IN THE SUPREME COURT OF FLORIDA

JOEL DIAZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC11-949
Lower Tribunal NO. 97-3305CF
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

On November 18, 1997, the grand jury returned a three count indictment charging Joel Diaz with (1) the premeditated murder of Charles Shaw; (2) the attempted first degree murder of Lissa Shaw; and (3) aggravated assault with a firearm upon Roy Isakson. (DAR V1:R.7-8). The case proceeded to jury trial on July 25-28, 2000, before the Honorable Thomas S. Reese. At the conclusion of the trial, the jury returned a guilty verdict as charged on all three counts. (DAR V4:R.84-86). After conducting the penalty phase on October 10, 2000, the jury returned an advisory verdict of 9-3 recommending the death penalty. (DAR V5:R.138). The trial court conducted a Spencer hearing on November 3, 2000, and on January 29, 2001, the court rendered an order imposing the death penalty for the murder of Charles Shaw. (DAR V5:R.168-97, 203-16). The court also imposed a consecutive 151 month sentence for the attempted murder of Lissa Shaw and a consecutive five year sentence for the aggravated assault conviction, each with a three year minimum mandatory sentence for the use of a firearm. (DAR V5:R.196-97).

This Court set forth the following factual background in the opinion affirming Diaz's conviction and death sentence:

> Diaz and Lissa Shaw dated for about two years. During the second year of their relationship, they lived in Diaz's home with Lissa's young daughter. The relationship proved "rocky," however, and around

August 1997 Lissa moved in with her parents, Charles and Barbara Shaw. After she moved out, Diaz tried to see her, but she refused all contact. The two last spoke to each other in September 1997.

On October 6, Diaz purchased a Rossi .38 special revolver from a local pawn shop. He was eager to buy the gun, but because of a mandatory three-day waiting period, could not take it with him. Three days later, Diaz returned to the pawn shop to retrieve the gun, but it could not be released to him because his background check remained pending. Diaz was irritated, and continued to call the shop nearly every day until he was cleared. On October 16, Diaz finally was allowed to take the gun.

On October 27, Diaz asked his brother Jose, who was living with him at the time, for a ride to a friend's house the next morning. Sometime that night or early the next morning, Diaz wrote a letter to his brother, which the police later discovered in his bedroom. It reads:

> Jose [f]irst I want to apologize for using you or to lieing to you to take me where you did I felt so bad but there was no other way. Theres no way to explain what I have to do but I have to confront the woman who betrayed me and ask her why because not knowing is literly [sic] killing me. What happens then is up to her.
>
> If what happen is what I predict than I want you to tell our family that I love them so much. Believe me I regret having to do this and dieing knowing I broke my moms heart and my makes it even harder but I cant go on like this it's to much pain. Well I guess that all theres to say I love you all.
>
> Joel
>
> P.S. Someone let my dad know just because we werent close doesn't mean I don't love him because I do.

At 5:30 a.m. on October 28, Diaz's brother and his brother's girlfriend drove him to the entrance of the Cross Creek Estates subdivision, where the Shaws lived. Diaz carried his new gun, which was loaded, and replacement ammunition in his pocket. Diaz walked to the Shaws' house and waited outside for about ten minutes.

At 6:30 a.m., Lissa Shaw left for work. She entered her car, which was parked in the garage, started the engine, and remotely opened the garage door. She saw someone slip under the garage door, and when she turned, Diaz stood at her window, pointing the gun at her head. He told her to get out of the car. She pleaded with him not to hurt her. When she saw that "the situation was not going anywhere," she told him, "Okay, okay, hold on a second, let me get my stuff," and leaned down as if retrieving personal items. She then shoved the gear into reverse and stepped on the gas pedal. Diaz started shooting. Lissa heard three shots, but did not realize she had been hit. As she continued backing out, the car struck an island behind the driveway. She then put the car into forward drive. As she drove away, she saw Diaz in the front yard pointing the gun at her father, Charles Shaw. Charles was about five feet from Diaz, pointing and walking toward him. Lissa drove herself to the hospital where it was discovered she had been shot in the neck and shoulder.

Charles and Diaz then had some sort of confrontation in the front yard and an altercation in the garage, resulting in Diaz chasing Charles into the master bedroom where Barbara was lying in bed. A quadriplegic, Barbara could not move from the bed.

As the two men moved through the house, Barbara heard Charles saying, "Calm down, put it down, come on, calm down, take it easy." Barbara was able to roll back to see Diaz standing in the bedroom with a gun. He was standing on one side of a chest of drawers, closer to the door, while Charles was standing on the other side of the chest, closer to the bathroom. Charles talked to Diaz, telling him to calm down and put down the gun. Diaz held the gun with two hands, pointing it straight at Charles, about six to eight

inches from Charles's chest. Diaz pulled the trigger, but the gun, out of ammunition, only clicked. Charles visibly relaxed, but Diaz reloaded the gun. When Charles realized Diaz was reloading, he ran into the bathroom. Diaz followed. As Charles turned to face him, Diaz fired three shots. Charles's knees buckled, and he grabbed his midsection and fell face first to the floor.

Diaz went back into the bedroom and stood beside Barbara, holding the gun. Barbara screamed, "Why did you do this?" Diaz answered that Charles deserved to die. He stood in the bedroom from 30 seconds to a minute, then returned to the bathroom, bent over Charles's body, extended his right arm, and shot Charles again. He then moved his arm left, which Barbara judged to be toward Charles's head, and shot again. Diaz returned to the bedroom and, according to Barbara, said, "If that bitch of a daughter of yours, if I could have got her, I wouldn't have had to kill your husband."

Diaz remained in the house between 45 minutes and an hour. He spent some of this time talking to Barbara in the bedroom, where he passed the gun from hand to hand and unloaded and loaded the gun about three or four times. He remained in the house until the police arrived and arrested him.[FN1]

> FN1. At some point during the incident, a neighbor walked up to the Shaws' house. When he approached, both the garage door and the door leading from the garage to the inside of the house were open. The man saw an individual pacing back and forth inside the home, and as he entered the garage, he called out for Charles. Diaz then stepped into the garage, pointed the gun at the man, and said, "Get the f--- out of here." The neighbor returned to his house and called police.

The jury found Diaz guilty of the first-degree murder of Charles Shaw, the attempted first-degree murder of Lissa Shaw, and aggravated assault with a firearm on the neighbor. After penalty phase proceedings, the jury recommended a sentence of death by a vote of nine to three. After a Spencer[FN2]

> hearing, the trial court found three aggravating circumstances [FN3] and five statutory mitigating circumstances,[FN4] and sentenced Diaz to death.
>
> FN2. Spencer v. State, 615 So. 2d 688 (Fla. 1993).
>
> FN3. The aggravating factors were: (1) the capital felony was especially heinous, atrocious, or cruel (HAC) (great weight); (2) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP) (great weight); and (3) the defendant was previously convicted of another capital felony or of a felony involving use or threat of violence to the person (great weight).
>
> FN4. The mitigating factors were: (1) the defendant had no significant history of prior criminal activity (very little weight); (2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance (moderate weight); (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (very little weight); (4) the age of the defendant at the time of the crime (moderate weight); and (5) the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty: (a) the defendant was remorseful (very little weight); and (b) the defendant's family history of violence (moderate weight).

Diaz v. State, 860 So. 2d 960, 963-64 (Fla. 2003).

At the penalty phase proceeding, the State did not call any witnesses but opted to rely on the evidence presented at the guilt phase. Defense counsel called Diaz's sister, Minerva Diaz, as a witness. Ms. Diaz, who was four years younger than

Appellant, testified that their father was an alcoholic and drug addict. (DAR V5:T.824). Their father would beat their mother in view of the children and he was abusive to her brothers. (DAR V5:T.824). Defendant had to quit school in the 9th grade because their father stopped working and wanted the children to get jobs and support the family. Minerva Diaz believed that her father's problems affected Defendant and caused him to physically strike his three girlfriends. (DAR V5:T.826, 833).

Defendant testified at the penalty phase hearing and informed the jury that he had no other criminal history, just traffic violations. (DAR V5:T.840). He then apologized to the victims' family and to his family. (DAR V5:T.841). Defendant claimed on cross-examination that he was only physically abusive to two of his girlfriends, Missy and Lissa Shaw. (DAR V5:T.844).

The State requested that the jury be instructed on three aggravating circumstances: (1) CCP, (2) HAC, and (3) prior violent felony conviction. Defense counsel did not raise any objections to these instructions. (DAR V5:T.846-47, 891). After closing arguments, the jury returned an advisory verdict recommending the death penalty by a vote of 9-3. The trial judge followed this recommendation and sentenced Defendant to death. The court found that the three aggravating factors of CCP, HAC and prior violent felony conviction outweighed the mitigating

factors established. The court found in mitigation: (1) the defendant has no significant history of prior criminal activity; (2) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired; (4) the age of the defendant at the time of the crime (24 years old); (5) the defendant is remorseful; and (6) the defendant's family history of violence. The trial court stated that each one of the aggravating circumstances, standing alone, would be sufficient to outweigh the mitigation presented.

On direct appeal to this Court, Diaz raised the following issues:

> ISSUE I: THE CIRCUMSTANTIAL EVIDENCE PRESENTED BY THE STATE AS WELL AS BY THE DEFENSE DID NOT DISPROVE, BUT INSTEAD STRONGLY TENDED TO CORROBORATE, APPELLANT'S TESTIMONY THAT HE WAS STRUCK IN THE FACE DURING AN ALTERCATION WITH MR. SHAW IN THE GARAGE JUST PRIOR TO THE HOMICIDE.
>
> ISSUE II: THE TRIAL COURT ERRED IN FINDING, AND INSTRUCTING THE JURY ON, THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING FACTOR; AND FURTHER ERRED BY MAKING MATERIALLY INACCURATE FACTUAL FINDINGS IN SUPPORT OF THAT AGGRAVATOR.
>
> ISSUE III: THE TRIAL COURT ERRED IN FINDING, AND INSTRUCTING THE JURY ON, THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING FACTOR; AND FURTHER ERRED BY USING, AND ALLOWING THE PROSECUTOR TO ARGUE TO THE JURY, A LEGALLY INAPPLICABLE "TRANSFERRED INTENT" THEORY TO FIND THIS AGGRAVATOR.

A. The Elements of CCP

B. Standard of Review

C. The Attempted Murder of Lissa Shaw was not "Cold" Within the Meaning of the CCP Aggravator, Nor Was it Proven Beyond a Reasonable Doubt to be Preplanned

D. The Doctrine of Transferred Intent is Legally Inapplicable to the Facts of this Case

E. The Murder of Charles Shaw was Neither Cold nor Preplanned Within the Meaning of the CCP Aggravator, and There was No Proof of Heightened Premeditation

ISSUE IV: THE DEATH SENTENCE IS DISPROPORTIONATE

Initial Brief of Appellant, Diaz v. State, Case No. SC01-278. In affirming Diaz's conviction and sentence of death, this Court found that the evidence did not support a finding that the murder was especially heinous, atrocious, or cruel, but found that this error was harmless given the other two aggravating factors and the five mitigating circumstances. Diaz v. State, 860 So. 2d 960, 965-68 (Fla. 2003). Diaz filed a motion for rehearing and argued for the first time that Florida's capital sentencing scheme was unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). This Court denied the motion and issued its mandate.

Diaz petitioned the United States Supreme Court for a writ of certiorari and challenged the Florida Supreme Court's harmless error ruling following the striking of the HAC

aggravator. The Court denied the petition for writ of certiorari on April 26, 2004. Diaz v. Florida, 541 U.S. 1011 (2004).

On April 15, 2005, Diaz timely filed a Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend with this Court. The State filed "State's Response to Defendant's 'Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend'" (hereinafter "Response"). After years of public records litigation, Diaz received permission to file an amended 3.851 motion raising fifteen claims and numerous sub-claims which were ultimately denied by the trial court: 1) Defendant argues that Fla. Stat. §119.19 and Fla. R. Crim. P. 3.852 are unconstitutional, both facially and as applied to Defendant, because defense access to public records in the possession of state agencies has been withheld; 2) Defendant argues that the Rule 3.851 requirement that he file his postconviction motion one year after his conviction and sentence become final violates due process and equal protection guarantees; 3) Defendant argues that juror misconduct rendered the outcome of his trial, and his sentence, unreliable, and violated his due process rights; 4) Defendant argues that Florida Rule of Professional Responsibility 4-3.5(d)(4) is unconstitutional because it prohibits defense counsel from interviewing jurors in violation

of Defendant's equal protection rights; 5) Defendant argues that his death sentence is the result of "a pattern and practice of Florida prosecuting authorities, courts and juries to discriminate on the basis of race" in violation of the equal protection clause and eight amendment; 6) Defendant argues that Defendant was unconstitutionally denied a jury of his peers drawn from a fair cross-section of the community. Defendant also argues that trial counsel was ineffective for failing to challenge the jury panel before voir dire began, to adequately investigate and question the jurors during voir dire about their racial biases, and for failing to challenge jurors for cause and using only six peremptory challenges; 7) Defendant argues that trial counsel was ineffective during the guilt phase, and that the State failed to disclose exculpatory evidence; 7(a) Defendant argues that the State failed to disclose exculpatory evidence, in the form of evidence of blood droplets in the Shaw home containing his DNA, which would have supported his contention that the shooting was a result of a confrontation with the victim rather than premeditation; 7(b) Defendant argues that trial counsel was ineffective for failing to adequately question the jury panel about their views on mental health, the insanity defense, and racial bias; 7(c) Defendant argues that trial counsel was ineffective for failing to strike jurors

Clark, Vinnedge and Markley for cause due to their exposure to pre-trial publicity, and for failing to use a peremptory challenge on juror Williams; 7(d) Defendant argues in a jumbled list of reasons that trial counsel was ineffective for failing to adequately investigate and prepare; 7(e) Defendant argues that trial counsel was ineffective for failing to present mental health evidence; 8) Defendant argues that he was denied a fair trial due to prosecutorial misconduct, including suppression of impeachment evidence in violation of Brady, and that trial counsel failed to object to the prosecutorial misconduct; 9) Defendant argues that he was denied the right to expert psychiatric assistance pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985); 10) Defendant argues that trial counsel was ineffective for failing to adequately investigate and prepare for the penalty phase and failing to introduce adequate mitigation evidence; 10(a) Defendant argues that trial counsel failed to present mitigation evidence during the penalty phase. Defendant argues that counsel did not present any testimony from a competent mental health expert at the penalty phase; 10(b) Defendant argues that trial counsel was ineffective for twice misstating the law to the jury during the penalty phase by informing them that the defense had to prove mitigators by a preponderance of the evidence; 10(c) Defendant argues that trial

counsel failed to challenge the aggravating factors; 10(d) Defendant argues that trial counsel failed to file a motion to recuse the trial judge; 11) Defendant argues that he is innocent of first-degree murder and cannot receive the death penalty. Defendant argues that his mental state and lack of intent makes him innocent of first-degree murder. He further argues that his history of severe mental illness places him within the class of defendants, like those under the age of 18 and those with mental retardation, who are categorically excluded from being eligible for the death penalty; 12) Defendant argues that counsel was ineffective and the trial court erred in allowing the jury to improperly consider nonstatutory aggravators; 13) Defendant argues that his death sentence is unconstitutional because (a) the law and instructions given shifted the burden to Defendant to prove that death was inappropriate, (b) the trial court employed a presumption of death in sentencing Defendant, and (c) the standard jury instructions unconstitutionally and inaccurately diluted the jury's sense of responsibility towards sentencing; 14) Defendant argues that lethal injection constitutes cruel and unusual punishment; the DOC unconstitutionally delegated its authority to create and implement lethal injection procedures to the AG's Office in violation of Article II section 3 of the Florida Constitution;

and the denial of court appointed counsel to represent Defendant in the federal courts on his Eighth Amendment claim (section 1983 civil rights action) is a violation of the Equal Protection Clause; and 15) Defendant argues that he is insane and cannot be executed. (PCR V84:13387-426).

