, the court would be more inclined to find malingering in a case such as this. Finally, the court questions Dr. Keyes' ability to objectively analyze the data, as he has apparently taken a strong position that mentally retarded individuals are routinely executed. See e.g., Dr. Denis Keyes, William Edwards, Esq., & Robert Perske, "People with Mental Retardation are Dying, Legally" Mental Retardation, Vol. 35, No. 1, (Feb. 1997).

The court finds record evidence buttressing its determination that the defendant is not mentally retarded. In volume III of the background materials that CCRC-S provided to the experts, there exists a "Psychological Screening Report" that was prepared on or about September 18, 1981. It appears to have been completed by the Department of Corrections immediately following imposition of sentence for a grand theft conviction. The psychological observations in this report indicate that the defendant appeared normal, productive, relevant, and had no significant indications of disorientation or active psychosis. The clinician preparing the report observed that there were no signs of memory impairment or impaired concentration. The report indicates that the defendant himself reported no history of mental problems. It further documents that he expressed an

> interest in vocational training and work release, and that he requested to be housed at an institution close to home. Importantly, the report indicates that the subject "appears to be functioning at a level somewhat higher than that indicated by the Beta II score."
>
> Additionally, the disciplinary reports included in the background materials also reflect that the defendant engaged in goal-directed behavior while incarcerated, and understood when and for what reasons he was being disciplined and sanctioned. The court has not ignored the school records that reflect poor academic achievement in certain subjects (i.e., A in Science, A in Language, C in Social Studies, and F in Physical Education and Mathematics). However, the court finds that a slow learner or a person who is less than astute in mathematics and spelling, but who is adaptive enough to achieve a passing grade in other subject areas, and who has achieved a score of 73 on the Kaufman, a 73 on the WAIS-III, and a 75 on the Kaufman Brief, is not mentally retarded.

(PC2 V12/2127-29).

Floyd contests this ruling by attacking the credibility decisions made by the judge below. According to Floyd, the experts that concluded he is mentally retarded were more qualified in the field of mental retardation, so the court erred in rejecting their opinions. Obviously, as noted in the Order itself, the credibility of the experts, and resolution of the conflict between opinions, is a matter to be determined by the fact-finder and not by this Court. <u>Porter v. State</u>, 788 So. 2d 917, 923 (Fla. 2001).

Floyd's assertion that the trial court erred in relying on Drs. Gamache and Merin because these witnesses were not experts is not supported by any reasonable reading of the record. The

court below found them both to be qualified experts and noted both had been hired by both the defense and prosecution in their careers (PC2 V12/2127). The court commented that Gamache in particular provided great assistance to the court, and was knowledgeable in mental retardation and in the field of psychological testing and assessment as a whole, noting Floyd's attempts to discredit him on cross examination "failed in all respects" (PC2 V12/2127).

These findings are supported by the record, which refutes Floyd's incorrect assertion that neither Merin nor Gamache had done any current research, written papers, or lectured on mental retardation (Appellant's Initial Brief, p. 77). Merin's credentials are outlined in the record, and include helping to set up a program for mentally retarded individuals at the McDonald Center in Tampa in the early 1960s, founding a center for people with learning disabilities including retardation, and doing research on mental retardation on thousands of people (PC2 V10/1736-37, 1774-77).

Gamache testified directly that he considered the diagnosis of mental retardation to be within his expertise, and has done research and published works on the issue (PC2 V11/1897). His resume may not reflect the details, but several publications listed relate directly to mental retardation (PC2 V11/1898).

Gamache has practiced clinical psychology in Florida since 1985; he has studied retardation, given classes on testing assessment and evaluation of intelligence, and considers it a significant part of his practice (PC2 V11/1876, 1898). He is certified to train other doctors to use the Kaufman test and his knowledge of other common testing instruments was corroborated by Dr. Keyes (PC2 V11/1883, 1904-05, 1926, 1969-70).

