IN THE SUPREME COURT OF FLORIDA

DEAN KILGORE,

Appellant,

v. **CASE NO. SC09-257**
L.T. No. CF89-0686A1-XX

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Cases

Other Authorities

PRELIMINARY STATEMENT

References to the direct appeal record (SC 83,684) will be designated as follows: DA-R followed by the appropriate record page or transcript page #.

References to the instant post-conviction record on appeal (SC09-257), will be designated as (PCR Vol. #/page #).

FACTS AND PROCEDURAL HISTORY

The 1994 Jury Trial

The trial court's final post-conviction order summarized the "overwhelming evidence" presented at Kilgore's jury trial (PCR V34/5118-5119) as follows:

> A review of the trial transcript reflects that there was overwhelming evidence against Defendant. The evidence and testimony from numerous inmate and law enforcement witnesses reflected the following: Mr. Jackson and Defendant were lovers, but Mr. Jackson was known for being a troublemaker who had a pattern of becoming involved with other men, returning to Defendant to seek protection from those men, then again becoming involved with those other men; on February 13, 1989, at Polk Correctional Institution, Defendant carried a brown paper bag and furtively went into Mr. Jackson's dorm area, an area where Defendant did not live and was not supposed to be; Defendant confronted Mr. Jackson, they struggled and Defendant stabbed Mr. Jackson, then poured a chemical substance on Mr. Jackson; another inmate intervened and pulled Defendant away; Mr. Jackson died from one of the stab wounds and his face and chest were covered in a thick brown liquid which appeared to be and smelled like paint thinner or similar substance and contained wood chips or sawdust; after the stabbing, Defendant told detention deputies that he had stabbed Mr. Jackson and hoped he had killed him; Defendant subsequently pulled a knife, which had dried blood, out of his pocket and handed it over to the officers. Defendant worked in the hobby area almost daily and had access to caustic materials such as paint thinner; the day before the stabbing, Defendant hid something in a brown paper bag in the garbage can of the hobby area, and asked that the garbage not be thrown out. Detective Ore found, among Defendant's personal belongings, a hand written note dated February 13, 1989, written to his mother and confessing that he had killed his "only friend" that morning. Defendant gave a tape-recorded statement wherein he denied any intent to kill Mr. Jackson but admitted that he was "trying to nick him a little bit"; in his taped statement, Defendant further stated he went to confront Mr. Jackson, who then started calling him names, a struggled ensued and he stabbed Mr. Jackson. Defendant admitted that after thinking Mr.

> Jackson was only pretending to be hurt, he poured sealer on him but denied that he tried or intended to light a match or burn Mr. Jackson. (See trial transcript, pp. 563, 622, 624, 638-39, 655, 664, 681, 717, 734, 736, 760, 764, 783, 832, 842, 1006, 1021, 103 1-35, 1037-40, 1045, 1066-107 1, 1087-89, 1152-94).
>
> (PCR V34/5118-5119)

The trial court's final post-conviction order also summarized the mitigation presented at the 1994 penalty phase:

> **A review of the penalty phase trial transcript reflects Judge Alcott presented the following penalty phase witnesses: William G. Kremper, Ph.D., Henry Dee, Ph.D., Mary Hall, Dorothy Speight [fn9] and Irlene Cason; additionally, the prior deposition testimony of Dr. Ainsworth was published to the jury.**
>
> **Dr. Kremper, a clinical psychologist**, was tendered as an expert in the field of forensic pyschology. Dr. Kremper testified to the following: he evaluated Defendant on August 10, 1989 and August 22, 1989 and October 25, 1989; he administered the WAIS and Defendant obtained a full-scale IQ score of 76; trial counsel provided him with investigation reports related to the homicide investigation, as well as several previous evaluations of Defendant; he spoke to Defendant's mother. **Dr Kremper found that Defendant functioned intellectually within a borderline range; compared to previous evaluations, Defendant's intellectual functioning had declined and he attributed that deterioration to Defendant's diabetic condition, possible head injuries and frequent beating as juvenile in reform school, extensive history of alcohol use**. (*See* Trial Transcript, pp. 1457-77, attached). Dr. Kremper further testified that Defendant was under extreme emotional distress at the time the incident occurred and that, although Defendant understood the difference between right and wrong, he lacked the capacity to conform his conduct to what the law requires. (*See* Trial Transcript, pp. 1477-80, 1490-92, attached).
>
> **Henry Dee, Ph. D., a clinical and neuropsychologist**, was tendered as an expert in the field of neuropsychology. **Dr. Dee evaluated Defendant on March 15, 1994 and diagnosed Defendant with organic brain syndrome or brain damage. He testified that Defendant's**

mental condition had deteriorated since Dr. Kremper last saw Defendant in 1989 and attributed the "accelerating deterioration of his mental condition" to Defendant's diabetic condition, which was in the advanced stage, as well as continued alcohol abuse. He further testified that Defendant was under extreme emotional distress at the time the incident occurred and that, although Defendant understood the difference between right and wrong, he lacked the capacity to conform his conduct to what the law requires. (*See* Trial Transcript, pp. 1515-1528-30, attached).

In his deposition testimony, which was published to the jury, **Dr. Gary M. Ainsworth, M.D,** testified that he was a psychiatrist and conducted a psychiatric evaluation of Defendant on November 28, 1989 and January 19, 1990. (*See* Trial Transcript, pp. 1550, attached). Dr. Ainsworth testified that he reviewed Dr. Kremper's evaluation as well as various previous evaluations provided by trial counsel. **Information contained in the reports reflected Defendant's history of alcohol abuse as well as that of his family, including that his mother gave him moonshine as a child and he was possibly exposed to lead from the moonshine. As one previous report pointed out that there was evidence of brain damage**, he recommended that Defendant receive a neurological examination, which was then performed by Dr. Greer. **Dr. Ainsworth described the psychological and physical effects of diabetes, including insulin dependence, loss of eyesight, swelling of joints, or impotence; he also noted that alcohol would accelerate the diabetic changes. Based on Dr. Kremper's report, Defendant's intelligence quotient was very low or "borderline retarded" and he was aware that Defendant had suffered significant head injuries and been severely beaten on several occasions. Defendant advised him that as a child, his mother would give him moonshine to go to sleep. He opined that Defendant had an adjustment disorder.** Dr. Ainsworth further testified that Defendant appeared to be truly remorseful for the offense. He also testified that Defendant was under the influence of extreme mental or emotional disturbance at the time the offense occurred and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (*See* Trial Transcript, pp. 1548-71, attached).

Mary Ann Hall, a corrections officer who worked at

Polk Correctional Institution, testified that she was on duty after this incident occurred, and was assigned to observe Defendant on suicide watch. (*See* Trial Transcript, pp. 1534-36, attached). She testified that **Defendant appeared remorseful, was crying and kept asking if the victim had died, and told her he was in love with the victim and did not mean to kill him.** (*See* Trial Transcript, pp. 1536-39, attached).

Dorothy Speight, Defendant's younger sister, testified regarding Defendant's childhood and family. **There were thirteen children in the family. Their parents separated and they lived with their mother and stepfather on somebody else's farm, working the farm. The entire family lived a in a small two to three bedroom house. Defendant went to school "every now and then" until he was eleven years old. The family has a history of both diabetes and alcohol abuse. Ms. Speight also testified that the children were abused by their mother and Defendant "used to get the worst" of it. Defendant would cry for food but he had to wait until the adults finished eating, and by then there was nothing left. She recalled Defendant left the home when he was eleven years old because the family was poor and "eating was a problem." She also recalled that Defendant once received a significant head injury while in police custody.** Ms. Speight also testified Defendant spent so much time with Barbara Ann Jackson that she thought he was living with her, and she once caught them in bed together. Defendant called her after the instant offense occurred; he was crying and told her that he did not mean to kill the victim, only nick him, and he poured "the stuff" on him to embarrass him, not to set him on fire. She regularly visits Defendant in prison and would continue to do so. (*See* Trial Transcript, pp. 1587-1601, attached).

Irlene Cason, another of Defendant's younger sisters, testified to that Defendant called her after the offense and sounded remorseful and "broken up." Their mother was unable to testify due to her diabetes and related illnesses including gallstones, paralysis and having both legs amputated. She would continue to maintain contact with Defendant if he were in prison the rest of his life. (*See* Trial Transcript, pp. 1602-05, attached).

(PCR V34/5179-5181) (e.s.)

The Post-Conviction Evidentiary Hearings

The witnesses at the multi-day hearings on Kilgore's IAC claims included: Trial Counsel: Roger A. Alcott,[1] who represented Kilgore at his 1994 trial (PCR V14/2187-V15/2534); and Jeff Holmes, who represented Kilgore at his original trial in and change of plea proceeding in 1990. (PCR V15/2646-V16/2742) Defense experts: Professor Jimmy Bell (PCR V16/2539-2641); Dr. Hyde, (PCR V17/2742-60); Dr. Dudley (PCR V18/2925-81), Dr. Hyman Eisenstein, (PCR V18/2981-V19/3086); and Dr. Dee. (PCR V19/3127-V20/82) Prison inmates: Jonathan Montgomery (PCR V18/2855-69), Timothy Squires (PCR V18/2869-79), Anthony Jackson (PCR V18/2879-87), Jeffrey Barnes (PCR V18/2888-99), Stanley Williams (PCR V18/2899-2902); Charley Thompson. (PCR V19/3091-3126) Family members: Dorothy Speight (PCR V17/2765-95); Elbert Kilgore (PCR V17/2795-2829); Jimmy Dean Kilgore. (PCR V18/2829-55) Also, the deposition

[1] Roger Alcott was an experienced criminal trial attorney. Alcott graduated from law school in 1971, and worked as an assistant public defender for approximately three years, a prosecutor at the State Attorney's Office in the Tenth Circuit for five years, field counsel for FDLE (counsel on organized crime), a statewide prosecutor for about three years, and a special assistant U.S. attorney for a couple of years. Alcott was actively involved in trying criminal cases in both state and federal court. In 1984, Alcott entered private practice, primarily handling criminal cases, with some juvenile dependency and family law, until his appointment to the bench in 2000. Alcott estimated that he'd handled approximately 200 felony jury trials. Alcott tried one murder case as an assistant public defender and two murder cases as a prosecutor, although they did not involve the death penalty. In addition, before Kilgore's trial in 1994, Alcott was hired or appointed in four or five first-degree murder cases, some of which were death penalty cases.

testimony of Barbara Jackson was presented. (PCR V19/3127; V23/3485-3510) The trial court set forth a fact-specific summary of the testimony presented in post-conviction (V34/5178-5186) and this fact-specific excerpt is set forth at pages 37 - 45 of the instant brief.

A two-day evidentiary hearing was held on Kilgore's claim of mental retardation, and the trial court summarized:

> **During the January 22 and 23, 2007 evidentiary hearings, the Court heard from three different mental health experts - Hyman H. Eisenstein, Ph.D., A.B.P.N., Henry Dee, Ph. D., and Michael P. Gamache, Ph.D**. Each of the mental health experts administered the Wechsler Adult Intelligence Scale, Third Edition (WAIS III), to Defendant and testified accordingly. Dr. Eisentein [sic] administered the WAIS III to Defendant on August 23, 2000, and testified that Defendant obtained a **full-scale IQ score of 75**. (*See* January 22, 2007 transcript, p. 18, attached; Defense Exhibit C). Dr. Dee administered the WAIS III to Defendant on October 2004, and testified that Defendant obtained a **full-scale IQ score of 74.** (*See* January 23, 2007 transcript, p. 130, attached; Defense Exhibit C). Dr. Gamache administered a prorated version of the WAIS III to Defendant on May 23, 2006, which resulted in a **full scale IQ score of 85**. (*See* January 23, 2007 transcript, p. 226, attached; Defense Exhibit C and State Exhibit 1 entered on January 23, 2007).
>
> (PCR V34/5164) (e.s.)

The trial court's 110-page final order (PCR V34/5103-5212) was filed on December 3, 2008, and re-entered, following the defense motion to re-enter the order for failure to have been served. Kilgore filed a notice of appeal on February 5, 2009. (PCR V49/7710-7713)

SUMMARY OF THE ARGUMENT

I. The IAC and *Brady* Claims

The trial court correctly denied Kilgore's intertwined claims under *Strickland* and *Brady*. The trial court set forth detailed factual findings which are supported by competent, substantial evidence. Inasmuch as no procedural or substantive errors have been shown with regard to the factual findings or the trial court's application of the relevant legal principles, no relief is warranted and this Court must affirm the trial court's order denying post-conviction relief.

II. The IAC/Penalty Phase Claims

This is not a case where trial counsel failed to investigate and present mitigating evidence. During the penalty phase, defense counsel presented the testimony of a clinical psychologist, Dr. Kremper; a neuropsychologist, Dr. Dee; and the transcribed testimony of a psychiatrist, Dr. Ainsworth. In addition, family members also addressed Kilgore's background, deprived childhood, poverty, dismal upbringing and mental health status. The evidence offered in post-conviction is largely cumulative to the evidence presented in 1994; and, after conducting several days of evidentiary hearings, the trial court found that Kilgore failed to establish any deficiency of counsel and resulting prejudice under *Strickland*. The trial court's order is supported by competent, substantial evidence.

III. The Claim of Mental Retardation

The Circuit Court (1) held an evidentiary hearing on Kilgore's claim of mental retardation, (2) followed the correct procedures outlined under Florida law, and (3) found that "under both a preponderance of the evidence standard as well as a clear and convincing evidence standard, that Defendant does not meet the Florida criteria for "significantly subaverage general intellectual functioning" as required for a finding of mental retardation." (PCR V34/5163-66). Kilgore's IQ scores exceed the cut-off for mental retardation. The trial court's order is supported by competent, substantial evidence.

IV. The Rule 3.203 Claim

In challenging Rule 3.203, CCRC essentially repeats arguments that were addressed, and rejected, by this Court in *Nixon v. State*, 2 So. 3d 137 (Fla. 2009). Here, as in *Nixon*, CCRC's challenge to Rule 3.203 must be denied.

V. The Summary Denial of Remaining Claims

CCRC's *pro forma* restatement of claims that were summarily denied below is inadequate to fairly preserve any issue on appeal. This entire issue, consisting of three perfunctory sub-claims, is waived for appellate review. See, *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990).

ARGUMENT

ISSUE I

THE IAC / *BRADY* / NEWLY DISCOVERED EVIDENCE CLAIMS

In this first issue, CCRC combines allegations of ineffective assistance of trial counsel, *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), and "newly-discovered" evidence. The following legal principles and standards apply to these commingled claims.

Applicable Legal Principles & Standards of Review

IAC claims:

In *Pagan v. State*, 2009 WL 3126337, 5-6 (Fla. 2009), this Court summarized the following standards for claims of ineffective assistance of counsel:

> Following the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court has held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied:
>
> > First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.
>
> *Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986) (citations omitted). Where this Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a

> meritless argument. See *Heath v. State*, 3 So.3d 1017, 1033 (Fla. 2009).
>
> Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the trial court's factual findings that are supported by competent, substantial evidence, but reviewing the trial court's legal conclusions de novo. See *Sochor v. State*, 883 So.2d 766, 771-72 (Fla.2004).
>
> There is a strong presumption that trial counsel's performance was not ineffective. See *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id*. In *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000), this Court held that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct."
>
> *Pagan*, 2009 WL 3126337, 5-6

Brady Claims:

Brady claims present mixed questions of law and fact. Where, as here, the trial court has conducted an evidentiary hearing, this Court defers to the factual findings of the trial court that are supported by competent, substantial evidence, but reviews the application of the law to the facts *de novo*. *Hurst v. State*, 2009 WL 2959204, 5 (Fla. 2009), citing *Sochor v. State*, 883 So. 2d 766,

785 (Fla.2004). In *Pagan*, 2009 WL 3126337, this Court summarized the following standards applied to *Brady* claims:

> Pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the State is required to disclose material information within its possession or control that is favorable to the defense. See *Mordenti v. State,* 894 So.2d 161, 168 (Fla. 2004). To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence-either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. See *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); see also *Way v. State*, 760 So.2d 903, 910 (Fla. 2000). To meet the materiality prong, the defendant must demonstrate a reasonable probability that had the suppressed evidence been disclosed the jury would have reached a different verdict. See *Strickler*, 527 U.S. at 289, 119 S.Ct. 1936. A reasonable probability is a probability sufficient to undermine confidence in the outcome. See *Way*, 760 So.2d at 913; see also *Strickler,* 527 U.S. at 290, 119 S.Ct. 1936. The remedy of retrial for the State's suppression of evidence favorable to the defense is available when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler*, 527 U.S. at 290, 119 S.Ct. 1936 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). Giving deference to the trial court on questions of fact, this Court reviews de novo the application of the law and independently reviews the cumulative effect of the suppressed evidence. See *Mordenti*, 894 So.2d at 169; *Way*, 760 So.2d at 913.
>
> * * *
>
> . . . If the evidence in question was known to the defense, it cannot constitute *Brady* material. Thus, a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it; the evidence simply cannot then be found to have been withheld from the defendant. See *Occhicone v. State*, 768 So.2d 1037, 1042 (Fla.2000).
>
> *Pagan*, 2009 WL 3126337

Newly Discovered Evidence:

Although CCRC makes three conclusory references to "newly discovered" evidence (Initial Brief at pages 3, 9 and 11), CCRC fails to identify any "newly discovered" evidence and fails to present any argument to support a "newly discovered" evidence claim. Thus, any purported "newly discovered" evidence claim is procedurally barred. See, *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) ("[m]erely making reference to arguments below without further elucidation does not suffice to preserve issues").

The IAC Sub-Claims

CCRC alleges that trial counsel, Alcott, failed to adequately investigate and prepare for trial. In light of Kilgore's multiple confessions and various witness accounts, the defense theory at trial was that this was not a premeditated murder. CCRC does not quarrel with this defense theory, but, instead, alleges that trial counsel was ineffective in failing to: (1) request a second defense attorney, (2) spend more time in pre-trial preparation and have more contact with Kilgore, (3) re-depose the state witnesses, (4) request the appointment of Dr. Dee earlier, (5) file additional motions, (6) seek a change of venue or recusal of the entire Tenth Judicial Circuit, (7) adequately *voir dire* on the topics of homosexuality or race and (8) cross-examine the witnesses with DOC records and disciplinary reports. (Initial Brief at 11-22) CCRC also alleges that trial counsel was ineffective during the penalty

phase in failing to impeach Barbara Jackson, the 1978 kidnapping victim, about having a romantic relationship with Kilgore. (Initial Brief at 22-24) For the following reasons, the trial court correctly denied relief on all of the foregoing IAC claims.

