IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-257

DEAN KILGORE,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's denial of Rule 3.851 relief following a limited evidentiary hearing, as well as various rulings made during the course of Mr. Kilgore's request for post-conviction relief. The following symbols will be used to designate references to the record in this appeal:

"1990 R. " – record on 1990 direct appeal to this Court;

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

"T. " -- transcript of original trial proceedings;

"PCR. " -- record on first postconviction appeal including transcripts of both evidentiary hearings below;

All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Kilgore has been sentenced to death. The resolution of the issues in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the issues at stake. Mr. Kilgore, through counsel, accordingly urges that the Court permit oral argument.

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STANDARD OF REVIEW

Mr. Kilgore has presented several issues which involve mixed questions of law and fact. Thus, a *de novo* standard applies. *Bruno v. State*, 807 So. 2d 55, 61-62 (Fla. 2001).

This Court should also take into account that in *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that the execution of the mentally retarded violated the Eighth Amendment's prohibition against cruel and unusual punishment. The Supreme Court found a "consensus [among the States which] unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders and the relationship between mental retardation and the penological purposes served by the death penalty." *Id.* at 317. The Court further held that executing the mentally retarded "undermine[s] the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Id.*

Mr. Kilgore meets the definitions of mental retardation as defined by the American Association on Intellectual and Developmental Disabilities ("AAIDD", f.k.a. American Association on Mentally Retardation or "AAMR") and the American Psychiatric Association ("APA"), which were approved by the United States Supreme Court in *Atkins* as:

> Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following adaptive skill areas: communication,

> self-care, home living, social skills, community use, self-direction, heath and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

Atkins at 309 n.3 (*quoting* the definition of the American Association of Mental Retardation and the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000).

Despite defining mental retardation and prohibiting the execution of those who are mentally retarded, the *Atkins* Court left "to the States the task of developing appropriate ways to enforce the Constitutional restrictions upon its execution of sentences." *Atkins*, 536 U.S. at 317 (*citing Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). However, this is not a bar to Mr. Kilgore's claim as Florida's definition for mental retardation, as discussed herein, cannot itself violate the rule in *Atkins*. The *Atkins* Court specifically recognized that an "IQ score between 70 and 75 or lower" is "typically considered the cutoff score for the intellectual function prong." *Atkins*, 536 U.S. at 309, n.5 (*quoting*, 2 B. Sadock & V. Sadock, Comprehensive Textbook of Psychiatry 2952 (7th ed. 2000).

SUMMARY OF ARGUMENTS

1. Mr. Kilgore's conviction and sentences are materially unreliable because no adversarial testing occurred due to the cumulative effects of ineffective assistance of counsel, the withholding of exculpatory or impeachment evidence,

newly discovered evidence, and/or improper rulings by the trial court, in violation of Mr. Kilgore's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

2. The lower court erred when it found no deficient performance by trial counsel and no prejudice below to Mr. Kilgore, who was denied the effective assistance of counsel at the sentencing phase of his trial in violation of the Sixth, Eighth and Fourteenth Amendments and United States Supreme Court case law. Mr. Kilgore's due process rights were violated. No adversarial testing occurred, counsel's performance was deficient, and as a result, Mr. Kilgore's death sentence is unreliable.

3. The lower court's finding, following an evidentiary hearing, that a mental retardation evaluation in Florida in the context of capital postconviction requires a finding that there is a bright line IQ score cutoff of 70 or below with no allowance for standard error of measurement was erroneous and an abuse of discretion. This finding violated Mr. Kilgore's rights under the equal protection and due process clauses of the Fourteenth amendment as well as the Eight amendment's prohibition on cruel and unusual punishment pursuant to *Atkins*. In addition, the lower court should have considered the evidence below and made findings as to age of onset and adaptive functioning.

4. Fla. R. Crim. P. 3.203 failed to provide Appellant with a

Constitutionally adequate procedure to resolve his mental retardation claim in circuit court.

5. Other findings by the lower court were in error.

STATEMENT OF THE CASE AND THE FACTS

The Circuit Court of the Tenth Judicial Circuit, Polk County, entered the judgments of convictions and sentences under consideration. On March 2, 1989, a Polk County grand jury indicted Mr. Kilgore for one count of first degree murder of Emerson Robert Jackson, a fellow inmate at Polk Correctional Institution, on February 13, 1989; and for one count of possession of contraband by an inmate. Mr. Kilgore was initially sentenced to death in 1990 by the Honorable Tim Strickland, after pleading *nolo contendere* to first degree murder. During the ensuing appeal, this Court returned jurisdiction to the circuit court when questions arose as to the validity of Mr. Kilgore's plea to first degree murder.

After a hearing before the Honorable Susan C. Bucklew, Mr. Kilgore was allowed to return to Circuit Court for a new disposition of his case. Mr. Kilgore filed a motion requesting that the Circuit Court impose a life sentence, which was denied, and Mr. Kilgore was instead retried in 1994. A jury returned a verdict of guilty and recommended a sentence of death by a vote of nine (9) to three (3).

On April 27, 1994, the Honorable Dennis P. Maloney sentenced Mr. Kilgore to death on a count of first degree murder. On direct appeal, this Court affirmed Mr. Kilgore's convictions and sentences. *Kilgore v. State*, 688 So. 2d 895 (Fla. 1996), *cert. denied*, 139 L.Ed. 58 (1997).

Under Fla. R. Crim. P. 3.851 (1996), predecessor counsel for Mr. Kilgore in

CCRC-Middle filed a Motion to Vacate on June 5, 1998. Thereafter, CCRC Middle conflicted off Mr. Kilgore's case and CCRC South was appointed in replacement.

At first appearance in Polk County on Mr. Kilgore's behalf CCRC South was notified in open court on February 29,2000 by the Honorable Dennis P. Maloney that Roger Allan Alcott, the trial counsel for Mr. Kilgore in his 1994 capital case, had recently been appointed to the Circuit Court bench for the Tenth Judicial Circuit and had an office adjacent to Judge Maloney.

CCRC South filed a Motion to Disqualify Judge on March 24, 2000 along with an original affidavit of Dean Kilgore of March 28, 2000, alleging that Judge Maloney's personal and professional relationship with Judge Alcott presented a conflict extending to all the judges in the Tenth Judicial Circuit.

Circuit Judge Dennis Maloney disqualified himself on March 31, 2000, and thereafter, the Honorable J. Rogers Padgett of the Thirteenth Judicial Circuit was appointed by this court. Mr. Kilgore filed an amended Rule 3.850/3.851 motion on October 14, 2002, raising twenty-seven (27) grounds for relief.

Following a *Huff*[1] hearing on February 7, 2003, on April 29, 2004 the lower court entered an order detailing the claims upon which a hearing was granted. They included: Claim II (in part), at 5214-45[2], Ineffective Assistance of Counsel (IAC)

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[1] *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993).

[2] The page citation for these claims is to the lower court's order of April 29,

during pre-trial and trial/no adversarial testing, including points 3, 8, 9, 10, 18-27, 28, 29. 30, 31, 32; Claim IV (in part), at 5246-49, IAC during Voir Dire, including points 1 and 2; Claim V (in part), at 5249-63, prosecutorial misconduct at guilt/innocence and penalty phase/IAC, including point 5; Claim VI (in part), at pages 5263-68, *Ake v. Oklahoma*/IAC claim at guilt and penalty phases of capital trial, including points 2, 3, 5, 6 and 7; Claim VIII, at pages 5269-70, the entire IAC at sentencing phase claim; and Claim XV (in part), at pages 5283-87, the IAC /*Ring v. Arizona* claim, including points 2 and 4. Mr. Kilgore's other claims were summarily denied with the exception of Claims VII and XXVII (both Cumulative Consideration), upon which the lower court reserved ruling until after the evidentiary hearing.[3] The lower court issued an interim order on August 24, 2004 granting a hearing in part of Claim XX. The first evidentiary hearing was held on June 13-17, 2005.

At the evidentiary hearing the following witnesses testified: Trial counsel Roger A. Alcott, PCR. 2187-2534; defense expert Jimmy Bell, Professor of Sociology at Jackson State University, Jackson, Mississippi, PCR. 2539-2641; Jeff Holmes, Esq., predecessor trial counsel in 1989-90, PCR. 2646-2742; defense

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2004, found at PCR. 5213-5303.

[3] The lower court denied claims I, II (in part), III, IV (in part), V (in part), VI (in part), IX, X, XI, XII, XII, XIV, XV (in part), XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, and XXVI.

expert Dr. Thomas Hyde, a behavioral neurologist, PCR. 2742-60; Dorothy Speight, sister of appellant, PCR. 2765-95; Elbert Kilgore, brother of appellant, PCR. 2795-2829; Jimmy Dean Kilgore, brother of appellant, PCR. 2829-55; inmate witnesses Jonathan Montgomery, PCR. 2855-69, Timothy Squires, PCR. 2869-79, Anthony Jackson, PCR. 2879-87, Jeffrey Barnes, PCR. 2888-99, Stanley Williams, PCR. 2899-2902; defense expert Dr. Richard Dudley PCR. 2925-81, defense expert Dr. Hyman Eisenstein, PCR. 2981-3086; inmate Charley Thompson, PCR. 3091-3126, defense expert Dr. Henry Dee, 3127-82; and later memorialized testimony of Barbara Ann Jackson, PCR. 3127, 3485-3510.

At the at the close of the June 2005 evidentiary hearing on the State's motion, the lower court ordered Mr. Kilgore to amend pursuant to Fla. R. Crim. P. 3.203(d)(4)(c). PCR. 3185-91. Accordingly, on August 15, 2005, Mr. Kilgore filed an amended 3.850 motion detailing his Constitutional right against execution under *Atkins v. Virginia*, 536 U.S. 304 (2002).

In an order dated October 21, 2005, the lower court indicated that "in an abundance of caution" it would grant an evidentiary hearing to address Mr. Kilgore's claims of mental retardation as alleged in both his initial and amended 3.851 motions.[4] A hearing ultimately was held on January 22-23, 2007.

[4] This same Order reserved judgment on all the other claims as presented in Mr. Kilgore's June 2005 evidentiary hearing.

During the second evidentiary hearing counsel for Mr. Kilgore presented the testimony of Court appointed expert Dr. Hyman Eisenstein and CCRC Investigator Katt McNish on January 22, 2007. PCR. 3679-3791; PCR. 3791-97. On January 23, 2007 defense expert Dr. Henry Dee who had previously testified in 2005 again testified PCR. 3803-71. Later that same day the State presented the testimony of the second court appointed expert, Dr. Michael Gamache. PCR. 3872-4066.

The Honorable J. Rogers Padgett entered a final order denying all relief on November 26, 2008. It was received and filed by Richard M. Weiss, Clerk of Court for Polk County on December 3, 2008. It was not received by CCRC until January 21, 2009. The Order included rulings on twenty-seven (27) claims. This appeal follows.

ARGUMENT I

MR. KILGORE'S CONVICTIONS AND SENTENCES ARE MATERIALLY UNRELIABLE BECAUSE NO ADVERSARIAL TESTING OCCURRED DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, NEWLY DISCOVERED EVIDENCE, AND/OR IMPROPER RULINGS OF THE TRIAL COURT, IN VIOLATION OF MR. KILGORE'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. Introduction

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

proceeding. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and `material either to guilt or punishment"'. *United States v. Bagley*, 473 U.S. 667, 674 (1985), *quoting Brady v. Maryland*, 373 U.S. 83, 87 (1963). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 685. Where either or both fail in their obligations, a new trial is required if confidence is undermined in the outcome. *Smith v. Wainwright*, 799 F.2d 1442 (11th Cir. 1986). To the extent that newly discovered evidence is uncovered, that evidence must be considered along with the evidence not disclosed by the State and/or not investigated by defense counsel in assessing the reliability of the outcome. *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996). Further, the Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. *Beck v. Alabama*, 477 U.S. 625 (1980).

Mr. Kilgore was denied a reliable adversarial testing. The jury never heard the considerable and compelling exculpatory and impeachment evidence. In order "to ensure that a miscarriage of justice [did] not occur," *Bagley*, 473 U.S. at 675, it was essential for the jury to hear this evidence. *State v. Gunsby*. Whether the State

suppressed the evidence, defense counsel unreasonably failed to present the evidence, or the evidence is newly discovered, confidence is undermined in the outcome because the jury did not hear the evidence.

B. Ineffective Assistance of Counsel

> An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Id., at 687*. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id., at 688*.

Wiggins v. Smith, 123 S. Ct. 2527, 2535 (2003). Counsel has "[A] duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 668 (citation omitted).

In the context of ineffective assistance of counsel, that the correct focus is on the fundamental fairness of the proceeding:

> In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland v. Washington, 466 U.S. 668, 696 (1984) . The evidence presented in Mr. Kilgore's postconviction proceedings demonstrates that the result of his capital trial is unreliable.

1. Counsel's Failure to Investigate and Prepare

Counsel's highest duty is the duty to investigate and prepare. Where, as here,

counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. Roger Alcott first appeared in court on the case on a motion to continue on May 6, 1993. R. 33-34. Despite assistant counsel being available to him, Alcott never requested another lawyer to work with him on Kilgore's case. The practice of appointing second chair counsel was not unusual. Previous counsel Holmes was promised a second chair attorney if he stayed on the case, and Mr. Kilgore was represented by two attorneys at his 1978 murder trial.

Alcott did virtually nothing on Mr. Kilgore's case in the seven months following his appointment, as he wrote to Mr. Kilgore:

> I have your letter of 28 November, 1993 and wish to advise you that I have obtained the transcripts of the depositions taken by Mr. Holmes and am in the process of obtaining a transcript of the proceedings held before Judge Strickland at the time of your sentencing. Right now I need those transcripts to prepare for your trial. Once I am done with them, I will package them up and mail them to you.
>
> * * *
>
> I do need from you a list with the name and address of persons who you would like to have me subpoena for court who can testify as to what a proper sentence for you in the event you are found guilty, and witnesses who might testify as to your guilt or innocence. Please supply me with a list of the names and addresses as best you can as quickly as possible.

When that letter was written on December 2, 1993, Alcott had only spent about 17 hours on Kilgore's case since he had been appointed. This included a little over four hours in hearings and only a couple of hours with predecessor counsel Holmes. There

is no indication he ever spoke with counsel from Mr. Kilgore's 1978 case.

According to the affidavit for payment filed after the trial, Alcott met only once with Kilgore for 1.5 hours on May 14, 1993 ("Interview client and review letter") and had a brief phone call with him on August 2, 1993. These were the only contacts Kilgore had with trial counsel that were not associated with a court appearance until the December 1993 letter.

Alcott failed to move for the appointment of any expert until just weeks before the trial. He never requested the appointment of, or funds for, an investigator. He did no independent investigation and he also failed to depose any witnesses, simply relying on the work of Holmes in 1989-1990, the lawyer Mr. Kilgore had fired. Rather than conducting an independent investigation, Alcott relied on the self-report of Mr. Kilgore, a man he later would argue was brain damaged and mentally retarded.

On March 2, 1994, Alcott finally filed a motion requesting that psychologist Dr. Henry Dee be appointed for mitigation purposes and an order was entered by the trial court appointing Dr. Dee two days later. R. 45-48. A pre-trial conference was held on March 23, 1994. R. 50-80. Other than the motion for an expert, Alcott filed no other new motions after taking over for Holmes a year before. R. 60-61.