A recurring criticism of Drs. Gamache and Merin focuses on their failing to explore the prong of defining mental retardation which requires onset prior to the age of 18. Floyd highlights the fact that most accepted definitions of mental retardation include this consideration, and asserts the doctors' failure to specifically address that element of the definition renders their conclusions invalid and demonstrates their incompetence as doctors. Floyd's claim ignores the common sense explanation that a doctor that determines mental retardation does not presently exist based on intelligence and adaptive skills has no reason to assess when the retardation which he did not find must have originated. Since the authorities noted by Floyd require that all elements of the retardation definition be satisfied before a retardation diagnosis can be made, there is no reason to analyze onset before age 18 where the other criteria have not been met. Floyd's criticism is simply that

the doctors failed to determine when a man they found was not retarded became retarded; it makes no sense.

Floyd's second criticism of Dr. Merin is that he believes Merin placed too little emphasis on a school record showing Floyd tested with an IQ of 51 when he was 15 years old. Floyd notes that Merin discounted the score because it was dated and he did not know the reason for score. This was appropriate. Floyd in fact places too much emphasis on this document, which he inflates to claim that, "school counselors and teachers who had an opportunity to observe and test Mr. Floyd every day thought he was mentally retarded and the IQ scores bore that out." (Appellant's Initial Brief, p. 85). The school records do not support this statement, see PC2 V2/212-16, and there was no testimony presented below from anyone that knew Floyd when he was in school to substantiate it.

Floyd also attempts to discredit Dr. Gamache for failing to conduct a clinical interview with Floyd and failing to mention his analysis of Floyd's adaptive abilities within his written report. He asserts that Gamache failed to use either of the intelligence tests which the Department of Children and Families has preliminarily indicated may be used reliably for mental retardation testing; that Gamache lied on his CV; that Gamache was wrong to discount Floyd's school record and failing to

recognize that it provides a formal diagnosis of mental retardation; and was wrong to conclude adaptive skills could even be determined by Floyd's behavior on death row since he has spends all his time in lock down and has no free choice. None of these subjective criticisms provide any basis to reverse the trial court's findings that Gamache was credible and Floyd is not mentally retarded.

Gamache explained that he did not need to conduct a full clinical interview in order to determine whether Floyd is retarded (PC2 V11/1924-25). Floyd notes that the other experts chose to conduct such an interview, but he does not cite any evidence or authority which suggests that a clinical interview is critical to any diagnosis of retardation; he merely attacks Gamache for not having the same protocol as the other experts. This is not a basis to discount Gamache's opinion. Similarly, the lack of adaptive functioning analysis in Gamache's written report is insignificant where Gamache analyzed and testified about his interpretation of Floyd's adaptive skills (PC2 V11/1887-90, 1930-36).

Floyd's refusal to accept Gamache's explanation about his use of the title of assistant professor at the University of South Florida on his CV is petty and inconsequential (PC2 V11/1900). Gamache's refusal to read Floyd's school record as

a formal diagnosis of mental retardation is supported by a review of the record; even as quoted in Floyd's brief, the record does no more than document that Floyd was functioning in the retarded *range of intelligence* at that time. As Gamache and Floyd's favorite expert, Dr. Keyes, acknowledged, a diagnosis of retardation requires more than a finding that a person is operating within a particular range of intelligence, there must also be an analysis of adaptive skills (PC1 V11/1930, 1965). The school record upon which Floyd relies suggests, if anything, adaptive skills were normal, noting "In short, socially, James interacts like a young man a few years older than his chronological age would indicate" (PC2 V2/212). There is no express diagnosis of retardation in the report, and Gamache's refusal to read something into a record which was not there is not a sign of incompetence or dishonesty. Finally, Floyd's criticism of Gamache's reliance on Floyd's ability to read, write, watch TV, and interact appropriately when outside in the yard to demonstrate adaptive skills is unfair; although Floyd's behavior may be limited by his circumstances, the fact that he can read, write, watch TV, and interact with others is weighty. Floyd's insistence that these skills are irrelevant because he is in lock down and has no free choice does not negate his ability to perform these skills.