Alcott was an experienced criminal defense attorney who was familiar with this case even before his appointment for trial. As a result of Alcott's initial appointment, Kilgore's plea and death sentence were set aside. In preparing for trial, Alcott obtained attorney Holmes' files and reviewed the pre-trial depositions, witness statements, and transcripts of the original penalty phase.

The trial court's initial order of May 4, 2004 and final order of December 3, 2008 addressed all of the IAC sub-claims. The order of May 4, 2004, summarily denied some of the IAC sub-claims and granted an evidentiary hearing on others. The order of May 4, 2004, states, in pertinent part:

> Next, Defendant claims Alcott failed to request another lawyer to work with him on Defendant's case. Defendant claims the inexplicable failure on the part of Mr. Alcott to request a second chair was deficient performance that operated to the extreme prejudice of Defendant. However, "appointment of multiple counsel to represent an indigent defendant is within the discretion of the trial judge and is based on a determination of the complexity of a given case and the attorney's effectiveness therein." *Armstrong v. State*, 642 So. 2d 730, 737 (Fla. 1994). Moreover, "dual representation is not mandated in every circumstance." *Lowe v. State*, 650 So. 2d 969, 975 n. 3 (Fla. 1995). Lastly, Defendant has failed to allege how counsel's failure to request co-counsel resulted in prejudice.
>
> After reviewing this portion of claim II, the State's response, Defendant's Reply, the arguments presented on February 7, 2003, the court file, and the

record, **the Court finds that Defendant has failed to meet the second prong of *Strickland* in that he has failed to prove how counsel's alleged failure to request co-counsel resulted in prejudice when any request would have been subject to the Court's discretion, and Defendant has failed to allege how he has been prejudiced by counsel's failure to make the alleged request**. Since Defendant has failed to meet the second prong of *Strickland*, it is unnecessary to address the performance component. *See Kennedy v. State*, 547 So. 2d 912, 914 (Fla. 1989). As such, no relief is warranted upon this portion of claim II.

Next, Defendant claims Alcott did virtually nothing on Defendant's case in the seven months following his appointment, only spending about 17 hours on Defendant's case since he had been appointed in May. Defendant further claims that there is no indication that Mr. Alcott ever spoke with counsel from Defendant's 1978 case. However, Defendant has failed to allege how counsel's failure to spend more time on Defendant's case and how counsel's failure to speak with counsel from Defendant's 1978 case resulted in prejudice.

After reviewing this portion of claim II, the State's Response, Defendant's Reply, the arguments presented on February 7, 2003, the court file, and the record, **the Court finds that Defendant has failed to meet the second prong of *Strickland* in that he has failed to prove how counsel's alleged failure to spend more time on Defendant's case and how counsel's failure to speak with Defendant's previous trial counsel resulted in prejudice**. Since Defendant has failed to meet the second prong of *Strickland*, it is unnecessary to address the performance component. See *Kennedy v. State*, 547 So. 2d 912, 914 (Fla. 1989). As such, no relief is warranted upon this portion of claim II.

Defendant claims Mr. Alcott had been negligent in meeting with Defendant, speaking to him only once for about 1.5 hours on May 14, 1993, and briefly on the phone on August 2, 1993. **However, brevity of consultation with counsel is not grounds for postconviction relief**. See *Rosemond v. State*, 433 So. 2d 635 (Fla. DCA 1983); *Byrd v. State*, 243 So. 2d 1 (Fla. 3d DCA 1971). Consequently, no relief is warranted upon this portion of claim II.

Next, Defendant claims Mr. Alcott failed to move for

the appointment of any expert until weeks before the re-trial. In its Response, the State asserts that although Defendant does not sufficiently allege how counsel's inaction operated to render him ineffective, in an abundance of caution, the Court may wish to grant an evidentiary hearing on this issue. (*See* State's Response, page 8, attached). After reviewing this portion of claim II, the State's Response, Defendant's Reply, the arguments presented on February 7, 2003, the court file, and the record, the Court finds that Defendant is entitled to an evidentiary hearing on this portion of claim II.

* * *

Defendant further claims that other than the motion for an expert, Alcott filed no new motions after taking over for Holmes a year before. However, Defendant has failed to specifically allege what motions counsel should have filed nor has he alleged how counsel's failure to file any motions resulted in prejudice. After reviewing this portion of claim II, the State's Response, Defendant's Reply, the arguments presented on February 7, 2003, the court file, and the record, **the Court finds that Defendant has failed to meet the second prong of *Strickland* in that he has failed to prove how counsel's alleged failure to file any new motions resulted in prejudice.** Since Defendant has failed to meet the second prong of *Strickland*, it is unnecessary to address the performance component. *Kennedy v. State*, 547 So. 2d 912, 914 (Fla. 1989). As such, no relief is warranted upon this portion of claim II.

Defendant further claims Mr. Alcott failed to ask for the recusal of the entire circuit despite the fact that Judge Strickland had been a material witness in the interim proceedings before Judge Susan Bucklew. In its Response, the State asserts that Defendant does not sufficiently allege how it could have resulted in a different outcome. (*See* State's Response, page 8, attached). At the February 7, 2003 hearing, the State argued that anything that occurred during Defendant's first 1990 trial before Judge Strickland is irrelevant to the 1994 trial, which is the subject of this 3.850 motion. (*See* February 7, 2003 Transcript, pages 41 - 42, attached).

After reviewing this portion of claim II, the State's Response, that arguments presented on February 7,

2003, the court file, and the record, **the Court finds that any post-conviction proceedings which resulted from Defendant's first 1990 trial before Judge Strickland are not related to the 1994 trial. Therefore, the Court finds that Judge Strickland's involvement as a witness in the 1990 post-conviction proceedings did not warrant recusal of the entire circuit for the new trial. Consequently, Defendant has failed to meet the second prong of *Strickland* in that he has failed to prove how counsel's alleged failure to request recusal of the entire circuit resulted in prejudice when Judge Strickland's involvement as a witness in the 1990 proceedings did not warrant recusal.** Since Defendant has failed to meet the second prong of *Strickland*, it is unnecessary to address the performance component. *See Kennedy v. State*, 547 So. 2d 912, 914 (Fla. 1989). As such, no relief warranted upon this portion of claim II.

Defendant claims Mr. Alcott failed to file either a motion for change of venue or a motion to recuse the Tenth Judicial Circuit based on racism and bias of the trial court and the venue. In its Response, the State asserts that Defendant does not sufficiently allege how the filing of the alleged motions could have resulted in a different outcome. (*See* State's Response, page 8, attached). After reviewing this portion of claim II, the State's Response, Defendant's Reply, the arguments presented on February 7, 2003, the court file, and the record, **the Court finds that Defendant has failed to meet the second prong of *Strickland* in that he has failed to prove how counsel's alleged failure to file the alleged motions resulted in prejudice when Defendant has failed to provide this Court with any basis to support the filing of the alleged motions.** Since Defendant has failed to meet the second prong of *Strickland*, it is unnecessary to address the performance component. *See Kennedy v. State*, 547 So. 2d 912, 914 (Fla. 1989). As such, no relief is warranted upon this portion of claim II.

(PCR V11/1659-1664) (e.s.)

The trial court's final post-conviction order addressed, and denied, in fact-specific detail, the remaining IAC sub-claims which

were considered at the evidentiary hearing. (PCR V34/5105-5149; 5150-5155; 5166-5177) In denying the IAC sub-claims based on the failure to (1) request the appointment of a *third* mental health expert [Dr. Dee] sooner, (2) hire an investigator, (3) re-depose inmate witnesses, (4) file a motion for change of venue/recuse the Tenth Circuit, and (5) impeach witnesses with DOC records, the final post-conviction order states, in pertinent part:

> Next, Defendant claims Mr. Alcott failed to move for the appointment of any expert until weeks before the re-trial.
>
> During the June 17, 2005 evidentiary hearing, Henry Dee, Ph.. D., testified that he was pressed for time and was not provided with information which might have been useful in his evaluation, but he did not testify that he had insufficient time to properly evaluate Defendant nor that his diagnosis would have been different had he received certain materials from trial counsel. (*See* June 17, 2005 transcript, pp. 942-95, attached). **Dr. Dee testified that he saw Defendant on March 15, 1994, conducted an interview with Defendant for 1.5 hours, and spent another 8-9 hours performing a battery of tests, which is the typical amount of time he would spend on such an evaluation,** as follows:
>
> > [POSTCONVICTION COUNSEL]: Okay. Do you have any recollection as to how long the clinical interview and the test combined would be.
> >
> > [DR. DEE]: Well, I don't time those. The trial was imminent, and I did an interview and testing that probably would have spent about eight hours. The interview typically last about an hour and a half.
> >
> > (*See* June 17, 2005 transcript, p. 948, attached).
> >
> > . . . .
> >
> > [POSTCONVICTION COUNSEL]: The battery that you gave in 1994, was that your standard neuropsychological battery?

[DR. DEE]: Yes, pretty much. I mean, there are sometimes slightly different tests selected, but that's pretty much a standard battery that I use for forensic neuropsychological evaluations.

(*See* June 17, 2005 transcript, p. 950, attached).

. . . .

[THE STATE]: And do you recall explaining to the jury that you had spent time with the defendant? In fact, I believe you told them that you spent about an hour and a half interviewing him on one day, and about nine hours of testing on another day?

[DR. DEE]: Okay. That's probably [a] more precise recollection, yeah.

[THE STATE]: And that would be about a standard amount of time that you would spend with a defendant in this situation?

[DR. DEE]: Yes, it was.

(See June 17, 2005 transcript, p. 977, attached). Dr. Dee further testified that he did not have time to get additional information, but he would not have done so anyway, as follows:

[POSTCONVICTION COUNSEL]: As to investigating the case, if you're retained three weeks prior to trial back in 1994, do you have time to plan a trip to go to Mississippi to look for records in your practice?

[DR. DEE]: I remember that I scarcely got time to do the evaluation, much less do an investigation. And I don't do investigations anyway. I rely on other people to do that, of course. And so the answer to your question is certainly not.

(*See* June 17, 2005 transcript, p. 977, attached). Finally, Dr. Dee testified that the results of his 1994 evaluation were reliable. (*See* June 17, 2005 transcript, p. 957, attached). **Dr. Dee stated, "Reviewing everything that I've seen, even with all the additional information I have, I think my opinion remains about the same in**

terms of what's wrong, his current mental level, and what is causing it." (*See* June 17, 2005 transcript, p. 966, attached). Consequently, the Court finds Defendant has failed to show how counsel performed deficiently or that he was prejudiced by counsel's failure to obtain an expert until weeks before the trial. As such, no relief is warranted on that portion of Claim II.

Defendant further claims Mr. Alcott never requested the appointment of funds for an investigator. **During the June 14, 2005 evidentiary hearing, Mr. Alcott testified that he did not request funds for an investigator because he did not feel he needed one, as follows**:

> [THE STATE]: Now, you also, I believe, indicated that you did not request the Court to appoint an investigator to assist you to get ready for the trial?
>
> [MR. ALCOTT]: True.
>
> [THE STATE]: Is that correct? Okay. Now, let me ask you back at that time in your practice when you initially got an appointment on a criminal case, and especially let's assume a first degree or capital case, would you sometime decide that you did need an investigator and ask the Court for funds to do that?
>
> [MR. ALCOTT]: Oh, absolutely.
>
> [THE STATE]: But in this particular case, you did not?
>
> [MR. ALCOTT]: Correct.
>
> **[THE STATE]: Could you explain the reason why in this case you did not ask for an investigator?**
>
> [MR. ALCOTT]: Routinely back at that time I had a friend who was a retired FBI agent that worked at the state Attorney's Office when I worked there, and he had sort of retired from there. And I utilized him to do investigative work when it was a case where, like it happened the offense was in the community and there were on-the-street type witnesses that were needed to be located and maybe run down and interviewed as opposed to deposed

sometimes, that sort of thing.

In this case, it happened in an institutional setting. All the witnesses were in somewhat closed supervision, you know, type of thing. Many, as I recall, were themselves serving life sentences. I think a couple of them were. So I mean, it basically wasn't question of having to look up witnesses and try to locate them. So there wasn't that investigative need.

And frankly, Mr. Holmes had worked it up to the point where it was ready for jury trial. He had began picking up the jury trial. And so I just picked it up from there. I saw no need to go back and plow the ground again.

(June 14, 2005 transcript, pp. 228-29, attached). During the June 15, 2005 evidentiary hearing, Jeff Homes, Esquire, the attorney assigned to the case before Judge Alcott, testified similarly, as follows:

[THE STATE]: Now, you didn't hire an investigator in this case. And you might have answered this, but I just want to make clear I was, did you feel that there was a need to have an investigator appointed to assist you to get ready for either the guilty phase or the penalty phase?

[MR. HOLMES]: Well, in retrospect, it might have been a good idea. You know, at the time I didn't feel like I needed an investigator or I would have asked for an investigator. I don't know if it would have been granted, but be that as it may, **this was a, you know, prison situation and it was somewhat different that [in] the usual murder case that I was familiar with**. But, again, I didn't ask for an investigator.

[THE STATE]: By not asking for an investigator, do you feel that you were hampered at all in your preparation to get ready for the trial and be properly prepared?

[MR. HOLMES]: No. No.

(June 15, 2005 transcript, pp. 549-50, attached). **The**

Court finds the testimony of Judge Alcott and Mr. Holmes to be credible. Accordingly, the Court finds Judge Alcott made a reasonable strategic decision to not request funds for an investigator. "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). **Consequently, the Court finds Defendant has failed to show how counsel performed deficiently pursuant to *Strickland*. As such, no relief is warranted on that portion of Claim II**.

Defendant claims that it appears that Mr. Alcott did not do an independent investigation and he also failed to do any depositions, relying on the work of Jeff Holmes in 1989 - 1990, the lawyer Defendant had fired.

As the Court aforementioned, during the June 14, 2005 evidentiary hearing, **Judge Alcott testified that he relied on the work performed by Attorney Holmes because Mr. Holmes "had worked it up to the point where it was ready for jury trial" and, therefore, he "saw no need to go back and plow the ground again**." (June 14, 2005 transcript, p. 229, attached). **Mr. Alcott further testified that he did not need to take additional depositions, as follows:**

> [THE STATE]: Did you see the need to at least attempt to try to take any more depositions of any of these witnesses that had been deposed and testified at the penalty phase?
>
> [MR. ALCOTT]: Well, no, I'd say apparently not because, had I seen the need, I would have.
>
> [THE STATE]: And even if you had seen the need, would you have had to get court approval to do that, to be able to show that you had a valid reason for wanting to redepose a witness?
>
> [MR. ALCOTT]: I'm not sure. I guess it would become an issue if I sent out the deposition and noticed it and the [S]tate moved to quash on the grounds that the person had already been deposed and then we'd have a hearing and find out what the story was on.

[THE STATE]: The reason that I ask that, I'm just assuming, correct me if I'm wrong. As a defense attorney that normally you would like to take a person's deposition as many times as possible in hopes that perhaps they might say something different in different deposition so you would have even perhaps further impeachment. Am I correct in that assumption?

[MR. ALCOTT]: Well, I guess probably yes and no. I mean, **there's also disadvantages at times. It helps locate witnesses for the state. It helps to refresh their memories, give the state a new current address. You know, I'm saying it doesn't necessarily work to the benefit of the defense to run out and find out somebody who is going to be a state witness.**

[THE STATE]: But in this case, the fact that you didn't seek to take additional depositions of the same witnesses, would that indicate to you that you made a decision that it was not necessary?

[MR. ALCOTTI: Just didn't see a need to.

[THE STATE]: And the reason that I ask that is because one of the things that hasn't been asked is when you initially get a case, appoint -- I mean, let's even limit it to the capital cases, would your standard practice have been to have deposed every witness you thought was important and essential to try to find out what they would be able to testify to at a coming trial?

[MR. ALCOTT]: Yes. My typical practice would be to get the police reports, review the police reports, again preparing this worksheet as to who the witnesses are and what they are going to testify to. And over the years I got a way at alphabetizing them so that I can quickly find them in the sheets here, or whatever. And then at that point in time, knowing what they were going to say and whether I wanted to contest it or not and it was going to become something that I wanted to learn more about, then set a deposition for that person. Then as I depose that person, incorporate what they had to say in the original statement and

go from there.

[THE STATE]: So in your practice over these years, you routinely took depositions. You weren't like some attorneys who just made the determination they just don't ever want to take depositions.

[MR. ALCOTT]: Yes. I mean, I routinely took depositions. But on the other hand, you don't necessarily need take a deposition of everybody.

(June 14, 2005 transcript, pp. 223-25, attached). **The Court finds Judge Alcott's testimony to be credible. Therefore, the Court finds Judge Alcott made the reasonable strategic decision to rely upon the depositions and investigation conducted by Attorney Holmes, who had previously prepared the case for a jury trial.** "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone, 768 So. 2d at 1048. **Additionally, the Court notes that in the instant claim, Defendant fails to identify who trial counsel should have deposed or specify what additional investigation he should have conducted. Consequently, the Court finds Defendant has failed to show how counsel performed deficiently or how his alleged deficient performance prejudiced the outcome of the proceedings pursuant to *Strickland*. As such, no relief is warranted on that portion of Claim II.**

(PCR V34/5108-5114) (e.s.)

In denying the IAC/*voir dire* sub-claim, *t*he trial court's final order of December 2, 2008 (PCR V34/5150-5155) explained:

A review of the trial transcript reflects that although jurors Fugate, Cook, Wise, Boykin, Smith, Griffin, Abney, and Mime expressed disapproval or feelings against homosexuality, **each juror also stated that his or her view would not affect their ability to fairly sit as a juror.** (*See* Trial Transcript, pp. 138-39, 146, 217-18, 261-62, 273, 291, 329, 341-42, 474, attached).

Additionally, during the June 13, 2005 evidentiary

hearing, Judge Alcott testified that he did not feel it was necessary to conduct individual *voir dire* on homosexuality and felt comfortable with the jurors' responses regarding homosexuality, as follows:

> [THE STATE]: The issue of homosexuality, is that something that you thought about whether or not you needed to do that individually, or you felt that it was more advantageous to do it in a group setting?
>
> [JUDGE ALCOTT]: I don't recall. **And I've got to say that if I didn't ask for individual, I must have made the determination that it can just be handled in the group setting**.
>
> (June 14, 2005 transcript, p. 243, attached).
>
> . . .
>
> [POSTCONVICTION COUNSEL]: Now, during the jury selection, arguably eight of the 13 people who were selected to the final jury expressed anti-homosexual feelings on the record. And we pled that in our 3.850. Jurors Fugate, Wise, Smith Griffin, Cook, Boykin, Miline and Abney. If in fact those jurors were homophobe, is that a reason you would have considered asking for and using additional peremptory challenges? Should have, I should ask.
>
> [JUDGE ALCOTT]: Part of the answer, I guess I don't have the feel of it right now because I don't remember. **But I'm just saying that, apparently, I was comfortable at the time in my contact with them overall as being fair jurors, and whatever they did say, apparently, I didn't feel like it was going to be enough where I felt like I needed a cause challenge, or the individual voir dire.**
>
> (June 13, 2005 transcript, pp. 110-11, attached).