Alcott failed to ask for the recusal of the circuit despite the fact that Judge Strickland had been a material witness in the interim proceedings before Judge Susan

Bucklew. R. 67-68. Although Alcott stated on the record that Mr. Kilgore had expressed deep concerns about the case being retried in Polk County after his experiences with Judge Strickland in both 1978 and 1990, Mr. Alcott failed to file either a motion for change of venue or a motion to recuse the Tenth Judicial Circuit. In the pretrial conference he said that he didn't personally consider the limited pre-trial publicity a problem. R. 55-56. No mention was made of the issues of racism, homophobia or the fact that the case involved a prison killing. Mr. Kilgore was denied his right to a fair and impartial jury by prejudicial pretrial publicity, by the lack of a change of venue, and by counsel's failure to plead events in the courtroom during the 1978 and 1990 trials before Judge Strickland and during the 1994 trial. Trial counsel rendered ineffective assistance in this regard and/or the trial court erred. Denied below without a hearing. PCR. 5292-94.

2. Counsel’s Failure to Adequately Voir Dire

Mr. Kilgore's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida constitution were violated by counsel's ineffectiveness during voir dire whether due to counsel's deficiencies or being rendered ineffective by state action. Denied below. PCR. 5150-55. Strategic decision was found below as the rationale for trial counsel’s failure to: (1) request individual voir dire; (2) inquire as to issues of bias concerning homosexuality or race; or (3) request additional preemptory challenges in instant

circumstances where the crime was a black on black prison murder involving homosexual lovers. Race and homosexuality were issues that trial counsel ignored during jury selection to the significant prejudice of Mr. Kilgore. In addition, counsel was ineffective where he failed to review the record of Mr. Kilgore's case with predecessor counsel in preparation for jury selection. After he was informed in open court by the state, trial counsel admitted on the record during the pre-trial conference that he was unaware that in 1990 predecessor counsel Jeff Holmes had been allowed individual voir dire on the issues of jurors feelings about prison killings and homosexuality. R. 57. During voir dire, trial counsel completely failed to request individual voir dire even when it became apparent that jurors in the pool harbored anti-homosexual bias. In addition, racial bias as a possible subject matter for individual voir dire was not raised by the state or by trial counsel in 1994. Trial counsel's efforts to uncover potential racial bias amongst jurors was wholly inadequate.

At Mr. Kilgore's 1990 proceedings, Jeff Holmes argued before Judge Strickland that individual voir dire of potential jurors was necessary to assure no racial bias affected their decision. Holmes called a fellow defense attorney to testify that he had had experiences trying cases in Polk County where racial bias was a factor. Holmes also noted on the record that he and attorney Dan Brawley, who had served as co-counsel for Mr. Kilgore in 1978, had recently upset a jury panel by

trying to draw out admissions of racialist feeling. (1990 R. 865). Judge Strickland granted Holmes's request and allowed individual voir dire of prospective jurors regarding race and homosexuality issues, (1990 R. 856), and later stated on the record during the trial:

> I can remember death, homosexuality and race. Those are rather sensitive. People may not wish to speak openly with those things.
>
> * * *
>
> Well, sitting over there, Mr. Kilgore looks like a person who's entitled to his constitutional rights. Sitting five feet from my white 21 year old female juror, I'm not sure that she's going to feel that way about it. And the next question is whether of not she can candidly tell us that or if she develops a sort of distinct dislike for Mr. Kilgore in the pit of her stomach, but we don't ask her that question.

(1990 R. 4, 9). Trial counsel's jury selection in 1994 shows no awareness of this past record in Polk County. Trial counsel's voir dire regarding race was insufficient. See Jurors Griffin, Sutherland, Smith, Curry, Wise, Abney, and Boykin. PCR. 1808-1922.

Alcott's questioning of the potential jurors failed to elicit meaningful responses indicative of prejudice:

> One topic I want to mention very quickly and go over it. Mr. Kilgore is obviously a black man. Is there any problem with you serving as a juror in such a case where you're white and he's black?

PCR. 1915. While the jurors did not indicate a "problem" with deciding Mr. Kilgore's case, Alcott made no effort to uncover potential bias that would affect their decision.

Cook, Mackroy, Fugate, Sulim and Wise were never asked about any issues regarding race and their participation in this case by either the state or Mr. Alcott. The following exchange occurred during voir dire between Assistant State Attorney Paul Wallace and Juror Charles Fugate:

> MR. WALLACE: Mr. Fugate, do you know anyone who is a homosexual?
>
> MR. FUGATE: Yeah.
>
> Q: Do you have -- do you think you would have any difficulty in sitting on this case if you were to find out that both the man who was killed, Emerson Jackson, and Dean Kilgore, the defendant, at some point in time had a homosexual relationship?
>
> A: Shouldn't.
>
> Q: Is the issue of homosexuality something that you have some pretty strong feelings on or is it just one of those subjects that you think and talk about without really having very strong emotional feelings?
>
> A: I got some feelings but I don't talk about it.

PCR. 1835-36. In another exchange with Attorney Alcott, Fugate expressed similar views:

> MR. ALCOTT: And you're going to hear that my client was the male and the deceased in this case was the female in such a relationship. It's basically a boyfriend/girlfriend/other boyfriend triangle type of a thing.
>
> Mr. Fugate, you indicated that that wouldn't affect your decision making in any way.
>
> MR. FUGATE: Well, it shouldn't.
>
> Q: Well, and I know it shouldn't. But on the other hand maybe it

does.

A: I would have to hear the case out.

* * *

Q: Okay, how long were you in the service?

A: Two years active.

Q: Okay. And I'll bet you had some opinions about President Clinton recently changed the rules of the military so that personal with a gay lifestyle could serve in the military; and I bet you had some thoughts about that didn't you?

A: I think all military people did.

Q: Okay. I take it you were somewhat opposed to that?

A: Yes sir.

Q: Okay. Now, did you voice your opposition? I mean write a letter to the Congressman and so forth?

A: Yes, two or three.

PCR. 1852-53.

Juror Russell Abney expressed "very strong" feelings regarding homosexuality. PCR. 1892. Juror Barbara Wise also expressed strong feelings of disapproval about homosexuality. PCR. 1857. Juror Betty Boykin and Elizabeth Milne expressed disapproval. PCR. 1859. Jurors Andrea Smith and Jeffrey Griffin expressed anti-homosexual feelings. PCR. 1877, 1891. Juror Thomas B. Cook, the foreman of the jury, also expressed anti-homosexual views personally and as a

member of the Church of Christ. PCR. 1843, 1846.

Though eight of twelve jurors who served expressed anti-homosexual feelings, Alcott made no effort to further inquire as to any juror's anti-homosexual bias either as a panel or individually. Certainly Alcott should have been on notice that the State was concerned about possible prejudice to their case if the jury learned that the victim was HIV positive, since the state had already opposed the attempt to get that information before the jury in 1990.

3. Counsel's Failure to Cross-Examine State Witnesses Effectively

Because he did not conduct any pretrial investigation, trial counsel failed to discover information that controverts the testimony offered by state witnesses. As a result, Alcott failed to effectively cross-examine the witnesses presented by the state to establish Mr. Kilgore’s guilt.

Alcott failed to obtain personnel files of any of the Polk County Sheriff's Office personnel involved in Mr. Kilgore's case, and failed to obtain prison records regarding the several inmate witnesses. The testimony of these prison inmates at the postconviction evidentiary hearing provided numerous examples of potential impeachment that would have been available to Alcott if he had only requested their prison records before the trial.

Jonathan Craig Montgomery testified at Mr. Kilgore’s sentencing phase in 1994 and at the postconviction evidentiary hearing. PCR. 2855-68.

Mr. Montgomery was an inmate with Mr. Kilgore at Polk Correctional Institution. At the evidentiary hearing, Mr. Montgomery identified numerous documents entered into evidence as records of his 22-year incarceration. Amongst the records available prior to Mr. Kilgore's sentencing phase are disciplinary reports for drug possession, intoxication, possession and consumption of alcoholic beverages, others PCR. 732-766; 784-953. Since his incarceration, Mr. Montgomery has received over 47 disciplinary reports. According to Mr. Montgomery, drugs were rampant at Polk C.I. Mr. Montgomery testified that "As long as I was there, I was high . . . If I wasn't high I was drunk". Marijuana and cocaine were available "everywhere". Inmates would make their own alcohol with fruit and sugar. Mr. Montgomery testified that marijuana affects his thinking and judgment, and admitted that he was smoking marijuana at the time that Emerson Jackson was killed. He was high at the time, and got even higher after it occurred and he was under the influence at the time he gave his statement to the investigating officers at Polk. C.I. Alcott could have effectively impeached Mr. Montgomery with this information, had he sought it out.

Mr. Montgomery also testified to Emerson Jackson's reputation amongst the prison population, which sheds additional light on the reasons for his death:

> Pearl was a whore. He was a trick. [] He played head games. He would hang out with you, and you baby him, take care of him, and then if you're going to take care of him, he'll find somebody else to play around. He played emotional games with everybody. It was just a

> thing that Pearl did with people. One did cut him once before across his neck at another institution, told him God told him to do it to get the devil out of him.
>
> * * *
>
> He played with people's emotions. This kind of game, that's a very delicate thing to be stepping in. You can get killed for that.

PCR. 2862.

Timothy Squires was also incarcerated with Mr. Kilgore at Polk C.I. in 1989 and testified for the State at Mr. Kilgore's capital trial. At the postconviction evidentiary hearing, Mr. Squires identified documents obtained by postconviction counsel as his Department of Corrections records. PCR. 2869-79; 651-706. Like Mr. Montgomery, Mr. Squires had received a number of disciplinary reports for possession and use of alcohol and drugs while incarcerated. He testified that "about anything you wanted" was available at Polk C.I.

As Mr. Squires recalls, shortly after Mr. Kilgore was placed in lock up, Investigator Williams placed him in confinement. Soon thereafter, Mr. Squires was sent to Florida State Prison. While at F.S.P., Mr. Squires was approached by Mr. Vance, a classifications officer, who openly discussed Mr. Squires potential "deal" for his testimony in Mr. Kilgore's case. Mr. Squires memorialized this encounter in a letter. PCR. 362-70.

Mr. Squires had known Emerson Jackson at Polk C.I., and from their previous incarceration together at Union Correctional Institution. He testified to

Emerson Jackson's reputation amongst the prison community:

> He wasn't a very liked fellow. He [] caused a lot of chaos between people. It seemed like that was his regular real motive, [to] create problems.
>
> * * *
>
> [W]e just called it telling lies, kind of like he would tell you something and he would go back and tell somebody else something, and you know, just create a bunch of mess.

PCR. 2875-76.

In his testimony at the evidentiary hearing, Alcott acknowledged that he failed to obtain any of the prison records of the prisoner witnesses and that he never considered impeaching their testimony with such information. PCR. 2345-70. He also failed to obtain or use available impeaching information to cross examine law enforcement and corrections personnel. PCR. 2370-74. Had trial counsel conducted a reasonable investigation, he would have been able to effectively impeach these witnesses. Because he did not adequately investigate and prepare, Mr. Kilgore's conviction is unreliable.

Similarly, Alcott's cross-examination of Barbara Jackson at the penalty phase, which consisted of only of six pages of transcript (R. 1438-1443), was woefully deficient. At the penalty phase, the State offered the 1978 murder conviction to establish the aggravating factors of "prior violent felony" and "under sentence of imprisonment." In addition to the documentary evidence establishing Mr. Kilgore's

prior violent felony conviction, the State also presented Barbara Ann Jackson and Capt. Joe Keil to testify regarding the events and circumstances of Mr. Kilgore's prior offenses.

Jackson's 1978 deposition was fifty-two pages and her 1978 testimony was 67 pages of transcript. PCR. 557-617. Alcott failed to review these prior statements and, as a result, failed to use Jackson's prior inconsistent statements to impeach this critical witness. Despite testifying at trial that she and Mr. Kilgore were not romantically involved, Ms. Jackson admitted at her 1978 deposition that she had a romantic relationship with Mr. Kilgore. Such information was critical to understanding the context of the 1978 offense and also stated that she thought he had been drinking on the night of the 1978 offense. (1978 R. 463, 513). Despite these admissions, which bear directly on Ms. Jackson's credibility, trial counsel did not attempt to impeach Ms. Jackson because he was not aware that this impeaching information existed. Counsel's duty to investigate and prepare includes a duty to challenge to aggravating factors offered by the State:

> The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.41, p. 93 (1989)).

Wiggins v. Smith, 123 S. Ct. at 2536-2537 (emphasis added). Alcott failed not only

to investigate impeachment material that would have challenged the aggravators established by Barbara Jackson's testimony, he failed to obtain and review the records regarding Mr. Kilgore's prior violent felonies that the State argued in aggravation. The lower court held that, even if Alcott's performance was deficient, there was no prejudice shown below:

> 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.

PCR. 5197.

> "[T]his 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."

PCR. at 5199.

Contrary to the circuit court's findings, Mr. Kilgore has established that the facts and circumstances of Mr. Kilgore's 1978 offense were subject to challenge due to Barbara Jackson's inconsistent testimony and the State's withholding of impeachment evidence. Counsel's failure to obtain and review these records not only deprived him of valuable mitigation information, it deprived him of the ability to challenge the weight of Mr. Kilgore's prior offenses in aggravation.

C. Withholding of Impeachment Evidence

In addition to his failure to investigate, Alcott's failure to effectively cross-examine Barbara Jackson must be attributed in part to the State's failure to disclose impeachment material in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In response to demands made pursuant to Fla. R. Crim. P. 3.852, and upon *in camera* inspection of materials for which exemptions had been claimed, the circuit court disclosed certain "state attorney notes" of interviews with Barbara Jackson and Jeffrey Barnes made prior to the 1978 trial. These notes had never been previously made available to counsel for Mr. Kilgore. In her 52-page 1978 deposition, Ms. Jackson admitted that she had a romantic relationship with Mr. Kilgore and she stated that she thought he had been drinking on the night of the 1978 offense. When compared with other statements by these witnesses, including Barbara Jackson's testimony at the penalty phase in the instant case, these notes reveal impeachment material that should have been used by trial counsel.

Mr. Kilgore in 1978, 1990, and 1994 did not have the benefit of this potential impeachment material because it had been withheld, and had no reason to know that the notes existed until they were disclosed in postconviction by the trial court.[5] Had trial counsel had the benefit of these state attorney notes, he would

[5] After the disclosure, postconviction counsel moved for access to *all* of the withheld "attorney notes" of State Attorney interviews with named police officers and other witnesses from the 1978 proceedings and subsequently filed a motion to

have been able to effectively impeach Ms. Jackson's testimony at Mr. Kilgore's capital sentencing phase.

When considering whether Mr. Kilgore was prejudiced by the State's withholding of this impeachment material, this Court must consider whether *the jury* "would reasonably have been troubled" by the withheld information and whether "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." *Kyles v. Whitley*, 514 U.S. 419, 441-43 (1995). Given the divergent testimony offered by Barbara Jackson at Mr. Kilgore's 1978 and 1994 trials, as well as the inconsistencies with her pre-trial deposition and statements, it cannot be said that Mr. Kilgore's jury would not have found her inconsistent testimony troubling. This is especially evident given the fact that, even without hearing this impeachment evidence, Mr. Kilgore's jury remained split by a vote of 9 to 3 on whether to recommend life or death.

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vacate the 1978 judgments of convictions and sentences pursuant to Fla. R. Crim. P. 3.850. The motion to vacate alleged, *inter alia*, that Mr. Kilgore's 1978 convictions are materially unreliable because no adversarial testing occurred due to the cumulative effects of ineffective assistance of counsel and the withholding of exculpatory evidence. The State responded to Mr. Kilgore's motion by moving to discharge CCRC-South from representing Mr. Kilgore in any challenge to the 1978 conviction. The circuit court granted the state's motion and entered an order dismissing CCRC from the 1978 case. Mr. Kilgore appealed the circuit court's order dismissing CCRC-South to the Second District Court of Appeal. The Second District converted the appeal to a petition for certiorari and certified the issue to this Court for review. *Kilgore v. State*, 933 So. 2d 1192, 1193 (Fla. 2d DCA 2006). This Court ultimately affirmed the circuit court's dismissal of CCRC-South as counsel for Mr. Kilgore in the 1978 case.

