IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-865

LOWER TRIBUNAL Nos. CRC 84-00578 CFANO,
CRC 84-00589 CFANO

JAMES FLOYD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Floyd's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied Mr. Floyd's claims after an evidentiary hearing.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and page number(s) following the abbreviation:

"R." – record on direct appeal to this Court;

"RS." - record on appeal after the second sentencing;

"PC-R1." - record on appeal after postconviction summary denial;

"PC-R." – record on appeal after an evidentiary hearing;

"PC-S." - supplemental record on appeal after an evidentiary hearing.

"D-Ex." - Defense exhibits entered at the evidentiary hearing and made part of the postconviction record on appeal.

REQUEST FOR ORAL ARGUMENT

Mr. Floyd has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr.

Floyd, through counsel, urges that the Court permit oral argument.

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STATEMENT OF THE CASE

On March 6, 1984, Mr. Floyd was charged by indictment with one count of first-degree murder and related offenses (R. 6-7). He pled not guilty. After a jury trial, Mr. Floyd was found guilty on August 23, 1984 (R. 883-885). The jury recommended death by a vote of seven (7) to five (5).

On August 27, 1984, the trial court imposed a sentence of death on the count of first-degree murder and consecutive sentences of five years imprisonment on each of the nine related counts (R. 950-951).

On direct appeal, the Florida Supreme Court affirmed Mr. Floyd's convictions, but overturned his sentence of death because: (a) the trial court improperly found the cold, calculated and premeditated aggravating factor; (b) the trial court improperly found the murder to prevent arrest aggravating factor; and (c) the trial court failed to instruct the jury adequately about non-statutory mitigating factors. Floyd v. State, 497 So. 2d 1211 (Fla. 1986).

Mr. Floyd's second sentencing hearing was held on January 12-14, 1988 before Circuit Court Judge Richard A. Luce. On January 14, 1988, the jury by a vote of eight (8) to four (4) returned an advisory recommendation of death (RS. 1039).

On February 29, 1988, the trial court imposed a sentence of death, stating that his personal belief was that the Florida Supreme Court incorrectly prevented him from doubling aggravators (RS. 1066); the Florida Supreme Court was

incorrect in specifically finding that the murder to prevent arrest aggravating factor was not present in this case (RS. 1066); and that the Florida Supreme Court was incorrect in finding that the cold, calculated and premeditated aggravating factor was not present in this case (RS. 1068-1069). The trial judge said he would ignore these aggravating factors, notwithstanding his personal opinions. The trial court found two aggravating factors[1] and no mitigating ones, statutory or non-statutory (R. 1072). The Florida Supreme Court affirmed Mr. Floyd's second sentence of death, Floyd v. State, 569 So. 2d 1225 (Fla. 1990).

Mr. Floyd's initial Fla. R. Crim. P. 3.850 motion was filed on August 17, 1992. Amended motions were filed August 1, 1994, April 9, 1998 and November 13, 1998. On July 21, 1999, the court issued an order summarily denying Mr. Floyd an evidentiary hearing on all of his claims. On August 2, 1999, counsel for Mr. Floyd filed a motion to set aside and/or reconsider order, arguing that the trial court relied on *ex parte* communication with the State Attorney to deny Mr. Floyd relief. Mr. Floyd also filed a Motion to Disqualify Judge based on the improper conduct of the State and the judge. The trial court denied all of Mr. Floyd's motions (PC-R1. 935). Mr. Floyd filed a Notice of Appeal (PC-R1. 937).

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[1]The aggravating factors were that the murder was committed for financial gain and it was heinous, atrocious and cruel (RS. 332-337).

While the case was pending in the Florida Supreme Court, Florida Governor Bush signed into law a statute that prohibits the execution of the mentally retarded, Fla. Stat. Sec. 921.137. Mr. Floyd filed a motion in the Florida Supreme Court seeking to brief the issue as it pertained to Mr. Floyd's case.

On January 17, 2002, the Florida Supreme Court ordered that Mr. Floyd was entitled to an evidentiary hearing on trial counsel's effectiveness at both the guilt and penalty phases of his trial and on his Brady claim. Floyd v. State, 808 So. 2d 175 (Fla. 2002). The Court denied the motion to file supplemental briefing on the mental retardation claim without prejudice to file the claim in the trial court on remand. Floyd v. State, 808 So. 2d 175 (Fla. 2002).

Following the remand, on April 15, 2002, Mr. Floyd filed an Amended 3.850 motion. This motion pertained to mental retardation issues as well as a Ring claim. A Huff hearing was conducted on July 12, 2002 (PC-S. 235). On July 17, 2002, the circuit court issued a Case Management Order, which granted a bifurcated evidentiary hearing.[2]

On October 21, 2002, Mr. Floyd filed in the circuit court a Motion to Stay Proceedings Pending Adoption of Rules of Procedure by the Florida Supreme Court in relation to mental

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[2]The first hearing would concern the claims in Mr. Floyd's amended motion relating to mental retardation (PC-R. 99). The second hearing would related to claims remanded by the Florida Supreme Court (PC-R. 100).

retardation determinations (PC-R. 1681). The motion was denied on October 23, 2002 (PC-R. 1696). Subsequently, on October 23, 2002, Mr. Floyd filed in the Florida Supreme Court a Petition Seeking to Invoke this Court's All Writs Jurisdiction[3] as well as Motion to Stay Proceedings.[4]

On October 28-29, 2002, an evidentiary hearing was held in the circuit court regarding Mr. Floyd's claim that he was mentally retarded (PC-R. 1724). During the hearing, Mr. Floyd filed a motion to disqualify the judge due to improper *ex parte* communication with a court appointed expert, Dr. Sidney Merin (PC-S. 7-25). The court denied the motion (PC-S. 26-7).

Following an Order by the circuit court finding that Mr. Floyd was not mentally retarded (PC-R. 2118-2131), on December 31, 2002, Mr. Floyd filed a Notice of Appeal (PC-R. 2133). On January 21, 2003, the State moved to dismiss the aforementioned appeal on the basis that the Order was an interlocutory ruling, as the postconviction proceedings had not yet been completed.[5] On January 29, 2003, Mr. Floyd filed a Motion to Consolidate as well as a Motion to Stay

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[3]An amended petition was filed on October 23, 2002. On March 14, 2003, this Court issued an order denying Appellant's amended petition seeking to invoke the Court's all writs jurisdiction. Floyd, Et Al. v. Charles J. Crist, Jr., Etc., Et Al, Case NO SC02-2295 (March 14, 2003).

[4]This motion was denied by the Florida Supreme Court. Floyd v. State, Case NO SC02-2295 (October 28, 2002).

[5]An evidentiary hearing was set for February, 2003, on additional claims remanded by this Court following a postconviction appeal.

Proceedings in the Florida Supreme Court, until after oral arguments were heard in the case of Burns v. State, Case No. SC01-166, an argument which concerned mental retardation.

On February 13, 2003, the Florida Supreme Court granted the State's motion to dismiss without prejudice to raise the claim again upon completion of the circuit court postconviction proceedings. Floyd v. State, 839 So. 2d 698 (Fla. 2003) On that same day, the Court denied the Motion to Consolidate. Floyd v. State, Case NO SC03-2 (February 13, 2003).

On February 19-20, 2003, the circuit court held an evidentiary hearing on Mr. Floyd's remanded claims, which included Brady and ineffective assistance of counsel issues. On May 1, 2003, the lower court issued an order denying relief. This appeal follows.

STATEMENT OF THE FACTS

THE TRIAL

> **"It's a circumstantial case. I've said that all along. The State hasn't tried to hide a single thing**."

(R. 827)(Excerpt from prosecutor's closing argument)(emphasis added). Mr. Floyd's conviction did not rest on any physical evidence from the crime scene. Mr. Floyd's conviction was not secured through eye witness testimony placing him at the victim's residence at any time, much less the time of the murder. Mr. Floyd's conviction rested on suggestive and circumstantial evidence.

There was testimony that motorcycle tire marks by the victim's house were similar in tread design to the ones on Mr. Floyd's motorcycle (R. 673-82). However, it was acknowledged that the tread design was a quite common one found on Japanese motorcycle street bikes (R. 680). There was testimony that Negroid hair fragments were found on the bed spread, bed sheets and sweater of the victim (R. 701-3). Other than the fact that Mr. Floyd is an African American, no evidence was presented that these hairs belonged to him or, even more tellingly, that these hairs were even similar in nature to Mr. Floyd's hairs.

There was testimony that an old business card from Suncoast Lawn Service was discovered in the victim's belongings, with the owner of the Service being listed as Johnnie Floyd (R. 555, 559). The names "James" was handwritten in the upper right corner of the card (R. 1002). The victim's daughter identified the handwriting as her father's, and she testified that he had been dead for at least eight years (R. 561-2). She was not aware of anyone from Suncoast Lawn Service having done work for her mother (R. 559). There was simply no evidence that Mr. Floyd had ever been in the victim's residence.

There was additional testimony that, following Mr. Floyd's arrest, a sock with a brown substance on it was found in Mr. Floyd's jacket (R. 514-15). Testing on the sock indicated that it was the same blood type as the victim, type

O (R. 687-8). No evidence was presented that this was the victim's blood.

There was testimony from a jailhouse snitch, Gregory Anderson, that Mr. Floyd admitted to the stabbing of a white woman (R. 731-2). Following the postconviction evidentiary hearing, the trial court found that the defense attorney had "proceeded to quite effectively discredit Anderson by questioning him concerning his letter writing to Judge Walker (the judge assigned to Anderson's case at the time), his prior involvement as a 'snitch' in other cases, and his apparent favorable treatment in prior cases." (PC-R. 2162). There was also testimony that Mr. Floyd gave inconsistent stories to police about his whereabouts during a three day period encompassing the time of the crime (R. 628-69).[6]

The only physical evidence connecting Mr. Floyd to any crime was the victim's checkbook in Mr. Floyd's possession (R. 498-9), along with the forged checks. The Defense never contested these facts, or that Mr. Floyd committed forgery (R. 390-1, 520-1). The Defense maintained that Mr. Floyd found the victim's checkbook in a dumpster (R. 390-1).

THE RESENTENCING

Mr. Floyd's penalty phase defense consisted of seven lay witnesses whose cumulative testimony consisted of the facts

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[6]Considering Mr. Floyd's claim of mental retardation, infra, the fact that he couldn't accurately recall his whereabouts over a three day period should hardly be surprising.

that Mr. Floyd's mother was an alcoholic (RS. 850, 857, 872 904); that Mr. Floyd was affected by it (RS. 873, 904); that Mr. Floyd worked for his father and was a good worker (RS. 849-50, 855, 874, 902); that his father died in 1983 from cancer (RS. 909); and that Mr. Floyd was not known to be violent (RS. 852, 856, 905, 912). There was also testimony that about six months before the homicide, Mr. Floyd began to have mood swings, would be in a big depression, was almost manic, and perhaps was on drugs (RS. 859, 863-4); and that Mr. Floyd began missing work and was suspected of stealing things (RS. 860-3).

During the presentation of its case, the Defense elicited testimony from a witness, Thomas Snell, that he never knew of Mr. Floyd to be in any kind of trouble (RS. 873). As a result of this questioning, the court found that "the defense has opened the door and that the State, if they so desire, may inquire as to knowledge regarding other criminal actions and whether that would change that opinion." (RS. 892).

As a result, the State was permitted to ask the witness whether he was aware of the fact that Mr. Floyd was convicted of a prior petit theft, two grand thefts, a burglary and a failure to appear (RS. 894). Further, the State was permitted to introduce the judgments and sentences as to each of these offenses into evidence (RS. 935-7, 942). In sentencing Mr. Floyd to death, the court found no mitigating factors (RS. 1072).

THE POSTCONVICTION EVIDENTIARY HEARING

PART I-MENTAL RETARDATION

Four expert witnesses were called to testify during this portion of the evidentiary hearing: Dr. Merin, Dr. Toomer, Dr. Gamache and Dr. Keyes.[7]

Dr. Merin testified that he "probably" was a mental retardation expert (PC-R. 1774). Dr. Merin didn't know how much of his practice has dealt with mental retardation. He has never written any articles, nor has he done any research on mental retardation (PC-R. 1774-5). However, in 1956, Dr. Merin did write a doctoral dissertation involving how children with different levels of intelligence would respond or could be predicted to behave under certain circumstances (PC-R. 1775). Dr. Merin was of the opinion that research has not changed much on mental retardation since 1956. Id.

Dr. Merin testified that he reviewed four volumes of records compiled by the defense as well as the raw data from the Wechsler Adult III (PC-R. 1738).[8] Dr. Merin saw Mr. Floyd

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[7]Following the submission of an expert list by each party, on July 29, 2002, the court issued an Order Appointing Mental Retardation Experts (PC-R. 105-6). In its order, the Court appointed two experts from the State's list, Dr. Merin and Dr. Gamache, and one expert from the defense list, Dr. Toomer. Dr. Keyes, not a court-appointed expert, was called as a defense witness (PC-S. 1).

[8]The Wechsler examination was performed by a defense expert (PC-R. 1739). Dr. Merin testified that he needed the raw data from this test because it was a more comprehensive test (PC-R. 1773).

for one and a half hours in the morning and a portion of the afternoon (PC-R. 1739-40).

Dr. Merin did not believe that Mr. Floyd was malingering during the testing, but he did "consider in my finding or I did indicate that his general personality or there was a lack of motivation or depression present." (PC-R. 1744). With regard to the testing, Dr. Merin took a history and observed Mr. Floyd clinically (PC-R. 1738-9; 1746). Mr. Floyd was given a Beta-III examination, a WAIS, a Paradigm, a vocabulary test, a sentence completion test and the Stroup test (PC-R. 1746-8). Dr. Merin also gave a test relating to brain damage (PC-R. 1774).

Mr. Floyd scored a 70 on the Beta exam (PC-R. 1786). Dr. Merin didn't recall that the Department of Corrections had also given Mr. Floyd a Beta in 1981 (PC-R. 1786). After being shown the background materials he had received, which showed a Beta score of less than 60, Dr. Merin proclaimed that this was a different Beta (PC-R. 1786). Dr. Merin then attributed the change in score to an upgrade in the demographics, along with a reformation of the test (PC-R. 1789).

In performing his evaluation, Dr. Merin relied heavily on the DSM-IV rather than the statute, although there was no reference by the court to use it (PC-R. 1770-1). Dr. Merin determined that Mr. Floyd's verbal IQ was 75, which would place him in the borderline range (PC-R. 1750). Mr. Floyd's non-verbal IQ was also 75 (PC-R. 1751). His full scale was 73

(PC-R. 1769), which would make it a score of sixty-eight to seventy-eight (PC-R. 1751).[9] When Dr. Merin was presented with letters that were purportedly written by Mr. Floyd, he thought that the letters reflected a higher level of intelligence than one would expect, given Mr. Floyd's IQ scores (PC-R. 1756).[10]

Dr. Merin found that Mr. Floyd had adaptive capabilities in the areas of vocabulary and word usage (PC-R. 1761); the fact that Mr Floyd wouldn't discuss the events surrounding his murder[11] (PC-R. 1761); that Mr. Floyd would talk about his father and not the murder, because statements about his father might be helpful to him (PC-R. 1761-2); that Mr. Floyd provided for his children (PC-R. 1762); that he had friends prior to his present incarceration and made one or two friends in prison (PC-R. 1763); that, outside of prison, he would play sports or do nothing (PC-R. 1763); that he did not frequent

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[9]Dr. Merin again opined that Mr. Floyd had not malingered on the test: "I don't think he knew this stuff. Where he performed well, he could. On this test, where he performed poorly, I don't think he could perform it any better." (PC-R. 1753).

[10]At Mr. Floyd's trial in 1984, Gregory Anderson testified that he wrote lots of letters while he was in the Pinellas County Jail and that Mr. Floyd asked him to write letters on his behalf because "I believe that my opinion is that he thought I could write them better." (R. 750). Despite such testimony from a State witness, the prosecutor at Mr. Floyd's evidentiary hearing repeatedly asked the court-appointed experts if Mr. Floyd could write letters and what it meant for his adaptive skills. Yet, the State never authenticated the letters or proved that Mr. Floyd wrote them.

[11]Dr. Merin acknowledged that it might have made a difference if he had known that Mr. Floyd was told by his defense counsel not to talk about the offense (PC-R. 1799).

bars or lounges (PC-R. 1763); that he worked for his father (PC-R. 1763); that he did odd jobs (PC-R. 1763); and that he was a custodian (PC-R. 1763).