During the June 14, 2005 evidentiary hearing, Judge Alcott further testified that he did not see the case as one of race and did not need to inquire into racial issues, as follows:

> [THE STATE]: Well, one issue that has come up in your direct examination was were you concerned

about trying to spend a lot of time developing any potential racial bias that any of the potential jurors might have in this case?

[JUDGE ALCOTT]: I have to say no. I mean, **I just didn't really see this as being a racially charged case.**

[THE STATE]: Have you handled some other first degree murder cases in which you thought race might be something that was significant?

[JUDGE ALCOTT]: Oh, absolutely.

[THE STATE]: And what are some factors you look at to try to determine whether you think race is potentially going to be a significant factor?

[JUDGE ALCOTT]: Well, I mean, typically what you'll have [is] a white victim with a black accused person, and that's what I would, you know, look at sometimes. Or if it seemed to be especially racially motivated in some fashion.

[THE STATE]: Now, in this particular case, of course Dean Kilgore is black and the victim Pearl, was he black as well?

[JUDGE ALCOTT]: Yes.

[THE STATE]: And a number of inmates that were going to testify, were a number of those inmates black as well?

[JUDGE ALCOTT]: Black and white, as I recall, Hispanic.

[THE STATE]: Did you in any way, as you were approaching jury selection, think that either because some of the witnesses were not black, or things of that nature, that you needed to go into what you normally would do in terms of racial prejudice?

[JUDGE ALCOTT]: **Not in this case**.

(June 14, 2005 transcript, pp. 238-39, attached).

Accordingly, the Court finds Judge Alcott made a reasonable strategic decision when he did not request individual voir dire or further inquire as to issues of homosexuality or race. "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. *Occhicone*, 768 So. 2d at 1048. **Consequently, the Court finds Defendant has failed to show that counsel performed deficiently pursuant to *Strickland*.** As such, no relief is warranted on that portion of claim IV.

Next, Defendant claims that Mr. Alcott's voir dire examination was undirected and purposeless. Defendant further claims that Mr. Alcott failed to move for additional challenges, [fn8] and his failure to do so resulted in a negligent failure to identify the jurors he would have struck if he had been allowed additional challenges. Defendant claims the resulting prejudice was the empanelment of a jury made up of persons whose bias against Defendant, a black prison inmate involved in a homosexual love triangle, which was evident from the record of the jury selection process.

> [fn8] Pages 81 - 89 of Defendant's Amended Motion lists the jurors that Alcott used his peremptories to remove along with the jurors comments: Juror Meyer, Juror Lasseter, Juror Lewis, Juror Thayer, Juror Sams, Juror Pollard, Juror Menze, Juror McDonald, Juror Hall, and Juror Locascio.

During the June 13 and 14, 2005 evidentiary hearings, Mr. Alcott also testified that he was aware he could have requested additional challenges, but was satisfied with the selected jury, as follows:

> [POSTCONVICTION COUNSEL]: Were you satisfied with the jury that you ended up with?
>
> [MR. ALCOTT]: Well, I'm assuming I was; otherwise I would have asked for some additional challenges, and I get the impression I didn't. Okay. So I think the answer is yes. I must have been satisfied.
>
> (June 13, 2005 transcript, pp. 109-110, attached).
>
> . . .

> [THE STATE]: Now, were you familiar enough with the law back at that time that if you had exhausted all of your challenges and you still felt like you needed an additional challenge, that you could always request the judge to give you additional challenges?
>
> [MR. ALCOTT]: I would have asked for it, right.
>
> [THE STATE]: And the fact that you didn't do that in this case, what would that indicate to you?
>
> **[MR. ALCOTT]: That apparently I was comfortable with the ones that were selected.**
>
> (June 14, 2005 transcript, pp. 245-46, attached). Accordingly, **the Court finds Judge Alcott made a reasonable strategic decision when he did not request additional peremptory challenges**. "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. *Occhiconee*, [sic] 768 So. 2d at 1048. **Consequently, the Court finds Defendant has failed to show that counsel performed deficiently pursuant to *Strickland*.** As such, no relief is warranted on that portion of claim IV.
>
> (PCR V34/5151-5155) (e.s.)

As evidenced by the foregoing, the trial court included specific excerpts from the record and the trial court's order is supported by competent, substantial evidence. Trial counsel was not deficient in failing to contact Dr. Dee earlier or failing to call Dr. Dee during the guilt phase. Dr. Dee admitted that he spent the "typical" amount of time evaluating Kilgore, Dr. Dee admitted that his diagnosis was unchanged in post-conviction, and CCRC has not established the availability of any mental health

defense which would have been admissible during the guilt phase. See, *Evans v. State*, 946 So. 2d 1, 11 (Fla. 2006) ("defense counsel is not ineffective for failing to present the defense of diminished capacity because diminished capacity is not a viable defense in Florida"), citing *Chestnut v. State*, 538 So. 2d 820, 820 (Fla. 1989) (holding that diminished capacity is not a viable defense); see also, *Hodges v. State*, 885 So. 2d 338, 352 n. 8 (Fla. 2004) ("This Court has held on numerous occasions that evidence of an abnormal mental condition not constituting legal insanity is inadmissible to negate specific intent."); *Spencer v. State*, 842 So. 2d 52, 63 (Fla. 2003) (evidence of defendant's dissociative state would not have been admissible during the guilt phase).

CCRC alleged below that Alcott should have used DOC disciplinary reports (DR's) to allegedly impeach some of the inmates and entries in two personnel records to allegedly impeach a corrections officer and a crime scene technician. On appeal, CCRC does not assert any specific argument with respect to DOC personnel; therefore, this sub-claim is waived. Furthermore, Alcott did not believe that the comments in the personnel records would have been useful impeachment. CCRC has not identified any evidentiary basis under which hearsay comments and DR's would have been deemed admissible during the guilt phase. After reviewing CCRC's packet of "impeachment," including the DR's, Alcott concluded that the inmate's DR's were not relevant or particularly

significant, especially in light of the inmates' multiple felony convictions, and the DR's probably would not have been admissible.

On appeal, CCRC focuses on two of the inmates - Squires and Montgomery - and CCRC faults Alcott for not impeaching these inmates with multiple DR's. (Initial Brief at 20-22) However, these two inmates provided testimony at trial which supported the defense claim that Jackson was a trouble-maker. At trial, inmate Timothy Squires testified that Kilgore frequented the hobby shop, made small boats, and usually minded his own business. (DA-R T897) Squires described Jackson as "a trouble-making dude" who played people against each other and caused a lot of problems. (DA-R T897-98) Jackson caused a group of other inmates to confront Kilgore at the hobby shop. Kilgore defended Jackson from the others, but he argued with Jackson for causing problems. (DA-R T898-99) Inmate Jonathan Montgomery testified at trial that Jackson came to the hobby shop on Saturday or Sunday and started an argument with Kilgore, who told Jackson to leave him alone, that he was tired of Jackson messing with him and playing games. (DA-R T920-21)

Defense counsel Alcott was by no means inactive or passive during Kilgore's trial. Alcott cross-examined the State's witnesses and vigorously challenged the State's theory of premeditation. In addition, Kilgore's own "favorable" version of events was already before the jury *via* Kilgore's tape-recorded statement and it was unnecessary for Alcott to call any additional

witnesses to support this defense theory. Thus, Alcott was able to argue this theory and did not have to forfeit final closing argument, which was available to the defense in 1994. See, Fla. R. Crim. P. 3.250. Second-guessing of Alcott's reasonable strategic decision does not constitute any basis for relief under *Strickland [v. Washington*, 466 U.S. 668 (1984)].

None of the grounds cited by Kilgore credibly support any viable claim of deficiency and prejudice under *Strickland*. The murder was committed in a confined setting and there was no need for trial counsel to hire an investigator to locate "street" witnesses. The inmates and DOC personnel were deposed before Kilgore's first trial and Alcott reviewed those pre-trial depositions and statements. CCRC has not identified any legitimate defense which Dr. Dee actually could have presented during the guilt phase. And, finally, the unpresented DR's and hearsay comments in DOC materials were insignificant, irrelevant, and largely inadmissible. Trial counsel vigorously defended this case and challenged the State's case. Kilgore has not established any deficiency of counsel and resulting prejudice under *Strickland*.

Moreover, as to the Barbara Jackson sub-claim, the trial court found that the defendant failed to show any prejudice. As the trial court explained in denying post-conviction claim XV,

> Although it appears that Judge Alcott did not review the files on the prior violent felony convictions which were used as aggravators, the Court finds Defendant has failed to show that he was prejudiced by counsel's failure to review those files. **First, although Barbara**

Ann Jackson denied having a romantic or sexual relationship with Defendant, Officer Keel testified that Defendant and Ms. Jackson were once in a relationship, Defendant's sister testified that she once caught Defendant in bed with Ms. Jackson, and during the penalty phase opening statements, even the State conceded that Ms. Jackson had been Defendant's girlfriend. (*See* Trial Transcript transcript, [sic] pp. 1415-1416, 1450-51, 1594, attached). **Secondly, Mr. Alcott was still able to draw the parallel between the prior violent felonies and in the instant murder, and mitigate the prior murder conviction, as follows**:

> In his opinion my client was suffering from extreme emotional distress at the time of this situation. That he didn't have the capacity to conform his conduct.
>
> Mr. Wallace [the State] stood up here and said, you know, we hoped that when our children do something and act out we try to discipline and we try to change their behavior. And they're remorseful, they're sorry, but they turn around and do the same thing again.
>
> Well, some of us have the emotional tools that we have acquired in life to deal with life's problems. Some of us, for whatever reason, God hasn't given us those tools and we don't have them. Or if we ever had them we've lost them. We don't have the ability to deal with life's problems.
>
> And if you look at the incidences that Mr. Kilgore was in it's obviously life's problems in regard to his relationships personally with someone who he considers his love interest. In 1978 it was Barbara Ann Jackson. And in 1989 it was Pearl Jackson.
>
> He is not a danger to the world at large. These weren't random, terrorized kidnapping, taking them off in the woods and brutal killings. **These were situational situations, cases involving emotions. And each case involving somebody he considered to be close to him to whom he was attempting to protect or look after or whatever that he had a relationship with or role with that person. Whether it was Barbara Ann Jackson who he thought**

he had a relationship with, was home baby-sitting when she was down at the bar and her boyfriend comes by or whatever and causes him emotional rollercoastering problems for the 1978 situation. Again, emotions. Boyfriend/girlfriend thing. He simply doesn't have the ability to control his emotional [sic]. He acts out. He doesn't' have the skills that other people have to control, coping skills.

Now, does that excuse him from being punished for his conduct? No, it doesn't. It doesn't. But does it explain and mitigate this awesome situation where the Government says we as Government are going to kill one of our citizens, one of us who has been born among us and raised among us, is living among us and who is part of the American system, American society. We as people, as elected jurors, whatever, as the court, as a Government, we have decided that we are going to kill one of our own. We are going to because of what they have done.

And you said in appropriate cases that is acceptable. I simply submit that this is not an appropriate case because the mitigating factors here are simply outweighed - - or excuse me - - are simply outweighing the aggravating facts.

The prior offense in 1978 involving Mr. Wood, where Mr. Wood fired out the house and Mr. Kilgore fired in the house and resulted in the death of Mr. Wood, was, in fact, arose out of the kidnapping and taking of Mrs. Jackson. It was [] what we called a capital felony. A capital felony can be broken down into either one that was committed by premeditation or was committed by felony murder. And the facts of that case suggest it was a felony murder and not a premeditated murder.

I also ask you to look at the role that frankly Pearl Jackson played in bringing about the situation which resulted in the death of her - - Pearl. And I'm certainly not going to stand up here and say to you well, Pearl was responsible for what happened. But think about it. This rollercoastering and emotional situation, this endless trap that Dean found himself in the institution of come and

> help me and protect me. Stay away from me I want nothing to do with you. I'm going to belittle you. No, I want you. You know, please come over and bring me some cigarettes. You know, he is on an emotional roller coaster. He was playing - - Pearl Jackson was playing with absolute psychological dynamite. And it exploded.
>
> I suggest that that is a factor that should be weighed heavily in the decision is this an appropriate case for the death penalty. I suggest, it's not.

(Trial transcript, pp. 1664-1667, attached**). Moreover, this case is not like *Rompilla v. Beard*, 545 U.S. 374, 390 (2005), where the Supreme Court found, "[i]f defense lawyers had looked in file on Rompilla's prior conviction, it is uncontested they would have found a range of mitigation leads that no other source had opened up." In the instant matter, Defendant has not shown that anything obtained from those prior conviction files would have changed the outcome of the proceedings.** Consequently, the Court finds Defendant has failed to show he was prejudiced by counsel's allegedly deficient performance under *Strickland*. As such, no relief is warranted on that portion of Claim XV.

(PCR V34/5197-5199) (e.s.)

During the post-conviction hearing, Alcott confirmed that, at the time of trial, he was not concerned with trying to impeach Barbara Jackson on whether she'd actually had a sexual relationship with Kilgore years earlier. From Alcott's perspective, it was unimportant. (PCR V15/2480-81) Defense counsel's strategic decision does provide any basis for relief. See, *Spencer v. State*, 842 So. 2d 52, 61 (Fla. 2003) (trial counsel was not ineffective in failing to present witnesses who could testify to the stormy and antagonistic relationship that defendant had with the victim).

***Brady* Sub-Claim: Prosecutor's Deposition Notes**

Kilgore also alleges a *Brady* violation based on the failure to provide the defense with the prosecutor's deposition notes regarding statements made by Barbara Jackson and her son, Jeffrey Barnes, both of whom were deposed and testified at Kilgore's 1978 trial. This claim is spurious. As the trial court found, Kilgore "failed to prove any *Brady* violation *when the alleged notes were the State's notes taken during depositions and Defendant's counsel was at those depositions.*" (PCR V11/1685-86) Since the defendant had equal access to the information, Kilgore's allegations fail to establish any *Brady* violation. See, *Maharaj v. Sec'y of the Dep't of Corr.*, 432 F.3d 1292, 1315 n. 4 (11th Cir. 2005) (there is no suppression if the defendant knew of the information or had equal access to obtaining it). Furthermore, the depositions of Barbara Jackson and Jeffrey Barnes related solely to Kilgore's crimes in 1978 and were unrelated to Kilgore's trial for the 1989 prison murder of Pearl. Therefore, they were irrelevant to the guilt phase; and, in denying Kilgore's subsidiary IAC/penalty phase claim, the trial court found no *Brady* violation and prejudice under *Strickland*:

> . . . the Court finds that Defendant has failed to prove any *Brady* violation when the alleged notes were the State's notes taken during depositions and Defendant's counsel was at those depositions. **Moreover, the Court finds that Defendant has failed to meet the second prong of *Strickland* in that he has failed to prove how counsel's alleged failure to attempt to obtain the alleged notes resulted in prejudice when the deposition**

> **transcripts were more complete than the alleged notes and Defendant's counsel was at the depositions. Since Defendant has failed to meet the second prong of *Strickland*, it is unnecessary to address the performance component.** *See Kennedy v. State*, 547 So. 2d 912, 914 (Fla. 1989). As such, no relief is warranted upon claim III.
>
> (PCR V11/1686) (e.s.)

The trial court's fact-specific and detailed written order, which includes specific record excerpts relating to each post-conviction claim, is supported by competent, substantial evidence and should be affirmed.

ISSUE II

THE IAC/PENALTY PHASE CLAIM

During the penalty phase in 1994, the defense witnesses included three mental health experts: Dr. Kremper, a clinical psychologist; Dr. Dee, a clinical and neuropsychologist; and Dr. Ainsworth, M.D., a psychiatrist, whose prior testimony was published to the jury. In addition, defense counsel also presented the testimony of DOC corrections officer, Mary Hall, and Kilgore's two sisters: Dorothy Speight [Spates] and Irlene Cason. After conducting a week-long evidentiary hearing, the trial court found no deficiency of counsel and no resulting prejudice under *Strickland*. (PCR V34/5178-5186). For the following reasons, the trial court's comprehensive and fact-specific post-conviction order should be affirmed.

Applicable Legal Standards

The *Strickland* standards, as summarized in *Pagan v. State*, 2009 WL 3126337, 5-6 (Fla. 2009), are included at pages 9 - 10 of the instant brief. In *Pagan,* this Court also addressed the investigation and presentation of mitigation evidence and stated:

> With respect to the investigation and presentation of mitigation evidence, the Supreme Court observed in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), that "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case." *Id*. at 533. Rather, in deciding whether trial counsel exercised reasonable professional judgment with regard to the investigation and presentation of mitigation evidence, a reviewing court must focus on whether the investigation resulting in counsel's decision not to introduce certain mitigation evidence was itself reasonable. *Id.* at 523; *Strickland*, 466 U.S. at 690-91. When making this assessment, "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." *Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527.
>
> An attorney can almost always be second-guessed for not doing more. However, this is not the standard by which counsel's performance is to be evaluated under *Strickland*. Deficient performance involves "particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards." *Maxwell*, 490 So.2d at 932.
>
> *Pagan v. State*, 2009 WL 3126337, 5-6 (Fla. 2009)

In challenging a death sentence, the prejudice inquiry

concerns "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, at 695, 104 S. Ct. at 2069.