On May 12, 2010, Petitioner filed a motion pursuant to Florida Rule of Criminal Procedure 3.203, alleging that he is mentally retarded. (PCR V26:3114-54). The trial court conducted evidentiary hearings on Diaz's motions on June 21-24, 2010 (PCR V93:1-V96:758) and on September 20-24, 2010. (PCR V97-102:1-1219). Separate closing memoranda were filed on Diaz's ineffective assistance of counsel claims and his mental retardation claim. (PCR V82:13087-123, 13181-216; V82:13124-144, 13145-180). On April 8, 2011, the court filed its order denying postconviction relief (PCR V84:13384-V85:13714) and a separate order finding Diaz not mentally retarded. (PCR V85-86:13715-938). On May 3, 2011, Diaz filed a Notice of Appeal appealing the court's ruling on both motions.

At the June, 2010 evidentiary hearing, the court heard testimony from thirteen witnesses, including among others, Diaz's initial trial attorney (Assistant Public Defender Kenneth Garber), Diaz's two trial attorneys (Frank Porter and Neil Potter), the two prosecuting attorneys (Jesus Casas and Maria

Gonzalez), and the three mental health experts who had examined Diaz prior to trial (Drs. Paul Kling, Bruce Crowell, and Richard Keown). (PCR V93-V96:1-758). At the September, 2010 evidentiary hearing which was primarily devoted to Diaz's mental retardation claim, another fifteen witnesses testified, including Diaz's postconviction mental health experts (Drs. Antonio Puente, Philip Harvey, Richard Dudley), and lay witnesses, as well as the State's witnesses, including mental health experts from the Department of Corrections and forensic psychologist, Dr. Michael Gamache. Appellee will address the relevant witnesses' testimony in the argument section of the brief.

SUMMARY OF THE ARGUMENT

The postconviction court properly denied Appellant's claim that a juror committed misconduct during voir dire by purposefully lying or failing to disclose personal and professional information. Contrary to Appellant's allegations, the juror did not give any false answers during voir dire and she was not required to volunteer unsolicited information about herself. Additionally, Diaz's claim that the State violated Brady by failing to disclose a potential juror's arrest is without merit as the lower court properly found that the potential juror's arrest was not evidence that was favorable to the defense because it was either exculpatory or impeaching, was not suppressed by the State, nor was Diaz prejudiced as a result. Accordingly, this Court should affirm the postconviction court's denial of the instant claim.

Diaz's numerous claims of ineffective assistance of counsel at the guilt and penalty phases of his trial are without merit and were properly denied by the lower court. Diaz claims that guilt phase counsel was ineffective for failing to introduce DNA evidence regarding Diaz's blood being found inside the victims' home, but this evidence was not relevant to his insanity defense. Diaz also failed to establish deficient performance and prejudice based on trial counsel's failure to interview and

present testimony from Diaz's friend, Melissa McKemy. The lower court found that McKemy's testimony included negative information that would be prejudicial to Diaz and it was also cumulative to other evidence presented. Trial counsel was also not ineffective in preparing his expert for the insanity defense testimony or for introducing his expert's written reports into evidence and then failing to object when the State introduced their expert's written report into evidence. Likewise, the lower court properly denied Diaz's claim that his penalty phase counsel was ineffective for failing to investigate and present mitigating evidence. Diaz and his family were uncooperative and Diaz did not want negative information presented to the jury. Penalty phase counsel presented mental mitigation from their retained expert at the guilt phase and were not ineffective for relying on this testimony for the penalty phase. The postconviction court also found that, had penalty phase counsel acted as alleged by Diaz, there was not a reasonable probability of a different outcome. Because Diaz failed to carry his burden of establishing both deficient performance and prejudice, this Court should affirm the lower court's order.

Lastly, the court properly found that Diaz failed to carry his burden of establishing by clear and convincing evidence that he was mentally retarded. After hearing testimony from a number

of mental health experts and lay witnesses, the trial court made credibility determinations that the defense experts' opinions and test results were not credible. The court found that Diaz failed to establish any of the three requirements for a determination of mental retardation, and because the court's factual findings are supported by competent, substantial evidence, this Court should affirm the lower court's order.

ARGUMENT

ISSUE I

THE POSTCONVICTION COURT PROPERLY DENIED APPELLANT'S CLAIM REGARDING ALLEGED JUROR MISCONDUCT AND HIS RELATED CLAIM THAT THE STATE FAILED TO DISCLOSE MATERIAL INFORMATION IN VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83 (1963).

In his first claim on appeal, Diaz argues that the postconviction court erred in summarily denying his claims that he was deprived of his constitutional right to a fair trial when juror Sherri Williams "lied" during voir dire and "purposefully failed to disclose" personal and professional experiences, including the fact that she had been arrested for domestic violence and battery, and that he should be allowed to interview the jurors based on these allegations. (PCR V5:365-73; V6:458-63). The State responded that the claims should be summarily denied as procedurally barred and without merit. (PCR V7:746-60). Diaz subsequently filed an amended postconviction motion regarding his juror misconduct claim and added an allegation that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose the fact that the Lee County State Attorney's Office prosecuted Ms. Williams' case. (PCR V24:2786-95). After conducting a case management conference, Judge Thomas S. Reese issued an order setting an evidentiary hearing on some of Appellant's other postconviction claims, and indicated that a

final order would be forthcoming after the evidentiary hearing. (PCR V25:3037-40).

Shortly after issuing the order scheduling the evidentiary hearing, Appellant moved to disqualify Judge Reese and any other Twentieth Judicial Circuit judges because the prosecuting attorney and one of Diaz's defense attorneys were now judges in the circuit. (PCR V25:3041-61). After granting the motion, this Court assigned Judge Charles Roberts from the Twelfth Judicial Circuit to serve as a temporary judge in these proceedings. (PCR V26:3103). After conducting an evidentiary hearing on Appellant's postconviction and mental retardation claims, Judge Roberts issued a detailed order denying Appellant's claims, including the juror misconduct and motion to interview claims, as well as the related Brady claim:

> 9. As to Claim III, Defendant argues that juror misconduct rendered the outcome of his trial, and his sentence, unreliable, and violated his due process rights. Defendant argues that juror foreperson, Sherri Smith Williams, concealed relevant "personal and professional experiences" during voir dire. Specifically, he claims that Ms. Williams stated during voir dire that she was a professor of criminal justice at FGCU, she had been the victim of a home invasion robbery and had sought an injunction in the past. However, through public records, Defendant subsequently learned that Ms. Williams taught a domestic violence course in 1998, she "has been a domestic violence counselor," she has "participated in events on behalf of battered women;" she interned for the department of corrections in another state; she has been a "Certified Domestic Violence Trainer for Health Care Professionals;" and she failed to disclose

her 1999 arrest for domestic battery or her completion of a diversion program. Finally, Defendant argues that the State had constructive knowledge of Ms. Williams' arrest, such that the State's failure to disclose it constituted a Brady violation. . . .

10. Information is considered concealed for purposes of testing for juror misconduct due to concealment of information where the information is squarely asked for and not provided. Wiggins v. Sadow, 925 So. 2d 1152 (Fla. 4th DCA 2006). In order to establish juror concealment, the moving party must demonstrate, among other things, that the voir dire question was straightforward and not reasonably susceptible to misinterpretation. *See* Tran v. Smith, 823 So. 2d 210 (5th DCA 2002). A potential juror cannot and should not conceal information on voir dire or fail to answer questions completely, but where a juror correctly answers a question, it is counsel's responsibility to inquire further if more information is needed. Ottley v. Kirchharr, 917 So. 2d 913 (Fla. 1st DCA 2005). While the trial court urged the jurors to be candid, the trial court did not require jurors to offer information that was not asked for (Trial transcript pp. 25-27). **The panel was asked if anyone had been a victim of a crime (Trial transcript p. 54), if a family or friend had been charged with a crime (Trial transcript p. 58), and whether anyone had sought a restraining order or injunction against someone else (Trial transcript p. 136). Neither the panel in general, nor Ms. Williams in particular, were asked if they had been arrested for any crimes or if injunctions or restraining orders had been taken out against them. Defendant has not established that Ms. Williams concealed information during questioning. She was not required to volunteer information, and she truthfully answered all questions she was asked. The Court is unable to find any portion of the record in which Ms. Williams stated she could not be neutral and unbiased. Defendant has not established that the domestic violence related information was material to Ms. Williams' service on the jury for a murder trial. While the issue of domestic violence between Defendant and his girlfriends was raised at trial, any such episodes were tangential to the jury's determination of whether Defendant murdered the victim, Mr. Shaw. Defendant's assertions that Ms. Williams was biased**

against Defendant or had some hidden agenda are mere speculation. Defendant has failed to demonstrate that juror misconduct occurred.

11. **Defendant has failed to point to any specific question(s) that Ms. Williams failed to answer fully or truthfully. Instead, he appears to argue that it was Ms. Williams' responsibility to offer unsolicited, additional information about herself during voir dire and, when she failed to do so, the State had an obligation to inform the defense.** To establish a Brady violation, a defendant must show: (1) evidence favorable to the accused, because it is either exculpatory or impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that prejudice ensued. Guzman v. State, 868 So. 2d 498, 508 (Fla. 2003). . . . At the evidentiary hearing, Maria Gonzalez, who prosecuted this case, testified that she and the defense got the jury list on the morning of jury selection, as the jury panel was brought in (June evidentiary hearing transcript p. 279). She further testified that she had no knowledge at that time that Ms. Williams had been arrested for domestic violence, had completed a diversion program prior to jury selection in which the charges were dropped, or any of the other information subsequently discovered by current defense counsel about Ms. Williams (June evidentiary hearing transcript p. 279). **Accordingly, this testimony refutes Defendant's allegations that the State had knowledge of this information. The State could not disclose information it did not possess. Even if the State is imputed with this knowledge, these issues were not material to Ms. Williams' service on the jury for a murder trial, the information Ms. Williams gave was not false, the information was not favorable to the Defendant, and there is no prejudice since this information does not undermine confidence in the outcome of the trial.** *See* Guzman, 868 So. 2d at 505-508. The Court finds no . . . Brady violation[] occurred on this issue. Therefore, Claim III is DENIED.

12. As to Claim IV, Defendant argues that Florida Rule of Professional Responsibility 4-3.5(d)(4) is unconstitutional because it prohibits defense counsel from interviewing jurors in violation of Defendant's equal protection rights. Similar constitutional

> challenges to Florida Rule of Professional Responsibility 4-3.5(d)(4) have repeatedly been rejected. *See* Johnson v. State, 804 So. 2d 1218, 1224 (Fla. 2001); Arbelaez v. State, 775 So. 2d 909, 920 (Fla. 2000). Based on that authority, the Court finds the Rule constitutional. Further, this claim is procedurally barred. A similar postconviction claim was raised in Arbelaez. The Florida Supreme Court upheld the denial of postconviction relief, finding that the claim was procedurally barred because any "claims relating to Arbelaez's inability to interview jurors should and could have been raised on direct appeal." Id. at 920. Therefore, Claim IV is DENIED.

(PCR V84:13389-92) (emphasis added). The State submits that the postconviction court properly denied Appellant's claims related to alleged juror misconduct.[1]

The crux of Appellant's juror misconduct claim is based on the faulty premise that juror Williams lied or failed to

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[1] Although the lower court addressed Appellant's juror misconduct claim on the merits and did not find it procedurally barred, this Court has consistently held that such claims are procedurally barred in postconviction proceedings as claims that could have and should have been raised on direct appeal. See Troy v. State, 57 So. 3d 828, 838 (Fla. 2011); Elledge v. State, 911 So. 2d 57, 77 n.27 (Fla. 2005). The court properly found Diaz's juror interview claim procedurally barred. See Johnston v. State, 63 So. 3d 730, 739-40 (Fla. 2011); Spencer v. State, 842 So. 2d 52 (Fla. 2003); Vining v. State, 827 So. 2d 201, 216 (Fla. 2002); Arbelaez v. State, 775 So. 2d 909 (Fla. 2000); Young v. State, 739 So. 2d 553, 555 n.5 (Fla. 1999).

This Court applies a mixed standard of review to the court's denial of the instant claims. For example, this Court has noted that Brady claims present mixed questions of law and fact. Sochor v. State, 883 So. 2d 766, 785 (Fla. 2004). As to findings of fact, this Court defers to the lower court's findings if they are supported by competent, substantial evidence, and reviews the trial court's application of the law to the facts de novo. Hurst v. State, 18 So. 3d 975, 988 (Fla. 2009).

disclose information during voir dire. However, contrary to Appellant's assertions, and as the lower court properly found after reviewing the transcript of the voir dire proceedings, juror Williams never "lied" or gave "false responses" to any questions from the court or counsel during voir dire. Additionally, the court noted that Williams had no obligation to offer unsolicited, additional information about herself during voir dire.

Appellant's allegation that juror Williams purposefully lied or failed to disclose information regarding her domestic violence arrest is simply without merit. As the record clearly demonstrates, *none* of the jurors were ever asked if they had ever been arrested or been subject to any legal proceedings. At the outset of voir dire, the trial judge preliminarily informed the venire that the attorneys would be asking them questions, and if any member of the panel felt embarrassed by a question, they could come up to the bench to discuss the matter out of the hearing of the panel. The judge stated that this was quite common, "especially if somebody has ever been charged with a case and you're reluctant to say anything." (DAR V1:T.26-27). After his initial instructions, the trial judge questioned the venire and stated that the attorneys "want to know whether you've sat on a jury before in a civil or criminal case," or if

"any member of the jury had been a victim of a crime." (DAR V1:T.29-30). Based on this question, juror Williams informed the court that she had been the victim of a home invasion and had fired a weapon during the incident. (DAR V1:T.54, 107). The trial judge also asked the panel whether "***any member of your family or a close friend*** [has] been charged with a crime other than a parking ticket or minor traffic offense." (DAR V1:T.58). As a result of this question, a number of potential jurors discussed how their family members had been charged with crimes. (DAR V1:58-68). Only one potential juror, Mr. Shelton, revealed in front of the entire panel that *he* had a prior record:

> JUROR SHELTON: I have a son's who doing time in Kentucky for transportation of narcotics or whatever. I'm not sure what it's called, but he had drugs and wasn't supposed to.
>
> THE COURT: All right. Do you feel he was fairly treated by law enforcement?
>
> JUROR SHELTON: He did the crime, he's got to do the time.
>
> THE COURT: Is that going to have any bearing on your ability to be objective and impartial on this case?
>
> JUROR SHELTON: No sir. I was convicted of a Class C felony 25 years ago and I did the crime and I did my time and I never served any prison time, but I did my probation, paid restitution. I feel that I have lived up to the obligations that the Court has and they erased it I guess from my record because I'm allowed to vote and everything.

(DAR V1:T.65).[2] Obviously, Mr. Shelton's revelation of a prior conviction was not responsive to the judge's direct question regarding family members' or friends' prior crimes, but was more of an explanation of Mr. Shelton's "you do the crime, you do the time" philosophy. Additionally, the judge's question would not have alerted the venire to disclose their own personal run-ins with law enforcement. Compare Young v. State, 720 So. 2d 1101 (Fla. 1st DCA 1998) (stating that, in light of direct questions regarding personal experiences with sexual abuse, it was "abundantly clear from the transcript of the voir dire proceedings that no person sufficiently perceptive and alert to be qualified to act as a juror could have sat through voir dire without realizing that it was . . . her duty to make known to the parties and the court" her own sexual abuse). Given the fact that the venire was never asked about their own personal criminal history, there can be no showing that juror Williams engaged in misconduct by failing to truthfully and fully answer any questions. Thus, Appellant's claim of juror misconduct based on juror Williams' failure to disclose her domestic violence arrest is without merit and should be denied.

[2] One other potential juror, juror Lynch, asked to approach the bench, and at a private bench conference, informed the court and counsel that she had prior juvenile arrests, her father had been incarcerated for DUIs, and she had a restraining order on her ex-husband. (DAR V1:66-67).

