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IN THE SUPREME COURT OF FLORIDA

SONNY BOY OATS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-749

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Oats." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

OVERVIEW

On or about March 14, 2002, Oats filed a successive postconviction motion pursuant to *Florida Rule of Criminal Procedure* 3.850[1] claiming that he was mentally retarded and therefore barred from execution based on *Atkins v. Virginia*, 536 U.S. 305 (2002). Oats was evaluated, discovery was conducted, and an evidentiary hearing was held on September 28-29, 2010, and June 17, 2011. After all of the evidence was presented, and after Oats had the opportunity to "re-open" his presentation, the Circuit Court ultimately issued an order denying all relief on March 14, 2012. This appeal follows.

RESPONSE TO "INTRODUCTION"

On pages 1-6 of his brief, Oats sets out a histrionic and factually inaccurate "introduction" which seems to have heaping *ad hominem* abuse on the State and the Court as its primary purpose. That part of Oats' brief is unhelpful and does nothing

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[1] The motion was amended or supplemented on or about November 29, 2004, February 5, 2007, and September 10, 2010.

to assist this Court in deciding the appeal before it.

STATEMENT OF THE CASE AND FACTS

The Eleventh Circuit Court of Appeals was the last court to issue a decision in this case. That Court described the facts of the case, and the course of proceedings, in the following way:

> Appellant Sonny Boy Oats ("Oats"), a prisoner awaiting execution on Florida's death row, appeals from the district court's denial of his petition for a writ of habeas corpus. For the reasons stated below, we affirm the district court's decision to deny the writ. [FN1]
>
> > [FN1] Oats' petition for writ of habeas corpus was filed before April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and thus the AEDPA standard of review provisions are not applicable. *See Lindh v. Murphy*, 521 U.S. 320, ----, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997); *see also Neelley v. Nagle*, 138 F.3d 917, 921 (11th Cir. 1998); *Hardwick v. Singletary*, 122 F.3d 935, 936 (11th Cir. 1997), *vacated in part on reconsideration*, 126 F.3d 1312 (11th Cir. 1997).
>
> I. FACTS AND PROCEDURAL HISTORY
>
> On December 20, 1979, Jeanette Dyer, the cashier at a convenience store near Ocala, Florida, was killed during a robbery of the store. The cause of her death was a single bullet fired from approximately one foot away that penetrated her right eye and her brain. On December 24, 1979, a police officer observed an automobile with two suspicious looking occupants in the vicinity of another convenience store in Ocala. As the officer approached the car, it sped away at a high rate of speed. The officer gave chase. The fleeing car soon crashed and the occupants dispersed. Shortly thereafter, Donnie Williams was arrested as a suspect in the high-speed chase, transported to the Marion County Jail, and gave a statement to the police implicating the appellant Sonny Boy Oats in the murder of Jeanette Dyer. Subsequently, Oats was arrested as a

suspect in the high-speed chase and given Miranda warnings. During the interview that followed, Oats admitted his involvement in the chase and stated he had thrown his firearm away during the chase. The firearm was later discovered on the roadside near the location described by Oats.

In his interview with the police, Oats also admitted his involvement in an ABC liquor store robbery and shooting that had occurred on December 19, 1979, [FN2] one day prior to the robbery and murder of Jeanette Dyer. On December 28, 1979, [FN3] during a tape recorded interview, Oats again confessed to the ABC liquor store robbery and shooting, and also admitted robbing and killing Jeanette Dyer on December 20. Ballistics tests conducted on the gun recovered from the roadside established that it was the same weapon used in both the ABC liquor store and Jeanette Dyer shootings.

> [FN2] In the ABC liquor store robbery, Oats robbed the store's clerk, Eric Slusser, and then shot Slusser in the head.
>
> [FN3] This second interview occurred four days after Oats' first interview because Oats escaped from police custody during a visit to his mother's house and was not recaptured for three days.

Oats was indicted on two counts of robbery and first degree murder, arising out of the killing of Jeanette Dyer on December 20, 1979. Oats was also charged separately in another case for the robbery and attempted murder at the ABC liquor store that occurred on December 19, 1979. During February and March of 1980, Oats was examined, at the request of trial counsel, by three separate psychiatrists, Drs. Frank Carrera, Rafael Gonzalez, and Fausto Natal, all of whom reported to the court and to Oats' counsel that Oats was sane at the time of the offenses and competent to stand trial. [FN4]

> FN4. Additional facts regarding these psychiatric evaluations and the evaluations of other doctors will be discussed later in this opinion.

In early June 1980, Oats was tried in a separate proceeding for the ABC liquor store robbery and shooting and was convicted of robbery with a firearm and attempted murder in the first degree. [FN5]On June 14, 1980, Oats escaped from the Marion County Jail. He was recaptured approximately six months later in Texas, and was returned to Florida for trial in the instant capital case. [FN6]

> FN5. The ABC liquor store case was noncapital and thus proceeded at a faster pace than the instant case.
>
> FN6. While on escape from prison, Oats robbed a liquor store in New York and stabbed the clerk numerous times in the head, neck, and back.

On February 6, 1981, the jury in the instant case found Oats guilty of first degree murder and robbery with a firearm. After hearing the evidence relevant to sentencing, the same jury rendered an advisory sentence of death. On February 10, the trial judge followed the jury's recommendation and imposed the death sentence for the murder charge and ninety-nine years imprisonment for the robbery charge.

In Oats' direct appeal of his conviction and sentence, [FN7] the Florida Supreme Court affirmed Oats' conviction, but remanded for resentencing and a reweighing of the aggravating circumstances by the trial judge because the trial judge erred in his original determination of three of the aggravating circumstances. *Oats v. State*, 446 So. 2d 90, 95 (Fla. 1984). On April 26, 1984, following the remand from the Florida Supreme Court, the state trial court conducted another sentencing hearing. At the resentencing hearing, Oats' attorney objected to the resentencing and made a motion seeking the appointment of experts to determine Oats' sanity and competence. The trial judge denied this motion based on the judge's observations of Oats' demeanor at that time and during prior proceedings. The trial judge then reweighed the valid aggravating circumstances against the single mitigating circumstance and reimposed the death penalty, which was affirmed by the Florida Supreme Court. [FN8] See Oats v. State, 472 So. 2d 1143 (Fla. 1985), *cert. denied*, 474 U.S. 865, 106

S.Ct. 188, 88 L.Ed.2d 157 (1985).

> [FN7] While Oats' appeal of his conviction and sentence in the instant case was pending before the Florida Supreme Court, Florida's Fifth District Court of Appeal reversed Oats' convictions in the ABC liquor store case because the trial court had failed to instruct the jury concerning the applicable ranges of punishment as required by a Florida rule of criminal procedure. *Oats v. State*, 407 So. 2d 1004 (Fla. Dist. Ct. App. 1981). On February 9, 1982, after a re-trial, Oats was convicted of robbery and attempted second degree murder. That conviction was affirmed in *Oats v. State,* 434 So. 2d 905 (Fla. Dist. Ct. App. 1983), prior to the Florida Supreme Court's resolution of Oats' direct appeal in the instant capital case.
>
> [FN8] The trial judge weighed the mitigating circumstance of age against the aggravating circumstances of (1) Oats' prior violent felony conviction, (2) murder during the commission of a robbery, (3) the murder was committed to avoid lawful arrest, and (4) the murder was cold, calculated, and premeditated.

On October 7, 1987, Oats filed a motion for post-conviction relief in the state trial court pursuant to *Fla. R. Crim. P.* 3.850, and in May 1989, filed an original petition for a writ of habeas corpus in the Florida Supreme Court. Following the signing of a death warrant by the Governor in 1989, the state trial court granted a stay of execution and subsequently conducted an evidentiary hearing on Oats' Rule 3.850 motion. This Rule 3.850 hearing lasted eleven days over a period from February 19 to June 5, 1990, and primarily concerned whether Oats' trial counsel were constitutionally deficient in their representation of Oats. The state trial court denied Oats' Rule 3.850 petition in November 1990. The Florida Supreme Court affirmed the trial court's denial of Oats' Rule 3.850 motion and denied Oats' original state habeas corpus petition in *Oats v. Dugger*, 638 So. 2d 20 (Fla. 1994), *cert. denied*, 513 U.S. 1087, 115 S.Ct. 744, 130

> L.Ed.2d 645 (1995). Oats then filed the instant federal habeas action pursuant to 28 U.S.C. § 2254. The district court denied Oats' petition without holding an evidentiary hearing.

Oats v. Singletary, 141 F.3d 1018, 1021-1023 (11th Cir. 1998).