The Trial Court's Ruling

The trial court's final order of December 3, 2008, set forth the following detailed analysis of the IAC/penalty phase claims:

> Defendant claims that in Defendant's capital penalty phase proceedings, substantial mitigating evidence, both statutory and nonstatutory, went completely undiscovered and was thus not presented for the consideration of the judge and jury, both of whom are sentencers in Florida. Defendant claims he was sentenced to death by a judge and jury who knew nothing about him. Defendant claims the evidence set forth in this claim demonstrates that an unreliable death sentence was the resulting prejudice. Defendant claims Dr. Henry Dee was the only expert retained independently by 1994 trial counsel Alcott. Defendant claims that neither Dr. William Kremper, Dr. Gary Michael Ainsworth, Dr. R. Roque Ramos, Dr. Alan Gessner, or Dr. Melvin Greer testified in 1990 or 1994 about the trauma or torture that Defendant suffered through from April 1963 until December 1965 at the infamous Oakley School for Boys in Raymond, Mississippi. Defendant claims this facility was later admonished by a federal judge for its cruel and unusual treatment of children, citing to *Morgan v. Sproat*, 432 F. Supp 1130, (U.S. S.Dist.Miss. 1977).
>
> Defendant claims Mr. Alcott failed to send an investigator to explore Defendant's life and childhood in Mississippi including his early childhood, lack of education, his father being poisoned to death, the cruelty and unjustifiable punishments Defendant would receive from his parents, seizure, bronchitis, pneumonia, and other juvenile trauma. Defendant claims the death of Emerson Jackson in 1989 followed a pattern of spurned love and rejection that began many years before in Mississippi. Lastly, Defendant claims Mr. Alcott's failure to investigate Defendant's background, or even to retain an investigator on his case was profoundly deficient performance.

"[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." *State v. Riechmann*, 777 So.2d 342, 350 (Fla.2000). **A review of the penalty phase trial transcript reflects Judge Alcott presented the following penalty phase witnesses: William G. Kremper, Ph.D., Henry Dee, Ph.D., Mary Hall, Dorothy Speight [fn9] and Irlene Cason; additionally, the prior deposition testimony of Dr. Ainsworth was published to the jury.**

Dr. Kremper, a clinical psychologist, was tendered as an expert in the field of forensic psychology. Dr. Kremper testified to the following: he evaluated Defendant on August 10, 1989 and August 22, 1989 and October 25, 1989; he administered the WAIS and Defendant obtained a full-scale IQ score of 76; trial counsel provided him with investigation reports related to the homicide investigation, as well as several previous evaluations of Defendant; he spoke to Defendant's mother. **Dr Kremper found that Defendant functioned intellectually within a borderline range; compared to previous evaluations, Defendant's intellectual functioning had declined and he attributed that deterioration to Defendant's diabetic condition, possible head injuries and frequent beating as juvenile in reform school, extensive history of alcohol use**. (*See* Trial Transcript, pp. 1457-77, attached). Dr. Kremper further testified that Defendant was under extreme emotional distress at the time the incident occurred and that, although Defendant understood the difference between right and wrong, he lacked the capacity to conform his conduct to what the law requires. (*See* Trial Transcript, pp. 1477-80, 1490-92, attached).

Henry Dee, Ph. D., a clinical and neuropsychologist, was tendered as an expert in the field of neuropsychology. **Dr. Dee evaluated Defendant on March 15, 1994 and diagnosed Defendant with organic brain syndrome or brain damage. He testified that Defendant's mental condition had deteriorated since Dr. Kremper last saw Defendant in 1989 and attributed the "accelerating deterioration of his mental condition" to Defendant's diabetic condition, which was in the advanced stage, as well as continued alcohol abuse.** He further testified that Defendant was under extreme emotional distress at the time the incident occurred and that, although

Defendant understood the difference between right and wrong, he lacked the capacity to conform his conduct to what the law requires. (*See* Trial Transcript, pp. 1515-1528-30, attached).

> [fn9] In [sic] appears that in the trial transcript, Dorothy Speight's name is spelled as Dorothy Spates.

In his deposition testimony, which was published to the jury, **Dr. Gary M. Ainsworth, M.D,** testified that he was a psychiatrist and conducted a psychiatric evaluation of Defendant on November 28, 1989 and January 19, 1990. (*See* Trial Transcript, pp. 1550, attached). Dr. Ainsworth testified that he reviewed Dr. Kremper's evaluation as well as various previous evaluations provided by trial counsel. **Information contained in the reports reflected Defendant's history of alcohol abuse as well as that of his family, including that his mother gave him moonshine as a child and he was possibly exposed to lead from the moonshine. As one previous report pointed out that there was evidence of brain damage**, he recommended that Defendant receive a neurological examination, which was then performed by Dr. Greer. **Dr. Ainsworth described the psychological and physical effects of diabetes, including insulin dependence, loss of eyesight, swelling of joints, or impotence; he also noted that alcohol would accelerate the diabetic changes. Based on Dr. Kremper's report, Defendant's intelligence quotient was very low or "borderline retarded" and he was aware that Defendant had suffered significant head injuries and been severely beaten on several occasions. Defendant advised him that as a child, his mother would give him moonshine to go to sleep.** He opined that Defendant had an adjustment disorder. Dr. Ainsworth further testified that Defendant appeared to be truly remorseful for the offense. He also testified that Defendant was under the influence of extreme mental or emotional disturbance at the time the offense occurred and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (*See* Trial Transcript, pp. 1548-71, attached).

Mary Ann Hall, a corrections officer who worked at Polk Correctional Institution, testified that she was on duty after this incident occurred, and was assigned to observe Defendant on suicide watch. (*See* Trial

Transcript, pp. 1534-36, attached). She testified that **Defendant appeared remorseful, was crying and kept asking if the victim had died, and told her he was in love with the victim and did not mean to kill him.** (*See* Trial Transcript, pp. 1536-39, attached).

Dorothy Speight, Defendant's younger sister, testified regarding Defendant's childhood and family. **There were thirteen children in the family. Their parents separated and they lived with their mother and stepfather on somebody else's farm, working the farm. The entire family lived a in a small two to three bedroom house. Defendant went to school "every now and then" until he was eleven years old. The family has a history of both diabetes and alcohol abuse. Ms. Speight also testified that the children were abused by their mother and Defendant "used to get the worst" of it. Defendant would cry for food but he had to wait until the adults finished eating, and by then there was nothing left. She recalled Defendant left the home when he was eleven years old because the family was poor and "eating was a problem." She also recalled that Defendant once received a significant head injury while in police custody.** Ms. Speight also testified Defendant spent so much time with Barbara Ann Jackson that she thought he was living with her, and she once caught them in bed together. Defendant called her after the instant offense occurred; **he was crying and told her that he did not mean to kill the victim, only nick him, and he poured "the stuff" on him to embarrass him, not to set him on fire.** She regularly visits Defendant in prison and would continue to do so. (*See* Trial Transcript, pp. 1587-1601, attached).

Irlene Cason, another of Defendant's younger sisters, testified to that Defendant called her after the offense and sounded remorseful and "broken up." Their mother was unable to testify due to her diabetes and related illnesses including gallstones, paralysis and having both legs amputated. She would continue to maintain contact with Defendant if he were in prison the rest of his life. (*See* Trial Transcript, pp. 1602-05, attached).

A review of the record reflects the jury recommended a sentence of death by a vote of nine to three. In its sentencing order, the Court found two aggravators existed, specifically, the capital felony was committed

by a person under sentence of imprisonment or placed on community control and the defendant was previously convicted of another capital felony or of a felony involving the use of threat or violence to the person. (*See* Judgment and Sentence, attached). **The trial court also found that both statutory mitigators presented had been proven – the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance and the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.** (*See* Judgment and Sentence, attached). **The Court further considered the following non-statutory mitigating factors: Defendant was raised in an environment of extreme poverty; he was beaten as a child; lack of education; and poor physical and mental health.** (*See* Judgment and Sentence, attached). **However, the trial court further found that the instant offense was accomplished with "considerable preparation, cunning, steal which inconsistent with extreme disturbance."** (*See* Judgment and Sentence, attached). After noting that Defendant was previously found guilty of first degree murder, the trial court found follows:

> Under the certain circumstances the state not only has the right, but the obligation to take the life of convicted murderers in order to prevent them from murdering again. This is one of those cases. To sentence Mr. Kilgore to anything but death would be tantamount to giving him a license to kill. The fact that his prey would be theoretically be limited to fellow inmates and prison guards is not comforting. An orderly society cannot permit human life to be violently taken with impunity.

(*See* Judgment and Sentence, attached).

During the instant postconviction proceedings, Defendant further presented the testimony of Defendant's siblings, Dorothy Speight, Elbert Kilgore, and Jimmy Dean Kilgore, and that of Anthony Jackson and Charley Thompson.

During the June 15, 2005 hearing, **Ms. Speight** testified their parents worked as sharecroppers and all the children worked in the fields with them. The family

lived in a one bedroom house, and slept on pallets on the floor. The children would get “whoopings” and Defendant got the worst of them. The children had to wait for the adults to finish eating first and then they would get “what was left.” Defendant would cry often as he feared there would be no food left and his mother and step-father would mock him for crying. Defendant once found a rat and they cooked and ate it. The children “didn’t go to school very much” because they lived out in the woods and the buses did not always go out there; sometimes the children did not go to school because they did not have shoes or clothes to wear to school. Defendant told her that he was repeatedly beaten for no reason while at the Oakley reform school. All of the brothers drank moonshine from a young age. Ms. Speight barely recalled Judge Alcott and did not recall meeting with him to discuss Defendant’s case. At some point, she had a stroke and has trouble remembering recent events. Although Defendant’s mother, father, step-father and two siblings have passed away, the remaining siblings still live in Lakeland, Florida. (*See* June 15, 2005 transcript, pp. 579-609, attached).

Defendant’s older brother, Elbert Kilgore, testified during the June 15, 2005 evidentiary hearing and described Defendant’s early family life. Their parents were sharecroppers and the family lived in poverty. Defendant’s father abandoned the family in 1954. The family went to Grenada to live with their grandparents and their mother eventually remarried. Both their mother and step-father were alcoholics and would make “home brew.” The children, including Defendant, would steal and drink their alcohol, and Defendant was about three or four years when he started drinking whiskey or beer. Defendant and the other children would have to wait for the adults to finish eating before they could eat whatever was left, and when there was no food, they would drink the whiskey or beer. Defendant would cry often because there was no food and his step-father would mock him for crying. Sometimes their mother and step-father would go out drinking all day, leaving “the next oldest” child in charge. The children went to school, which was five or six miles away, when they could, i.e, when they were not out on the farm, when it was warm enough or not raining. At different points in time, Defendant and other family members moved to Lakeland. Defendant “practically moved” in with Ann Jackson and took care of her children. Mr. Kilgore heard from one of his other brothers, Roy, that he had also had relations with Ms. Jackson. He heard

from an investigator name Frank Bruno that the "shooting" was actually a gun fight and Defendant and the victim were shooting at each other. (*See* June 15, 2005 transcript, pp. 610-43, attached).

Jimmy Dean Kilgore, Defendant's younger brother, also testified regarding Defendant's early life. Their parents were sharecroppers and they grew up in a small shack with an outhouse in the pasture. Food was scarce and they basically had to hunt or grow whatever they could. Although their mother loved them, she would discipline them with a belt or switch. Defendant received the "most serious whooping;" sometimes the brothers would hold him down and he would pass out but then come to after water was thrown on him. He knew Barbara Jackson and knew that she and Defendant "were messing around." She also had a relationship with another brother, Lee, as well as various other men. She used men and Defendant basically gave all his money to her. (*See* June 15, 2005 transcript, pp. 643-70, attached).

Anthony Jackson, the son of Barbara Jackson, testified that Defendant babysat him and his siblings. He had no independent recollection as to whether his mother told him she was dating Defendant. On the night his step-father, Thomas Woods, was killed, he did not see what happened and did not see Defendant. He had no independent recollection of statements he made during the 1978 depositions regarding that event. Defendant later denied shooting his stepfather. (*See* June 15, 2005 transcript, pp. 694-701, attached).

Jeffrey Barnes, another son of Barbara Jackson, testified that he did not have any personal knowledge regarding Defendant's relationship with his mother. He recalled that his stepfather first fired a shot and Defendant and his stepfather were shooting at each other. (*See* June 15, 2005 transcript, pp. 714, attached).

During the June 14, 2005 evidentiary hearing, Defendant presented the testimony of Professor Jimmy Bell, MA, Ph. D., a professor at Jackson State University, tendered as an expert in the area of criminal justice and sociology. (*See* June 14, 2005 transcript, pp. 354-457, attached). Professor Bell researched and investigated the Oakley Training School, interviewed people familiar with the Oakley Training School, and also interviewed some of Defendant's family members. Professor

Bell described the rural Mississippi and the share cropping system. He described living conditions at Oakley and his research indicated that when Defendant was at Oakley, the school was segregated; it was difficult to separate work from school; and the punishment system was extremely harsh, abusive and essentially inhumane. He opined that Defendant was completely institutionalized, having spent almost his entire life in a prison-type setting, beginning with Oakley when he was just 12 years old.

During the June 17, 2005 hearing, **Charley Thompson** testified that he attended the Oakley Training School during the same time as Defendant. He recalled that they would get beaten in "the shop" and Defendant was beaten there when he ran away. He described poor conditions at Oakley, including the beatings, working and lack of education. He testified that he is also on death row. (*See* June 17, 2005 transcript, 905-40, attached).

During the June 15, 2005 evidentiary hearing, Defendant also entered into evidence numerous background materials including previous medical and psychological evaluations, DOC records, photographs and reports from CCRC regarding interviews with the following: Defendant's siblings, Dorothy Speight, M.C. Kilgore, Bobby Gene Kilgore, Elbert Kilgore, Jimmie Dean Kilgore, Roy Kilgore, Paul Kilgore; and other family members and persons acquainted with the Kilgores, Janie Kilgore, Donald and Evelyn James, Alfred Parker; former employees of the Oakley Training School, Geraldine Howard, Annie and Charles Stamps; their son, Ken Stamps; Charles Thompson, a friend of Defendant's who was also at Oakley; and Barbara Ann Jackson. (*See* Defense Exhibits 36-40, 60, 61, 72-82, I, J, K, L). Defendant further introduced evidence regarding Defendant's step-father, Sam Spearman, including documents related to his criminal convictions and death certificate. *See* Defense Exhibits 61(2). Defendant also introduced numerous publications regarding the investigations and findings of abuse at the Oakley Training School. (*See* Defense Exhibits 61(12)-(13), 62).

However, after considering Defendant's Motions, the State's Responses, and Defendant's Reply, as well as the testimony and evidence presented during the June 13, 14, 15, 16, and 17, 2005 and January 22 and 23, 2007 evidentiary hearings, and Defendant's and the State's written closing arguments and supplemental filings, and the court file and record, **the Court finds counsel**

> **conducted a reasonable investigation into Defendant's background. The testimony regarding Defendant's early life is largely cumulative where the defense penalty phase witnesses testified regarding the family's poverty and work as sharecroppers, Defendant's lack of education, physical abuse by his mother, Defendant's and his family's history of alcohol abuse, drinking moonshine as a child and possible exposure to lead from the moonshine, effects of his diabetic condition, head injuries and frequent beatings as a juvenile. Consequently, Defendant has failed to show how counsel performed deficiently**. *See Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007) ("[T]his Court has held that even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence."). **Moreover, even after considering all of the additional mitigation testimony and evidence presented during the evidentiary hearings, the Court finds Defendant has still failed to show that the outcome of the proceedings would have been different as required under *Strickland*.** As such, no relief is warranted on Claim VIII.
>
> (PCR V34/5178-86) (e.s.)

Analysis

CCRC faults trial counsel for failing to present more evidence – more family members, more mental health experts, and more information, especially about Kilgore's juvenile confinement at Oakley (which occurred approximately thirty years before the penalty phase). For the following reasons, the trial court's order, finding no deficiency of counsel and no resulting prejudice under *Strickland*, should be affirmed.

In *Bobby v. Van Hook*, 2009 WL 3712013, 4 (2009), the U.S. Supreme Court summarily rejected a similar defense claim -- that trial counsel was ineffective in failing to interview more family

members and more mental health experts who could have helped trial counsel narrate "the true story of [the defendant's] childhood experiences." In *Van Hook*, the Court recently explained:

> **Despite all the mitigating evidence the defense did present, Van Hook and the Court of Appeals fault his counsel for failing to find more**. What his counsel did discover, the argument goes, gave them "reason to suspect that much worse details existed," and that suspicion should have prompted them to interview other family members-his stepsister, two uncles, and two aunts-as well as a psychiatrist who once treated his mother, all of whom "could have helped his counsel narrate the true story of Van Hook's childhood experiences." 560 F.3d, at 528. But there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties. The ABA Standards prevailing at the time called for Van Hook's counsel to cover several broad categories of mitigating evidence, see 1 ABA Standards 4-4.1, comment., at 4-55, which they did. **And given all the evidence they unearthed from those closest to Van Hook's upbringing and the experts who reviewed his history, it was not unreasonable for his counsel not to identify and interview every other living family member or every therapist who once treated his parents. This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, cf. *Wiggins*, 539 U.S., at 525, 123 S.Ct. 2527, or would have been apparent from documents any reasonable attorney would have obtained, cf. *Rompilla v. Beard*, 545 U.S. 374, 389-393, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). It is instead a case, like *Strickland* itself, in which defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments." 466 U.S., at 699, 104 S.Ct. 2052. [**FN3]**
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> [FN3] In addition to the evidence the Sixth Circuit said his attorneys overlooked, Van Hook alleges that his lawyers failed to provide the expert witnesses with a "complete set of relevant records or [his] complete psycho-social history." Brief in Opposition 4. But he offers no support for that

assertion. He further claims that his counsel failed to obtain or present records of his military service and prior hospitalizations, but the record shows that they did review the former, see App. to Pet. for Cert. 380a, and that the trial court learned (from one of the written expert reports) all the relevant information Van Hook says it would have gleaned from the latter, see *id*., at 373a-377a.

What is more, even if Van Hook's counsel performed deficiently by failing to dig deeper, he suffered no prejudice as a result. See *id*., at 694, 104 S.Ct. 2052. As the Ohio court that rejected Van Hook's state habeas petition found, the affidavits submitted by the witnesses not interviewed shows their testimony would have added nothing of value. See *State v. Van Hook*, No. C-910505, 1992 WL 308350, *2. Only two witnesses even arguably would have added new, relevant information: One of Van Hook's uncles noted that Van Hook's mother was temporarily committed to a psychiatric hospital, and Van Hook's stepsister mentioned that his father hit Van Hook frequently and tried to kill Van Hook's mother. App. to Pet. for Cert. 227a, 232a. But the trial court had already heard - from Van Hook's mother herself - that she had been "under psychiatric care" more than once. *Id*., at 340a. And it was already aware that his father had a violent nature, had attacked Van Hook's mother, and had beaten Van Hook at least once. See also *id*., at 305a (noting that Van Hook "suffered from a significant degree of neglect and abuse" throughout his "chaotic" childhood). **Neither the Court of Appeals nor Van Hook has shown why the minor additional details the trial court did not hear would have made any difference**.

