IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-726

VICTOR TONY JONES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

Defendant was charged, in an indictment filed on January 11, 1991, in the Eleventh Judicial Circuit of Florida in and for Miami-Dade County, Florida, case number F90-50143, with committing: (1) the first degree murder of Matilda Nestor, (2) the first degree murder of Jacob Nestor, (3) the armed robbery of Matilda Nestor, (4) the armed robbery of Jacob Nestor, and (5) the possession of a firearm by a convicted felon. (DAR. 13-16)[1] The crimes were alleged to have been committed on December 19, 1990. *Id.*

After the trial court granted Defendant's motion to sever the charge of possession of a firearm by a convicted felon, the matter proceeded to trial on the remaining counts on January 26, 1996. (DAT. 932) The jury found Defendant guilty as charged on the four remaining counts, and the trial court adjudicated Defendant guilty in accordance with the verdicts. (DAR. 319-22, 323) After a penalty phase proceeding, the jury recommended a sentence of death for the murder of Mrs. Nestor by a vote of 10 to 2, and recommended a sentence of death unanimously for the murder of Mr. Nestor. (DAR. 353-54) The trial court followed the jury's recommendations and imposed death sentences for both

[1] The symbols "DAR" and "DAT" will refer to the record on appeal and transcript of proceedings from Defendant's direct appeal, Florida Supreme Court Case No. 81,482, respectively.

murders. (DAR. 325-27) The trial court also sentenced Defendant to life imprisonment for each of the robbery counts and ordered that all of the sentences be served consecutively. *Id.*

Defendant appealed his convictions and sentences to this Court, raising 5 issues:

> 1) the trial court erred by denying his motion for judgment of acquittal on the two armed robbery counts; 2) the trial court erred by failing to instruct the jury that if it found both the aggravating factor of "during the course of a robbery" and the aggravating factor of "for pecuniary gain" that it had to consider the two factors as one; 3) the trial court erroneously rejected Jones' mental or emotional disturbance at the time of the offense as a statutory mitigating factor and failed to properly instruct the jury on the factor; 4) a new sentencing proceeding is required because the mental health experts who testified failed to bring the possibility that Jones suffered from fetal alcohol syndrome/fetal alcohol effect to the court's attention and because the court refused to consider Jones' abandonment by his mother as a mitigating circumstance; and 5) the trial court erred by failing to grant Jones' motion for mistrial based upon various alleged improper comments made by the prosecutor during penalty phase closing argument.

Jones v. State, 652 So. 2d 346, 359 (Fla. 1995). This Court affirmed Defendant’s convictions and sentences on January 12, 1995. *Jones v. State*, 652 So. 2d 346 (Fla. 1995). In doing so, this Court found the following facts:

> According to the evidence presented at the trial, on December 19, 1990, the bodies of sixty-six-year-old Matilda Nestor and sixty-seven-year-old Jacob Nestor were discovered in their place of business. Mr. Nestor's body was found in the main office. He had been stabbed once in the chest. An empty holster was found on Mr. Nestor's waistband. Mrs. Nestor's body

was discovered in the bathroom. She had been stabbed once in the back. The Nestors' new employee, Victor Tony Jones, was found slumped over on the couch in the main office not far from Mr. Nestor's body. The butt of a .22 caliber automatic pistol was protruding from under Jones' arm.

According to the evidence, December 19 was Jones' second day of work for the Nestors. It appears that as Mrs. Nestor was entering the bathroom in the rear of the building Jones came up behind her and stabbed her once in the back. As Mr. Nestor came toward the bathroom from the main office, Jones stabbed him once in the chest. The medical examiner testified that Mrs. Nestor died as result of a stab wound to the base of her neck which severed the aorta that carries blood and oxygen to the brain and Mr. Nestor died as a result of the stab wound to his chest which entered his heart.

There was evidence that after being stabbed, Mr. Nestor retreated into the office, where he pulled the knife from his chest, attempted to call for help, drew his .22 caliber automatic pistol and shot five times, striking Jones once in the forehead. No money or valuables were found on either victim or in Mrs. Nestor's purse which was found on the couch in the main office next to the defendant. The evidence also was consistent with Mr. Nestor's body having been rolled over after he collapsed so that personal property could be removed from his pockets.