Whether or not Oats is "mentally retarded" was an issue in that proceeding, albeit in a different context that the *Atkins v. Virginia* exclusion from execution. The Court of Appeals discussed the testimony from state court on the issue, and summarized it as follows:

> [FN12] Unlike Drs. Phillips and Carbonell, Dr. Krop did not specifically conclude that Oats was incompetent to stand trial and unable to understand and waive his Miranda rights in 1980. However, he concluded that it was likely that Oats would have had great difficulty in assisting his counsel at the time of his trial. Dr. Krop and Dr. Carbonell reported that Oats scored approximately 57 and 61 on IQ tests, placing him in the mildly mentally retarded range of functioning, and that he was at a beginning third grade level in terms of basic academic skills. These conclusions are inconsistent with Department of Corrections records indicating that Oats scored a 93 on an IQ test in 1976, and Dr. Carrera's testimony that Oats' scores on basic academic skills tests put him at a seventh-grade level in terms of classroom information. Furthermore, Dr. Charles Mutter testified that, in his opinion, **Oats' ability to process material and his knowledge of language indicated that Oats "was smarter than he was showing on the tests."**
>
> [FN13] Dr. Mutter first challenged the defense experts' assumption that Oats' brain damage was partly the result of sniffing liquid paper. Dr. Mutter testified that this assumption was flawed because the inhalation of the solvents in liquid paper may cause severe liver damage and gastrointestinal problems, but there is no medical evidence that the solvents produce brain damage. Dr. Mutter also testified that Dr. Krop's conclusion that Oats suffered from diffuse brain damage was contradicted to some degree by Dr.

> Krop's conclusion that Oats was orientated to time, place, and person. Based on his evaluation of Oats, Dr. Mutter concluded that Oats suffered from a "minimal organic disturbance" in expressing himself in terms of words and certain types of vocabulary, but that Oats understood the questions asked in the evaluation, his answers were responsive and appropriate, and Oats' psychomotor activity and other body language were in context with an individual who does not show "any kind of frank organic impairment." **Finally, Drs. Mutter and Haber concluded that Oats' IQ scores, as reported by defense experts, did not reflect Oats' actual mental functioning and that Oats demonstrated an ability to use certain language and appreciate the nuances of the doctors' questions that were "far beyond the ability of an individual with a full scale IQ of 57."**

Oats v. Singletary, 141 F.3d at 1024 n. 12, 13. (emphasis added). The Court of Appeals went on:

> Dr. Carrera also testified regarding his conclusion that Oats was functioning at either the "very low average range or possibly the upper part of the borderline range of intelligence" and at a seventh-grade level in terms of classroom information. . . .
>
> With regard to Oats' contention that his trial counsel should have called other experts, such as Drs. Phillips and Carbonell, **to testify as to his mental retardation** and brain damage and the existence of mitigating circumstances, we note that the state court, after the eleven day Rule 3.850 hearing, rejected this argument based on its finding that
>
> > the factual bases upon which these experts posit their opinion are not believable and are not supported by such objective evidence as to suggest a reasonable possibility that the jury's recommendation and therefore the sentence would have been different. Moreover, **the ultimate conclusions of the experts are positively refuted by the record, including the Defendant's conduct prior to, during, and subsequent to the criminal episodes and throughout the judicial proceedings.**

Order Denying 3.850 Relief, at 5 (November 21, 1990). These state court findings of fact are entitled to deference, *see Strickland*, 466 U.S. at 698, 104 S.Ct. at 2070 (stating that state court findings of fact made in the course of deciding an ineffective assistance of counsel claim are subject to the deference requirement of § 2254(d)). Our review of the record of the Rule 3.850 proceeding persuades us that these factual findings are fairly supported by the record. **The state court's finding of fact discrediting the factual bases of the defense mental health experts has support in the record and undermines the opinions of these experts.** Moreover, if Oats had sought to call Drs. Carbonell and Phillips to testify regarding his mental functioning and brain damage, the State could have called Drs. Mutter and Haber to contradict these conclusions. [FN27] Also, the potential testimony of the defense mental health experts regarding the existence of mitigating circumstances could have been rebutted by the State. Drs. Mutter and Haber concluded that Oats was not under the influence of an extreme mental or emotional disturbance at the time of the offense, and had the capacity to conform his conduct to the requirements of the law. **Drs. Mutter and Haber also testified that Oats' conduct during the offense and its aftermath, his detailed confession, his conduct during his two escapes, and his conduct during the litigation proceedings were inconsistent with the picture of Oats painted by the defense experts.** In light of the foregoing, in light of the fact that the substance of Oats' mental deficiencies and abusive childhood were presented to the jury, and in light of the four strong aggravating circumstances found by the sentencing judge on remand, [footnote omitted] we conclude that there is no reasonable probability that the jury would have returned a life sentence. Thus, Oats has failed to satisfy the prejudice prong of Strickland. *See Daugherty v. Dugger*, 839 F.2d 1426, 1432 (11th Cir. 1988) (concluding that "given the severity of the aggravating circumstances in this case, we cannot conclude that the absence of psychiatric testimony in the sentencing phase creates a reasonable probability that the jury would have recommended life"). [footnote omitted].

[FN27] *See supra* note 13

Oats v. Singletary, 141 F.3d at 1028-1029. (emphasis added).

EVIDENTIARY HEARING FACTS

The "statement of the facts" contained in Oats' brief is incomplete, inaccurate and argumentative. The State does not accept it, and submits the following in place of Oats' version of the facts.

The evidentiary hearing was held on September 28-29, 2010, and June 17, 2011. As part of the proceeding, the parties agreed to include the perpetuated testimony of Dr. Denis Keyes taken on September 27, 2010. The defense waived Oats' presence at Keyes' September 27 deposition. (SR, V1, R4).[2]

Dr. Denis Keyes, Ph.D., is a professor of special education at the College of Charleston. (SR, V1, R3). He primarily teaches courses on intellectual developmental disabilities, classroom management, and severe/ profound disabilities. He consults on death penalty cases when mental retardation/intellectual ability is an issue. (SR, V1, R5, 10). Keyes has never worked in a forensic unit and does not teach any classes in forensic psychology. (SR, V1, R119, 120).

Keyes said that the term "mental retardation" is now

[2] Citations to the 3.851 supplemental record are "SR, V_, R_." Citations to the 3.851 appeal record are "V_, R_," for volume number and page number. Citations to the direct appeal record are "DAR, V_, R_."

called "intellectual disability" due to the perceived offensive nature of the original terminology. (SR, V1, R17).

Keyes' involvement in a death penalty case started in the 1988 United States Supreme Court case, *Penry v. Lynaugh*,[3] but he "wasn't actually as consultant on that. I just kind of did legwork and I was involved in the writing of the *amicus brief*."[4] (SR, V1, R10, 97). Keyes has published several articles about mental and physical disabilities. (SR, V1, R8-9).

Keyes explained the three-prongs[5] that must be met to make a determination of mental retardation: 1) age of onset prior to age 18; 2) intellectual sub-average functioning that is two standard deviations below the mean (the mean is 100); and 3) significant deficits in adaptive behavior. (SR, V1, R13, 19, 83-4).

In evaluating Oats, Keyes reviewed the trial testimony, testimony from Drs. Carbonnell and Krop, school records,

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[3] *Penry v. Lynaugh*, 492 U.S. 302 (1989).

[4] Keyes' testimony was self-serving and grandiose. The *amicus brief* in *Penry* was written by Jim Ellis and Ruth Luckasson for the American Association on Mental Retardation. (SR, V1, R97).

[5] Keyes referenced the American Association of Intellectual and Developmental Disabilities (AAIDD) and American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000. (SR, V1, R13).

psychiatric records, and the report of court-appointed expert, Dr. Harry McClaren. He interviewed Oats twice and spoke with Oats' relatives and a former teacher. (SR, V1, R13-14). Keyes administered the following tests to Oats: Stanford-Binet Intelligence Scale, Fifth Edition; Woodcock-Johnson Psycho-Educational Battery, Part 2; Visual Motor Integration Test; Scale of Independent Behavior-Revised ("SIB-R"); and the Test of Memory Malingering ("TOMM").[6] (SR, V1, R14). Oats only produced two scores on the Woodcock-Johnson test that fell within the range of mild mental retardation. (SR, V1, R99; SR, V1, R322-23). Oats' other scores fell within the low normal range. Oats' scored an 83 on the oral language portion and an 82 score on the broad written language portion. (SR, V1, R100).

Keyes administered the Scales of Independent Behavior-Revised to three people: Oats, Oats' brother, and Oats' cousin, Idella. (SR, V1, R101). Oats' self-reported his score at 47, which is in the moderate range of "adaptability deficit." (SR, V1, R101). Oats' brother generated a score of 35, which indicated a "severe disability in adaptive skills." (SR, V1,

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[6] The Woodcock-Johnson, Stanford Binet, Fifth Edition, and WAIS-III all have a mean score of 100. (SR, V1, R99). Under *Florida Statute* 921.137, the Woodcock-Johnson is not an approved standardized test used for determining mental retardation. (V9, R1722).