Likewise, Appellant's complaint that juror Williams failed to disclose information regarding her professional experience is without merit. Appellant implies that Williams had an obligation to disclose that she had taught a domestic violence class while working as a professor of criminal justice at a local college and had been a domestic violence counselor and involved in events for battered women. When introducing herself during voir dire, juror Williams indicated that she was a college professor at Florida Gulf Coast in the Criminology and Criminal Justice department. (DAR V1:32). Obviously, the attorneys for both the State and the defense could have inquired into the types of courses she taught and her other professional experience with the criminal justice system, but such questions were never posed to Ms. Williams. As the lower court properly found, Williams did not have an obligation to offer unsolicited, additional information when she was never asked any questions on this topic.

Appellant argues that he has satisfied the three-part test for determining whether a juror's nondisclosure of information during voir dire requires a new trial. In De La Rosa v. Zequeira, 659 So. 2d 239, 241 (Fla. 1995), this Court stated:

> In determining whether a juror's nondisclosure of information during voir dire warrants a new trial, courts have generally utilized a three-part test. First, the complaining party must establish that the

> information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence.

Contrary to his assertions, Diaz has failed to satisfy this test. The lower court correctly determined that Williams' domestic violence related information was not relevant and material to Diaz's murder prosecution of his girlfriend's father: "While the issue of domestic violence between Defendant and his girlfriends was raised at trial, any such episodes were tangential to the jury's determination of whether Defendant murdered the victim, Mr. Shaw." (PCR V84:13390); see also Johnston v. State, 63 So. 3d 730, 739 (Fla. 2011) (juror's position as a prior defendant in criminal matter makes bias against capital defendant especially unlikely); Lugo v. State, 2 So. 3d 1, 13-16 (Fla. 2008) (juror's failure to disclose that he had been a victim of a violent battery was not relevant and material to his service on capital defendant's case); Conde v. State, 860 So. 2d 930, 939 n.6 (Fla. 2003). Additionally, as has been noted, juror Williams did not "conceal" any information. Finally, any attempt to argue that the failure to disclose the information was attributable to defense counsel's lack of diligence is speculative and without merit.

Additionally, as in Lugo, supra, the State submits that the proper standard for determining whether Diaz is entitled to postconviction relief on this issue is the standard set forth by this Court in Caratelli v. State, 961 So. 2d 312, 324 (Fla. 2007) (citations omitted) (emphasis added):

> A juror is competent if he or she "can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Lusk, 446 So. 2d at 1041. Therefore, actual bias means bias-in-fact that would prevent service as an impartial juror. . . . **Under the actual bias standard, the defendant must demonstrate that the juror in question was not impartial -- i.e., that the juror was biased against the defendant, and the evidence of bias must be plain on the face of the record.**

Here, Diaz cannot establish that juror Williams was actually biased against him given her prior personal and professional experiences. Juror Williams indicated that she had taught classes in the criminal justice program and was "familiar with the pros and cons and arguments for and against the death penalty, but I would like to think I'm always neutral and remain objective." (DAR V1:175). She also indicated that her personal opinions and perspectives would not affect her ability to be impartial or her decision-making process. (DAR V1:187). Given her answers, it is clear that she was an impartial juror and was not biased against Diaz. Thus, because Diaz has failed to

establish that a biased juror served on his jury, his claim must be denied.

Diaz further alleges in his brief that had he known about Williams' prior history, his counsel would have moved to strike juror Williams for cause or, if unsuccessful, would have used a peremptory challenge on her. This speculative claim is without merit. First, as has been set forth, juror Williams' information would not have supported a cause challenge because she was an impartial and unbiased juror. See Lusk v. State, 446 So. 2d 1038, 1041 (Fla. 1984) ("The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court."). Defense counsel also would likely have not utilized a peremptory challenge on juror Williams. As trial counsel Neil Potter testified at the postconviction evidentiary hearing, he favored keeping highly educated people, like college professor Williams, on the jury because she would be more liberal and better able to grasp the technicalities involved in a first degree murder case. (PCR V95:546-47). Thus, contrary to Diaz's speculative allegations that trial counsel would have attempted to strike Williams, the record from the trial and postconviction proceedings indicate that defense counsel favored keeping

Williams on the jury. See Johnson v. State, 903 So. 2d 888, 896 (Fla. 2005) (rejecting defendant's claim that trial counsel could have used his peremptory challenges in a different manner to obtain a more defense-friendly jury as such speculation fails to rise to the level of ineffective assistance under Strickland standard).

Finally, Appellant's claim that the State had a duty to disclose juror Williams' arrest and prosecution under Brady v. Maryland, 373 U.S. 83 (1963), is without merit. In order to establish a Brady violation, a defendant must establish three elements: (1) the evidence at issue was favorable to the defendant, because it was either exculpatory or impeaching; (2) the evidence was suppressed by the State; and (3) the suppression resulted in prejudice. Johnson v. State, 921 So. 2d 490 (Fla. 2005). Under the Brady standard of materiality, the undisclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667 (1985). Furthermore, a defendant alleging a Brady violation bears the burden to show prejudice, i.e., to show a reasonable probability that the undisclosed

evidence would have produced a different verdict. Strickler v. Greene, 527 U.S. 263, 281 n.20 (1999).

In the instant case, as the lower court properly found, Appellant cannot establish any of the prongs necessary for establishing a Brady violation. First, Diaz cannot establish that the evidence of a potential juror's arrest for battery and domestic violence is evidence that is favorable to the defendant because it is either exculpatory or impeaching. Diaz has failed to cite to a single case holding that a potential juror's information qualifies as exculpatory or impeaching evidence under Brady.

Similarly, Diaz cannot establish that the evidence of Williams' arrest and completion of a pre-trial diversionary program was "suppressed" by the State. As the lower court noted when denying this claim, the prosecuting attorney testified at the evidentiary hearing that she and defense counsel received a list of the potential jurors on the morning of jury selection when the venire was brought into the courtroom, and "[t]he State could not disclose information it does not possess." (PCR V84:13391; V94:279). Appellant argues that the lower court ignored this Court's caselaw finding that the State is charged with constructive knowledge of evidence withheld by other state agents. See generally Gorham v. State, 597 So. 2d 782 (Fla.

1992); Archer v. State, 934 So. 2d 1187, 1203 (Fla. 2006) ("[T]he prosecutor is charged with possession of what the State possesses...."). While the State recognizes this caselaw, its application to the given facts is unreasonable and inappropriate. This Court's application of this rule has always been applied in cases where the prosecuting attorney is imputed with knowledge regarding evidence relating to witnesses in the case or to the defendant. Appellee is unaware of a single case where the prosecuting attorney is held responsible for information possessed by law enforcement or the State Attorney's Office regarding prospective jurors, especially when the prosecutor and defense counsel only obtained the list of prospective jurors on the morning of jury selection and the selection process was finalized that day. (DAR V1-2:5-224). Because the prosecuting attorney in this case should not have imputed knowledge of juror Williams' arrest, this Court should find that Diaz has failed to establish that the State "suppressed" this evidence.

Lastly, as previously discussed supra, the information regarding juror Williams' domestic violence arrest was not material to Diaz's prosecution for first degree murder. Juror Williams was arrested for domestic violence and battery for an incident with her roommate and completed a pretrial diversionary

program in order to avoid prosecution for the misdemeanors. Diaz cannot show that had this evidence been disclosed to defense counsel, there is a reasonable probability that the outcome of the proceedings would have been different. Even assuming that defense counsel decided to exercise a peremptory strike on Ms. Williams (which is highly unlikely given defense counsel Potter's postconviction testimony that he favored more educated, liberal college professors like Williams), the jury would have nevertheless convicted Diaz of the charged crimes and recommended the death penalty. See Diaz, 860 So. 2d at 963-65 (noting the competent, substantial evidence supporting the jury's verdicts in this case). Thus, because Diaz's Brady claim is without merit, this Court should affirm the lower court's denial of the instant claim.

ISSUE II

THE POSTCONVICTION COURT PROEPRLY DENIED DIAZ'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES.

In his second issue, Appellant combines his numerous postconviction ineffective assistance of counsel claims into a single issue and presents a myriad of sub-claims relating to alleged ineffectiveness at the guilt and penalty phases.[3] The postconviction court granted an evidentiary hearing on Diaz's ineffective assistance of counsel claims and after conducting a lengthy bifurcated hearing, the court denied the claims based on a finding that Diaz had failed to establish both deficient performance and prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984). (PCR V84:13396-413, 13416-22). The State submits that the lower court properly concluded that Appellant was not entitled to relief on his ineffective assistance of counsel claims.

In order for a defendant to prevail on a claim of ineffective assistance of counsel pursuant to the United States

[3] Collateral counsel complains that the lower court separated his claims into numerous sub-claims and addressed them in a "superficial and piecemeal" fashion. To the contrary, the lower court properly attempted to organize Appellant's "litany of complaints" into logical sub-claims, rather than the "jumbled list of reasons that trial counsel was ineffective" contained in Diaz's postconviction motion. (PCR V84:13400).

Supreme Court's decision in Strickland, a defendant must establish two general components.

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). Furthermore, as the Strickland Court noted, there is a strong presumption that counsel's performance was not ineffective. Strickland, 466 U.S. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

On appeal, when reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prongs de novo. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the lower court properly identified the applicable law in analyzing Diaz's claims, correctly applied this law to

the facts as presented in the trial and postconviction proceedings, and concluded that Diaz was not entitled to postconviction relief.

Guilt Phase Claims

Appellant first claims that trial counsel was ineffective at the guilt phase and performed deficiently by failing to introduce evidence from an FDLE analyst regarding DNA results obtained from blood droplets located within the victims' home. Diaz claims that he was prejudiced by this alleged deficiency because the DNA evidence would have supported his defense theory that the victim, Charles Shaw, struck him during an altercation and that the subsequent murder was not premeditated. After conducting an evidentiary hearing on this claim, the postconviction court denied the issue because Diaz failed to establish deficient performance and prejudice:

> . . . Defendant argues that the evidence of Defendant's DNA in blood droplets found in the home was not presented to corroborate Defendant's story that the murder was not premeditated, but was a result of a confrontation with the victim. Defendant contends that trial counsel should have presented the report by FDLE lab analyst Agent Esposito, and was ineffective for failing to do so. The record reflects that Mr. Porter did question Agent Walker regarding the blood droplet evidence he submitted to FDLE for testing, and that the State objected to the results of that testing and admission of the report due to lack of foundation, with a comment that it would also require a hearing (Trial transcript pp. 437-439). Ms. Gonzalez testified during the evidentiary hearing that she did not know why she made the objection (June evidentiary hearing

> transcript p. 266). Mr. Porter did not recall why Agent Esposito was not called as a witness (June evidentiary hearing transcript p. 357). **Mr. Potter testified at the evidentiary hearing that he thought the DNA evidence was important at first, but that it would have gone nowhere because it only supported a self defense claim, and there was no self defense in this case** (June evidentiary hearing transcript p. 562). Mr. Potter believed that the defense did not call Agent Esposito because he was listed as a State witness, and they may have expected to be able to cross-examine him, but the State did not call him, and he was not present (June evidentiary hearing transcript p. 515). **Based on the foregoing, the Court finds counsel was not deficient. Even had counsel's performance somehow been deficient, Defendant cannot show prejudice.** The only testimony that the victim struck Defendant is from Defendant himself (Trial transcript pp. 594, 596, 618). However, Defendant did not shoot the victim during this alleged fight (Trial transcript p. 619). Defendant shot the victim after the victim ran from Defendant into his home and was cowering from him in the bathroom. Even if the shooting had been a result of the confrontation, Defendant would not have been justified in using deadly force to meet non-deadly force. The evidence of Defendant's blood in the home, even if admitted, would not have corroborated his defense, and there is no reasonable probability that admission of this evidence would have changed the outcome. Defendant has failed to meet his burden as to either prong of Strickland.

(PCR V84:13408-09) (emphasis added).

At trial, the State presented evidence from crime scene technician Richard Joslin regarding, among other things, the fact that he had taken samples of blood stains from various locations in the victims' home. (DAR V3:T.388-414). On cross-examination, the witness testified that he did not know whose blood it was in the samples, but another analyst, Robert Walker,

sent the blood samples to FDLE for testing and Walker would have received the results. (DAR V3:T.417-18). Joslin had the FDLE report in his possession and defense counsel asked if it was a document that was kept in the normal course of business at the sheriff's department. (DAR V3:T.418-19). When crime scene technician Robert Walker subsequently testified, defense counsel attempted to introduce the FDLE report into evidence as a business record and prosecutor Jesus Casas objected on the grounds that trial counsel had not laid a proper foundation for the admission of the report. (DAR V3:T.437-39). At the bench conference, the other prosecutor, Maria Gonzalez, also added:

> In addition, it requires a Frye hearing for DNA to be introduced and that cannot be done through business records exception which is what he's trying to do through this witness.

(DAR V3:T.438). When trial counsel Porter indicated that he could admit the report as a business record, prosecutor Gonzalez responded that the report could have been admissible if the proper foundation had been laid, but "that again is subject to a Frye hearing." (DAR V3:T.438-39).

At the evidentiary hearing, collateral counsel introduced evidence from crime scene technicians Robert Walker, Richard Joslin, and FDLE DNA analyst Darren Esposito regarding the DNA testing on the blood samples found in numerous places within the victims' home. Esposito testified that he had performed PCR DNA

testing in this case in 1998, but that FDLE transitioned to the newer, STR DNA testing in 1999. (PCR V93:157-62). Esposito testified that his DNA report, which was provided to the State and defense counsel prior to trial, indicated that a number of blood samples were attributed to Joel Diaz. (PCR V93:186-87). Prosecutor Jesus Casas testified at the evidentiary hearing that he objected to trial counsel's attempt to introduce the FDLE report because counsel had not laid the proper predicate in order to admit the report. (PCR V94:238). Prosecutor Casas further testified that he thought prosecutor Gonzalez' objection based on Frye was "odd." (PCR V94:238). Prosecutor Maria Gonzalez testified that she did not have any concerns about FDLE's lab work, but thought that the FDLE lab report could not be admitted at trial without the proper predicate being established; she did not recall why she raised a Frye objection at trial. (PCR V94:266-67). Trial counsel Porter testified that he could not recall why he did not call Darren Esposito as a witness, but acknowledged that his defense was insanity wherein he admitted that Diaz committed first degree murder, thus any argument regarding self-defense was inconsistent with his main defense theory. (PCR V95:462-66).

Even though trial counsel failed to admit the FDLE report during the guilt phase, any alleged deficiency was not

prejudicial to Diaz as the main defense theory was insanity and any evidence tending to disprove premeditation was irrelevant. The DNA evidence also would not have supported a defense theory of justifiable use of deadly force because, as the lower court correctly noted, Diaz did not shoot Charles Shaw during this alleged altercation in the garage, but rather, Diaz shot the victim after he chased him into the home and while Charles Shaw was cowering from Diaz in the master bathroom and begging for his life. Diaz was not justified in using deadly force to meet non-deadly force, especially when he could have easily retreated from the situation.

Additionally, the defense introduced evidence at trial that blood was found at various places in the house, and since the murder was confined to the master bathroom, the blood would have likely belonged to Diaz. This evidence, coupled with Diaz's own testimony that the victim had struck him in the face during an altercation in the garage, was sufficient to allow the jury to find that Diaz was bleeding at some point while rummaging through other areas of the victims' house. Finally, any argument that Diaz was prejudiced by trial counsel's failure to introduce this report is refuted by the overwhelming evidence of premeditation introduced by the State. As this Court noted on direct appeal, "whether an altercation in the garage furnishes

circumstantial evidence that the victim struck Diaz in the face is **ultimately irrelevant** given the substantial evidence surrounding Diaz's intent to go to the Shaw's house on the morning of October 28 to commit murder." Diaz, 860 So. 2d at 965 n.5 (emphasis added). Because the lower court properly found that Diaz failed to establish deficient performance and prejudice as required by Strickland, this Court should affirm the lower court's denial of the instant sub-claim.

