IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-749

SONNY BOY OATS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION[1]

Mr. Oats appeals the circuit court's denial of his Rule 3.851 motion which included a claim premised upon on *Atkins v. Virginia*, 536 U.S. 304 (2002) and upon evidence demonstrating that Mr. Oats was and is mentally retarded within the meaning of Fla. Stat. § 921.137.[2] As to Mr. Oats' *Atkins* claim, the circuit court held:

> 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.

(PCR2. 1280) (emphasis added). That holding refers to the second prong of the statutory test for *Atkins* determinations of mental retardation.

However, during the testimony of Dr. Denis Keyes, competent evidence was introduced without objection that:

> when [Mr. Oats] was 13 years old and he had a . . . Slosson intelligence test at 13, and he came up with a 70 IQ, that should have been enough to at least get him a full-scale assessment, which he never had.

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[2] The parties stipulated to the introduction of the testimony and exhibits from the 1990 evidentiary hearing as evidence at the 2010-11 evidentiary hearing on Mr. Oats' mental retardation claim (PCR2. 1377, 1384-87). In addition, Mr. Oats presented the testimony of Dr. Denis Keyes and Dr. Harry Krop during the 2010-11 evidentiary hearing and the State presented Dr. Harry McClaren.

(SPCR2. 45).[3] In his written evaluation of Mr. Oats, which was introduced into evidence, Dr. Keyes also noted that school records showed that "Sonny had difficulty in school from the beginning and was retained at the suggestion of his second grade teacher" (SPCR2. 187).[4] The Slosson results had also been introduced into evidence at the 1990 evidentiary hearing, and the record from that proceeding was introduced into evidence at the beginning of the 2010 evidentiary hearing on Mr. Oats' mental retardation claim (PCR2. 1377, 1384.87).

The State's expert at the hearing below was Dr. Harry McClaren.[5] He

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[3] Dr. Denis Keyes testified on behalf of Mr. Oats in a deposition taken to perpetuate testimony which was introduced at the evidentiary hearing below. That deposition along with his written report regarding Mr. Oats appears in Volume 1 of the Supplemental Record on Appeal.

[4] In conducting his evaluation of Mr. Oats, Dr. Keyes tested Mr. Oats' IQ in 2005 using the 5th edition of the Stanford-Binet. On that test, Mr. Oats scored an IQ of 54 (SPCR2. 25-26, 184).

[5] In his evaluation of Mr. Oats, Dr. McClaren administered a WAIS III in October of 2005 and obtained an IQ score of 62 (SPCR2. 26). Dr. McClaren testified: "I got a verbal IQ of 60, which would have a 95-percent confidence interval of being somewhere between 56 and 66; I got a performance IQ, a nonverbal IQ of 72, which would be a 95-percent confidence interval of between 67 and 80; and a full-scale IQ, which would be between - - 95-percent chance that it would fall in the range of 59 to 67" (PCR2. 1417).

Dr. McClaren acknowledged that Dr. Harry Krop had obtained similar IQ scores when he administered a WAIS-R in 1987 (SPCR2. 190). Dr. McClaren noted that Dr. Krop "indicate[d] that he, on a WAIS-R, got a full scale 57 with a verbal IQ of 58 and performance of 61" (PCR2. 1465).

Dr. McClaren also acknowledged that Dr. Joyce Carbonell tested Mr. Oats' IQ in the course of her 1989 evaluation (SPCR2. 190). Dr. Carbonell "reported that she did a WAIS-R with a full scale IQ of 61, verbal of 64, and performance of 62" (PCR2. 1530).

acknowledged in his testimony that Mr. Oats had as a matter of fact received an IQ score of 70 on a Slosson administered when Mr. Oats was 13 years old:

> Q And the school records contain an IQ score of 70, do they not?
>
> A They have a Slosson IQ - -
>
> Q Which is an IQ score, is it not?
>
> A It is an IQ score.
>
> Q And it's 70, is it not?
>
> A It is 70 in 1970 when he was 13.
>
> Q When he was 13. So that's two standard deviations below the mean?
>
> A But not on a test that would be used to diagnose mental retardation.
>
> Q Are you - - well, let me ask you this. Are you saying the statute requires, when it says "manifested before the age of 18," the statute requires that there have been an IQ test approved by the Department of Children and Family Services to do an individualized assessment of whether or not he was mentally retarded?
>
> A The statute doesn't say that.

(PCR2. 1488-89) (emphasis added).

Dr. McClaren did note in his testimony that the Slosson had been given to Mr. Oats at the age of 13 "when he's being savagely abused by all accounts" (PCR2. 1489). And he also noted that he was aware of Mr. Oats' school records (PCR2. 1491-92). He was then asked:

Q So the Slosson was given the year that he got the best grades?

A Okay.

Q Is that correct?

A Yes

Q And in addition, in terms of the abuse that he was suffering and the malnourishment, don't those also cause damage to the brain, physical damage to the brain?

A Malnourishment might, depending on what kind it is. If the abuse was of the type that caused a significance head injury, brain dysfunction, that could lower somebody's cognitive ability. But for lack of knowing what really happened, you see the grades and you don't know what the cause is.

(PCR2. 1492).

Nonetheless, Dr. McClaren was troubled by whether the statute's third prong, the requirement that the "significantly subaverage general intellectual functioning" was "manifested during the period from conception to age 18" as required by Fla. Stat. §921.137(1), was satisfied in Mr. Oats' case.[6] Specifically,

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[6] Fla. Stat. §921.137(1) 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 specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of

Dr. McClaren expressed concern that this element of Florida's definition of mental retardation within the meaning of *Atkins v. Virginia* was not met in Mr. Oats' case because in his view there was an absence of "compelling" evidence of this particular element, the third prong of the statutory definition. In this regard, Dr. McClaren testified during cross-examination as follows:

> Q Okay. So of the three elements, the first element, current test results, that's present. Your concern is you don't have test results that are satisfactory to you prior to the age of 18; is that correct?
>
> A You don't have - - to me, you don't have compelling evidence that the onset of any mental retardation was before 18, or scores to indicate, that would be consistent with retardation had an onset before 18.

(PCR2. 1513) (emphasis added).

It was on the basis of Dr. McClaren's testimony as to the third prong of Florida's definition of mental retardation and the concerns that he expressed regarding the supporting evidence that Judge Stancil rested his finding that Mr. Oats was not entitled to relief:

> 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

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> this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

> current law of Florida. There is no competent evidence that the defendant suffered from any mental retardation prior to the age of 18.

(PCR2. 1280) (emphasis added).

Thus, this case is one of statutory construction. Specifically, what does the statutory language requiring a showing that "significantly subaverage general intellectual functioning" was "manifested during the period from conception to age 18" actually mean and what constitutes competent evidence that satisfies this particular element of statutory definition of mental retardation.

STATEMENT OF CASE AND FACTS

Procedural History

On January 30, 1980, Sonny Boy Oats was indicted for 1st degree murder and robbery (R1. 1521). Dr. Frank Carrera, Dr. Raphael Gonzalez, and Dr. Fausto Natal examined Mr. Oats for competency and sanity pre-trial. While noting that Mr. Oats had some mental deficiencies, the three experts without seeking to define the observed deficiencies concluded that Mr. Oats was competent to stand trial and that he was not insane at the time of the offense.[7]

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[7] At a 1990 evidentiary hearing on Mr. Oats' previous Rule 3.851 motion, Dr. Carrera testified that the IQ score of 61 obtained by Dr. Carbonell's testing in 1989 was consistent with his observations of Mr. Oats in 1980 (PCR1. 945). Indeed at the time of his 1980 competency evaluation he did note that Mr. Oats suffered from mental impairment and was even called to testify at the 1981 penalty phase that Mr. Oats was "a slow learner" (R1. 1155). Dr. Carrera's 1980 report noted: "The Bender-Gesalt test suggested some perceptual motor disturbance, but the KENT emergency test indicates a mental age of twelve years old" (PCR1. 943).