On the other side of the scales, moreover, was the evidence of the aggravating circumstance the trial court found: that Van Hook committed the murder alone in the course of an aggravated robbery. See Ohio Rev.Code Ann. § 2929.04(A)(7) (Lexis 2006). Van Hook's confession made clear, and he never subsequently denied, both that he was the sole perpetrator of the crime and that "[h]is intention from beginning to end was to rob [Self] at some point in their evening's activities." App. to Pet. for Cert. 295a; see *id.*, at 276a-278a, 294a. Nor did he arrive at that intention on a whim: Van Hook had previously pursued the same strategy-of luring homosexual men into secluded settings to rob them-many times since

> his teenage years, and he employed it again even after Self's murder in the weeks before his arrest. See *id*., at 279a, 295a, 374a. Although Van Hook apparently deviated from his original plan once the offense was underway - going beyond stealing Self's goods to killing him and disfiguring the dead body - that hardly helped his cause. **The Sixth Circuit, which focused on the number of aggravating factors instead of their weight, see 560 F.3d, at 530; cf. Ohio Rev.Code Ann. § 2929.04(B), gave all this evidence short shrift, leading it to overstate further the effect additional mitigating evidence might have had.**
>
> *Van Hook*, 2009 WL 3712013, 4-5

CCRC relies, primarily, on *Williams v. Taylor*, 120 S. Ct. 1495 (2000), *Wiggins v. Smith*, 123 S. Ct. 2527 (2003) and *Rompilla v. Beard*, 125 S. Ct. 2456 (2005). As this Court recognized in *Marek v. State,* 8 So. 3d 1123, 1128 (Fla. 2009), the United States Supreme Court in these cases did not change the standard of review for claims of ineffective assistance of counsel under *Strickland*. Moreover, all three of these cases were distinguished in *Van Hook,* 2009 WL 3712013, 3 (concluding that the Sixth Circuit was incorrect in saying Van Hook's lawyers waited until the "last minute."); Cf. *Williams v. Taylor*, 529 U.S. 362, 395, 120 S. Ct. 1495 (2000) (counsel waited "until a week before the trial" to prepare for the sentencing phase); ("[t]his is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, cf. *Wiggins*, 539 U.S., at 525, 123 S.Ct. 2527, or would have been apparent from documents any reasonable attorney would have obtained, cf. *Rompilla v. Beard*, 545

U.S. 374, 389-393, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). It is instead a case, like *Strickland* itself, in which defense counsel's 'decision not to seek more' mitigating evidence from the defendant's background 'than was already in hand' fell 'well within the range of professionally reasonable judgments.' 466 U.S., at 699, 104 S.Ct. 2052.")

CCRC also refers to the ABA guidelines as "specific requirements" (Initial Brief at 29), which they are not, and *never* have been. See, *Strickland*, 466 U.S. at 688-689, 104 S. Ct. at 2065 ("[p]revailing norms of practice as reflected in American Bar Association standards and the like, . . . are guides to determining what is reasonable, but they are only guides"); *Lynch v. State*, 2 So. 3d 47 (Fla. 2008) (citing *Strickland* and reiterating that the ABA standards . . . are "only guides"). In *Van Hook*, the U.S. Supreme Court criticized the Sixth Circuit for treating the ABA guidelines as "inexorable" commands:

> To make matters worse, the Court of Appeals (following Circuit precedent) treated the ABA's 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel "'must fully comply.'" 560 F.3d, at 526 (quoting *Dickerson v. Bagley*, 453 F.3d 690, 693 (C.A.6 2006)). ***Strickland*** **stressed, however, that "American Bar Association standards and the like" are "only guides" to what reasonableness means, not its definition**. 466 U.S., at 688, 104 S.Ct. 2052. We have since regarded them as such. [FN1] See *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). What we have said of state requirements is *a fortiori* true of standards set by private organizations: "[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are

> well represented, **we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices."** *Roe v. Flores-Ortega*, 528 U.S. 470, 479, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).
>
> *Van Hook*, 2009 WL 3712013, 3[2]

This is not a case where trial counsel failed to investigate and present available mitigating evidence. Defense counsel Alcott presented family members and mental health experts who addressed Kilgore's background, deprived childhood, poverty, dismal upbringing and mental health status. The only "new" information which Kilgore's post-conviction witnesses offered, which is distinct from the mitigation that was previously presented at trial, involves the emphasis on the Oakley Training School in Mississippi. With the exception of the details about the Oakley Training School, the evidence that Kilgore claims should have been presented is largely cumulative to that which was actually presented at the penalty phase. See, *Gudinas v. State*, 816 So. 2d 1095, 1105-06 (Fla. 2002) (trial counsel was not ineffective for failing to present mitigation brought forth at evidentiary hearing

[2] Justice Alito joined the *per curiam* opinion in *Van Hook* and added a concurrence, which noted that the ABA is "after all, a private group with limited membership" and "[t]he views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination." *Van Hook* 2009 WL 3712013, 6

that was cumulative to evidence presented at penalty phase).

Defense counsel Alcott presented the testimony of multiple mental health witnesses, including a clinical psychologist, Dr. Kremper, (DA-R T1454-93) a neuropsychologist, Dr. Dee, (DA-R T1494-1531), as well as the transcribed prior testimony of a deceased psychiatrist, Dr. Ainsworth. (DA-R T1547-84) The defense introduced evidence that Kilgore suffered from brain damage, "organic brain syndrome" from childhood injuries, the consumption of lead tainted moonshine during childhood, and the combined effects of diabetes, long term alcohol abuse, and a brief period of heroin abuse. (DA-R T1476-77, 1485-88, 1507-15, 1517, 1523, 1552-61) According to the defense experts, the brain damage, diabetes, and alcohol abuse caused a continuing decline in Kilgore's cognitive abilities, including his memory and self-control. (DA-R T1462, 1475, 1481, 1484, 1499-50, 1504-07, 1510-15, 1523-28) According to the defense theory, Kilgore's diabetes, alcohol abuse, brain damage, and stress from his relationship with the victim [Pearl] caused Kilgore to be extremely emotionally disturbed on the day of the crime. (DA-R T1480, 1490-91, 1523, 1528, 1562-68) According to Dr. Dee, Jackson threatened to reveal to other inmates that Kilgore was impotent and Kilgore wanted to establish his status and dominance by "nicking" Jackson. (DA-R T1519-21) Dr. Ainsworth concluded that Kilgore was distressed by Jackson's threat, by Jackson's involvement with other inmates, and "a lot of

paranoid ideations about what Pearl was planning to do to him." (DA-R T1564-68, 1571-73, 1576-77)

Two of Kilgore's sisters, Dorothy Speight and Irlene Spearman, also testified that Kilgore expressed remorse for killing Jackson. (DA-R T1587, 1595-96, 1602-04) Mrs. Speight also testified about Kilgore's early years in Mississippi, including: (1) his impoverished childhood, (2) his lack of formal education, (3) alcohol abuse by his parents and other family members, (4) his own alcohol abuse, (5) an untreated head injury suffered during a prior arrest, and (6) physical abuse by their mother. (DA-R T1588-1601) In his sentencing memorandum and oral argument, defense counsel addressed several mitigating circumstances, including 1. extreme mental and emotional disturbance; 2. substantial impairment of capacity to conform conduct; and 3. the domestic nature of the relationship between Kilgore and Jackson. (DA-R 103-07, 111-16) Alcott also requested a special instruction on additional non-statutory mitigating circumstances, including: a. remorse; b. mental retardation; c. low level of intelligence and comprehension; d. lack of education; e. learning disability; f. situational stress; g. deprivation in childhood; h. emotional turmoil at the time of the offense; i. chronic ill health; and j. emotional and personal reasons for homicide. (DA-R 87)

CCRC's reliance on additional family members and more experts in post-conviction is unavailing. Ms. Speight testified during the

penalty phase in 1994. Ms. Speight told the jury that Dean had received the worst of the punishment, and the only thing she would now add to her prior testimony was that his drinking could "play a big role in it." (PCR V17/2790-91) Alcott had the name of Elbert Kilgore crossed out on his trial notes, and Alcott concluded that Elbert was anticipated but not used at trial. Elbert left Mississippi in 1959, when Dean Kilgore was 9 years old. (PCR V18/2816) Elbert left Mississippi in order to better himself (PCR V18/2825); Elbert did not have frequent contact with Dean and didn't know much about the 1978 case or the prison homicide. (PCR V18/2818; 2820; 2823). Jimmy Kilgore was born in 1952; Jimmy moved with his family to Florida when he was 11 or 12 and has been in prison in Florida since 1978.[3] (PCR V18/2845) According to Jimmy, Barbara Jackson was involved with several different men - she would stay with any man who gave her money. (PCR V18/2838) Dean told Jimmy about the "whoopings" and that he'd run away from Oakley; their mother never whipped them for "no reason," but Dean always wanted to run away. (PCR V18/2849-50)

Dr. Hyde's post-conviction examination of Kilgore in 2002 was consistent with Dr. Greer's report and 1990 EEG (there were "no abnormalities"). (PCR V17/2751; 2754) Dr. Hyde concurred with Dr.

[3] See also, *Hodges v. State*, 885 So. 2d 338, 349, n. 6 (Fla. 2003) (noting that "the [post-conviction] records contain a mixture of those related to [the defendant] and other members of his family. Conditions that may or may not relate to other family members cannot be attributed to [the defendant] by simply co-mingling records.")

Greer. (PCR V17/2751; 2754) Dr. Dudley agreed with the conclusions of the mental health experts in 1994 (Dr. Ainsworth, Dr. Kremper and Dr. Dee), although Dr. Dudley believed that the prior experts failed to adequately explain the impact on [Kilgore's] development. (PCR V18/2941; 2951; 2952-53) In post-conviction, Dr. Eisenstein agreed with Dr. Dee's opinion in 1994. (PCR V19/3058) Dr. Dee's post-conviction findings in 2004 were consistent with his diagnosis in 1994. (DA-R T958)

The post-conviction presentation of additional, and even "more favorable mental health experts does not automatically establish that the original evaluations were insufficient." *Cooper v. State*, 856 So. 2d 969, 976 (Fla. 2003), citing *Carroll v. State*, 815 So. 2d 601, 618 (Fla. 2002); see also *Gaskin v. State*, 822 So. 2d 1243, 1250 (Fla. 2002) ("counsel's mental health investigation is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert"). Kilgore has not established deficient performance by trial counsel; and, therefore, the first prong of *Strickland* has not been met.

Moreover, even if CCRC arguably could demonstrate any deficiency of counsel, which the State strongly disputes, Kilgore cannot demonstrate any resulting prejudice under *Strickland*. As previously noted, much of the evidence that Kilgore claims should have been presented is cumulative to that which was actually presented at the penalty phase. See, *Downs v. State*, 740 So. 2d

506, 516 (Fla. 1999) (affirming denial of IAC/penalty phase claims where the additional evidence was cumulative to that presented during sentencing); *Dufour v. State*, 905 So. 2d 42 (Fla. 2005) (same). Testimony concerning Kilgore's deprived childhood and background was presented during the penalty phase from Kilgore's sisters and the defendant's mental health experts. "Questioning a few more family members and searching for old records can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there." *Rompilla v. Beard*, 545 U.S. 374, 389, 125 S. Ct. 2456, 2467 (2005).

Moreover, the 1989 prison murder was not a random act of violence. The presentation of additional "mental health" evidence and the addition of remote evidence of Kilgore's juvenile confinement at Oakley would not have been nearly enough to counterbalance the powerful aggravating factors.[4] See, *Arbelaez v.*

[4] CCRC admits that Mississippi juvenile records from the Oakley Training School are unavailable. Professor Bell addressed the inability to obtain, at any time, any Oakley records from the 1960's, if any existed. This case was the first time Professor Bell had testified in any death penalty case. (PCR V16/2601) Professor Bell knew that Kilgore was born in 1950, and he was sent to Oakley at around age 11 or 12 and released from Oakley at approximately age 15. (PCR V16/2606) Kilgore's prior records indicated that Kilgore was arrested in 1967 in Mississippi and later arrested in New York City. Kilgore's first incarceration in Florida occurred in 1970 or 1971. (PCR V16/2607) According to Professor Bell, Oakley is "shut-down" in terms of records (PCR V16/2628-29); and, even in the 1970's, Mississippi Congressman Thompson was not able to get any Oakley records. (PCR V16/2629-30) Any contrary speculation – that maybe some records from Oakley (in the 1960's) might have been available to Alcott in 1994, but not to collateral counsel (appointed in 1998), is woefully inadequate to meet the defendant's burden under *Strickland*. Moreover, Alcott

State, 898 So. 2d 25, 37-38 (Fla. 2005); *Buenoano v. Dugger*, 559 So. 2d 1116, 1119 (Fla. 1990) ("In our opinion the mitigation evidence . . . in no way would be sufficient to overcome the overwhelming evidence presented against [the defendant] at trial. . . . We do not believe the unfortunate circumstances of Buenoano's childhood are so grave nor her emotional problems so extreme as to outweigh, under any view, the four applicable aggravating circumstances.") *Van Hook*, supra.

At the time of the 1989 prison murder, Kilgore was serving a life sentence for the 1978 murder of Thomas Woods and Kilgore also had a multitude of other prior violent felony convictions. The trial judge found that the aggravating factors "far outweigh" all of the statutory and non-statutory mitigating circumstances. (DA-R T126) Alcott could not credibly challenge the validity of the prior violent felony convictions, all of which were final long before Kilgore's 1994 trial.[5] However, in 1994, trial counsel,

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knew that Kilgore had been in a juvenile training school in Mississippi during the 1960's, and any records confirming Kilgore's placement would have verified what was undisputed. Professor Bell concluded that **he would not necessarily show Kilgore in a humane light**, but would show Kilgore "in the context of what he is based upon his environment and his history." (PCR V16/2639)

[5] Moreover, Jeffrey Barnes was present when Kilgore shot and killed Thomas Woods in 1978. Jeffrey Barnes was ten years old at the time of Woods' murder. Barnes was asleep in the living room when heard the sound of glass breaking in the back of the house. (PCR V18/2891-92) Barnes' step-father, Thomas Woods, opened the front door and fired a shot out the front door. (PCR V18/2892) Woods closed the front door and Kilgore came into the house through the back door. Kilgore had a .38 gun and Barnes saw them shoot at each another. (PCR V18/2897)

Alcott, did seek to distance the 1989 prison stabbing of Pearl from the prior 1978 homicide, as not constituting a premeditated offense.

Although Alcott had not reviewed the 1970 and 1978 PSI reports, he was aware of the same type of background information in 1994. Unlike *Rompilla*, post-conviction counsel has not identified any "undiscovered" information contained in the prior records which credibly support any claim of deficiency and resulting prejudice under *Strickland*. CCRC further argues that testimony could have been presented to show that the defendant's adjustment to prison life can be mitigating. This claim is especially perplexing since Kilgore "adjusted" to prison life by killing another inmate. See, *Wong v. Belmontes*, 2009 WL 3805746, 6 (2009) ("If, for example, an expert had testified that Belmontes had a "'high likelihood of a ... nonviolent adjustment to a prison setting,'" . . . the question would have immediately arisen: 'What was his propensity toward violence to begin with? Does evidence of another murder alter your view?' Expert testimony explaining why the jury should feel sympathy ... would have led to a similar rejoinder: 'Is such sympathy equally appropriate for someone who committed a second murder?'")

Although Alcott did not send an investigator to Mississippi on the remote possibility that they might be able to locate someone who knew Kilgore thirty years earlier, *Strickland* does not require

otherwise. See *Bell v. State,* 965 So. 2d 48, 62 (Fla. 2007), citing *Rompilla v. Beard*, 545 U.S. 374, 383, 125 S. Ct. 2456 (2005) ("[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.")

In addition, Kilgore's juvenile confinement was remote - by thirty years - and of minimal, if any, significance, when compared to the weighty aggravating circumstances. See, *Porter v. Attorney General*, 552 F.3d 1260, 1274 (11th Cir. 2008), citing *Bolender*, 16 F.3d at 1561 (deferring to this Court's conclusion that, in light of the defendant's age at the time of the crime, mitigating factor [of troubled background] "is entitled to little if any, mitigating weight when compared to the aggravating factors." *Bolender*, 16 F.3d at 1561. In *Hodges v. State*, 885 So. 2d 338 (Fla. 2003), defense counsel did not travel to another state in order to possibly locate remote background mitigation on his client's behalf. In *Hodges*, this Court concluded that penalty phase counsel conducted a reasonable investigation. In light of the strong aggravation presented in 1994, and the largely cumulative mitigation offered in post-conviction, Kilgore cannot demonstrate any resulting prejudice in this case. See, *Ferrell v. State*, 918 So. 2d 163, 172 (Fla. 2005) (under the prejudice analysis, the trial court should determine whether there is a reasonable probability that the

sentence would have been different if this evidence had been presented at the penalty phase). In view of the nature of the mitigation evidence at the post-conviction hearing and the fact that the sentencing judge previously considered Kilgore's deprived childhood and mental health deficits, Kilgore has not established any deficiency of counsel and resulting prejudice under *Strickland. See, Belmontes;*; *Van Hook.*

In *Wiggins*, the scope of trial counsel's investigation was unreasonable "in light of what counsel actually discovered in [*Wiggins'*] DSS records." 123 S. Ct. at 2537. These documents revealed evidence of Wiggins' mother's alcoholism, his history of emotional difficulties, and the fact that he had experienced severe deprivation. However, *Wiggins'* counsel introduced no evidence concerning the defendant's life history during the sentencing hearing. In *Williams*, 529 U.S. at 396, 120 S. Ct. at 1514, "[t]he failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession." In the instant case, the trial court also found that Kilgore's case is not like *Rompilla*. As the trial court found:

> . . . this case is not like *Rompilla v. Beard*, 545 U.S. 374, 390 (2005), where the Supreme Court found, "[i]f defense lawyers had looked in the file on Rompilla's prior conviction, it is uncontested they would have found a range of mitigation leads that no other source had opened up." **In the instant matter, Defendant has not shown that anything obtained from those prior conviction files would have changed the outcome of the**

> **proceedings. Consequently, the Court finds Defendant has failed to show he was prejudiced by counsel's allegedly deficient performance under *Strickland***. As such, no relief is warranted on that portion of Claim XV.
>
> (PCR V34/5199)

On direct appeal, *Kilgore v. State*, 688 So. 2d 895, 900-901 (Fla. 1996), this Court denied Kilgore's claim regarding the treatment of the mental health mitigation and explained:

> In his second penalty-phase claim, Kilgore asserts that the sentencing order was insufficient in its treatment of the mitigation presented. In particular, he avers that the trial judge contradicted himself in treating mental health mitigation and failed to expressly evaluate each piece of proposed mitigation.
>
> As previously recited, the trial judge found that two statutory mitigating factors were proven: (1) Kilgore acted under the influence of extreme mental or emotional disturbance; and (2) Kilgore's capacity to conform his conduct to the requirements of law was substantially impaired. In his conclusion, however, the trial judge wrote:
>
> > Concerning the mitigating circumstances, I have found that both statutory mental health circumstances were proved during the penalty phase. Nevertheless, there is little or nothing about the facts of this case from which one could conclude that at the time of the murder, or during the twenty-four hours preceding the murder, Mr. Kilgore was under the influence of extreme mental or emotional disturbance.
>
> Kilgore asserts that such a conclusion necessarily contradicts the earlier finding that the two statutory mitigating factors existed. **Basically, Kilgore is complaining that the judge gave no weight to the statutory mitigation. We disagree. Instead, we read the sentencing order to indicate that the mental health factors were entitled to little weight. Certainly this is within the discretion of the trial court**. (citations omitted)

CCRC seeks to relitigate this determination under *Tennard v. Dretke*, 542 U.S. 274, 124 S. Ct. 2562 (2004). This claim is procedurally barred and also without merit. In *Tennard*, the Supreme Court held it is improper to screen out mitigating evidence on the basis that it did not have a causal connection with the crime. *Id.* at 287. The *Tennard* Court focused on the requirement that courts must *consider* relevant mitigation evidence at sentencing. *Id.* at 286-87. In this case, the trial court did not preclude consideration of Kilgore's mental health mitigation. To the contrary, the trial court specifically found the existence of both statutory mental health mitigators. The fact that the trial court assigned less weight to the evidence than Kilgore urged does not constitute a constitutional violation and the *Tennard* Court did not prescribe a certain weight that states must give to mitigating evidence. See *Harris v. Alabama*, 513 U.S. 504, 512, 115 S. Ct. 1031 (1995) (the Constitution does not require that a specific weight be given to any particular mitigating factor).