Due to the cumulative effects of counsel's ineffectiveness and the State's withholding of exculpatory impeachment material, the result of Mr. Kilgore's trial and sentencing are unreliable. As a result, Mr. Kilgore's conviction and sentenced violate the Fifth, Sixth and Eighth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

ARGUMENT II

THE LOWER COURT ERRED WHEN IT FOUND NO DEFICIENT PERFORMANCE BY TRIAL COUNSEL AND NO PREJUDICE BELOW TO MR. KILGORE, WHO WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. MR. KILGORE'S DUE PROCESS RIGHTS WERE VIOLATED, NO ADVERSARIAL TESTING OCCURRED, COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, MR. KILGORE'S DEATH SENTENCE IS UNRELIABLE

A. Introduction

Counsel's highest duty is the duty to investigate, prepare, and present the available mitigation. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003); *see also Williams v. Taylor*, 120 S. Ct. 1495 (2000); *Rompilla v. Beard*, 125 S. Ct. 2456 (2005) reaffirming *Wiggins* and finding that "[e]ven when a capital defendant and his family members have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review materials that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial's sentencing phase.") The *Wiggins* Court clarified that "in assessing the

reasonableness of an attorney's investigation, 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." 123 S. Ct. at 2538. In other words, counsel must conduct a complete investigation to know what evidence is available before a reasonable decision can be made whether or not to present it.

Throughout the Court's analysis in *Wiggins* of what constitutes effective assistance of counsel, it turned to the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines"). *See id*. at 2536-7. Under the ABA Guidelines, trial counsel in a capital case "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c), p 93 (1989)." *Id*. at 2537. Despite the fact that these national standards have been widely practiced for several decades[6], trial counsel testified at the 2005 evidentiary hearing that

[6] *See Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003) ("Although the instant case was tried before the 1989 ABA edition of the standards was published, the standards merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases."); *See also*, *31 Hofstra L. Rev. 913*, 920 (2003) (noting that the 1989 ABA Guidelines were "designed to express existing practice norms and constitutional requirements" and that the 1989 ABA Guidelines "reflect prevailing

although he was "aware" of the ABA Guidelines he did not hold them as anything more than "aspirational goals" at the time of Mr. Kilgore's trial in 1994. PCR. 2226-27. Trial counsel supported this ideology on the record several times in noting that the ABA Guidelines were not local standards and practices, thereby inferring their inapplicability. (See, e.g., PCR. 2220, 2226, 2229, 2339-40).

Under the ABA Guidelines, there are specific requirements which should be met from the initial appointment on a case through its conclusion. Guideline 11.4.1(c) states, "the investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." In order to comply with this standard, counsel is obliged to begin investigating both phases of a capital case from the beginning. *See id*. at 11.8.3(A). This includes requesting all necessary experts as soon as possible. *See* Commentary to Guideline 11.4.1(c). In addition, when an expert or other persons working with the defense talk with the defendant, defense counsel is obligated to prepare the client for such an interview. *See id*. at 11.8.3(D).

B. Trial testimony of family members and respective proceedings

Mr. Kilgore's claimed below that the representation provided by trial

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norms in the profession that have existed since the early 1980's").

counsel was unconstitutionally deficient because of his failure to reasonably investigate Mr. Kilgore's background. Mr. Kilgore was thereby prejudiced, as his jury never heard significant mitigating evidence that was presented at the evidentiary hearings when they recommended by a nine (9) to three (3) vote that Mr. Kilgore should die. This information related to the severe neglect, deprivation, physical abuse and mental abuse Mr. Kilgore suffered as a child both by his family and at the Oakley Training School in Mississippi, and related testimony about his mental and medical status.

Mr. Kilgore's October 2002 Rule 3.850 motion included an extensive "life history" in Claim VIII based on investigation to date by postconviction counsel. PCR. 654-672. At the evidentiary hearings in June 2005 and in January 2007, Mr. Kilgore presented testimony and documentary evidence that significantly expanded upon the social, medical and mental health history that had been presented at trial. The evidence admitted included two volumes of background materials which included a section of interviews and other materials concerning both Mississippi and Lakeland, Florida family and other contacts. PCR. 1701-82.

In its final order denying postconviction relief, the circuit court found that:

> [C]ounsel 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 moon shine, 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.

PCR. 5186. In his penalty phase opening statement trial counsel outlined his case in mitigation. He promised the jury that he would present the testimony of some of Mr. Kilgore's family members, part of a large family of 13 children that grew up in 1950s rural Mississippi and later in Florida. R. 1418-1419. The penalty phase evidence that Roger Alcott presented at the April 1994 trial included only five live witnesses. Trial counsel presented the testimony of Dr. William Kremper, Ph.D. PCR. 1442-81; R. 1454-1493, Dr. Henry Dee, Ph.D. PCR. 1588-1626; R. 1494-1531, and the 1990 testimony of the late Dr. Gary M. Ainsworth, a psychiatrist, was read into the record. PCR. 1497-1536; R. 1549-1583. To support his plea to the jury for mercy, Alcott presented Corrections Officer Mary Ann Hall, who testified that after the homicide, Mr. Kilgore was crying and stating that he loved the victim, and that he was remorseful. R. 1535-1542.

Alcott ultimately presented only two family witnesses: Mr. Kilgore's sister Dorothy L. Spates (a.k.a. Dorothy Kilgore), who admitted that she had little

contact with Dean Kilgore from the time he left home at age 11 until he rejoined the family (which had moved from Mississippi in the interim) at the age of 15 or 16. R. 1588-1601, and another younger sister, Irlene Cason (a.k.a. Irlene Spearman), who testified very briefly that she had and would continue to visit Mr. Kilgore in prison and stated he was very sorry about what had happened. Counsel failed to elicit any family history or facts from Ms. Cason. R. 1603-1605. The family member testimony Alcott ultimately presented to Mr. Kilgore's jury totaled a mere fourteen transcript pages.

The prejudicial impact of trial counsel's failure to explore both Mr. Kilgore's juvenile record and his adult criminal record only compounded his negligent guilt phase preparation. Trial counsel failed to seek the appointment of an investigator, failed to do any independent investigation, failed to take advantage of the trial court's apparent willingness to appoint co-counsel, failed to depose any witnesses, failed to seek appointment of expert psychologist Dr. Dee until days before the trial, and failed to obtain impeachment materials concerning the inmate and law enforcement witnesses at the guilt phase. These negligent actions doomed the case in mitigation.

Postconviction investigation and the evidentiary hearings below show that Dean Kilgore was born in Mississippi on October 16, 1950 in a small, three-room shack located on the edge of his parents' employer's land. A sharecropper by trade,

Dean's mother Matilda had worked up until Dean's birth in the cotton fields to ensure that she and her other five children could get paid and buy food. Ultimately, thirteen children would be born to Matilda although there are many accounts that she lost several children in pregnancy and shortly after their birth. PCR. 1701-06.[7] Having this many children was essential to making a "profit" sharecropping. Dean, along with all of his siblings, worked in the fields picking cotton. However, the family never seemed to get out of debt or have enough money to survive. Appellant's older brother, Elbert Kilgore, testified at the June 2005 evidentiary hearing : "Well, they stayed in debt. Well, what you would do, you might stay with this fellow two or three years, and then you would have to pay something to go to another, and another, and it just kept you going around like that. That's the way sharecroppers worked. You did the work but you never got out of debt." PCR. 2797. In an interview brother Paul Kilgore described how his mother and the children were forced to work in the fields picking cotton. Two bales of cotton, roughly equivalent to 1400-1600 pounds, were the required production per day. Although promised to make $18.00 per bale, the payment was often much less. PCR. 1705-06. The bulk of this money went to purchase food for the ever-growing

[7] The interviews cited to herein were introduced and admitted at the evidentiary hearings and were relied on by the experts who testified as part of the basis for their opinions. PCR. 1701-1782. The information in the interviews should have been heard by the jury considering Mr. Kilgore's fate at the penalty phase.

family. As Dorothy Speight, Dean's younger sister, explained, "Mealtime was- - well, we was happy to have something to eat, but it was kind of like, kids you've got to wait until the grown people get to eat. So when we waited until the grown people get to eat, there wasn't too much left when it got back around to us." PCR. 2768. Elbert Kilgore also described how home-made whiskey or beer would be given to the children to fill their stomachs and make them go to sleep. PCR. 1731-33. Battling alcoholism and financial stress, Paul Kilgore (Dean's father), left the family in 1954. This year "was one of the worser years" that Elbert Kilgore could remember. PCR. 2798. Matilda, now alone with nine children, took odd jobs to make ends meet. PCR. 2801. Embarrassed at the conditions her children were living in and scared of getting into trouble, Matilda had her employers drop her off down the road from her home. (Id.) She did not want anyone to see her children running around unclothed and unfed. (Id.)

Elbert Kilgore testified that his mother did not drink until 1956, although his biological father was what he would consider an alcoholic. PCR. 2799. Elbert recalls that he and his step-father used to drink together; often leaving the children unattended for the entire day. PCR. 2806. Elbert recalled the older children having to attend to each other until their mother and step-father returned. (Id.) With no parents in the home and no food to cook, the children were left to fend for themselves when they got hungry. (Id.) Although there were some times when

food was brought back, it usually only consisted of some bologna and bread. (Id.) Elbert Kilgore, along with several of his siblings, testified to or gave statements about the pervasive presence of alcohol in their family. Their father, Paul Kilgore, made his own whiskey and "home brew" to sell to locals. PCR. 2800; 2808. This was what was often fed to and/or stolen by the children. (Id.) Both Paul Jr., and Elbert Kilgore recall instances in which their father would have seizures attributed to alcohol use. PCR. 1705-06. Elbert Kilgore testified that all of his siblings had problems with alcohol having been exposed to it at an early age. PCR. 2803. Elbert testified that a deceased brother, M.C., died of cirrhosis of the liver. PCR. 2827. Elbert notes that Dean began drinking at age three or four, and was drinking on a regular basis for eight or nine years of age. PCR. 2801.

Schooling was virtually non-existent for the Kilgore children, being in such a remote area. Elbert Kilgore recalls that the school was five or six miles away from their home, and that he often went to school without shoes on. PCR. 2802-03. Paul Kilgore noted that in addition to the school's distance, the only time the children could go would be in the cotton-picking off season. PCR. 1705-06. Being that this was winter time and the children did not have shoes, he often did not want to go. (Id). Recalling that Dean Kilgore went to school some during the period of 1956-1959, Elbert Kilgore did not think Dean, or any of his siblings "could pass like we should." PCR. 2803. Dorothy Speight testified, "We did not go to school

that much in Mississippi, none of us. Everybody was behind." PCR. 2785.[8]

Dean Kilgore was a slow child who seemed "mildly retarded" and "not being right" according to his oldest brother Paul Kilgore and sister in law, Janie Kilgore. PCR. 1705-06. However, every sibling post-conviction counsel spoke to indicated that Dean always seemed "slow" and that he was "not normal." PCR. 2793; 2803. M.C. Kilgore, Dean's deceased brother, described Dean to an investigator as "slow witted." PCR. 1720. Noticing that he "used to cry a lot," Dorothy Speight indicated that she always thought her brother Dean was "different from the rest of us." PCR. 2772. Jimmy Dean Kilgore testified that Dean didn't seem to learn from his mistakes. Despite getting severely punished for running away, Dean would continue to leave. "He would get the whooping, get the whooping, but you wake up, you look around, and he's gone." PCR. 2850. Jimmy Dean Kilgore also noted that he always thought Dean was "the strange one" in the family. PCR. 1726-27. In remembering her brother-in-law's development, Janie Kilgore recalled "there was something always wrong with Dean." PCR. 1701-02. Janie remembers Dean having fits as a child, "hollering" and "falling down." (Id.) Additionally, Janie recalls that Dean continued to soil his clothing until he was well into school age

[8] Mr. Kilgore has attempted to obtain these records in post-conviction. However, no attendance or other school records have been made available by the Mississippi Department of Education. Only the juvenile court records describing the bicycle theft that resulted in Appellant's placement in the Oakley Training School from 1963-1968 were located. PCR. 1415-16; 2792-93.

years. (Id.).

Janie Kilgore recalls Dean often getting into trouble over stealing food. PCR. 1705-06. By every sibling's account, there was never enough food to go around. PCR. 2801. Dean was always hungry, and always crying for food. This continued until Dean was an older child. Dean never seemed to understand that the adults had to eat first or that there would be some food left for him to eat. This was despite repeated attempts to explain this to him. Matilda, and her new husband Sam Spearman, would berate Dean for crying and make fun at him in front of the other children. PCR. 2769; 2776; 2804. If Dean continued to cry, he would often face harsh punishment in the form of being beaten by Matilda. In describing what his mother would use in disciplining the children, Jimmy Dean Kilgore testified, "She used the belt. She used fan belt. She'd get a little piece of rubber out of the tire. She'd get a big switch, whatever." PCR. 2834-35. Dorothy Speight testified that she now considers such treatment abuse, although she didn't recognize it at the time. PCR. 2770; 2789. Describing a beating he witnessed, younger brother Jimmy Dean Kilgore recalls, "Mama would have a couple of the older brothers to hold him down, put him down and whoop him. And sometimes he would just black out, just roll his eyes and just go out. And then a few minutes later, she might throw some water on him and he would back to, you know." PCR. 2835; 2794. Jimmy Dean Kilgore further noted that "Dean really got the most serious whoopings out of

all of us.

Although Alcott contacted Dean's two youngest siblings (his sister Dorothy Speight and Earlene Spearman) prior to presenting them as witnesses at the penalty phase of Mr. Kilgore's trial, he failed to interview other family members or to investigate the full context of Dean's adolescence. Nine of Mr. Kilgore's eleven surviving siblings (M.C. died in 2002) lived in the Lakeland, Florida area. Trial counsel never interviewed the others despite the fact that they lived in the same area as Dean's sisters and Alcott himself. PCR. 2776; 2810.

Alcott's failure to contact Mr. Kilgore's family is remarkable because of how easily accessible the family was to him; not only by physical proximity but also due to their willingness to assist their brother. PCR. 2807. Dorothy Speight noted that her own interaction with Alcott was probably only on "court day". When asked if Alcott developed a good relationship with the family, Dorothy replied, "No, because I barely remember him really. I don't ever remember him just having a talk with us to ask us what was going on, how was Dean. We never had that conversation." PCR. 2774-75.

The lower court's finding that the evidence and testimony offered in postconviction was merely cumulative is erroneous. Trial counsel failed to retain an investigator. He failed to interview family members in Mississippi. The two youngest members of Mr. Kilgore's immediate family were presented at the

penalty phase to the jury as a source of information about their older brother's development as a child and as a young adult. Trial counsel knew Ms. Speight and her sister had, at best, a "rudimentary knowledge of [Mr. Kilgore's] history from a narrow set of sources."[9] Under these circumstances, effective counsel would have expanded his investigation beyond a "narrow set of sources," and would have sought other sources of background information.[10] Furthermore, Mr. Kilgore's post-conviction presentation of mitigation evidence through Ms. Speight's testimony at the evidentiary hearing was not cumulative. To the contrary, it was presented along with detailed testimony from older brother Elbert Kilgore, his brother closest in age (Jimmy Dean Kilgore), a friend from reform school (Charlie Thompson), and a sociologist who is a Mississippi native with special expertise in criminal justice in the context of Mississippi culture (Professor Jimmy Bell) who interviewed Paul and Janie Kilgore, Ken Stamps, and Dean Kilgore and reviewed the interviews of the other material witnesses from Mississippi. PCR. 2602-06. In addition, all the written interviews with witnesses in mitigation who did not appear in person at the evidentiary hearing were admitted as evidence without objection

[9] *Wiggins*, 123 S. Ct. at 2537.