After the couple was murdered, Jones was locked inside the building where he remained until police knocked down the door after being called to the scene by a neighbor. Money, keys, cigarette lighters and a small change purse that was later identified as belonging to Mrs. Nestor were found in Jones' front pocket. The Nestors' wallets were later found in the defendant's pants pockets. It was not immediately apparent to the police that Jones had been shot. However, after Jones was handcuffed and escorted from the building, he complained of a headache. When an officer noticed blood on Jones' forehead, and asked what happened, Jones responded, "The old man shot me." Rescue workers were called and Jones was taken to the hospital. While in the intensive care unit, Jones told a nurse that he had to leave because he had "killed

> those people." When asked why, Jones told the nurse, "They owed me money and I had to kill them."
>
> * * * *
>
> As to each murder, the court found in aggravation: 1) Jones was under a sentence of imprisonment at the time of the murder, 2) Jones was convicted of a prior violent felony, 3) the murder was committed during the course of a robbery, and 4) the murder was committed for pecuniary gain, which the court merged with the "during the course of a robbery" aggravating factor. Although Jones presented evidence that he had been abandoned at an early age by his mother and that he suffered from extreme emotional or mental disturbance throughout his life, the court found nothing in mitigation.

Id. at 348-49. Defendant then sought certiorari review in the United States Supreme Court, which was denied on October 2, 1995. *Jones v. Florida*, 516 U.S. 875 (1995).

After Defendant was determined to be competent to proceed with post conviction litigation, he filed an amended motion for post conviction relief raising 22 claims:

> (1) postconviction counsel was ineffective because of the lack of sufficient funding fully to investigate and prepare the postconviction motion; (2) appellant was denied due process and equal protection because records were withheld by state agencies; (3) no adversarial testing occurred at trial due to the cumulative effects of ineffective assistance of counsel, the withholding of exculpatory or impeachment material, newly discovered evidence, and improper rulings of the court; (4) trial counsel was ineffective for (a) failing adequately to investigate and prepare mitigating evidence, (b) failing to provide this mitigation to mental health experts, and (c) failing adequately to challenge the State's case; (5) trial counsel was burdened by an actual conflict of interest adversely affecting counsel's representation; (6) appellant was denied due process because he was incompetent, and trial counsel failed

> to request a competency evaluation; (7) appellant was denied a fair trial because of improper prosecutorial argument, and trial counsel was ineffective for failing to object; (8) appellant's convictions are constitutionally unreliable based on newly discovered evidence; (9) appellant was denied due process because the state withheld exculpatory evidence; (10) appellant's death sentence is unconstitutional because the penalty phase jury instructions shifted the burden to appellant to prove death was inappropriate; (11) the jury instructions on aggravating circumstances were inadequate, facially vague, and overbroad, and trial counsel was ineffective for failing to object; (12) appellant's death sentence is unconstitutional because the State introduced nonstatutory aggravating factors, and counsel was ineffective for failing to object; (13) jury instructions unconstitutionally diluted the jury's sense of responsibility in sentencing, and trial counsel was ineffective for not objecting; (14) appellant was denied his constitutional rights in pursuing postconviction relief because he was prohibited from interviewing jurors; (15) appellant is innocent; (16) execution by electrocution is unconstitutional; (17) Florida's capital sentencing statute is unconstitutional facially and as applied; (18) appellant's conviction and sentence are unconstitutional because the judge and jury relied on misinformation of constitutional magnitude; (19) appellant's death sentence is unconstitutional because it is predicated on an automatic aggravating circumstance, and counsel was ineffective for failing to object; (20) appellant "is insane to be executed"; (21) because of juror misconduct, appellant's rights were violated; and (22) cumulative errors deprived appellant of a fair trial.

Jones v. State, 855 So. 2d 611, 614 n.2 (Fla. 2003).

The lower court ordered an evidentiary hearing on "Claim III-Voluntary Intoxication;" "Claim IV-Mental Health and Family History Mitigation;" and "Claim VI-Competency Prior to Trial."