Appellant next claims that the postconviction court erred in denying his claim that trial counsel was ineffective for failing to interview Diaz's friend, Melissa McKemy, because her testimony regarding Diaz's state of mind would have been useful in either the guilt or penalty phase. Melissa McKemy testified at the evidentiary hearing that Diaz was depressed after breaking up with Lissa Shaw, and when she spoke to Diaz the night before the murder, she was concerned with his level of depression and thought he might be suicidal. (PCR V97:190-91). On cross-examination, McKemy testified that she was driving with Diaz one day after he had broken up with Lissa Shaw, but before the murder, when they saw Lissa Shaw going to a Western Auto store. Diaz asked McKemy to turn around and take him to the store, and after dropping Diaz off, she observed him hitting Lissa Shaw. (PCR V97:194-95). Defense counsel Porter testified

at the evidentiary hearing that Diaz wanted to call McKemy, but he could not recall if Diaz told him what McKemy would testify about. When questioned about whether Porter would have presented McKemy given her prejudicial observations of the Western Auto incident, he testified that he would not have presented her simply because Diaz wanted to call her. (PCR V95:433-34).

In denying this sub-claim, the lower court found that Diaz failed to establish that trial counsel performed deficiently or that he was prejudiced. (PCR V84:13407-08). The court noted that Diaz's brother, Jose Diaz, testified at trial about Diaz's state of mind at the time of the murder, including his observations of Diaz on the morning of the murder. Jose Diaz testified that his brother was depressed about the break-up with Lissa Shaw, had recently quit his job, had started smoking more, and was depressed and quiet on the morning of the murder. (DAR V3:T.472-73, 489-90). The postconviction court noted that McKemy's testimony regarding Diaz's state of mind prior to the offense would have been cumulative to the testimony of Jose Diaz and the defendant himself (DAR V3:T.577-87), and McKemy's testimony regarding the Western Auto incident would have been harmful to Diaz. As the court properly noted,

> Counsel cannot be ineffective for failing to present cumulative evidence. Farina v. State, 937 So. 2d 612, 624 (Fla. 2006); Jones v. State, 949 So. 2d 1021, 1035-36 (Fla. 2006); Holland v. State, 916 So. 2d 750,

> 757 (Fla. 2005); Cole v. State, 841 So. 2d 409,425 (Fla. 2003); Marguard v. State, 850 So. 2d 417, 429-30 (Fla. 2002)." . . . Mr. Porter testified at the evidentiary hearing that he did not recall if Defendant told him what Ms. McKemy would have testified to, but that he would not have called her as a witness if she had negative testimony just because Defendant wanted her as a witness (June evidentiary hearing transcript p. 434). Consequently, the Court finds counsel's performance was not deficient. Even had counsel presented this testimony, there is no reasonable probability it would have changed the outcome. Defendant has failed to meet his burden as to either prong of Strickland.

(PCR V84:13408). Because the court properly found that Diaz failed to satisfy his burden under Strickland, this court should affirm the court's denial of this sub-claim.

Appellant next claims that trial counsel was "ill-prepared" for the complexities of the insanity defense and failed to properly investigate and prepare Dr. Paul Kling for his guilt phase testimony in support of the insanity defense. Appellant erroneously claims that Dr. Kling agreed with the State that Diaz's mental state did not meet Florida's definition of insanity and cites to page 572 of the direct appeal record in support of this assertion. Clearly a review of this transcript page, as well as Dr. Kling's entire testimony, fails to support any assertion that Dr. Kling agreed with the State that Diaz did not meet Florida's definition of insanity. (DAR V3:T.533-75).

At trial, the defense presented Dr. Kling to testify regarding Appellant's sanity at the time of the crime. Dr. Kling

initially found Diaz sane at the time of the murder and issued a report of such finding, but after meeting with Diaz on two more occasions and reviewing the depositions of eyewitnesses Lissa Shaw, Barbara Shaw, and Deborah Wilson, he issued a second report finding him insane. (DAR V3:T.533-47). On cross-examination, Dr. Kling testified that he was either never told, or simply could not recall, that Diaz had purchased the gun days prior to the murder and was calling the pawn shop daily because he had to wait for it, had purchased bullets in advance, and had written a letter to his brother shortly before the murder. (DAR V3:T.552-55).

Diaz claims that had trial counsel better prepared Dr. Kling for his testimony and provided him with more information, the State would not have been able to "score points" with him on cross examination. Collateral counsel complains that the State was able to elicit from Dr. Kling that Diaz suffered from an "ungovernable temper" and counsel erroneously opines that Dr. Kling's "credibility was destroyed." Of course, the fact that Diaz has an "ungovernable temper" and anger issues was not disputed by the defense at trial as that diagnosis was the basis of his insanity defense theory. Thus, defense counsel cannot be deemed ineffective for allowing the defense expert to opine that Diaz had these anger issues as this was the only viable defense

theory available to Diaz given the "horrible facts" of this case. (PCR V93:117-18; V94:348; V95:561-62). Furthermore, as the lower court noted when denying this claim, Diaz has not specified how more preparation would have changed Dr. Kling's truthful testimony at trial. (PCR V84:13410). Dr. Kling testified at the postconviction hearing that, even after reviewing additional information, he would not change his opinion that he gave at the time of trial. (PCR V96:657). Thus, because Diaz failed to meet his burden as to either prong of Strickland regarding this sub-claim, this Court should affirm the lower court's order denying this sub-claim.

Diaz further alleges that trial counsel was ineffective for failing to object when the State introduced the report of its rebuttal expert, Dr. Richard Keown, and was ineffective for allowing Dr. Keown to testify regarding the results he obtained after administering the Anger Styles Quiz to Diaz.[4] As previously noted, during the defense's case, trial counsel presented testimony from his mental expert, Dr. Kling, including

[4] Without any legal support or factual basis, Diaz claims that the Anger Styles Quiz is not generally accepted in the scientific community. Dr. Keown testified at the postconviction evidentiary hearing that the quiz was developed about fifteen years ago by social workers who worked in the anger management field. (PCR V96:737). Thus, given the fact that the test had been utilized for over fifteen years by experts in the anger management field, the State submits that even had trial counsel raised a Frye objection, it would have been overruled. See generally Ramirez v. State, 651 So. 2d 1164 (Fla. 1995).

introducing the two reports prepared by Dr. Kling. Subsequently, when the State presented Dr. Keown as a rebuttal witness, trial counsel did not object when the State introduced Dr. Keown's report.[5] Obviously, trial counsel does not perform deficiently when he seeks to introduce two reports from his own expert, and then chooses not to raise an objection when the State does the same exact thing in rebuttal. Furthermore, as trial counsel testified at the evidentiary hearing, the report from Dr. Keown contained beneficial mitigating information that was helpful to their client. (PCR V95:470-71, 569-74). Based on this testimony and the record, the postconviction court properly rejected this sub-claim and found that trial counsel had a valid strategic reason for failing to object to Dr. Keown's report or to his testing. (PCR V84:13404-05).

In addition to finding no deficient performance regarding trial counsel's handling of Dr. Keown, the court also found that Diaz failed to establish any prejudice as a result of the alleged ineffectiveness. Dr. Keown's testimony regarding Diaz's test results on the anger quiz were similar to the defense expert's opinions on Diaz's anger -- Dr. Kling's psychological testing and interviews with Diaz revealed that he had an

[5] Trial counsel successfully objected and had the court remove a reference in Dr. Keown's report to a restraining order. (DAR V4:T.643, 698).

ungovernable temper and anger. (DAR V4:T.572). Similarly, Diaz was not prejudiced by the admission of Dr. Keown's report. Diaz argues on appeal that the report contained damaging information ("[Joel Diaz] could be threatening and physically abusive as well as unpredictable in terms of when he might get angry"), and "incorrect" information (Dr. Keown stated that Diaz "appeared to be of average intelligence"). Clearly, the jury was aware that Diaz could be threatening and physically abusive with an unpredictable temper based on the facts of this case, as well as the defense expert's testimony and Diaz's own testimony at the guilt phase. Finally, Diaz was not prejudiced by Dr. Keown's opinion that Diaz "appeared to be of average intelligence," when his IQ had been tested prior to trial by another doctor at 86, or "low average range." (PCR V71:10607-09). Based on Diaz's failure to establish deficient performance and prejudice as required by Strickland, this Court should affirm the lower court's denial of this claim.

Penalty Phase

Appellant asserts that the lower court erred in denying relief on his ineffective assistance of penalty phase counsel claim and asserts that the court's factual findings are not supported by the record and that the court misunderstood controlling law. Collateral counsel further claims that the

lower court gave "short shrift" to the claims and devoted only two pages in its order to these claims. To the contrary, due to the disjointed nature of the claims, the court was forced to address Diaz's claims of ineffective assistance of counsel in a number of various places throughout its order (see Order Denying Motion for Postconviction Relief, Claims VII(d) and (e) and Claim IX - PCR V84:13400-16), as well as extensively discussing Diaz's "litany of complaints" in his tenth postconviction claim:

> 48. As to Claim X, Defendant argues that trial counsel was ineffective for failing to adequately investigate and prepare for the penalty phase and failing to introduce adequate mitigation evidence. This claim also contains a litany of complaints, in which defense counsel made no attempt to separate the complaints into specific, enumerated, claims. The Court has attempted to group the allegations into 4 Sub-claims.
>
> 49. As to Sub-claim X(a), Defendant argues that trial counsel failed to present mitigation evidence during the penalty phase. Defendant argues that counsel did not present any testimony from a competent mental health expert at the penalty phase. Defendant argues that an expert could have testified regarding his mental state, history and background and could have explained that he did not possess the heightened premeditation necessary for first-degree murder. Defendant argues that a mental health expert's testimony could have supported the statutory mitigator that his ability to appreciate the criminality of his act was substantially impaired. He claims he was prejudiced during the penalty phase because evidence of his "organic brain damage" and a childhood marked by meningitis, chronic depression, poverty, abuse and neglect were not presented to the jury. **These claims are similar to those already discussed. See responses to Sub-claims VII(d) and (e) and Claim IX, *supra*.** Ken Garber, initial trial counsel, testified at the evidentiary hearing that Dr. Kling's evaluation was

for competence, sanity, IQ and mitigators. Dr. Kling testified at the evidentiary hearing that he found in his second report the mitigator of extreme emotional distress. **Mr. Porter testified at the evidentiary hearing that he did not consider hiring a mental health expert for the penalty phase, because he had Dr. Kling, whose testimony and reports had already been introduced during the guilt phase**. He further testified that his main resource for information was his client, and neither Defendant, nor his interactions with Defendant, suggested Defendant had any mental health issues. **Mr. Potter testified at the evidentiary hearing that he did not consider hiring a mental health expert because nothing stood out from the evaluations, and Defendant actively resisted counsel when they inquired about such issues. He stated that the only thing he saw in his interactions with Defendant is that Defendant had a very short and violent temper. Counsel is not ineffective for relying on the evaluations conducted by qualified mental health experts, which found no indication of organic brain damage, mental retardation, or any other mental defect. See Stewart v. State, 37 So. 3d 243, 251-253 (Fla. 2010) Counsel cannot be found ineffective for not hiring a mental health expert when nothing in the interviews with Defendant, his family, or the doctors' evaluations suggested Defendant had organic brain damage, or that such an expert would have useful testimony. [See also PCR V84:13405-07]. Counsel conducted reasonable investigation into mental health mitigation evidence, and made a reasonable tactical decision not to pursue the investigation further upon receiving no useful information from Defendant, his family, or the experts' evaluations. Counsel's performance is not now rendered incompetent merely because Defendant has now secured the more favorable testimony of other mental health experts, who came to different conclusions based on similar evidence. Asay v. State, 769 So. 2d 974, 986 (Fla. 2000), Jones v. State, 732 So. 2d 313, 320 (Fla. 1999).**

50. To the extent Defendant may be arguing counsel failed to investigate or present adequate mitigation evidence, this claim also fails. The record shows the defense called Minerva Diaz, Defendant's sister, to testify on his behalf at the penalty phase. She testified regarding their childhood in very poor

conditions, and their father's drinking and abusive behavior. Defendant also testified at the penalty phase regarding his lack of significant criminal history and his remorse. The trial court found as mitigating circumstances that Defendant had no significant prior criminal history, Defendant was under extreme mental or emotional disturbance, Defendant's ability to understand the criminality of his conduct was impaired, age of Defendant, remorse, and family history. A copy of the sentencing order is attached. Regarding school, medical or other records, Mr. Porter testified at the evidentiary hearing that if he felt he needed them, he would have gotten them. He stated that they did not call other family as witnesses, because they put on the family that knew Defendant best. He did not see the need to corroborate the family history with documentation, when it was not in dispute. Mr. Potter testified at the evidentiary hearing that there was not much legitimate mitigation evidence in this case. He stated that Defendant's family was not cooperative. He further testified that Defendant was not cooperative in this regard either, did not want any evidence presented that would reflect on him negatively, and became angry and violent during a jail interview after his sister's testimony. Mr. Potter testified regarding school, medical and other documentation that he would have gotten it if there was a point. He stated that if he thought he had something to benefit Defendant, he would have brought it out. He did not think "kitchen sink" mitigation was effective with juries, and that judges preferred selective mitigation. The Court finds trial counsel's performance in this regard was not deficient, and that the decision not to perform "kitchen sink" mitigation was trial strategy. "Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." Taylor v. State, 3 So. 3d 986 (Fla. 2009), *quoting* Wiggins v. Smith, 539 U.S. 510, 533 (2003). What mitigation evidence existed was presented, and was considered by the jury and the trial court. That current defense counsel can now provide reams of school, medical, and other documents of ambiguous value, to corroborate the evidence already presented, or the testimony of experts who disagree with the

> findings of previous experts, does not render trial counsel's performance at the time, based on the information they had, ineffective. *See* Cherry v. State, 781 So. 2d 1040, 1052 (Fla. 2000). **Further, Defendant has failed to establish prejudice, in that he has failed to show that any additional mitigation evidence would have outweighed the aggravating factors. Nor has Defendant shown that he was deprived of a reliable penalty phase proceeding.** *See* Orme v. State, 896 So. 2d 725 (Fla. 2005), *citing* Asay v. State, 769 So. 2d 974, 985 (Fla.2000). Defendant has failed to meet his burden as to either prong of Strickland. Therefore, Sub-claim X(a) is DENIED.

(PCR V84:13416-20) (record citations omitted and emphasis added).

Appellant's claim that the lower court's factual findings are unsupported by the record is without merit and should be rejected. At the evidentiary hearing, trial attorney Porter testified that he was appointed in November, 1998,[6] and moved to appoint co-counsel Neil Potter on May 1, 2000. (PCR V94:331, 410-11). Neil Potter testified that the six months he had to prepare for the penalty phase was a sufficient amount of time.[7] (PCR V95:500). Potter testified that there was not much "legitimate" mitigation in this case and, unlike other

[6] Assistant Public Defender Kenneth Garber was initially appointed to represent Diaz on October 29, 1997. (DAR V1:R.5, 10). On August 21, 1998, Diaz filed a pro se motion to dismiss Garber because he had "done nothing" on his case and did not believe Diaz. (DAR V1:R.13). The judge ultimately allowed Garber to withdraw from the case on January 25, 1999, and Porter filed his notice of appearance on February 1, 1999. (DAR V2:R.22-24).