Although trial counsel, in every case, could have hired more experts and brought in more witnesses, the standard for assessing ineffective assistance claims "is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result." *Brown v. State*, 846 So. 2d 1114, 1121 (Fla. 2003); *Strickland*, 466 U.S. at 689 ("Even the best criminal defense

attorneys would not defend a particular client in the same way."). As the U.S. Supreme Court reiterated in *Wong v. Belmontes*, 2009 WL 3805746, 9 (2009), *Strickland* does not require the State to "rule out" a sentence of life in prison to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a "reasonable probability" that the result would have been different. 466 U.S., at 694. And, as the Court further emphasized in *Belmontes*, "It is hard to imagine expert testimony and additional facts about [the defendant's] difficult childhood outweighing the facts of [the victim's] murder. It becomes even harder to envision such a result when the evidence that [the defendant] *had committed another murder* - "the most powerful imaginable aggravating evidence," . . . - is added to the mix."

The *Ake* Sub-Claim

Any claim that Kilgore was deprived of his right to an evaluation by a competent mental health expert pursuant to *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087 (1985) is procedurally barred because it could have been raised on direct appeal. See, *Marshall v. State*, 854 So. 2d 1235, 1248 (Fla. 2003); *Cherry v. State*, 781 So. 2d 1040, 1047 (Fla. 2000) ("The claim of incompetent mental health evaluation is procedurally barred for failure to raise it on direct appeal.").

Moreover, Kilgore's subsidiary claim of ineffective assistance of counsel is conclusively without merit. Based upon the mental

health testimony presented by the defense, the trial court found that the two statutory mental health mitigators were established: the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance and the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. *Ake* requires that a defendant have access to a "competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." See, *Schwab v. State*, 814 So. 2d 402, 414 (Fla. 2002). In this case, Kilgore had the assistance of several experienced mental health professionals who testified regarding their evaluations of Kilgore and their resulting opinions. In *Hodges v. State*, 885 So. 2d 338, 352-353 (Fla. 2003), this Court rejected a similar IAC/*Ake* claim, and explained:

> Ineffective Assistance of Mental Health Experts
>
> Hodges argues that penalty phase counsel's failure to ensure that Hodges received the benefit of fully informed mental health experts constituted prejudicially deficient performance and deprived Hodges of his entitlement to expert psychiatric assistance as required under *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985). The United States Supreme Court held in *Ake* that where an indigent defendant demonstrates to the trial judge that his sanity at the time of the offense will be a significant factor at trial, the state must "assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83.
>
> Hodges' *Ake* claim lacks merit. Hodges does not argue that he was denied access to mental health

> professionals or that these professionals failed to conduct the appropriate examinations. Indeed, any such claim would run contrary to Dr. Maher's testimony that he conducted a standard psychiatric evaluation of Hodges prior to trial. **Hodges had access to multiple mental health experts prior to trial, and the experts performed all of the essential tasks required by *Ake*. Thus, Hodges fails to establish a violation of the *Ake* rule**. See *Johnson v. State*, 769 So. 2d 990, 1005 (Fla. 2000). Instead, Hodges simply recasts his ineffective assistance of counsel argument, which we reject for the reasons stated above.

Hodges, 885 So. 2d at 352-353 (e.s.)

Here, as in *Hodges*, Kilgore received the assistance of a psychological expert as contemplated by *Ake* and his recast IAC/*Ake* claim is without merit. The trial court's order should be affirmed.

ISSUE III

THE CLAIM OF MENTAL RETARDATION

Next, CCRC challenges the circuit court's determination that Kilgore is *not* mentally retarded in accordance with the definitions outlined in Florida Rule of Criminal Procedure 3.203 and section 921.137(1), Florida Statutes (2006). Under Florida law, the defense must prove mental retardation by demonstrating: (1) significantly subaverage general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, and (3) which has manifested during the period from conception to age 18. § 921.137(1), Fla. Stat.; see also Fla. R. Crim. P. 3.203(b); *Franqui v. State*, 14 So. 3d 238, 239 (Fla. 2009). In order to

"demonstrate that a defendant is mentally retarded and, therefore, not subject to the death penalty, all *three* prongs must be established." *Rodgers v. State*, 948 So. 2d 655, 667 (Fla. 2006).

The Circuit Court (1) held an evidentiary hearing on Kilgore's claim of mental retardation, (2) followed the correct procedures outlined under Florida law, and (3) found that "under both a preponderance of the evidence standard as well as a clear and convincing evidence standard, that Defendant does not meet the Florida criteria for 'significantly subaverage general intellectual functioning' as required for a finding of mental retardation." (PCR V34/5163-66) Under section 921.137(1), "significantly subaverage general intellectual functioning" correlates with an IQ of 70 or below. See, *Jones v. State*, 966 So. 2d 319 (Fla. 2007); *Cherry v. State*, 959 So. 2d 702 (Fla. 2007); *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005). For the following reasons, the trial court's order should be affirmed.

Standards of Review

In *Nixon v. State*, 2 So. 3d 137, 141 (Fla. 2009), this Court summarized the following standards applied in reviewing mental retardation determinations:

> When reviewing mental retardation determinations, we must decide whether competent, substantial evidence supports the trial court's findings. See *Cherry*, 959 So.2d at 712 (citing *Johnston v. State*, 960 So.2d 757 (Fla.2006)). We do not "reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007) (citing *Trotter v. State*, 932 So. 2d 1045, 1049

(Fla. 2006)). However, we review the trial court's legal conclusions *de novo*. See *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

Nixon, 2 So.3d at 141

The Trial Court's Order

The trial court found that Kilgore *does not* meet the Florida criteria for "significantly subaverage general intellectual functioning" as required for a finding of mental retardation. The trial court's order states, in pertinent part:

> The Court will first address Defendant's *Atkins* claim. Pursuant to Florida Rule of Criminal Procedure 3.203(b),
>
> > the term 'mental retardation' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term 'significantly subaverage general intellectual functioning,' for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65B-4.032 of the Florida Administrative Code. The term 'adaptive behavior,' for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.
>
> Additionally, "under Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below." *Zack v. State*, 911 So. 2d 1190 (Fla. 2005). **Although Defendant argues that the Court should factor in the standard error of measurement when considering a defendant's intellectual functioning, Florida law dictates otherwise. In *Cherry v. State*, 959 So. 2d 702, 712-13 (Fla. April 12, 2007), the Florida Supreme Court affirmed the circuit court's ruling which rejected the defendant's argument that measurement of intellectual functioning is more**

appropriately expressed as a range of scores rather than just one number, and the standard error (SEM) of plus or minus five points should be taken into account so that the actual cutoff score is 75. In affirming the circuit court's ruling, Florida Supreme Court held as follows,

> Both section 921.137 and rule 3.23 provide that significantly subaverage general intellectual functioning means 'performance that is two or more standard deviation from the means score on a standardized intelligence test.' One standard deviation on the WAIS III, the IQ test administered in the instant case, is fifteen points so two standard deviations away from the mean of 100 is an IQ score of 70. As pointed out by the circuit court, the statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statue and the corresponding rule are clear.

***Id.* at 712-13; *see also Phillips v. State*, 2008 WL 731897, 5 (March 20, 2008) ("We have consistently interpreted this definition to require a defendant seeking exemption from execution to establish he has an IQ of 70 or below."); *Jones v. State*, 966 So. 2d 319 (Fla. 2007) ([U]nder the plain language of the statute, 'significantly subaverage general intellectual functioning' correlates with an IQ of 70 or below."; *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007) (noting that in *Cherry*, "we held the statutory definition of mental retardation required a showing that a defendant had an IQ score of 70 or below.").**

During the January 22 and 23, 2007 evidentiary hearings, the Court heard from three different mental health experts - Hyman H. Eisenstein, Ph.D., A.B.P.N., Henry Dee, Ph. D., and Michael P. Gamache, Ph.D. Each of the mental health experts administered the Wechsler Adult Intelligence Scale, Third Edition (WAIS III), to Defendant and testified accordingly. Dr. Eisentein [sic] administered the WAIS III to Defendant on August 23, 2000, and testified that Defendant obtained a full-scale IQ score of 75. (*See* January 22, 2007 transcript, p. 18, attached; Defense Exhibit C). Dr. Dee administered the WAIS III to Defendant on October 2004, and testified that Defendant obtained a full-scale IQ score of 74. (*See* January 23, 2007 transcript, p. 130, attached; Defense Exhibit C). Dr. Gamache administered a prorated version

of the WAIS III to Defendant on May 23, 2006, which resulted in a full scale IQ score of 85. (*See* January 23, 2007 transcript, p. 226, attached; Defense Exhibit C and State Exhibit 1 entered on January 23, 2007). Furthermore, Defendant previously obtained a full scale IQ score of 76 on a WAIS-R administered by Dr. Kremper on August 22, 1989, a full scale IQ score of 84 on a WAIS-R administered by Dr. Citola on March 14, 1990, and a full scale IQ score of 67 on a prorated WAIS administered by Dr. Dee on March 15, 1994. (*See* Defense Exhibit C).

As Dr. Eisenstein noted, three of the IQ scores are "very, very similar, 74, 75 and 76." (*See* January 22, 2007 transcript, p. 24, attached). The remaining scores fall at the two extremes of the spectrum – 67, 84 and 85. Out of those six tests, the only full scale IQ score which meets Florida's mental retardation criteria is the score of 67 obtained during Dr. Dee's 1994 prorated version of the WAIS. However, the Court finds that single score does not sufficiently satisfy the intellectual functioning prong for mental retardation under either a preponderance of the evidence standard or a clear and convincing evidence standard. The score of 67 is significantly lower than any of the other five IQ scores – including Dr. Dee's own subsequent 2004 full battery exam. *Additionally, that 1994 evaluation was prorated and included only seven of the eleven required subtests. (See January 23, 2007 transcript, p. 130, attached). As Dr. Dee commented during the January 23, 2007 hearing, "Prorating has its own dangers. . . And I would have more confidence in any test that used all of the subtests that are required." (See January 23, 2007 transcript, p. 159, attached). Finally, the Court notes that during the 1994 evaluation, Dr. Dee was not actually evaluating Defendant for mental retardation purposes but was simply conducting a neuropsychological evaluation. (See January 23, 2007 transcript, p. 133, attached).* **Consequently, the Court finds, under both a preponderance of the evidence standard as well as a clear and convincing evidence standard, that Defendant does not meet the Florida criteria for "significantly subaverage general intellectual functioning" as required for a finding of mental retardation. As Defendant fails to meet this prong, the Court does not address the other two prongs**. *See Cherry*, 959 So. 2d at 714 ("Because we find that *Cherry* does not meet this first prong of the section 921.137(1) criteria, we do not consider the two other

> prongs of the mental retardation determination."). As such, no relief is warranted on Defendant's *Atkins* claim.
>
> (PCR V34/5163-66) (e.s.)

Analysis

Kilgore argues that (1) this Court's decision in *Cherry* violates *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002), (2) the cut-off IQ score for mental retardation should be 75, (3) section 921.137(1) has been interpreted to create fact-finding procedures that are incompatible with the "constitutionally proper" adjudication of *Atkins* claims, (4) the definition of mental retardation violates *Atkins*, and (5) in the alternative, Kilgore suffers from an [unidentified] "equivalent and equally paralyzing affliction that renders him ineligible for the death penalty." (Initial Brief at 74-75; 80; 91-92). In *Nixon v. State,* 2 So. 3d 137, 142-143 (Fla. 2009), this Court squarely addressed, and rejected, virtually identical defense arguments as follows:

> **Nixon first argues that this Court's interpretation of section 921.137 in *Cherry*, which requires a defendant to have an IQ score of 70 or below, violates *Atkins***. [FN4] Nixon asserts that because the Supreme Court noted in *Atkins* that the consensus in the scientific community recognizes an IQ between 70 and 75 or lower, states are only permitted to establish procedures to determine whether a capital defendant's IQ is 75 or below on a standardized intelligence test. **Nixon's claim is without merit.** [FN5] In *Atkins*, the Supreme Court recognized that various sources and research differ on who should be classified as mentally retarded. Accordingly, the Court left to the states the task of setting specific rules in their statutes. See *Atkins*, 536 U.S. at 317, 122 S.Ct. 2242 ("As was our approach in *Ford v. Wainwright* [, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed. 2d 335 (1986)] with regard to insanity, 'we leave to the State[s] the task of

developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'") (citations omitted). **This State in section 921.137(1) defines subaverage general intellectual functioning as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." We have consistently interpreted this definition to require a defendant seeking exemption from execution to establish he has an IQ of 70 or below. See, e.g., *Jones v. State*, 966 So. 2d 319, 329 (Fla.2007) ("[U]nder the plain language of the statute, 'significantly subaverage general intellectual functioning' correlates with an IQ of 70 or below."); *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005) (finding that to be exempt from execution under *Atkins*, a defendant must establish that he has an IQ of 70 or below).**

> [FN4] In *Cherry*, we noted that another jurisdiction considering a similar claim found that "fourteen of the twenty-six jurisdictions with mental retardation statutes have a cutoff of seventy or two standard deviations below the mean." 959 So.2d at 713 n. 8 (citing *Bowling v. Commonwealth*, 163 S.W.3d 361, 373-74(Ky.) (upholding use of seventy IQ score cutoff), cert. denied, 546 U.S. 1017, 126 S.Ct. 652, 163 L.Ed.2d 528 (2005)).
>
> [FN5] Nixon makes a number of assertions questioning this Court's *Cherry* decision. All of these arguments are versions of his main argument that an IQ of 70 or below should not be the standard and that such a standard is unconstitutional.

Nixon further asserts that our interpretation of section 921.137 in *Cherry* creates an irrebuttable presumption that no one with an IQ over 70 is mentally retarded. Nixon claims that we created an irrebuttable presumption because once we concluded that Cherry's IQ score was 72 our inquiry terminated, i.e., we did not consider the two other prongs of the mental retardation determination. See *Cherry*, 959 So.2 d at 714. We have consistently interpreted section 921.137(1) as providing that a defendant may establish mental retardation by demonstrating all three of the following factors: (1) significantly subaverage general intellectual

functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. See, e.g., *Jones*, 966 So.2d at 325; Johnston, 960 So.2d at 761. **Thus, the lack of proof on any one of these components of mental retardation would result in the defendant not being found to suffer from mental retardation.**

Nixon further asserts that our interpretation of section 921.137(1) does not provide constitutionally adequate procedures to determine mental retardation. More specifically, Nixon claims that in *Cherry*, we interpreted section 921.137(1) to create fact-finding procedures that preclude a defendant from presenting relevant material. Nothing in *Cherry* or section 921.137 precludes a defendant from presenting any evidence that is germane to the issues involved in a mental retardation claim. Section 921.137(1) and rule 3.203 provide defendants with notice of the type of evidence that is relevant to the issues and that will be considered by a trial court. In addition defendants are given an opportunity to present any relevant evidence to the court. This procedure was followed in this case. After an evidentiary hearing, the trial court issued a final order that thoroughly explained its decision, finding that Nixon had not established that he should be excluded from the death penalty by reason of mental retardation.

The trial court informed Nixon of his opportunity to present his case, provided an evidentiary hearing, determined Nixon's mental retardation claim on the basis of the examinations performed by two psychiatrists, and provided Nixon with an adequate opportunity to submit expert evidence in response to the report and testimony of the court-appointed expert. We find that Nixon was included in the truth-seeking process and had a full and fair opportunity to present evidence relevant to his mental retardation claim and to challenge the state-appointed psychiatrist's opinions. **Because the statute, rule, and caselaw outline adequate procedures for the presentation of mental retardation claims, Nixon is not entitled to relief on this issue.**

Nixon further contends that this Court's definition of mental retardation violates both the United States and Florida Constitutions because the definition of mental retardation in section 921.137, as construed in *Cherry*, is inconsistent with the constitutional bar on the

execution of mentally retarded persons. **In *Jones v. State*, 966 So. 2d 319, 326 (Fla. 2007), we found that Florida's definition of mental retardation is consistent with the American Psychiatric Association's diagnostic criteria for mental retardation.** [FN6] Moreover, in *Atkins*, the Supreme Court noted that the statutory definitions of mental retardation throughout the country are not identical to the one outlined in *Atkins* but generally conform to the clinical definitions set forth in the case. See 536 U.S. at 317 n. 22, 122 S.Ct. 2242. Florida's statutory definition of mental retardation is not identical but conforms to the one outlined in *Atkins*. See *id*. at 309 n. 3, 122 S.Ct. 2242; § 921.137(1), Fla. Stat. (2007). **Nixon's claim involving the definition of mental retardation is also without merit.**

> [FN6] The American Psychiatric Association's definition provides the following diagnostic criteria for mental retardation:
>
> A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test (for infants, a clinical judgment of significantly subaverage intellectual functioning).
>
> B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.
>
> C. The onset is before age 18 years.
>
> *Jones v. State*, 966 So.2d 319, 326-27 (Fla.2007) (quoting *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders* 49 (4th ed.2000)).