[10] *See*, *Wiggins*, 123 S. Ct. At 2532-33 (noting effective counsel would have "chronicled petitioner's bleak life history" by obtaining "social services, medical, and school records, as well as interviews with petitioner and numerous family members.").

by the State. PCR. 2600. This Court must consider this evidence when reviewing the lower court's order denying relief.

Capital defense lawyers know that "evidence bearing on the defendant's ability to adjust to prison life" can be mitigating. *See Skipper v. South Carolina*, 476 U.S. 1, 6 (1986). Effective counsel would have obtained and reviewed Mr. Kilgore's prison records (including juvenile incarceration records) as possible sources of mitigating evidence. The need to obtain these records was particularly clear in Mr. Kilgore's case because of the family members' limited knowledge about Mr. Kilgore's juvenile incarceration at the Oakley Training School (hereinafter "Oakley School") in Mississippi from 1963-1968. *See e.g., Morgan v. Sproat*, 432 F. Supp. 1130 (1977). By all accounts, Oakley residents were treated worse in segregation days when it only housed the State's African-American juvenile offenders and orphans. *See* PCR. 1714-19[11] 11-year old Dean Kilgore was first placed under the control of the juvenile court and then sent to Oakley in 1963 at the age of 12.

Charlie Thompson, a former resident of the Oakley School and a former Florida death row inmate, testified at the evidentiary hearing about the school's

[11] It is important to note that the Oakley School also housed African-American orphans and/or abused children as the State of Mississippi did not have integrated group homes. Thus, not all children at Oakley were considered youthful offenders under the State of Mississippi's juvenile code. PCR. 1711-12.

inhumane treatment of its residents including his then-friend Dean Kilgore. PCR. 3091-3126. Mr. Thompson described the school as more of a prison than a school, and noted that "you didn't learn too much" at Oakley due to the frequent beatings and focus on manual labor. Charlie Thompson repeatedly referenced the beatings by Oakley staff members. The recollection of one Oakley staff worker in particular ("Mr. Stamps") caused Mr. Thompson to become emotional on the stand as he noted that the 210-pound Mr. Stamps would "beat you too bad." PCR. 3103-05.

Corroborating Thompson's accounts, Mr. Stamps' son Kenneth Stamps stated that he would often see the residents abused. Kenneth Stamps recalled seeing grown men beating children with their fists, gin straps, paddles, or sticks, noting that "if one man got tired, another would join in." PCR. 1711-12. Mr. Charles Stamps himself noted that the workers "took care of discipline right then and there" and that "they were big kids- you need men to handle them." PCR. 1714-19.

In reviewing information surrounding Mr. Kilgore's time at the Oakley School, Jackson State University Professor of Sociology Jimmy Bell testified at the evidentiary hearing about the impact of such discipline:

> Well, the older parents or house parents and work staff at Oakley were part of an older system of slavery in terms of that slave- - plantation mentality, rather than slavery, but plantation mentality. So people in rural communities grew up understanding that the way African-

> Americans were disciplined were through lashes and whoopings . . . [t]he theory of internalized oppression simply means that people who actually subscribe to this method of meting out punishment simply have internalized the practices of oppressor and they say that to them it's real and this is the way it will be . . . And it doesn't take anything away from you to inflict punishment and pain on other people because this is the way it has always been done.

PCR. 2564.

In discussing his own conversation with Kenneth Stamps, Prof. Bell recalled the conversation about children defecating on themselves from being beaten so severely. PCR. 2565. This practice was handed down from supervisor to supervisor. (Id.) Prof. Bell discussed the rationale for why such abuse was allowed to continue, opining that since it was the only employer for African-American people in the community that people did "whatever was necessary to maintain your job or you did whatever you thought people wanted you to do to maintain your job that you can maintain your living, your lifestyle." PCR. 2570.

In applying this internalized oppression at Oakley to how it affected Dean Kilgore, Professor Bell notes that the entire experience had to have had a "dehumanizing and negative impact on his outlook on life and perspective on life." PCR. 2595. Further, Professor Bell notes that Mr. Kilgore's entry into Oakley School as an twelve year old child was a "traumatic experience" that would "totally dehumanize him and perhaps basically alienate him from his family members." (Id.) In noting how Oakley affected Mr. Kilgore's adult life, Professor Bell opines

that:

> I think that Mr. Kilgore has become completely institutionalized and has been a victim, if you will of institutionalized inequities. He has become a product of his environment, and which all that implies, violence, drugs, whatever. I think he's been completely institutionalized. And so certainly he functions as an inmate. And that's what the concept of prisonisation is, that he's been taught the appropriate ways of behaving and acting out, or whatever, in a prison environment and in a prison setting.

PCR. 2593. In discussing such information's use in a capital case, Professor Bell notes that such information regarding Oakley and Dean's experiences there (in his professional opinion) should have been presented to a jury to make Dean Kilgore a "human as opposed to another number and a statistic" and to aid jurors in adding context to Mr. Kilgore's life and experiences as a felon and as a prisoner. PCR. 2598. Professor Bell's testimony is supported by the testimony of Dr. Dudley.

C. Look to *Rompilla*

The United States Supreme Court agreed with Professor Bell's assessment in *Rompilla v. Beard*.[12] In *Rompilla* as in Mr. Kilgore's case, the defense knew that the State would be seeking the death penalty by proving "Rompilla had a significant history of felony convictions indicating the use or threat of violence, that it would attempt to establish this history by proving the prior conviction, and

[12] 125 S. Ct. 2456 (2005).

that it would emphasize his violent character." (Id. at 2460). Despite this knowledge, defense counsel failed to fully investigate all possible aggravation that could have been argued by the State, including previous convictions. *Id.*, *at* 2464. As in Mr. Kilgore's case, in failing to investigate such possible aggravation, the defense also failed to discover viable mitigation.[13] This undiscovered "mitigation evidence taken as a whole 'might well have influenced the jury's appraisal' of [Rompilla's] culpability. (Id. at 2469, citing *Wiggins*, supra at 694) and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing" (citing *Strickland*, 466 U.S. at 694).

Trial counsel testified at the 2005 evidentiary hearing concerning why he failed to investigate Mr. Kilgore's childhood and juvenile offenses in Mississippi: "Because I believe probably at the time back in 1994 that I had all the background historical data that I needed to put that information before a fact finder." PCR. 2343. Trial counsel's failure to seek information about Mr. Kilgore's history in Mississippi was unreasonable attorney performance. Counsel's own words

[13] This mitigation included organic brain damage, childhood problems related to fetal alcohol syndrome, and that Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense. *Rompilla*, 125 S. Ct. 2456, at 2469. *See* undisclosed DOC information introduced at evidentiary hearing through Dr. Dee. PCR. 4829-40, 2562-74.

highlight the inadequacy of his investigation and the quality of his representation as a whole.

Trial counsel in the instant case, like defense counsel in *Rompilla*, failed to fully investigate the background of his client. In Mr. Kilgore's case, this background included an extensive period of time between the ages of 12 and 18 spent in a juvenile institution in Mississippi in addition to Mr. Kilgore's adult criminal history. At the evidentiary hearing trial counsel minimized the importance of investigating the first 18 years of Mr. Kilgore's life and also admitted that he failed to review the records concerning Mr. Kilgore's adult felonies. PCR. 2339-45. Trial counsel never attempted to investigate Mr. Kilgore's juvenile court record in Mississippi which was reviewed on site by postconviction counsel. PCR. 2912-14; 2919-24; 3183-84. Trial counsel admitted that he failed to review the prior felony conviction files related to Mr. Kilgore's adult offenses relied on by the State and the trial court as aggravating factors. PCR. 2209-15; 2267-85.[14]

Such a review by trial counsel would have provided undiscovered information about Mr. Kilgore's family history and his juvenile record, revealed patterns in Mr. Kilgore's criminal history material to the instant capital charges, and compelled the retention of both a second chair attorney and an investigator

[14] Trial counsel also testified that he failed to obtain and review the 1971 and 1979 Post Sentence Investigations and parole records connected to the 1970 and 1978 prior violent felonies used as aggravators.

and/or a sociologist to help work up the penalty phase.[15] Capital counsel is required to thoroughly investigate a client's background in order to present to the jury the "compassionate or mitigating factors stemming from the diverse frailties of human kind."[16] When that does not occur, the defendant has not been treated as a "uniquely individual human bein[g]" and there is no "reliable determination that death is the appropriate sentence,"[17] and the death sentence is not a "reasoned moral response"[18] to the offense and the offender. Trial counsel abdicated that responsibility in this case to the severe prejudice of Mr. Kilgore. The true nature of his background and his prior offenses was never heard by the jury below.

D. Specific detailed and credible expert testimony in post conviction proceedings

At the June 2005 evidentiary hearing postconviction counsel also presented mental health experts including Dr. Thomas Hyde, Dr. Richard Dudley, Dr. Hyman Eisenstein and Dr. Henry Dee. This testimony was presented to demonstrate the deficiencies of the prior testimony of Dr. William Kremper, Ph.D., and Henry Dee, Ph.D, who testified at the 1994 trial at the penalty phase. And in

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[15] Trial counsel testified that he did not hire an investigator. PCR. 2233.

[16] *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

[17] *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *Woodson*, 428 U.S. at 304-305).

[18] *Penry v. Johnson*, 532 U.S. 782, 788 (2001).

addition, to supplement through the new expert testimony a more complete, detailed and credible picture of Mr. Kilgore's background in support of the statutory mitigation that had been found by the judge at the penalty phase but given little weight.

Dr. Richard Dudley is a psychiatrist who evaluated Mr. Kilgore and who opined regarding the presence of statutory and non-statutory mitigating factors. *See* Testimony of Richard Dudley, M.D. PCR. 2925-81. He recommended an updated neuropsychological battery and a neurological evaluation, which was done. Dr. Dudley testified that Mr. Kilgore suffered from

> a history of really severe neglect and abuse, not only within the family, but in the larger context that had resulted in a development of a fairly severe personality disorder. That was then made worse by other psychiatric problems, cognitive deficits, substance, alcohol abuse, but then which also, in turn, made the abuse and neglect even more severe. So it was kind of a spiraling sort of story.

PCR. 2931.

Dr. Dudley explained further that Mr. Kilgore suffers from Borderline Personality Disorder, the most severe of the personality disorders, resulting from Mr. Kilgore's experiences during important developmental years. *Id.* As a result, Mr. Kilgore experiences instability in virtually every area: an unstable sense of self and instability in interpersonal relationships. PCR. 2932-34. As Dr. Dudley explained, the impact of the stress from this disorder could result in outbursts of anger, rage, or explosiveness.

PCR. 2934-35.

Dr. Dudley testified that Mr. Kilgore became institutionalized at a young age. "There would have been things that could have been done when he was 12 or 13 that would have, in fact, been helpful" PCR. 2939. However:

> There was clearly nothing helpful that came from [the Oakley Training School] experience [] in the sense of counterbalancing the abuse and neglect he had already experienced. There wasn't anything helpful with regard to how they would be underlying problems, [] either cognitive of psychological that made it more damaging for min and there wasn't anything helpful with regard to addressing the damage that had already occurred, and instead, really was only teaching a very violent approach to [] taking care of yourself and managing the problems that had resulting in the difficulties he had already had in the first place.

PCR. 2938. As a result of this institutionalization, this way of life became the only thing Mr. Kilgore could attach to, and then continued to follow. PCR. 2940.

Dr. Dudley reviewed the 1990 report and 1994 testimony of psychiatrist Dr. Gary Ainsworth. PCR. 2940. Dr. Ainsworth was deceased by the time of the 1994 trial. Dr. Ainsworth's findings were consistent with his own, according to Dr. Dudley, in that, at the time of the offense, Mr. Kilgore suffered extreme emotional distress and that the capacity to conform his behavior was impaired, and there were serious psychiatric problems and emotional distress. PCR. 2941-42. However, Dr. Dudley explained that Dr. Ainsworth's basis for his opinions is "a little vague" and not articulated. PCR. 2942. Dr. Dudley testified that Dr. Ainsworth did

not have knowledge of Mr. Kilgore's damaging experiences during important developmental years and the collateral support for that, and understanding the impact that that had on Mr. Kilgore's development and functioning as an adult. PCR. 2943.

He testified that this type of information is "critical information to a psychiatrist, period. And certainly when you're doing this kind of work, to get some sort of understanding of what is really the underlying difficulty". PCR. 2944. Based on his evaluation, Dr. Dudley opines that Mr. Kilgore's relationship with Barbara Ann Jackson was:

> exactly the kind of thing you would expect to see in somebody who has the kind of psychiatric problems that [Mr. Kilgore] has. [W]hat you see is some frantic attempt to find somebody who you believe cares about you, is concerned about you, in an attempt to really establish [] just feeling okay and not feeling so empty, not feeling so alone.
>
> And what of course generally happens when people are so frantic is that they make bad choices. And so you're involved with somebody who you think cares about you, who had taken this opportunity of your frenzy really to use you and manipulate you, so that getting in relationships that you feel you know are positive and make you feel better, but are, in fact, relationships which you're being used and taken advantage of is a [] common experience. That course results in their falling apart, because at some point all of that breaks through. Then you feel totally empty again and you start to fall apart. And that [is], to me, what happened in the context of [Mr. Kilgore's] relationship with Ms. Jackson.
>
> [Y]ou talk to the siblings about it and it was clear that that's what was going on all along, [but it was] not clear to Mr. Kilgore until sometime into the relationship.

PCR. 2946.

Furthermore, concerning Mr. Kilgore's relationship with the deceased, Emerson Jackson:

> [I]t's the same kind of relationship. [] While much has been made of the [] sexual relationship, what's clear is that the more important issue is the same sort of thing, somebody who seemingly cares, making somebody with these underlying psychiatric problems feel less empty, feel somewhat more okay about themselves.
>
> What's interesting about the relationship with Mr. Jackson is [] the fact that the sexual piece of the relationship was not necessarily something that was all a part of Mr. Kilgore in his past only indicates how frantic and how needy people with these underlying problems are that they will even engage in a relationship that is not necessarily natural for them. And again, I think it was less about the sexual need as it was about the psychological need.

PCR. 2947-48.

Dr. Dudley reviewed the reports and testimony of Drs. Dee and Dr. Kremper, and does not dispute their findings with regard to mitigation stated that "the severity of them was not clear and the impact on [Mr. Kilgore's] development was not explained." PCR. 2952.

Undersigned counsel also presented the testimony of a neuropsychologist, Dr. Hyman Eisenstein, who performed a neuropsychological battery of tests on Mr. Kilgore. He testified at the evidentiary hearing as to the presence of statutory and non-statutory mitigation. *See* Testimony of Dr. Hyman Eisenstein. PCR. 2981-3086.

Dr. Eisenstein testified that Mr. Kilgore showed consistent patterns in the data of the various tests performed by various clinicians over fifteen years:

Mr. Kilgore's verbal skills are lower than his visual skills. PCR. 3006. Mr. Kilgore also performed poorly on the categories test, which indicates difficulties with higher executive functioning, including frontal lobe functions of planning, executing, strategizing and alternative problem solving skills. PCR. 3010.

Dr. Eisenstein explained that Mr. Kilgore's impaired functioning could be the result of a variety of different sources, including anoxia, metabolic conditions or brain injury, but that could not be determined from his testing. PCR. 3011.