[7] The penalty phase began on October 10, 2000. (DAR V5:T.805-99).

attorneys, his strategy was not to present the "kitchen sink" in mitigation. (PCR V95:509-14). Moreover, Diaz and his family were extremely uncooperative with the attorneys and did not assist them in their efforts to obtain mitigating information despite the defense team utilizing an interpreter to communicate with Diaz's mother. (PCR V95:430-33, 438, 509-14). Trial counsel anticipated presenting the testimony of Diaz's mother at the Spencer hearing, but Diaz did not want her testimony presented. (DAR SV1:48, 70). The only family member who was available and cooperative with the defense team was Diaz's sister, Minerva Diaz, and the only reason she was available was because she was incarcerated at the jail. (PCR V95:511, 577). Diaz also did not want mental health and evidence of abuse presented to the jury. (PCR V95:523-26).

With regard to retaining and presenting mental health experts at the penalty phase, Potter's recollection was that Diaz had been previously examined by mental health experts[8] and there was not much information in their reports that caused him to seek further evaluations. Potter did not see a need to seek out a neuropsychologist because, based on his review of the mental health experts' reports, and in talking with counsel and with Diaz numerous times, Potter did not see any evidence of low

[8] Prior to trial, Diaz was evaluated by Drs. Paul Kling, Bruce Crowell, and Richard Keown.

intelligence or mental or emotional problems. (PCR V95:539). Potter also had the mental health experts' reports, as well as Diaz's sister who observed Diaz's childhood firsthand, and he did not feel the need to seek out additional information given this evidence. (PCR V95:573). Lead counsel Porter also testified that the defense team did not retain a separate penalty phase mental health expert because they presented Dr. Kling at the guilt phase. (PCR V95:414). As this Court has previously noted, trial counsel is not deficient for relying on the guilt phase testimony of a mental health expert in arguing for mitigation. See Carroll v. State, 815 So. 2d 601, 616 (Fla. 2002) (holding that trial counsel was not ineffective for failing to present mental health mitigation at penalty phase when experts testified at length during guilt phase); Provenzano v. Dugger, 561 So. 2d 541, 546 (Fla. 1990) (finding that trial counsel was not ineffective for failing to present expert testimony during the penalty phase concerning defendant's mental condition when counsel presented extensive testimony during the guilt phase that defendant was paranoid).

As the lower court properly found based on the testimony at the evidentiary hearing, trial counsel is not constitutionally deficient for relying on their retained expert, Dr. Kling, merely because collateral counsel has obtained different mental

health experts to testify regarding their opinions in the postconviction proceedings. See generally Bowles v. State, 979 So. 2d 182 (Fla. 2008) (finding counsel did not perform deficiently by relying on retained mental health expert and not seeking out another mental health expert); Asay v. State, 769 So. 2d 974, 986 (Fla. 2000) (holding that trial counsel's reasonable investigation is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable expert in postconviction). Additionally, collateral counsel's hindsight attack on trial counsel is unavailing, especially considering that, at the time of trial, Diaz and his family were not cooperating with his attorneys and providing beneficial information. Both trial attorneys testified regarding the uncooperativeness of Diaz and his family members in investigating potential mitigation, as evidenced by Diaz's severe anger with counsel after he presented mitigating evidence from Diaz's sister that made Diaz and his family "look bad." (PCR V95:520-22). The law is well established that trial counsel has a duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence, Ragsdale v. State, 798 So. 2d 713, 716 (Fla. 2001), and the reasonableness of trial counsel's actions may be substantially influenced by the defendant's own statements or actions. See

Anderson v. State, 18 So. 3d 501 (Fla. 2009) (rejecting ineffective assistance of penalty phase counsel claim because attorneys' performance was not deficient when defendant himself was a barrier to the discovery of the mitigating evidence); Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000) (noting that the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions).

Collateral counsel further alleges that trial counsel was ineffective for failing to discover and present evidence of sexual abuse within the family. Collateral counsel asserts that "Potter was not aware of sexual abuse and he did not have Dr. Bruce Crowell's report in his file." Initial Brief at 72. Potter never testified that he did not have Dr. Crowell's report. When questioned about this report, Potter assumed he had the report in his file, but he could not specifically recall. (PCR V95:532). Of course, the report was addressed to his co-counsel and presumably was mailed to Porter. (PCR V71:10607-09). Furthermore, Dr. Crowell's report is silent regarding any alleged sexual abuse. (PCR V71:10607-09). The only mention of alleged sexual abuse within the family was contained in Dr. Kling's report -- which trial counsel possessed and introduced into evidence at the guilt phase. Dr. Kling stated that Diaz's

sister, Minerva Diaz, commented that "there is a significant family history for sexual abuse, physical abuse, violence, anger, legal problems, and alcoholism." (DAR V2:R.41). At the penalty phase, trial counsel presented the testimony of Minerva Diaz and she testified that there was quite a bit of abuse in their household when they were growing up and noted that their father was an alcoholic who was physically abusive. (DAR V5:T.822-25). At the postconviction evidentiary hearing, Minerva Diaz discussed the sexual abuse in the household stemming from their exposure to pornography, but she was unaware if Appellant suffered any physical sexual abuse. (PCR V97:136-37, 152).

Collateral counsel further claims that penalty phase counsel was ineffective for failing to present evidence of Appellant's farm work and exposure to pesticides to the jury. At the evidentiary hearing, trial counsel Potter testified that he did not consider this evidence to be compelling mitigation. (PCR V95:533-36). In the postconviction proceedings, collateral counsel presented testimony from Ana Garcia that Diaz began working on a farm with his mother during Christmas and summer breaks when he was ten or eleven years old. (PCR V97:46-47). According to Garcia, Appellant told her he had been sprayed by a pesticide airplane on at least one occasion. (PCR V97:77). On cross examination, the witness testified that Diaz lived in city

residential areas during this time period, and Social Security records showed only minimal farm work from January 1985 (when Diaz was 11 years old) through the time of the murder in 2000. (PCR V97:47, 68-73). The witness also was unaware of any studies finding that farm pesticides used on food causes any adverse effects. (PCR V97:73-74). Appellant also presented testimony from David Griffith, a professor of anthropology, who testified that he was aware of studies indicating that "children in agricultural households" can be exposed to pesticides within the house and on vehicles which can cause higher levels of organo phosphates in their blood, but he was unaware of any testing performed on Diaz. (PCR V97:116, 123-25).

Based on the evidentiary hearing testimony, the postconviction court properly found that trial counsel was not deficient for failing to present evidence of Diaz's farm work. As trial counsel testified, the evidence regarding Diaz's farm work and alleged exposure to pesticides was not compelling. The evidence established that Diaz consistently lived in city residential housing and was not living in an "agricultural home." Income records showed minimal agricultural work, and in the years leading up to the murder, Diaz worked at a Perkins' restaurant and for a lumber company building trusses.

Although not required to address the prejudice prong of Strickland given Diaz's failure to establish deficient performance on the part of penalty phase counsel, this Court should also find that the lower court properly found that Diaz failed to establish that he was prejudiced. See Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001) (noting that "[w]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong"); Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003). When addressing the prejudice prong of a claim directed at penalty phase counsel's performance, the defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000). In the instant case, as the lower court noted, there was no reasonable probability that the additional mitigation evidence presented in the postconviction proceedings would have outweighed the aggravating factors and resulted in a life sentence.

At the guilt and penalty phase proceedings, trial counsel presented mitigating evidence from mental health experts, Appellant, and from his sister, Minerva Diaz. As a result of

this mitigating evidence, the jury recommended the death penalty by a vote of nine to three. In following the jury's recommendation, the trial court found that the three aggravating factors: (1) the capital felony was especially heinous, atrocious, or cruel (HAC) (great weight); (2) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP) (great weight); and (3) the defendant was previously convicted of another capital felony or of a felony involving use or threat of violence to the person (great weight),[9] far outweighed the five statutory mitigating factors: (1) the defendant had no significant history of prior criminal activity (very little weight); (2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance (moderate weight); (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (very little weight); (4) the age of the defendant at the time of the crime (moderate weight); and (5) the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty: (a) the defendant was

[9] This Court struck the HAC aggravator on direct appeal, but found the error harmless given the two remaining aggravators and the five mitigating circumstances. Diaz v. State, 860 So. 2d 960, 965-68 (Fla. 2003).

remorseful (very little weight); and (b) the defendant's family history of violence (moderate weight). Diaz v. State, 860 So. 2d 960, 964 n.4 (Fla. 2003). In fact, the trial judge noted that **"[e]ach one of the aggravating circumstances in this case, standing alone, would be sufficient to outweigh the mitigation**." (DAR V5:R.215) (emphasis added).

As has been set forth above, the mitigation presented at the postconviction evidentiary hearings was not compelling and would not have resulted in a different outcome. The jury was aware of mental mitigation and other mitigating evidence from Drs. Kling's guilt phase testimony and written reports and the fact that collateral counsel obtained additional experts with different opinions does not equate to a finding that trial counsel was ineffective.[10] See Asay v. State, 769 So. 2d 974, 986 (Fla. 2000). The jury also heard the live testimony of Minerva Diaz, Diaz's sister, regarding their childhood of growing up in

[10] Additionally, as defense counsel testified, they did not object to the introduction of Dr. Keown's report because it contained some good mitigation evidence. For instance, Dr. Keown noted that Diaz's childhood was difficult, his father had a drinking problem and was verbally and physically abusive, there was often little food in the house, Diaz made average grades in school until he was forced to quit in the ninth grade and started work bussing tables, and eventually began working at a lumber company when he was eighteen. Dr. Keown also noted that Diaz had an Axis I diagnosis of Adjustment Disorder with Depressed Mood, and Probable Adult Deficit Hyperactivity Disorder, and an Axis II diagnosis of Dependent and Passive-Aggressive Traits (DAR V3:R.65-73).

a household of violence with an abusive father. There is no reasonable probability that the additional evidence of Appellant's farm work and low average intelligence would have affected the outcome of these proceedings. As such, the lower court properly found that Diaz failed to establish that he was deprived of a reliable penalty phase proceeding.

Appellant claims that the postconviction court "misstated" Strickland's prejudice standard in finding that the additional mitigation evidence introduced at the postconviction proceedings would not have outweighed the aggravating factors nor was he deprived of a reliable penalty phase proceeding. (PCR V84:13420). To the contrary, the postconviction court properly recognized that Strickland governed the analysis of Diaz's postconviction claims and cited the appropriate standard in the order denying relief. (PCR V84:13387). In finding that Diaz had not met his burden of establishing prejudice based on counsel's failure to present mitigating evidence, the court properly relied on caselaw from this Court to find that Diaz was not deprived of a reliable penalty phase proceeding. (PCR V84:13420; citing Orme v. State, 896 So. 2d 725, 731 (Fla. 2005) and Asay v. State, 769 So. 2d 974, 985 (Fla. 2000)). Although Diaz disagrees with the court's conclusion rejecting his ineffective assistance of penalty phase claim, he has failed to show that

the court’s factual findings or application of the law was erroneous. Accordingly, this Court should affirm the lower court’s order denying his ineffective assistance of counsel claims.

ISSUE III

THE LOWER COURT PROPERLY REJECTED DIAZ'S ALLEGATION THAT HE IS MENTALLY RETARDED AND INELIGIBLE FOR EXECUTION UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In his final issue on appeal, collateral counsel claims that Diaz is mentally retarded and that the lower court denied him a fair and full hearing on his claim when the court declined his request for a continuance at the end of the bifurcated two-week long evidentiary hearing. After hearing extensive testimony on Diaz's mental retardation claim, the trial court issued a detailed order finding that Diaz failed to establish *any* of the three prongs necessary for establishing mental retardation. In making this determination, the trial judge discredited the defense experts' opinions and testing results and found that the State's expert, Dr. Michael Gamache, was more credible.

On pages 84-92 of his initial brief, collateral counsel makes an unfounded attack on the qualifications of the State's expert, forensic psychologist Dr. Gamache, and argues that the postconviction court abused its discretion in denying his motion for continuance, for an undetermined amount of time, in order to rebut Dr. Gamache's testimony. First, as will be discussed in more detail infra, a review of the testimony from the evidentiary hearing clearly supports the trial judge's credibility finding regarding the various experts' opinions and

test results. The fact that the trial judge utilized Dr. Gamache's testimony to easily point out the glaring issues with the defense experts' testing methods and opinions does not warrant collateral counsel's unsupported attack of Dr. Gamache's qualifications. Furthermore, collateral counsel's reliance on this Court's discussion of Dr. Gamache's testimony in Kilgore v. State, 55 So. 3d 487, 509 (Fla. 2010), is misplaced. In Kilgore, this Court, relying on the testimony of the defense expert's testimony, stated:

> There is competent, substantial evidence to support the postconviction court's finding that Kilgore does not meet the first prong for mental retardation as defined by section 921.137 and rule 3.203. Kilgore received the following full-scale IQ scores: 76 (Dr. Kremper—August 1989), 84 (Dr. Ciotola—March 1990), 67 (Dr. Dee—March 1994), 75 (Dr. Eisenstein—August 2000), 74 (Dr. Dee—October 2004), 85 (Dr. Gamache—May 2006).
>
> The evidence suggests that the full-scale scores of 84 and 85 **may not be reliable**. The full-scale score of 84 was achieved through a test administered six months after the first administration of the IQ test. Dr. Ciotola's own report acknowledged that the practice effect was likely an issue. **Similarly, Dr. Gamache's May 2006 administration that resulted in a full-scale score of 85 was the sixth administration of the WAIS–III, and thus was probably affected by the practice effect. Casting even further doubt on Dr. Gamache's administration is the fact that it was prorated. Finally, the fact that Kilgore had just entered the "55 plus" category, which automatically increases the IQ score by five to six points simply because of one's age, further reduces the credibility of Dr. Gamache's score.**

Id. (emphasis added). This Court's discussion of Dr. Gamache's work in Kilgore, based on the facts and testimony in that case, does not constitute a rejection of his alleged "unconventional theories of psychometric testing." In fact, a review of Burns v. State, 944 So. 2d 234 (Fla. 2006), establishes that this Court has no issue with relying on Dr. Gamache to rebut a defense expert's opinion that a defendant is mentally retarded. See Burns, 944 So. 2d at 245-49 (affirming the lower court's order denying Burns' claim of mental retardation based on a credibility finding that Dr. Gamache's testimony was more credible than the defense expert's conflicting opinion).

As this Court has previously stated, "[i]t is within the court's discretion to determine the qualifications of a witness to express an expert opinion, and this determination will not be reversed absent a clear showing of error." Chavez v. State, 12 So. 3d 199, 205 (Fla. 2009). Clearly, a review of Dr. Gamache's extensive qualifications in the field of psychology qualified him to testify at the postconviction hearing as an expert witness. Dr. Gamache detailed his educational background, including a doctorate degree in clinical psychology, and the fact that he has been involved in forensic psychology and neuropsychology since 1985. (PCR V101:840-48; PCR V87:14065-70). Dr. Gamache also indicated that he has previously testified in

approximately 10-12 death penalty cases on the issue of mental retardation. (PCR V101:844). After hearing collateral counsel voir dire the witness, the postconviction court properly determined that Dr. Gamache could testify as an expert in this case and "give certain expert opinions that I think would be helpful to me in reaching my ultimate conclusions." (PCR V101:890-92).

Collateral counsel further claims that the postconviction court abused its discretion in denying her request for a continuance after the State presented rebuttal testimony from Dr. Gamache. Collateral counsel claimed that Dr. Gamache was not properly assessing Diaz for mental retardation because he was not utilizing the standard set forth by the American Association on Intellectual and Developmental Disabilities (AAIDD). As Dr. Gamache explained in great detail at the hearing, he was aware that numerous organizations offer slightly different definitions of mental retardation,[11] but in this case, he utilized the definition of mental retardation set forth in Florida Rules of Criminal Procedure 3.203(b) and Florida Statutes, section

[11] Contrary to collateral counsel's assertion that Dr. Gamache was unfamiliar with the AAIDD's manual, Dr. Gamache explained that he was unfamiliar with it by that name because it had recently been changed in 2010, but he was familiar with it by its prior name: the American Association of Mental Retardation (AAMR). (PCR V101:854-58); see also Franqui v. State, 59 So. 3d 82, 92 n.9 (Fla. 2011) (noting that the AAMR had changed its name to the AAIDD).