(PCR1. 365)[2] After the evidentiary hearing, the lower court denied all of the claims. (PCR1. 379-96) In rejecting the claim of ineffective assistance of penalty phase counsel, the lower court specifically found that the testimony of Pamela Mills was incredible, that statements about Defendant being a poor student were contradicted by the evidence and that opinions of the experts who testified at the evidentiary hearing were unreliable. (PCR1. 386, 387, 388)

Defendant appealed the denied of his first motion for post conviction relief to this Court, raising 5 issues:

> (1) "that trial counsel was constitutionally ineffective for failing to investigate a voluntary intoxication defense, failing to present other evidence consistent with the defense at trial, failing to challenge several jurors for cause, and failing to ensure appellant's presence at all critical stages of trial, and that no reliable adversarial testing occurred at the guilt phase as a result of the combined effects of trial counsel's deficient performance;" (2) "that defense counsel had a conflict of interest that denied appellant the effective assistance of counsel;" (3) "that no adequate adversarial testing occurred at the penalty phase because trial counsel failed properly to investigate and present available mitigation, failed to present evidence to support the unconstitutionality of appellant's prior convictions, and failed to object to constitutional error with regard to jury instructions;" (4) "that the lower court erred in determining that public documents were exempt from disclosure;" (5) "that he is 'insane to be executed' but admits that this issue is not ripe for review."

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[2] The symbols "PCR1." and "PCR1-SR." will referred to the record on appeal and supplemental record on appeal in the instant appeal, respectively.

Jones, 855 So. 2d at 615 n.4. In his reply brief, Defendant asserted a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). This Court affirmed this Court's denial of the motion for post conviction relief. *Jones v. State*, 855 So. 2d 611 (Fla. 2003). In doing so, this Court expressly noted that "one of [Defendant's] teacher's described [Defendant] as a good student, and the school records obtained by counsel bore this out." *Id.* at 618.

While the appeal from the denial of the first motion for post conviction was still pending, Defendant filed a second motion for post conviction relief, raising a claim pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002) and a claim of cumulative error. (PCR2. 28-102)[3] Upon motion by the State, this Court dismissed that motion for lack of jurisdiction. (PCR2. 107-09, 1338)

After this Court issued its mandate, Defendant filed the instant motion for post conviction relief. (PCR2-SR. 1-85) The motion raised two claims:

> I.
> [DEFENDANT] IS MENTALLY RETARDED, THUS, PURSUANT TO THE HOLDING OF ATKINS V. VIRGINIA, 122 S. CT. 2242(2002), HIS DEATH SENTENCE IS IN CONFLICT WITH [DEFENDANT'S] RIGHT TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE EIGHTH AND

[3] The symbols "PCR2." And "PCR2-SR." will refer to the record and supplemental record in the present appeal, respectively.

FOURTEENTH AMENDMENTS TO UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

II.

[DEFENDANT'S] TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNO BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

(PCR2-SR. 1-85) The State responded to the motion, arguing that claim of retardation was procedurally barred since Defendant had never previously claimed to be retarded, that the claim was insufficiently pled, that the claim was conclusively refuted by the record and that there was no error to cumulate. (PCR2. 139-206) The lower court conducted a *Huff* hearing. (PCR2. 305-36) Thereafter, the lower court summarily denied the motion. (PCR2. 246-49) Defendant moved for rehearing and attached a copy of a report from Dr. Glenn Caddy, which did not diagnose Defendant as retarded. (PCR2. 250-64) The lower court denied the motion for rehearing. (PCR2. 265-66)

This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly summarily denied the claim that Defendant was retarded. The claim was procedurally barred because Defendant had never previously claimed to be retarded despite repeated evaluations and the tools to raise such a claim. Moreover, the claim was facially insufficient as it did not allege all of the elements of retardation and was not supported by any opinions that Defendant was retarded. Additionally, the claim was conclusively refuted by the record, including the lower court's prior consideration, and rejection on credibility grounds, of much of the factual support for the claim and the wealth of expert opinions in the record that Defendant was not retarded.

ARGUMENT

THE LOWER COURT PROPERLY DENIED DEFENDANT'S CLAIM THAT HE WAS MENTALLY RETARDED.

Defendant asserts that the lower court improperly denied his successive motion for post conviction relief because his claim of retardation was allegedly not conclusively refuted by the record. Defendant appears to claim that the lower court's order is deficient because it did not attach portions of the record. Defendant also seems to contend that Dr. Caddy's report, which did not diagnose Defendant as retarded, the testimony of Dr. Eisenstein and his sister Pamela Mills from the last evidentiary hearing and an alleged diagnosis of "borderline mental retardation" from a 1975 hospital report show that an evidentiary hearing should have been ordered. However, the lower court properly denied this motion as procedurally barred, facially insufficient and conclusively refuted by the record.