Dr. Merin didn't speak to any family members, employers, co-workers or prison officials (PC-R. 1796-7). He spoke only to Mr. Floyd (PC-R. 1797). Dr. Merin didn't confirm whether anything Mr. Floyd told him was true (PC-R. 1797). He didn't know whether Mr. Floyd could hold down a job or whether he gave money to his family (PC-R. 1797). Dr. Merin didn't know what Mr. Floyd's job performance was or whether he was able to care for himself (PC-R. 1797-8). Dr. Merin thought it was odd that Mr. Floyd didn't want to talk about sexual abuse (PC-R. 1801).

Dr. Merin acknowledged that Mr. Floyd had difficulty with mental flexibility (PC-R. 1808), that he couldn't shift mental gears or change from one concept to another (PC-R. 1808).[12]

During cross-examination by the defense, it was pointed out to Dr. Merin that, on direct examination, in discussing his diagnostic features, he never mentioned an onset before age eighteen (PC-R. 1772). Dr. Merin also acknowledged that he never mentioned this anywhere in his report. Id. Dr. Merin conceded that the Children's Wechsler Test contained in Mr. Floyd's school records, which indicated an IQ in the fifties, would be an indication that Mr. Floyd had been

[12]Further, Mr. Floyd might have had some brain damage, but not as severe as the Halstead indicated (PC-R. 1808).

retarded before the age of eighteen (PC-R. 1790-1). However, Dr. Merin did not think it was necessary to put this in his report because it happened thirty years ago (PC-R. 1791). With regard to Mr. Floyd's school records, Dr. Merin did not place a great deal of emphasis on them because "We don't know the reasons for those scores." (PC-R. 1792).

Dr. Toomer testified that his specialty is in the area of clinical forensic psychology (PC-R. 1822). Dr. Toomer was originally contacted in this case by collateral counsel in 1992 to perform a complete psychological evaluation of Mr. Floyd (PC-R. 1825). The evaluation consisted of a clinical interview, as well as an assessment of mental functioning (PC-R. 1829).[13] Based on the totality of the data that Dr. Toomer reviewed in 1992, he found Mr. Floyd to be mentally retarded (PC-R. 1830).

More recently, Dr. Toomer had been appointed by the court to render an opinion as to whether Mr. Floyd is mentally retarded (PC-R. 1826). In comparison to his evaluation in 1992, Dr. Toomer noticed some improvement in Mr. Floyd's overall demeanor and some increase in fluency (PC-R. 1831). Dr. Toomer attributed this change to the fact that Mr. Floyd was in a highly structured environment. Id.

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[13]The Bender, a wide range of achievement testing, as well as the Wechsler Adult Stage were administered (PC-R. 1829). Due to the level of impairment, Dr. Toomer was unable to administer this test and instead utilized a revised Beta exam (PC-R. 1830). The Beta IQ was less than 60. Id. The score was consistent with the test that was conducted by the prison upon Mr. Floyd's entry there. Id.

With regard to intellectual functioning, Mr. Floyd's IQ score was seventy-five (PC-R. 1832).[14] Dr. Toomer proceeded to examine other aspects of Mr. Floyd's overall functioning (PC-R. 1833). He assessed Mr. Floyd's academic skills; he gave Mr. Floyd the Bender test, to determine whether there might be any underlying neurological involvement; and he then attempted to gather data relating to overall adaptive functioning. Id. Dr. Toomer did this mainly by examining past records which described Mr. Floyd's functioning, both from an educational and a psycho-social perspective. Id. Dr. Toomer also relied on what Mr. Floyd told him, but it would have compromised the integrity of the testing process to rely solely on this information (PC-R. 1835-6).

With regard to the records, Dr. Toomer found a number of factors that were critical in terms of providing information regarding adaptive functioning (PC-R. 1834). In assessing developmental factors in the family history, Dr. Toomer noted that Mr. Floyd's mother suffered from alcoholism and that there were other variables that impacted on functioning (PC-R. 1834). There were also school records supplemented by narrative remarks and testing from the Wechsler test from when Mr. Floyd was fifteen (PC-R. 1834-5). Dr. Toomer believed that these records were critical, as they provided a picture

[14]Dr. Toomer administered the abbreviated Kaufmann (PC-R. 1867). In his evaluations in 1992 and 2002, Dr. Toomer found no evidence of malingering(PC-R. 1836).

of intellectual functioning prior to age eighteen (PC-R. 1835). Mr. Floyd had deficits in all areas. Id.

With regard to other adaptive skills, Dr. Toomer explained that the fact that Mr. Floyd was a dishwasher or custodian did not signal that he was not mentally retarded (PC-R. 1860-1). Rather, these are basically redundant tasks that do not require abstract functioning to complete (PC-R. 1861). Mentally retarded individuals can handle such tasks (PC-R. 1861-2).

Mr. Floyd's inability to hold a job as a janitor or dishwasher was indicative of poor adaptive skills (PC-R. 1869-70). Other indications of poor adaptive functioning included the areas of interaction with Mr. Floyd's peers, his deficit functioning in school and employment as well as self-direction (PC-R. 1865).

Dr. Toomer concluded that Mr. Floyd is mentally retarded (PC-R. 1839). Based upon a reasonable degree of psychological certainty, Mr. Floyd has significant subaverage intellectual function with deficits in adaptive behavior, which manifested during the period of birth to age eighteen. Id.

Dr. Gamache is a clinical psychologist who was appointed by the court to conduct a mental retardation evaluation of Mr. Floyd (PC-R. 1876, 1878). When asked about any research he had done relating to mental retardation, Dr. Gamache pointed to a publication from 1991, which dealt with a group of

subjects with thyroid or hormone syndromes (PC-R. 1897). None of the other six papers listed on his CV had anything to specifically do with mental retardation (PC-R. 1909). Although Dr. Gamache claimed to have written publications and done other work directly relating to mental retardation, there is no mention of it on his CV (PC-R. 1898). Dr. Gamache's explanation for this omission was that, "I try to keep my CV as concise as possible. I don't put every single detail on there." (PC-R. 1898). Dr. Gamache's thesis, nor his masters thesis, had anything to do with mental retardation (PC-R. 1902).

Dr. Gamache performed the Kaufman Intelligence test because he is very familiar with it (PC-R. 1926). According to Dr. Gamache, he didn't use the Stanford-Binet because it is a less valid and less reliable instrument Id.

During his examination, Dr. Gamache asked Mr. Floyd a total of five questions before beginning the testing (PC-R. 1924).[15]
He asked Mr. Floyd what grade he completed, when his birthday was, what the date was, how old he was, and could he read or write (PC-R. 1924-5). According to Dr. Gamache, this was all that was necessary to conduct the test (PC-R. 1925). Dr. Gamache did not do a clinical interview. Id. Had he been asked to do one, he would have talked with Mr. Floyd. Id.

[15]Dr. Gamache spent and hour and fifteen minutes to an hour and-a-half with Mr. Floyd (PC-R. 1886).

Interviews are not necessarily part of his evaluation for mental retardation (PC-R. 1926).

Dr. Gamache stated that Mr. Floyd's I.Q. score fell into the borderline intellectual function category, which includes scores in the range of seventy to seventy-nine (PC-R. 1892). Dr. Gamache theorized that Mr. Floyd would have a reason to malinger, to spare his life (PC-R. 1881). Dr. Gamache did not give Mr. Floyd any tests to determine if he was malingering (PC-R. 1941), nor did he offer the opinion that Mr. Floyd was malingering (PC-R. 1941, 1949).

With regard to adaptive behavior, Dr. Gamache obtained this information mostly from the records provided by defense counsel (PC-R. 1887). Dr. Gamache felt like the material did not suggest any marked impairment in multiple adaptive function. Id. While in prison, Mr. Floyd exercised, and he spent significant time reading, doing correspondence and watching t.v. Id. These went to the adaptive domains of health and leisure and self-direction, as well as perhaps communication and home living. Id. Also, there was no evidence that Mr. Floyd needed any help taking a shower (PC-R. 1888).

Dr. Gamache was also shown letters purportedly written by Mr. Floyd (PC-R. 1889). Dr Gamache stated that, "One could certainly argue that those letters would reflect, at a minimum, adequate communication skills and the ability to formulate these thoughts and ideas; the desire to communicate

with others, and the actual functional success of communicating with others." (PC-R. 1890). Dr. Gamache was not aware that in 1984, a witness testified that he wrote letters for Mr. Floyd (PC-R. 1896).

In rendering his opinion, Dr. Gamache considered the DSM criteria as well as those contained in the Florida statutes, particularly 921.137 (PC-R. 1893). Dr. Gamache noted that the statute "goes on to talk about adaptive behavior, as well, but the bottom line is that in terms of my administration and assessment and scoring of Mr. Floyd's intellectual ability, he's not more than two standard deviations below the mean" (PC-R. 1894).

Dr. Gamache does not have his own definition for mental retardation (PC-R. 1921). "It depends upon the context and purpose for which I'm doing the evaluation. Certainly, in a forensic matter, I have to consider what the legal definition or criteria are for mental retardation." Id.

Although he testified about it on direct examination, Dr. Gamache did not mention any adaptive skills in his report (PC-R. 1934), because he was convinced, after the testing, that Mr. Floyd's level of intellectual functioning was such that adaptive behavior wouldn't be meaningful (PC-R. 1935).[16]

[16]Ironically, when shown the finding of retardation in the school records, Dr. Gamache stated that the diagnosis of mental retardation is not based solely on test results (PC-R. 1930). "If one happens to have a formal intelligence test or IQ score of fifty-five, that would be a first step. It certainly suggests that you need to look at adaptive behaviors to determine whether somebody

When asked about the onset before the age of eighteen, Dr. Gamache stated, “It’s not typically or that’s not considered an independent prong, but certainly the diagnostic criteria made reference to it.” (PC-R. 1944). In his report, Dr. Gamache failed to mention the onset before age eighteen (PC-R. 1946).

> I didn’t mention it at all in my report. I didn’t have that. It was not necessary. If I thought that that was the cause or some childhood or that there was some adult onset or cause for his poor performance on his intellectual skill that he earned, I would have discussed that.

(PC-R. 1946). Dr. Gamache stated that he had no dispute with whether or not there was some indication of below-normal intellectual ability prior to age eighteen (PC-R. 1946).

Dr. Keyes is a professor of special education at the College of Charleston, South Carolina (PC-R. 1958). He testified that he teaches primarily graduate courses relating to mental retardation. Id. Dr. Keyes has a bachelors and masters degree in special education and a Ph.D. in special education in mental retardation. Id. His doctoral dissertation was in the study and analysis of responses in order to feign mental retardation. Id. Dr. Keyes is also a fellow of the American Association of Mental Retardation (PC-R. 1960).

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meets the diagnostic criteria, which is not one in the same with the intelligence score.” Id.

In addition to publishing multiple articles relating to mental retardation, Dr. Keyes is on the Board of American Association of Mental Retardation (PC-R. 1961). He is a certified psychologist and does assessment of and the determination of the existence of mental retardation. Id. Dr. Keyes has also done lectures in the area of mental retardation Id. Most of his presentations in the last ten years have been primarily criminal-justice issues and on the death penalty. Id. Although the majority of the organizations he has testified for have been defense-type groups, he has given presentations in Tampa for the Florida Association of Prosecuting Attorneys (PC-R. 1962).

Dr. Keyes has consulted on cases involving mental retardation, but he has not taken a lot of death-row cases that come his way (PC-R. 1962-3). He will take a death-row case if there is evidence of mental retardation (PC-R. 1963). Dr. Keyes has been qualified as an expert in the field of mental retardation in South Carolina, North Carolina, Florida, Arkansas, Texas, Missouri and a couple of other states (PC-R. 1964).

Dr. Keyes defines mental retardation as significant subaverage intellectual function, with significantly limited intellectual function that occurs at the same time as deficits in adaptive skills, manifesting prior to age eighteen (PC-R. 1965). Dr. Keyes explained that you need all three prongs in order to find somebody mentally retarded. Id.

In the field of psychology, Dr. Keyes would agree that the best indicator of intelligence is the Wechsler Adult Intelligence Third Edition (PC-R. 1973-4). The next most commonly used test is the Stanford-Binet,[17] followed by the Kaufman (PC-R. 1974). Dr. Keyes disagreed with Dr. Merin's testimony that the research involving mental retardation hasn't changed much over the years (PC-R. 1970). In fact, the definition of mental retardation has been upgraded five times since 1959. Id.

With regard to adaptive behavior, Dr. Keyes noted that it is a clear misconception to say that people cannot do anything or they are simply not mentally retarded (PC-R. 1976). "We have constant thinking that people with mental retardation can't do anything with their lives, yet there are things that they can do, given the correct instruction and support in their lives (PC-R. 1977).

In terms of doing an adaptive behavioral analysis, Dr. Keyes begins with records, including school, criminal, psychological and DOC records (PC-R. 1977). Dr. Keyes will also interview people who can tell him about that person's functional development during this period of their life (PC-R. 1977-8).[18] Further, Dr. Keyes utilizes the Vilin to determine

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[17]Dr. Keyes disagreed with Dr. Gamache on this point (PC-R. 1974).

[18]According to Dr. Keyes, self-reporting is unreliable in terms of determining adaptive behavior (PC-R. 1979).

someone's adaptive skills (PC-R. 1979). The types of questions in the Vilin involve communication, expressive skills, written skills, daily living skills, etc. Id . Dr. Keyes believes these interviews are vital to having a real good picture of the individual (PC-R. 1980).

When Dr. Keyes was initially contacted about becoming involved in Mr. Floyd's case, he asked for some background information (PC-R. 1981). After looking at school records, he agreed to become involved. Id. The school records demonstrated that Mr. Floyd was clearly impaired long before he did any testing (PC-R. 1982). "Kids don't get grades like these unless they have difficulty. They don't say a whole lot about how much they did to help him, but this was it." Id.

Dr. Keyes spent nine hours with Mr. Floyd on three separate trips (PC-R. 1984-5). Dr. Keyes administered the Wechsler-III, which resulted in a full scale score of 73 (PC-R. 1986). This result indicated that Mr. Floyd was within the standard range for retardation. Id. Dr. Keyes was also concerned that there was clear evidence of brain damage and as a result, he asked for neuropsychological testing to be performed (PC-R. 1987). Dr. Keyes reviewed Dr. Crown's report, and agreed with him that Mr. Floyd has brain damage. Id.

After completing the evaluation, Dr. Keyes began to look into the adaptive skills (PC-R. 1988). He started with the records, then got in touch with various family members and

friends. Id. Dr. Keyes identified Defense Exhibit No. 9 as a copy of a Vilin Adaptive Behavior Skills form that was used as the composite for Mr. Floyd (PC-R. 1989).[19] Dr. Keyes chose the Vilin because it gives the most accurate information, it is not terribly cumbersome to score, and it also gives you an opportunity to get good valid information from several different individual areas (PC-R. 1989). Dr. Keyes gave the Vilin to Johnny Floyd, who is the older brother of Mr. Floyd (PC-R. 1990). Dr. Keyes also spoke to two family friends, Jim Boykins and Lila Richards. Id.[20]

Dr. Keyes asked about their memories of what Mr. Floyd was like during his childhood and adolescence (PC-R. 1990). With regard to work, Mr. Floyd had difficulty showing up to work on time (PC-R. 1991-2). He worked for his father's company for a long time as a landscape assistant (PC-R. 1992). Mr. Floyd would probably have been fired long before then, if not for the fact his father was the boss (PC-R. 1992). Mr. Floyd did not have a bank account, although he was able to get a driver's license with his brother's assistance (PC-R. 1992-

[19]Dr. Keyes did not make his decision on whether or not Mr. Floyd was mentally retarded until he completed the Vilin (PC-R. 2010).

[20]Dr. Keyes spoke to Johnny Floyd on the phone for about two hours (PC-R. 2014). Dr. Keyes felt that Johnny Floyd was being very straightforward (PC-R. 2026). Dr. Keyes spent two hours with Mr. Boykins and about an hour and-a-half with Lila Richardson (PC-R. 2027).

3). When Mr. Floyd was young, his brother did his homework for him (PC-R. 1993).

Finally, Dr. Keyes explained the significance of structure in Mr. Floyd's life in relation to the test scores:

> Q. Okay, let's talk about the consistency of Mr. Floyd's scores. Let's see look at Mr. Floyd's test scores and then the background materials from when he was fifteen.
> Did that help you?
> A. Yes, very much.
> Q. How do you explain this fifty-one IQ in school compared to the seventy-three that the other expert came up with here?
> A. Well, a couple ways. When he was fifteen years old, his life was totally unstructured. He went to school when he wanted to. He didn't have a strong mother figure in his life. She was a very severe alcoholic. I don't think he was feigning any of these - -
> Q. So you didn't see malingering?
> A. No.[21]
> Q. Well, because isn't it true that it's not just the IQ score or the school records that indicate that he did poorly in school?
> A. Right.
> Q. How do you explain this sort of fluctuation from when he was fifteen or this IQ of fifty-one here, compared to the seventy-three here?
> A. It's structure. He has a higher level of structure now than he's ever had. By reference to his ability to think and react, it's increased.
> Q. So based upon your expertise in mental retardation, do you feel that Mr. Floyd is mentally retarded?
> A. James Floyd is mentally retarded, yes.
> Q. Based upon the AAMR definition?
> A. Yes.