A jury trial commenced on February 2, 1981 (R1. 1-1114). On February 6, 1981, the jury returned a verdict finding Mr. Oats guilty of 1st degree murder and robbery with a firearm (R1. 1109). A penalty phase was then conducted, and the jury returned a death recommendation on February 10, 1981 (R1. 1275). That same day, the sentencing judge issued his findings identifying 6 aggravators and 1 mitigator and imposed a death sentence (R1. 1675-77).[8]

Dr. Carrera testified at the 1981 penalty phase that Mr. Oats was "at the seventh-grade level in terms of classroom information" (R1. 1163). During his testimony in 1990, Dr. Carrera agreed that his test results in 1980 were "indicia" of "organic type impairment" (PCR1. 943), and were consistent with "an IQ of sixty-one" (PCR1. 945).

Dr. Gonzalez also testified in 1990 that he had not been asked in 1980 to evaluate whether Mr. Oats was retarded nor was he provided any background materials regarding Mr. Oats (PCR1. 2649-50). Dr. Gonzalez did note in his 1980 report regarding Mr. Oats that "[t]he patient's intellectual functions are marginal and this seems to be secondary to cultural and academic deprivation" (PCR1. 5258). However when he did receive such material in 1990, he testified that, in light of those materials and his examination of Mr. Oats in 1980, he believed that Mr. Oats was mentally retarded (PCR1. 2675, 2725).

Dr. Natal gave a sworn statement in 1990 that was introduced into evidence (PCR1. 5575-78). In his affidavit, Dr. Natal indicated that he had not been provided the results of any psychological, intelligence, and/or neuropsychological testing of Mr. Oats at the time of his 1980 evaluation. Had he known of the results of such testing of Mr. Oats, Dr. Natal stated: "I would have found within a reasonable degree of psychiatric certainty that with respect to the murder and robbery charge that Mr. Oats, **due to defective intelligence**, as reflected in Dr. Krop's evaluation, acted under considerable domination by his companions." (PCR1. 5576). Dr. Natal further stated: "if I had been provided with the results of intelligence and neuropsychological testing I would have found that Mr. Oats, to a reasonable degree of psychiatric certainty, had diminished capacity in regards to his ability to conform his conduct to the requirements of the law." (PCR1. 5577).

[8] The 6 aggravators found by the judge were: 1) previous conviction of a

On February 23, 1984, this Court affirmed the conviction but set aside the sentence of death and remanded for a resentencing, finding error in the application of 3 of the 6 aggravating circumstances. *Oats v. State*, 446 So. 2d 90 (Fla. 1984).[9] On remand without empaneling a new penalty phase jury, the judge on the basis of the 1981 jury's death recommendation re-imposed a sentence of death on April 26, 1984. The judge adopted the written findings in support of a death sentence which had been prepared by the State prior to the hearing finding 4 aggravators and only one mitigator (R2. 1767-70). On appeal, this Court affirmed the sentence of death. *Oats v. State*, 472 So. 2d 1142 (Fla. 1985).

On October 7, 1987, Mr. Oats filed a motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850. An evidentiary hearing commenced on February 19, 1990 on the issue of whether Mr. Oats's trial counsel rendered ineffective assistance of counsel. Within the ineffectiveness claim were sub-claims concerning counsel's failure to properly raise his concerns about Mr. Oats'

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crime of violence; 2) in the course of a robbery; 3) avoiding arrest; 4) pecuniary gain; 5) heinous, atrocious or cruel; 6) cold, calculated and premeditated (R1. 1677-78). The only mitigator found by the judge was Mr. Oats age (R1. 1678).

[9] This Court struck the heinous, atrocious or cruel aggravator. It said that the consideration of the pecuniary gain aggravator in addition to the "in the course of a robbery" aggravator constituted improper doubling. Finally, the Court ruled that the previous conviction of a crime of violence was invalid because the prior conviction had been vacated on appeal. However, because another conviction had been returned when the case was remanded for retrial, the judge on remand could rely on the new conviction to find the aggravator present.

competency in 1984 and counsel's failure to seek full-blown mental health evaluations of Mr. Oats as to mental health mitigation and the resulting inadequacy of the mental health evaluations that did occur concerning Mr. Oats' competency in 1980, sanity at the time of the offense, and mental health mitigation. Thus during the 1990 evidentiary hearing, the parties presented testimony and reports from a large number of mental health experts. Besides presenting the testimony of Dr. Carrera and Dr. Gonzalez and the sworn statement of Dr. Natal, Mr. Oats introduced the written evaluation prepared by Dr. Harry Krop in 1987, and Mr. Oats called Dr. Joyce Carbonell, and Dr. Robert Phillips to testify, each of whom had evaluated Mr. Oats during the collateral process. The State called Dr. Charles Mutter and Dr. Leonard Haber who had also evaluated Mr. Oats in the course of the collateral proceedings.

While the issue of mental retardation as a constitutional bar against execution had not yet been established at the time of the 1990 evidentiary hearing, mental retardation as a mental health diagnosis was well-known and the experts at the 1990 evidentiary hearing rendered opinions as to whether Mr. Oats was mentally retarded.[10] Indeed as was explained by Dr. Carbonell in 1990, the then

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[10] On September 28, 2010, the State did acknowledge that the issue of Mr. Oats' mental retardation was a significant component of the 1990 evidentiary hearing. However, the State erroneously argued that the issue arose only in the context of Mr. Oats' competency (the hearing "was actually in the context of a competency hearing, but retardation was the issue") (PCR2. 1385). However, it

accepted standard for diagnosing mental retardation included three components mirroring the three elements for mental retardation now set forth in Fla. Stat. § 921.137(1):

> A. There are basically three things that you look at when you look at mental retardation. One of them is the test score. One of them is essentially adaptive functioning and the third one is that it had to occur during the developmental years.
>
> So that sort of distinguishes from someone who, for example, suffers some kind of serious head injury or toxic substance and loses a lot of function late in life. It wouldn't be considered mentally retarded as a result of that because it wouldn't have occurred developmentally.

(PCR2. 246).[11]

The 6 expert opinions presented by Mr. Oats at that hearing concluded that Mr. Oats was mental retarded. Dr. Krop, a psychologist, administered a WAIS-R in 1987, and Mr. Oats scored an IQ of 57 (PCR1. 3473). In his October 1987 evaluation, Dr. Krop concluded that Mr. Oats was "functioning in the mild range of mental retardation" (PCR1. 3474).[12] Dr. Carbonell, a psychologist, administered

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was more primarily a component of Mr. Oats' claim of ineffective assistance at the penalty phase, *i.e.* counsel's failure to obtain a full mental health evaluation and present Mr. Oats' mental retardation at the penalty phase as it related to the aggravating and mitigating circumstances (PCR2. 1387).

[11] Indeed, this Court noted in *Jones v. State*, 966 So. 2d 319, 326-27 (Fla. 2007), that Florida's statutory "definition of mental retardation is consistent with the definition [used by] the American Psychiatric Association" in the "*Diagnostic and Statistical Manuel of Mental Disorders* 49 (4th ed. 2000) (DSM-IV)."

[12] Dr. Krop's written report dated October 1, 1987, was introduced into evidence at the 1990 evidentiary hearing as part of D.Ex. 7A (PCR1. 3466, 3469).

a WAIS-R in 1989, and at that time Mr. Oats scored an IQ of 61. Dr. Carbonell testified that it was her opinion that Mr. Oats was mentally retarded (PCR1. 245).[13] Dr. Phillips, a psychiatrist, also testified and opined that Mr. Oats was mentally retarded. He reached his opinion after performing an extensive medical and neuropsychological evaluation and reviewing the test results obtained by Dr. Krop and Dr. Carbonell. (PCR1. 12-13, 26).[14]

Dr. Krop was called as a witness at the evidentiary proceedings conducted on June 17, 2011 (PCR2. 1026).