921.137(1), i.e., that the defendant must demonstrate (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before the age of eighteen. At the conclusion of Dr. Gamache's testimony, collateral counsel requested a continuance of unknown duration so she could bring in rebuttal witnesses who had never even been subpoenaed for the hearing.[12] (PCR V102:1207-11). The trial judge denied the request to continue and allowed collateral counsel to submit information from her experts after the hearing for the court's consideration. (PCR V102:1210-11).

In Randolph v. State, 853 So. 2d 1051, 1062 (Fla. 2003), this Court noted that a trial court's ruling on a motion for continuance is within the trial court's discretion, and the court's ruling will be reversed only when an abuse of discretion is shown. See also Fennie v. State, 648 So. 2d 95, 97 (Fla. 1994) (stating that an abuse of discretion is generally not found unless the court's ruling on a continuance results in undue prejudice to the defendant). Obviously, the trial judge in the instant case acted within his sound discretion in denying collateral counsel's request to seek yet another continuation of

[12] Collateral counsel identified two witnesses, Dr. Tasse, who she had not heard from, and Dr. Oakland, who was in Thailand.

the bifurcated evidentiary hearing. As the judge noted at the September 24, 2010, hearing:

> We had the first part of this hearing in June [2010], and I think I was fairly clear that the matter would be rescheduled for this week including the 3.203 issues. I think matters that you are seeking to put off for further witnesses should have been anticipated or reasonable anticipated by you. I think you've had plenty of time to do that, and so I will deny the request to continue this hearing yet another time to obtain additional testimony.

(PCR V102:1211). Although the trial court denied Diaz's request for a continuance, he nevertheless allowed counsel to submit written documents from these witnesses. Accordingly, based on these facts, this Court should find that the postconviction court acted within its discretion in denying the request for a continuance.

As to Appellant's primary claim that he is mentally retarded, the postconviction court thoroughly addressed and rejected this claim in its Order Finding that Defendant is Not Mentally Retarded. (PCR V85:13715-33). After hearing the testimony at the bifurcated evidentiary hearing, the court made numerous credibility determinations adverse to Diaz, and his current complaints on appeal now revolve around his disagreement with the court's complete rejection of his experts' opinions. In the recent case of Dufour v. State, 69 So. 3d 235 (Fla. 2011),

this Court set forth the applicable standard of review for this claim:

> When reviewing determinations of mental retardation, we examine the record for whether competent, substantial evidence supports the determination of the trial court. See Nixon, 2 So. 3d at 141 (citing Cherry v. State, 959 So. 2d 702, 712 (Fla. 2007); Johnston v. State, 960 So. 2d 757, 761 (Fla. 2006)). **This Court cannot "reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses."** Brown v. State, 959 So. 2d 146, 149 (Fla. 2007) (citing Trotter v. State, 932 So. 2d 1045, 1049 (Fla. 2006)). However, to the extent that the circuit court decision concerns any questions of law, we apply a de novo standard of review. See Cherry, 959 So. 2d at 712.

Dufour, 69 So. 3d at 246 (emphasis added); see also Franqui v. State, 59 So. 3d 82, 91-92 (Fla. 2011). The trial court properly made credibility determinations in this case and his findings are supported by competent, substantial evidence. See also Burns v. State, 944 So. 2d 234, 247 (Fla. 2006) (upholding trial court's finding that Dr. Gamache provided "more credible expert testimony" when he opined that the defendant's low IQ scores were not indicative of mental retardation despite having received at least one IQ score within the mental retardation range).

In Nixon v. State, 2 So. 3d 137, 141 (Fla. 2009), this Court summarized the history leading up to Florida's definition of mental retardation, and stated:

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

As set forth in Florida Statutes, section 921.137(1):

> [T]he 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 authorized by 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.

§ 921.137(1), Fla. Stat. (2010). In Cherry v. State, 959 So. 2d 702, 711-14 (Fla. 2007), this Court held that in order for a defendant to establish subaverage intelligence, he must score a

70 or below on a standardized test. See also Nixon, 2 So. 3d at 141; Kilgore v. State, 55 So. 3d 487, 507-09 (Fla. 2010). Florida Statutes, section 921.137 further mandates that the defendant establish each of the three requirements by clear and convincing evidence. See § 921.137(4), Fla. Stat. (2010). In this case, the lower court properly found that Diaz failed to establish ***any*** of the three requirements by either clear and convincing evidence or by the lesser burden of a preponderance of the evidence. See Nixon, 2 So. 3d at 142 (stating that the lack of proof on any one of these requirements results in the defendant not being found to suffer from mental retardation).

(1) Significantly Subaverage General Intellectual Functioning

Diaz filed his mental retardation claim on May 21, 2010, after the CCRC-retained expert, Dr. Philip Harvey, diagnosed Diaz as mentally retarded based on Diaz's IQ score of 57 on the new Wechsler Adult Intelligence Scale – 4th Edition (WAIS-IV). (PCR V26:3110-54). This score was *significantly* lower than any other measurement of Diaz's IQ in the past. In fact, Dr. Harvey had previously tested Diaz in 2005 with the Wechsler Abbreviated Scale for Intelligence – 3rd Edition (WASI-III) and reported a full scale IQ score of 74. Prior to Diaz's trial in 2000, Dr. Crowell administered the Wechsler Abbreviated Scale of Intelligence (WASI) and Diaz obtained a full scale IQ score of

86. Dr. Crowell testified that he used the WASI, or the abbreviated version of the Wechsler intelligence test, which consisted of four sub-tests taken from the Wechsler Adult Intelligent Scale – 3rd Edition (WAIS-III): the block design, similarities, vocabulary and mixed reasoning. Drs. Crowell and Gamache both noted that the WASI scores correlate strongly with the full scale WAIS test. (PCR V96:699-700; V101:917). Additionally, as Dr. Michael Gamache explained in great detail, Diaz began taking nationally-standardized achievement tests (CAT) in elementary school and these scores and school records refute any allegation of mental retardation. (PCR V101:893-906). The results from Diaz's CAT tests indicate that his equivalent IQ scores were 91, 79, 98, 94, 98, and 114.[13] Dr. Gamache acknowledged that Diaz was held back in elementary school early on, but noted that Diaz's family spoke Spanish at home and Diaz was educated in an English-speaking school and the standardized tests were given in English. He noted that numerous scientific studies indicate that children with this type of bilingual upbringing often struggle early in their education. (PCR V101:904-06). Thus, the *only* evidence that Diaz could conceivably meet the first requirement of the definition of

[13] Dr. Gamache explained that a person can fake a low IQ score, but cannot fake a high IQ score, and Diaz's score of an 82 on the CAT test in 1986 was equivalent to an IQ of 114. (PCR V101:903).

mental retardation is Dr. Harvey's WAIS-IV test result of 57 in 2010. See Phillips v. State, 984 So. 2d 503, 511 (Fla. 2008) ("[T]he majority of Phillips's IQ scores exceed that required under section 921.137. Moreover, the court questioned the validity of the only IQ score falling within the statutory range for mental retardation.").

Regarding the validity of this vastly outlying IQ test score, the postconviction court found that, because of the "serious questions" he had regarding the validity of Dr. Harvey's scoring, he "completely discredit[ed]" the 57 WAIS-IV score obtained by Dr. Harvey. This credibility finding is supported by competent and substantial evidence. As set forth by the court in denying this claim:

> 4. Section 921.137(1) defines subaverage general intellectual functioning as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." The Florida Supreme Court has consistently interpreted this definition to require a defendant seeking exemption from execution to establish he has an IQ of 70 or below. Phillips v. State, 984 So. 2d 503 (Fla. 2008). The two approved standardized intelligence tests specified in the rules are the Stanford-Binet Intelligence Scale and the Wechsler Intelligence Scale. Fla. Admin. Code R. 65G-4.0l1. However, Rule 65G-4.011 also states that a court is authorized to:
>
> > consider the findings of the court appointed experts or any other expert utilizing individually administered evaluation procedures which provide for the use of valid tests and evaluation materials, administered and

interpreted by trained personnel, in conformance with instructions provided by the producer of the tests or evaluation material.

. . .

6. Significant Subaverage General Intellectual Functioning.

Onset Prior to Age 18

It does not appear that Defendant was administered any intelligence tests as a child. Defense expert Dr. Harvey and State expert Dr. Gamache both testified that Defendant's score of 82 on the 1986 California Achievement Test would be equivalent to an IQ of 114 (September evidentiary hearing transcript pp. 503; 902-903). Dr. Gamache further testified that Defendant's lowest score on the California Achievement Test in 1982 would still equate to an IQ score of 79, and that the rest of Defendant's scores between 1981 and 1989 would equate to IQ scores between 91 and 114 (September evidentiary hearing transcript p. 1138). He stated that these scores were contrary to what one would expect in someone with mental retardation, because mentally retarded children have school records which reflect serious difficulties, and Defendant's scores on the standardized testing showed no intellectual deficits (September evidentiary hearing transcript pp. 898, 902-903, 906).

While the defense raised the fact that Defendant achieved low-average to failing grades during most of his time in school, Dr. Gamache testified that there is not a direct correlation between grades and IQ, but there is a direct correlation between achievement test scores and IQ (September evidentiary hearing transcript p. 907). Defense expert Dr. Puente testified that all kinds of issues could have caused the poor grades, such as lack of motivation or malnutrition, and that Defendant's poor performance could also have been due to poor attendance (September evidentiary hearing transcript pp. 396-398). Dr. Harvey testified that classroom scores are not the best indicator of intelligence (September evidentiary

hearing transcript p. 503). Dr. Harvey believed that aptitude tests such as the California Achievement Test were a better indicator of intelligence (September evidentiary hearing transcript pp. 503-504).

The testimony of the defense experts thus agrees with the testimony of the State expert, that the achievement test scores, not Defendant's grades, are the best indicator of Defendant's intellectual functioning before age 18. Based on the evidence submitted, Defendant's scores on the California Achievement Test resulted in the equivalent of IQ scores between 79 and 114. Therefore, the Court finds that Defendant has not met his burden of proving by clear and convincing evidence, or by a preponderance of the evidence, that he had significant subaverage general intellectual functioning, in the form of an IQ below 70, whose onset occurred prior to age 18.

Current Intellectual Functioning

The record indicates that trial defense expert Dr. Crowell administered the Wechsler Abbreviated Scale of Intelligence (WASI) in 2000, at which time Defendant scored 86. In 2005, defense expert Dr. Harvey administered the WASI again, and Defendant scored 76. Dr. Harvey administered the Wechsler Adult Intelligence Scale IV (WAIS IV) in 2010, and Defendant scored 57. **Trial defense expert Dr. Crowell testified that, while the WASI cannot be used to diagnose mental retardation, it can be used to rule it out (June evidentiary hearing transcript p. 703). Defense experts Dr. Puente and Dr. Harvey agreed, testifying that the WASI was a screening test that gives an estimate of a person's IQ (September evidentiary hearing transcript pp. 293-294; 454). Therefore, while Defendant's scores on the two WASI tests cannot be considered by the Court as the final indication of Defendant's IQ, those scores may be considered by the Court in making the determination of whether or not Defendant is mentally retarded.**

Dr. Gamache discussed problems he had discovered in Dr. Harvey's testing of Defendant. Dr. Gamache testified that he had concerns that Dr. Harvey may have incorrectly scored the two tests he administered.

Dr. Gamache testified that he re-scored the WASI administered by Dr. Harvey in 2005, resulting in a corrected score of 81 (September evidentiary hearing transcript p. 1042). Dr. Gamache pointed out that on the WAIS IV, Dr. Harvey had failed to follow the administrative guidelines in making follow up inquiries to some responses in some subtests, improperly scored at least five individual responses contrary to the manual instructions, failed to follow appropriate discontinue rules, and failed to follow appropriate reversal rules (September evidentiary hearing transcript pp. 924-927). The Court noted that Dr. Harvey testified that he scored Defendant zero on some questions, to responses the Court may have given if asked the same question. For instance, Dr. Harvey asked Defendant what was the commonality between knees and elbows, and scored Defendant zero for the response of body parts, instead of joints (September evidentiary hearing transcript pp. 516-518). Dr. Gamache testified that the manual indicates Defendant should have been given points for his response on that and other similar questions (September evidentiary hearing transcript pp. 924-927). Dr. Gamache pointed to the fact that, on the various subtests of the intelligence tests, Defendant had some scores that were good, and some that were poor. He testified that a mentally retarded person would be expected to do poorly across the board, with a flat line score for all subtests (September evidentiary hearing transcript pp. 1043).

Dr. Gamache further testified that Dr. Harvey failed to perform any malingering tests on Defendant, and did not use any independent measures of validity (September evidentiary hearing transcript pp. 929-93 1). Dr. Gamache indicated that he administered the Test of Memory Malingering to Defendant during his interview, and that it was a test for which normally even people with mental retardation or Alzheimer’s disease get nearly all the questions correct, but people who malinger do poorly (September evidentiary hearing transcript pp. 956-958). This testing indicated that Defendant was not putting forth his full effort (September evidentiary hearing transcript pp. 955-956). **In his opinion, the test results showed that Defendant was malingering** (September evidentiary

hearing transcript pp. 959-968). Further, Dr. Gamache testified that Defendant did not complete the validity indicator profile, a metric reasoning test derived from the same type of subtest on the WAIS and WASI tests, due to an alleged inability to understand what he was supposed to do (September evidentiary hearing transcript pp. 964-967). Yet, Dr. Harvey never indicated that Defendant had any difficulty with this subtest, even though the version used in the WAIS IV is even harder (September evidentiary hearing transcript pp. 928-929; 965-966). Defendant took the WAIS IV with Dr. Harvey prior to being interviewed by Dr. Gamache, so he should have been familiar with the exercise.

Dr. Harvey failed to perform a complete evaluation of Defendant, in that he did not test for malingering. **Based on the facts, and after observing the demeanor of the witnesses and considering their testimony, the Court finds Dr. Gamache's testimony that Defendant's poor performance on intelligence tests was due to malingering, rather than mental retardation, more credible than that of Dr. Harvey.** ***See, e.g.*** **Phillips v. State, 984 So. 2d 503, 510 (Fla. 2008). Further, considering the concerns of Dr. Gamache regarding the incorrect scoring on the WASI and multiple mistakes in scoring and administration of the WAIS IV, the validity of both the WASI and WAIS IV performed by Dr. Harvey is in question. The score of 57 on the WAIS IV administered by Dr. Harvey cannot be relied upon by this Court, due to the serious questions as to the validity of Dr. Harvey's scoring. The Court completely discredits the reliability of this score.** There is no other approved test with which to make a definitive finding of Defendant's IQ. Defendant scored 86 on the WASI administered in 2000, and 76, or, as re-scored by Dr. Gamache, 81, on the WASI administered in 2005. **While the WASI scores cannot be used to make a definitive finding of Defendant's IQ, the experts on both sides testified that the WASI scores could be used as an estimate of IQ, to screen for mental retardation. Those scores are above an IQ of 70. The Court finds that Defendant has not met his burden of proving by clear and convincing evidence, or by a preponderance of the evidence, that he currently suffers from significant subaverage**

> **general intellectual functioning.** Therefore, the Defendant has failed to meet his burden as to the first and third prongs of the mental retardation definition.

(PCR V85:13716-21) (emphasis added).

As the lower court properly found, Dr. Harvey's scoring of the tests he administered to Diaz were not reliable. Dr. Gamache identified numerous factors affecting the credibility of Dr. Harvey's opinions and the reliability of his test results, including scoring inaccuracies and a failure to follow administrative guidelines when administering the tests. (PCR V101:923-45, 955-68). After administering the Test of Memory Malingering (TOMM) to Diaz, Dr. Gamache opined that Diaz was malingering. Collateral counsel asserts that the court erred in finding Dr. Gamache credible and in rejecting Dr. Harvey's testimony because Dr. Harvey also tested Diaz for malingering when he administered a sub-test during the comprehensive Repeatable Battery for the Assessment of Neuorpsychological Status (r-BANS) test. However, as Dr. Gamache explained, he had the same concerns with the validity of Dr. Harvey's r-BANS testing as he did with the other tests administered by Dr. Harvey. (PCR V102:1041).