R102). All three people indicated Oats does not have any motor skill problems. (SR, V1, R103). Oats scored himself high in the social interaction area. Keyes said this "is very common for people who are mentally retarded." (SR, V1, R103-04). However, Oats' brother's score was 31, which indicated Oats' abilities in community living were significantly deficient. (SR, V1, R104). In Keyes' opinion, Oats is "right on the edge" of severe to moderate in community living. Oats social interaction/communication skills are in the range of severe adaptive skills, not mental retardation. (SR, V1, R111). Nonetheless, Keyes concluded that Oats "overall adaptive functioning abilities is estimated to be about the level of a child between four and seven years of age ... well within the range of moderate adaptive problems, not severe." Keyes would not assess Oats present adaptive skills as Oats is "in an artificial environment." (SR, V1, R113).

Prior to the murder in this case, Keyes knew Oats had escaped from police custody on two occasions and also supported himself when he lived in New York.[7] (SR, V1, R113-14). However, "escapes" and obtaining money "illegally" are "maladaptive"

[7] It is unclear how Oats supported himself. Lori Decker Vaughan, Oats' girlfriend at the time, opined that Oats had robbed a store to get money. (SR, V1, R114, 126).

behaviors. (SR, V1, R126, 127, 129).[8] Keyes said antisocial behavior can exist with mental retardation. (SR, V1, R130).

Oats scored 36 out of 50 and 35 out of 50 on the TOMM tests. However, to reach a conclusion of mental retardation based on malingering on the TOMM, the other test scores have to be considered. (SR, V1, R105). Keyes does not believe psychiatrists are the "professionals of choice" for dealing with mental retardation. (SR, V1, R106). Keyes disagreed with the 1990 scores Oats received on tests administered by Drs. Gonzalez, Natal, and Carrera, which found Oats was competent and not mentally retarded. (SR, V1, R107, 124). Drs. Carbonnell and Krop diagnosed Oats with mental retardation without assessing his adaptive skills, which Keyes said, "is insufficient for a diagnosis." (SR, V1, R110).

Keyes said an IQ of 70 and below is the "cutoff" which qualifies a person as having an intellectual disability as long as there are also deficits in adaptive behavior and occurrence prior to age 18. (SR, V1, R19-20, 28). Keyes said the primary cause of mental retardation prior to age 18 is malnutrition. Other causes include genetic anomalies, birth trauma, metabolism problems, and traumatic brain injury. (SR, V1, R21-22, 23).

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[8] Oats has identified no authoritative source for the proposition that criminal behavior automatically equates to impaired adaptive functioning.

Keyes said Oats suffered from malnutrition and traumatic brain injury as a child. (SR, V1, R24). Oats' full-scale IQ score on the Stanford-Binet test was 54. He scored a 62 on the WAIS-III administered by Dr. McClaren. (SR, V1, R25, 26). "Clinical judgment" plays a part in scoring an individual's answers on the tests. (SR, V1, R26, 27). In Keyes' opinion, Oats' intellectual disability is "moderate" with a score of 54 and "mild" with a score of 62 (Dr. McClaren's test score). (SR, V1, R28-9). The eight-point difference in the two scores is not considered statistically different. (SR, V1, R29).

Keyes reviewed the 1990 scores of the experts that evaluated Oats for the 1990 evidentiary hearing. (SR, V1, R29). Keyes referenced the "Flynn Effect"[9] which affects intelligence scores as a person takes tests over a number of years, saying "The scores tend to go up." (SR, V1, R30). Keyes said the Flynn Effect[10] is "a natural phenomena" and has been accepted in courts and by the American Psychological Association "as being a true factor in looking at intelligence tests." (SR, V1, R30-1). Keyes said Oats' 1990 test scores are "still valid" as long as they

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[9] Dr. James Flynn is a political science professor. Flynn has never said the Flynn effect can apply to a particular individual, only a "group effect." (SR, V1, R96-7).

[10] The Flynn effect is not mentioned in any expert report. (SR, V1, R34).

were administered correctly. (SR, V1, R33). Any time WAIS scores are evaluated, the Flynn Effect "has to be considered." (SR, V1, R34). Nonetheless, all of the test scores were in the "intellectual disability" range. (SR, V1, R35).[11]

Keyes explained that adaptive functioning refers to a person's ability to behave in the manner that is acceptable for their age, culture, racial, ethnic and religious groups. (SR, V1, R37). Individuals should be able to take care of themselves and function well within their environment and community. If a person is "mildly mentally retarded," he or she may have "remarkable abilities" in certain things. (SR, V1, R38). As a clinician, Keyes ensures whether or not a person is telling him the truth. (SR, V1, R39). In determining a level of adaptive skills, "that can be tricky." (SR, V1, R40). In Keyes' opinion, he never saw that Oats was malingering or trying to "act" mentally retarded. (SR, V1, R40-1).

Keyes spoke with Lori Decker Vaughan, a former girlfriend of Oats who dated him when he lived in New York, prior to the murder in this case. (SR, V1, R47). Decker said Oats was "good-looking" and "always a gentleman ... so agreeable." (SR, V1, R49, 64). Keyes said that people with mental retardation "have

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[11] No Florida decision allows consideration of the "Flynn effect" in the death penalty context.

an inclination to acquiesce to other people, people that are important to them." (SR, V1, R49). Decker also said that Oats moved around and did not spend a night in the same place twice. Decker told Keyes that Oats "was smart in some things and dumb in others." (SR, V1, R50). Nonetheless, nothing Decker told Keyes made him think that Oats was not retarded. (SR, V1, R51).

Keyes disagreed with Dr. McClaren's assessment regarding Oats' adaptive functioning skills. (SR, V1, R52). In Keyes' opinion, "clinical judgment" plays a part in determining a person's level of adaptive skills. (SR, V1, R52). Keyes said that his 36 years of experience in the mental retardation field gives him "a little bit different insight" than Dr. McClaren. (SR, V1, R53).

Keyes' attempts to talk to Mary Rich, Oats' former probation officer, were unsuccessful. However, he believed Rich "had some ... good insight" on mental retardation and people with various disabilities. (SR, V1, R47, 62-3). Although Oats was unemployed, Keyes said it was Rich's job to "facilitate his getting a job." (SR, V1, R68). Mentally retarded people often find gainful employment. (SR, V1, R70). At some point, Oats was employed as an assembler at a roofing company and as a dishwasher at another time. (SR, V1, R72, 89; V9, R1628). Keyes did not know if Oats was or was not qualified for certain jobs. (SR, V1, R88). However, Keyes said it is not uncommon for a

person on probation not to have a job. (SR, V1, R89).

In Keyes' opinion, a mentally retarded person handles the confines of death row "very well." (SR, V1, R74). However, death row is not an appropriate place to determine a defendant's adaptive functioning. (SR, V1, R75). In Keyes' opinion, prison guards are not appropriate persons to interview regarding an inmate's adaptive functioning. "The adversarial nature of the guard/inmate relationship can also color their impressions." (SR, V1, R79). In addition, prison guards base their eyewitness account of inmates' behavior that are in a highly structured environment that is not typical of any place else. (SR, V1, R80).

Keyes concluded that Oats' intellectual functioning is significantly sub-average. His IQ score is between the high 50's and low 60's. His adaptive skills are deficit in practical, social, and conceptual ways that "existed long ago (in) his childhood." However, no school ever diagnosed Oats as mentally retarded. (SR, V1, R117-18). Nonetheless, Keyes concluded that Oats qualifies under the State statute for a diagnosis of mental retardation. (SR, V1, R81).

Keyes was aware that the statue indicates "present deficits" in adaptive functioning. However, "I don't believe ... (it) will give you a complete view of the person's functioning, because how a person functions on death row is not indicative of

how they will function in general society." (SR, V1, R85, 86). Adaptive functioning includes how people "behaved as children and how they behave today. You also have to take into consideration the environments where they are living." (SR, V1, R87).[12] Keyes said functioning changes over time but intelligence is "reasonable stable." (SR, V1, R121).

Keyes was aware that Oats frequently uses the grievance process in prison. But, "I don't question that he at least gets some help from someone else in writing those grievances." (SR, V1, R91, 92). The grievance documents followed the format and conveyed what Oats' was trying to say. (SR, V1, R115). It was unclear how long it took Oats to write the letters. (SR, V1, R127).

Keyes has no dispute with the way the WAIS-III is scored. "The WAIS is an excellent test." (SR, V1, R94). Keyes said there is no reason to "throw out" a WAIS-III result just because there is a new WAIS-IV. (SR, V1, R95).

Keyes admitted that he has been found to be biased in court and his testimony has been found to be "unworthy of belief" and "incredible." (SR, V1, R120, 121). Keyes said that "to his knowledge," he has never been denied as an expert in mental

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[12] This may be Keyes' opinion, but it is not Florida law. *Dufour v. State*, 69 So. 3d 235 (Fla. 2011).

retardation. (SR, V1, R128).