[13] Dr. Carbonell explained in her testimony that Mr. Oats' test score fell within the mentally retarded range and "Mr. Oats ha[d] some serious deficit in adaptive functioning" (PCR1. 247-48). She also testified that there was evidence that the mental retardation was manifested prior to the age of 18:

> A. Yes. He did. There are reports from his family that he was slow developing, that he didn't do well - - slow walking, slow talking - - to reach those developmental milestones.
>
> He did poorly in school and more and more poorly as he got older, which is what you see with people with mild mental retardation; that is, they do okay for a little bit but their learning curve is just incredibly slow and then eventually, unless something special is done, flunk out.
>
> There was a - - something called a Slosson Quick Test that was given to him, I think, way back in the first or second grade and he hit right at about 70. His achievement levels always lagged behind. IQ tests that were given to him about 10 years ago are very similar to this and he's consistently looked retarded.

(PCR1. 246-47).

[14] Dr. Phillips testified that "Mr. Oats is a man of significantly substandard intellectual capacity as a result of a degree of mental retardation that is well

Dr. Carrera, who had evaluated Mr. Oats's competency at trial, testified in 1990 that he had reviewed background materials and Dr. Carbonell's testing and found no reason to question her conclusion that Mr. Oats was mentally retarded (PCR1. 947-48). Indeed, Dr. Carrera noted that the IQ score of 61 that she had obtained was consistent with his observations of Mr. Oats and the limited testing that he had conducted in 1980. (PCR1. 945-46).

Dr. Gonzalez also performed a competency evaluation in 1980. Dr. Gonzalez did note in his 1980 report regarding Mr. Oats that "[t]he patient's intellectual functions are marginal and this seems to be secondary to cultural and academic deprivation" (PCR1. 5258). However, he testified in 1990 that he had not been asked in 1980 to evaluate whether Mr. Oats was retarded, nor was he provided any background materials regarding Mr. Oats at that time (PCR1. 2649-50). In 1990, Dr. Gonzalez was provided the background materials, the results of the WAIS-R obtained by Dr. Carbonell, and other mental health evaluations of Mr. Oats. Dr. Gonzalez testified in 1990 that in light of those material and his own examination of Mr. Oats in 1980, he believed that Mr. Oats was in fact mentally retarded (PCR1. 2675, 2725).

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documented" (PCR1. 12). Dr. Phillips found "a longstanding history of maladaptive behavior (PCR1. 27). Dr. Phillips testified that "I think when we look at Mr. Oats from a developmental standpoint, it's very clear that the retardation is something that is genetic in origin. It's one of the cards that he was dealt." (PCR1. 32).

Dr. Natal, a psychiatrist, also performed a competency evaluation at trial. An affidavit from Dr. Natal was introduced at the 1990 evidentiary hearing as D.Ex. 18 (PCR1. 5575-78). Dr. Natal indicated that he did not have the background material or the results of the IQ tests at the time of his 1980 evaluation. Had he known of the results of such testing of Mr. Oats, Dr. Natal stated: "I would have found within a reasonable degree of psychiatric certainty that with respect to the murder and robbery charge that Mr. Oats, **due to defective intelligence**, as reflected in Dr. Krop's evaluation, acted under considerable domination by his companions." (PCR1. 5576). Dr. Natal further stated: "if I had been provided with the results of intelligence and neuropsychological testing I would have found that Mr. Oats, to a reasonable degree of psychiatric certainty, had diminished capacity in regards to his ability to conform his conduct to the requirements of the law." (PCR1. 5577).

The State called Dr. Charles Mutter to testify in 1990. Dr. Mutter performed no testing on Mr. Oats, but instead merely estimated that in his opinion Mr. Oats's IQ was in the mental retardation range of "between 65 and 70." (PCR1. 1317).[15] Dr. Mutter then testified:

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[15] Dr. Mutter acknowledged that "[t]he records indicate that he has a relatively low IQ, running anywhere from 57 to 61 numerically. On a clinical basis, I think his IQ is somewhat higher than that." (PCR1. 1235). Dr. Mutter then estimated without conducting any testing that Mr. Oats' IQ to be in the "65 to 70" range (PCR1. 1310).

Q Let me rephrase it. A person between 65 and 70, in your opinion does that person fall into the mentally retarded range?

A Yes, I believe in the mild mentally retarded.

(PCR1. 1317). Dr. Mutter then testified:

Q To a reasonable degree of psychiatric certainty is Mr. Oats mentally retarded or were you able to formulate an opinion on that?

A Yes, I formulated an opinion.

Q And your opinion is?

A I felt that he was borderline to very minimal.

Q Borderline to very minimal what?

A Mentally retarded.

(PCR1. 1321-22).[16] Dr. Mutter found impairments in Mr. Oats' adaptive functioning (PCR1. 1321). Dr. Mutter also testified: "According to Dr. Krop's testing and the numbers that he gave, if those numbers were correct assessments of this man's true mental state, then he would fall in a category according to this book as having mental retardation." (PCR1. 1328).

The State also called Dr. Leonard Haber, a psychologist, at the 1990

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[16] However, Dr. Mutter indicated that he did not "adhere" strictly to the definition of mentally retardation set forth in DSM-III (PCR1. 1318). He thought it proper to substitute his guess of Mr. Oats' IQ in lieu of actual scores on IQ tests. Certainly, this is contrary to the requirement in §921.137 that test scores obtained on specified standardized intelligence tests be used in determining whether an individual is mentally retarded within the meaning of the statute.

evidentiary hearing. Dr. Haber performed no psychological testing on Mr. Oats. He merely "guesstimated" Mr. Oats's IQ to be between 70 and 90 (PC-R. 2166).[17] He acknowledged that use of such a guesstimate was contrary to the provision of DSM-III (PCR1. 2166-67).[18] Dr. Haber explained that the requirements of DSM-III are for the purpose of diagnosing mental retardation; however, his examination was not for that purpose (PCR1. 2168). His purpose was to evaluate Mr. Oats' "capacity to understand" (PCR1. 2168). He explained: "If the individual understands, it's irrelevant what the IQ number is" (PCR1. 2168).[19]

At the conclusion of the 1990 hearing, the State submitted a written closing. Based on the evidence presented in 1990, the State conceded that "Under the DSM-III criteria, the defendant falls in the mildly mentally retarded area. No doubt about that." (PCR1. 3248).[20] The State acknowledged that Mr. Oats "scored 61 and

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17. Dr. Haber did concede that it was quite possible that Mr. Oats' IQ could be a "67" (PCR1. 2167).

18 Dr. Haber explained that his guesstimate was "an estimate based upon 30 years of experience in examining thousands of individuals; having studied language usage; having written a dissertation on language; that is my clinical impression." (PCR1. 2166). Thus, Dr. Haber's guesstimate does meet the criteria of § 921.141 that IQ scores be obtained on specified standardized intelligence tests.

19 Dr. Haber conceded that "[i]f in fact Mr. Oats fell within the bottom end of [his] guesstimate, 68, 69, up to 75, he would meet the DSM-III criteria for mental retardation" (PCR1. 2169).

20 The State then argued that "The DSM-III is not infallable [sic] for the same reason that SAT's and LSAT's are not infallable [sic]." (PCR1. 3248).