As the lower court noted, the evidence presented by Diaz at the evidentiary hearing does not establish by clear and convincing evidence, or even by a preponderance of the evidence,

that Diaz has significantly subaverage general intellectual functioning. The test scores obtained from Diaz established that he did not perform two or more standard deviations from the mean score on a standardized intelligence test. The only exception to this is Dr. Harvey's administration of the recent WAIS-IV, which as found by the trial court, is an inaccurate and unreliable result. Because Diaz failed to establish significant subaverage general intellectual functioning and manifestation prior to the age of eighteen, this Court should find that he is not mentally retarded and deny the instant claim. See Nixon, 2 So. 3d at 142 (holding that the defendant must establish all three of the elements of a mental retardation claim, and the lack of proof on any one of these components results in the defendant not being found to suffer from mental retardation).

(2) Concurrent Deficits in Adaptive Behavior

In addition to finding that Diaz failed to satisfy his burden of proving that he had significant subaverage general intellectual functioning and manifestation before the age of eighteen, the postconviction court also found that Diaz failed to establish that he has concurrent deficits in his adaptive behavior. As set forth in Florida Statutes, section 921.137, 'adaptive behavior' 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." § 921.137, Fla. Stat. (2010). As noted by this Court, "adapative functioning refers to how effectively individuals cope with common life demands and 'how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.'" Phillips v. State, 984 So. 2d 503, 511 (Fla. 2008) (quoting Rodriguez v. State, 919 So. 2d 1252, 1266 n.8 (Fla. 2005)). In order to support a diagnosis of mental retardation, Diaz must establish that he has significant limitations in at least two of the following skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, and work. Hodges v. State, 55 So. 3d 515, 533-34 (Fla. 2010) (quoting Atkins, 536 U.S. at 308 n.3).

In the instant case, the trial court found that Diaz did not have *any* deficits in his adaptive functioning:

> Defense expert Dr. Puente tested Defendant's adaptive functioning, but did not test Defendant directly. Rather, he tested Defendant's siblings, Jose and Minerva, with the ABAS II, over the phone. Dr. Puente testified that he only recorded, and thus scored, Minerva's responses if they were below 3. He stated that neither Minerva nor Jose answered "unsure" or guessed on any of the 250 questions. Dr. Puente indicated that the ABAS questions test for functioning before age 18. The ABAS does not have any internal validity measures. Dr. Puente admitted that if Minerva or Jose did not understand the questions on the ABAS,

their scores would be invalid. Dr. Puente testified that, in his opinion, Defendant was mentally retarded.

Minerva Diaz testified that Dr. Puente did ask her questions as part of a test to assess Defendant's adaptive functioning. Ms. Diaz testified that "I had to write down the four parts of it, whether it's yes, no, maybe, sometimes, sometimes never". She indicated she answered most of the questions "sometimes" because the task was not something Defendant did, or was responsible for, not because Defendant was not capable of the task. For instance, she stated that she answered "no" for letter writing, not because Defendant was not capable of writing a letter, but because he lived with her for most of her life and had no need to write a letter to her. There was no evidence that Jose Diaz was not laboring under similar misunderstanding when the test was administered to him.

Ms. Diaz' obvious misunderstanding of both the responses and what the questions asked, tends to render most, if not all, of her responses regarding Defendant's abilities suspect. Since Jose Diaz gave similar responses, his responses regarding Defendant's abilities are similarly suspect. Dr. Gamache testified that he had concerns about Ms. Diaz's responses, since she was younger than Defendant, and might not have had a chance to observe some of the behavior in the questions. He indicated that in such situations, the response must be marked as a guess, yet none of Ms. Diaz' responses were marked as guesses.

Dr. Gamache testified that he reviewed the ABAS II administered by Dr. Puente. He expressed concerns about the administration of this test, because he had discovered a scoring error, in which the first 11 questions for Minreva Diaz were not scored, and no questions were marked as estimates, as required if the test taker did not directly observe the behavior. He believed that had the first 11 questions been scored properly, it would have resulted in a 33 point increase in Ms. Diaz' test results. He stated that he had reviewed Ms. Diaz' testimony at the evidentiary hearing, and it appeared she did not understand some of the questions, that some of her responses on the

test were inconsistent with her testimony regarding Defendant's behavior, and that some of her responses were refuted by the record.

Further, as Dr. Puente testified, the ABAS II tests for adaptive functioning prior to age 18. Such retrospective diagnosis of adaptive function is insufficient to satisfy the second prong of the mental retardation definition. Phillips v. State, 984 So. 2d 503, 511 (Fla. 2008). As Dr. Puente testified that, in his opinion, "concurrent" meant "prior to age 18," contrary to the mental retardation definition, and he disregarded any adaptive functioning after age 18, the Court is less than confident in Dr. Puente's opinions.

The State's expert, Dr. Gamache, was the only expert to attempt to assess Defendant's adaptive function contemporaneously with intellectual functioning. Dr. Gamache interviewed the Defendant at the time he administered the TOMM, and this interview was recorded, and the recording played for the Court to observe Defendant's demeanor. Dr. Gamache testified that he also interviewed Lissa Shaw, Defendant's ex girlfriend, regarding Defendant's adaptive functioning when she lived with Defendant, and administered to her a test of Defendant's adaptive functioning.

Ms. Shaw testified that she dated Defendant for two years. She stated that Defendant initiated the contact with her. Defendant was well groomed and well mannered. Ms. Shaw testified that Defendant found a trailer and secured the rental before she moved in with him. Later, Defendant found another trailer for them to purchase. Defendant worked, and decided on his own what to do with his income. Defendant bought his own vehicles, drove, and had a drivers license. Defendant could read and write, cared for and groomed himself, liked nice clothes, and wore 14 carat gold jewelry. Ms. Shaw indicated that Defendant did laundry, that he cooked and taught her to cook the food he preferred, he did chores and minor repairs to the home, performed maintenance and repairs to their vehicles, and picked out his own food and clothing when shopping. Ms. Shaw testified that Defendant was also involved in child care, caring for her daughter and his niece.

As it relates to communication skills, the Court finds Defendant has shown no currently existing deficits in this area. Defendant testified coherently, rationally, and intelligently at trial. Defendant wrote the note to his brother Jose, which was entered into evidence at trial. Defendant gave his brother directions on the day of the murder. Defendant wrote a trial motion for new counsel, and letters to his attorneys. Defendant filled out grievance forms while in prison, as well as forms in order to marry. The Court finds the defense's argument that there is no way to determine if Defendant actually wrote those motions, letters, or grievances to be pure speculation. Minerva Diaz testified that Defendant writes letters to her about once a month. Dr. Gamache testified that Ms. Shaw told him that Defendant could read recipes, and used a pager. During the interview with Dr. Gamache, Defendant displayed normal demeanor and responded to questions coherently, rationally, and intelligently, if perhaps, not with sophistication. Defendant stated he can read and write in English, that he can read and write a little in Spanish, and he sometimes reads magazines, newspapers, or books while he has been in prison. Defendant also stated he writes letters to his wife, and that he wrote back and forth with her for more than a year prior to their marriage. During the interview, Defendant read a portion of defense counsel's Rule 3.851 motion to Dr. Gamache, with little to no difficulty, despite it being a complicated legal document. The Court also finds no evidence of the onset of any communication deficits prior to age 18. While Dr. Puente testified that Defendant's second grade teacher said Defendant was slow, Defendant indicated to Dr. Gamache that he did poorly in the first few grades because he was still learning English. Dr. Puente also testified that Defendant's mother indicated Defendant talked late as a baby, but there was no indication as to what constituted "late," nor any evidence that this delay was not within normal ranges for development. Therefore, Defendant has failed to meet his burden of proving any deficits in adaptive functioning in the communication skill area. As it relates to the self care skill, the Court finds Defendant has shown no currently existing deficits in this area. Defendant indicated during his interview with Dr. Gamache that

he showers and shaves three times a week. He gets exercise out in the yard for two hours twice a week, where he plays volleyball and basketball with other inmates. He said he sometimes walks around his cell or does jumping jacks, but not regularly. While the defense argued that the Court cannot consider the prison environment in determining current adaptive function because prison is not "the community," this argument fails. *See* Jones v. State, 966 So. 2d 319, 327-328). Defendant told Dr. Gamache that, before he was in prison, he cared for regular headaches with painkillers. As already indicated, Ms. Shaw testified that Defendant kept himself clean and well groomed, liked to wear nice clothes when not working, changed his work clothes and took a shower immediately upon coming home from work, cooked, fed himself, and did laundry. Dr. Gamache testified that people with mental retardation sometimes do not recognize the appropriateness of certain clothing for certain occasions, and that Defendant did. The Court also finds no evidence of the onset of any self care deficits prior to age 18. No evidence was presented on this issue. While Minerva Diaz testified that Defendant would not put a bandage on a cut, for instance, she qualified that answer by stating that they did not having money growing up for bandages. Therefore, Defendant has failed to meet his burden of proving any deficits in adaptive functioning in the self care skill area.

As it relates to the home living skill, the Court finds Defendant has shown no currently existing deficits in this area. As indicated above, Ms. Shaw testified Defendant found and arranged the rental of a trailer for them to live in, and found the trailer for them to buy. She stated Defendant did chores, maintenance, and minor repairs around the house, drove, had a drivers license, and performed repairs and maintenance to both their vehicles. Ms. Shaw indicated that Defendant coordinated with her for payment of the rent and utilities. Defendant indicated to Dr. Gamache that he had a checking account for about a month, but closed it because he did not want it. He cashed checks and paid bills by sending money orders or going to the business to pay the bill. Defendant stated he did not rent or sign up for things

he could not afford. He described himself as the breadwinner when he lived with his family. Defendant admitted he had a drivers license, but that it was revoked due to a traffic ticket. He stated he bought his first car when he was about 16 years old. He described financing a couple cars from used car dealers, and choosing the cars from the lot based on what he liked and could afford. It appears Defendant also maintains his environment while in prison. Defendant stated that he sweeps his cell and cleans his sink and toilet twice a week. He puts his laundry in a bag for pickup three times a week. He makes his bed every day. Dr. Gamache testified that the fact that Defendant sometimes went to his employer for an advance on his paycheck in order to pay bills shows the kind of responsibility that is not something a mentally retarded person would have. The Court also finds no evidence of the onset of any home living deficits prior to age 18. No evidence was presented on this issue. Therefore, Defendant has failed to meet his burden of proving any deficits in adaptive functioning in the home living skill area.

As it relates to the social/interpersonal skills, the Court finds Defendant has shown no currently existing deficits in this area. Defendant indicated to Dr. Gamache that he talks to other inmates and plays volleyball and basketball when out in the yard twice a week. Ms. Shaw testified that Defendant initiated contact with her, and was sociable. Dr. Gamache testified that Ms. Shaw indicated to him during their interview and on the adaptive functioning test he administered, that Defendant was sociable and outgoing. Ms. Shaw relayed to Dr. Gamache an incident in which Defendant was pulled over by law enforcement, told the officer that he had forgotten his license at home, and gave the officer the name of his brother Jose, so he would not get a ticket. It seems unlikely that a mentally retarded individual would have the mental agility and composure to come up with and maintain such a ruse on the spur of the moment under pressure, when faced with a uniformed law enforcement officer. Minerva Diaz thought Defendant had been taken advantage of by others, describing him buying gold that “wasn’t real,” and buying cars that broke down. However, Ms. Shaw testified that the gold Defendant

wore was stamped 14 carat gold. There was no evidence that the condition of the cars Defendant bought was not due to his financial situation, rather than being taken advantage of by the sellers. The Court also finds no evidence of the onset of any social deficits prior to age 18. While Minerva Diaz testified that they were picked on by neighborhood children, and that Defendant had trouble playing games with neighborhood children, she also described racial tensions in the neighborhood. There was no evidence presented that the behavior she described was not due to racial tension, or Defendant learning to speak English, rather than the implication of mental retardation. Therefore, Defendant has failed to meet his burden of proving any deficits in adaptive functioning in the social skill area.

As it relates to the use of community resources skill, the Court finds Defendant has shown no currently existing deficits in this area. Defendant told Dr. Gamache that he had obtained both a drivers license and a checking account. This shows Defendant was able to navigate the resources of both the bank and the Department of Highway Safety and Motor Vehicles. Defendant described attorney visits arid phone calls while at prison, he described the procedures for phone calls, visitations, and visitation request forms for friends and family. Defendant monitors his canteen account in prison, and orders desired items from the canteen. Defendant filed grievance forms in prison. Defendant filed forms in order to marry while in prison. Dr. Gamache testified that Ms. Shaw indicated Defendant went to parks, restaurants, movie theaters, and fairs. The Court also finds no evidence of the onset of any deficits in community use prior to age 18. No evidence was presented on this issue. Therefore, Defendant has failed to meet his burden of proving any deficits in adaptive functioning in the community use skill area.

As it relates to the self direction skill, the Court finds Defendant has shown no currently existing deficits in this area. Defendant worked regularly since he was 16 years old, and was working at a truss company before the murder. He told Dr. Gamache that his long term goals before the murder were to maintain

that job, obtain his GED and go to school at night, and qualify for a better job. Defendant also indicated that he had been talking with Ms. Shaw about marriage before the murder. Defendant consults with his attorneys and reads his legal documents. During the interview with Dr. Gamache, Defendant had paperwork to give to his attorney. Dr. Gamache testified that Ms. Shaw confirmed that Defendant had been future oriented about getting a bigger home, and possibly having children together. Ms. Shaw testified that Defendant found and obtained the rental on the first trailer for them, and found the second trailer for them to buy. The Court also finds no evidence of the onset of any deficits in self direction prior to age 18. No evidence was presented on this issue. Therefore, Defendant has failed to meet his burden of proving any deficits in adaptive functioning in the self direction skill area.

As it relates to the functional academics skill, the Court finds Defendant has shown no currently existing deficits in this area. Defendant indicated to Dr. Gamache that he is bilingual, and fluent in both English and Spanish. Defendant's testimony at trial was coherent and intelligent. Defendant spoke intelligently during his interview with Dr. Gamache. He was not noticeably slow, was engaged, answered appropriately, and displayed appropriate emotions, as well as a sense of humor. Notably, while Defendant refused to answer several questions regarding his wife or his legal case, he did so firmly, but with the utmost politeness. Dr. Gamache testified that Defendant used words and language that would be atypical of someone who was mentally retarded. The Court also finds no evidence of the onset of any deficits in functional academics prior to age 18. As discussed above, while Defendant's school grades were low average to failing, his California Achievement Test scores were consistent and indicated Defendant has low average to average intelligence. Therefore, Defendant has failed to meet his burden of proving any deficits in adaptive functioning in the functional academics skill area.

As it relates to the work, leisure, health and safety skills, the Court finds Defendant has shown no

currently existing deficits in these areas. Defendant worked consistently since he was 16 years old. Lawrence Pelliccione, a representative at the truss company at which Defendant was last employed, testified at his deposition that Defendant had worked there for three years, was trustworthy, did good work, and was a "slightly above average" employee. Dr. Gamache testified that Ms. Shaw indicated Defendant got up and went to work on time by himself. Dr. Gamache stated that, unlike people with mental retardation, Defendant did not require constant supervision to get up, get to work, or stay on task at work. Regarding health, Defendant stated that he exercised a little and played basketball and volleyball during recreation. He took painkillers for headaches. Defendant regularly showers, shaves, cleans his cell, and puts his laundry out for pick up. Dr. Gamache testified that Ms. Shaw indicated Defendant had no health problems when she lived with him, and he was attentive to self care. Regarding safety, Defendant indicated to Dr. Gamache that he had not been in any accidents, other than a few incidents playing as a child, and had one work injury to his wrist for which he had been out of work for a while. Dr. Gamache testified that Ms. Shaw relayed that Defendant was aware of safety for both himself and others, in various situations such as in parks or during storms. Dr. Gamache also testified that Defendant's memory of a plane spraying pesticides when he was working in a field was indicative of adaptive functioning, because Defendant had made the correlation, and was concerned for his health and safety, in a way a mentally retarded person would not. In considering the facts of the crime, the Court finds that Defendant's request that his brother drive him to the scene, because he could not see to drive in the dark, to be indicative of adaptive functioning in the safety area. Regarding leisure, Defendant told Dr. Gamache that he sometimes reads newspapers, magazines, or books that come down the cell block from other inmates, talks with other inmates, and plays basketball or volleyball. Defendant indicated that before being in prison, he would hang out with a girlfriend, go bowling, watch tv, go see a movie, or go out to eat. Ms. Shaw testified that they would play pool, and that Defendant was a decent pool player. Dr.