Dr. Harry McClaren, psychologist, was appointed to this case as a court mental health expert on June 22, 2005. (V6, R980, 985, 999). He has evaluated hundreds of individuals to determine whether or not the individual was mentally retarded. (V8, R1393, 1396, 1444-45).[13]

McClaren explained the three prongs that must be met to make a mental retardation determination: 1) the person must be of significant subnormal intelligence consisting of two standard deviations below the mean (a score of 100) of an intelligence test;[14] 2) the onset of sub-average intellectual functioning occurs prior to age 18; and 3) there are concurrent deficits in adaptive behavior.[15] (V6, R1023-24; V8, R1396-97, 1448).

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[13] Oats devotes much of his memorandum to attacks on Dr. McClaren based on the order of an Alabama Federal District Court. What Oats omits is that that order is not binding on **any** court for any purpose at all. *Camreta v. Greene*, 131 S.Ct. 2020, 2033, n.7 (2011). A review of the Federal Appeals Court decision (which affirmed the grant of relief but said nothing about the district court's comments about Dr. McClaren) leaves no doubt that Alabama law is vastly different from Florida's. *Thomas v. Allen*, 607 F.3d 749 (11th Cir. 2010).

[14] Appropriate IQ tests include the Stanford-Binet or a WAIS Scales test. (V8, R1397). A score of 70 or below indicates an IQ score of mental retardation. (V8, R1400-01). *See Cherry v. State*, 959 So. 2d 702 (2007).

[15] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000.

McClaren said the Minnesota Multiphasic Personality Inventory test ("MMPI") and TOMM test are commonly used to determine if a person is malingering. (V8, R1406).

McClaren evaluated Oats in 2005. (V8, R1408). He reviewed voluminous records from the Department of Corrections, the prior 1990 evidentiary hearing transcripts, medical records, police reports, Oats' written letters and Oats' grievance letters. (V8, R1408-09; V9, 1709). One letter written by Oats contained directions to family members to destroy some evidence which included a stocking cap and gloves, in addition to directions on "how to testify about his behavior during the time period of the murder." (V8, R1409-10). McClaren administered the WAIS-III and a test of memory malingering. He also interviewed Mary Rich, Oat's probation officer, and Lori Decker Vaughan, Oats' former girlfriend. (V8, 1410-11).

During McClaren's interview with Mary Rich, Rich acknowledged she had prepared a PSI in Oats' case.[16] (V6, R1003, 1005, 1020; V9, R1623, 1624). In Rich's opinion, Oats was not mentally retarded. (V6, R1005, 1014). Rich told McClaren, "It never went through [my] mind that he was mentally retarded."

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[16] Oats was on probation for six months in New York. He held a couple of jobs for a few weeks each. (V9, R1626).

(V9, R1624). However, McClaren's interview with Rich did not carry "much weight." (V6, R1006). McClaren asked Rich "open-ended" questions. He did not use any standardized interview technique as Rich had not seen Oats in thirty years. (V6, R1016, 1017, 1020-21, 1022). Rich told McClaren her main concern was that Oats stayed employed. (V9, R1630). McClaren said that Mary Rich would not be able to provide any information about Oats' present adaptive functioning. (V6, R1024).

McClaren spoke to Lori Decker Vaughan, Oats' New York teenager girlfriend. (V8, R1424, 1646-47, 1649). Vaughan did not think Oats "was very smart." (V9, R1649). McClaren read a letter Vaughan wrote to Dr. Keyes saying Oats "was agreeable ... we never had an argument." (V9, R1653, 1656). Further, Vaughan never saw Oats read nor did he have a job. (V9, R1658, 1659). One day Oats "appeared with a wad of cash" and Vaughan did not know how he got it. (V9, R1659). Vaughan was not able to provide McClaren with much information. (V6, R1018).

Additionally, McClaren interviewed former police officer Vance Ferguson, who was involved in one of Oats' arrests. (V8, R1411-12; V9, R1589).

McClaren administered the Scales of Independent Behavior-Revised ("SIB-R") to Mary Rich and Vance Ferguson which assessed how well Oats could perform certain acts. (V8, R1412-13). Some examples included Oats' social interaction with others and how

well he reads and comprehends reading materials. (V8, R1413). The respondents given the SIB-R are allowed to "estimate" what an inmate is capable of, due to the limitations of an incarcerated individual. (V8, R1414).

McClaren said a present level of adaptive functioning is required under the definition of mental retardation. (V8, R1415). Correctional officers[17] assessed Oats' adaptive behavior at a score of 90 on the SIB-R, which indicated a low-average range. (V8, R1416; V9, 1608). A score of 90 does not indicate a deficit in adaptive functioning. (V9, R1714). Oats, however, rated himself at a score of 18 and also 47, which "was quite a disparity." (V8, R1416; V9, R1609, 1614-15). Family members gave Oats even lower scores which consisted of a 35 and 39. (V9, R1615). A person with a score of 18 would not be able to dress themselves, feed themselves or commit burglary,[18] robbery and murder. (V8, R1416, 1430).

McClaren administered the WAIS-III to Oats. He scored a 60 on the verbal scale and a 72 on the performance scale. Oats'

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[17] McClaren consulted with the administrative sergeant at the prison to determine which guards knew Oats the best and could rate his behavior. (V9, R1611-12). McClaren relied on these test results "very, very little." (V9, R1614).

[18] Oats burglarized a store by chopping through the roof of the building with an axe. McClaren opined that entry through a roof is a "somewhat sophisticated" method of getting into a building to commit a burglary. (V8, R1431; V9, R1593).

full-scale IQ was 67. (V8, R1417). In McClaren's opinion, these scores are an underestimate based upon Oats' writings and behavior over the years, as well as his performance on the Test of Memory and Malingering (which is sometimes referred to as the TOMM). (V8, R1418). Oats' IQ tests administered by Drs. Carbonell (1989), Krop (1987), Keyes (2005), and McClaren (2005) had scores more than two standard deviations below the mean. (V8, R1451-52, 1457, 1465; V9, R1696). However if a person is declared mentally retarded, it is not necessarily a life-long condition. Adaptive behavior changes an IQ score. (V8, R1452-53). Additionally, malingering makes an IQ score lower. (V8, R1454).

McClaren said there is no psychiatric evidence that Oats had a sub-average intellect at least two standard deviations below the mean prior to age 18.[19] (V8, R1419, R1419, 1425). There are no school records[20] that indicated a diagnosis of mental

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[19] The Slosson IQ test administered to Oats at age 13 resulted in a score of 70. However, McClaren said the Slosson test is not a test used to determine mental retardation. (V8, R1488).

[20] Oats repeated the second grade and left school in the tenth grade. (V8, R1420, 1485; V9, R1688). McClaren said a number of children repeat kindergarten, first or second grade if something impedes their learning. Impediments can include a learning disability, the environment one lives in, or malnutrition. (V8, R1420, 1421). Students are generally tested at an early age if they are not learning properly. (V8, R1426). Although Oats' grades were poor, he was promoted. (V8, R1426-27). Oats' grades

retardation. (V8, R1420). Oats rode a bicycle, used public transportation, or obtained rides with other people to get around. (V8, R1421-22, 1428; V9, R1679-80). At one point before his current incarceration, Oats escaped from one police officer, and then escaped from the Marion County jail. (V8, R1422). McClaren said Oats was able to learn quickly and thus, was able to plan his escape.[21] (V8, R1422). Additionally, Oats was involved in a high-speed chase, threw a weapon out the car window, and later took police back to the scene where he disposed of the weapon. (V8, R1425; V9, R1685).

McClaren said the 1990 IQ score obtained by Dr. Haber indicated Oats' IQ was in the high 60's, or, according to Dr. Mutter, as high as 90. (V8, R1429). Nonetheless, Haber did not believe Oats' behavior indicated he was mentally retarded. (V8, R1429). Additionally, three psychiatrists evaluated Oats pre-trial and did not find he was mentally retarded. Subsequent to psychological testing, some experts changed their testimony.[22]

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were basically C's and D's with an occasional F. (V8, R1491).

[21] Oats escaped from the Marion County jail in Ocala and travelled to New York where he remained undetected for five months. (V8, R1423-24).

[22] Drs. Frank Carrera and Raphael Gonzales changed their initial opinions to reflect that Oats was mentally retarded after they received additional information. (V9, R1567-70). Dr. Fausto Natal's opinion was that Oats was "borderline to minimally

(V8, R1429). McClaren said Krop had obtained an IQ score of 60 but Krop thought it had declined from a higher level. (V8, R1430, 1483). Oats' academics have improved over time and continued to do so until Keyes examined him in 2005. (V8, R1431). Oats had a low-average intelligence in 1979 at Marion Correctional institution and was described as "functioning outstandingly" according to educational staff. (V8, R1432). Oats had a reputation of being likable and fun to be around. However, Brevard County jail personnel described Oats as "devious" and having patterns of irresponsibility in his actions. (V8, R1432, 1433). McClaren gave the example that in 1990, prison officials wrote a disciplinary report that Oats flooded his cell **after** he placed his personal belongings on his bed. (V8, R1433). McClaren said "rational thought-out behavior" is not expected "from a mentally retarded person." (V8, R1433). In McClaren's opinion, devious behavior is inconsistent with mental retardation. (V8, R1433).