[21]If Dr. Keyes had seen any evidence of malingering, he would have withdrawn from the case (PC-R. 2023).

(PC-R. 1997-8). Based on his expertise in the field, Dr. Keyes concluded that Mr. Floyd is mentally retarded (PC-R. 1998).

PART II: REMANDED CLAIMS

During the second part of the evidentiary hearing, several witness testified regarding the ineffective assistance of counsel claim at the penalty phase.[22] Robert Love testified that he was appointed to represent Mr. Floyd in his resentencing on February 10, 1987 (PC-S. 305). At the time of his appointment, Mr. Love was not aware of what kind of resentencing he was doing (PC-S. 308).[23] Further, prior to this case, Mr. Love had not done any other capital murder trials or penalty phases (PC-S. 305-6).

Prior to the resentencing, Mr. Love did not speak to nor did he obtain any documents from Mr. Floyd's attorney at the first trial, Martin Murray (PC-S. 309). Mr. Love maintains that he attempted to track him down, but it was to no avail. Id.

Mr. Love agreed that it would be fair to say that the theme he was going for at the resentencing was that Mr. Floyd was a good and responsible person who was relatively non-violent with a solid work record (PC-S. 351). Mr. Love spoke

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[22]All of the evidence from the mental retardation hearing was incorporated into this hearing (PC-S. 637-8).

[23]He later became aware after receiving some discovery and pleadings (PC-S. 308).

with Mr. Floyd and the people who were to testify, and he developed their testimony that would help his theme (PC-S. 352).[24]

The victim's daughter was a part of the centerpiece of what Mr. Love was trying to do (PC-S. 358). Her feelings were that her mother would not have wanted Mr. Floyd to be put to death (PC-S. 359). This fit into the theme that Mr. Floyd was a salvageable person. Id.[25]

In the course of representing Mr. Floyd, it never occurred to Mr. Love that Mr. Floyd was not understanding what he was telling him (PC-S. 365). Nothing from his dialogues with Mr. Floyd made Mr. Love think that Mr. Floyd "is just not right there and, you know, I'm a little worried about that, maybe I ought to get something done." (PC-S. 366). Mr. Love does not recall Mr. Floyd telling him that he had a low IQ, or that he wanted to promote an additional theme to show that he was a slow learner or mentally handicapped. Id. Mr. Love believed that at the conclusion of the case he had represented Mr. Floyd to the best of his abilities (PC-S. 384). However, Mr. Love did concede that:

> I don't think there is a question of tactics have changed and the law has changed, but **also my ability in handling the case would have changed.**

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[24]He does not recall if he contacted any of Mr. Floyd's siblings (PC-S. 342).

[25]At the resentencing, Ms. Anderson was not permitted to tell the jury that Mr. Floyd should not be sentenced to death (RS. 920-7).

(PC-S. 385)(emphasis added).

When questioned about his failure to investigate, Mr. Love conceded that he did not obtain any of Mr. Floyd's records, nor did he hire a mental health expert:

Q I'm showing you what has been marked as Defense Exhibit No. 15, ask you if you recognize that document. Have you seen that document before?
A I think I have seen it recently, but I did not have this or obtain it.
Q What is it?
A At the time of my representation of James, it is a psychological report from the Pinellas County Public Schools.
Q What is the date?
A It says contact date on the corner. I don't know if is {sic} marked 24. It is 1976. It has apparently a contact date of December of 1975.
Q Does it look like a school record of Mr. Floyd?
A Apparently so.
Q I would like you to go down to the evaluation of test data on the first page.
A Yes.
Q Where it indicates that **the result of the tests indicate that James' functioning is within the retarded range of intelligence; verbal IQ 55; performance IQ 55;** Do you see that?
A Yes, I do.
Q **Were you aware when you represented Mr. Floyd that Pinellas County Schools had found him to be mentally retarded - - or in the mentally retarded range?**
A **At the time I did not know.**
Q **And you made no effort to get these records from Mr. Floyd, did you?**
A **No, I did not.**
Q Did you hire anybody in your involvement of Mr. Floyd's case to look into his mitigation?
A A mitigation specialist?
Q Yes.
A No.
Q **How about a mental health expert?**
A **No.**
Q **Did you obtain any records besides the school records on Mr. Floyd, any hospital records?**
A **Not that I can specifically recall.**
Q How about prison records?

A I know that I had discussed those things with James, about how he had been handling things and whatever, that he had done well; but I can't recall specifically, you know.
Q Did you have Mr. Floyd evaluated for mental retardation?
A No, I didn't.
Q Did you have him evaluated for any organic brain damage?
A No.

(PC-S. 338-40)(emphasis added).[26]

Testimony at the evidentiary hearing reflected that Mr. Love should have been aware of the need for a mental health expert:

Q Mr. Estelle stated at the resentencing that Mr. Floyd had extreme mood swings, staring into space, suffered a big depression, and at times appeared manic. Do you recall the testimony?
A Not the specific testimony, but I recall testimony about James having some difficulties.
Q Did that raise any concerns that you should, perhaps, hire a health expert or some sort of expert to look into Mr. Floyd's problems that he was having at the time?
A Apparently not.

(PC-S. 344).

Testimony at the evidentiary hearing established that Mr. Love's failure to obtain records was not based on strategy:

Q Was there a strategic reason not to get his DOC records?
A Not that I can recall.
Q Was there a strategic reason not to hire a mental health expert?
A Strategic reason, no.

(PC-S. 378-9).

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[26]Although Mr. Love was aware that Mr. Floyd had been on death row prior to representing him, he did not obtain Mr. Floyd's prison records, including a Florida State Prison document indicating that Mr. Floyd had an IQ of less than 60 (PC-S. 341).

Mr. Love acknowledged that his present practice is to utilize mental health experts:

Q Do you represent capital defendants today?
A Yes, I do.
Q Do you regularly hire mental experts in your investigation today?
A Yes, I do.
Q Do you regularly hire investigators?
A Yes, I do.
Q Is that a standard practice of course today?
A Yes, it is.

(PC-S. 345).

At the time of this case, Mr. Love had not picked a death qualified jury before (PC-S. 347). He recalled that the Florida Supreme Court mentioned in the remand that he had failed to preserve the issue of the striking of a black juror. Id. Mr. Love thought that he did not need to say more at trial, but apparently, he was incorrect on that (PC-S. 348-9). At the conclusion of Mr. Love's testimony, the Defense moved his file into evidence as Defense Exhibit No. 16 (PC-S. 385)[27]

In addition to Mr. Love, several lay witnesses also testified at the evidentiary hearing: Lelia Richardson, Benjamin Boykins and Agnes Floyd.[28] Ms. Richardson recounted an incident in which James, when he was young, drank some kerosene that was on the floor (PC-S. 460). James had to be

[27]After reviewing the file, Mr. Love concluded that it was his complete file (PC-S. 386).

[28]Ms. Richardson and Mr. Boykins had previously testified at Mr. Floyd's resentencing proceeding.

taken to the emergency room. Id. Ms. Richardson also stated that Pinkie Floyd. James' mother, drank while she was pregnant with some of the children (PC-S. 456); that she took Ms. Floyd to AA meetings, but that none of this worked. Id.

There was additional testimony which detailed the physical abuse by James Floyd's father toward his mother (PC-S. 458). In response to Pinkie's drinking, Mr. Floyd would abuse her; he would slap her around (PC-S. 479). Several times, as a result of this, Pinkie Floyd ended up in the hospital (PC-S. 479-80).

Finally, there was testimony that James Floyd did work at his father's direction (PC-S. 465); that he seemed to have a problem with learning things (PC-S. 468-9); and that he wasn't able to do very much on his own (PC-S. 470).

Faye Sultan, a clinical psychologist, testified that she was hired by CCRC in 1994 to perform a psychological evaluation on Mr. Floyd for mitigation purposes (PC-S. 483, 496-7).[29] Dr. Sultan conducted a very extensive clinical interview and did some psychological testing (PC-S. 498).

After meeting with Mr. Floyd in 1994, it was clear to Dr. Sultan that there was something about his intellectual functioning and general brain function that was not within normal limits (PC-S. 498).

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[29]Dr. Sultan met with Mr. Floyd twice in 1994 for about 10 hours (PC-S. 497). She met with him again for about two hours in September of 2002. Id.

> For example, maybe that's the best way to explain it, Mr. Floyd knew what year his son was born, but didn't know how old his son was and couldn't figure it out from the current date at that time back to his child's birthday. He was off by six years. I think his son was 12 or 13 and he told me he was six or seven, which is a very extraordinary distortion or inability to process.
>
> It struck me as pretty odd. There was something about his verbal fluency that was unusual as well. He spoke very slowly. He often used the wrong words in sentences.

(PC-S. 498-9). As a result of these questions, Dr. Sultan administered the Wechsler Adult Intelligence Scale Revised as well as the Woodcock Johnson Psycho Educational Battery (PC-S. 499-500). The Wechsler indicated that Mr. Floyd was functioning within the range of mental retardation, with a full scale IQ of 68 (PC-S. 500). The Woodcock test indicated that Mr. Floyd's reading level was at the very beginning of grade five. Id.[30]

Dr. Sultan also reviewed background material that were contained in Defense Exhibit 16 (PC-S. 503). As for the significance of the school records, Dr. Sultan stated:

> In order to make a diagnosis of mental retardation we're really required, as psychologists, to know what the level of intellectual functioning was prior to the age of 18.
>
> And there was the good fortune in this case of Mr. Floyd having been tested by the Pinellas County School System by a school psychologist somewhere before Christmas break of the 8th grade. He was 15 years and four months old. They did a couple kinds

[30]Following this testing, Dr. Sultan also informed the attorneys that neuropsychological testing might reveal some brain damage quite separate from the mental retardation (PC-S. 501).

> of testing, so I was able to compare the scores from back then to the current scores.
>
> The psychologist administered the Wechsler Intelligence Scale for Children Revised to him and reported that Mr. Floyd was - - James, as they called him then because he was a school kid, received an overall IQ of 51.
>
> The school psychologist talked about how serious Mr. Floyd's learning problems were, how slow he was intellectually. Talked about the fact that he was functioning in the mentally retarded range and that he knew that school was very, very uncomfortable for Mr. Floyd because he was large. Because he actually looked like an 18 or a 19-year old and was actually functioning, looking at his achievement test scores, as about a third grader. His wide range achievement test scores at that time were all in the second or third grade.
>
> What that means is that from the age of 15 until the age at which I did the same test at 34, his reading level, his reading recognition level, had moved from the fourth month of the second grade to the very beginning of the fifth grade. That's important to me for some reasons, too; people with mental retardation certainly continue to learn once they're adults. There is nothing about retardation that would prevent learning. They simply learn much more slowly than a person without mental retardation.

(PC-S. 504-6).

Dr. Sultan also reviewed Mr. Floyd's report cards (PC-S. 506). She found the teachers' narrative reports very significant in that it was clear that Mr. Floyd was functioning well below his grade level (PC-S. 507), and that he didn't have the capacity to initiate his own learning or his own self correction. Id.

In describing Mr. Floyd's background, Dr. Sultan noted that he originally described the family as a nice, loving group of people (PC-S. 520). As the clinical evaluation went on, his description of the household strongly contradicted the

picture he originally presented Id. Mr. Floyd described a household where the children were essentially on their own. Id. There were arguments between James' parents over his mom's drinking (PC-S. 520-1). James' father would become enraged with his mother and he would scream at her and hit her (PC-S. 521).

Mr. Floyd had extreme difficulty in school, but he did not want anybody to know that. Id. His older brother, Johnny, probably knew about it because he would sometimes help James do his homework. Id. Johnny also helped James get his driver's license by tutoring him for the test. Id. James didn't get his drivers' license until he was around 20 because he couldn't pass the driving test. Id. James would make a lot of mistakes when he was working for his dad, and his dad would become angry and call him stupid. Id. James also talked about his father isolating him from the other children and raping him anally on a number of occasions when he was about the age of 10 (PC-S. 522).

Dr. Sultan described what Mr. Floyds' life was like in 1984 leading up to the murder (PC-S. 523). His father had died and left his home and inheritance to a daughter from another relationship. Id As a result, the family was displaced. Id. Mr. Floyd, who required a great deal of structure in his life, and who was not very successful at maintaining a job, had nowhere to go. Id. He was living with

a girlfriend at the time of the offense, had a small child, and was increasing his use of substances (PC-S. 523-4).

Dr. Sultan stated that it would be fair to say that Mr. Floyd was under extreme emotional disturbance of distress in 1984 (PC-S. 525). He had suffered from serious depression, and he had some difficulty in reasoning, thinking and judgment. Id.[31]

Added to all of this was the fact that Mr. Floyd was using substances at the time of the offense and he had mental retardation. Id. In addition, Mr. Floyd had a background that was quite traumatic and would lead to a great deal of dysfunction and distress. Id.

With regard to non-statutory mitigating factors, Dr. Sultan found:

> James Floyd has suffered from a mental illness of depression from at least the time of early adulthood prior to the time of this offense.
>
> I found that James Floyd suffered from some diffuse brain damage that altered his reasoning abilities, his concept formation abilities, generally impaired his judgments, specifically in the frontal lobe areas of his brain.
>
> I found that James Floyd had mental retardation. I found that James Floyd had a severely chaotic family life. That he both witnessed and himself experienced physical and emotional abuse when at his house. That he was himself the victim of sexual abuse.
>
> I found that he was one of several children, all of whom were severely neglected in their families and not properly cared for. I found that the lack of structure in his home environment caused him severe dysfunction in his life.

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[31]Neuropsychological testing indicated that Mr. Floyd suffers from brain damage (PC-S. 526).

> I found that he suffered from severe academic problems. I found that the mother's alcoholism was a severe detriment to his health and nourishment as a child and basically rendered the family a dysfunctional environment.
>
> I found that his difficulties in school also led to social difficulties so that he was socially inhibited and quite shy and had a lot of trouble in social interaction with people as an adult.
>
> I found that he was unable to hold a job. That the jobs that he did hold were repetitive menial tasks during which he still required a great deal of supervision.

(PC-S. 531-2). Dr. Sultan concluded that these factors were present in 1984 when Mr. Floyd first went to trial (PC-S. 532).

Another major issue during the evidentiary hearing dealt with a Brady/Giglio claim. The Defense supported its claim primarily through uncontroverted documentary evidence. Additionally, the Defense elicited testimony from several witnesses: Joe Episcopo, the assistant state attorney who prosecuted Mr. Floyd's case (PC-S. 388); Stephen Kissinger, a former CCRC attorney who had served as lead postconviction counsel on Mr. Floyd's case (PC-S. 418); and Robert Love, Mr. Floyd's resentencing attorney.[32]

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[32]Further, the Defense called several other diligence-type witnesses: Theresa Walsh, a CCRC investigator, testified to her efforts to locate Mr. Murry in 1992 (PC-S. 442-5); Odalys Rojas, also a CCRC investigator (PC-S. 535-8) and Pam Izakowitz, Mr. Floyd's postconviction counsel (PC-S. 540-4), testified to their unsuccessful attempts to locate Tina Glenn prior to the evidentiary hearing.

There was also a stipulation regarding the proposed testimony of Jeff Walsh, another CCRC investigator. The lower court accepted the stipulation that Mr. Walsh was able to locate Ms. Glenn in 1994, that he spoke to her, and that he procured an affidavit as a result of that conversation (PC-S. 448-

Mr. Floyd presented as Def. Ex. 1 police reports contained in the State Attorney's files that were disclosed to Mr. Floyd's collateral counsel pursuant to public records request (PC-S. 300). Within Def. Ex. 1 were two police reports authored by Det. Gatchel regarding statements made by Tina Glenn. Det. Gatchel reported that while conducting a neighborhood canvass, he contacted Tina Glenn who lived at 1310 13th Street North.[33] Regarding his first interview of Ms. Glenn, Det. Gatchel wrote that Ms. Glenn:

> advised that she was aware of the homicide investigation and indicated that on Monday at 1100 hours she last saw the victim around the residence wearing a dress described as possibly aqua with flowers and the victim was on the southside of the residence bent over looking at something on the ground. The victim picked up something from the ground and then went back into the house.
>
> She indicated that somewheres {sic} in the neighborhood at 1330 to 1400 hours while watching "All My Children" on television, she heard a car pull up and observed it facing south between her house and the victim's house in front of a large hedge of bushes. She advised the vehicle was possibly a Lincoln Continental white over redish orange being in poor condition and having red primer on the large portion of the vehicle advising the vehicle had a spare tire kit in the trunk similar to the continental kit. While discussing the description of the vehicle, this investigator noted

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9).