In addition to personally attacking the experts relied upon by the court below,[13] Floyd criticizes the court for finding the testimony of Drs. Toomer and Keyes to be less credible. Consistent with his entire theme in this issue, Floyd asks this Court to review and reweigh the testimony and, based on his subjective arguments from isolated excerpts from the evidentiary hearing, reject the testimony accepted below in favor of the testimony expressly rejected below. In addition to this being outside the scope of this Court's purview, Floyd's attempt to bolster the credibility of Toomer and Keyes is not persuasive on this record.

Although Floyd has made no effort to analyze the expert testimony on this issue cumulatively, it is apparent from a review of the record that the gap between the conclusions reached by Drs. Merin and Gamache and those of Toomer and Keyes is not as wide as Floyd leads this Court to believe. In fact, all four experts testified consistently about Floyd's intellectual functioning. Despite all Floyd's protests about

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[13]Floyd's brief contains a number of unsupported and unwarranted personal attacks against Drs. Gamache and Merin. The misrepresentations such as those stated in Appellant's Initial Brief, p. 97, accusing these doctors of giving opinions based on false evidence and being "intellectually dishonest" by failing to review all of the provided background materials, are unprofessional and should not be tolerated where, as here, no good faith basis exists for the accusations.

the procedures employed, the type of tests used, and the varying levels of expertise, each expert found that Floyd's IQ to be 73-75 (Dr. Merin at PC2 V10/1750-51 [full scale IQ of 75 using Dr. Keye's raw data from WAIS-III]; Dr. Toomer at PC2 V9/1709, V10/1832 [full scale IQ of 75 using Kaufman Brief Intelligence Test]; Dr. Gamache at PC2 V11/1885 [full scale IQ of 73 using Kaufman Adolescent Adult Intelligence Test]; and Dr. Keyes at PC2 V11/1986 [full scale IQ of 73 using WAIS-III]).

Therefore, the individual diagnoses with regard to mental retardation turned on the different conclusions as to Floyd's adaptive functioning. Despite this being the critical difference in the opinions rendered, Floyd spends little time addressing this issue or analyzing the different approaches taken by the experts, choosing instead to focus his argument on alleged shortcomings in the qualifications of the experts. To an extent, this assessment requires some subjective creativity when a defendant is on death row. Bearing in mind that the classification of mental retardation was created by educators as a tool to help get children a proper education, the adaptive functioning is ideally assessed by an objective instrument completed by individuals familiar with a subject's life skills as demonstrated on a daily basis (PC2 V11/1958, 2016).

In the instant case, Dr. Merin assessed adaptive functioning

by reviewing the backgrounds materials provided by Floyd's counsel, noting that Floyd's history demonstrated an ability to work, make friends, pay child support, get married while in prison, read books, newspapers, magazines, and write "fairly bright" letters (PC2 V10/1754-56, 1760-65). He also noted that the facts of Floyd's crime required adaptive functioning, including cashing checks (PC2 V10/1765). Merin concluded that Floyd's records did not indicate he was unable to adapt as would be necessary for a finding of mental retardation (PC2 V10/1760).

Dr. Toomer concluded that Floyd had the necessary deficits in adaptive functioning to be classified as mentally retarded (PC2 V10/1839). Toomer acknowledged that Floyd's letter writing reflected some skills, but not adaptive functioning (PC2 V10/1958-59). Toomer did not believe Floyd's work history demonstrated adaptive functioning, because mentally retarded people can hold jobs and Floyd's jobs only required repetitive or redundant activities rather than abstract thinking (PC2 V10/1860-61). Toomer also acknowledged that "of course" Floyd can take care of himself, with the skills to brush his teeth and get dressed, but noted that a subject can have these skills and still be retarded (PC2 V10/1862-63). He did not interview any Department of Corrections personnel about Floyd's current

adaptive functioning, but concluded that the necessary deficits existed based on reading accounts "by teachers and others describing his almost deficit functioning in early years," particularly in terms of interaction with peers, inability to master educational and employment skills (PC2 V10/1865-66). The specific records to support this characterization of Floyd's abilities are not identified by Toomer.