McClaren said Oats has written several grievances in prison which is also inconsistent with mental retardation. (V8, R1409,

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retarded." (V9, R1571, 1573). Natal clarified that there is no such diagnosis of "borderline mentally retarded." Oats was mentally retarded in some areas, but "in other areas he's not." (V9, R1574). Natal also said that he had "a greater degree of flexibility in his opinion" when he came to a mental retardation diagnosis, which was different criteria than that of the DSM-I through DSM-III. (V9, R1575).

1433). Oats makes his desires known and "stick[s] up for himself." (V8, R1434). Additionally, McClaren reviewed a letter in which Oats' described himself in the following language:

> "Dear Carol: Hi there. So how is the diva of the Big Apple is doing today? Just wonderful I hope and pray ... I consider my personality contained the potency of men's cologne that is exotic, musky, exciting, sensual, masculine, full of mystery, yet delicate as a night-blooming flower, strong-minded, intelligent, dependable, honest, outgoing, fun to be around, and preeminent lover in bed."

(V8, R1435). In McClaren's opinion, this is not the type of language a mentally retarded person would use in writing letters. (V8, R1435).

Oats' cousin Idella had told Keyes that their aunt beat "the living daylights" out of Oats. (V8, R1434). In Freddie Oats' 1990 affidavit, (Oats' brother), Freddie said Oats "took the brunt of the abuse." (V8, R1470-71, 1472). Family members reported that Oats has scars on his head that occurred when he fell out of a tree house as a child and was also hit on the head by his aunt. (V8, R1471, 1477, 1481: V9, R1716). However, there was no documented evidence of how Oats received these injuries. (V9, R1716). Freddie Oats also claimed that he, Oats, and their sister Shirley were not fed by their aunt. (V8, R1479). This evidence of physical abuse was presented at the 1990 evidentiary hearing. (V8, R1472, 1474). However, McClaren pointed out that not everybody who suffered physical abuse ends up in prison. (V8, R1475).

Prior to the start of the evidentiary hearing, McClaren received and reviewed additional disciplinary reports and medical reports from prison. McClaren said it appeared that Oats was "getting sicker." (V9, R1618,1619-20). Additionally, prison records indicate a psychiatrist examined Oats and found he had anxiety and "he might have a mild mental retardation." (V9, R1622).

McClaren said Oats' case had to be looked at "very closely" to make a determination of mental retardation. (V8, R1462, 1494). McClaren said there was no diagnosis of mental retardation for Oats prior to age 18 nor was there any "credible evidence" to support it. Oats progressed through school despite having a very physically abusive upbringing; he repeatedly escaped from jail and travelled to New York and then maintained a relationship with a young woman; and further, Oats writes grievance letters in prison. In McClaren's opinion, Oats does not meet the criteria for a diagnosis of mental retardation under Florida Statute or the DMS-IV-TR. (V8, R1419, 1435-36, 1459-61, 1494-95, 1511-12; V9, R1582-83, 1700-01).

On November 6, 2008, McClaren sent an "addendum" to the State Attorney's office requesting assistance in locating witnesses in New York that knew Oats. (V6, R980, 982, 984, 997-98, 1007). The "addendum" was merely work product communication with the assistant state attorney, not meant to be any type of

addition or addendum to his previous report. (V6, 983, 984). This addendum was provided to Oats' counsel at the September 28-29 hearing. (V6, R981, 994, 998). McClaren had previously asked the defense to provide him with any information that would assist in evaluating Oats. (V6, R989, 1019). As a court appointed expert, McClaren asks the State or the defense for assistance in evaluating a defendant, but does not necessarily let both parties know what he is requested from the other. (V6, R991-92).

McClaren spoke with New York State police investigator John Wagner in order to get names of potential witnesses who knew Oats. (V6, R982, 997-98, 1007). Although Wagner did not know Oats, he provided information to McClaren which led him to talk to Lori Decker Vaughan. (V6, R1018, 1020).

Dr. Harry Krop, Ph.D., evaluated Oats in 1987 and found him to be "in the mild range of mental retardation." (V6, R1026, 1027). Krop explained that the three prongs that need to be met to make a determination of mental retardation must be concurrent, *i.e.*, deficit in IQ score, deficit in adaptive function, and onset prior to age 18. (V6, R1029-30, 1044, 1051). Krop said clinical judgment is used to conduct an objective assessment of adaptive behavior. (V6, R1031, 1033, 1036-37). Krop "informally" assessed Oats' adaptive behavior in 1987. (V6, R1042). Krop has not performed any other work on Oats' case

since 1987. (V6, R1043).

The Trial Court Order.

On March 15, 2012, the Circuit Court entered its order denying relief on Oats' claim that he is mentally retarded. The Circuit Court noted, among other things, that Dr. McClaren (like previous experts) was of the opinion that Oats' scores on intelligence assessment instruments represented an "underestimate" of his functioning and ability. (V7, R1279). The Court said:

> Dr. McClaren explained that the defendants' "writing over the years, his behavior over the years, and his performance on the Test of Memory and Malingering" did not support the low [IQ] score. Dr. McClaren was suspicious of the defendant's TOMM[23] score and thought that something was interfering with the defendant's effort or motivation.

(V7, R1279) (internal citations omitted). The Court went on to

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[23] For example, McClaren said that when he was reviewing the scores of the TOMM test that he had administered four years prior, Oats obtained a score of 26. However, when McClaren re-administered the TOMM test, Oats obtained a score 30. McClaren said, "It is still in the range that is approximate chance -- if you think about 25, 25 to 18, below 18, that's a 95-percent chance a person had to know the right answer to get that poorly. When you get above 32, that's commensurate the other way, upward, but -- using the norms of the test manual. But if it's less than 25, you become suspicious of at least something interfering with a person's effort or motivation." (V8, R1418). Further, " ... according to the manual, when you get less than 45, the issue of malingering should be pretty strongly entertained." (V8, R1408).

say:

> Dr. McClaren summarized his testimony and his conclusions that the defendant was not mentally retarded:
>
> > Lack of diagnosis before 18, **even though there was some evidence that he had been identified with the screening tests with an IQ of 70.** He is able to progress through school, despite having a very physically abusive and probably very confusing upbringing.
> >
> > His repeated escapes. His traveling to New York. His letter writing, complaint writing. Ability to get a relationship with a young woman in New York, after getting there. These are the kinds of things that make me think that this man is not mentally retarded.
>
> Having **considered the history and record of this case** together with the evidence presented the court finds the evidence insufficient to substantiate defendant's claim that he is mentally retarded under the current law of Florida. There is no competent evidence that the defendant suffered from any mental retardation prior to the age of 18.

(V7, R1280). (emphasis added; internal citations omitted). This appeal follows.

SUMMARY OF ARGUMENT

The trial court correctly found, after consideration of all of the evidence, that Oats is not mentally retarded. That result is consistent with the outcome of the previous, pre-*Atkins*, litigation, as well as being consistent with the evidence from the most recent proceeding. The collateral proceeding trial court resolved the credibility-of-the-witnesses issues in favor

of the State and against Oats. That result is supported by the evidence and should not be disturbed.

The "confidential expert" claim was not preserved for review by timely objection at the time of the evidentiary hearing. In any event, Oats has no basis for complaint and is attempting to develop a claim where none exists. Even if some "error" is present, it was harmless beyond a reasonable doubt because there is nothing to imply that the testimony at issue was inaccurate or misleading.

The "restriction on cross-examination" claim has no legal basis. The trial court's objection was properly sustained, and to answer given on proffer was non-responsive. Oats did not complain at the time, and cannot do so now.

The "judicial neutrality" claim has no legal basis. Trial judges are allowed to question witnesses, and when, as here, there is no jury, there is no issue of an improper comment on the evidence. The mental retardation issue is complex, and the trial judge should not be faulted for insuring that he understood the testimony.

The claim that Oats is entitled to a "jury determination" of his claimed mental retardation has been expressly rejected by this Court. To the extent that Oats complains about the statutory burden of proof, that claim has no legal basis. And, the denial of relief is correct under either a preponderance of

the evidence or a clear and convincing evidence standard.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY FOUND THAT OATS IS NOT MENTALLY RETARDED

On pages 27-76 of his brief, Oats says that the Circuit Court was wrong when it found that he is not mentally retarded for purposes of the *Atkins v. Virginia* exclusion from execution of his death sentence. Interspersed throughout the brief are personal attacks on the State, its witnesses, and the trial court. Those "claims" do nothing to help Oats' case. Because this claim was decided after an evidentiary hearing, the standard of review is: "[a]s long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."'" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997), *quoting Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984), *quoting Goldfarb v. Robertson*, 82 So. 2d 504, 506 (Fla. 1955); *Melendez v. State*, 718 So. 2d 746 (Fla. 1998). The Circuit Court properly denied relief.