Mr. Kilgore's score on the Halstead Categories Test was within the "brain damaged" category. PCR. 3012. On the Tactile Performance Test, Mr. Kilgore's overall time was impaired, but as significant, performance with his left hand was slower than his right, and Mr. Kilgore's second performance was slower than the first, which indicates that learning is also compromised. PCR. 3016. Mr. Kilgore's score of 48 out of 50 on the Test of Memory Malingering indicated that he was not malingering and the results are valid. PCR. 3019.

The Peabody Picture Vocabulary Test, third edition, placed Mr. Kilgore in the 53rd percentile, in the average range of receptive language skills. The Rey Complex Figure resulted in a score within normal limits. PCR. 3022. The Boston Naming Test yielded a mildly impaired score. PCR. 3025. On the Trail Making Test, Parts A and B, "a very sensitive measure of brain impairment," Mr. Kilgore scored as "profoundly impaired". PCR. 3030. Mr. Kilgore's score of 75 "is

indicative of cognitive slowness and cognitive impairment" PCR. 3029. Significantly, Dr. Ciotola's scores from several years prior yielded "almost identical" results. PCR. 3031.

Mr. Kilgore's performance on the Wide Range Achievement Test, third edition, similar to achievement tests given in schools, yielded a reading grade equivalent of 4.5, spelling equivalent of grade six, and a mathematics equivalent of grade three. PCR. 3040-42.

Mr. Kilgore's scores on the WAIS III he administered were "almost identical" to those on the WAIS-R. performed by Dr. Kremper as testified to at trial. PCR. 3046. Dr. Eisenstein testified that both Drs. Kremper and Dee performed the Denman Neuropsychology Memory Scale subtest. Dr. Kremper's report noted the discrepancy between verbal and nonverbal memory, and Mr. Kilgore's "limited intellectual ability and serious verbal memory deficit suggestive of brain dysfunction". PCR. 3052. Dr. Dee found the same discrepancy of 27 points, almost two standard deviations below the mean which Dr. Eisenstein testified was "certainly significant". PCR. 3052-53.

Simply put, Mr. Kilgore's scores on the full IQ tests administered by Drs. Eisenstein, Kremper and Dee "basically all fall within one or two points, and they are all in the borderline range. Basically, they are the same". PCR. 2492, 3057. Dr. Eisenstein has no disagreement with Dr. Dee's opinion in

1994 that both statutory mental health mitigators apply to Mr. Kilgore. PCR. 3058.

When faced with a situation where he does not possess the mental abilities to choose alternative solutions to problems, Mr. Kilgore "has only one response in his repertoire . . . he just doesn't have those abilities." PCR. 3060. In addition, "Mr. Kilgore's behavior, his neuro-behavioral pattern that he's displayed his entire life from early childhood through adulthood is consistent with frontal lobe damage, frontal lobe impairment". PCR. 3062. "Testing, clinical opinion, as well clearly the behavior and his own pattern as well as his family all demonstrate the consistency of the inability to control, to modulate and to formulate alternative strategies and opinions". PCR. 3064.

In 1994, Dr. Dee had diagnosed Mr. Kilgore with mental retardation and dementia. Dr. Dee also testified at the 2005 evidentiary hearing. PCR. 3127-82. He stated that in 1994 he "was not using the term mental retardation in the usual sense," rather, it was a description of the level of Mr. Kilgore's IQ performance. Dr. Dee admitted that did not have the necessary information to diagnose mental retardation, which would include school records, family accounts, and records of a previous diagnosis. He was "simply [] pointing out that his performance was subnormal basically, [] and that it was due to some organic brain problem" . Dr. Dee testified that trial counsel had never discussed the issue of mental retardation with him, and did not prepare his testimony at the penalty phase

regarding either retardation or dementia. Dr. Dee testified that it was his opinion that Mr. Kilgore's IQ scores did not rule out mental retardation.

Dr. Dee testified that he was not trial counsel's investigator and does not consider himself a mitigation specialist or death penalty social worker. PCR. 3145. Dr. Dee testified that his evaluation was based on Mr. Kilgore's self report, his test data, some prison medical records and the psychological evaluations that Jeff Holmes obtained in 1990 when he was counsel for Mr. Kilgore. For example, Dr. Kremper interviewed Mr. Kilgore's mother on November 2, 1989 "Ms. Spearman denied her son ever exhibited any strange, unusual or bizarre behavior suggestive of a serious mental disorder." However, Matilda Spearman, apparently said something entirely different in a December 10, 1971 Post Sentence Investigation, contradicting her 1989 statements to Dr. Kremper. The PSI indicates that, "Mother claims something is wrong with subject mentally." The 1971 PSI was admitted into evidence at the June 2005 evidentiary hearing. PCR. 504-8. This is but one example of why investigation was necessary.

Trial counsel never asked Dr. Dee to obtain any additional records or to talk to any family members or other inmates. PCR. 3146. Dr. Dee testified that he had the opportunity to review two volumes of background materials provided by postconviction counsel, which he said included:

> [A] great deal of additional information of the circumstances under which [Mr. Kilgore] grew up and a good deal of information about the

> Oakley Training School. The information on his childhood, I think fleshes out what was [pretty much] absent, a description or understanding of what it was like growing up in his family, because I really had no information on that previously. And of course, other than his statements about having been to Oakley, that's all I knew about. And your information provided a great deal of information.

PCR. 3147. Dr. Dee explained that the materials provided are the types of materials he would rely upon as a neuropsychologist in forming his opinions. PCR. 3148-49. According to Dr. Dee, trial counsel never provided any information to Dr. Dee regarding Mr. Kilgore's prior felonies that were offered by the State as aggravation, nor Mr. Kilgore's prison records, Department of Corrections intake or presentence investigation reports, or medical and psychological records. PCR. 3149-50.

Dr. Dee testified again at the January 2007 mental retardation evidentiary hearing. PCR. 3803-71. He offered his opinion that "I don't think I have ever seen a case of such dire economic and cultural deprivation in my life from any source, whether it be a capital case or any other." PCR. 3870. He answered a series of questions concerning Florida DOC Classification materials from 1971 and 1979 concerning Mr. Kilgore that he recently had reviewed, information that he was not provided with by trial counsel prior to the 1994 trial. PCR. 3820. He stated that these materials were significant in supporting his opinion concerning mitigation and mental retardation in Mr. Kilgore's case. He noted that the 1971 summary indicated that at age 20 Mr. Kilgore was reporting that he finished 5th grade and

was testing at vocabulary grade level 3.2, reading comprehension grade level 3.3, arithmetic reasoning grade 3.2 and actual computation grade level 4.7. He also found that a report from a correctional counselor concerning job placement was material in that it indicated that the counselor, when considering Mr. Kilgore's request for training in troweling (laying mortar), "said it was too complex for him, that he had no faith that he would be able to learn that, which is, of course, a low level skill occupation and it suggests that this vocational counselor thought him capable of only the simplest occupational training." He also testified that the 1971 DOC summary indicated that there were then some records from the Oakley School in Mississippi available to DOC that indicated that Mr. Kilgore reached the 4th grade at Oakley, was a good worker and did not participate in vocational training. PCR. 3821-26.

Dr. Dee testified about a 1979 DOC classification summary that he had not been provided with at trial. He found it to be relevant and material to a diagnosis of mental retardation. He agreed that Mr. Kilgore would have been 28 at the time of the 1979 summary. PCR. 3826-27. He testified that Mr. Kilgore's low level of academic achievement was also memorialized in the 1979 report. His reading vocabulary score was grade level 2.2, his reading comprehension grade level was 3.3, math reasoning was grade level 208, and math computation was grade level 4.3. The 1979 report also included, according to Dr. Dee, further affirmation from

a counselor's notes that "only the most basic vocations, road maintenance, concrete work, cement mixing and general construction helper" would be appropriate as goals for Mr. Kilgore. PCR. 3821.

Dr. Dee explained that although his findings were still consistent with his 1994 opinion, he believed the information he now had made his opinion much stronger:

> I think that the devastating conditions under which [Mr. Kilgore] grew up is something I didn't really appreciate before. He had an unusually deprived youth. Both culturally and physically, he suffered a lot of hunger, a great deal of abuse, felt and experienced a great deal of rejection at the hands of his mother and father, because of the problems they were facing I think in part. He probably experienced a great deal of neglect, which I failed to appreciate previously.
>
> And when he grew up, it is my opinion that he continued to look for the support and affection, as most of us do in a sense, in other relationships with the woman that he was involved with back in '78 that ultimately led to his conviction and life sentence. And even in his relationship with his homosexual lover there in 1989, [] its fleshed out to the point that I understand it. I think that he was really devastated by what he felt was abandonment by them, which gives me a much better understanding of what was going on in Dean Kilgore during those episodes, which I really didn't appreciate before, frankly.

PCR. 3154. Dr. Dee stated that Mr. Kilgore was not able to relay this information to him in 1994 because "he's not that articulate". PCR. 3155. As a result, Dr. Dee was unable to communicate his opinion to Mr. Kilgore's jury. He stated that "I scarcely got time to do the evaluation, much less do an investigation." PCR. 3155. The mental health expert in a capital case has a special responsibility to protect the

client's rights, and the expert violates these rights when he or she fails to provide adequate assistance. *State v. Sireci*, 502 So. 2d 1221, 1224 (Fla. 1987). The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background.

Post conviction counsel also retained a neurologist, Dr. Thomas Hyde, who examined Mr. Kilgore and who later testified at the 2005 hearing. PCR. 2742-60. He offered a medical opinion at the evidentiary hearing in support of the presence of mitigation in Mr. Kilgore's case. Dr. Hyde evaluated Mr. Kilgore on March 13, 2002. His evaluation involved interviewing Mr. Kilgore, a mental status examination, and nerve, motor gait and sensory modalities. PCR. 2747. In addition to his evaluation of Mr. Kilgore, Dr. Hyde reviewed several volumes of materials, including testing performed by a variety of practitioners (Defense Exhibits 60 and 61), MRI Scan films (Defense Exhibit 93), and an extensive handwritten note by Mr. Kilgore. PCR. 2745-46.

In Dr. Hyde's opinion as a behavioral neurologist, Mr. Kilgore by history exhibits a very limited educational background, closed head trauma, head injury as a teenager, heavy alcohol and some polysubstance abuse, and insulin-dependent diabetes. PCR. 2748.

Dr. Hyde testified that although his findings were "largely consistent" with a prior neurological evaluation, there were some significant differences. PCR. 2748.

While Dr. Greer "didn't find a whole lot on Mr. Kilgore", Dr. Hyde found that Mr. Kilgore exhibited slurred speech, poor mathematics skills and memory impairment. He also displayed poor complex motor sequencing in the hands, absent deep tendon reflexes of the ankles and a "fairly significant" peripheral neuropathy. PCR. 2748-49.

Dr. Hyde further explained that Mr. Kilgore's memory was not grossly normal and would be within the moderate range of impairment, his poor complex motor sequencing is a subtle finding seen in people with organic brain damage, particularly in the frontal lobes, and absent reflexes are consistent with neuropathy, probably of outside medical origin, consistent with Mr. Kilgore's diabetes. PCR. 2749. The damage to nerves in peripheral neuropathy is thought to be related to vascular problems and can often affect the brains of individuals with diabetes, and the cognitive process. PCR. 2750. This is the kind and quality of testimony from a medical doctor that could and should make a profound impression on a jury. *See Coney v. State,* 845 So. 2d 120, 132 (Fla. 2003) ("it is peculiarly within the province of the jury to sift through the evidence, assess the credibility of the witnesses, and determine which evidence is the most persuasive.")

E. Prejudice and not cumulative evidence in mitigation

Every life has a story. Mr. Kilgore's story is one of abuse and neglect, both at the hands of his family and in the juvenile justice system. Even though they

heard little mitigating evidence from the defense with Mr. Kilgore serving a life sentence for a prior murder, the jurors voted 9 to 3 for death. Valuable mitigating evidence was available. It would have proved a real case for life - evidence of childhood mistreatment and trauma, mental impairments, alcoholism, and serious mental and emotional disturbances. No doubt, this is evidence upon which a member of Mr. Kilgore's jury could have relied to vote for a life sentence instead of death. This evidence also undermines the aggravation - the jury would have seen that there is a mitigating explanation for Mr. Kilgore's inability to conform to the law. "Had the jury been able to place [this additional evidence] on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a difference balance."[19] As such, Mr. Kilgore is not without remedy. This Court must consider the prejudice that ensued when the jury at sentencing never had a chance to hear the evidence presented at the evidentiary hearings because of trial counsel's deficient performance.

Effective capital counsel must "conduct a thorough investigation of the defendant's background for "all reasonably available mitigating evidence."[20] In

[19] *Wiggins*, 123 S. Ct. at 2543.

[20] *Wiggins v. Smith*, 123 S. Ct. 2527, 2535, 2537 (2003) (quoting *Williams*, 529 U.S. at 389, and American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1 (1989))(second emphasis in *Wiggins*).

particular, one of the first steps counsel must take as part of a "thorough investigation of the defendant's background" is to seek "reasonably available" records about the defendant's history, including records about his "educational history," his "prior adult and juvenile record," his "prior correctional experience" and his "medical history."[21] Trial counsel admitted he failed to do so.

These standards are not new and/or promulgated by current case law. Rather, the American Bar Association Guidelines articulate "reasonable," professional "standards for capital defense work"; they are "norms" and "standards" to which the United States Supreme Court has long referred to as "guides to determining what is reasonable" under the Sixth Amendment.[22] The United States Supreme Court has reaffirmed the right of a capital defendant to the effective assistance of counsel. In the case of *Wiggins v. Smith* 123 S. Ct. 2257 (2003), the Court emphasized the principles set forth in *Strickland v. Washington*, 466 U.S. 558 (1984) , when it restated:

> We established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984)(citations omitted). An ineffective assistance claim

[21] ABA Guidelines 11.4.1 (D)(2)(c)-(d) (cited in *Wiggins*, 123 S. Ct. At 2537); see also *Wiggins*, 123 S. Ct. At 2532-33 (counsel ineffective for failing to develop social history from "social services, medical, and school records, as well as interviews with petitioner and numerous family members"); *Williams*, 529 U.S. at 395-96 (counsel ineffective for failing to obtain defendant's juvenile records).

[22] *See*, *Wiggins*, 123 S. Ct. At 2536-37 (citing *Strickland*; *Williams*).

> has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Id.*, at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688.(*Wiggins v. Smith*, 123 S. Ct. 2527, 2535).
>
> The Supreme Court further held that counsel has:
>
> > [A] duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland,* 466 U.S. at 668 (citation omitted).

Mr. Kilgore has proven both deficient performance and prejudice at the evidentiary hearing, undermining the adversarial testing process at trial.

Much of Mr. Kilgore's claim of ineffective assistance of trial counsel at the penalty phase rests on the failure by trial counsel to investigate and present mitigation that was available. What was presented in post conviction demonstrates a much richer mix of expert opinion in support of statutory mitigation that should have been heard by the jury that voted nine to three for death.

Specifically, the jury should have heard Dr. Dudley’s testimony that Dr. Ainsworth’s opinions were vague and based only on self-report, that Mr. Kilgore suffers from borderline personality disorder, that Mr. Kilgore has been impacted by institutionalization from the age of 12 when he entered Oakley, and that Mr. Kilgore’s relationship with Barbara Ann Jackson had many things in common with his relationship with the victim in the instant case, Emerson Jackson.

The jury should have heard Dr. Eisenstein’s testimony that there was a

consistent pattern of data that emerged from all the testing of Mr. Kilgore over many years that confirmed that he is brain damaged, frontal lobe damaged, suffers from depression, brain dysfunction, and has a low IQ in the mildly mentally retarded to borderline range.