While Defendant appears to assert that the lower court's order cannot stand merely because it did not attach portions of the record, this is untrue. In *Patton v. State*, 784 So. 2d 380, 388 (Fla. 2000), this Court addressed a claim that an order denying post conviction relief was defective because it did not attach portions of the record:

> The order gives very specific reasons as to why each claim was denied. The court does not have to attach specific portions of the record to the order summarily

> denying postconviction relief where the reasons for denial are clearly spelled out in the order. *See Demps v. Dugger*, 714 So. 2d 365 (Fla. 1998); *Mills v. State*, 684 So. 2d 801 (Fla. 1996); *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993).

Here, the lower court clearly spelled out its reasons for denying the motion. (PCR2. 246-49) It explained that the motion failed to include more than a conclusory allegation that Defendant was retarded. *Id.* It explained that the claim was procedurally barred because any allegation that Defendant was retarded could have and should have been raised earlier because retardation that long been important mitigation. *Id.* It also explained that record conclusively refuted the claim that Defendant was mentally retarded because his school records showed he was a good student, his teacher's testimony showed he was a good student, his IQ scores had been consistently above the level of retardation and experts had already testified that Defendant was not retarded. *Id.* Since the order clearly spelled out the lower court's reasoning for denying the motion for post conviction relief, the lower court's failure to attach portions of the record was not error.

Moreover, the lower court properly found that this claim was procedurally barred. Defendant was evaluated by about nine mental health professionals at the time of trial and by no fewer than six mental health professional during the pendency of his

first post conviction motion. Despite these numerous evaluations, Defendant never attempted to claim that he was retarded until his reply brief in the appeal from the denial of the last motion for post conviction relief. However, the United States Supreme Court had recognized mental retardation as power mitigation as early as 1989. *See Penry v. Lynaugh*, 492 U.S. 302 (1989). This Court made a similar recognition in 1994. *Thompson v. State*, 648 So. 2d 692, 697 (1994). Moreover, Florida law has provided a definition of retardation that is the same as the one presently applied since before Defendant even committed this crime. *Compare* §393.063(41), Fla. Stat. (1989) *with* §921.137(1), Fla. Stat. and Fla. R. Crim. P. 3.203(b). Moreover, one aspect of all of these definitions is that retardation had to have its onset before the age of 18. §393.063(41), Fla. Stat. (1989); §921.137(1), Fla. Stat.; Fla. R. Crim. P. 3.203(b). Here, Defendant was 29 year old when he committed these crimes. (PCR2. 6, 24-27) Thus, an evidence that he was retarded would have been available.

Given the impact of evidence of retardation as mitigation, the existence of retardation in Florida law and the fact that any evidence would have had to have been available, Defendant could have and should have presented any claim or evidence that he was retarded at the time of trial or the first motion for

post conviction relief. Since Defendant did not previously claim to be retarded, the lower court properly denied the claim as procedurally barred.

While Defendant asserts that he could not have previously claimed to have been retarded because *Atkins* had yet to be decided, this is untrue. The United States Supreme Court has recognized that a claim based on a change of law can still be procedurally barred when the claim was not raised earlier in the proceedings. *Bousley v. United States*, 523 U.S. 614, 622-23 (1998)(Even claim based on retroactive change in law barred where basis to raise claim was reasonably available); *see also Engle v. Isaac*, 456 U.S. 107, 130-34 (1982). Instead, the Court has focused on whether the defendant had the tools available to him to make the argument even if it would have been rejected. *Bousley*, 523 U.S. at 622-23; *Engle*, 456 U.S. at 130-34. In fact, the United States Supreme Court has directed the federal courts that they should ordinarily address the issue of procedural default before they even attempt to determine whether a new rule of constitutional law is retroactive. *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997). This Court has also required that a claim have been previously asserted to avoid a procedural bar when it was based on a change in law. *Walton v. State*, 847 So. 2d 438, 445 (Fla. 2003)(to claim retroactive

application of *Espinosa v. Florida*, 505 U.S. 1079 (1992), issue must have been raised at trial). Here, the tools to raise a claim of retardation were available as evidence by *Penry*, *Thompson* and §393.063(41), Fla. Stat. (1989). As such, the lower court properly found that the claim was procedurally barred even though *Atkins* had not previously been issue. It should be affirmed.