Dr. Gamache's conclusion that Floyd possessed sufficient adaptive functioning to avoid a mental retardation diagnosis was based primarily on the background materials provided by Floyd's attorney (PC2 V11/1887). He stated that generally, Floyd's past conduct and behavior did not suggest any marked impairment in multiple adaptive functioning (PC2 V11/1887). Specifically, he noted Floyd's ability to work and that the prison records reflected Floyd used the outside exercise yard regularly and spent significant time in his cell reading, doing correspondence, or watching TV, going to the adaptive domains of health, leisure, self-direction, communication, and home living (PC2 V11/1887-88). Gamache also noted that there was no evidence that Floyd ever needed caretaking assistance; the lack of impairment in self-care abilities was demonstrated by his ability to perform basic care functions without assistance (PC2 V11/1888). Floyd's abilities to drive a motorcycle, read his

Bible, write letters, and hold down a job all support a finding of sufficient adaptive functioning (PC2 V11/1888-89). Gamache reviewed two letters written by Floyd and concluded that they were well-written and reasonably articulate, reflecting communication skills, social skills, and interpersonal skills (PC2 V11/1889-90).[14]

Dr. Keyes analysis of Floyd's adaptive functioning consisted of reviewing background records and interviewing people that knew about Floyd's functional development (PC2 V11/1977-78). He also administered the Vineland Assessment Scale to Floyd's brother, Johnny[15] (PC2 V11/1989-90). According to Keyes, Johnny's recollections about Floyd as a child supported a finding that Floyd's adaptive functioning was specifically impaired. The examples noted by Keyes were Johnny's memory of Floyd burning his tongue "a lot," and a time when Floyd dropped

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[14]Floyd's suggestion that these letters may have been written by Gregory Anderson at Floyd's request is refuted by the record. Anderson only wrote two letters for Floyd, both directed to the Florida Bar seeking a "street lawyer" to replace Floyd's public defender prior to trial (DA V5/749). The letters offered by the State for consideration on this issue are letters which were admitted at Floyd's initial penalty phase as letters he had written to the victim's daughter (DA V7/1015-16).

[15]Keyes also spoke to Ben Boykins and Lela Richardson, two family friends, but did not complete a Vineland questionnaire for them because their memories were not strong and the information they provided was largely anecdotal (PC2 V11/2020).

his father's bowling ball on his foot (PC2 V11/1991, 2016).[16] According to Keyes, Floyd's repeatedly burning his tongue showed that he did not learn from his mistakes, and the bowling ball incident showed Floyd was absent-minded and therefore not adaptive (PC2 V11/1991, 2016-17). He was not able to obtain information about Floyd's job at the Baptist church,[17] but he considered the fact that Floyd had difficulty showing up for work on time as evidence of adaptive impairment (PC2 V11/1992). Keyes did not believe that the DOC records offered a good indication of Floyd's adaptive skills, as they just reflected that he did what he was told to do (PC2 V11/1997).

Floyd's current criticisms of the credibility determinations made below are insufficient to establish any error in the proceedings or compel a conclusion that Floyd is in fact mentally retarded. The trial court's factual findings with regard to this issue are supported by substantial, competent evidence, and Floyd's subjective disagreement with the ultimate

[16]Keyes also noted that Floyd would "eat odd stuff," but agreed that Floyd's refusal to eat meatloaf was "not necessarily non-adaptive" (PC2 V11/2017).