The jury should have heard Dr. Dee's testimony that he had no background information on Mr. Kilgore in 1994 and really could not diagnose mental retardation and that trial counsel never even discussed the issue with him. The jury should also have heard his testimony that he had little information about Mr. Kilgore's childhood, and was not provided by trial counsel with available PSIs or DOC classification information that would have supported his opinion in 1994. And they certainly never heard his opinion that Mr. Kilgore's case was the worst he had ever seen of "dire economic and cultural deprivation." Finally, the jury never heard a medical doctor, a neurologist like Dr. Hyde, testify that Mr. Kilgore had possible organic brain damage and frontal lobe problems that he diagnosed based on a neurological exam that revealed poor complex motor sequencing and peripheral neuropathy.

Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. *Williams v. Taylor*, 120 S. Ct. 1495, 1524 (2000).[23] *See also Id.* at 1515 ("trial

[23] The Supreme Court granted relief to Mr. Williams, the first time the Court

counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); *State v. Riechmann*, 777 So. 2d 342 (Fla. 2000) ("an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence"). "It seems apparent that there would be few cases, if any, where defense counsel would be justified in failing to investigate and present a case for the defendant in the penalty phase of a capital trial." *Id.* While an attorney is not required to investigate every conceivable avenue of potential mitigation. The Supreme Court has emphasized that:

> In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of known evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.

Wiggins v. Smith 123 S. Ct. 2527, 2538 (2003). Furthermore:

> Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation.

Id. at 2539, citing *Strickland*, 466 U.S. at 690-691.

A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to the proceeding. *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of

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has granted relief on the basis of ineffective assistance of counsel as to the penalty phase of a capital case. As demonstrated at the hearing and in this memorandum, Mr. Kilgore's case is even stronger than Mr. Williams' and his entitlement to relief is clearly established under the *Williams* decision.

[the defendant's] state of mind." *Blake v. Kemp*, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." *United States v. Fessel*, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, *see O'Callaghan v. State*, 461 So. 2d 1354 (Fla. 1984), and to assure that the client is not denied a *professional and professionally conducted* mental health evaluation. *See Fessel*; *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991); *Mason v. State*, 489 So. 2d 734 (Fla. 1986); *Mauldin v. Wainwright*, 723 F.2d 799 (11th Cir. 1984).

The sentencing order of the trial court found that the capital felony was committed while Mr. Kilgore was under the influence of extreme mental or emotional disturbance and that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. PCR. 2019-23. The order also noted that Mr. Kilgore's IQ was "borderline range or less", but concluded that "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." PCR. 2022.

The findings in the trial court's sentencing order simply gave little weight to

Dr. Dee's report (PCR. 284-289) and trial testimony that Mr. Kilgore was brain damaged, that there had been pathological deterioration since 1989, that he might be mentally retarded, that he had organic brain disease, and that his severe emotional disturbance was organic brain syndrome. PCR. 284-89; PCR. 1588-1626.

The trial court was wrong when it sentenced Mr. Kilgore to death even when finding the two statutory mental health mitigating circumstances, but finding that they were unconnected to the underlying offense. Trial counsel's mitigation investigation did not need to focus on the facts of the murder or on Mr. Kilgore's culpability or motive. The requirement of such a nexus between the mitigation and the crime has been rejected in *Tennard v. Dretke*, 124 S. Ct. 2552 at 2571 (2004). Specifically, no nexus between the handicap and the crime itself is required.

A proper prejudice analysis focuses on the impact the unpresented mitigation, along with that presented at the penalty phase, might have had on *the jury* hearing the case. This Court's focus should be on "whether the nature of the evidence is such that *a reasonable jury* may have believed it." *Light v. State*, 796 So. 2d 610, 617 (Fla. 2d DCA 2001) (emphasis added).

In Mr. Kilgore's case, the prejudice is apparent. *See Williams v. Taylor*, 120 S. Ct. 1495 (2000), in which the Supreme Court granted relief based on ineffective assistance of counsel because " . . . the graphic description of [Mr. Kilgore's]

childhood, filled with abuse and privation . . . might well have influenced the jury's appraisal of his moral culpability." *Williams v. Taylor*, 120 S. Ct. 1495 at 1515. A proper analysis of prejudice to Mr. Kilgore in the instant case entails an evaluation of the totality of available mitigation -- both that adduced at trial and the evidence presented at the evidentiary hearing. *Id*. at 1515. "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990) (citing *Lockett v. Ohio*, 438 U.S. 586 (1978)).

In order for trial counsel to have made a strategic decision to present Dr. Dee as a credible mitigation witness at sentencing, it was necessary that he have an understanding of what mental retardation is, to have done the investigation necessary to support the three prongs of the mental retardation definition, and to then have then taken sufficient time and care to prepare Dr. Dee to explain to the jury and the trial court in a credible and comprehensive fashion why Mr. Kilgore met the definition of mental retardation. Trial counsel’s failure to take any of these basic steps negates any excuse of "strategy" for his presentation of Dr. Dee. No matter how qualified and learned an expert may be, the failure to select, prepare and examine the expert properly can undermine the credibility of the expert. Mr. Alcott's use of Dr. Dee was deficient performance. *See* Testimony of

Dr. Henry Dee, PCR. 3127-82.

The prejudice to Mr. Kilgore resulting from trial counsel's deficient performance and Dr. Dee's unsubstantiated testimony is clear. The jury voted nine to three for death and, although the trial court found both statutory mental health mitigating factors and noted consideration of non-statutory mitigation, the trial judge gave the mitigation he found very little weight and sentenced Mr. Kilgore to death.

The numerous experts who have undertaken mental health evaluations of Mr. Kilgore over the years had their reports, depositions and testimony made a part of the record included in Defendant's exhibits 60 & 61 below. When combined with the testimonies in June 2005 of Drs. Dudley, Hyde, Eisenstein and Dee, the totality of the evidence in support of a life recommendation and sentence was more than cumulative.[24] Both the record of Mr. Kilgore's penalty phase and the evidence

[24] Defendant's Exhibits 60 & 61 found at PCR. 1420 include: R.K. Rogers, psychologist report of 3/09/71; Jorge L. Sierra psychological technician report of 5/26/76; L. Roque Ramos, M.D., report of 9/17/76; G.C. Omer III, Psy. Spec., report of 1/02/79; William G. Kremper, Ph.D., 1989 psychological evaluation and testimony at the penalty phase; Alan Gessner, Ph.D. letter of 1/16/90; Gary Ainsworth, M.D., evaluation of 1/19/90 and 1990 testimony; P.V. Ciotola, Ph.D., report of 3/14/90; Melvin Greer, report of 3/20/90; outpatient notes and 8/2/93 notes from Steven C. Wiggins, Ph.D.; Henry L. Dee, Ph.D., report of 4/4/94 and 1994 testimony; Dr. Burt Kaplan, report of 12/12/78; 1989 outpatient notes from Martin Correctional; Thomas McClane, M.D., psychiatric evaluation of 12/31/92; Henry L. Dee, Ph.D., raw data of October 2004; Hyman Eisenstein, Ph.D., raw data of 8/23/00; and, MRI report of 4/10/02.

presented at his evidentiary hearing reveal trial counsel made a "less than complete investigation" and that his omissions were the result of either no strategic decision at all, or by a "strategic decision" that was itself unreasonable, being based on inadequate investigation. As a result, counsel's performance was deficient, with regard to the social history and mental health evidence.

The standard that this Court should utilize regarding the evidence which trial counsel should have investigated and presented, but failed to do, is whether the totality of the evidence and testimony presented at the evidentiary hearings would have made a difference to *the jury*. In order to properly assess prejudice, the Court must consider the "totality of available mitigating evidence" offered both at the penalty phase and the post-conviction hearing. *Wiggins v. Smith* , 123 S. Ct. 2527, 2542 (2003). If "the mitigating evidence, taken as a whole, '*might well have influenced the jury's appraisal*' of [the defendant's] moral culpability," *Wiggins*, 123 S. Ct. at 2544 (emphasis added), then prejudice has been shown.

A wealth of compelling mitigation was never presented to the jury charged with the responsibility of whether Mr. Kilgore would live or die. Important, necessary, and truthful information was withheld from the jury, and this deprivation violated Mr. Kilgore's constitutional rights. *See Penry v. Lynaugh*, 109 S. Ct. 2934 (1989); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

A rich cultural tapestry of Mr. Kilgore's blighted early years which was revealed in detail at the evidentiary hearing through Professor Jimmy Bell and the family and friend witnesses must be considered by this Court along with the additional evidence adduced at the evidentiary hearing concerning Mr. Kilgore's impaired mental status. Drs. Dudley, Hyde, Eisenstein, and Dee testified in detail about Mr. Kilgore's frontal lobe brain damage, borderline personality disorder, and borderline to mild mental retardation level intellectual functioning which were all exacerbated by his diabetes and substance abuse. Had all the available mitigation been properly investigated and presented, Mr. Kilgore would have received a life sentence.

A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to the proceeding. *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985). Mr. Kilgore was also denied his rights under *Ake v. Oklahoma* at the guilt and penalty phases of his capital trial, when counsel failed to obtain an adequate mental health evaluation and failed to provide the necessary background information to the equal protection under the Fourteenth Amendment to the united states constitution mental health consultant in violation of Mr. Kilgore's rights to due process and, as well as his rights under the Fifth, Sixth, and Eighth Amendments.

Under the circumstances at trial it was inappropriate for Dr. Dee to diagnose

Mr. Kilgore as mentally retarded and for Mr. Alcott to present testimony to that effect. Mr. Kilgore did not meet the standards then in place for a diagnosis of mental retardation. There was no investigation into adaptive functioning. There was no investigation of Mr. Kilgore's age of onset. Trial counsel failed to investigate Mr. Kilgore's family history in Mississippi and made no attempt to collect any records including childhood records from Mississippi during the pendency of his case from 1989 to 1994. Ergo, Trial counsel was incapable of presenting a mental retardation case at trial through Dr. Dee or otherwise. The failure to do so prejudiced Mr. Kilgore where the jury never heard a full accounting of his human frailties.

ARGUMENT III

THE LOWER COURT ABUSED ITS DISCRETION IN FINDING THAT THE ASSESSMENT AND EVALUATION OF MR. KILGORE'S MENTAL DEFICIENCY, THE FIRST PRONG OF THE REQUIREMENTS FOR MENTAL RETARDATION, REQUIRES THAT MR. KILGORE'S FULL SCALE IQ BE 70 (SEVENTY) OR BELOW. THIS RESULTED IN A VIOLATION OF MR. KILGORE'S RIGHTS UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT AS WELL AS THE EIGHTH AMENDMENT'S PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT.

A. Mr. Kilgore's IQ scores meet the standard for mental retardation pursuant to *Atkins*

The testimony presented at Mr. Kilgore's evidentiary hearings, pursuant to Fla. R. Crim. P. 3.203(e)(2005), supports a ruling from this Court finding

Mr. Kilgore mentally retarded. An individual with an IQ score of above 70 may still meet the criteria for mental retardation under *Atkins*. For purposes of this appeal, the issue of whether Appellant was mentally retarded issue was disposed of in the lower court's order of November 26, 2008, based on the lower courts review of the history of IQ testing in Mr. Kilgore's case. PCR. 5162-77.

Drs. Eisenstein, Dee and Gamache all testified at the mental retardation evidentiary hearing in 2005. Including the four IQ tests given to Mr. Kilgore by the three testifying psychologists, there were a total of six different IQ tests administered to Mr. Kilgore from 1989 until 2006, resulting in scores of: WAIS-R full scale IQ score of 76 obtained on August 22, 1989 (Dr. Kremper), WAIS-R full scale score of 84 obtained on March 14, 1990 (Dr. Ciotola), WAIS-R prorated full scale score of 67 obtained on March 15, 1994 (Dr. Dee), WAIS III full scale score of 75 obtained on August 23, 2000 (Dr. Eisenstein), WAIS III full scale score of 74 obtained in October 2004 (Dr. Dee), and a WAIS III prorated full scale score of 85 obtained on May 23, 2006 (Dr. Gamache). PCR. 2492. The lower court's order denying relief found:

> 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 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 neurolopsychological evaluation.[25] (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 other two prongs of the mental retardation determination.") As such, no relief is warranted on Defendant's *Atkins* claim.

PCR. at 5165-66.

The Florida Legislature promulgated Fla. Stat. § 921.137 (1) (2005)[26], which

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[25] Whatever the significance of the lower court's observation about the purpose for which Dr. Dee's 1994 IQ testing was directed, it should be noted by this Court that neither Dr. Kremper's 1989 evaluation resulting in a full scale WAIS-R IQ of 76 score nor Dr. Ciotola's 1990 DOC evaluation resulting in a full scale WAIS-R IQ score of 84 were part of a mental retardation evaluation. And as is argued elsewhere, Dr.Citola's testing was undertaken only six months following Dr. Kremper's testing, raising concerns about the possible impact of the "practice effect" on the reliability of the later scores.

[26] Mr. Kilgore's Mental Retardation claims, filed in 2002 and 2005, are properly reviewed under this definition, rather than that of the 2006 Amendment which now provides for regulation by the Agency for Persons with Disabilities. The regulation still recommends the WAIS or Stanford-Binet intelligence tests as the preferred instruments.

defines mental retardation as follows:

> Imposition of the death penalty upon a mentally retarded defendant prohibited.
>
> (1) As used in this section, 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 section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services. The term “adaptive behavior,” for the purpose of this definition, 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. The Department of Children and Family Services shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

When this Court issued Fla. R. Crim. P. 3.203 (b)(2005), it provided a vehicle for bringing a claim on mental retardation (Fla. R. Crim. P. 3.203(c) and (d)) and a method of reviewing its merits in circuit court (Fla. R. Crim. P. 3.203(e)). These provisions apply to Mr. Kilgore’s claim of mental retardation, as *Atkins* is retroactive in Florida. *See Phillips v. State*, 894 So. 2d 28 (Fla. 2004).

Neither Florida Statute § 921.137 (2005) nor Fla. R. Crim. P. 3.202 (2005) themselves contain a literal absolute cutoff score of 70 or below for a diagnosis of mental retardation in Florida. Rather, both Florida’s Statute and Rule concerning mental retardation mirror the definitions by the AAIDD and the APA, which were approved by the United States Supreme Court in *Atkins*, by referring to two or

more standard deviations from the mean score on a standardized intelligence test. However, this Court has held that there is a bright line rule in Florida such that an IQ score or 70 (exactly two standard deviations below the mean score of 100) or below is required for a determination of mental retardation in the capital punishment context. *Cherry v. Florida*, 959 So. 2d 702, 712-714 (Fla. 2007) ("The fundamental question considered by the circuit court and raised in this appeal is whether the rule and statute provide a strict cutoff of an IQ of seventy in order to establish significantly subaverage intellectual functioning")("[W]e concluded that competent, substantial evidence supports the circuit court's determination that Cherry does not meet the first prong of the mental retardation determination. Cherry's IQ score of 72 does not fall within the statutory range for mental retardation, and thus the circuit court's determination that Cherry is not retarded should be affirmed.").

As a function of statistics, a WAIS-III score of 65 to 75 points is clearly within the domain of two standard deviations below the mean. This position is supported by the American Psychological Association, the American Association on Intellectual and Developmental Disabilities (formerly the American Association on Mental Retardation), the American Psychiatric Association and the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("a Wechsler IQ of 70 is considered to represent a range of 65-75" (DSM-IV, p. 39)). In addition, the United States Supreme Court adopted a score of 75, based upon the DSM-IV

definition, when deciding *Atkins v. Virginia*. *See Atkins*, 536 U.S. 304, 309 at n. 3 (2002).