Even if the claim was not procedurally barred, the lower court properly denied the claim as facially insufficient. In adopting Fla. R. Crim. P. 3.203, this Court required post conviction defendant to raise any claim under *Atkins* in a motion pursuant to Fla. R. Crim. P. 3.851. Fla. R. Crim. P. 3.203(d)(4). To file a motion under Fla. R. Crim. P. 3.851, the motion must include "a detailed allegation of the factual basis for [the] claim." Fla. R. Crim. P. 3.851(e)(1)(D) & (e)(2)(A). This Court has held that conclusory allegations are insufficient to meet this requirement. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). This Court has also held that motions should be fully pled when filed. *Vining v. State*, 827 So. 2d 201, 212-13 (Fla. 2002).

Under both §921.137, Fla. Stat. and Fla. R. Crim. P. 3.203, retardation is "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive

behavior and manifested during the period from conception to age 18." This requires a defendant is required to allege and prove that (1) his IQ is significantly subaverage, (2) he presently has deficits in adaptive functioning, and (3) both prongs (1) and (2) existed before he was 18.

Here, the facts alleged in support of Defendant's claim were that 1975 hospital records alleged included a diagnosis of borderline mental retardation; a 1988 Beta IQ score of 76, a 1991 WAIS-R IQ score of 72, a 1999 WAIS-III IQ score of 67, Defendant's sister's testimony that Defendant was "very slow in school" and had learning disabilities, Dr. Eisenstein's account of a statement Defendant's aunt made to him during the last post conviction proceeding that Defendant was slow in school and attended special classes and an allegation that a new expert had done testing that allegedly showed that Defendant functioned "at an educational level between grades two and three" and had an IQ score in the same range as the 1991 and 1999 scores.

However, with the exception of one of Dr. Eisenstein's IQ scores, the scores Defendant relies upon are all above 70. As Dr. Caddy himself noted in his report, his test score was in the borderline range, not the retarded range. As such, Defendant has not alleged sufficient evidence to show that his present

level of intellectual functioning is significantly subaverage. The claim was properly denied.

Further, the earliest test score relied upon was from 1988, when Defendant was approximately 26 years old. Thus, none of the test scores were obtained before Defendant was 18. In an attempt to compensate for the lack of evidence of subaverage intellectual functioning, Defendant relies upon an alleged diagnosis in the 1975 JMH report. However, that report contains no such diagnosis. The diagnosis in the report is unsocialized aggressive reaction to adulthood. The report noted that Defendant had been "labeled as borderline mental retardation." An evaluation attached to the report indicates that Defendant's intelligence was estimated as average. As such, the report does not provide a sufficient allegation of clear and convincing evidence that Defendant had subaverage intellectual functioning before he was 18. The claim was properly summarily denied.

Moreover, the facts alleged shed no light on what Defendant's present level of adaptive function is. Additionally, Defendant has not asserted anything other than that he was slow in school as evidence of adaptive functioning before he was 18. However, both the AAMR definition and the DMS-IV definition of retardation require deficits in more than one area of adaptive functioning. In fact, Dr. Caddy refused to

opine on whether Defendant was retarded because there was insufficient evidence of deficits in adaptive functioning. Thus, Defendant has not sufficiently alleged a claim that he is mentally retarded. The claim was properly summarily denied.

In an attempt to compensate for Dr. Caddy's lack of findings, Defendant asserts that had an evidentiary hearing been ordered, he would have had Dr. Caddy review materials and do additional work to determine whether Defendant is retarded. However, such belated attempts to file a sufficient claim are contrary to this Court's direction in *Vining* that motions should be fully pled when filed. *Id.* at 212-13. As such, the allegation does not show that the lower court erred in finding the motion facially insufficient. The claim should be denied.

Even if the claim was not procedurally barred and facially insufficient, the denial of the claim should still be affirmed because the claim is conclusively refuted by the record. Defendant relies upon the opinion of Dr. Eisenstein, his affidavit about an alleged statement by Long and the statement of Pamela Mills. However, the lower court had already considered Dr. Eisenstein's opinion and Mills' statement and found them to be unreliable and incredible. (PCR1. 386-88) This Court affirmed these findings. *Jones v. State*, 855 So. 2d 611 (Fla. 2003). Moreover, the lower court found that Dr.