This Court has left no doubt about the burden of proof and the standard of review that apply to *Atkins* claims:

> In reviewing the trial court's determination that Quince was not mentally retarded, "this Court examines the record for whether competent, substantial evidence

> supports the determination of the trial court." *Herring*, 76 So.3d at 895. "**A defendant who raises mental retardation as a bar to imposition of a death sentence carries the burden to prove mental retardation by clear and convincing evidence**." *Franqui v. State*, 59 So. 3d 82, 92 (Fla. 2011). "This Court 'does not reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses.'" *Herring*, 76 So. 3d at 895 (*quoting Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007)).

Quince v. State, 2012 WL 6197458, 1 (Fla. 2012). (emphasis added).

The Previous Mental State Litigation.

In his brief, Oats claims, on numerous occasions, that the State "admitted" (in the sense of an "admission by a party opponent") that Oats is mentally retarded in the course of the prior State collateral proceedings. The problem with that argument, which Oats completely fails to mention, is that it was not credited by the courts that ruled on that proceeding. As discussed at pages 6-8, above, the testimony, **in the 1990 proceedings**, was that Oats' attained IQ scores did not accurately reflect his true abilities. In crediting the State experts from that proceeding, the Eleventh Circuit said:

> We conclude that the state court's finding is fairly supported by the record. Although defense experts testified and/or issued reports opining that Oats' alleged mild mental retardation, organic brain damage, and history of substance abuse rendered him incompetent to stand trial, **this evidence was contradicted** by (1) the conclusions of the State's mental health experts, (2) Oats' own coherent testimony at his trial and at the pretrial suppression hearing, [FN16] (3) Oats' confession to the police in which he was able to accurately describe details

regarding the two offenses, [FN17] and (4) the circumstances surrounding Oats' two escapes from police custody. [FN18] *See Daugherty v. Dugger*, 839 F.2d 1426, 1432 (11th Cir. 1988) (concluding that defendant failed prejudice prong of *Strickland* because expert testimony regarding defendant's alleged domination by another would have been subject to rebuttal by defendant's prior contradictory statements). In denying Oats' Rule 3.850 motion for post-conviction relief, the state court found that **"the ultimate conclusions of the [defense] experts are positively refuted by the record, including the Defendant's conduct prior to, during, and subsequent to the criminal episodes and throughout the judicial proceedings.**" Order Denying Rule 3.850 Relief, at 5 (November 21, 1990). The state court's finding that Oats was competent to stand trial is amply supported by the evidence. Thus, we conclude that Oats fails to satisfy the prejudice requirement of Strickland, and we reject this aspect of his ineffective assistance of counsel claim. [footnote omitted].

> [FN16] We note that during the cross-examination of his mother during the penalty phase of trial, Oats appeared to be alert and listening attentively to the testimony. Oats' mother testified that the co-defendant in the ABC case told her that he had shot the liquor store clerk, dropped the gun because he was wearing gloves, and then Oats picked up the gun. After the state attorney stated to Oats' mother that Oats' fingerprints were found on the gun, Oats interrupted and stated "[s]he just told you he had gloves on, didn't she?" Later, during his own testimony during the guilt phase of the trial, Oats apologized to the judge for this earlier interruption.
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> [FN17] We note that after giving his confession to the police, Oats was able to direct the police to the overpass where he had thrown his gun during the high-speed car chase with the police.
>
> [FN18] Oats' first escape occurred on December 24, 1979, while he was in custody for police interrogation. After confessing

> to the ABC liquor store crime, Oats told police officers that because his mother was very ill, he wished to see her and tell her in person that he had been arrested. The officers complied with Oats' request and let Oats visit his mother. During this visit, Oats escaped out the back door of her house and remained free for three days. Oats' second escape occurred on June 14, 1980, prior to his trial in the instant case. While a guard was distracted, Oats and other inmates climbed over a wall at Marion County Jail. Oats was recaptured approximately six months later after traveling to New York and Texas.

Oats v. Singletary, 141 F.3d at 1025-1026. (emphasis added). It is true that that litigation did not squarely address the *Atkins*-based mental-retardation-as-a-bar-to-execution claim that is the issue in this proceeding. However, Oats makes much of the expert testimony (or at least some of it) from that 1990 proceeding. He cannot change the outcome, nor can he change the credibility choices and legal conclusions reached by the various courts to consider that evidence in its context. It is misleading to suggest that there has been any prior finding that Oats is, in fact, mentally retarded. The contrary is the state of the record -- the starting point in any analysis is that the law of the case is that Oats is **not** mentally retarded, and that his level of functioning is inconsistent with that of a mentally retarded person. That is the opinion that Dr. McClaren reached when he evaluated Oats 20 years after the first litigation. To suggest that there is some fabrication or other deficiency with

that opinion is specious.

The post-*Atkins* Proceedings.

Florida law is well-settled with respect to mental retardation as a bar to execution:

> Finally, Cherry challenges the circuit court's determination that he is not mentally retarded in accordance with the definition set forth in section 921.137(1), *Florida Statutes* (2002), which provides:
>
> > As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test 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.
>
> Thus, Cherry must establish that he has significantly subaverage general intellectual functioning. If significantly subaverage general intellectual functioning is established, Cherry must also establish that this significantly subaverage general intellectual functioning exists with deficits in adaptive behavior. Finally, he must establish that the significantly subaverage general intellectual functioning and deficits in adaptive behavior manifested before the age of eighteen.

Cherry v. State, 959 So. 2d 702, 711 (Fla. 2007). The applicability of that definition to this case is not disputed. There is no doubt that "[l]ow IQ alone does not necessarily mean

that a person is mentally retarded. *Rodriguez v. State*, 919 So. 2d 1252, 1266 (Fla. 2005)." *Burns v. State*, 944 So. 2d 234, 248 (Fla. 2006).

The collateral proceeding trial court credited the opinion of Dr. McClaren that Oats is not mentally retarded. Specifically, the court credited, *inter alia*, the fact that Oats had not been diagnosed as mentally retarded despite his low score on a screening instrument, the fact that he had progressed through school, had repeatedly escaped, and that Oats' letter writing and complaint writing were inconsistent with the level of performance that a mentally retarded individual could generate. (V7, R1280).[24] Those findings, which were made after the court observed the witness testify, are supported by competent substantial evidence, and should not be disturbed.

Oats makes much of the phrase in the order that there is "no competent evidence that the defendant suffered from any mental retardation prior to the age of 18." (V7, R1280). Whatever the phrase "no competent evidence" may mean in the abstract, in context of this case, it is clear that the trial court found that Oats had not carried his burden of proving the pre-18 onset

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[24] In a footnote on page 41 of his brief, Oats says that the State did something improper by asking Dr. McClaren to list reasons supporting his opinion that Oats is not mentally retarded. That suggestion, respectfully, is absurd.

component of the three-part mental retardation criteria. That is sufficient, **by itself**, to support denial of Oats' claim for relief. *Cherry, supra.*

More importantly, the "no competent evidence" phrase **followed** the trial court's statement that "**Having considered the history and record of this case together with the evidence presented the court finds the evidence insufficient to substantiate defendant's claim that he is mentally retarded under the current law of Florida.**" (V7, R1280). When that sentence is taken in context (and coupled with the sentence that follows), it is clear that the circuit court considered the testimony (from the current proceeding and from 1990) that Oats' IQ test scores were not an accurate reflection of his true abilities, and that his behavior and activities were not those of an individual who is mentally retarded. The evidence, and the prior record which Oats insists must be considered, fully support the conclusion that Oats is not mentally retarded. The Circuit Court was correct when it denied relief, and that result should be affirmed in all respects.

Oats seems to suggest that it is inappropriate to consider his criminal "skill" in assessing his "adaptive functioning" in the mental retardation context. While society certainly regards burglary, robbery and murder as "maladaptive behaviors," it stands reason on its head to suggest that the means and methods

by which those offenses are conducted is not reflective of intelligence. It does not require an advanced degree to conclude that a nighttime burglary accomplished by cutting through the roof of a business is several orders of magnitude more sophisticated than a "smash-and-grab" conducted in broad daylight in full view of surveillance cameras. Any other conclusion is artificial and does nothing to assist the court in its truth seeking function. As Dr. McClaren said, "some of the means of achieving his criminal goals show an ability to plan, to think, to reason, things that suggest intelligence greater than the bottom two percent of the population." (V2, R1587).