[17]Keyes testified that he went by a house several times to get information, without success. According to testimony presented at Floyd's resentencing, he was a responsible, hard worker for awhile, but was suspected of taking drugs following his father's death and was fired because he was believed to be involved in thefts at the church (RS V6/855-62).

conclusion reached does not provide a basis to reject these findings. Other than his complaints about being denied a jury trial and the alleged improprieties in the procedures used, Floyd has taken no issue with the legal standards applied by the court below. Absent any demonstration of legal or factual error, this Court must affirm the ruling below and deny relief on this issue.

ISSUE V

WHETHER THE LOWER COURT ERRED IN REFUSING TO RECUSE ITSELF FROM THE POSTCONVICTION PROCEEDINGS.

Floyd's next issue alleges that Judge Luce erred in denying Floyd's motion to disqualify. The standard of review from the denial of an initial motion to disqualify is de novo. Sume v. State, 773 So. 2d 600, 602 (Fla. 1st DCA 2000).[18] On the facts of this case, Floyd has failed to demonstrate any error in the denial of his motion.

Floyd's motion to disqualify was filed in open court on October 29, 2002 (PC2 V10/1820-21). Floyd alleged that Judge

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[18]Although this Court has applied an abuse of discretion standard to review claims of disqualification pertaining to a successive judge, see King v. State, 840 So. 2d 1047, 1049 (Fla. 2003), the First District in Sume concluded the proper standard on an initial motion to disqualify, as in this case, to be de novo.

Luce's disqualification was required because one of the court appointed experts, Dr. Merin, had improperly communicated with the judge about a defense expert (PC2 SV1/7-25). A review of the record demonstrates that the motion was properly denied as facially insufficient.

It must be noted initially that Floyd's motion could have been properly denied as untimely. Floyd's attorney was aware of communication to the circuit court by appointed expert Dr. Merin at least by September 27, 2002, when a status hearing was held before the Honorable Judge Downey, who was substituting for Judge Luce for purposes of that hearing only (PC2 SV2/258). There was a discussion at that hearing about a letter Merin had written to court staff attorney Mark Chancey (PC2 SV2/269-272). Floyd's attorney was clearly incensed and voiced her concerns at that time, stating that Merin had no business discussing the qualifications of her expert with the court (PC2 SV2/272). Judge Downey did not believe there was a reasonable basis for the concerns expressed (PC2 SV2/272-274).

It was not until over a month later, after Merin had testified at the evidentiary hearing, that Floyd filed his motion to disqualify Judge Luce based on these same facts (PC2 V10/1817, 1820; SV1/7-25). Because of the delay in seeking to disqualify the judge, Floyd's motion should have been denied as

untimely. Fla. R. Jud. Admin. 2.160(e); Willacy v. State, 696 So. 2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997).

In addition, the motion was properly denied as legally insufficient. Floyd has provided no authority which supports his claim that a reasonable fear of being denied a fair hearing can arise from these or similar facts. There is no question that the court was communicating independently with the appointed experts, as was necessary to insure that the experts could accomplish what they needed to do to be prepared to testify regarding Floyd's alleged retardation. Floyd's counsel had expressed concern over the fact that several experts were involved, and they needed to be aware of what tests the other experts were conducting in order to avoid problems with duplication and practice effect (PC2 SV2/252-253). The fact that a court appointed expert contacts the staff attorney about a legitimate concern encountered in complying with the appointment order is not surprising or improper and did not compel Judge Luce's disqualification.

Case law demonstrates that no meritorious basis for disqualification has been offered on these facts. This Court has consistently rejected claims that disqualification is required even where a party has ex parte contact with the judge. In Hardwick v. Dugger, 648 So. 2d 100, 103 (Fla. 1994), this

Court rejected the claim that a judge's contact with the State requesting a change on the date provided in a proposed order amounted to an improper ex parte communication. Similarly, a judge's request to the State for the preparation of an order did not require disqualification in Swafford v. State, 636 So. 2d 1309, 1311 (Fla. 1994). And in Barwick v. State, 660 So. 2d 685, 692 (Fla. 1995), an allegation that the judge and prosecutor held a colloquy outside the presence of the defense regarding the need for a hearing on a defense motion for a psychiatrist was ruled insufficient to require disqualification. See also Diaz v. Dugger, 719 So. 2d 865, 876 (Fla. 1998) (noting alleged ex parte communication was with judicial assistant, not judge).