Therefore, under *Atkins*, the guideline IQ score sufficient for showing subaverage intellectual functioning is 75 or below. Mr. Kilgore meets the equivalent of this requirement, or in the alternative, his learning disabilities, borderline IQ range, and mild brain damage show that he functions at subaverage intelligence level, or at the equivalency of a mentally retarded individual. In 1994, Dr. Dee testified at the penalty phase that Mr. Kilgore had an estimated full-scale IQ of 67 on his short-form Wechsler Adult Intelligence Scale- Revised (WAIS-R), thereby placing Mr. Kilgore well within the mentally retarded range of intellectual functioning. Dr. Dee failed to opine at trial either about age of onset or adaptive functioning and was never asked by trial counsel to do a mental retardation evaluation.

The additional IQ testing undertaken in 2000 and 2004 by Drs. Eisenstein and Dee supports the intellectual impairment prong of the definition of mental retardation under *Atkins* based on their findings of a full scale IQ scores of 74 and 75. PCR. 2991-3002, 3058, 3066, 3142-43. *See United States of America v. Earl Whitley Davis,* (United States District Court for the District of Maryland, Case RWT-07-0199) Memorandum Opinion of April 24, 2009 at 48 ("As to intellectual capacity, the defendant has a well-documented and consistent history on

intellectual functioning that brings him within the heartland of mild mental retardation. His full scale IQ scores have consistently been within the established range for mild mental retardation (taking into account the standard error of measurement), even without application of the Flynn effect."). *See also United States of America v. Shannon Shields,* (United States District Court for the Western District of Tennessee, Case No. 04-20454) Order of May 11, 2009 at 22 ("Of course, of Defendant's five full scale scores on Wechsler IQ test, his "best performance " is still a 73 – within the standard margin of error for a score of approximately 70 or below.").

B. Findings regarding the other two prongs below

The lower court failed to make any findings about the two other prongs of the mental retardation definition. PCR. 5166. The evidence presented below showed that Mr. Kilgore was always considered a slow child and a "bit retarded" by his siblings while growing up in rural Mississippi. Living in a family of poor, uneducated sharecroppers, schooling was considered unimportant compared to working and earning money for the fifteen-member family. This brief includes a basic overview of the evidence presented below in support of Mr. Kilgore's adaptive functioning deficits and onset before the age of eighteen.

Mr. Kilgore's formal education was intermittent at best, and very limited school records were obtained from the Mississippi Department of Education,

Calhoun County and Grenada County. PCR. 2550-2558. At the age of twelve, Mr. Kilgore was sent to the Oakley Training School for Boys as punishment for being caught stealing food. Oakley School was considered more of a work camp; notorious for extreme human rights violations and sub-human conditions imposed on juveniles. Although Mr. Kilgore reported receiving some education from the Oakley School, no records currently exist for Mr. Kilgore, or any of the other residents housed there during the 1940's-1970s. *See* Testimony of Professor Jimmy Bell, PCR. 2539-2642. What was presented below concerning Mr. Kilgore's mental development prior to the age of eighteen comes from interviews and testimony of his family members, friends and contacts and Mr. Kilgore's own self reporting.[27]

Significant medically and legally recognized indicia of subaverage

[27] Volume II was entered into evidence at PCR. 2600 at the June 2005 evidentiary hearing. It includes detailed interviews with: Dean Kilgore's late brother M.C. Kilgore, brothers Bobby Gene Kilgore and Elbert Kilgore, sister Dorothy Kilgore Speight and former girlfriend Barbara Ann Jackson, who appeared in some role in almost all of Mr. Kilgore's prior felony convictions (all of these witnesses were interviewed in Lakeland, Florida); his incarcerated brother Jimmy Dean Kilgore; a host of people from Mississippi, including Mr. Kilgore's brother in Big Creek, Mississippi, Paul Kilgore and his wife Janie Roseman Kilgore, former Oakley Training School employees Charlie Stamps, Annie Stamps, and Geraldine Howard, and Donald and Evelyn James and Alfred Parker, the children of the deceased white landowners upon whose land the Kilgores sharecropped in the 1950s; and Mr. Kilgore's fellow Oakley Training School inmate Charlie Thompson. As noted *supra*, Jimmy Dean Kilgore, Elbert Kilgore, Dorothy Speight Kilgore and Charlie Thompson all testified at the June 2005 evidentiary hearing.

intellectual functioning are abundant. For example, Mr. Kilgore reported that upon being sent to the Oakley Training School in 1964, he was placed in the second grade. This was despite the fact that Mr. Kilgore was 12 at the time of initial placement. Mr. Kilgore reported that at the time he left Oakley at the age of 15, he had not completed the fourth grade. Furthermore, Mr. Kilgore reported that he did not know how to read until early adulthood. Mr. Kilgore, frustrated that he had to have others read for him, learned to read in prison. Mr. Kilgore noted that this took him a little over three years to do so. In discussing their brother's development and mental abilities, Mr. Kilgore's siblings noted that Dean "never seemed to understand" despite being told repeatedly. This inability to comprehend covered every aspect of every dealing with Mr. Kilgore, from why the family had to work to why he had to wait until the adults finished eating before it was his turn. Additionally, Mr. Kilgore's family noted that he often "acted like a baby", was "very immature", and seemed to get frustrated very easily. Mr. Kilgore's mother often beat him, trying to "get him to do right." Despite punishment, Mr. Kilgore would repeat the same offense and "not seem to learn."

Mr. Kilgore's disability originated before age 18. Multiple reports from family members show that Mr. Kilgore's subaverage intellectual functioning and deficits in adaptive behavior begin from conception and continued through age 18.

Mr. Kilgore meets the third prong of a mental retardation diagnosis, as his

disability was evident, yet undiagnosed, prior to the age of 18. All of the information from every source indicated that Mr. Kilgore's cognitive, intellectual, and adaptive deficits are longstanding. As testified to by Dr. Eisenstein, Dr. Dee, and the expert recommended to the lower court by the State, Dr. Gamache, Mr. Kilgore was not malingering and was trying his best on the tests administered to him. This is evidenced in Mr. Kilgore's score on the Test of Memory Malingering (or the "TOM") which Dr. Eisenstein testified as showing "[Mr. Kilgore's] performance is a true reflection of his true abilities." PCR. 3722, 3782. Thus, Mr. Kilgore was in no way attempting to circumvent his sentence by feigning mental retardation as an adult. The evidence supports that Mr. Kilgore is, and always has been, mentally retarded.

The testimony below of mental health experts Dr. Hyman Eisenstein and Dr. Henry Dee supports a finding that Mr. Kilgore meets the mental retardation standard, or in the alternative, he suffers from an equivalent and equally paralyzing affliction that renders him ineligible for the death penalty. Thus, it is clear that under the United States Constitution, Florida Constitution, and Florida Statutes, the State cannot legally execute Mr. Kilgore.

C. Testimony of Dr. Hyman Eisenstein

Dr. Hyman Eisenstein was appointed upon the lower court's order "to conduct a comprehensive psychological evaluation and to assess whether or not the

defendant, Mr. Kilgore, was indeed- - meets the criteria for mental retardation." PCR. 3681. Dr. Eisenstein was requested by defense counsel to perform Mr. Kilgore's evaluation, due in large part to his educational background, his board certification in neuropsychiatry, and his experience throughout the State with intelligence testing and mental retardation evaluations[28]. PCR. 3680-81. Additionally Dr. Eisenstein, as testified to at Mr. Kilgore's mental retardation hearing, has a history of evaluating Mr. Kilgore and had developed a rapport with him. PCR. 3690

He testified at the January, 2007 evidentiary hearing[29] that Dean Kilgore met the State of Florida's diagnosis criteria for being mentally retarded. There are a number of definitions of mental retardation which are broadly similar although not identical. However, all of the definitions require three basic elements: low intelligence, impaired adaptive functioning, and onset before age 18.

Dr. Eisenstein tested Mr. Kilgore's intellectual functioning by administering the Wechsler Adult Intelligence Scale, Third Edition ("WAIS-III")[30] on August 23,

[28] In fact, the State stipulated to having Dr. Eisenstein come in as an expert on mental retardation. PCR. 3680.

[29] In addition to his formal report to the lower Court, Dr. Eisenstein testified numerous times at Mr. Kilgore's evidentiary hearing that he found Mr. Kilgore to meet Florida's diagnosis of mental retardation. *See* PCR. 6, 17, 40, 67-69, 2481-88.

[30] The WAIS-III is one of the two tests identified by the Department of Children and Families to be used in testing for mental retardation in the State of

2000. PCR. 3692. Through this administration, Mr. Kilgore obtained a full scale IQ score of 75 which Dr. Eisenstein considered to be a valid score meeting the first prong of a mental retardation diagnosis. PCR. 18, 19, 47-48. Dr. Eisenstein's diagnosis is consistent with the United States Supreme Court's decision in *Atkins* where it is clearly stated that "an IQ between 70 and 75 is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Atkins*, 536 U.S. at 309 n.5 (2002).

Mr. Kilgore's IQ of 75 puts him within the "lower fifth of the general population" or, in other words, that "95 percent of the population scores better than an IQ of 75." PCR. 18. However, as Dr. Eisenstein testifies, the scoring is "not a perfect science, obviously, and there's a lot of different factors as to how one takes the test and how one scores the test and how one is - - how one actually is performing on the test." PCR. 3696. These factors comprise the WAIS-III's "confidence intervals" which Dr. Eisenstein testified means the "discrepancy of that particular score that could be approximately five points above or five points below the IQ, the obtained IQ score. *Id*.

As Dr. Eisenstein testified, Mr. Kilgore has been a "well tested individual, to say the least." PCR. 3691. This is problematic, as Dr. Eisenstein explained: "There

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Florida. In addition to administering the WAIS-III in its entirety, Dr. Eisenstein also administered two of the three optional sub-tests. PCR. 3754-56.

is what's called a practice effect. And when you take the same test and you re-administer it over and over and over, so it loses it's effect to really accurately assess IQ. It's overlearned." PCR. 3700.

Further, Dr. Eisenstein noted that practice effect can occur despite any positive or negative feedback from an administrator. PCR. 3788. He testified that of the four full scale IQ tests administered and the two partial IQ tests administered[31], there is a convergence of data which supports Mr. Kilgore's "diagnosis of mental retardation based on the IQ score with the confidence intervals." PCR. 3699.

Dr. Eisenstein acknowledged in his testimony that two of the six IQ scores (not Dr. Dee's 1994 score) obtained in Mr. Kilgore's case were outlying numbers, as they were higher scores which did not comport with a mental retardation diagnosis. Dr. Eisenstein testified that in his opinion, Dr. Ciotola's 1990 WAIS-R administration was invalid due to admitted "practice effect"[32] and that Dr. Michael

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[31] As discussed *supra*, Dr. Eisenstein consulted with Dr. Henry Dee who also administered IQ testing with Mr. Kilgore. Specifically, Dr. Eisenstein questioned Dr. Dee's 1994 pro-rated score which found Mr. Kilgore to have an IQ of 67. In contrast to Dr. Gamache, Dr. Dee tested Mr. Kilgore in search of neurological damage. Dee's testing "wasn't for the determination of IQ or certainly not for mental retardation." PCR. 3780. Thus, Dr. Dee's prorated score can be accepted within professional norms for the limited purpose he which he was using it. This testimony was not taken into account in the lower court's findings.

[32] Dr. Eisenstein testified that "Dr. Ciotola, who administered the WAIS-R approximately within six months of Dr. Kremper, mentioned in his report that the

Gamache's 2006 administration was invalid for numerous reasons. PCR. 3700-03, 3744, 3757, 3773-76, 3785-86. Overall, Dr. Eisenstein believed these scores were invalid based on their non-compliance with professional norms of administration within the IQ testing arena. PCR. 3757. The scores obtained by Ciotola and Gamache, Dr. Eisenstein testified, are "not reflective of where his (Mr. Kilgore's) true IQ scores really fall." PCR. 3734.

Dr. Eisenstein also testified that Mr. Kilgore's adaptive skills were impaired "in several domains that are required for the adaptive functioning skills." PCR. 3724. In making this diagnosis, Dr. Eisenstein relied upon a variety of sources of information: Mr. Kilgore's own self reporting, the descriptions by family members in face-to-face interviews about Mr. Kilgore when he was a child and young adult, the testimony and written interviews of other family members and Mr. Kilgore's schoolmate while at Oakley Training School, and by reviewing a variety of Mr. Kilgore's records contained within his Department of Correction files that were not available to the experts at trial. PCR. 3725-28.[33]

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full-scale IQ that he obtained, 84, may indeed be because of practice effect because of the fact that the test had just been administered and it was familiar, the items are familiar to the individual." PCR. 3701. Dr. Eisenstein testified further regarding the reliability of Dr. Ciotola's score: "He himself says it may be inflated because of practice effect. So I think that that score can probably be somewhat discounted on his own credibility, his own testimony to the fact that due to practice effect, it may have been inflated." PCR. 3701-02.

[33] Dr. Eisenstein testified that he chose not to administer tests for measuring

Impairment in adaptive skills/behavior requires an examiner to determine if the subject has "incurred deficits or impairment in present adaptive functioning." PCR. 3723. As Dr. Eisenstein testified, the DSM-IV-TR requires a review of "the person's effectiveness for meeting the standards expected by 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." *Id.* As testified by Dr. Eisenstein, he found that "Mr. Kilgore was impaired in several domains that are required for the adaptive functioning skills." *Id.* This testimony is corroborated in Dr. Eisenstein's report where he found Mr. Kilgore lacking in five (5) areas. This is three (3) additional deficits found than required for a mental retardation diagnosis.

Dr. Eisenstein also testified about the third prong of the mental retardation definition regarding the onset of Mr. Kilgore's mental retardation prior to age 18 This was another issue that the lower court did not reach in light of its finding that Mr. Kilgore's IQ did not meet the standard for mental retardation.

Mr. Kilgore, through the testimony of Dr. Eisenstein, has shown that the onset of his low IQ and adaptive deficits occurred before the age of 18.

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adaptive skills (such as the Vineland, the SIB-R, or the ABOSC) to corrections officers as the tests "really serve no purpose" as they are not normed to the prison population and are inapplicable to someone who is institutionalized. PCR. 3733.

Dr. Eisenstein's testimony supports that deficits in Mr. Kilgore's functioning were developmental, and not due to "serious head trauma or head injuries or psychological disorders or some other illness" which would contribute to a different diagnosis. PCR. 3790-91. Dr. Eisenstein testified, a retrospective diagnosis is "perfectly acceptable" when an individual with mental retardation did not receive an official diagnosis of metal retardation during the developmental period. PCR. 3683.[34]

Due to lack of documentation for Mr. Kilgore's childhood and adolescent years, Dr. Eisenstein utilized a retrospective diagnosis. Dr. Eisenstein defined what a retrospective diagnosis is, and denoted its use in Mr. Kilgore's case as making "a diagnosis of mental retardation based on current information and then compare it or go back in time to onset before age 18." PCR. 3787

In conducting his retrospective diagnosis, Dr. Eisenstein not only interviewed Mr. Kilgore but also interviewed family members[35], reviewed the

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[34] The American Association on Intellectual and Developmental Disabilities ("AAIDD" f.k.a. American Association on Mental Retardation) has published information on the use of retrospective diagnosis when there was no prior diagnosis. Specifically, the AAIDD contemplate the use of retrospective diagnosis in "sentencing eligibility questions such as those related to the recent *Atkins* (2002) case." AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, USER GUIDE: MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 17 (2007). *See also*, PCR. 3742-43; 3788-89.

[35] As noted on cross-examination, Dr. Eisenstein interviewed family

testimony of family members as well as family interview statements, reviewed reports of other psychological and psychiatric evaluations, medical records, and Mr. Kilgore's Department of Corrections records to determine "how Mr. Kilgore is functioning." PCR. 3691, 3736-38. The exhaustive list of materials included in Dr. Eisenstein's review are noted within his report.