[33]The State called Robert Engelke who had been the lead detective on Mr. Floyd's case in 1984. Mr. Engelke had reviewed the various police reports prior to testifying and recalled that Det. Gatchel's interviews of Tina Glenn occurred the morning of January 18, 1984 (PC-S. 559). This was shortly before Mr. Floyd's arrest. And this was the morning after Ms. Anderson's body had been discovered on the evening of January 17, 1984.

> a white over red cadillac sitting across the street also having primer on it. At which time she advised the color was orangish and advised the Cadillac was at that location when the Lincoln pulled up.
>
> She described the suspect 1, being the passenger as a white male, 30 years old, tall, thin. Dark long hair with big curls, moustache indicating his eyes stood out in contrast to his skin having dark eyes and light color skin.
>
> Subject was wearing possibly a faded out plaid shirt almost white in color with blue jeans.
>
> Subject number 2, white male, approximately 30 about the height however, medium build, having straight short brn hair, clean shaven wearing a t-shirt and blue jeans. She indicated both subjects had a fast stride up to the house, knocked on the door, and although she did not see the victim they were led into the house.
>
> She advised possibly a half hour to 45 minutes later, she heard the door slam at the house at which time again she peered out and observed both subjects running to the car looking around suspiciously and get into the car and speed off.
>
> Miss Glenn advised her boyfriend Alan Avant, WM 32, had his birthday Monday, however, he worked that day and worked late until 1630 hours and going out having drinks with friends at work and was not home during that time. She advised that she lived there for four months and the victim kept mostly to herself, however, she saw a lot of young people coming over to see her and has had parties on her back porch.
>
> She advised the curly hair subject described as 1, she believed she has seen on the back porch before.

Def. Ex. 1, Supplementary Report (five pages) of Det. Gatchel at 1-2. Det. Gatchel noted that after completing his neighborhood canvass, he invited Ms. Glenn to the police station because he felt “that she may have possibly seen the

perpetrators and wanted to reconduct a more thorough interview." Id.

Det. Gatchel wrote a second supplementary report summarizing Ms. Glenn's second statement. According to Det. Gatchel, Ms. Glenn again asserted that at 1:00 to 1:30 while she watching "All My Children," a Lincoln Continental drove up in front of the victim's house. Ms. Glenn observed two white men. They "walked fairly fast towards the front of the residence and one subject knocked on the door and both subjects walked into the residence, however, she did not see the victim actually answer the door." Def. Ex. 1, Supplementary Report (two pages) of Det. Gatchel at 1. As Ms. Glenn moved about her own house, she "observed subject 1, come out onto the back porch area of the residence." Id at 2. According to Det. Gatchel, Ms. Glenn then advised that "approximately 1 hour after the individuals had arrived," she heard a door slam and she "went to the window again." She observed "them 'walking very fast' almost running and looking around very suspiciously. She stated that she went to the front porch area and state[d] that she heard the curly hair subject say to the driver, 'come on lets go.' She indicated the vehicle then had the tires squealing as they left and even thin[k]s they ran the stop sign at 13th Avenue heading southbound from the residence." Id at 2. Ms. Glenn was shown a photo pack that included "the subject Richard Nigger" who "had been working in that area, painting residences and known

to be bilking elderly ladies of money." Ms. Glenn didn't identify Mr. Nigger's photo, but did indicate that one of the photos looked like subject 1.[34]

Testimony during the evidentiary hearing established that these reports had not been disclosed to trial counsel. CCRC attorney Kissinger testified that after obtaining these documents through the public records process (PC-S. 424, 427), he wanted to find out from Mr. Murry why they didn't show up at trial (PC-S. 430). He also wanted to find Mr. Murry's file to determine if these documents were in there (PC-S. 431).

After a lengthy search, Mr. Kissinger located Mr. Murry in California in October, 1992 (PC-S. 422). He proceeded to fly out and interview Mr. Murry (PC-S. 423). With regard to the file, Mr. Murry stated that he did not know where the file was but that he would ask around (PC-S. 424). CCRC was never able to locate Mr. Murry's file (PC-S. 435). After speaking with Mr. Murry, Mr. Kissinger focused his efforts on the component of the Brady claim as opposed to an ineffective assistance of counsel claim (PC-S. 433).[35]

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[34]At the evidentiary hearing, Mr. Floyd offered into evidence an affidavit obtained from Tina Glenn in 1994 reaffirming her statements to Det. Gatchel (PC-S. 449, 543-4). However, the Court sustained the State's objection to Ms. Glenn's affidavit being introduced into evidence (PC-S. 544).

[35] Based on a hearsay objection by the State, Mr. Kissinger was not permitted to state what Mr. Murry had told him in reference to the documents (PC-S. 431-2). Mr. Murry was deceased at the time of the evidentiary hearing and, as such, unavailable to testify.

Mr. Love testified that in his review of the package of discovery materials, he did not see any police reports or statements relating to Tina Glenn (PC-S. 315).[36] Further, Martin Rice testified that if Mr. Murry had the information described in the Tina Glenn report, it is something that Mr. Rice would have to assume that Mr. Murry explored (PC-S. 595).[37] Similarly, Mr. Louderback echoed the same sentiments (PC-S. 628).[38]

Coupled with the testimony of these witnesses is the fact that the State conceded that at the time of Mr. Floyd's trial, police reports had not been disclosed to the defense except for those portions that contained verbatim statements of

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[36]In its order denying relief, the lower court stated that it could "only assume that Murry did not know of Tina Glenn-Avant or her statement to the police." (PC-R. 2159).

[37]Martin Rice, a state witness at the evidentiary hearing, was an attorney who was familiar with Martin Murry (PC-S. 574).

[38]Frank Louderback, also a state witness at the evidentiary hearing, was an attorney who was familiar with Martin Murry (PC-S. 601).

witnesses (PC-S. 75-6, 632).[39] Joe Episcopo confirmed this practice in his testimony (PC-S. 407-8).

In addition to the Tina Glenn reports, multiple other police reports contained in Def. Ex. 1 were introduced into evidence by postconviction counsel as not having been disclosed to trial counsel.[40] These reports establish clear inconsistencies in the crime scene investigation. These inconsistencies include evidence which would have diminished the significance of negroid hairs found at the scene and impeachment that could have been used by the defense.

Next, Mr. Floyd presented as Def. Ex. 2, state attorney investigative reports (sometimes called "Green Sheets") contained in the State Attorney's files that were disclosed to Mr. Floyd's collateral counsel pursuant to public records

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[39]When Mr. Floyd attempted to call Assistant State Attorney McGarry as his first witness at the evidentiary hearing in order to testify to the policies of the State Attorney's Office, the State objected, saying "We have already conceded in this case that the discovery may not have included some [of] the parts they wish to raise. There is no further reason that we are aware of to call Mr. McGarry as a witness in this case" (PC-S. 297). Accepting the State's stipulation to the non-disclosure, Mr. Floyd indicated that he wished to establish that the undisclosed material had been in the State's possession (PC-S. 298). Thereupon, the parties worked out a stipulation that Def. Ex. 1-4 had been in the State's possession and provided to collateral counsel pursuant to public records requests (PC-S. 297-304, 422-24, 634-5). As a result, Mr. McGarry did not take the witness stand.

[40]Included in Def. Ex. 1 was a handwritten report by Officer Olsen, a supplemental report by Detective Engelke dated 1-23-84, a supplemental report by Detective Crotty dated 1-23-84, a supplemental report by Detective Crotty dated 6-14-84, a supplemental report by Detective Pflieger dated 2-6-84, and a supplemental report by Officer Newland dated 2-4-84.

request (PC-S. 301). These investigative reports include information which could have been used to impeach state witnesses Huey Byrd and Gregory Anderson. They also included information that could have led to an investigation of other possible suspects.

The State conceded that at the time of Mr. Floyd's trial, these investigative reports were viewed as privileged and were not disclosed to the defense (PC-S. 414-15). According to Mr. Episcopo, "[w]e never gave out the Green Sheets." (PC-S. 409). In fact, the State in seeking to quash the subpoena of Glenn Martin set forth its policy regarding the disclosure of evidence gathered pursuant to a State Attorney investigation:

> 9. The State Attorney, under the system established by the Florida Constitution and laws of Florida, is a "one-man grand jury" and as such, he possesses all the rights and privileges afforded to the grand jury. Imperato v. Spicola, 238 So.2d 503 (Fla. 2d DCA 1970).
>
> 10. Seeking the investigative work product of the State Attorney's Office is clearly improper and harassive. Bedami v. State, 112 So.2d 284 (Fla. 2d DCA 1959). * * * The confidentiality of such information is also recognized by federal case law. Vogel v. Gruaz, 110 U.S. 311, 5 S.Ct. 12 (1884). In Vogel, the U.S. Supreme Court held that statements made by a witness to a state attorney concerning a criminal investigation were absolutely privileged and inadmissible in evidence. This privilege is of constitutional origin. In re Quarles, 158 U.S. 532, 15 S.Ct. 959 (1885).

(PC-S. 32-6).

Finally, Mr. Floyd presented as Def. Ex. 3, letters written by Gregory Anderson to Det. Pfleiger and Joe Episcopo, the assigned assistant state attorney. These letters were

contained in the State Attorney's files that were disclosed to Mr. Floyd's collateral counsel pursuant to public records request (PC-S. 301).

In a March 8, 1984 letter, Mr. Anderson had written to the trial prosecutor and stated:

> You know before I had even talked to you concerning what Floyd had told me, Det. Pfleiger and I had talked several times, on the phone and in person and he had talked to his supervisor and to Det. Grigsby's supervisor about getting the robbery charge reduced and he had informed me more than once that they had no objection to having the charge reduced. He had even talked to my State's Attorney about it and my last conversation with Det. Pfleiger he was going to be in court today and say this. I wonder what happened, if they would have reduced it even to Grand Theft and even if I would have plead guilty to the other charge it would have put me in the point system of Probation, or at the very worse 1 yr or 18 months which I already have 8 months in.

Def. Ex. 3.

In a letter to Det. Pfleiger that pre-dated his phone call to Det. Pfleiger,[41] Anderson wrote, "Well Ralph I've been keeping my ears open and made friends with this black guy in here James Floyd." Within the letter, Mr. Anderson stated:

> I would really appreciate to talk to you as soon as possible, you told me if I heard anything to let you know and no one else, I tried to get a hold of Detective Lieutenant Hensley at first but I thought I should wait and talk with you first as you told me, hope to be seeing you real soon, he's got Ron Heidi, Public Defender for his lawyer but he's trying to get appointed a street lawyer. Ralph, I

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[41]Det. Pfleiger testified that his only contact with Gregory Anderson following his arrest on January 18, 1984, was when Anderson called him on February 10, 1984, which led to Pfleiger arranging a meeting with Mr. Episcopo on February 13, 1984 (R. 801-02).

> pray to God you are still trying to help me, I hope you haven't said the hell with me like Taylor has you know I appreciate anything you can do, Ralph, I'd rather die then go to prison and not be able to be a part of and watch my daughter grow up, please Sir, and thank you.

Def. Ex. 3. This letter contained the following postscript, "I don't know why you won't or can't except {sic} my phone calls, but will you please take the time and come out here and discuss this with me." Id.

Mr. Episcopo testified that he had "no idea whether [the Anderson] letters were" disclosed to Mr. Floyd's trial attorney (PC-S. 397-8). However, he indicated that the Acknowledgment of Discovery dated April 11, 1984, (Def. Ex. 4) was the best evidence of what he disclosed to Mr. Floyd's trial attorney (PC-S. 123-4). The letters were not included in this document.[42]

In its rebuttal case, the State called Robert Engelke,[43] Martin Rice and Frank Louderback (PC-S. 574; PC-S. 601).

Mr. Engelke had the occasion to interview Mr. Floyd along with Detective Crotty (PC-S. 548). Mr. Engelke was of the opinion that Mr. Floyd was not impaired in any fashion, nor did he have any kind of disability, and he was adequately able to express himself (PC-S. 552).

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[42]In its order denying relief, the lower court found that these letters were not disclosed (PC-R. 2161).

[43]Mr. Engelke is presently an investigator for the State Attorney's Office (PC-S. 546). At the time of the murder, he was a detective who had worked on Mr. Floyd's case (PC-S. 546).

With regard to the Tina Glenn report, Mr. Engelke testified that Tina Glenn was interviewed twice by Detective Gatchel (PC-S. 571). On the same day that Ms. Glenn was interviewed, Mr. Floyd was arrested (PC-S. 559-60). Mr. Engelke has no memory of any conversations with Detective Gatchel regarding the information that is contained in that report (PC-S. 562).

Martin Rice and Frank Louderback, both attorneys, were familiar with Mr. Murry (PC-S. 574, 602). In addition to their aforementioned testimony, they testified that, essentially, Mr. Murry was an excellent attorney (PC-S. 576, 606); that he had an alcohol problem (PC-S. 578, 648); and that he pulled clear of this problem after treatment (PC-S. 579, 605).

SUMMARY OF ARGUMENT

1. Mr. Floyd was deprived of his rights to due process when the State failed to disclose a wealth of exculpatory evidence in its possession to Mr. Floyd. Confidence in the reliability of the outcome of the proceedings is undermined by the non-disclosures. Further, the State knowingly presented false or misleading evidence and/or argument at his trial in order to obtain a conviction and sentence of death. The circuit court erred in its analysis of the components of this due process claim and failed to consider the cumulative effect of the prejudice suffered as a result of the State's misdeeds.

Mr. Floyd's convictions and sentence of death must be vacated and a new trial and sentencing ordered.

2. Mr. Floyd was deprived of the effective assistance of counsel at his capital trial. When cumulative consideration is given to the wealth of exculpatory evidence that did not reach Mr. Floyd's jury, either because the State failed to disclose or because trial counsel failed to discover, confidence in the reliability of the outcome is undermined.

3. Mr. Floyd was deprived of effective assistance of counsel at the penalty phase of his capital trial when counsel unreasonably failed to present evidence of compelling and substantial mitigating circumstances.

4. Mr. Floyd's death sentence is unconstitutional due to the fact that he is mentally retarded. The procedures and standards used by the lower court in determining Mr. Floyd's mental retardation were erroneous and in violation of Mr. Floyd's constitutional rights. Mr. Floyd is entitled to a proper hearing, with proper procedures in place and to a jury determination as to mental retardation.

5. The lower court judge should have disqualified himself from the postconviction evidentiary hearing proceedings. Mr. Floyd had a reasonable fear that the judge could not be fair and impartial due to *ex parte* communication with a court-

appointed expert. This case should be remanded for new proceedings before an impartial judge.

6. Mr. Floyd's conviction and sentence are unconstitutional under Ring v. Arizona. Sentencing relief is warranted.

STANDARD OF REVIEW

The constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court. The legal conclusions of the lower court are to be reviewed independently. See Ornelas v. U.S., 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); Stephens v. State, 748 So.2d 1028 (Fla. 1999).

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING MR. 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.

During the evidentiary hearing, Mr. Floyd presented testimony and documentary proof of the State's failure to disclose material, exculpatory evidence, and its presentation of false and misleading evidence.

I. The Undisclosed Exculpatory Evidence

A. *The Legal Standard*

In order to insure that a constitutionally sufficient adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon the prosecuting attorney. The

prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). The State also has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. Strickler v. Greene, 527 U.S. 263, 281 (1999). It is reasonable for defense counsel to rely on the "presumption that the prosecutor would fully perform his duty to disclose all exculpatory evidence." Id. at 284. Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or sentencing phase of the trial would have been different. Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993). This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434 (1995).

This Court has indicated that the question is whether the State possessed exculpatory "information" that it did not

reveal to the defendant. Young v. State, 739 So. 2d 553 (Fla. 1999). If it did, and it did not disclose this information, a new trial is warranted where confidence is undermined in the outcome of the trial.[44] In making this determination, "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." Rogers v. State, 782 So. 2d at 385. This includes impeachment presentable through cross-examination challenging the "thoroughness and even good faith of the [police] investigation." Kyles, 514 U.S. at 446.

B. The Undisclosed Police Reports

At the evidentiary hearing, Mr. Floyd presented as Def. Ex. 1, police reports contained in the State Attorney's files that were disclosed to Mr. Floyd's collateral counsel pursuant to public records request (PC-S. 300). Between the State's stipulation and the uncontroverted evidence presented at the evidentiary hearing, it is clear that the police reports introduced in Def. Ex. 1 were not disclosed to Mr. Floyd's trial attorney.