* * *

Lastly, Nixon asserts that the trial court erroneously denied him a hearing on his claim that mental illness bars his execution. We rejected this argument in

> *Lawrence v. State*, 969 So. 2d 294 (Fla. 2007), and *Connor v. State*, 979 So. 2d 852 (Fla.2007). **In *Lawrence*, we rejected the defendant's argument that the Equal Protection Clause requires this Court to extend Atkins to the mentally ill.** See 969 So.2d at 300 n. 9. In *Connor,* we noted that "[t]o the extent that Connor is arguing that he cannot be executed because of mental conditions that are not insanity or mental retardation, the issue has been resolved adversely to his position." *Connor*, 979 So.2d at 867 (citing *Diaz v. State*, 945 So.2d 1136, 1151 (Fla.) cert. denied, --- U.S. ----, 127 S.Ct. 850, 166 L.Ed.2d 679 (2006) (indicating that **neither the United States Supreme Court nor this Court has recognized mental illness as a *per se* bar to execution)**). Accordingly, Nixon is not entitled to relief on this claim.

Nixon, 2 So. 3d at 142-143; 146 (e.s.)

Kilgore's arguments must fail under this Court's controlling precedent in *Nixon*, *Cherry, Jones, Rodgers, Lawrence* and *Conner*.

A. Kilgore's IQ scores exceed the cut-off for mental retardation

This Court repeatedly has held that a defendant must score two standard deviations below the mean score on an IQ test, or 70 or below, in order to satisfy the first prong of the mental retardation criteria. See, *Johnston v. State*, 930 So. 2d 581, 586 (Fla. 2006); *Jones v. State*, 966 So. 2d 319, 329 (Fla. 2007); *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005).

On August 23, 2000, Dr. Eisentein administered the WAIS III to Kilgore and Kilgore's full-scale IQ score was 75. Dr. Dee administered the WAIS III on October 2004, and Kilgore's full-scale IQ score was 74. On May 23, 2006, Dr. Gamache administered a prorated version of the WAIS III, which resulted in Kilgore's full scale IQ score of 85. In addition to these IQ scores obtained in

post-conviction – all above the 70 cut-off score - the record also included prior IQ test results. The trial court specifically addressed Kilgore's *one-and-only lower* IQ test score, prorated at 67 by Dr. Dee in *1994*, and explained:

> Out of those six tests, the only full scale IQ score which meets Florida's mental retardation criteria is the score of 67 obtained during Dr. Dee's 1994 prorated version of the WAIS. *However, the Court finds that single score does not sufficiently satisfy the intellectual functioning prong for mental retardation under either a preponderance of the evidence standard or a clear and convincing evidence standard*. The score of 67 is significantly lower than any of the other five IQ scores — including Dr. Dee's own subsequent 2004 full battery exam. Additionally, that 1994 evaluation was prorated and included only seven of the eleven required subtests. (*See* January 23, 2007 transcript, p. 130, attached). As Dr. Dee commented during the January 23, 2007 hearing, "Prorating has its own dangers. . . And I would have more confidence in any test that used all of the subtests that are required." (*See* January 23, 2007 transcript, p. 159, attached). Finally, the Court notes that during the 1994 evaluation, Dr. Dee was not actually evaluating Defendant for mental retardation purposes but was simply conducting a neuropsychological evaluation. (See January 23, 2007 transcript, p. 133, attached).
>
> (PCR V34/5165)

Inasmuch as this score prorated by Dr. Dee in 1994 included only seven of the eleven required subtests, and Dr. Dee admitted that he would have more confidence in a score that used all [eleven] of the required subtests, and Dr. Dee was not evaluating Kilgore for mental retardation in 1994, the trial court correctly discounted this single prorated score.

Here, as in *Cherry*, to be exempt from execution under *Atkins*, the defendant must establish that he has an IQ of 70 or below.

Competent substantial evidence supports the trial court's finding that Kilgore did not meet the first prong of the mental retardation definition. Thus, it is unnecessary to consider the other two prongs. See, *Cherry, Jones, Johnston*.

B. The other two prongs: adaptive behavior and onset before 18

Next, Kilgore faults the trial court for not addressing the two other prongs of the mental retardation criteria. This Court has consistently interpreted section 921.137(1) as providing that a defendant may establish mental retardation only by demonstrating all *three* of the following factors: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. *Nixon,* 2 So. 3d at 142. In declining to address the additional two prongs, the trial court correctly followed this Court's controlling precedent. See, PCR V34/5163-66, citing *Cherry*, 959 So. 2d at 714.

C. Testimony of Dr. Eisenstein, Dr. Dee and Dr. Gamache

Once again, because Kilgore did not meet the first prong of the mental retardation criteria, it is unnecessary to consider the other two prongs. See, *Cherry, Nixon, Jones*. Nevertheless, Kilgore spends several pages focusing on the additional testimony of the mental health experts. (Initial Brief at 80 – 91) In an abundance of caution, the State adds the following:

Under Florida law, the term "adaptive behavior" is defined as

"the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." § 921.137(1), Fla. Stat. This requires an individual to have significant limitations in adaptive functioning in two or more of the following areas: communication, self-care, home living, social and interpersonal skills, use of community resources, self-direction, academics, work, leisure, health, and safety. See, *APA definition in Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. 2000) [DSM-IV]; *Atkins*, 536 U.S. at 308.

Dr. Eisenstein testified as the defense expert at the initial post-conviction hearing in June of 2005. Thereafter, Dr. Eisenstein was court-appointed to assess Kilgore's status for mental retardation. (PCR V24/3681) Kilgore obtained a verbal IQ score of 78 and a performance IQ score of 76, which, according to Dr. Eisenstein, resulted in a full-scale IQ score of 75. (PCR V24/3693)

Dr. Dee, the defendant's mental health expert at trial, testified at the penalty phase, at the initial post-conviction hearing, and during the hearing on mental retardation. According to Dr. Dee, Kilgore's full-scale IQ score in 2004 was 74. (PCR V25/3807) At the penalty phase in 1994, Dr. Dee noted that Kilgore's prior IQ scores were average, around 91 or 94 [on the Beta test], but Kilgore's full-scale IQ scores had declined by

1994. (PCR V25/3845-46; 3847) At the time of the penalty phase, Dr. Kremper's testing revealed a score of 76. (PCR V25/3847) In 1994, Dr. Dee reported Kilgore's full-scale IQ score as 67, which was prorated because Dr. Dee used only 7 of the 11 required sub-tests. (PCR V25/3807; 3850) In 1994, Dr. Dee concluded that Kilgore had been of normal intelligence, but Kilgore's intellectual functioning was declining as a result of his diabetic condition. (PCR V25/3848; 3852) In post-conviction, Dr. Dee concluded that Kilgore's intellectual functioning was pretty stable, largely because Kilgore was receiving adequate care, both nutritional and medical, in prison. (PCR V25/3851-52) Dr. Dee acknowledged that Kilgore had been in a prison setting since he was about 20 years old and Kilgore was out of prison for only a short period of time, from 1977-1978. (PCR V25/3851) Dr. Dee assumed that any "practice effect" would vary from individual to individual. (PCR V25/3854)

Dr. Gamache examined and tested Kilgore on May 23, 2006. (PCR V25/3877) Kilgore's full-scale IQ score was 85. (PCR V25/3903) Dr. Gamache scrutinized Kilgore's individual subtests to see if there was even a single one, or a combination of subtests that were in the range typically associated with mental retardation, and there were none. (PCR V25/3903) The individual subtest scores are important because people who are mentally retarded tend to display a "flat line" profile and all of their scores tend to be two standard deviations below the mean. (PCR V25/3901) Kilgore did not

have a flat-line profile; instead, he had a jagged or saw-tooth profile reflecting strengths and weaknesses. Kilgore's overall scores were "pretty high" and were not in the questionable range. (PCR V25/3902) Although there are 14 subtests on the WAIS-III, the standard "full battery" is comprised of eleven (11) subtests. (PCR V25/3894-96) Dr. Gamache administered six of the verbal subtests and four of the performance subtests, for a total of ten out of the eleven "full battery." (PCR V25/3896) Dr. Gamache did not administer the "picture arrangement" subtest because Kilgore was in a wheelchair, shackled and handcuffed. The picture arrangement requires putting pieces of a puzzle around the table; and because Kilgore could not get right up to the table, Dr. Gamache used a prorated score.[6] (PCR V25/3897) According to Dr. Gamache, the absence of the picture arrangement subtest did not affect the integrity of the scores because:

> Number one, he had been administered the same subtest or equivalent subtest in previous batteries. So I knew approximately what his performance had been before. This wasn't the first time he has ever been tested. Secondly, that test comes towards the end. It's the tenth out of 11 subtests, and I had a pretty good idea what his performance was already at that point. So I felt comfortable prorating that score. It wasn't going to have a significant impact on his overall score.
>
> (PCR V25/3898)

Dr. Gamache considered the possibility of the practice effect.

[6] The prorated score utilized by Dr. Gamache on the picture arrangement subtest was the same subtest score that Dr. Dee considered in 1994. (See, DA-R 582)

However, any expected practice effect would be pretty small and offset by other factors in this case. (PCR V25/3908) Those other factors included the tight security, closely monitored environment, and the presence of third party observers, which heightens self-consciousness and can have a negative effect on performance. (PCR V25/3908-09) Dr. Eisenstein rescored Dr. Gamache's raw data on the vocabulary subtest and would have rescored the subtest eight points lower; however, that "would have practically no impact on the overall IQ score." (PCR V25/3918-19) Kilgore's intellectual functioning is a full standard deviation *above* the range required for mental retardation. (PCR V25/3913)

Dr. Eisenstein and Dr. Dee apparently agreed that Kilgore met the criteria for mental retardation if he had a full scale IQ score of 75 or below on any one accepted instrument. Dr. Gamache spoke with Kilgore with regard to his adaptive behavior, both historically and recent. (PCR V25/3892) Kilgore did not have any difficulty answering questions or providing background information. (PCR V25/3878) Kilgore provided the following information to Dr. Gamache: Kilgore came from a large family, his parents remained together until he was about five, and he also lived with an aunt, JD Black. Kilgore began to get into trouble around the age of 12, and he was sent to the Oakley Training School in Mississippi, where he remained until age 15. (PCR V25/3879-80) Kilgore was given a leave around Christmas time to visit his mother, who was living in

Lakeland, Florida; and Kilgore did not return to Oakley after that time. (PCR V25/3880-81) Kilgore was credited with completing the fifth grade while at the training school in Mississippi. (PCR V25/3881) According to Kilgore, he taught himself to read and write by repeatedly going through comic books and magazines available at DOC. (PCR V25/3882) As a teenager, Kilgore worked for a lady who was a palm reader -- Kilgore took care of her home and office, tended the grounds, and passed out promotional cards around town. (PCR V25/3882-83) When asked about his adult employment, Kilgore explained that he'd been locked up for most of his adult life; therefore, Kilgore's adult vocational activities were in an institutional setting. (PCR V25/3883) According to Kilgore, he'd worked at the license tag factory, twice for extended periods of time, and he'd also done custodial work and kitchen work at the prison. (PCR V25/3883) Kilgore got out of the reform school around 1965 and went to prison as an adult in 1970. (PCR V25/3884) Between 1965 and 1970, Kilgore lived with his mother and step-father in Lakeland for part of that time, he also lived with a lady friend and lived on his own during part of that time. (PCR V25/3884) Although Kilgore operated a vehicle, he never tried to get a driver's license. (PCR V25/3885)

Kilgore did not have any difficulty in comprehending or responding appropriately. (PCR V25/3885-86) In March of 1990, Kilgore underwent a neurological examination and the results of the

exam were normal -- there was no evidence of any impairment of brain function or any neurological condition. (PCR V25/3886) When asked about any head injury, Kilgore advised that he was in a fight around 1967, and was "throwed" on his head. Kilgore considered it to be pretty insignificant; there was no evidence of seizures, loss of consciousness, or cognitive impairment. (PCR V25/3887) Kilgore was not aware of ever being considered to be mentally retarded; and Kilgore told Dr. Gamache, in no uncertain terms, that he [Kilgore] did not think that he was mentally retarded. (PCR V25/3890-91)

Dr. Gamache knew that Kilgore grew up in an impoverished background. Kilgore was sent to a reform school, and lived in a very rural area of Mississippi. Kilgore's parents were share-croppers, not very educated themselves. It was a poor environment, and Kilgore did not have the kind of academic and intellectual stimulation that would be ideal in facilitating school achievement and in maximizing one's intelligence. However, despite this upbringing, Kilgore was able to teach himself to read and write and he was able to develop communication skills. (PCR V25/3909-10) According to Dr. Gamache, because there was no psychometic evidence that Kilgore would meet the diagnostic criteria for mental retardation, it was unnecessary to consider the next step -- whether the intellectual impairment (which was not supported by any psychometric evidence) existed during childhood. (PCR V25/3913-14)

In *Johnston v. State*, 930 So. 2d 581 (Fla. 2006), this Court

affirmed the trial court's ruling that Johnston was not mentally retarded, based on evidence from both mental health experts who "testified that [Johnston] consistently scored too high on IQ tests to support a finding of 'significantly subaverage general intellectual functioning.'" *Id*. at 585.[7] Moreover, even if poor intellectual functioning is demonstrated on a standardized test, there must be some effort to insure that the cause of the poor performance is low intelligence.

In this case, the defense experts' approach amounted to embracing a single full-scale score and discounting any high scores, rather than any meaningful assessment of actual ability. Dr. Eisenstein discounted Kilgore's higher IQ scores as attributable to the practice effect, and also rescored Dr. Gamache's raw data, thus achieving a reduced subtest score. Although the reduction was inconsequential, it is readily apparent that Dr. Eisenstein, although court-appointed for the mental retardation hearing, was still furthering his original role as a defense expert. Dr. Eisenstein concluded that Kilgore met the impaired "adaptive functioning" criteria because, according to Kilgore's siblings, Kilgore interacted with younger children and was described as "stupid" and "slow" (PCR V24/3724; 3727); his

[7] On appeal, Johnston criticized the experts because they did not perform adaptive functioning tests. However, as this Court noted, both experts testified that this testing was unnecessary and contrary to standard professional practice because all three prongs of the rule must be met in order for a defendant to be found mentally retarded. *Johnston*, 930 So. 2d at 586.

communication skills allegedly were deficient (PCR V24/3727); he was "slow" academically, according to inmate Charley Thompson (PCR V24/3728-29); and he "required" others to provide for him. (PCR V24/3730) Dr. Dee concluded that it would not be very useful to look at Kilgore's level of adaptive functioning because Kilgore is on death row and his environment is so structured.[8] (PCR V25/3856) However, Florida law requires proof that the subaverage intellectual functioning exists "*concurrently*" with the adaptive deficits. Since Kilgore's IQ scores exceeded 70 and since Dr. Dee considered any adaptive functioning assessment to be unavailable due to Kilgore's incarceration, CCRC did not remotely establish that these factors existed at the same time.

Although the defense witnesses depicted Kilgore as deficient and "slow," the record is replete with examples of Kilgore's skilled levels of communication (writing detailed letters to counsel and promptly contacting others for assistance when concerned about his own health and welfare), and his levels of self-care are consistent with his own self-seeking agenda (for example, keeping a wheelchair) and are inconsistent with mental retardation. Kilgore's own sworn testimony in court, correspondence, and DOC records belie CCRC's claim of mental retardation. For example, the transcript of Kilgore's taped

[8] See, *Bottoson v. State*, 813 So. 2d 31, 33, n.3 (Fla. 2002) (noting trial court found Dr. Dee's testimony not credible and unacceptably vague).

statement (2/13/89) details his fact-specific responses and early efforts to minimize his criminal conduct. (PCR V27/4215-33) In his handwritten letter to his mother (2/13/89), Kilgore admitted killing his "only friend." (PCR V27/4234) Kilgore's testimony at his suppression hearing also belied his claim of mental impairment. (PCR V27/4238; DA-R T733) Kilgore's taped statements described, in fact-specific detail, the chronology of events on the night that Kilgore shot Thomas Woods in 1978. (PCR V28/4245-4399) Years later, Kilgore's statements to the Public Defender's Investigator were similarly detailed in recounting the 1989 prison murder of 'Pearl.' (PCR V28/4400-4410) In his 1978 bond hearing, Kilgore, who was then 28 years old, testified that he could read and write. (PCR V29/4411-31; DA-R T120-140) At that bond hearing, Kilgore also discussed, in detail, his criminal history, including a 1969 arrest in New York, his prior incarceration and release dates, his addresses during 1977-1978; and Kilgore disputed equating his parole violation with parole revocation. (PCR V29/4414-21; DA-R T123-130) In 1978, Kilgore's defense counsel also filed a motion requesting that Kilgore be allowed to act as co-counsel. (PCR V314827-28) These circumstances are not indicative of mental retardation.

Throughout his incarceration, Kilgore has been a prolific letter writer. His letters are focused, articulate, and designed to achieve a specific outcome/benefit. (See, PCR V29/4432-72) For

instance, in Kilgore's letters to attorney Jeff Holmes, Kilgore detailed complaints about his diet, urged enforcement of a court order, and alerted his counsel to another inmate's information regarding a prosecutor's inquiry. (PCR V29/4432-56) Kilgore identified witnesses, suggested areas of cross-examination, detailed grounds for disqualification of the trial judge, renewed his dietary complaints, sought medical and dental care, requested transfer to another DOC facility, and provided a fact-specific chronology of the prison murder. (PCR V29/4432-56)

Kilgore's letters to his successor trial counsel, Alcott, are even more elaborate. Kilgore requested copies of witness statements, transcripts of hearings, with dates provided, sought enforcement of Judge Bucklew's ruling (on his motion to withdraw plea), requested a change of venue, a motion in limine, a gag order, sought new depositions of every state witness, identified 20+ witnesses, asked that an investigator take photographs of all weapons seized from inmates at Polk Correctional, and inquired about the number of prison inmates killed since his original incarceration in 1971. (PCR V29/4457-72)

At trial, Judge Maloney asked Dr. Dee about Kilgore's letters to the Court – letters which were literate, coherent, and logical. (PCR V31/4822; DA-R T1586) Judge Maloney concluded that it was "incredible" to refer to Kilgore as mentally retarded. (PCR V31/4824; DA-R T1249) In post-conviction, Kilgore's trial counsel,

Alcott, confirmed that he had the same impression that Judge Maloney did –- Kilgore seemed very coherent, literate, had a grasp of the legal concepts, his communications made sense, and he knew what was going on, what was important. (See, PCR V15/2472-73) Alcott was concerned that Kilgore's testimony in court would not benefit Kilgore later on, in terms of alleged mental retardation and low "function-ability." (PCR V15/2439) Kilgore's actions at the time of the 1989 prison murder were not those associated with a mentally retarded individual. As the trial court noted, "the accomplishment of this murder necessitated considerable preparation, cunning, and stealth" because entry to Jackson's dormitory was planned, the shank knife was borrowed, the caustic liquid was hidden, and Jackson's presence was anticipated. *Kilgore*, 688 So. 2d at 897.