Despite the assertions in Oats' brief, the issue is not complex. The law of the case, as found in the Eleventh Circuit decision, is that Oats' attained IQ scores are inaccurate in that they are an underestimation of his true ability. That conclusion was reiterated in the most recent proceedings. Likewise, the testimony that was credited by the collateral proceeding trial court was that Oats' behavior is simply inconsistent with that of a mentally retarded individual. Finally, Oats was never diagnosed as mentally retarded before the age of 18, **despite there being evidence that he had scored a**

70 on a screening instrument at the age of 13.[25] At the end of the day, Oats must establish all three components of the mental retardation criteria -- he has failed to establish any one of them. As this Court has said in another mental retardation case,

> In this case, the circuit court found that "[t]here is *no credible evidence* to suggest that Jones is mentally retarded." (Emphasis added.) **Thus, Jones did not present evidence sufficient to meet even the lesser standard of preponderance of the evidence.** *See Trotter,* 932 So.2d at 1049 n. 5 (finding it unnecessary to address claim that clear and convincing standard was unconstitutional "because the trial court concluded that Trotter was not mentally retarded [under] either" standard).

Jones v. State, 966 So. 2d 319, 329-330 (Fla. 2007). (italics in original; emphasis added). The same outcome applies here.

To extent that discussion of the burden of proof and scope of review is necessary, those issues have been settled:

> The defendant has the burden to prove that he is mentally retarded by clear and convincing evidence. § 921.137(4), *Fla. Stat.* (2005). If a defendant fails to prove any of the three components, he or she will not be found to be mentally retarded. *Nixon,* 2 So. 3d at 142.
>
> "When reviewing mental retardation determinations, we

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[25] The fact that Oats was not diagnosed as mentally retarded after attaining a score of 70 is even more significant than it first appears. **At the time Oats achieved that score, the diagnostic criteria for mental retardation called for a score of 83 or less.** *Diagnostic and Statistical Manual of Mental Disorders - Second Edition*, 14, American Psychiatric Association (1968). Oats places too much emphasis on this score. *Initial Brief*, at 74. The fact that Oats was **not** diagnosed as mentally retarded **despite this score** is the significant fact.

> must decide whether competent, substantial evidence supports the trial court's findings. We do not 'reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses.'" *Nixon*, 2 So. 3d at 141 (citation omitted) (*quoting Brown v. State,* 959 So. 2d 146, 149 (Fla. 2007)). "[T]he concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the [decision]." *Brown*, 959 So. 2d at 149 (alteration in original) (*quoting Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981)); *see also Nixon*, 2 So. 3d at 144. To the extent that the trial court's decision concerns questions of law, the Court applies a *de novo* standard of review. *Cherry v. State*, 959 So. 2d 702, 712 (Fla. 2007).

Hodges v. State, 55 So. 3d 515, 527 (Fla. 2010). *Snelgrove v. State*, 107 So. 3d 242, 252 (Fla. 2012) (". . . there was competent, substantial evidence to support the trial court's finding that Snelgrove is not mentally retarded."). The denial of relief should be affirmed in all respects.

II. THE "CONFIDENTIAL EXPERT" CLAIM

On pages 76-83 of his brief, Oats complains that court-appointed expert Dr. McClaren did not act as a "court expert" because there was a communication between Dr. McClaren and the assistant state attorney in which Dr. McClaren sought assistance in investigating Oats' activities in the State of New York where he was living following his escape from Marion County, Florida. According to Oats, the remedy for this purported error is to strike the testimony of Dr. McClaren and not consider it on appeal.

The problem for Oats is that he never raised this issue below, and is now attempting to place the trial court in error based on a claim that was never presented to it, and upon which that court was never asked to rule. It is true that Oats filed a motion to "preclude" Dr. McClaren's testimony, but that motion was based on grounds wholly different from those argued in his brief. (V4, R671-65).[26] Florida law is well-settled that issues cannot be raised for the first time on appeal. *Mendoza v. State*, 87 So. 2d 644, 661 (Fla. 2011); *Hutchinson v. State*, 17 So. 3d 696, 703, n.5 (Fla. 2009); *Bates v. State/McNeil*, 3 So. 2d 1091, 1103 (Fla. 2009); *Franqui v. State/McDonough*, 965 So. 2d 22, 32 (Fla. 2007).

Oats' claim ignores the reality of *Florida Rule of Criminal Procedure* 3.203 litigation. It is not uncommon for an expert appointed by the trial court under the terms of the Rule to ultimately be called as a witness by one party or the other. For example, in the *Cherry* case, both of the experts appointed by the court were called by the defense. *Cherry v. State*, 959 So. 2d 702, 711 (Fla. 2007). In *Johnston*, both court appointed experts were ultimately called as State witnesses. *Johnston v. State*, 960 So. 2d 757, 759 (Fla. 2006). In *Brown,* the court

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[26] That motion was based on a claimed *Crawford v. Washington*, 541 U.S. 36 (2004), issue.

expert was called as a State witness. *Brown v. State*, 959 So. 2d 146, 148 (Fla. 2007). In short, there is no basis for complain, and no error, when an expert appointed under Rule 3.203 is ultimately called to testify by one party or the other. A rule to the contrary would make no sense, and would unnecessarily hamper the presentation of evidence which, in turn, would obstruct the truth-seeking function that is the ultimate objective of a criminal proceeding. It stands reason on its head to argue that a court-appointed expert may not ask one party or the other for assistance in developing information that will help the expert complete his assignment.

Oats says that the "remedy" to the claimed "error" is to strike the expert testimony. However, as set out in Oats' brief, he had ample opportunity to conduct discovery, and was allowed to re-open the evidentiary presentation as he had requested. The problem for Oats is that any error was harmless beyond a reasonable doubt. *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986). Despite the claims contained in his brief, there is nothing to suggest or imply that any of the testimony was inaccurate or misleading -- Oats' only issue with the testimony is that it is not favorable to him. That is not a sufficient basis for relief of any sort.

III. THE "RESTRICTION ON CROSS-EXAMINATION" CLAIM

On pages 83-85 of his brief, Oats says that the trial court

"improperly" restricted his cross-examination of Dr. McClaren. Trial judges retain wide latitude to impose reasonable limits on cross-examination. *Delaware v. van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). Limitation of cross-examination is subject to an abuse of discretion standard. *Moore v. State,* 701 So. 2d 545 (Fla. 1997), *cert. denied*, 523 U.S. 1083, 118 S.Ct. 1536, 140 L.Ed.2d 685 (1998). The scope of and limitation on cross-examination in a criminal trial lies within the sound discretion of the trial court and is not subject to review except for a clear abuse of discretion. *Tompkins v. State*, 502 So. 2d 415, 419 (Fla. 1986); *Diaz v. State*, 747 So. 2d 1021, 1023 (Fla. 3rd DCA 1999).

In his brief, Oats says that *Ring v. Arizona*, 536 U.S. 584 (2002) is applicable to his mental retardation claim. That is not the law. *See, infra*, at 49-51. Moreover, the "improperly sustained" objection, which is supposed to have "curtailed his right to cross examination," was:

> Q. So then the defendant is -- a capital defendant is the one who bears the risk of a wrongful determination of mental retardation?
>
> I mean, like if there is a erroneous determination of mental retardation because the evidence is insufficient to reach the level that you are requiring it to reach, then he bears the risk that he is going to be executed?

(V2, R1580). The State's objection was sustained, and the proffered answer was as follows:

> I think in some of these old cases, there is not strong enough evidence to prove or to convince me that the person is mentally retarded when you got some evidence, but it is not strong.[27]

(V2, 1581). That answer is non-responsive to the question asked by Oats, but he never raised any complaint or sought to re-ask the question. Moreover, the question at issue called for a legal conclusion, not a psychological one. And, under Florida law, the moving party (in this case Oats) does, in fact, bear the risk of a failure of proof. *Gore v. State*, 964 So. 2d 1257, 1270 (Fla. 2007); *Branch v. State/McDonough*, 952 So. 2d 470, 480 (Fla. 2006). The trial court properly sustained the objection, and the proffered answer was not responsive, anyway. There is no error.

IV. THE "JUDICIAL NEUTRALITY" CLAIM

On pages 85-98 of his brief, Oats says that he is entitled to unspecified relief based on his claim that the trial judge departed from its "role of neutrality" during the course of the evidentiary hearing. This claim, apparently, is predicated on the court's questioning of the only witness to testify live about various issues concerning assessment and diagnosis of mental retardation. There was no abuse of discretion in the court asking questions of the witness concerning mental

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[27] Oats attempts to convert this answer, which was general at best, into a statement that there was "some evidence" present in this case. That interpretation is based on an out-of-context reading of the record.

retardation and the process through which it is diagnosed. Because that is so, there is no error, and no basis for relief of any sort.