Eisenstein’s affidavit regarding Defendant’s aunt’s alleged statement was inadmissible hearsay. As the lower court had already determined that Dr. Eisenstein’s opinion is unreliable, his report of the alleged statement by the aunt was inadmissible and Mills’ statement was incredible, Defendant was barred from relying upon them as evidence to support this claim. *See State v. McBride*, 848 So. 2d 287 (Fla. 2003). The claim was properly denied.

Moreover, the record amply supports this Court’s ruling and refutes Defendant’s assertion of retardation. At trial, Dr. Toomer testified that Defendant was an average student in grades 1 through 5. (DAT. 2610) Dr. Toomer also stated Defendant was of average intelligence. (DAT. 2638-39, 2658) Dr. Mutter testified that Defendant was of at least average intelligence. (DAT. 2686) Dr. Mutter also stated that his review of the school records showed that Defendant was doing well in school until he started behaving antisocially. (DAT. 2702) Dr. Eisenstein admitted at the time of trial that Ms. Long, Defendant’s aunt, had told him that Defendant did well in school and was smart. (DAT. 2823) Defendant also told Dr. Eisenstein that he was an average student. (DAT. 2363) Laura Long testified at trial that Defendant did very well in school, did not have any problems doing his school work and was an ideal student in

elementary school. (DAT. 2836-37) She also stated that Defendant was given an award in school for being an ideal student. (DAT. 2837)

Dr. Eisenstein stated that on the WAIS-R he administered in April 1991, Defendant's verbal IQ was 76, his performance IQ was 69 and his full scale IQ was 72. (DAT. 2350) He stated that this placed Defendant in the borderline range and at the fourth percentile. *Id.* Dr. Eisenstein also admitted that Defendant had a high score on the malingering scale of the MMPI. (DAT. 2385)

During the pendency of the post conviction proceedings, Defendant was evaluated for competency by two neuropsychologists: Dr. Latterner and Dr. Ansley. (PCR2. 176-88) Dr. Latterner noted that Defendant's social skills were normal and that his intellectual functioning was in the borderline to low average range after administering an IQ test. (PCR2. 184-88) Dr. Ansley obtained a verbal IQ of 74, a performance IQ of 76 and a full scale IQ 73 on the WAIS-III. (PCR2. 179) Moreover, she found that Defendant put forth minimal effort on the tests and the scores were lower than Defendant's actual level of functioning. *Id.* She also noted that Defendant was faking bad and making "a deliberate attempt to exaggerate symptoms of psychiatric illness." As such, she

stated that Defendant's pattern of test results do not support a find of organic brain damage. (PCR2. 181-82)

At the competency hearing during the post conviction proceedings, Dr. Ansley testified that Defendant did not do so poorly on the tests that they resulted in invalid results but that Defendant intentionally did badly on parts of the tests. (PCR1. 1422-25) She pointed out that retardation required more than a low IQ score, that retardation required an IQ score below 70 on the WAIS series of tests and that Defendant's score was in the borderline range, above the level for retardation. (PCR1. 1443-45) Dr. Latterner also testified that Defendant lacked motivation episodically during the testing. (PCR1. 1467) Dr. Latterner agreed with Dr. Ansley that the pattern of test results did not support a diagnosis of brain damage. (PCR1. 1470) Dr. Latterner directly stated that Defendant was not mentally retarded. (PCR1. 1475)

At evidentiary hearing on Defendant's first motion for post conviction relief, Vera Edwards, Defendant's third grade teacher, stated that Defendant had no academic difficulties and was an above average student with above average intelligence. (PCR1. 1161-62, 1166, 1168, 1173) Dr. Herrera testified that Defendant had average intelligence. (PCR1. 1081) Dr. Toomer testified that his opinion of Defendant's mental state had not

changed since the time of trial and was merely reinforced by the information he received for the evidentiary hearing. (PCR1. 1095, 1130-31) Dr. Toomer later stated that Defendant was of borderline to average intelligence and admitted he had testified at trial that Defendant was of average intelligence. (PCR1. 1156)