57 on the intelligence tests and has 'deficits in adaptive functioning'" as the DSM-III required for a mental retardation diagnosis (PC-R 3242, 3248). This was admission by a party opponent that the criteria set forth in the DSM-III (which included deficits in adaptive functioning and onset before the age of 18) were present in Mr. Oats' case as to the question of whether he was mentally retarded. Fla. Stat. § 90.803(18).

Judge Angel (who conducted the 1990 hearing and presided in the proceedings at issue herein prior to the case being reassigned to the judge that conducted the instant hearing, Judge Hale R. Stancil) denied relief in the 1990 proceeding on the issue of ineffective assistance of counsel. That ruling did not include any finding as to the presence of absence of mental retardation. This Court affirmed the denial and did not address Mr. Oats' mental retardation in any fashion in the course of its opinion. *Oats v. Dugger*, 638 So. 2d 20 (Fla. 1994).

Current proceedings

In 2002, *Atkins v. Virginia* created a categorical constitutional bar precluding the execution of mentally retarded individuals under the Eighth Amendment.[21] That decision changed the legal context and meaning of the issue of a capital defendant's mental retardation in a capital proceeding. Whereas in Mr. Oats' case

[21] The Florida Legislature had already enacted a statutory bar to the execution of mentally retarded individuals. That provision, Fla. Stat. § 921.137, was signed into law on June 12, 2001.

the issue of his mental retardation arose in the context of a penalty phase ineffective assistance of counsel claim, following the decision in *Atkins* Mr. Oats' mental retardation became a stand alone issue requiring an adjudication of his mental retardation, an adjudication that had not been required when evidence of his retardation was presented as prejudice arising from the ineffective assistance of his trial counsel.[22]

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[22] In *Bobby v. Bies*, 129 S. Ct. 2145, 2152 (2009), the US Supreme Court addressed whether litigation of a capital defendant's mental retardation as a mitigating circumstance in the penalty phase of a capital trial and the determination that the mitigating circumstance was present precluded relitigation of the issue the defendant's mental retardation following *Atkins*. The Court stated:

> Issue preclusion bars successive litigation of "an issue of fact or law" that "is actually litigated and determined by a valid and final judgment, and . . . is essential to the judgment." . . . even where the core requirements of issue preclusion are met, ***an exception to the general rule may apply when a "change in [the] applicable legal context" intervenes.***

(emphasis added; citations ommitted). The *Bies* Court found that pre-*Atkins* determinations of mental retardation did not preclude post-*Atkins* litigation of mental retardation. However, in Mr. Oats' case, *there was no prior resolution of Mr. Oats' mental retardation itself*, there was simply evidence presented on mental retardation as a mitigation as prejudice on a penalty phase ineffectiveness claim. The ineffectiveness claim was denied without specific resolution of Mr. Oats' mental retardation under any particular standard. Thus, issue preclusion is not of concern in this case. Thus, the State's admission on the record during the 1990 proceedings that Mr. Oats was doubtlessly mentally retarded under the DSM-III, while not binding as to whether he is retarded under Fla. Stat. § 921.141, does constitute evidence which bears on the question of whether the elements of a mental retardation under Fla. Stat. § 921.137 are present, as does the testimony of numerous witnesses at the 1990 evidentiary hearing and the exhibits admitted at the 1990 hearing.

Florida Rule of Criminal Procedure 3.203 was promulgated to govern the *Atkins* inquiry using the definition of mental retardation found in § 921.137, which had created a three-prong test for the determination of mental retardation in Florida. Under § 921.137, mental retardation precluding a capital defendant's execution was defined as: 1) subaverage intellectual functioning, as demonstrated by an IQ score of at least two standard deviations below the norm on a qualifying[23] standardized IQ test, 2) deficits in adaptive functioning, and 3) onset of subaverage intellectual functioning prior to the age of 18.

On March 15, 2002, Mr. Oats filed the Rule 3.851 motion at issue in this appeal on the basis of the newly adopted Fla. Stat. § 921.137, which had been signed into law on June 12, 2001. Mr. Oats also argued that the Eighth Amendment precluded his execution because of his mental retardation.[24] This argument was

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[23] Rule 65B-4.032 of the Florida Administrative Code, entitled "Determination of Mental Retardation in Capital Felony Cases: Intelligence; Tests to be Administered," specifies that the tests to be used to determine mental retardation are the Stanford-Binet Intelligence Scale, the Wechsler Intelligence Scale or other tests meeting certain criteria. Both those specified tests were administered to Mr. Oats and both yielded a score well-within the mental retardation range.

[24] The Rule 3.851 motion filed on March 15, 2002, included: 1) a claim that Mr. Oats' death sentence violation the Florida Constitution; 2) a claim that Mr. Oats' death sentence violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment; 3) a claim that Mr. Oats' death sentence violated the Eighth and Fourteenth Amendments; 4) a claim that due to a conflict, Mr. Oats' should be provided with conflict-free counsel; and 5) a claim premised upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On August 13, 2002, Mr. Oats filed a memorandum of law regarding the then new decisions in *Atkins v. Virginia*, 536

made in anticipation of a decision in *Atkins* which was then pending before the US Supreme Court. The decision in *Atkins* issued on June 20, 2002. On November 30, 2004, the Rule 3.851 motion was amended to specifically rely upon *Atkins v. Virginia* and *Ring v. Arizona*. The Rule 3.851 also contained additional claims, which were found to be procedurally barred by the lower court in its January 24, 2005 order.

As to the *Atkins* claim, the circuit court determine that an evidentiary hearing was required (PCR2. 317-18). Thereafter, the circuit court appointed a mental health expert under Rule 3.203(c)(2) to evaluate Mr. Oats a submit a written report of his findings "to the parties and to the court." (PCR2. 349).

In 2007, Judge Carven Angel retired from his position as a circuit court judge in the 5th Judicial Circuit.[25] Subsequent to his retirement, Mr. Oats' case was reassigned to Judge Willard Pope in January of 2008 (PCR2. 501). Based upon information that Judge Pope disclosed to Mr. Oats' counsel at a February 6, 2008, hearing, Mr. Oats moved to disqualify Judge Pope (PCR2. 553-559). On February

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U.S. 304 (2002); and *Ring v. Arizona*, 536 U.S. 584 (2002). On November 30, 2004, Mr. Oats was permitted to formally amend his Rule 3.851 motion in light of those decisions and in light of the promulgation of Rule 3.203 by this Court. Within his amended motion (specifically Claim II), he presented challenges to the procedure set forth in Rule 3.203 under the Sixth Amendment (PCR2. 219, 238-51).

[25] Judge Angel had presided over the 1990 evidentiary hearing in Mr. Oats' case.

19, 2008, Judge Pope granted the motion (PCR2. 561). Subsequently, Judge Hale Stancil was assigned to preside over Mr. Oats' pending Rule 3.851 motion.

The evidentiary hearing was scheduled to commence on June 28, 2010, when the State disclosed that Dr. McClaren had prepared a supplemental report regarding Mr. Oats. The State provided defense counsel with this supplement report on Friday, June 18, 2010.[26] The following week, Mr. Oats requested a continuance (PCR2. 816-17). The evidentiary hearing was then continued until September 28, 2010. Due to scheduling issues, Mr. Oats was permitted to perpetuate Dr. Denis Keyes' testimony in a deposition conducted on September 27, 2010, and which was then introduced into evidence at the evidentiary hearing that commenced the next day (PCR2. 1382).[27]

While neither *Atkins* nor Rule 3.203 existed in 1990 when the State conceded Mr. Oats's mental retardation and the experts testified regarding his

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[26] Dr. McClaren had evaluated Mr. Oats with his counsel present to observe on October 19, 2005 (PCR2. 1457). Six months later, Dr. McClaren prepared a written report stating his conclusions on April 21, 2006 (PCR2. 1461). Mr. Oats' counsel deposed Dr. McClaren in September of 2008 (PCR2. 1462). In October of 2008, Dr. McClaren then conducted an interview of a woman who had written a presentence investigation report concerning Mr. Oats in 1979 (PCR2. 1623-24). Based upon the October 2008 interview, Dr. McClaren wrote his supplemental report in June of 2010 which was provided to Mr. Oats' counsel 10 days before an evidentiary hearing was scheduled to begin (PCR2. 816).