In the instant case, the only action the judge took with the information provided by Merin was to notify the parties that it was an issue they should be prepared to discuss at the next status conference. Furthermore, the particular information related by Merin was later explored when Floyd called his expert, Dr. Keyes, as a witness; the judge did not receive any information from Merin's communication beyond what was properly admitted for the court's consideration on cross examination. No reasonable person would believe that these facts would interfere with Floyd's ability to receive a fair hearing.

Unsubstantiated, conclusory allegations of an improper ex parte communication do not require judicial disqualification. See Valle v. State, 705 So. 2d 1331, 1334 (Fla. 1997) (insufficient allegation of ex parte communication where judge and prosecutor were seen leaving chambers together during trial). A factual basis for disqualification is insufficient where it relies on speculation or a subjective fear of impartiality. 5-H Corporation v. Padovano, 708 So. 2d 244, 248 (Fla. 1997); Fischer v. Knuck, 497 So. 2d 240, 242 (Fla. 1986).

It bears noting that a similar claim was rejected by this Court in Floyd's prior appeal. Floyd had previously moved to recuse Judge Luce following the summary denial of his initial motion for postconviction relief, alleging there had been an improper communication with the State Attorney's Office. This Court denied the claim in a footnote, finding that Floyd had failed to establish a well-grounded fear that he would not receive a fair hearing, and citing Correll v. State, 698 So. 2d 522, 524 (Fla. 1997), and Quince v. State, 592 So. 2d 669, 670 (Fla. 1992). Floyd, 808 So. 2d at 181, n. 11. These authorities also support the denial of relief on the more recent motion to recuse.

The only authorities cited in Floyd's argument on this issue are Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988), and Rogers v.

State, 630 So. 2d 513 (Fla. 1993), neither of which is remotely similar to the facts at hand. See Suarez (judge alleged to have made extrajudicial statements to newspaper after defendant's death warrant had been signed expressing special interest in defendant's speedy execution); Rogers (judge erred in protesting facts in denying disqualification motion rather than limiting inquiry to legal sufficiency of motion). Thus, neither of these cases provide any support for Floyd's current claim.

The court below properly denied the motion to disqualify, and no relief is warranted on this issue.

ISSUE VI

WHETHER FLOYD'S CONVICTION AND SENTENCE ARE UNCONSTITUTIONAL UNDER RING V. ARIZONA.

Floyd's next issue alleges that his conviction and death sentence are unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). The court below denied this claim, citing Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002) (PC2 AddV1/661). This is a purely legal issue which is reviewed de novo. Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002).

Floyd cannot prevail on this issue for several reasons. First, a challenge to the constitutionality of the sentencing

statute should have been raised on direct appeal, and is not appropriate in a postconviction challenge. Hall v. State, 742 So. 2d 225, 226 (Fla. 1999); LeCroy v. Dugger, 727 So. 2d 236, 241, n. 11 (Fla. 1998). No Sixth Amendment claim was presented in Floyd's direct appeal, and this issue is procedurally barred.