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[44]This Court has not hesitated to order new trials in capital cases wherein confidence has undermined the reliability of the conviction as a result of the prosecutor's failure to comply with his obligation to disclose exculpatory evidence. Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); State v. Huggins, 788 So.2d 238 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Gunsby, 670 So.2d 920 (Fla. 1996).

1. The Tina Glenn Reports[45]

The Tina Glenn reports represent the proverbial "bombshell", an eyewitness account of two white men at the victim's residence within the time frame that James Floyd, a black male, had purportedly committed the murders.

Detective Gatchell interviewed Ms. Glenn on the morning of January 18, 1984 (PC-S. 559), less than two days after the murder had been committed.[46] Given the proximity of time between the homicide and the statement of Ms. Glenn, it is likely that her recollection was fresh and accurate.

Ms. Glenn last saw the victim around 11:00 a.m. on January 16, 1984.[47] She described the victim as wearing a dress described as possibly aqua with flowers.[48] Ms. Glenn was able to describe in detail the two men who entered the victim's house around 1:00 to 1:30 while she was watching "All

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[45]The lower court concluded it could "only assume that Murry did not know of Tina Glenn-Avant or her statement to the police." (PC-R. 2159).

[46]The murder occurred on January 16, 1984 (R. 3) and the victim's body was discovered on the evening of January 17, 1984 (R. 3).

[47]Within Def. Ex. 1 is Officer Olsen's handwritten report detailing the discovery of Ms. Anderson's body. According to Officer Olsen, Rev. Warthen was the last person who was then known to see the victim alive. Rev. Warthen "last saw the vict. at church yesterday (First Pres. Church, 701 Beach Dr. N.E.) at approx. 1100 hrs, 16 Jan." Def. Ex. 1, Narrative Continuation Sheet of Officer Olsen at 2.

[48]Detective Engelke's report described the victim's dress as a floral blue, pink and purple pattern (PC-S. 565).

My Children."[49] Ms. Glenn saw the two men exiting the house and running to their car possibly a half hour to 45 minutes later.[50]

The lower court erroneously concluded that "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.'" (citations omitted) (PC-R. 2159).

The aforementioned information substantiates the importance of Ms. Glenn's statements. The medical examiner testified that Ms. Anderson died on January 16, 1984 (R. 469). A bank teller testified that she had cashed a check on Ms. Anderson's account at 1:47 p.m. on January 16, 1984 (R. 400).[51]

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[49]According to the report:

> She described the suspect 1, being the passenger as a white male, 30 years old, tall, thin. Dark long hair with big curls, moustache indicating his eyes stood out in contrast to his skin having dark eyes and light color skin.
>
> Subject was wearing possibly a faded out plaid shirt almost white in color with blue jeans.
>
> Subject number 2, white male, approximately 30 about the height however, medium build, having straight short brn hair, clean shaven wearing a t-shirt and blue jeans.

Def. Ex. 1, Supplementary Report (five pages) of Det. Gatchel at 1-2).

[50]In a follow-up interview, Ms. Glenn recalled that the two individuals left approximately one hour after they had arrived. Def. Ex. 1.

[51] The victim's daughter Anne Anderson testified that the signature on her mother's check was her mother's handwriting.

Mr. Floyd had cashed a forged check on Ms. Anderson's account at approximately 4:15 p.m. (R. 473-75). Therefore, the murder had to have occurred after 1:47 pm and before 4:15 p.m. on January 16, 1984.

Ms. Glenn's statement places the two white males at the Glenn residence on January 16, 1984, somewhere in the time frame of 1:00 p.m. to 2:30 p.m., when the murder likely occurred. In his closing argument, the trial prosecutor argued that Ms. Anderson had thereafter returned home and surprised an intruder in her house (R. 851). Ms. Glenn's statement supports this notion. The only discrepancy with the prosecutor's argument is that there were two intruders, they were white, and neither one was James Floyd.

2. Crime Scene Investigation

Based on the information found in several of the remaining undisclosed police reports, it is clear that the crime scene investigation was suspect. These reports clearly demonstrate not only discrepancies as to what may have taken place on the day of the murder, but also the importance of evidence submitted at the trial.

For example, the State presented evidence that there were negroid hair fragments found on the victim's bed (R. 701-2),

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(R. 551).

with the insinuation being that these hairs belonged to Mr. Floyd.[52]

However, the credibility of this evidence is called into question based upon Detective Engelke's undisclosed report, which observed that the bed where the victim's body was found "was fully made." Def. Ex. 1, Supplementary Report dated 1-23-84 by Det. Engelke at 12. "Laying underneath the victim was a blue and white afghan. Also underneath the victim were several papers from church." Id.

The location of Ms. Anderson's body on top of church papers, on top of an afghan, on top of a made bed, raises questions as to the significance of "negroid body hair fragments" on the sheet and bedspread.

Similarly, in another undisclosed report, Det. Crotty reported that he had spoken with Steve Drexler of the FDLE lab in Sanford on June 13, 1984 and that Mr. Drexler had located "some negro body hair fragments" on "the sheet and the white bedspread in the victim's bedroom." Def. Ex. 1, Supplementary Report dated 6-14-84 by Det. Crotty at 2.

However, no explanation was provided as to how "negroid body hair fragments" on a sheet inside a made bed underneath Ms. Anderson's body, church papers and an afghan revealed anything about who stabbed her to death. Had this information been disclosed, trial counsel would have been able to

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[52]The victim was murdered in her bedroom and found lying on her bed (R. 404-5).

undermine the State's assertion that those hairs could possibly belong to Mr. Floyd.

Additionally, Det. Engelke further noted in his undisclosed report that on the bottom shelf of the night stand between the two twin beds in the bedroom it "appeared as if something had been moved from the bottom shelf." Def. Ex. 1, Supplementary Report dated 1-23-84 by Det. Engelke at 12. This never came out at trial and suggests that something was taken from the residence by the assailant or assailants. No evidence was presented at trial that Mr. Floyd had taken anything other than the victim's checkbook.

Further inconsistencies in the crime scene investigation were revealed through an undisclosed police report by Officer Olsen:

> In the bedroom where the vict[im] was found, there are **fresh pry marks on the east window**, on the inside only. The window was not opened however, and appears to be painted shut. Possibly the suspect attempted to exit the res. from this window. **There are pry marks on one window on the north window also, but these did not appear to be as fresh.**

Def. Ex. 1, Narrative Continuation Sheet of Officer Olsen at 3 (emphasis added).[53]

This report conflicts with Det. Engelke's undisclosed report, where it was noted that he observed pry marks on the window frame of the north window that he said were "fresh."

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[53]In the accompanying diagram, Olsen indicated that the pry mark on the inside of the window was on the west window. The bedroom did not have windows on the east wall.

As to the windows on west wall of the bedroom, Det. Engelke said "[t]here was no evidence of fresh pry marks on the interior of the window frames." Def. Ex. 1, Supplementary Report dated 1-23-84 by Det. Engelke at 12.

Not only does Detective Engelke's report conflict with that of Officer Olsen, it also conflicts with his own trial testimony, where he stated, "There were two windows that had fresh, what appeared to be fresh pry marks." (R. 626).[54]

C. Undisclosed State Attorney Investigative Reports

The State Attorney's Office's policy of concealing their investigative reports, called "Green Sheets" based upon their being work product is suspect.[55] In Mr. Floyd's case exculpatory information included in these Green Sheets was impermissibly withheld from trial counsel.

In the undisclosed state attorney investigative reports was a document entitled Reinvestigation that contains the summaries of additional sworn statements of witnesses. One of these sworn statements was that of Ann Anderson, the victim's

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[54]The State made a big point of suggesting at trial that the pry marks were evidence that Mr. Floyd attempted to escape from the house through one of the windows in the victim's bedroom. However, according to the State, since they were painted shut, Mr. Floyd killed the victim in order to avoid being identified.

[55]Between the State's legal arguments in its motion to quash, its stipulation and the uncontroverted evidence presented at the evidentiary hearing, it is clear that the investigative reports introduced in Def. Ex. 2 were not disclosed to Mr. Floyd's trial attorney.

daughter. She reported that "a white male" had painted the victim's house "in the fall or winter of 1983." Had trial counsel been aware of this information as well as the Tina Glenn reports, he would have had an abundance of resources within which to challenge the State's case.

Also included were the transcribed sworn statements of Edna Whitfield and Gregory Anderson.[56] Ms. Whitfield's statement included a discussion of her belief that Huey Byrd may have killed the victim. Another undisclosed investigative report related to Mr. Byrd. Mr. Episcopo noted that Mr. Byrd had shown deception on a polygraph examination.[57]

In denying this claim, the lower court determined that it was not developed by defense counsel at the evidentiary hearing; that both Murry and Love were aware of Detective Crotty's deposition, in which he stated that Mr. Byrd showed "little signs of deception"; that "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; and that CCRC-S has failed to show that Byrd's deception could have been used during the

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[56] Mr. Anderson's sworn statement, which is discussed infra, could have been utilized for impeachment purposes.

[57] Additionally, an undisclosed supplemental police report by Detective Pflieger, dated 2-6-84, reported that Mr. Byrd gave deceptive responses during a polygraph examination on January 18, 1984. Def. Exh. 1.

guilt phase or the resentencing phase for impeachment purposes." (PC-R. 2159-61).

The lower court's reasoning is not supported by the record from the evidentiary hearing. Mr. Love was shown a February 6, 1984 police report by Detective Engelke, contained in Defense Exhibit 1 (PC-S. 321). He had not seen this document before, nor was it provided to him in discovery (PC-S. 321-322). Mr. Love did not consider this to be a "minor" deception. "My understanding is that basically you have three possibilities. You can either have no deception indicated, you have - - you can't get a result, or you have deception."

* * * *

Q If you had the information that Mr. Byrd had failed the polygraph - - was deceptive in the polygraph, is that something that you would have wanted to have investigated with Detective Crotty?
A Yes.
Q Is that something that you would have wanted to question the State prosecutors about, as to why you were not given the polygraph?
A Well, if I found out, I would have, again, pursued it.
Q You don't recall having received this from the State in any way?
A No.
Q Do you believe you were entitled to this document?
A I believe I should have been provided with this document or should have been provided it at some point in time. Whether or not it was provided to Mr. Murry initially, I don't know. I recall having some deposition of Detective Crotty and reading about it, but I did not basically feel there was anything germane at the time, at least from the deposition.
Q But now that you know about the deception in the polygraph, does it change your mind?
A Yes, it does.

(PC-S. 322-4).[58]

D. Undisclosed Gregory Anderson Letters

At the evidentiary hearing, Mr. Floyd presented as Def. Ex. 3, letters written by Gregory Anderson to Det. Pfleiger and Joe Episcopo, the assigned assistant state attorney.

It is clear that the State neither disclosed these letters from Gregory Anderson nor the content of these letters that demonstrate false testimony on Mr. Anderson's part and Det. Pfleiger's part, as well as establish Mr. Anderson's desperate efforts to obtain consideration from the State for his testimony against Mr. Floyd[59]. The State intentionally hid from Mr. Floyd's counsel and from his jury the plan to reward Mr. Anderson once he had testified. The non-disclosure of these letters clearly violated due process.

The lower court found that these letters were not disclosed and that they "did, in fact, possess exculpatory and/or impeachment value to the defense." (PC-R. 2161). However, in denying relief, the lower court determined that the third prong of Brady had not been established. The court

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[58] Mr. Love had never seen the February 13, 1984 report by assistant state attorney Joe Episcopo, which was part of Def. Ex. 2 (PC-S. 324). It is this something that he would have wanted to know in his representation of Mr. Floyd. (PC-S. 326).

[59]This is significant because it provides hints of accuracy to Gregory Anderson's claim in his undisclosed letters that he had contact with Det. Pfleiger and Pfleiger's supervisor Lt. Hensley prior to Anderson's incarceration with Mr. Floyd. This constitutes evidence of a violation of United States v. Henry, 447 U.S. 264 (1980).

found that Mr. Murry had "proceeded to quite effectively discredit Anderson by questioning him concerning his letter writing to Judge Walker (the judge assigned to Anderson's case at the time), his prior involvement as a 'snitch' in other cases, and his apparent favorable treatment in prior cases." (PC-R. 2162). Thus, the court concluded that CCRC-S had failed to show sufficient prejudice with respect to either the guilt phase or the resentencing proceeding (PC-R. 2162-63).

The lower court overlooks the fact that it, and presumably this Court, relied upon Mr. Anderson's testimony in sustaining Mr. Floyd's conviction. Floyd v. State, 497 So.2d 1211 (Fla. 1986). As such, this information was pertinent in putting this case in such a different light as to undermine confidence in the outcome. Alternatively, in light of the lower court's opinion that Mr. Anderson was discredited, any further evaluation of this case should be conducted without the "benefit" of his testimony. When a cumulative analysis is conducted, it is clear that Mr. Floyd's conviction cannot stand.

E. The Undisclosed Exculpatory Evidence Undermines Confidence in the Outcome

Appellant plainly disagrees with the lower court's assertion that the police reports, particularly the Tina Glenn

reports, were not discoverable at the time of trial.[60] Appellant maintains that the obligation to disclose exculpatory material under Brady supersedes any discovery practice purportedly outlined in Miller v. State. Moreover, this Court has indicated that the question is whether the State possessed exculpatory "information" that it did not reveal to the defendant. Young v. State, 739 So.2d at 553. The information need not be in admissible form. If the State possessed exculpatory information and it did not disclose this information, a new trial is warranted where the non-disclosure undermines confidence in the outcome of the trial. In making this determination "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present

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[60]The lower court is presumably relying on the State's argument that the aforementioned material was not discoverable at the time of trial. The court stated:

> At the outset, the court notes that the State Attorney's Office, at the time of this trial, was engaged in the practice of redacting police reports, disclosing only that portion which contained verbatim statements of witnesses. This practice was explained as "Millerizing," pursuant to Miller v. State, 360 So. 2d 46 (Fla. 2d DCA 1978). Love's testimony at the evidentiary hearing, as well as that of the prosecutor Joe Episcopo, confirmed this practice. [T: 76-77, 120-22]. The State argues that this practice was the discovery law in effect at the time of trial in 1984 and the resentencing in 1988, until the amendment of Fla. R. Crim. P. 3.220, effective July 1, 1989. In re Amendment to Florida Rule of Criminal Procedure 3.220, 550 So. 2d 1097 (Fla. 1989).

(PC-R. 2157).

other aspects of the case." Rogers v. State, 782 So.2d at 385.[61] This includes impeachment presentable through cross-examination challenging the "thoroughness and even good faith of the [police] investigation." Kyles v. Whitley, 514 U.S. at 446.

Without this information, trial counsel was seriously "handicapped" in his representation of Mr. Floyd. Rogers, 782 So.2d at 385. Furthermore, counsel was limited in his ability to impeach the "thoroughness" and "good faith" of the State's investigation of this case. Kyles, 514 U.S. at 446. Robert Love, Mr. Floyd's re-sentencing counsel testified that these non-disclosure were "candidly, I think those were pretty important" (PC-S. 362).[62]

Mr. Floyd's counsel were affirmatively misled by the false and/or misleading testimony given in depositions and at trial. When the State failed to correct the testimony, defense counsel had every reason to believe that the State was in compliance with its constitutional obligations. Strickler v. Greene, 527 U.S. 263, 281 (1999).

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[61]This Court has recognized that the United States Supreme Court in Strickler eliminated the due diligence element of a Brady claim. Occhicone v. State, 768 So.2d 1037, 1042 (Fla. 2000); Way v. State, 760 So.2d 903 (Fla. 2000).

[62]Mr. Love stated at another point, "I would have to be candid that in the report that I see here today, relative to seeing people at the scene, relative to adding to whatever Crotty had said on the slight {sic}, or whatever that was in the polygraph test, if you want my answer, that poses quite a concern" (PC-S. 360).

In the Brady context, the United States Supreme Court and this Court have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. at 436; Young v. State, 739 So.2d at 559.[63] In Lightbourne v. State, 742 So. 238 (Fla. 1999), this Court, in explaining the analysis to be used when evaluating a successive motion for postconviction relief, reiterated the need for a cumulative analysis:

> In this case the trial court concluded that Carson's recanted testimony would not probably produce a different result on retrial. In making this determination, the trial court did not consider Emanuel's testimony, **which it had concluded was procedurally barred**, and did not consider Carnegia's testimony from a prior proceeding. **The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision**.
>
> When rendering the order on review, the trial court did not have the benefit of our recent decision in Jones v. State, 709 So. 2d 512, 521-22 (Fla.) cert. denied, 523 U.S. 1040 (1998), where we explained that when a prior evidentiary hearing has been conducted, "the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial'" in determining whether the evidence would probably produce a different result on retrial. **This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a Brady claim. See Kyles v. Whitley, 514 U.S. 419, 436 (1995)**.