[27] A pleading entitled, Joint Motion to Perpetuate Testimony, was served on September 17, 2010 (PCR2. 919). An order granting the motion was filed on September 22, 2010 (PCR2. 921).

mental retardation, the mental health evaluations had been conducted under the same clinical diagnostic criteria used by the psychological community that the statutory definition was patterned upon. Indeed, the parties to this proceeding stipulated to the admission of the evidence from the 1990 hearing at the evidentiary hearing conducted on Mr. Oats' *Atkins* claim which commenced in 2010 (PCR2. 1384, 1389).[28]

Along with the entire record of the 1990 evidentiary hearing being adopted into the current proceedings, three experts testified at the instant evidentiary hearing.[29] In addition to the evidence from the 1990 hearing, the defense presented the testimony of Dr. Denis Keyes (PCR2. 1382-83). The State then presented Dr. Harry McClaren (PCR2. 1392-93). In the course of the cross-examination of Dr. McClaren, the State for the first time disclosed a November 6, 2008, addendum to

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[28] As Mr. Oats' counsel explained when introducing the record from the 1990 evidentiary hearing:

> MR. MCCLAIN: But in terms of presenting Mr. Oats' case, as opposed to recalling everybody and having them testify again, we have stipulated with the State to introduce the testimony.

(PCR2. 1389).

[29] At the beginning of the evidentiary hearing, Mr. Oats filed a motion challenging the constitutionality of the clear and convincing burden of proof set forth in the statute (PCR2. 929). Counsel explained on the record, "[t]he Florida Supreme Court in one of their more recent pronouncements in the Victor Jones case, which is 966 Southern Second 319, deferred to another day addressing the clear and convincing standard versus the preponderance standard." (PCR2. 1390).

Dr. McClaren's 2006 report (PCR2. 1663).[30] Mr. Oats' counsel had not received the 2008 addendum at the time of either his September 4, 2008 deposition of Dr. McClaren or his September 3, 2010, deposition of Dr. McClaren (PCR2. 1664-65). He did not receive the 2008 addendum until he was in the midst of cross-examination on September 29, 2010. In explaining the State's failure to disclose the addendum previously, counsel for the State explained on the record: "And that addendum, Dr. McClaren would say, was his work product, is what it was" (PCR2. 1665).[31] When Mr. Oats' counsel asked for a continuance "so I can have a chance to pursue this information that's in these four pages and talk to my mental health expert about" (PCR2. 1664), Judge Stancil directed counsel to finish the cross that he had been prepared for (PCR2. 1666). However, Judge Stancil further stated: "I think the Court would be inclined to give you a period of time to - - if you wanted to file anything supplemental or have any other hearing." (PCR2. 1666).

Following the conclusion of Dr. McClaren's testimony on September 29, 2010, Mr. Oats served a Motion to Reopen Evidentiary Hearing on November 27, 2010 (PCR2. 959-61). This motion was premised upon the previously undisclosed

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[30] This 4-page single-spaced addendum was ultimately introduced as an exhibit and appears in the record (PCR2. 943-47).

[31] Of course, this does not explain why Dr. McClaren who was appointed under Rule 3.203(c)(2) and who was accordingly obligated to "submit a written report of any findings to the parties and the court" prepared an addendum in 2008 that he only shared with the State. Under Rule 3.203, Dr. McClaren was not a

2008 addendum authored by Dr. McClaren.

The motion to reopen the hearing was granted, the evidentiary hearing was reopened on June 17, 2011 (PCR2. 979).[32] At the time, Mr. Oats recalled Dr. McClaren to the stand (PCR2. 980). When his testimony was concluded, Mr. Oats called Dr. Harry Krop to testify (PCR2. 1026).

Written closing arguments were submitted subsequent to the conclusion of the June 17th hearing. On March 15, 2012, the circuit court's order denying Mr. Oats' motion for postconviction relief was filed (PCR2. 1270). In this order, Judge Stancil explained the basis for his decision as follows:

> 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," referring to the second prong of the statutory test for *Atkins* determinations of mental retardation.

(PCR2. 1280) (emphasis added).

SUMMARY OF THE ARGUMENTS

1. Florida's definition of mental retardation contains three prongs: 1) recognized IQ test scores of 70 or below; 2) deficits in adaptive behavior; and 3)

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confidential state expert, but was in fact a court-appointed expert.

[32] The transcript of the June 17, 2011, hearing appears in the record before the transcripts of the earlier September 28-29, 2010, proceedings. Thus, the pagination numbers for that transcript are smaller than those for the September 28-29th

onset before the age of 18. In the proceedings below, there was no real question regarding the presence of the first two prongs. Even the State's expert, Dr. McClaren, readily conceded the first prong, and more reluctantly conceded the second prong, *i.e.* that Mr. Oats had deficits in his adaptive behavior. As to the third prong, Dr. McClaren testified that he did not find the evidence of onset before the age of 18 compelling. In his order denying Rule 3.851 relief, Judge Stancil went further and rested his decision to deny relief entirely on the third prong, saying that Mr. Oats' claim of mental retardation was denied because there "is no competent evidence that the defendant suffered from any mental retardation prior to the age of 18."

The third prong of Florida's definition of mental retardation is consistent with and illuminated by the parallel definition appearing in the DSM-IV. The third prong is concerned with whether the subaverage intellectual functioning and deficits in adaptive functioning begin in the developmental years, *i.e.* prior to the age of 18. If those conditions have an onset in one who is adult, the diagnosis is not mental retardation, but something different, *e.g.* brain damage, brain injury, dementia, etc. So in determining whether the third prong is satisfied, the issue is when did the subaverage intellectual functioning and deficits in adaptive functioning begin. This analysis requires consideration of not just what evidence

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proceedings.

shows an onset before the age of 18, but also what evidence shows an onset after the age of 18 because it is an either-or question - did onset occur before or after the age of 18.

In his analysis of the third prong, Judge Stancil failed to properly construe the third prong. His erroneous construction of the third prong led him to the erroneous conclusion that Mr. Oats had presented "no competent evidence" of onset before the age of 18, which is belied by the record, and Judge Stancil completely overlooked the fact that there is no evidence that the subaverage intellectual functioning and deficits in adaptive behavior did not begin until after the age of 18.

When the third prong is properly understood and properly analyzed, it is clear that Mr. Oats is mental retarded under Florida law.

2. Mr. Oats' constitutional rights were violated by the court-appointed expert in this case acting as part of the prosecutorial team, keeping certain information confidential with the State and advising they State of steps it should take to build a case against Mr. Oats to attempt to overcome the strong evidence of mental retardation.

3. The circuit court unconstitutionally curtailed Mr. Oats' cross-examination of Dr. McClaren by ruling that questioning Dr. McClaren as to his assessment of the strength of the evidence of mental retardation improperly sought a legal

conclusion regarding the standard of proof for ruling on a claim of mental retardation. In Dr. McClaren's proffered answer to the excluded question, he conceded that there was evidence that Mr. Oats was mentally retarded and that his concern was merely with the strength of that evidence. Dr. McClaren's answer to the question was relevant evidence which should have been admitted and considered by the presiding judge when ruling on Mr. Oats' mental retardation claim.