> Gamache testified that Ms. Shaw also relayed that she and Defendant would go to parks, restaurants, movies and fairs. She indicated that Defendant would listen to the radio, watch tv, read, visit his family, or they would rent movies. The Court also finds no evidence of the onset of any deficits in the areas of work, health, safety, or leisure prior to age 18. Therefore, Defendant has failed to meet his burden of proving any deficits in adaptive functioning in the work, health, safety, or leisure skill areas.
>
> **Defendant has not met his burden of proving by clear and convincing evidence, or by a preponderance of the evidence, that he has currently existing deficits in two or more of the skill areas that make up adaptive functioning. Defendant has further failed to prove onset of any deficits in adaptive functioning prior to age 18. The Court finds that the second and third prongs of the mental retardation definition have also not been met.**
>
> **8. After considering the evidence, the demeanor of the witnesses, and their testimony, the Court finds that the greater weight of the evidence indicates that Defendant does not have subaverage intellectual functioning, has no currently existing deficits in adaptive functioning, and that there was no onset of either element prior to age 18. Defendant has not met his burden of proving by clear and convincing evidence, or by a preponderance of the evidence, any of the three prongs of the mental retardation definition.**

(PCR V85:13721-33) (transcript citations omitted and emphasis added).

The postconviction court's order is supported by competent and substantial evidence. At the evidentiary hearing, collateral counsel presented evidence from Dr. Antonio Puente, a neuropsychologist, regarding his retroactive diagnosis of Diaz's adaptive functioning based on his review of materials, and his

interview of Diaz and his family members, friends, and two teachers. After considering Dr. Harvey's WAIS-IV test results, Dr. Puente opined that Diaz is mentally retarded based on his significant limitations in adaptive functioning that occurred prior to the age of 18.

Dr. Puente testified that Diaz worked a number of jobs, beginning at a young age working on a farm. When he was 16, Diaz reported that he began working at a bagel shop, and then was a busboy or dishwasher at a catering business, Burger King, and Red Lobster. (PCR V98:306-07). Diaz's most significant job was working for a truss company where he assembled trusses and took measurements and cut two-by-fours. (PCR V98:278). Dr. Puente minimized this job's requirements of taking accurate measurements and making precise cuts as routine because it was straightforward and a repeated task. (PCR V98:279). Dr. Puente testified that Diaz did not have a credit card or a bank account, and managed his finances with cash. (PCR V98:308). He claimed that Diaz did not perform any household tasks because others would handle these things for him. (PCR V98:308-09). Dr. Puente testified that when Diaz moved in with Lissa Shaw, she had found and purchased the trailer, but Diaz somehow ultimately entered into some type of contract to make payments on the lot. (PCR V98:309). Dr. Puente further discounted Diaz's ability to

manage his finances based on his car purchases. Diaz's first car was a Ford Pinto that he purchased from a family friend for $500. According to Dr. Puente, Diaz subsequently bought others cars, including a car that "blew up," and a car from a car dealership that turned out to be stolen. (PCR V98:309-10).

In addition to interviewing Diaz, Dr. Puente also spoke to Diaz's mother, Esperanza Diaz, his sister, Minerva Diaz, his brothers, Jose Diaz, Jr. and Roel Diaz, two teachers, and friend Melissa McKemy. Dr. Puente gave the Adaptive Behavior Assessment System (ABAS) test to Minerva and Jose. Based on his interviews and test results, Dr. Puente opined that Diaz had deficits in communication, community use, functional academics, home living, health and safety, leisure, self-care, self-direction and social skills. (PCR V98:332-35).

In contrast to Dr. Puente's testimony regarding Diaz's alleged deficits in adaptive functioning, the State presented testimony from Lissa Shaw regarding her experience in dating and living with Diaz over a two year period of time. Ms. Shaw testified that she met Diaz when she was working at a pet shop at the mall. She was attracted to Diaz as he was well groomed and well mannered.[14] (PCR V100:755-56). After dating for a period

[14] Ms. Shaw testified that Diaz wore hair product in his hair and liked to wear nice clothes and jewelry when not working. (PCR V100:760-62).

of time, they moved into a trailer that Diaz had located and secured by entering into a rental agreement. Subsequently, they purchased a trailer, which Diaz had located, so they would not have to pay rent, but would only have to pay rent for the trailer pad. (PCR V100:757-58). During the time they were together, Diaz worked for the truss company and was paid regularly with a paycheck. Ms. Shaw testified that Diaz handled his own finances and contributed to the joint living costs and would spend his remaining money appropriately on things like eating out and buying nice clothes. (PCR V100:758-60). She testified that Diaz could read and write, had a driver's license, did his own laundry, and sometimes cooked the meals as he preferred Spanish food which Ms. Shaw did not know how to prepare.

Ms. Shaw testified that Diaz found a Ford Mustang that he liked and negotiated with the private seller and purchased the car with cash he had obtained from his income tax return. (PCR V100:764-65). In addition to performing chores around the house, Diaz was also able to do repairs, both to the home and their cars. When Ms. Shaw's car would not start because of a problem with the computer chip, Diaz knew how to by-pass this problem and connect wires to get the car started. (PCR V100:765-66).

Regarding leisure and social activities, Ms. Shaw testified that they would go to movies and the mall and sometimes a club.

Ms. Shaw also testified that Diaz watched her young child and would babysit his young niece. Diaz eventually became very controlling in their relationship and always wanted his mother to babysit Ms. Shaw's daughter rather than having Barbara Shaw babysit. (PCR V100:770-71). Eventually, Ms. Shaw left Diaz because he was physically abusive with her and began to abuse her young daughter. (PCR V100:772-74).

In addition to Ms. Shaw, the State introduced evidence at the hearing from four Department of Corrections' mental health specialists. Like all the experts and attorneys who had been involved in Diaz's case since 1997, none of these witnesses ever had reason to believe that Diaz was mentally retarded based on their exposure to him. Diaz was screened in 2001 when he first came to death row and sought medication for sleeping problems which was common for defendants upon entering death row. (PCR V101:798-801). While on death row, Diaz consistently refused any mental health evaluations or treatment, but was required to submit to a mental health evaluation when he requested that he be allowed to marry. Diaz was evaluated by mental health specialist Nicole Parra to assure that he was competent and not delusional or incoherent. The mental health specialist had to

verify that Diaz was capable of making the decision of whether he wanted to marry someone and also had to determine whether there were any major mental illnesses going on at that time. (PCR V101:806-08). Diaz had earlier requested to marry a different individual and explained to the mental health specialist that he chose not to marry her because she was young, lived at home, and he wanted someone more independent. (PCR V101:808). Mental health specialist Parra further testified that she had previously worked with mentally retarded individuals, and the Department of Corrections had an adaptive behavior checklist to fill out if an inmate was suspected of being mentally retarded, but there was no evidence that such a checklist had ever been filled out for Diaz. (PCR V101:809-12). The State also introduced documents into evidence showing the administrative actions Diaz took in seeking to marry these two women. (PCR V79:12617-76; V102:1007-10).

As previously discussed, the State presented evidence from Dr. Gamache regarding his opinion that Diaz is not mentally retarded. In concluding that Diaz did not meet the statutory definition, Dr. Gamache opined that Diaz had no deficits in his adaptive functioning. Dr. Gamache testified at length regarding problems with the ABAS test administered by Dr. Puente to Minerva Diaz and Jose Diaz, Jr. Dr. Gamache opined that the ABAS

test was incorrectly administered by Dr. Puente and he erroneously calculated the scores. Dr. Gamache had numerous examples of scoring errors and information that refuted the answers given by Diaz's siblings. Furthermore, a review of Minerva Diaz's testimony at the evidentiary hearing clearly supports the lower court's finding that she did not understand the test directions and questions and, thus, she answered the questions incorrectly. (PCR V101:975-91).

In order to assess Diaz's adaptive functioning, Dr. Gamache interviewed Diaz, reviewed voluminous materials, and interviewed Lissa Shaw regarding her observations of Diaz's behavior during their relationship. (PCR V101:992). Regarding his communication skills, Dr. Gamache noted that Diaz's school records did not indicate any issues with language or communication. (PCR V101:975). Diaz reported that he engages in written communication with his wife in Switzerland, he reads books and magazines, and he communicates well with his attorneys, correctional officers and other inmates. Diaz is bilingual and is able to communicate in both English and Spanish. (PCR V101-02:993-1010).

Under the category of self-care, Dr. Gamache obtained information from Diaz's videotaped interview and relied on this, as well as, information obtained from Lissa Shaw. (PCR

V102:1011). Ms. Shaw informed him that Diaz routinely and consistently engaged in self-care including bathing, grooming, and exercise. She described Diaz as "meticulous" about his grooming, especially his hair, and almost compulsive with showering and looking clean. (PCR V102:1010-12).

Under the adaptive functioning category of home living, Dr. Gamache testified that, in addition to information he gained from Diaz on the videotaped interview regarding his daily living in prison, he also spoke with Lissa Shaw regarding her observations of Diaz's behavior when they lived together.[15] She described Diaz engaging in various home living tasks, including housekeeping and cleaning on a regular basis. (PCR V102:1014-17). As Ms. Shaw testified, Diaz also performed maintenance tasks to both the home and their automobiles.

Dr. Gamache further testified that Diaz did not have any deficits in the category of social and interpersonal skills as evidence by his videotaped interview, Lissa Shaw's observations,

[15] Unlike Dr. Puente who engaged in a retroactive diagnosis of Diaz's adaptive functioning focusing on Diaz's behavior prior to the age of 18, Dr. Gamache considered Diaz's current behavior in prison as well as his behavior when living with Lissa Shaw. (PCR V102:999-1001); see also Hodges v. State, 55 So. 3d 515, 536 (Fla. 2010) (noting that proper determination of adaptive behavior focuses on behavior as an adult); Phillips v. State, 984 So. 2d 503, 511 (Fla. 2008) (rejecting expert's retrospective diagnosis of defendant's adaptive functioning because Florida law requires significantly subaverage general intellectual functioning to exist *concurrently with* deficits in adaptive behavior) (emphasis added).

and Dr. Gamache's review of records. (PCR V102:1016-22). As an example of his knowledge of traffic rules, Lissa Shaw reported an incident where she was riding with Diaz as he was driving with his suspended license, and after being pulled over by the police, Diaz told the officer that he had forgotten his license and gave the officer his brother's name. (PCR V102:1017).

Dr. Gamache's assessment concluded that Diaz did not have any deficits in the use of community resources. In reaching this conclusion, Dr. Gamache relied on his interview with Diaz and Lissa Shaw. (PCR V102:1022-26). Lissa Shaw noted that they often went to the county parks, the mall, movies, and local fairs or festivals. Diaz also utilized the community in prison to obtain newspapers, magazines and books from other inmates.

In the category of self-direction, Dr. Gamache found that Diaz communicated with his employers and his attorneys. (PCR V102:1026-29). Lissa Shaw noted that Diaz was future-oriented in his thinking when they were dating, indicating that he wanted to move on to bigger things and wanted to have a child with her. Diaz acted like a father to Lissa Shaw's daughter and was responsible in helping take care of her and make sure she was safe. Diaz also indicated that he considered getting his GED.

In the categories of academic and work skills, Dr. Gamache testified at length regarding Diaz's academic performance. As

previously noted, Dr. Gamache testified that Diaz performed well on the nationally-standardized California Achievement Tests. Based on Lissa Shaw's statements and a review of a deposition from Diaz's boss at the truss company, Dr. Gamache noted that Diaz was a good worker. (PCR V102:1030-33). Additionally, Dr. Gamache did not find any deficits in Diaz's adaptive functioning under the category of health and safety. (PCR V102:1047-50).

Given the testimony at the evidentiary hearings, the documents introduced into evidence, including Diaz's videotaped interview with Dr. Gamache, the State submits that the lower court properly found that Diaz failed to carry his burden of establishing by clear and convincing evidence that he suffers subaverage intellectual functioning concurrent with deficits in adaptive functioning. In addition to all of the information introduced before the court in the postconviction proceedings, the State urges this Court to review the direct appeal record and the underlying facts of the crime because these facts also establish that Diaz has no deficits in his adaptive functioning.[16] See Hodges v. State, 55 So. 3d 515, 535 (Fla.

[16] Diaz purchased a firearm several weeks before the murder from a pawn shop and filled out all the paperwork in order to make the purchase. Diaz claimed he wanted the firearm for target practice. (DAR V3:T.441-47). After waiting the required 3-day waiting period, Diaz returned to the shop and was upset when he could not take possession of the gun because there was something in his background causing a "conditional approval." (DAR

2010) (noting that defendant's actions during crime were contrary to a finding of mental retardation); Nixon v. State, 2 So. 3d 137, 144 (Fla. 2009) (court did not err in considering Nixon's confession in finding that he was not mentally retarded); Phillips v. State, 984 So. 2d 503, 511-12 (Fla. 2008) (noting that the planning of the murder and the finding of CCP indicates the defendant has the ability to adapt to his surroundings).

Furthermore, like the defendant in Hodges, supra, Diaz supported himself and his family by working numerous jobs, including three years working at a truss company assembling trusses. At this job, Diaz was able to perform measurements and cut boards to the appropriate size and assisted in assembling the completed trusses. The evidence further shows that Diaz functioned well at home. Diaz was well groomed, wore appropriate clothes to work and in his leisure time, laundered his own

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V3:T.441-47). Additionally, as this Court noted, Diaz also was aware of Lissa Shaw's schedule and "[k]nowing that she left her parents' house at 6:30 a.m. for work, he asked his brother for a ride to a friend's house at 5:30 that morning. He then waited outside the house until the garage door opened, slipped under the door as it was going up, and confronted Lissa as she sat in her car. Finally, Diaz's statement to Barbara Shaw that 'if that bitch of a daughter of yours, if I could have got her, I wouldn't have had to kill your husband' is evidence of a calculated plan to kill Lissa Shaw." Diaz, 860 So. 2d 960, 970 (Fla. 2003). The State submits that this conduct, coupled with the evidence of Diaz's letter prior to the murder, clearly refutes any allegation of deficits in adaptive behavior.

clothes, was able to commute to his jobs, and handled his finances and made appropriate purchases with his money. See also Burns v. State, 944 So. 2d 234, 248-49 (Fla. 2006) (stating that competent, substantial evidence supported court's determination that defendant did not meet the adaptive behavior prong because he was consistently employed and able to fully support himself, was able to communicate well, and kept himself well-groomed).

In sum, competent and substantial evidence clearly supports the lower court's order that Diaz failed to establish by clear and convincing evidence the three requirements necessary to establish mental retardation in Florida. Diaz failed to prove (1) significant subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. Accordingly, this Court should affirm the lower court's order finding that Diaz is not mentally retarded.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, this Court should affirm the lower court's denial of Appellant's postconviction motion and the court's order rejecting Diaz's claim that he is mentally retarded.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Roseanne Eckert, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Southern Region, 101 N.E. 3rd Ave., Suite 400, Ft. Lauderdale, Florida 33301, this 21st day of May, 2012.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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