Defendant's prison records and school records were presented at the last hearing. The document that reports the Beta IQ score of 76 from 1988 also indicates that the tests do not reflect the true level of Defendant's intellectual functioning and that Defendant's intelligence is in the low average range. (PCR2. 190) Defendant's school records show that he received an A and B's and C's in first and second grade. (PCR2. 197-206) They also show that Defendant got B's and C's in seventh and eighth grade. *Id.*

Dr. Eisenstein admitted that the 1975 JMH report stated that Defendant had been labeled as borderline mental retardation, that such a label indicated that a person had an IQ between 70 and 79 and that he had seen an IQ score of 77. (PCR1. 808) He stated that he had seen a Beta IQ score of 76, in the borderline range, from 1988 in the prison records. (PCR1. 814-15) He testified that he had administered Wechsler Adult Intelligence Scales to Defendant three times and had scores in

the 70's and upper 60's. (PCR1. 816) On direct, Dr. Eisenstein stated that Defendant was a slow leaner whose grades were 80% C's at ages 7 and 8 and all F's thereafter. (PCR1. 857) From this data, Dr. Eisenstein opined that Defendant was "an individual who's functioning in the borderline range with learning disabilities and a slow learner, difficulty reading." (PCR1. 857)

However, on cross, Dr. Eisenstein admitted that Defendant had passed first and second grade and had attended school regularly at that time. (PCR1. 880-81) The records from one grading period from ninth grade indicated failing grades, but Dr. Eisenstein could not say whether Defendant was attending school regularly at that point. (PCR1. 881-83) However, the records from the seventh grade indicated that Defendant had made B's and C's with the exception of art. (PCR1. 882) The records again showed C's in eighth grade. (PCR1. 882) Dr. Eisenstein admitted that his comment about Defendant receiving all F's in school was based solely on one reporting period in ninth grade. (PCR1. 883)

When asked about Defendant's level of intellectual functioning, Dr. Eisenstein insisted he was not calling Defendant borderline mentally retarded. (PCR1. 915-16) He did stated that Defendant's IQ scores had been in the borderline

range and below but refused to give his opinion of Defendant's intellectual functioning. (PCR1. 916-18) He admitted that Defendant could converse, write and communicate. (PCR1. 915, 918) He insisted Defendant had damage to his frontal lobe because of the gunshot wound. (PCR1. 918)

Given the prior findings regarding the credibility and admissibility of the information upon which Defendant relies and the evidence that already exists in the record, the lower court properly found that Defendant's conclusory allegation that he was mentally retarded was conclusively refuted by the record. Thus, it properly denied this successive motion for post conviction relief. Fla. R. Crim. P. 3.851(f)(5)(B). It should be affirmed.

To the extent that Defendant may complain that the lower court's consideration of the post conviction competence evaluations should not considered the post conviction competency reports or hearing testimony, the complaint is without merit. Post conviction competency evaluations are governed by Fla. R. Crim. P. 3.851(g) and not Fla. R. Crim. P. 3.211. Unlike Rule 3.211, Rule 3.851 contains no limitation on the use of competency evidence.

The lack of limitations in Fla. R. Crim. P. 3.851 is understandable. The limitations in Fla. R. Crim. P. 3.211 are

motivated by concerns that use of a court-ordered evaluation for competency for other purposes might result in Defendant's Fifth Amendment right against self-incrimination might be violated. *See Estelle v. Smith*, 451 U.S. 454 (1981). As such, the limitations prevent the defendant's statements from being used against him when the State is attempting to strip the defendant of his presumption of innocence. In a post conviction proceeding, it is not the State that is attempting to convict the defendant; it is the defendant who is attempting to overturn the presumptively valid conviction and sentence. *See id.* at 465-66 (distinguishing use of sanity evaluations from competency evaluations because the defendant is the one asserting the claim).

Moreover, this Court has repeatedly stated that lower courts should consider the entire record in ruling on motions for post conviction relief. *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996). Here, the competency evaluations and testimony are simply part of the entire record that this Court requires lower courts to consider. As such, any complaint concerning consideration of the post conviction competency evidence is without merit. The lower court's denial of this motion should be affirmed.

CONCLUSION

For the foregoing reasons, the summary denial of the successive motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **William Hennis,** CCRC-South, 101 NE 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this 9th day of May 2005.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

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SANDRA S. JAGGARD
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