4. The circuit court fundamentally erred by abdicating its role of neutrality, participating in the proceeding as an advocate, rehabilitating and providing answers for the State's witness, preventing cross-examination, and providing testimony and opinion itself that could not be objected to or challenged by counsel under the rules of court.

5. A determination that Mr. Oats is not mentally retarded is necessary under Florida law to render his eligible for a death sentence. Because of that, the full panoply of Sixth Amendment rights must attach. However, the process provided under Rule 3.203 did not provide for the full panoply of Sixth Amendment rights in Mr. Oats' case. Rule 3.203 as applied in Mr. Oats' case is unconstitutional, and the proceedings conducted on Mr. Oats' mental retardation unconstitutionally deprived him of his Sixth Amendment rights.

STANDARD OF REVIEW

Questions of statutory constructions are questions of law to which this Court applies a *de novo* standard of review. *Jones v. State*, 966 So. 2d 319, 325 (Fla. 2007). "The interpretation of a statute is a purely legal matter and therefore subject to the de novo standard of review." *Kephart v. Hadi*, 932 So. 2d 1086, 1089 (Fla. 2006).

To the extent that the circuit court here ruled that there was "no competent evidence that the defendant suffered from any mental retardation prior to the age of 18," the question of whether such competent evidence exists in the record is a questions of law to which this Court applies a *de novo* standard of review. *Cherry v. State*, 959 So. 2d 702, 712 (Fla. 2007).

To the extent that Judge Stancil's statement that "[t]here is no competent evidence that the defendant suffered from any mental retardation prior to the age of 18" (PCR2. 1280), is treated as a question of fact, this Court looks for whether competent, substantial evidence supports the determination of the trial court that there is no such competent evidence. *Johnston v. State*, 960 So. 2d 757, 761 (Fla. 2006).

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. OATS' CHALLENGE TO HIS SENTENCE OF DEATH ON THE BASIS THAT HIS EXECUTION IS CONSTITUTIONALLY PRECLUDED BECAUSE HE IS MENTALLY RETARDED.

A. Florida's Statutory Test for Mental Retardation

Florida's statutory definition of mental retardation which bars the imposition of the death penalty was set forth in Fla. Stat. § 921.137, and incorporated into Rule 3.203(b):[33]

> As used in this rule, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65B–4.032 of the Florida Administrative Code. The term "adaptive behavior," for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

Thus under Florida law, mental retardation has three components. First, there must be subaverage intellectual functioning which requires an IQ score on a qualifying[34] standardized that is two or more standard deviations below the norm.

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[33] Section 921.137 was enacted in June of 2001 before the decision in *Atkins* issued in June of 2002. After *Atkins* issued, this Court promulgated Rule 3.203 in order to provide a procedure to effectuate § 921.137, and to insure Florida's compliance with the dictates of *Atkins*. *See In re: Amendments to Fla. R. Crim. Pro. And Fla. R. App. Pro.*, 875 So. 2d 563 (Fla. 2004).

[34] Rule 65B-4.032 of the Florida Administrative Code, entitled "Determination of Mental Retardation in Capital Felony Cases: Intelligence; Tests to be Administered," specifies that the tests to be used to determine mental retardation are the Stanford-Binet Intelligence Scale, the Wechsler Intelligence Scale or other tests meeting certain criteria. Both those specified tests were administered to Mr.

This Court has explained that this means that the defendant must have IQ test score of 70 or below or an acceptable standardized test to meet this first element of mental retardation. *Cherry v. State*, 959 So. 2d at 712 (concluding that a "strict cutoff of an IQ score of 70 in order to establish significantly subaverage intellectual functioning" was the legislative intent).

The second component of mental retardation under § 921.137 and Rule 3.203 is deficits in "adaptive behavior." As Rule 3.203 explains, adaptive behavior " means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expect of his or her age, cultural group, and community." This Court in *Jones v. State*, 966 So. 2d 319, 326-27 (Fla. 2007), explained that guidance for construing this provision could be found in the definition of mental retardation adopted by the American Psychiatric Association:

> B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

Jones v. State, quoting American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 49 (4th ed. 2000) (DSM-IV). Thus, what is required are deficits "in at least two" of eleven areas of an individual's daily

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Oats and both yielded a score within the mental retardation range.

functioning as set forth in DSM-IV.

The third and final component of Florida's definition of mental retardation is a requirement that the significantly subaverage intellectual functioning be "manifested during the period from conception to age 18." As to this component, this Court explained in *Jones v. State*, 966 So. 2d at 326, "[t]he third prong . . . specifies that the present condition of 'significantly subaverage general intellectual functioning' and concurrent 'deficits in adaptive behavior' must have first become evident during childhood." Unlike the other two components appearing in Rule 3.203(b), no further explanation of this requirement is included within the text of either the statute or the rule. However, this Court in *Jones v. State*, 966 So. 2d at 327, did note that this provision was also consistent with the requirement appearing in the DSM-IV that "[t]he onset is before age 18 years."

B. The Evidence Presented Below

1. Subaverage intellectual functioning

This Court has indicated that this prong of Florida's definition of mental retardation requires there exist an IQ score of 70 or less on a qualifying standardized testing instrument (either the WAIS or the Stanford-Binet). *Cherry v. State*, 959 So. 2d at 712. In Mr. Oats' case, evidence was presented that Mr. Oats had score on IQ of 70 or less on numerous qualifying standardized intelligence tests.

On September 29, 1987, Dr. Harry Krop conducted an evaluation of Mr. Oats at Florida State Prison (PCR1. 3469). In his written report dated October 1, 1987, Dr. Krop reported that when meeting with Mr. Oats he had administered the "Wechsler Adult Intelligence Scale-Revised (WAIS-R)" (PCR1. 3473). Dr. Krop reported that the verbal IQ score was 58, the performance IQ score was 61, and the full scale IQ score was 57. Dr. Krop noted that these scores showed that Mr. Oats was "functioning in the mild range of mental retardation" (PCR1. 3473).

Dr. Joyce Carbonell conducted a mental health evaluation of Mr. Oats in 1989. Her examination of Mr. Oats consisted of 3 separate interviews in the course of 1989 (PCR1. 238). During her evaluation of Mr. Oats in 1989, she also administered a WAIS-R. She reported in her testimony that the verbal IQ score was 64, the performance IQ score was 62, and the full scale IQ score was 61, which would "place him in the lowest one percent of the population in terms of his abilities, his intelligence compared to the rest of the population" (PCR1. 245).

Dr. Denis Keyes evaluated Mr. Oats in 2005. On June 24, 2005, he met with Mr. Oats at Union Correctional Institution and administered the Standford-Binet Intelligence Scale-5th Edition (PCR2. 185, 191). Dr. Keyes reported in his testimony that Mr. Oats' full scale IQ score was 54 (SPCR2. 26). His verbal IQ score was 64, and his nonverbal IQ score was 47 (SPCR2. 184).

Dr. Harry McClaren, who was called to testify by the State, administered the

WAIS-III to Mr. Oats on October 19, 2005 (PCR2. 1457).[35] Dr. McClaren reported in his testimony that Mr. Oats' verbal IQ score was 60, a nonverbal IQ score of 72, and a full scale IQ of 62 (PCR2. 1417). Dr. McClaren acknowledged that in Mr. Oats' case that there were "a number of test results that are more than two standard deviations below the mean" (PCR2. 1451). Dr. McClaren acknowledged that there were results from "four, at least" different qualifying standardized testing instruments that produced full scale IQ scores below 70, indeed well below 70 (PCR2. 1451). These four qualifying IQ test results were obtained by Dr. Krop, Dr. Carbonell, Dr. Keyes and Dr. McClaren (PCR2. 1451). Dr. McClaren also acknowledged that "those test results, they are all pretty consistent" (PCR2. 1452). He explained: "I think the spread is five or six points, something like that." (PCR2. 1452). He specifically acknowledged the results that Dr. Krop obtained on his administration of the WAIS-R in 1987[36] qualified within the meaning of § 921.137 as a recognized standardized individual IQ test on which Mr. Oats' score was more than two standard deviations below the norm (PCR2. 1465). Later, Dr. McClaren

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[35] After administering the WAIS-III, Dr. McClaren ran into Mr. Oats' counsel who was observing his evaluation of Mr. Oats. They encountered each other at a vending machine within the prison (PCR2. 1458). In light of the IQ scores that Mr. Oats had received on the WAIS-III that Dr. McClaren had just administered, Dr. McClaren advised counsel that this may be a case where he would find retardation or that the issue was "going to be very close" (PCR2. 1458).