D. Testimony of Dr. Henry Dee

Dr. Henry Dee is a Lakeland-based psychologist with a specialty in neuropsychology. He testified as a defense witness at the 1994 penalty phase, then later testified at Mr. Kilgore's postconviction evidentiary hearing in 2005. Dr. Dee's testimony was offered at Mr. Kilgore's mental retardation evidentiary hearing in 2007 in support of Dr. Eisenstein's finding of low IQ, and to verify the history of low IQ scores obtained by Mr. Kilgore over the years, he also affirmed Dr. Eisenstein's ultimate diagnosis. PCR. 3803-71.

During his testimony, Dr. Dee advised the court that he had undertaken no additional interviews or testing of Mr. Kilgore since 2005. He stated that he had reviewed the reports of Drs. Eisenstein and Gamache and had also spoken for an

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members Raymond Kilgore, Earlene Cason, Dorothy Speight and Elbert Kilgore in person to obtain information about Mr. Kilgore. PCR. 3752-53. At the time of his interview with Mr. Kilgore's family members, no one knew that a mental retardation hearing would be granted. Thus, the family members were "not keened into the fact that (Dr. Eisenstein) was looking for impairment in adaptive functioning." PCR. 3768-69.

hour by telephone with Dr. Eisenstein. PCR. 3804. During his 2007 testimony, Dr. Dee recalled that in 1994 his diagnostic impression was that Mr. Kilgore presented with mental retardation, mild dementia, related to Mr. Kilgore's diabetes. PCR. 3805. He explained that this 1994 diagnosis was based largely on Mr. Kilgore's physical condition and his self-report because he had no other records to speak of. PCR. 3806. He thus believed that Mr. Kilgore's apparent mental deficiency was the result of microangiopathy encephalic vascular disease based on advanced diabetes. Id.

Dr. Dee briefly reviewed his own IQ testing of Mr. Kilgore, beginning with his short form WAIS on March 14, 1994 on which Mr. Kilgore obtained an estimated full-scale IQ of 67. PCR. 3807. He stated that his opinion was that this result is an accurate estimate of Mr. Kilgore's full scale IQ because it correlates with his Denman memory scale results and because there is substantial research supporting the accuracy of the short-form WAIS (not the WAIS-R or WAIS III) as a predictor of the full scale IQ score. PCR. 3808-3830-31.[36] Dr. Dee testified that the purpose of his testing in 1994 was not a mental retardation evaluation, but rather was as a part of a neuropsychological evaluation. He also noted that dementia is simply a decline in estimated general intellectual functioning and that

[36] Dr. Dee also agreed that his October 2004 WAIS -III testing of Mr. Kilgore obtained a full scale IQ score of 74. PCR. 3807.

there is no inconsistency with Mr. Kilgore presenting a dual diagnosis of dementia along with mental retardation. PCR. 3809-10.

Dr. Dee testified that previously he never had enough information about Mr. Kilgore's adaptive functioning to opine about whether he met the three prong definition of mental retardation. He further stated that after reviewing Dr. Eisenstein's report and discussing it with Dr. Eisenstein, he now could offer an opinion: "[W]ell, there is nothing that he found or I found that is inconsistent with [mental retardation]. It appears to fit the three-prong criteria that we use, low IQ seen before age 18 or actually age 15, I think was the original determination, and deficits in adaptive functioning in two or more areas." PCR. 3815.

Dr. Dee then briefly explained the concepts of confidence interval and the standard error of measurement as they related to administration of the WAIS III and Stanford-Binet. PCR. 3816-19. He also noted that there was no good reason that he could think of for not using the Stanford-Binet IQ test instead of the WAIS III except that the scores on the low end tend to come out lower using the Stanford test. PCR. 3819.

Dr. Dee testified that Mr. Kilgore's adaptation to the maximum security prison environment was not relevant to a determination of mental retardation. He stated that: "No level of adaptive functioning is required in that situation. So I don't think one can really do an adequate assessment of that. You have to look at what

they did before, since as I said, there's no way to assess in a prison setting, especially on death row." PCR. 3828. Dr. Dee testified that he also agreed with Dr. Eisenstein that practice effect probably explains some of the outlying high WAIS scores obtained by Mr. Kilgore on testing by Dr. Ciotola and Dr. Gamache. PCR. 3830-32, 3834-37.

E. Dr. Gamache's findings

At the recommendation of the State, the lower court appointed Michael Gamache, Ph.D., to evaluate Mr. Kilgore and render an opinion as to whether Mr. Kilgore is mentally retarded. Dr. Gamache's report and testimony detail his procedures and findings. PCR. 3981-4066 (Report is State Exh. 1). Dr. Gamache based his opinions on his evaluation of Mr. Kilgore on May 23, 2006, and the review of records provided by the State Attorney. Dr. Gamache concluded that "Mr. Kilgore does not meet the statutory criteria for mental retardation." Dr. Gamache did no adaptive functioning work-up.

Dr. Gamache's report and testimony demonstrates that he failed to properly perform the necessary testing to accurately determine Mr. Kilgore's IQ. PCR. 3872-4066. Dr. Gamache failed to obtain or review records which were available to him to determine if Mr. Kilgore suffers from deficits in adaptive functioning. As a result of his failings, Dr. Gamache's report is riddled with errors and inaccuracies which undermine his findings and call his credibility into

question. Because of his errors and omissions, Dr. Gamache's opinion in this case is of little value to this Court in determining whether Mr. Kilgore is mentally retarded. In fact, the lower court failed to comment on Dr. Gamache's findings in the final order and apparently considered his IQ testing to be flawed because, like Dr. Dee in 1994, he administered a prorated version of the WAIS in 2006. PCR. 5164. The inadequacies of Dr. Gamache's evaluation are best exemplified by his failure to administer all of the required subtests on the WAIS-III.

F. Conclusion

The lower court found that Mr. Kilgore did not show that his IQ was within the range of mental retardation because his three correlated WAIS IQ scores (74, 75, and 76) were not 70 or below. The statement of the United States Supreme Court that states are permitted to "develop[] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences," *Atkins*, 536 U.S. at 317, means in this context no more than that the states are permitted to establish procedures to determine whether a capital defendant's IQ score is 75 or below on a standardized intelligence test.

This Court's *Cherry* requirement that a defendant prove that his IQ score meets a strict cut-off score of 70 or below (without any higher scores in his or her record) violates the clear dictates of *Atkins* and is unconstitutional under the Eighth Amendment and its Florida constitutional analogue. In addition, this Court must

consider the legislative history of Fla. Stat. § 921.137 (2005), which specifically recognized that 70 was not a cutoff score for intellectual functioning. The staff analysis preceding the statute states: "The Department of Children and Family Services does not currently have a rule. Instead the Department has established criteria favoring the nationally recognized Stanford-Binet and Wechsler Series tests.[37] In practice, two or more standard deviations from these tests mean that the person has an IQ of 70 or less, although it can be extended up to 75." *Id.*, emphasis in original.

The order of the lower court has construed Section 921.137(1) to create fact-finding procedures that are incompatible with the constitutionally proper adjudication of *Atkins* claims in violation of fundamental principles of due process of the Fourteenth Amendment and the Florida Constitution. Relief to Mr. Kilgore should issue.

[37] Indeed, because the Department of Children and Family Services ("DCF") designated one of the tests to be administered to determine mental retardation as the WAIS-III, it is implicit in the statute and Rule 3.203 that a standard error of measurement of +/- 5 be considered in assessing IQ. The tests themselves require such an interpretation. Mr. Kilgore's Mental Retardation claims, filed in 2002 and 2005, are properly reviewed under the DCF definition, rather than that of the 2006 Amendment which provides for regulation by the Agency for Persons with Disabilities.

ARGUMENT IV

RULE 3.203(d)(4)(C) DOES NOT PROVIDE MR. KILGORE WITH A CONSTITUTIONALLY ADEQUATE PROCEDURE TO RESOLVE HIS MENTAL RETARDATION CLAIM.

Rule 3.203 does not provide a constitutionally adequate procedure for Mr. Kilgore, who was sentenced to death prior to the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), to resolve his mental retardation claim. According to Rule 3.203(d)(4), a death-sentenced defendant whose conviction and sentence are final and who argues that his mental retardation precludes a sentence of death "shall" raise his Eighth Amendment challenge in a motion pursuant to Rule 3.850/3.851 or an amendment to a pending motion.

The procedure for determining the Mr. Kilgore's mental retardation and hence his eligibility for a sentence of death must be subject to Sixth Amendment guarantees. Certainly, Rule 3.203 extends Sixth Amendment guarantees to those who have not yet been sentenced to death. Thus, those individuals who have no death sentence in place will receive the right to the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) , at the Rule 3.203 proceeding. They will have the right to the disclosure of exculpatory or favorable evidence bearing upon the mental retardation defense that is in the State's possession. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). They will have the right to assistance of a competent mental health professional. *See Ake v. Oklahoma*,

470 U.S. 68 (1985). *See Argument II.* Similarly, these individuals will have a proceeding that includes the right of confrontation and the right to a jury. *Crawford v. Washington*, 124 S. Ct. 1354 (2004); *Blakely v. Washington*, 124 S. Ct. 2531 (2004). Additionally, an individual not yet under a sentence of death will have the right to a direct appeal of an adverse verdict to this Court. That appeal will include an enforceable guarantee that the death-sentenced individual will receive effective appellate representation. *See Evitts v. Lucey*, 469 U.S. 387 (1985). Following the direct appeal, the defendant (raising a mental retardation defense and not currently under a sentence of death) will have a postconviction process in which he may challenge the effectiveness of the representation he received and any failure of the State to disclose exculpatory or favorable evidence regarding his defense of mental retardation.

Yet for Mr. Kilgore, who is currently under a sentence of death, Rule 3.203 strips him of all of those Sixth Amendment and due process guarantees. By providing that the proceedings for determining a death sentenced individual's mental retardation shall be conducted in Rule 3.850/3.851 proceedings, Mr. Kilgore will not receive the benefits of the Sixth Amendment. There will be no *Strickland* guarantee of effective assistance of counsel. *See Lambrix v. State*, 698 So. 2d 247 (Fla. 1996). This Court has never held that *Ake v. Oklahoma* applies in Rule 3.850/3.851 proceedings. Further, Rule 3.851 proceedings have been defined

as quasi-criminal in nature. *See State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 409-10 (Fla. 1998). As a result, the state of Florida has argued to the Florida Supreme Court that Rule 3.850/3.851 proceedings are properly designated as civil, and thus not criminal proceedings within the meaning of the Sixth Amendment. *See Roberts v. State*, 840 So. 2d 962, 971 (Fla. 2002). The State argued below that Sixth Amendment rights do not attach to a Rule 3.850/3.851 proceeding. Finally, an appeal from the denial of Rule 3.850/3.851 is not a direct appeal that includes an enforceable right to effective appellate representation under due process. In he instant case the lower court's final order simply held in that Mr. Kilgore did not meet the IQ score prong of the Florida mental retardation definition under either standard of proof. PCR. 5165.[38]

The omission of a standard of proof from Rule 3.203 gives Mr. Kilgore no notice regarding what standard will be applied to his claim, in violation of due process. *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (An essential principle of due process is that a deprivation of life . . . be preceded by notice and opportunity for hearing appropriate to the nature of the case").

Mr. Kilgore objects to the clear and convincing evidence standard contained

[38]"[T]he 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."

in Section 921.137, to the provision in that statute and in Rule 3.203 that a judge decides whether or not the defendant is mentally retarded, and to the provision in the statute and the rule that the defendant bears the burden of proof. An analysis of *Atkins* and *Ring v. Arizona*, 122 S. Ct. 2428 (2002), indicates that due process and the Eighth Amendment require that a jury make the decision, that the State bear the burden of proof and that the State prove beyond a reasonable doubt that the defendant is not mentally retarded. Whether or not a person is mentally retarded is an eligibility issue, and the fact that a person is not mentally retarded is an eligibility fact. Under *Ring*, this fact must be found by a unanimous jury based upon proof beyond a reasonable doubt.

If this Court finds *Ring* inapplicable, the Supreme Court's decision in *Cooper v. Oklahoma*, 517 U.S. 348 (1997), should set the constitutional floor regarding the standard of proof. In *Cooper*, the Supreme Court held that no standard of proof greater than a preponderance of the evidence could be placed upon a capital murder defendant challenging his competency to stand trial. The consequence of an erroneous determination below regarding Mr. Kilgore's mental retardation is even more dire, because that determination could result in the impermissible imposition of a death sentence. Without the obstacle of this Court's holding in *Cherry v. State* as regards the IQ score 70 or below bright line cutoff and the non-applicability of the standard error of measurement, Mr. Kilgore has

established below, by a preponderance of the evidence, that he is mentally retarded and ineligible to be executed. *See United States v. Cisneros*, 385 F. Supp. 2d 567 (E.D. Va. 2005) (preponderance of the evidence is the proper standard for a jury determination of mental retardation).

ARGUMENT V

THE LOWER COURT ERRED IN DENYING THE REMAINDER OF MR. KILGORE'S CLAIMS BELOW.

A. Mr. Kilgore was denied a fair trial and a fair, reliable and individualized capital sentencing determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, because the prosecutor's arguments at the guilt/innocence and penalty phases presented impermissible considerations to the jury, misstated the law and facts, and were inflammatory and improper. Defense counsel's failure to raise proper objections was deficient performance which denied Mr. Kilgore effective assistance of counsel. PCR. 5155-62. This claim was denied in the lower court's order except for Golden rule argument for which no prejudice was shown.

B. Mr. Kilgore is denied his First, Sixth, Eighth and Fourteenth amendments to the United States Constitution and the corresponding provisions of the Florida constitution and is denied effective assistance of counsel in pursuing his post-conviction remedies because of the rules prohibiting Mr. Kilgore's lawyers from interviewing jurors to determine if constitutional error was present. PCR. 5193-95. Juror Edward MacKroy was unfit to serve as a juror in Mr. Kilgore's trial where

records indicate he was untruthful during voir dire when asked about his involvement with the court system. FDLE records indicate that the juror was arrested on July 18, 1975 and charged with aggravated assault and sentenced to three years probation and thereafter was again arrested on June 12, 1978 by the Orange County Sheriff's Department and charged with violation of his probation and obtaining unemployment compensation by fraud. This claim was denied below without an evidentiary hearing and without granting a request for juror interviews or investigation based on an alleged procedural bar and no showing of prejudice. PCR. 5280-83+. The denial of this claim without an evidentiary hearing was error. *Lemon v. State*, 498 So. 2d 923 (Fla. 1986).

C. Mr. Kilgore is denied his rights under the Eighth and Fourteenth amendments of the United States Constitution and under the corresponding provisions of the Florida constitution, and under recognized applicable precepts of international law, because execution by electrocution and/or lethal injection is cruel and/or unusual and inhuman and degrading treatment and/or punishment and use of the death penalty and/or prolonged incarceration before judicial execution contradict evolving international human rights principals. Denied below without discovery or an evidentiary hearing. PCR. 5287-89. Florida's current protocol for execution by lethal injection violates the Eighth Amendment. *See also* PCR. 1416-1643.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Kilgore respectfully urges this Court to reverse the lower court order, grant a new trial and/or penalty phase proceeding, and grant such other relief as the Court deems just and proper.

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CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF has been furnished by United States Mail, first class postage prepaid, on Monday, August 17, 2009, to Katherine Blanco, Esq., Office of the Attorney General, Department of Legal Affairs, 13507 East Frontage Road, Suite 200, Tampa, FL 33607.

I FURTHER HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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