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[63]This Court has also held that cumulative consideration must be given to evidence that trial counsel unreasonably failed to discover and present at the capital trial. State v. Gunsby, 670 So.2d 920 (Fla. 1996). Thus, this argument must be evaluated cumulatively with Argument II, infra.

Lightbourne, 742 So. 2d at 247-248(emphasis added)(citations omitted).

Clearly, a cumulative analysis of all of the withheld evidence undermines confidence in the outcome of the trial and requires that this Court grant a new trial. Justice demands that Mr. Floyd receive a new trial. Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); State v. Huggins, 788 So.2d 238 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001).

II. The Presentation of False and/or Misleading Evidence Claim

A. The Legal Standard

In Giglio v. United States, 405 U.S. 150, 153 (1972), the United States Supreme Court recognized that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." Accordingly, the Court concluded that the Fourteenth Amendment "forbade the prosecution to engage in 'a deliberate deception of court and jury.'" Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935). If the prosecutor intentionally or knowingly presents false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process is violated and the conviction and/or death sentence must be set aside unless the error is harmless beyond a reasonable doubt.

Kyles v. Whitley, 514 U.S. 419, 433 n.7 (1995). The prosecution has a duty to alert the court, the defense, and the jury when a State's witness gives false testimony. Napue v. Illinois, 360 U.S. 264 (1959). The prosecutor must refrain from the knowing deception of either the court or the jury during a criminal trial. Mooney, 294 U.S. at 112. A prosecutor is constitutionally prohibited from knowingly relying upon false impressions to obtain a conviction. Alcorta v. Texas, 355 U.S. 28 (1957).

In cases "involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in **any reasonable likelihood** have affected the jury's verdict." United States v. Bagley, 473 U.S. at 678, quoting United States v. Agurs, 427 U.S. at 102. (emphasis added). As the United States Supreme Court explained in Bagley, this standard is the equivalent of the harmless beyond a reasonable doubt test. Thus, where the prosecution violates Giglio and knowingly presents either false evidence or false argument in order to secure a conviction, a reversal is required unless the error is proven harmless beyond a reasonable doubt. Bagley, 473 U.S. at 679 n.9.

B. At Mr. Floyd's Trial, Uncorrected False and/or Misleading Testimony

In Mr. Floyd's case, the State failed to correct false and/or misleading testimony of a crucial witness, Gregory

Anderson. The State relied upon this false and/or misleading testimony in convincing the jury to convict Mr. Floyd.

At Mr. Floyd's first trial, Mr. Anderson claimed that Mr. Floyd had confessed to him. Mr. Anderson testified that he did not know if he would receive any consideration for his testimony against Floyd.[64] In his own case he was facing a potential sentence of life plus 25 years if he was convicted on the pending charges (R. 781). Mr. Anderson testified that he had merely been told by the State that his testimony could not hurt him in relationship to his own case (R. 781). However, Mr. Anderson had written to the trial prosecutor on March 8, 1984, and stated:

> You know before I had even talked to you concerning what Floyd had told me, Det. Pfleiger and I had talked several times, on the phone and in person and he had talked to his supervisor and to Det. Grigsby's supervisor about getting the robbery charge reduced and he had informed me more than once that they had no objection to having the charge reduced. He had even talked to my State's Attorney about it and my last conversation with Det. Pfleiger he was going to be in court today and say this. I wonder what happened, if they would have reduced it even to Grand Theft and even if I would have plead guilty to the other charge it would have put me in the point system of Probation, or at the very worse 1 yr or 18 months which I already have 8 months in.

Def. Ex. 3, March 8, 1984, letter.[65]

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[64]Mr. Anderson testified that he came forward only because he did not believe in killing people (R. 788).

[65]In his August 7, 1984, deposition, Mr. Anderson indicated that he called Det. Pfleiger once and told him what he claimed Mr. Floyd had said. Anderson did not hear from Det. Pfleiger anymore until he was taken to talk to Mr. Episcopo (R. 124).

The prosecuting attorney at Mr. Floyd's trial did not correct Mr. Anderson's false or at the very least misleading testimony. Yet, the Fourteenth Amendment "forbade the prosecution to engage in 'a deliberate deception of court and jury.'" Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935).

In his deposition testimony, Mr. Anderson said that Det. Pfleiger had told him when he placed him in jail on his own pending charges, "'If you hear anything,' he said, 'I don't know if they'll help you out or anything like that,' but he said, 'It sure as hell won't hurt you.'" (R. 123). Yet in his sworn statement pursuant to a state attorney subpoena, Mr. Anderson testified that more than one officer had discussed this with him when he was placed in the jail:

> BY: You mentioned that the officers said to keep your eyes open?
>
> GA: I had asked them if I could hear something, if I heard anything about any type of case, would that help me on my cases. They said they couldn't make me any promises.
>
> BY: Did they send you in there to listen?
>
> GA: No. They made that very specific. Lt. Hensley made that specific.

Def. Ex. 2, February 13, 1984, statement, at 4.[66] The prosecuting attorney did not stand up and correct the false or

[66]Lt. Hensley was one of the supervisors who made case assignments (PC-S. 557). He was the Lieutenant in charge of the investigative division.

at the very least misleading testimony given during Mr. Anderson's deposition.

Det. Pfleiger testified at Mr. Floyd's trial immediately following Mr. Anderson.[67] He indicated that he was the officer who had arrested Anderson on January 18, 1984 (R. 800). He testified that Anderson had called him on February 10, 1984 (R. 801). Det. Pfleiger testified that these two occasions were the extent of his contact with Anderson; he and Anderson had not talked between January 18th and February 10th (R. 802). Det. Pfleiger testified that prior to the February 13, 1984, meeting with Anderson and the trial prosecutor, Anderson only contacted Det. Pfleiger "in any fashion" by calling on February 10, 1984 (R. 801).[68] Det. Pfleiger then arranged to meet with Anderson along with the trial prosecutor and Det. Engelke on February 13, 1984 (R. 803). Det. Pfleiger did not

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[67]Det. Pfleiger never mentioned that he was one of the three main detectives assigned to Mr. Floyd's case (PC-S. 558, 570-71). The implication of his testimony was that his involvement arose because he had arrested Mr. Anderson. As a result, he was the only one Anderson knew to contact. Therefore, Det. Pfleiger had no real knowledge of the facts of the homicide.

[68]Of course, this was false. Anderson wrote a letter saying "Well Ralph I've been keeping my ears open and made friends with this black guy in here James Floyd." Def. Ex. 3. Mr. Anderson stated, "I would really appreciate to talk to you as soon as possible, you told me if I heard anything to let you know and no one else, I tried to get a hold of Detective Lieutenant Hensley at first but I thought I should wait and talk with you first as you told me." This letter contained the following postscript, "I don't know why you won't or can't except {sic} my phone calls, but will you please take the time and come out here and discuss this with me."

make any promises to Anderson; he did not even say that the charges might be dropped (R. 804).

The prosecuting attorney did not stand up and correct the false or at the very least misleading testimony from Det. Pfleiger. The prosecutor had been informed by Anderson's March 8, 1984, letter that Anderson had numerous conversations with Det. Pfleiger who had discussed getting charges dropped and appearing in court on his behalf. The prosecutor had also been informed that Lt. Hensley had been part of the contact, specifically advising Anderson that he was not being asked to listen.

The State knowingly presented a false or at least misleading argument in closing. The prosecutor argued that Anderson had not been offered any deals (R. 862). The prosecutor vouched for the credibility of Anderson and that his story never changed (R. 861).[69] This clearly violated Giglio and Napue.

Another example of false and misleading testimony occurred during the pretrial deposition of Deputy Crotty, when he was asked by Mr. Floyd's trial counsel about the results of a canvass of the victim's neighborhood after the discovery of her body. Deputy Crotty informed Mr. Floyd's trial counsel that the only thing that turned up was that a black male had

[69]Based upon Anderson's testimony, the prosecutor argued that Mr. Floyd was a racist who bragged about stabbing "the white bitch" (R. 863).

been seen in the neighborhood (PC-S. 319-20). The prosecuting attorney did not correct this false or at the very least misleading testimony (R. 415). Intentional misleading of defense counsel violates due process. Gray v. Netherland, 518 U.S. 152, 165 (1996).

"The State, as the beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless error beyond a reasonable doubt." Guzman v. State, 28 Fla. L. Weekly S829 at 18 (Fla. 2003). Otherwise, a new trial is required.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING MR. FLOYDS' CLAIM THAT HE WAS DEPRIVED OF HIS CONSTITUTIONALLY GUARANTEED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court explained that under the Sixth Amendment:

> . . . a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

466 U.S. 668, 685 (1984). In order to insure that a constitutionally adequate adversarial testing, and hence a fair trial, occur, defense counsel must provide the accused with effective assistance. Accordingly, defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."

Strickland, 466 U.S. at 685. Where defense counsel fails in his obligations and renders deficient performance, a new trial is required if confidence is undermined in the outcome. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).[70]

To the extent that this Court finds that any or all of the documents and information in the State's possession as reflected by Def. Ex. 1, 2, and 3 were disclosed or available to Mr. Floyd's trial counsel, trial counsel's performance in not using and presenting those documents or the information contained therein to Mr. Floyd's jury was deficient. State v. Gunsby, 670 So.2d 920 (Fla. 1996); Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

Although the facts underlying Mr. Floyd's claims are raised under alternative legal theories -- i.e., Brady, Giglio, and ineffective assistance of counsel -- the cumulative effect of those facts in light of the record as a whole must be nevertheless be assessed. As with Brady error, the effects of the deficient performance must be evaluated cumulatively to determine whether the result of the trial produced a reliable outcome. When such consideration is given to the wealth of exculpatory evidence that did not reach Mr. Floyd's jury, either because the State failed to disclose or

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[70] Various types of state interference with counsel's performance may also violate the Sixth Amendment and give rise to a presumption of prejudice. Strickland, 466 U.S. at 686, 692. See United States v. Cronic, 466 U.S. 648, 659-660 (1984).

because trial counsel failed to discover, confidence in the reliability of the outcome is undermined.

ARGUMENT III

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

A. Introduction

As explained by the United States Supreme Court, an ineffective assistance of counsel claim is comprised of two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Williams v. Taylor, 120 S.Ct. 1495, 1511 (2000), quoting Strickland v. Washington, 466 U.S. 668, 687 (1984).

In Williams, the Supreme Court found deficient performance where counsel failed to prepare for the penalty phase of a capital case until a week before trial, "failed to conduct an investigation that would have uncovered extensive records," "failed to seek prison records," and "failed to return phone calls of a certified public accountant." 120 S.Ct. at 1514. Justice O'Connor in her concurring opinion explained, "trial counsel failed to conduct investigation that would have uncovered substantial amounts of mitigation," and as a result this was a "failure to conduct the requisite, diligent investigation." Id.

More recently, in Wiggins v. Smith, 123 S.Ct. 2527 (2003), the Supreme Court discussed counsel's decision to limit the scope of the investigation into potential mitigating evidence and the reasonableness of counsel's investigation. The Court stated:

> [A] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming [trial counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Wiggins, 123 S. Ct. at 2538.

This Court has recognized that trial counsel has a duty to conduct an adequate and reasonable investigation of available mitigation and evidence which negates aggravation. Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Rose v. State, 675 So. 2d 567 (Fla. 1996). This did not occur in Mr. Floyd's case.

B. Deficient Performance

During the postconviction evidentiary hearing, Mr. Love testified that it would be fair to say that the theme he was going for at the resentencing was that Mr. Floyd was a good and responsible person who was relatively non-violent with a solid work record (PC-S. 351). Mr. Love spoke with Mr. Floyd and the people who were to testify, and he developed their testimony that would help his theme (PC-S. 352).

Mr. Love developed his “theme” without conducting an adequate investigation into Mr. Floyd’s case. He did not obtain Mr. Floyd’s school records; he did not obtain the services of either a mitigation specialist or a mental health expert; he did not have Mr. Floyd evaluated for mental retardation; he did not have Mr. Floyd evaluated for organic brain damage; he did not obtain any hospital records; he did not obtain Mr. Floyd’s prison records; he did not investigate Mr. Floyd’s background to ascertain if there had been poverty or deprivation (PC-S 338-42).

Testimony at the evidentiary hearing established that Mr. Love’s failure to do many of the aforementioned things was not based on strategy:

Q Was there a strategic reason not to get his DOC records?
A Not that I can recall.
Q Was there a strategic reason not to hire a mental health expert?
A Strategic reason, no.

(PC-S. 378-9). Mr. Love acknowledged that his present practice is to utilize mental health experts:

Q Do you represent capital defendants today?
A Yes, I do.
Q Do you regularly hire mental experts in your investigation today?
A Yes, I do.
Q Do you regularly hire investigators?
A Yes, I do.
Q Is that a standard practice of course today?
A Yes, it is.

(PC-S. 345).

In accordance with Williams v. Taylor and Wiggins v. Smith, counsel's performance at the resentencing was deficient. "[I]nvestigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" Wiggins, 123 S.Ct. at 2527. (emphasis on original)(citations omitted). In a sentencing proceeding, "The basic concerns of counsel . . . are to **neutralize the aggravating factors advanced by the state**, and to present mitigating evidence." Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994), cert. denied, 115 S. Ct. 499 (1994)(emphasis added). Here, the necessary investigation to perform this function did not occur. At the evidentiary hearing, Mr. Love acknowledged:

> I don't think there is a question of tactics have changed and the law has changed, but **also my ability in handling the case would have changed.**

(PC-S. 385)(emphasis added).[71]

In its order denying relief, the lower court noted that:

> A review of the entire proceeding reflects that Love presented testimony from seven different witnesses- Eula Williams, Rex Estelle, Thomas Snell, Lela Richarson, Pinky Floyd, Ben Boykins, and Ann Shirley Anderson, the victim's daughter. A review of their testimony reveals that Love presented a **multi-faceted picture of mitigation**.

(PC-R. 2147)(emphasis added). Unfortunately, Mr. Love's "multi-faceted picture of mitigation" yielded absolutely

[71]Prior to this case, Mr. Love had not done any other capital murder trials or penalty phases (PC-S. 305-6).

no mitigation, statutory or non-statutory, in the sentencing order issued by this very same court, "Therefore, as I total up all the mitigating factors, there are none." (RS. 1071).[72]

Mr. Love's ineffectiveness was also demonstrated during the voir dire, where he failed to preserve a Batson challenge.

After the prospective jurors were questioned, the State procured the excusal of the only two blacks on the panel. Watson Haynes was excused for cause, because of his opposition to the death penalty (RS. 664-665). Mark Edmonds was excused peremptorily (RS. 670). Immediately upon the State's use of a peremptory to excuse Edmonds, defense counsel objected to the State exercising its challenges to exclude both of the black potential jurors, thus denying Mr. Floyd a cross-section of the community (RS. 670-671).

The court asked the State to give a reason for exercising its peremptory (RS. 671). The prosecutor responded that he did not need to give a reason unless systematic exclusion was shown, but then said, "I think he [Edmonds] said he would be satisfied for twenty-five years and that's punishment enough. You know, I thought

[72]In its order denying relief, the lower court avoids making a determination as to the deficient performance prong, "Assuming without deciding that Love was deficient..." (PC-R. 2149).

that that was enough." Id. The court said he did not specifically recall Edmonds' answer, but said it was on the record, and overruled Mr. Floyd's objection. Id.

The explanation offered by the State was patently false. Mr. Floyd's counsel was ineffective for not objecting to the explanation.

On direct appeal, this Court stated:

> There is no question that the state's explanation was race-neutral, and if true, would have satisfied the test established in State v. Neil, 457 So. 2d 481 (Fla. 1984), clarified, State v. Castillo, 486 So. 2d 565 (Fla. 1986), and State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988), cert. denied, 487 U.S. 1219, 108 S. Ct. 2873, 101 L.Ed.2d 909 (1988). It is uncontroverted, however, that the explanation was not true. At oral argument, the state conceded that the record indicates that Edmonds never made such a statement. Thus, we must determine the parameters of the trial court's responsibility to ascertain if the state has satisfied its burden of producing a race-neutral reason for the challenge.
>
> * * *
>
> Once the state has proffered a facially race-neutral reason, a defendant must place the court on notice that he or she contests the factual existence of the reason. Here, the error was easily correctable. Had defense counsel disputed the state's statement, the court would have been compelled to ascertain from the record if the state's assertion was true. Had the court determined that there was no factual basis for the challenge, the state's explanation no longer could have been considered a race-neutral explanation and Juror Edmonds could not have been peremptorily excused. **Because defense counsel failed to object to the prosecutor's explanation, the Neil issue was not properly preserved for review. We reject Floyd's first claim of error**.

Floyd v. State, 569 So. 2d 1225, 1229, 1230 (Fla. 1990) (emphasis added).