[36] Dr. McClaren specifically testified that Dr. Krop's results were "a full scale 57 with a verbal IQ of 58 and performance of 61" (PCR2. 1465).

was asked in reference to the test results obtained by Dr. Krop and Dr. Carbonell: "Is there any basis for rejecting those test results?" He responded testified: "I don't think there is any basis that forces one to reject them." (PCR2. 1514).

This prong is satisfied by the uncontested evidence presented in the circuit court, and there is little to discuss as to this prong.[37] As this Court indicated in *Cherry*, the definition of mental retardation set for in § 921.137 requires qualifying test results with a score of 70 or less. Mr. Oats has four such qualifying test results. Certainly in denying Rule 3.851 relief, the circuit court did not find a failure of proof as to this prong of statutory definition of mental; the sole basis given for denying relief was the statement that "[t]here was no competent evidence that the defendant suffered from any mental retardation prior to the age of 18 (PCR2. 1280).

2. Deficits in adaptive functioning

This Court addressed the second prong of Florida's mental retardation definition in *Jones v. State*, 966 So. 2d at 326-27. There, this Court rejected an argument "that the second prong is concerned solely with an individual's adaptive behavior as a child under age 18." Instead, this Court found that the first prong (the

[37] Indeed, the State in its written closing in 1990 admitted that this prong of the definition of mental retardation contained DSM was established by the test results obtained by Dr. Krop and Dr. Carbonell: "Under the DSM-III criteria, the defendant falls in the mildly mentally retarded area. No doubt about that." (PCR1. 3248).

intellectual functioning component) must exist concurrently with the second prong (deficient adaptive behavior). Thus, a mentally retarded individual who is by definition over 18 years of age must have both the significantly subaverage intellectual functioning and deficits in adaptive behavior, *i.e.* these two prongs must "'exist[ ] concurrently". *Jones v. State*, 966 So. 2d at 326 ("The word 'concurrent' means 'operating or occurring at the same.'"). This Court then found support for this conclusion by looking the definition of mental retardation provided by the American Psychiatric Association in its DSM-IV. This Court specifically noted that the definition of mental retardation appearing in the DSM-IV "is consistent" with Florida's definition of mental retardation. Clearly then, guidance as to what constitutes "deficits in adaptive behavior" under § 921.137 can be found by looking at the diagnostic criteria for the three components of mental retardation that also appear in the DSM-IV.

Indeed, this Court in *Jones v. State* quoted criteria in the DSM-IV concerning "deficits or impairments in present adaptive functioning" as providing helpful guidance in understanding and construing the statutory language, *i.e.* "deficits in adaptive behavior." *Jones v. State*, 966 So. 2d at 326-27. The language from the DSM-IV that this Court quoted is illuminating as to what constitutes "deficits in adaptive behavior":

> B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards

> expected for his or her age by his or cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

Jones v. State, 966 so. 2d at 326-27, quoting American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 49 (4th ed. 2000) (DSM-IV).

At the 1990 evidentiary hearing,[38] Dr. Carbonell testified regarding the three pronged criteria set forth in DSM III-R for diagnosing mental retardation:

> A. There are basically three things that you look at when you look at mental retardation. One of them is the test score. One of them is essentially adaptive functioning and the third one is that it had to occur during the developmental years.
>
> So that sort of distinguishes from someone who, for example, suffers some kind of serious head injury or toxic substances and loses a lot of function late in life. It wouldn't be considered mentally retarded as a result of that because it wouldn't have occurred developmentally.

(PCR1. 246). Dr. Carbonell was specifically asked to address "adaptive functioning" in her testimony:

> Q. And I asked Dr. Phillips some questions about this as well. What is adaptive functioning? What does that mean and what are, if any, Mr. Oats' deficits in that area?
>
> A. Mr. Oats has some serious deficits in adaptive functioning. He communicates at a very low level. His reading skills are less than third grade. His mathematics and spelling are also less than third grade.

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[38] The testimony from the 1990 evidentiary hearing was stipulated as evidence in the 2010-11 proceedings by the parties.

> He's generally always been with family or someone who could take care of him. He has never been able to maintain steady employment and he has those general sorts of adaptive ability deficits.

(PCR1. 247-48) (emphasis added).

At the 1990 evidentiary hearing, Dr. Phillips testified regarding Mr. Oats' deficits in his adaptive functioning:

> Q. You also indicated that in conjunction with the testing in order for a mental retardation finding to be made there needs to be a history - - I call it - - of impaired adaptive functioning?
>
> Can you tell us what the history is in Mr. Oats' case.
>
> A. Well, I think in Mr. Oats' case we have a longstanding history of maladaptive behavior to societal expectations which is not inconsistent with individuals that we find to be mentally retarded.
>
> There individuals frequently do not have an easy time conforming to standards of behavior. They tend not to do well in certain structure environments. They tend to have great difficulty in maintaining employment. They tend to get confused very easily.
>
> They not infrequently - - in fact, more frequently than not, tend to be subject to the domination of others.
>
> * * *
>
> They will try to, at least, view themselves or hope others will view them as normal by essentially going along with the crowd and so one of the problems we, not infrequently see in group homes for the mentally retarded or the placement of retarded individuals in the community, is their tendency to be dominated by others in ways that not infrequently get them in trouble, in large measure because they lack the capacity to recognize those parameters or boundaries of acceptable behavior that would prevent them from getting in trouble.

(PCR1. 26-28) (emphasis added).

Dr. Keyes' testimony was presented in 2010. As to the second prong of mental retardation, he explained:

> The second factor is adaptive behavior deficits. Adaptive behavior deficits look at the person's conceptual, practical and social functioning; how well does that person meet the age, culture and racial standards of their group.
>
> If that person is in a specific cultural or racial group that has somewhat different norms, if you will, than other parts of the population, those have to be considered as a factor in whether or not that person's adaptive skills actually qualify.
>
> If there are two areas of deficit, then it is considered as a reasonable indicator that the person is adaptively disable. If he has intellectual and adaptive deficits, then you look to see when this occurred.

(SPCR2. 19-20).[39]

Later, Dr. Keyes in his testimony elaborated:

> Q What does "adaptive functioning" mean? I'll take them one at a time.
>
> A. "Adaptive functioning" refers to a person's ability to behave in the manner that is acceptable for their same age, culture, racial, ethnic, sometimes religious group; do they act like people are supposed to act when they are X-age, X-group, and how much different are they in acting?
>
> Things like looking at how well they are able to keep themselves clean, how well they are able to function within their environment, how well they are able to use the community. Are they able to get

[39] Dr. Keyes reference to "two areas of deficit" correlates to the passage from the DSM-IV that this Court quoted in *Jones v. State*, 966 So. 2d at 326-27 ("deficits in at least two of the following areas"), as consistent with the second prong of Florida's definition of mental retardation.

> from Point A to Point B? Can they make change for a dollar? Can they pay their bills? Can they make a living? Do they hold jobs? Can they adapt themselves to their environment in a way that is successful? That's what adaptive skills are.