Florida Statutes § 60.615(2) explicitly states that "[w]hen required by the interests of justice, **the court may interrogate witnesses**, whether called by the court or by a party." (emphasis added). That is exactly what the trial court did in this case. And, because there was no jury, there is simply no issue of impermissible comment on the evidence. *See, Ehrhardt's Florida Evidence*, 690 (2013).[28]

Most, if not all, of Judge Stancil's questioning dealt with the differences in assessment of mental retardation in the 1990s as opposed to the post-*Atkins* era. The complexity of that issue, and the significance of it, has not escaped the notice of this Court and the United States Supreme Court:

> Finally, Hall alleges that the lower court should have been precluded from holding an evidentiary hearing on Hall's alleged mental retardation and should have entered a life sentence because the court previously found him to be mentally retarded. We disagree.
>
> In *Bobby v. Bies*, 556 U.S. 825, 129 S.Ct. 2145, 173 L.Ed.2d 1173 (2009), the United States Supreme Court addressed a similar issue. Michael Bies was tried and convicted in Ohio of the aggravated murder,

[28] Oats' reliance on a Fifth District case that involved a trial jury is inapposite. There is nothing in Oats' case to support the notion that Judge Stancil was anything other than wholly impartial.

kidnapping, and attempted rape of a ten-year-old boy nearly one decade prior to the Court's decision in *Atkins. Bies,* 129 S.Ct. at 2149. Bies' IQ fell in the 65 to 75 range, indicating that he is "mildly mentally retarded to borderline mentally retarded." *Id.* at 2149–50. On postconviction review, the trial court agreed that Bies was mildly mentally retarded, but concluded that he was still eligible for execution. Id. at 2150. After the Supreme Court issued *Atkins*, and the Ohio Supreme Court adopted it in *State v. Lott*, 97 Ohio St.3d 303, 779 N.E.2d 1011 (2002), Bies presented his *Atkins* claim to the state's postconviction court. [FN3] Id. Bies moved for summary judgment, arguing that the record established his mental retardation and that the State was precluded and estopped from disputing it. *Id.* The court denied summary judgment because Bies' mental retardation had not been established under the *Atkins-Lott* framework, and ordered a full hearing. *Id.* at 2151. Bies took his claim to the Federal District Court, arguing that the Fifth Amendment's Double Jeopardy Clause barred the State from relitigating the issue of his mental condition. The court agreed and ordered vacation of Bies' death sentence. The Court of Appeals affirmed. *Id.* The Supreme Court reversed, stating that "[t]he State did not 'twice put Bies in jeopardy.'" *Id.* Further, the court stated that no state-court determination of his mental retardation entitled him to a life sentence. *Id.* at 2152.

> [FN3] Unlike Florida, Ohio reviews mental retardation where the defendant's IQ is above 70 as a rebuttable presumption.

Here, Hall argues that the issue should be estopped because of the trial court's finding that Hall was mentally retarded as mitigation. As summarized by the Supreme Court in *Bies*,

> even if the core requirements for issue preclusion had been met, an exception to the doctrine's application would be warranted due to this Court's intervening decision in *Atkins.* Mental retardation as a mitigator and mental retardation under *Atkins* ... are discrete legal issues. The *Atkins* decision itself highlights one difference: "[R]eliance on mental retardation as a

> mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 536 U.S. at 321, 122 S.Ct. 2242. This reality explains why prosecutors, pre-*Atkins*, had little incentive vigorously to contest evidence of retardation.... Because the change in law substantially altered the State's incentive to contest Bies' mental capacity, applying preclusion would not advance the equitable administration of the law.
>
> *Bies*, 129 S.Ct. at 2153. Accordingly, we deny relief on this claim.

Hall v. State, 109 So. 3d 704, 710-711 (Fla. 2012). In view of that decisional authority, it is unreasonable to argue that the trial court did anything improper when it undertook to be sure that the issue was clearly understood.[29] In any event, Oats has identified nothing that he wanted to ask that he did not get to inquire fully into. The transcript of the proceedings speaks for itself, and it reveals no irregularity. There is no basis for relief. In any event, this "issue" cannot be raised for the first time on appeal. Instead, whatever claim Oats believes he has should have been but was not raised at the time of the evidentiary hearing. That failure to timely raise his "claim" is an independent and adequate basis for denial of relief, in

[29] Had Oats chosen to present his witness in person rather than by perpetuated testimony, that witness would likely have been questioned by the trial court as well. Oats made his choice as to witness presentation, and has no basis for complaint.

addition to the utter lack of merit associated with this claim.

V. THE *RING V. ARIZONA* CLAIM

On pages 98-100 of his brief, Oats says that he is entitled to a "jury determination" as to whether or not he is mentally retarded.[30] Oats' claim is that *Ring v. Arizona* compels that result.

While Oats does not acknowledge it, the square claim contained in his brief has been considered and rejected by this Court:

> Rodgers presents two claims here. First, he argues that section 921.137, *Florida Statutes* (2003), which governs determinations of mental retardation in death-sentenced defendants, is unconstitutional under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). **As in our past cases, we find this claim meritless**. *See Arbelaez v. State*, 898 So. 2d 25, 43 (Fla. 2005) (holding that the defendant "has no right under *Ring* and *Atkins* [*v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)] to a jury determination of whether he is mentally retarded"); *accord Rodriguez v. State*, 919 So. 2d 1252, 1267 (Fla. 2005) (citing *Arbelaez* and finding "no merit to [Rodriguez's] claim regarding the constitutionality of [section 921.137]").

Rodgers v. State, 948 So. 2d 655, 666 (Fla. 2006). (emphasis added). *Arbelaez* left no doubt that the *Ring/Atkins* "merger" is not the law:

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[30] The heading, on page 98 of Oats' brief, claims that the burden of proof contained in *Florida Statutes* § 921.137 is "unconstitutional." Oats' brief contains only cursory argument about the burden of proof, and is insufficient to present an issue for appellate review.

> Arbelaez cannot feed *Atkins* through *Ring.* He contends that, after *Atkins*, the absence of mental retardation is now an element of capital murder that, under *Ring*, the jury must consider and find beyond a reasonable doubt. We have rejected such arguments. *See Bottoson v. Moore,* 833 So. 2d 693 (Fla. 2002) (rejecting the defendant's *Atkins* claim on the ground that the trial judge had found the defendant not to be mentally retarded). Other state supreme courts have reached the same conclusion. *See, e.g., Head v. Hill*, 277 Ga. 255, 587 S.E.2d 613, 619–21 (2003); *Russell v. State*, 849 So. 2d 95, 148 (Miss. 2003); *State v. Williams*, 831 So. 2d 835, 860 n. 35 (La. 2002). Arbelaez has no right under *Ring* and *Atkins* to a jury determination of whether he is mentally retarded. [footnote omitted].

Arbelaez v. State, 898 So. 2d 25, 43 (Fla. 2005). Oats' claim is foreclosed by binding precedent even though he does not recognize those decisions. This claim is meritless.

In any event, Oats does not identify how the *Ring*-based claim was preserved by timely objection, leaving the Court, and the State, to speculate. he record indicates that Oats filed a memorandum in 2002 (V1, R120) which touched generally on *Atkins, Ring,* and the argument that the State should have the burden of proving that Oats is **not** mentally retarded beyond a reasonable doubt in a jury proceeding. That argument is insufficient to preserve the claim contained in his brief.

Finally, to the extent that Oats' brief can be construed to address the burden of proof issue, *Atkins* itself left the implementation of the constitutional mandate contained therein to the States. *Atkins v. Virginia*, 536 U.S. 304, 317, 321 (2002). And, Oats has identified no decision, from any court,

which holds that the clear and convincing evidence standard applied in Florida is deficient or invalid. The true facts are that, while this Court has not directly addressed the issue, the courts that have addressed the burden of proof applicable to mental retardation claims have upheld a "beyond a reasonable doubt" standard. *In re Hill*, 715, F.3d 284 (11th Cir. 2013); *Holsey v. Warden, Georgia Diagnostic Prison*, 694 F.3d 1230, 1231 (11th Cir. 2012); *Hill v. Humphrey*, 662 F.3d 1335, 1360-61 (11th Cir. 2011); *Stripling v. State*, 711 S.E.2d 665, 667-668 (Ga. 2011). If that standard is valid, and the courts have said that it is, Oats' claim fails, even if it is preserved.

Moreover, given that the trial court found that there was "**no** competent evidence" to support the pre-18 onset component, Oats loses under either a preponderance standard or a clear and convincing standard. The trial court carefully evaluated all of the evidence, including that from the previous post-conviction hearing, and found that there was insufficient evidence to substantiate the claim of mental retardation. (V7, R1280). That result is correct under either possible standard. The denial of relief should be affirmed in all respects.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the denial of post-conviction relief.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. E-MAIL on June 24th, 2013: Martin J. McClain, Esq. at martymcclain@earthlink.net, and M. Chance Meyer, meyerm@ccsr.state.fl.us.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,

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