At the evidentiary hearing, Mr. Love testified:

> Well, I remember the State moved to strike this particular juror, who was African-American. I objected on Neil grounds. I believe Mr. Federico, as I recall, implicated that the reason was supposedly race neutral. And at the time I specifically remember thinking that it was so patently incorrect that I did not need to say anything more, and didn't. **Apparently, I was incorrect on that.**
>
> * * * *
>
> I don't know if I would characterize it as a "strategic decision." I basically - - I guess you could. The fact that I was so absolutely sure that the record would reflect that the reason given for a neutral challenge would be absolutely incorrect; but, again, **as I found out, I was incorrect in that decision.**

(PC-S. 348-9)(emphasis added).[73] In denying relief, the lower court determined that the Florida Supreme Court opinion essentially amounted to new caselaw, and therefore Mr. Love could not have been ineffective (PC-R. 2151). Contrary to the lower court's order, Mr. Love's failure to properly preserve the Neil issue was based on nothing more than his ignorance of the law, which resulted in prejudice to Mr. Floyd.[74]

C. Prejudice

As a result of counsel's deficient performance, the resentencing jury never heard crucial mitigating evidence that would have rebutted and outweighed the two aggravating factors presented by the state. These two aggravating circumstances

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[73]At the time of this case, Mr. Love had not picked a death qualified jury before (PC-S. 347).

[74]Counsel was also ineffective in failing to request additional peremptory challenges.

were pecuniary gain and heinous, atrocious or cruel. No mitigating circumstances were established to weigh against these two aggravating circumstances.[75] Nevertheless, four of the jurors voted to recommend a life sentence. Only two additional jurors needed to be convinced to vote for a life recommendation for a binding life recommendation to have been returned.[76]

Had counsel investigated, evidence of a wealth of mitigating circumstances could have been presented. This evidence would have offset the two aggravating circumstances presented by the State and would have also established numerous mitigators: that Mr. Floyd was under the influence of extreme mental or emotional disturbance in 1984 (PC-S. 525); that Mr. Floyd suffered from a mental illness of depression from at least the time of early adulthood (PC-S. 525, 531); that he had some difficulty in reasoning, thinking and judgment (PC-S. 525); that he suffers from brain damage (PC-S. 526); that he has difficulty in problem solving Id.; that he has trouble making good judgments Id.; that he has difficulties with impulse control and has language and

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[75]Not only did Mr. Love's "efforts" at the resentencing result in a finding of no mitigation, he also opened the door to the State being able to present evidence of Mr. Floyd's prior non-violent felony convictions (RS. 892, 935-7, 942).

[76]Further, two justices of this Court voted to vacate Mr. Floyd's death sentence as disproportionate. Floyd v. State, 569 So.2d 1225, 1232 (Fla. 1990)(McDonald, J., dissenting, joined by Barkett, J.).

arithmetic deficits Id.; that he is mentally retarded (PC-S. 526); that he had a dysfunctional familial background (PC-S. 531-2, 1839, 1998); that he was sexually abused Id; and that he suffered from severe academic problems (PC-S. 521, 532).

The lower court disregarded the expert testimony presented by collateral counsel: "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**." (PC-R. 2148) (emphasis added).

The court's finding is erroneous. The jury could have accepted Dr. Sultan's finding of mental retardation as being reasonably established by a preponderance of the evidence, the standard utilized for mitigating factors at the penalty phase. More importantly, with regard to the plethora of other mitigation which Dr. Sultan found to exist, including a statutory mitigating circumstance, the court's position that her findings "are of no moment to these proceedings" is incorrect. If one were to accept the court's rationale, then no attorney could ever be found ineffective for failing to hire mental health experts, given that any postconviction evaluation would be years after the fact. Clearly, the court's statement is contrary to caselaw. See, e.g., Ragsdale v. State, 798 So. 2d (Fla. 2001).

When considering how close Mr. Floyd's death recommendation was (8-4), and how little was presented at the resentencing, this substantial mitigation would have tipped the scales towards life. Floyd v. State, 569 So. 2d 1232 (McDonald, J., dissenting, joined by Barkett, J.). The lower court's finding that Mr. Floyd has not shown "that he was sufficiently prejudiced," is erroneous (PC-R. 2149). Mr. Floyd is entitled to relief.

ARGUMENT IV

THE TRIAL COURT ERRED IN DENYING MR. 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.

Mr. Floyd has proven that he is mentally retarded. Mr. Floyd has significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social and practical adaptive skills. This disability originated before the age of 18. (See Definition of Mental Retardation, American Association on Mental Retardation, Defense Exhibit 8).

Mr. Floyd presented evidence from one expert in mental retardation and one court-appointed mental health expert that he is mentally retarded. These two experts relied on all three prongs of the definition of mental retardation. They applied those prongs to Mr. Floyd, and based on the facts and background materials, they determined Mr. Floyd is mentally retarded.

The two other court experts were far from having expertise in mental retardation. Neither had done current research or written papers in the area of mental retardation. Neither had lectured on the topic. More importantly, both failed to rely on the three-prong definition of mental retardation that they claimed they followed in determining if Mr. Floyd was mentally retarded. These two court-appointed experts failed to consider onset before the age of 18, a separate and independent prong of the definition of mental retardation.

A. JURY TRIAL

Mr. Floyd maintains that under Ring v. Arizona, 122 S. Ct. 2428 (2002), he is entitled to a jury trial to determine whether he is mentally retarded. Ring requires that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. A jury trial on Mr. Floyd's mental retardation is necessary in light of Ring because it is a fact, which if not proven, will increase his maximum punishment. See Murphy v. State, 54 P.3d 556, 568 (Okla. Crim. App. 2002) ("Unless the issue of mental retardation is resolved prior to trial, the issue of mental retardation shall be decided in the sentencing state of a capital murder trial...").

B. IMPROPRIETY OF THE PROCEEDINGS

On June 20, 2002, the United States Supreme Court announced that the execution of the mentally retarded violated

the Eighth Amendment and the evolving standards of decency. Atkins v. Virginia, 122 S.Ct. 2242 (2002). While so holding, the Supreme Court indicated, "As was our approach in Ford v. Wainwright, with regard to insanity, we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." Atkins, 122 S.Ct. at 2250, quoting Ford v. Wainright, 477 U.S. 399, 405 (1986).

1. SELECTION OF EXPERTS

In reliance in part on the decision in Atkins, Mr. Floyd challenged his sentence of death as violating the Eighth Amendment. After setting an evidentiary hearing on Mr. Floyd's mental retardation claim, the lower court indicated that it would appoint "three mental retardation experts to evaluate the defendant, pursuant to 921.137, Florida Statutes." (PC-S. 250). The court appointed three experts, two from the State's list and one from the defense list to evaluate Mr. Floyd and determine whether he is mentally retarded (PC-R. 99-100). In the Order Appointing Mental Retardation Experts, the court acknowledged that while Fla. Stat. 921.137 only calls for the appointment of two experts, the court bypassed the statute, stating it "would prefer to appoint no fewer than three experts to aid the court in determining if the defendant in this case is mentally retarded." (PC-R. 99-100).

In ignoring the protocol of the Florida Statute, the lower court improperly stacked the deck against Mr. Floyd. The court's actions demonstrated its bias against Mr. Floyd, and as a result, denied Mr. Floyd his right to due process (See Argument V).[77]

2. LACK OF STANDARDS

The lower court failed to give the experts any guidance as to how IQ testing should be used and what definition and standards governed the evaluations of Mr. Floyd. Further, the lower court failed to give any guidance as to the burden of proof.[78] When counsel for Mr. Floyd voiced her concerns about the lack of guidance given to the experts, the lower court said:

> ....the determination of what procedures should be employed, what tests should be administered, and what standards should apply are issues for the experts who regularly practice in the field.

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[77]With regard to Dr. Toomer, the one expert which the court appointed from collateral counsel's suggestion list, the court found that his 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 has been hired by CCRC 3 to 4 times per year for the past 10 years, approximately." (PC-R. 2128). In making this determination, the court attempted to discredit its own expert, based on his "prior affiliation." As a result, the only court-appointed experts who were deemed credible by the court were from the State's list of suggested experts. Mr. Floyd was denied his right to due process in this proceeding.

[78]The court did not specify whether Mr. Floyd's burden was by a preponderance of the evidence or by the clear and convincing evidence standard.

(PC-R. 1696-98). Because of the absence of rules of procedure, the lower court concluded that the procedure for determining mental retardation would be left entirely to the mental health examiners, who do not regularly practice in the field of mental retardation. In fact, none of the State's experts regularly practice in the field of mental retardation.

The lower court usurped the legislative function and turned over its judicial authority to experts who have no concept of what legal procedures and standards should be. Under Fla. Stat. Sec. 921.137, Mr. Floyd and the Florida Legislature had expected the Department of Children and Family Services (DCF) to specify the standards and tests necessary for the proper determination of mental retardation. However, DCF has not completed its development of those standards, even though the rules are in the process of being created (Defense Exhibit 4). Moreover, this statute in its current form does not apply to Mr. Floyd because it is not retroactive and this Court has not had an opportunity to correct those defects by promulgating new rules or procedures in light of Atkins.[79]

In addition to the statute, the lower court relied on a footnote in Crooks v. State, 813 So. 2d 68, 76 n. 5 (Fla. 2002) to support its suggestion that the court-appointed

[79]Mr. Floyd had asked that the proceedings be held in abeyance until the Florida Supreme Court promulgated rules (PC-R. 1696-98).

experts could establish their own standards, rules and procedures in an Atkins mental retardation hearing. However, Crooks was a direct appeal opinion decided on March 7, 2002, **without** consideration of the United States Supreme Court's decision in Atkins. The subject of Mr. Crooks' appeal was the failure of the trial court to consider borderline mental retardation as mitigating evidence. The footnote sets out that "society's understanding of mental retardation continues to evolve" and that the Florida Supreme Court has elected to follow the approach of the United States Supreme Court in treating low intelligence as a significant mitigating factor. See, Crooks, 813 So. 2d at fn 5. In addition, at footnote 7, this Court specifically said that Fla. Stat. Sec. 91. 137 had just been codified and that "**the applicability of this new legislation and its effect, on Crooks' case is not before us.**" Id at footnote 7 (emphasis added). Therefore, Crooks was not instructive at all in Mr. Floyd's situation.

The lower court essentially allowed the court-appointed experts to make it up as they go along -- allowing each expert to pick and choose from an incomplete mental retardation statute, the DSM-IV, from prevailing case law or the standard they use in their own practices. As a result, some experts chose different methods and then failed to follow the dictates of the methods they chose. The absence of procedures has resulted in inconsistent process applied to Mr. Floyd. This inconsistent and haphazard process denied Mr. Floyd his

procedural due process rights to notice and opportunity to be heard in a meaningful manner at a meaningful time. Mr. Floyd is entitled to a proper hearing, with proper procedures in place and to a jury determination as to mental retardation.

C. THE LOWER COURT'S ORDER

In its order denying relief, the lower court found that Mr. Floyd failed to show that he is mentally retarded.[80] (PC-R. 2127-29). In making this finding, the lower court relied on the testimony of Dr. Gamache and Dr. Merin, each of whom the court found to be qualified experts as well as highly credible.[81] (PC-R. 2127-28). The court's order is not based on objective evidence. The facts establish that neither Dr. Merin nor Dr. Gamache were mental retardation experts.

Although Dr. Merin stated that he chose to rely on the DSM-IV, and not the statute, (PC-R. 1771), he somehow overlooked Criterion C of the DSM-IV, which establishes that the onset of mental retardation must occur prior to the age of 18.[82]

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[80]The court did not specify whether Mr. Floyd failed to meet this burden by a preponderance of the evidence or by the clear and convincing evidence standard.

[81]The court found that Dr. Merin was qualified as an expert in mental retardation after Dr Merin claimed that he had been retained by the State and the defense equally and that he has been qualified as an expert hundreds of times (PC-R. 2121).

[82]On page 39 of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) is the heading Mental Retardation and Diagnostic Features, which says:

During his direct examination as well as in his report, Dr. Merin failed to mention the third prong of the definition as a basis for his conclusion. In fact, it appeared he had not considered it at all until defense counsel asked about this omission. Dr. Merin responded, "Well, I considered or it was my consideration that it was adaptive capabilities." (PC-R. 1772). However, the DSM-IV does not consider onset before age 18 and adaptive skills to be the same thing. That is why they are separated as two different criteria of the mental retardation definition. Unconcerned by this distinction, Dr. Merin failed to consider one of the three independent prongs required in an evaluation for mental retardation. Dr. Merin's omission was obvious. An expert who regularly practices in the field of mental retardation should know this basic point. He is no expert on mental retardation.[83]

Dr. Merin also offered that he omitted any reference of onset before age 18 from his report because "I didn't think it was necessary to put it in" and because "that's what happened

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> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

[83]Dr. Merin is of the belief that research on mental retardation has not changed much since the 1950s and 1960s (PC-R. 1776).

thirty years ago." Dr. Merin said he did not place a great deal of emphasis on Mr. Floyd's official school records from Pinellas County because, "we don't know the reasons for those scores." (PC-R. 1792).[84]

Dr. Merin's response is not only contrary to the DSM-IV, which he chose to rely on, but contrary to common sense. "Onset before age 18" is a part of the DSM-IV to distinguish long-standing problems from problems that manifest themselves at adulthood. There would be no other way to prove onset before age 18 without old school or medical records, especially considering Mr. Floyd's age of 42. The fact that the school records are more than 30 years old is what makes them so valuable to those who "regularly practice" in the field of mental retardation. They are valuable because they prove the third prong of the test.

The scores within those school records, which indicate that Mr. Floyd was functioning in the retarded range when he was 15 with a full-scale score of 51 IQ (PC-R. 212-216), meant 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. Dr. Merin could not

[84]Dr. Merin had no problem relying on Mr. Floyd's self-report about his adaptive skills and employment history. One would think that independent records by school counselors and teachers would be more reliable than a mentally-retarded death row inmate.

avoid this evidence by saying it was not reliable because they were too old.

Contrary to the lower court's order, the facts also establish that Dr. Gamache is not an expert in mental retardation. Professionally, Dr. Gamache's CV is lacking in any expertise on mental retardation. Practically, Dr. Gamache did even less than Dr. Merin in finding that Mr. Floyd was not mentally retarded.

Dr. Gamache failed to conduct a clinical interview with Mr. Floyd. When asked why he did not conduct such an interview, Dr. Gamache responded that his purpose was to determine if he was mentally retarded and "I did not ask any questions beyond that at that time." (PC-R. 1925). Dr. Gamache said he did not conduct a clinical interview with Mr. Floyd because he was not asked to do so and interviews are "not necessarily" part of his evaluation to determine mental retardation. (PC-R. 1925-26).[85]

Although he testified about it on direct examination, Dr. Gamache did not mention any adaptive skills in his report (PC-R. 1934). Additionally, while Dr. Gamache chose to rely on

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[85]Court-appointed expert Sidney Merin testified that his interview and evaluation with Mr. Floyd began at about 10:30 a.m. and he went past 1 p.m. (PC-R. 1739-40). Dr. Merin did not suggest that a clinical interview was superfluous. Dr. Toomer, another court-appointed expert, said he spent four hours interviewing and testing Mr. Floyd (PC-R. 1828). Defense expert Denis Keyes testified that he spent approximately nine hours interviewing and testing Mr. Floyd. He testified that it took at least two hours to get comfortable with Mr. Floyd and the environment (PC-R. 1984-5).

the DSM-IV and the Florida Statute, 916.106 (12),[86] (PC-R. 1915), he forget to mention the third prong of the definition of mental retardation-- onset before age 18, on direct examination and in his report. Dr. Gamache said he did not consider onset before age 18 "an independent prong" and said it was merely a way to differentiate between adults who may have suffered some illness (PC-R. 1945). He failed to mention onset before age 18 in his report because, he said, "it was not necessary.....I have no dispute with whether or not there was some indication of below normal intellectual ability prior to age 18" (PC-R. 1946). Yet, Dr. Gamache failed to mention it in his report to this Court or on direct examination. Like Dr. Merin, had Dr. Gamache found no evidence of onset before age 18, it is clear he would have cited that as a reason to show that Mr. Floyd was not retarded.

The statute that Dr. Gamache said he relied on speaks about three prongs: general intellectual functioning, adaptive behavior, manifesting during the period of conception to age 18. The statute speaks about the standards and rules of the department, which Dr. Gamache assumed was the Department of Children and Families. He said while he relied on that statute, he was unable to determine what rules had

[86]Fla. Stat. 916.106 (12) defines retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18."

been promulgated by the DCF. "I searched for such a rule. I found no such evidence." (PC-R. 1918-19).