Kilgore's prior mental health records (PCR V29/4477-4529) also failed to credibly support his claim of mental retardation. Those records include that Kilgore's IQ was considered to be in the normal to low average range. (PCR V29/4478-84), Report of Dr. Ainsworth, 1/30/90 [defendant's intelligence in the low average range]; Dr. Greer, 3/20/90 [EEG = normal]; Dr. Kremper, 1989 [full-scale IQ of 76]; Avon Park/Beta Screening (91) [normal intelligence]. During Dr. Kremper's deposition in 1989, Dr. Kremper testified that Kilgore's Verbal IQ was 77, his Performance IQ was 75, and his Full Scale IQ was 76. Kilgore was NOT within the

mentally retarded range. (PCR V29/4552). When Dr. Dee used the term mental retardation in 1994, he was not referring to mental retardation as it relates today. (PCR V20/3168-69) The DOC classification records also reflected that Kilgore had a "poor attitude" (PCR V31/4829-40), and his refusal to follow society's rules and regulations arguably had more of an impact than allegedly low intelligence. And this is, of course, consistent with Kilgore's longstanding incarceration.

Many of the defense experts' conclusions related to Kilgore's lack of formal education. However, Kilgore taught himself to read and write. Testimony was presented that Kilgore's literacy skills improved remarkably in prison. At most, the anecdotal information offered by the family was remote, limited, and insufficient to establish that Kilgore met the standards of personal independence and social responsibility required for a finding of mental retardation. And, the fact that Kilgore lived with his family or a lady friend is of no moment. See, *Rodgers*, supra.

Kilgore failed to demonstrate mental retardation by any burden of proof standard. See, *Nixon*, 2 So. 3d at 145; *Jones*, 966 So. 2d at 329-30 (no need to address burden of proof claim because the trial court found that "Jones did not present evidence sufficient to meet even the lesser standard of preponderance of the evidence") (citing *Trotter*, 932 So. 2d at 1049 n. 5)". The trial court's order denying Kilgore's claim of mental retardation should be affirmed.

ISSUE IV

THE RULE 3.203(d)(4)(C) CLAIM

Section 921.137(1), Florida Statutes (2005) sets forth the governing legal standards and rule 3.203 outlines the procedural requirements for mental retardation claims. Kilgore argues that Rule 3.203 fails to provide a constitutionally adequate procedure to resolve his claim of mental retardation. Specifically, Kilgore argues that (1) the Sixth Amendment should be judicially extended to civil post-conviction proceedings,[9] (2) the failure to include a standard of proof in the rule of procedure violates due process, (3) the standard of proof should be preponderance of the evidence under *Cooper v. Oklahoma*, 517 U.S. 348 (1997),[10] (4) the jury should determine the issue of mental retardation under *Ring v. Arizona*, 122 S. Ct. 2428 (2002); and, lastly, (5) Kilgore criticizes *Cherry*

[9] Kilgore recognizes, as he must, that the Sixth Amendment does not apply in post-conviction. Thus, there is no Sixth Amendment right to an attorney in post-conviction. See, *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 115 L.Ed.2d 640 (1991); *Lambrix v. State*, 698 So. 2d 247 (Fla. 1996); *see also*, *Peters v. State*, 984 So. 2d 1227 (Fla. 2008) (Sixth Amendment confrontation clause does not apply to probation revocation proceedings), approving *Peters v. State*, 919 So. 2d 624, 626 (Fla. 1st DCA 2006), citing *State v. Abd-Rahmaan*, 154 Wash. 2d 280, 111 P.3d 1157 (2005) ("By its own terms, the guaranties [sic] of the Sixth Amendment do not apply in these post-conviction settings, but to 'criminal prosecutions.'")

[10] In *Medina v. State*, 690 So. 2d 1241, 1246-47 (Fla. 1997), this Court examined whether, under *Cooper v. Oklahoma*, 517 U.S. 348 (1996), the standard of proof required to establish a defendant's incompetency to be executed under Florida law was appropriate. In *Medina*, this Court held that *Cooper's* due process concern with a lower standard for a pretrial determination of competency was not applicable in the post-conviction context.

v. State, 959 So. 2d 702 (Fla. 2007) - and the IQ cut-off score at 70 - as an obstacle to his mental retardation claim. (Initial Brief at 93 - 97).

The arguments raised by Kilgore in his attack of rule 3.203 were raised by other members of the capital defense bar when this Court was in the process of drafting the rule. See, e.g. *Pleadings filed*, SC03-685, *Amendments to the Florida Rules of Criminal Procedure and the Florida Rules of Appellate Procedure*. Certainly, this Court considered the defense arguments when crafting Rule 3.203; and Kilgore essentially repeats arguments that were squarely rejected by this Court in *Nixon v. State*, 2 So. 3d 137, 145-146 (Fla. 2009). In *Nixon*, this Court ruled:

> In 2001, the Florida Legislature enacted section 921.137, Florida Statutes (2001), which barred the imposition of a death sentence on the mentally retarded and established a method for determining which capital defendants are mentally retarded. See § 921.137, Fla. Stat. (2001). The following year, the United States Supreme Court issued its opinion in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), holding that execution of mentally retarded offenders constitutes "excessive" punishment under the Eighth Amendment. In response to *Atkins* and section 921.137, we promulgated Florida Rule of Criminal Procedure 3.203, which specifies the procedure for raising mental retardation as a bar to a death sentence. Pursuant to both section 921.137 and rule 3.203, a defendant must prove mental retardation by demonstrating: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. See § 921.137(1), Fla. Stat. (2007); Fla. R.Crim. P. 3.203(b).
>
> * * *

Cherry **Decision**

Nixon first argues that this Court's interpretation of section 921.137 in *Cherry*, which requires a defendant to have an IQ score of 70 or below, violates *Atkins*.

* * *

...We have consistently interpreted this definition to require a defendant seeking exemption from execution to establish he has an IQ of 70 or below. See, **e.g., *Jones v. State*, 966 So.2d 319, 329 (Fla. 2007) ("[U]nder the plain language of the statute, 'significantly subaverage general intellectual functioning' correlates with an IQ of 70 or below."); *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005) (finding that to be exempt from execution under *Atkins*, a defendant must establish that he has an IQ of 70 or below).**

...We have consistently interpreted section 921.137(1) as providing that a defendant may establish mental retardation by demonstrating all three of the following factors: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. See, e.g., *Jones*, 966 So.2d at 325; Johnston, 960 So.2d at 761. **Thus, the lack of proof on any one of these components of mental retardation would result in the defendant not being found to suffer from mental retardation.**

Nixon further asserts that our interpretation of section 921.137(1) does not provide constitutionally adequate procedures to determine mental retardation...

...The trial court informed Nixon of his opportunity to present his case, provided an evidentiary hearing, determined Nixon's mental retardation claim on the basis of the examinations performed by two psychiatrists, and provided Nixon with an adequate opportunity to submit expert evidence in response to the report and testimony of the court-appointed expert. We find that Nixon was included in the truth-seeking process and had a full and fair opportunity to present evidence relevant to his mental retardation claim and to challenge the state-appointed psychiatrist's opinions. Because **the statute, rule, and caselaw outline adequate procedures for the**

presentation of mental retardation claims, Nixon is not entitled to relief on this issue.

* * *

...In *Jones v. State*, 966 So. 2d 319, 326 (Fla. 2007), we found that Florida's definition of mental retardation is consistent with the American Psychiatric Association's diagnostic criteria for mental retardation...

* * *

Burden of Proof

Nixon argues that the trial court erred by requiring him to prove his mental retardation. Nixon opines that the State is required to prove that he is not mentally retarded beyond a reasonable doubt. Contrary to this assertion, **we have consistently held that it is the defendant who must establish the three prongs for mental retardation. See, e.g., *Cherry*, 959 So.2d at 711; Fla. R.Crim. P. 3.203(e).** Moreover, Nixon argues that if he bears the burden of showing his mental retardation, the appropriate standard is preponderance of the evidence. However, section 921.137(4) specifically states:

> At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has mental retardation. If the court finds, **by clear and convincing evidence,** that the defendant has mental retardation as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.

(Emphasis added.) **We need not address this claim because the circuit court held that Nixon could not establish his mental retardation under either the clear and convincing evidence standard or the preponderance of the evidence standard**. See *Jones*, 966 So.2d at 329-30 (noting that we did not need to address the claim because the trial court found that "Jones did not present evidence sufficient to meet even the lesser standard of preponderance of the evidence") (citing *Trotter*, 932 So.2d at 1049 n. 5).

> **Nixon also claims that under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), due process requires that a jury find beyond a reasonable doubt any facts that would make a defendant eligible for the death penalty. We have rejected this argument and held that a defendant "has no right under *Ring* and *Atkins* to a jury determination of whether he is mentally retarded**." *Arbelaez v. State*, 898 So. 2d 25, 43 (Fla. 2005); see also *Rodriguez v. State*, 919 So. 2d 1252, 1267 (Fla. 2005); *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002).
>
> The defendant contends the trial court erroneously rejected his argument that rule 3.203 does not provide a constitutionally adequate procedure for resolving mental retardation claims by persons whose death sentences were final before the Supreme Court decided *Atkins*. More specifically, **Nixon argues that rule 3.203 extends due process and other constitutional guarantees only to those who have not yet been sentenced to death. The claim is meritless. Florida Rule of Criminal Procedure 3.203 adopts the statutory definition of mental retardation and recognizes that *Atkins* applies to any defendant currently on death row. See Fla. R.Crim. Pro. 3.203(d); *Brown*, 959 So.2d at 147 n. 1 (citing *Phillips v. State*, 894 So.2d 28, 39-40 (Fla.2004)).**
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> ***** ***** *****

Nixon, 2 So. 3d at 141-146 (e.s.)

In this case, as in the above-cited decisions, including *Nixon*, *Cherry, Jones, Arbelaez and Rodriguez,* Kilgore's post-conviction challenge to the constitutionality of the procedures in Rule 3.203 must be denied.

ISSUE V

THE IAC AND CRUEL & UNUSUAL PUNISHMNENT CLAIMS

In this final issue, which totals *two* pages (Initial Brief at 97-98), CCRC alleges that the trial court erred in summarily

denying the following claims:

A. the IAC/prosecutor comments claim (Post-Conviction Claim V, denied at PCR V34/5155-5162 and V34/5249-5263);

B. the IAC/rules-prohibiting-juror-interviews claim (Post-Conviction Claim XIV, denied at PCR V34/5193-5195 and V35/5280-5283);

C. the cruel & unusual punishment claim (time on death row and method of execution) (Post-Conviction Claim XVI, denied at PCR V34/5199-5201 and PCR V35/5287-5289).

CCRC's *pro forma* restatement of claims that were summarily denied below is woefully inadequate to fairly preserve any issue on appeal. This entire issue, consisting of three perfunctory sub-claims, is waived for appellate review. See, *Rose v. State,* 985 So. 2d 500, 509 (Fla. 2008) (Rose merely stated a conclusion and referred to arguments made below and, therefore, issue was waived for appellate review), citing *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."); *Simmons v. State*, 934 So. 2d 1100, 1111 n. 12 (Fla. 2006); *Cooper v. State*, 856 So. 2d 969, 977 n. 7 (Fla. 2003) (same).

Moreover, the complaints underlying Kilgore's IAC claims (prosecutorial comments, rules governing juror interviews and execution by electrocution or lethal injection) all involve issues that were cognizable on direct appeal and, therefore, are

procedurally barred in post-conviction. See, *Bell v. State*, 965 So. 2d 48, 60 (Fla. 2007), citing *Lamarca v. State*, 931 So. 2d 838, 851 n. 8 (Fla. 2006) (prosecutorial misconduct claims procedurally barred because they could have been raised on direct appeal); *Allen v. State,* 854 So. 2d 1255, 1258 n.4 (Fla. 2003) (claims challenging the constitutionality of the rules governing juror interviews should be brought on direct appeal); *Suggs v. State,* 923 So. 2d 419, 441 (Fla. 2005) (claim that execution by electrocution or lethal injection constitutes cruel and unusual punishment was not raised on direct appeal; therefore, it is procedurally barred in post-conviction; furthermore, this Court has consistently rejected arguments that these methods of execution are unconstitutional. *Id*., citing *Sochor v. State*, 883 So. 2d 766, 789 (Fla. 2004); *Provenzano v. Moore*, 744 So. 2d 413, 414-15 (Fla. 1999); *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000).

Kilgore's bare-bone IAC complaints and cruel & unusual punishment claims are not only waived, see *Duest*, but are also without merit. As to the IAC/prosecutor comments claim (post-conviction claim V), the trial court addressed each of the comments cited by Kilgore and found either: (1) the prosecutor's remarks were not improper and consequently, Kilgore failed to meet the first prong of *Strickland* in that he has failed to prove counsel acted deficiently in failing to object to the alleged remarks or (2) Kilgore failed to meet the second prong of *Strickland* in that

he failed to prove how counsel's alleged failure to object to the alleged argument resulted in prejudice "when the Court instructed the jury that it was to decide the case solely upon the answers given by the witnesses and the exhibits, and that what the attorneys say in opening statements and closing arguments is not evidence." See, Orders at PCR V34/5155-5162 and V34/5249-5263; See also, *Taylor v. State*, 3 So. 3d 986, 997 (Fla. 2009), citing *Waterhouse v. State*, 792 So. 2d 1176, 1182 (Fla. 2001) (because *Strickland* requires both prongs, it is not necessary to address prejudice when a deficient performance has not been shown); *Harvey v. State*, 946 So. 2d 937, 943 (Fla. 2006) (where the defendant failed to demonstrate prejudice, this Court need not address the deficiency prong of *Strickland*).

Next, Kilgore's *pro forma* IAC/juror interview claim is likewise waived, see *Duest*, and also without merit. In denying the IAC/juror interview claim, the trial court found, *inter alia*, that (1) Kilgore's alleged inability-to-interview-jurors claim was procedurally barred and (2) juror MacKroy never lied during voir dire. See, PCR V35/5282-5283; PCR V34/5193-5195. Moreover, Kilgore "failed to allege that there were peremptory challenges remaining which counsel would have exercised at the time the question was asked. Consequently, Defendant has failed to meet the second prong of *Strickland* in that he has failed to prove how counsel's alleged failure to research juror MacKroy's criminal

history resulted in prejudice." (PCR V35/5283; PCR V34/5193-5195) Kilgore has not alleged, nor demonstrated, any basis for relief. See, *Evans v. State*, 995 So. 2d 933, 952 (Fla. 2008) (affirming trial court's summary denial of claim challenging the constitutionality of Rule 4-3.5(d)(4), Rules Regulating the Florida Bar).

Kilgore asserts a one-paragraph challenge to execution as alleged cruel and unusual punishment. In addition, Kilgore alleges that "prolonged incarceration before judicial execution contradict[s] evolving international human rights principals." (Initial Brief at 98). This token allegation is waived under *Duest.* Moreover, the trial court correctly denied Kilgore's claim as procedurally barred and also without merit. (PCR V34/5199-5202 and V35/5287-5289); See also, *Tompkins v. State*, 994 So. 2d 1072, 1085 (Fla. 2008), citing *Booker v. State*, 969 So. 2d 186, 200 (Fla. 2007) (noting that no federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay); *Marek v. State*, 8 So. 3d 1123, 1131 (Fla. 2009) (same).

Furthermore, Kilgore's perfunctory challenge to lethal injection is waived, *Duest,* and is also without merit, as this Court explained in *Finney v. State*, 2009 WL 2856929 (Fla. 2009):

> In his first claim in this appeal, Finney contends that the circuit court erred in summarily denying his

> challenge to Florida's lethal injection procedures as violating the constitutional prohibitions against cruel and unusual punishment. See U.S. Const. amend. VIII; art I, § 17, Fla. Const. **As appellant admits, however, we have repeatedly upheld these procedures against such constitutional challenges. See *Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008), cert. denied, 129 S.Ct. 1305 (2009)**; *Power v. State*, 992 So. 2d 218, 220-21 (Fla. 2008); *Sexton v. State*, 997 So. 2d 1073, 1089 (Fla. 2008); *Henyard v. State*, 992 So. 2d 120, 129-30 (Fla.), cert. denied, 129 S.Ct. 28 (2008); *Schwab v. State*, 995 So.2d 922, 924-33 (Fla. 2008); *Woodel v. State*, 985 So. 2d 524, 533-34 (Fla.), cert. denied, 129 S.Ct. 607 (2008); *Lebron v. State*, 982 So. 2d 649, 666 (Fla. 2008); *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla.2007), cert. denied, 128 S.Ct. 2485 (2008); *Schwab v. State*, 969 So. 2d 318 (Fla. 2007), cert. denied, 128 S.Ct. 2486 (2008). Additionally, **we have held the procedures constitutional under the requirements of *Baze v. Rees*, 128 S.Ct. 1520 (2008). See *Ventura v. State*, 2 So. 3d 194 (Fla.) ("Florida's current lethal-injection protocol passes muster under any of the risk-based standards considered by the *Baze* Court** (and would easily satisfy the intent-based standard advocated by justices Thomas and Scalia)."), cert. denied, 129 S.Ct. 2839 (2009); *Henyard*, 992 So.2d at 130.

Kilgore's final issue, which merely identifies claims summarily denied below, is waived. Claims cognizable on direct appeal are procedurally barred in post-conviction. And, CCRC's perfunctory IAC allegations fail to establish any deficiency of counsel and resulting prejudice under *Strickland*.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court denying post-conviction relief should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished U.S. Regular mail to William M. Hennis III, Litigation Director, Capital Collateral Regional Counsel - South, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, Florida 33301, this 20th day of November, 2009.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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