In addition, Floyd has offered no basis for applying Ring retroactively to his 1984 trial or 1988 resentencing. In fact, most courts have ruled that Ring is not subject to retroactive application. See In Re Johnson, 334 F.3d 403, 405, n.1 (5th Cir. 2003) (noting that while the Court need not reach the issue, "since the rule in Ring is essentially an application of Apprendi, logical consistency suggests that the rule announced in Ring is not retroactively available"); Moore v. Kinney, 320 F.3d 767, 771, n.3 (8th Cir.) (en banc) ("Absent an express pronouncement on retroactivity from the Supreme Court, the rule from Ring is not retroactive"), cert. denied, 123 S. Ct. 2580 (2003); Szabo v. Walls, 313 F.3d 392, 398-99 (7th Cir. 2002); Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir. 2002); Sibley v. Culliver, 243 F.Supp.2d 1278 (M.D. Ala. 2003); State v. Lotter, 664 N.W.2d 892 (Neb. 2003); Colwell v. State, 59 P.3d 463 (Nev. 2002); State v. Towery, 64 P.3d 828, 830 (Ariz. 2003); contra, State v. Whitfield, 107 S.W.3d 253 (Mo. 2003); Summerlin v.

Stewart, 341 F.3d 1082 (9th Cir.), cert. granted, 124 S. Ct. 833 (2003).

Retroactivity is not appropriate whether the issue is analyzed under Teague v. Lane, 489 U.S. 288 (1989),[19] or Witt v. State, 387 So. 2d 922 (Fla. 1980), which allows retroactivity only when a decision of fundamental significance so drastically alters the underpinnings of a case that "obvious injustice" exists. See New v. State, 807 So. 2d 52 (Fla. 2001); Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001) (court must consider the purpose served by the new case, the extent of reliance on the old law, and the effect on the administration of justice

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[19] In Teague, the United States Supreme Court announced that new constitutional rules of criminal procedure will not be applicable to cases which have become final before the new rules are announced, unless they fall within an exception to the general rule. 489 U.S. at 310. A case announces a new rule when it breaks new ground or imposes a new obligation on the state or the federal government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final. Id. at 301.

There are two exceptions to the general rule on non-retroactivity. First, a new rule should be applied retroactively if it places a certain kind of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. Id. at 311. The second exception, derived from an earlier view by Justice Harlan, requires that the new rule must "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." Thus, this exception is limited in scope to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." 489 U.S. at 311-313.

from retroactive application). Floyd cannot show that adoption of Ring satisfies these criteria. See Towery, 64 P.3d at 835-836 (finding Ring is not subject to retroactive application under Allen v. Hardy, 478 U.S. 255 (1986), applying a test similar to Witt).

Of course, Floyd is also not entitled to relief on the merits of his claim. This Court has repeatedly rejected his argument that Ring invalidated Florida's capital sentencing procedures. See Duest v. State, 855 So. 2d 33, 49 (Fla. 2003); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003) (rejecting Ring claim in a single aggravator (HAC) case); Porter, 840 So. 2d at 986; Bottoson, 833 So. 2d at 693; King, 831 So. 2d at 143. This Court has consistently maintained that, unlike the situation in Arizona, the statutory maximum sentence for first degree murder in Florida is death. See Mills v. Moore, 786 So. 2d 532, 536-538 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001); Porter, 840 So. 2d at 986; Shere v. Moore, 830 So. 2d 56, 61 (Fla. 2002) ("This Court has defined a capital felony to be one where the maximum possible punishment

is death"). Because Ring holds that any fact which increases the penalty beyond the statutory maximum must be found by the jury, and because death is the statutory maximum for first degree murder in Florida, Ring does not establish Sixth Amendment error under Florida's statutory scheme. In addition, Floyd's jury convicted him of forgery and theft charges, adding the weight of any needed jury verdict to the aggravating factor of pecuniary gain.

Floyd acknowledges that this Court has rejected this claim, but maintains without further discussion that Florida's death penalty statute violates the Sixth Amendment as interpreted in Ring. As Court has repeatedly recognized, Ring provides no basis for condemning Florida's capital sentencing statute or disturbing the conviction and sentence imposed in this case. Because Floyd offers no reason to recede from the many decisions rejecting this claim, relief must be denied on this issue.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the trial court's denial of Floyd's motion for postconviction relief must be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to John P. Abatecola, Assistant CCRC, 101 N.E. 3rd Ave., Suite 400, Fort Lauderdale, Florida, 33301, this ______ day of April, 2004.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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