When shown a draft from the DCF concerning mental retardation in capital felony cases, Dr. Gamache said he had not seen it before nor had anyone shared it with him. The draft, Defense Exhibit 4, mentions two tests that DCF will consider in determining mental retardation – the Wechsler Intelligence Scale and the Stanford Binet.[87] Dr. Gamache said he did not give either of those two tests to Mr. Floyd (PC-R. 1917-18).

Dr. Gamache said he found his role in these proceedings was to advise or educate the Court in a legal matter, but he was unable to determine what standards to rely on, although he concluded in his report that "Mr. Floyd did not meet the standards for post-conviction relief from death row on the basis of mental retardation." When asked what those standards were, Dr. Gamache was unable to say (PC-R. 1922-23).

In terms of credibility, the court disregarded the fact that Dr. Gamache was less than candid on his curriculum vitae, which he said was up-to-date. (CV of Dr. Gamache, Defense Exhibit 5). Although his CV indicates that he currently is a clinical assistant professor at the University of South

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[87]The proposed draft from the Department of Children and Families on determining mental retardation in capital felony cases cites the WAIS-III and the Stanford-Binet as the two most reliable tests to determine mental retardation. See Defense Exhibit 4.

Florida, College of Medicine, the University of South Florida has “no record of current employment ...for Michael P. Gamache” (Defense Exhibit 2, October 25, 2002 letter from University of South Florida indicating no records of current employment of Dr. Gamache). When asked to explain the discrepancy, Dr. Gamache said it was not a paid position, but rather a “courtesy appointment.” “I am not currently employed by the University of South Florida, I am not employed there. I receive no money or funding. I have no employment contract with them.” (PC-R. 1900).

Dr. Gamache claimed to have reviewed the Pinellas County School records of Mr. Floyd. However, he failed to see “that they formally diagnosed him as being mentally retarded” (PC-R. 1929). Dr. Gamache’s failure was telling and dishonest. In tab 6 of the background materials provided to Dr. Gamache and this Court, is a two-page psychological report conducted by Edilo M. Robles, a school psychologist who evaluated Mr. Floyd. The evaluation date was December 12, 1975 and indicated that Mr. Floyd was 15 in the eighth grade. The evaluation procedure involved testing of Mr. Floyd, along with teacher, principal and school team conferences, and interviews and counseling with Mr. Floyd.

The report said that Mr. Floyd was having academic difficulties and “is clearly well below the level of his present grade placement,” which was eighth grade. The psychologist tested Mr. Floyd and found that he was

"**functioning within the retarded range of intelligence**," with a full scale IQ of 51. Another testing profile indicated that Mr. Floyd had strengths in interpreting social situations, "comparatively speaking," but said that "**James is still functioning at the retarded range even in this particular area**." The psychological report found that Mr. Floyd's performance on various tests showed his grade level to be the third grade and that he was at least four years behind in basic subjects such as math, word recognition, and spelling. The Tyrone Middle School Education Team decided to recommend that Mr. Floyd be transferred to high school and placed in a "EMR" unit at that school, which means educable mentally retarded.

The summary of these records state that:

> James' performance on the WISC-R places him **within the retarded range of intelligence**. Performance in the WRAT indicate he is functioning at least 4 years behind present grade placement in his basic subjects. Results of the Bender-Gestalt also indicate his being at least 4 years behind in his perceptual abilities as compared to his peers. James' size and level of social interaction places a great deal of pressure both on him and on his teachers and peers in his present school environment.

(PC-R. 212-216)(emphasis added).

While ignoring the aforementioned information, Dr. Gamache found in Mr. Floyd's prison records adaptive functioning that he used the outside yard regularly and spent significant amount of time in his cell reading, writing and watching TV (PC-R. 1888). Dr. Gamache said those skills

showed “the adaptive domains of health and leisure and self-direction, as well as ....communication and home living.” Id.

Dr. Gamache, however, failed to question Mr. Floyd or anyone else about his life on death row (PC-R. 1951). Had he done so, he would have learned that Mr. Floyd had no ability to “self-direct” in 24-hour lock down. There is no adaptive skill required to sit in a locked cell where the only two options are watching TV or reading a book. There is no adaptive skill required to be directed to the yard twice a week for two hours.

In sum total, Dr. Gamache found Mr. Floyd not to be retarded based on: Five questions including when was his birthday; Seventy-five minutes of IQ testing; Dr. Gamache’s failure to see the school records that showed that Mr. Floyd was formally diagnosed as retarded at the age of 15 while in the eighth grade; and adaptive behaviors consisting of: Letter writing in which Dr. Gamache did not know if Mr. Floyd was the author; prison records of “health, leisure and self-direction,” in which Mr. Floyd was in 24-hour lock down and has no free choice; and testimony of Rex Estelle, who said that Mr. Floyd was not a good worker because he lost time and stole from the church and its parishioners.

With regard to Dr. Toomer and Dr. Keyes, the two experts who found Mr. Floyd to be mentally retarded, the lower court incidentally found their testimony to be less credible. The lower court criticizes Dr. Toomer because 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 (PC-R. 2128). The court overlooks Dr. Toomer's testimony that he relied on what Mr. Floyd told him, but it would have compromised the integrity of the testing process to rely solely on this information (PC-R. 1835-6). Also, the court obviously disregards the testimony of Dr. Gamache that, with regard to adaptive behavior, he obtained this information mostly from the records provided by defense counsel (PC-R. 1887).

Next, the court takes issue with the fact that Dr. Toomer failed to account for the marked difference in the scores from the tests he gave in 1992 as opposed to 2002. Id. Again, the court ignores the fact that the 1992 score was entirely consistent with the score Mr. Floyd obtained while in prison (PC-R. 1829-30). Further, the court acknowledges then seemingly dismisses the fact that Dr. Toomer utilized a different test in 2002.

The court also expressed concerned over the fact that:

> 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.

(PC-R. 2128).[88] The court's order ignores the evidence. In terms of the second prong of the DMS-IV test, overall adaptive functioning, Dr. Toomer said he looked at Mr. Floyd's past records that described his functioning, including his academic skills (PC-R. 1833).

Dr. Toomer said he found a number of critical factors in the background materials. Id. He said there was information on Mr. Floyd's family history and his mother's alcoholism (PC-R. 1834). He said he found information in the pre-sentence investigation that provided additional information about the family's dysfunction. Id. "There were also school records that provided a picture of his difficulty with intellectual functioning." Id.

Dr. Toomer described Mr. Floyd's school records as "critical":

> because they provided a picture of intellectual functioning prior to age eighteen. This was administered by school personnel. It also is supplemented by the narrative remarks, which pointed out the fact that he was underachieving.
>
> He had deficits in all areas. He was not performing up to his grade level or expectations overall. That's in

[88]The court also found 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 has been hired by CCRC 3 to 4 times per year for the past 10 years, approximately." (PC-R. 2128). In making this determination, the court attempted to discredit its own expert, based solely on his "prior affiliation." As a result, the only court-appointed experts who were deemed credible by the court were from the State's list of suggested experts. Mr. Floyd was denied his right to due process in this proceeding.

> terms of functioning and in terms of his mastering of the required information.

(PC-R. 1835). In stating that "the school records themselves show that the defendant excelled in Science and Language," the court is avoiding the overwhelming data and conclusion as stated in these records: that Mr. Floyd was found to be mentally retarded.

Moreover, with regard to Mr. Floyd's work as dishwasher, custodian and landscaper, Dr. Toomer explained that these are basically redundant tasks, that they don't require abstract function to do those kinds of tasks (PC-R. 1861). Mentally retarded individuals can handle those kinds of tasks (PC-R. 1862).

Dr. Toomer stated that Mr. Floyd's inability to hold a job as a janitor or dishwasher was indicative of poor adaptive skills (PC-R. 1869-70). Other indications of poor adaptive functioning included the areas of interaction with Mr. Floyd's peers, his deficit functioning in school and employment as well as self-direction (PC-R. 1865).

What distinguished Dr. Toomer from the other court-appointed experts was the equal consideration of all three prongs of the DSM-IV definition of mental retardation and their application to Mr. Floyd. Based on his expertise, and current and past testing, Dr. Toomer testified that Mr. Floyd has significant subaverage intellectual functioning that exists with deficits in behavior that manifested before the

age of 18, the third prong of the DSM-IV test. Dr. Toomer concluded that Mr. Floyd was mentally retarded (PC-R. 1839).

The court also found Dr. Keyes to be less credible despite the fact that he was the **only** expert who has focused his career in the field of mental retardation.[89] Even the lower court acknowledged that "throughout his testimony on direct-examination, Dr. Keyes demonstrated his thorough knowledge about mentally retarded persons." (PC-R. 2128). In an attempt to discredit Dr. Keyes and his admittedly "thorough knowledge," the court questioned the reliability of the Vineland test, which Dr. Keyes administered.

Ironically, in its order denying relief, the lower court states:

> In fact, the methodology employed by this court has been accepted by the Florida Supreme Court. In Bottoson, 813 So. 2d at 33-34, the Florida Supreme Court stated:
>
> > ...In the order denying relief, the trial court discussed Dr. Greg Pritchard's **use of the Vineland** test to evaluate adaptive behavior and noted that the test took into account the fact that Bottoson was institutionalized. Dr. Pritchard concluded that Bottoson did not have significant deficiencies in adaptive behavior. The court stated: "The court finds Dr. Pritchard's testimony credible and accepts this explanation."

[89]Based on 28 years of expertise in mental retardation, Dr. Keyes concluded that Mr. Floyd is mentally retarded (PC-R. 1998).

(PC-R. 2130)(emphasis added). Remarkably, despite questioning the reliability of the Vineland, the court relies on an opinion which cites to the use of the Vineland.

The Court then attempts to attack Dr. Keyes by stating that

> he gave inconsistent response regarding the number of times he was qualified as an expert in a court of law. And, he conceded that he has been only 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.

(PC-R. 2128). The court's reasoning is disingenuous. Dr. Keyes was clearly the most knowledgeable expert in mental retardation. Dr. Keyes testified that he has consulted on cases involving mental retardation, but he has not taken a lot of death-row cases that come his way (PC-R. 1962-3). He will take a death-row case if there is evidence of mental retardation (PC-R. 1963).[90] Dr. Keyes has been qualified as an expert in the field of mental retardation in South Carolina, North Carolina, Florida, Arkansas, Texas, Missouri and a couple of others (PC-R. 1964). The fact that Dr. Keyes does not regularly practice in Florida explains the reason he has only testified twice there.

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[90]The court attacked Dr. Toomer for his "affiliation" with CCRC, then subsequently attacks Dr. Keyes for being selective about the cases in which he gets involved.

In one final attempt to discredit Dr. Keyes, the court "questioned his 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. Dennis Keyes, William Edwards, Esq., & Robert Perske, "People with Mental Retardation are Dying, Legally" Mental Retardation, Vol. 35, No. 1, (Feb. 1997)." (PC-R. 2129).

The Court overlooks the fact that this very article was relied upon by the United States Supreme Court majority opinion in Atkins v. Virginia, 122 S. Ct. 2242 (2002) n. 20.[91]

D. CONCLUSION

Mr. Floyd is mentally retarded. After nine hours of interviewing and testing Mr. Floyd, more than five and half hours of questioning his family and friends about his adaptive skills; and reviewing background materials, Dr. Keyes determined that based on his IQ scores, his adaptive skills and onset before age 18, Mr. Floyd meets the definition of mental retardation. Dr. Keyes considered all three areas of mental retardation – subaverage intelligence, adaptive functioning and onset before age 18 – applied them to Mr. Floyd and found him to be mentally retarded.

[91]The court also failed to mention that Dr. Keyes has given presentations in Tampa for the Florida Association of Prosecuting Attorneys (PC-R. 1962).

Dr. Toomer, after two evaluations, review of background materials and testing Mr. Floyd for more than four hours, also considered the three areas of mental retardation, applied them to Mr. Floyd, and found him to be mentally retarded.

Doctors Merin and Gamache, however, failed to consider all aspects of the definition of mental retardation, even when they chose the standards to use. They both failed to mention onset before age 18 in their written reports or on direct examination. It was clearly an afterthought to both of them. Their expertise in dealing with the mentally retarded is limited at best.

Doctors Merin and Gamache failed to rely on the three-prong test of the definition of mental retardation; failed to learn about Mr. Floyd's prison environment; failed to request or rely on any independent sources for Mr. Floyd's adaptive skills; based their opinions on false information; and were less than thorough in their testing. Both doctors were intellectually dishonest when they failed to review all of the background materials provided to them, including onset before age 18. The testing and results of doctors Merin and Gamache do not reflect Atkins and should have been given no weight. Mr. Floyd is entitled to relief.

ARGUMENT V

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

Disclosures by Dr. Merin during the evidentiary hearing

alerted postconviction counsel to *ex parte* communications which occurred between Dr. Merin, a court-appointed expert, and the judge's staff regarding the qualifications of Mr. Floyd's confidential mental retardation expert. As a result of the *ex parte* information, the court issued an order on September 12, 2002 notifying defense counsel that the court has information that Mr. Floyd's "psychologist" was from South Carolina and may not be licensed in the State of Florida. The court ordered defense counsel into a hearing to explain herself.

Dr. Merin's evaluation of Mr. Floyd occurred on September 12, 2002 at Union Correctional Institution in Raiford, Florida. Defense counsel was present for the evaluation. During the evaluation, Dr. Merin asked defense counsel who had given Mr. Floyd the WAIS and she told him.

Counsel later received a court order dated that very same day, which stated:

> [T]he court is aware that defense counsel hired an independent mental retardation expert aside from the three experts appointed by the court, which defense counsel is certainly permitted to do. The court has been informed, however, that this independent defense expert is licensed as a mental health professional in the state of South Carolina (i.e. either as a psychologist or psychiatrist). The court has been informed that the Florida Department of Professional Regulations, Board of Psychologists forbids mental health professionals licensed in other states from practicing or administering tests in the State of Florida, absent some provision of reciprocity with the other state (which the court understands does not exist here). In light of this information, which may or may not prove to be pertinent, the court would like the attorneys of record to be

prepared to discuss this additional issue at the status check.

(PC-R. 107-08).

During the evidentiary hearing, on October 28, 2002, Dr. Merin acknowledged that he had written a letter, dated September 19, to Mr. Chancey[92] regarding a concern that Dr. Keyes was from South Carolina (PC-R. 1781, 1784).[93]

Subsequent to Dr. Merin's testimony, on October 29, 2002, counsel for Mr. Floyd filed Defendant's Motion to Disqualify Judge and Supporting Memorandum of Law, based upon Mr. Floyd's belief that he could not be fair and impartial in these proceedings (PC-S. 7-25). After a short recess, the court denied the motion as legally insufficient as a matter of law (PC-R. 1821).[94]

In the instant case, Mr. Floyd had a reasonable fear that he would not receive a fair hearing before Judge Luce because of the aforementioned circumstances. The facts alleged in the motion were "sufficient to warrant fear on [Mr. Floyd's] part that he would not receive a fair hearing by the assigned judge." Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988), Rogers v. State, 630 So. 2d 513 (Fla 1993).

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[92]Mr. Chancey was the court's law clerk.

[93]Dr Merin doesn't recall calling the judge or the JA on his way back from the prison (PC-R. 1785). He doesn't know how the judge found out (PC-R. 1786).

[94]The court subsequently issued a written order, dated November 4, 2002 (PC-S. 26-7).

The lower court should have recused itself from the proceedings. Its failure to do so resulted in error and a violation of Mr. Floyd's due process rights.

ARGUMENT VI

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

In Ring v. Arizona, 122 S.Ct. 2428 (2002), the Supreme Court held the Arizona capital sentencing scheme unconstitutional because a death sentence there is contingent upon finding an aggravating circumstance and assigns responsibility for finding that circumstance to the judge. Appellant, while acknowledging that this Court has previously ruled against Ring's application to Florida, maintains that because the Florida death penalty statute makes imposition of a death contingent upon findings of "sufficient aggravating circumstances" and "insufficient mitigating circumstances," and gives sole responsibility for making those findings to the judge, it violates the Sixth Amendment under Ring.

Additionally, Mr. Floyd's jury recommendation was eight to four. Findings of the elements by anything less than a unanimous verdict is unconstitutional under the Sixth and Fourteenth Amendments. Mr. Floyd's case is one in which no prior violent felony conviction was used as an aggravating factor, and thus there is no certainty that any aggravating factor was found unanimously. Relief must issue.

CONCLUSION

Mr. Floyd submits that relief is warranted in the form of a new trial and/or a new sentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by U.S. Mail, postage prepaid, to Carol Dittmar, Assistant Attorney General, Concourse Center #4, 3507 Frontage Rd., Suite 200, Tampa, Florida 36607 this ___ day of January, 2004.

CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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