(SPCR2. 38) (emphasis added).

Dr. Keyes specifically testified that Mr. Oats' "adaptive skills are defic[ient] in practical, social and conceptual ways" (SPCR2. 81). During cross-examination, Dr. Keyes specifically testified that "in living skills, personal living [skills] and social interaction/communication, he is within the range of severe adaptive skills [deficits]" (SPCR2. 111, 192). Dr. Keyes testified that "Sonny's overall adaptive functioning is estimated to be about the level of a child between four and seven years of age." (SPCR2. 113).

During the State's cross, Dr. Keyes was asked about Mr. Oats' escape attempts. On redirect, Dr. Keyes testified as follows:

> Q You discussed Mr. Oats' escape attempts on cross. You talked about, you know, whether a successful escape might indicate adaptive functioning. But, I mean, he was ultimately caught, right?
>
> MR. NUNNELLEY: It's outside the scope of cross and I object to it.
>
> BY MR. MEYER:
>
> Q You were asked about the escape attempts on cross?
>
> A I was.
>
> Q Would you characterize them as successful, even though he was caught?

MR. NUNNELLEY: Outside the scope. I didn't ask him whether they were successful or not.

MR. MCCLAIN: You used the word "successful." We can have it read back. You said he successfully escaped. Those were your words.

MR. NUNNELLEY: Okay. Fine.

A To get away in an escape, by definition, if he gets away for a couple of days, it's somewhat successful. So I can understand Mr. Nunnelley's use of that word.

However, I would also point out to you one thing that is very important about this. If you consider that to be an adaptive behavior, you're wrong, because adaptive behavior does not include maladaptive behaviors. And escape is a maladaptive behavior. Both the APA and the AAIDD agree to that.

(SPCR2. 125-26) (emphasis added).[40]

In the same vein, Dr. Keyes further testified in redirect:

Q There is a discussion of where Mr. Oats was getting his money in New York and Texas. Do we have any idea where he was getting his money?

A As Mr. Nunnelley pointed out, we have conjecture and that's all we can do. Lori Vaughan seemed to feel that he had robbed a particular shop to get it.

Q Does the fact that - - you know, she mentioned he had a wad of cash, just the fact that sometimes he was able to have money, does that indicate to you necessarily that he had normal adaptive

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[40] Rule 3.203(b) states: "The term 'adaptive behavior,' for purpose of this rule, means the effectiveness of degree with which an individual meets the standards of personal independence and **social responsibility** expected of his or her age, cultural group, and community." (Emphasis added). Clearly, committing a criminal escape does not meet acceptable standards for "social responsibility."

functioning?

A I would refer to the last answer, which is **maladaptive behavior is not adaptive**. If he got that money by robbing a store, that's maladaptive behavior, obviously not adaptive. So it would not support his adaptive skills, if he is able to get some money illegally.

(SPCR2. 126-27) (emphasis added).

Thereafter, Dr. Keyes testified on re-cross as follows:

Q So, doctor, what you're saying, just really briefly here, is that maladaptive behavior, while it may be antisocial behavior - - while this, certainly, I believe we could all agree was - - doesn't count as being an adaptive behavior for purposes of getting by in the world? Is that what you're saying?

A That is correct. That's what the determination of both APA and AAIDD has been, that you cannot consider maladaptive or illegal, unethical, wrong behavior as an adaptive skill. It is something that is clearly of more than just, say, a behavior that can be overlooked.

In other words, it's wrong. If it's wrong, it's wrong.

Q I mean, it doesn't matter how skillful that wrong behavior is, it does not indicate anything to do with adaptive ability and cannot be used as a component of whether assessing whether or not someone is mentally retarded? Is that what you're saying?

A It doesn't necessarily mean that they're not or are - - that they are mentally retarded or are not mentally retarded. Antisocial behavior can exist with mental retardation. It's just not adaptive. That's what it means.

(SPCR2. 129-30).[41]

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[41] Dr. Keyes explained in his testimony that for any diagnoses there is a treatise or guide, and in the case of mental retardation the DSM-IV published by the American Psyciactric Association must be considered when diagnosing mental

As to the adaptive functioning prong of the definition of mentally retardation, Dr. Krop testified in proceedings in June of 2011 as follows:

> Q Are you familiar with the Victor Jones opinion?
>
> A I am.
>
> Q And in the Victor Jones opinion there is reference to the DSM standards - - I guess it's the DSM-IV standards for adaptive functioning?
>
> A Correct.
>
> Q It is two - - deficits in two of ten areas?
>
> A Yes.

(PCR2. 1035).

Dr. McClaren was called by the State in the 2010 proceedings. At the end of his direct examination, Dr. McClaren was asked the State to "give us the top five reasons, if you will, that Sonny Boy Oats is not mentally retarded." (PCR2. 1435).[42] Dr. McClaren responded with his top five list:

1) "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

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retardation (SPCR2. 36). This is consistent with this Court's citation to the "diagnostic criteria for mental retardation" set forth in the DSM-IV as "consistent" with Florida's definition of mental retardation. *Jones v. State*, 966 So. 2d at 326.

[42] The formulation of this question by the State avoided having Dr. McClaren to address the issue within the framework of the three prongs contained in Florida's definition of mental retardation in a capital case.

progress through school, despite having a very physically abusive and probably very confusing upbringing" (PCR2. 1435-36) (this reason is clearly unrelated to the second prong - the adaptive functioning prong - and will be discussed *infra* in the section of addressing the testimony relating to the third prong of the mental retardation definition)

2) "His repeated escapes" (PCR2. 1436).

3) "His traveling to New York" (PCR2. 1436).

4) "His letter writing, complaint writing" (PCR2. 1436).

5) "Ability to get a relationship with a young woman in New York, after getting there." (PCR2. 1463).

After finishing his top five list, Dr. McClaren testified: "These are the kinds of things that make me think that this man is not mentally retarded." (PCR2. 1436). At that point, the direct examination was concluded (PCR2. 1436).

Earlier in his direct testimony, the State had referenced "Mr. Oats' escape first from Officer Ferguson's and then later from the custody of the Marion County Jail" in its questioning of Dr. McClaren (PCR2. 1422).[43] This were the "repeated

[43] In his direct testimony, Dr. McClaren noted that Mr. Oats did not escape alone - "He escaped with Donald Williams, who was also described as a bad influence on him and may have been one of his co-defendants." (PCR2. 1423). Later during cross, Dr. McClaren acknowledged that the jail escape was done not alone but with a group, and "I don't know how the plan evolved in reality." (PCR2. 1680).

escapes' making Dr. McClaren's top five list as reason number 2.

Then, the State asked Dr. McClaren if he "knew where he went when he escaped" from the Marion County Jail (PCR2. 1422-23). Dr. McClaren responded that "he ended up, by all accounts, in Gloversville, New York" (PCR2. 1423). This was the "traveling to New York" that also made the top five list as reason number 3. As Dr. McClaren later acknowledged in cross-examination, Mr. Oats "had family members in New York where he went when he was on the lam" (PCR2. 1598). Indeed, Mr. Oats "went to an areas where there were family members" (PCR2. 1598).[44]

Dr. McClaren then noted that Mr. Oats was "described as having money by his ex-girlfriend, then Lori Decker" (PCR2. 1424). This sexual "relationship with a woman" that a 22-year old Mr. Oats had while he was on the lam in New York also made Dr. McClaren's top five list as reason number 5.[45]

As for reason number 4, Mr. Oats' letter writing, Dr. McClaren testified to a specific letter:

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[44] Dr. McClaren admitted that he did not know "to what extent the family members were assisting in terms of finances and travel" (PCR2. 1598).

[45] During cross-examination, Dr. McClaren admitted that "the fact that he had a relationship with a woman in New York, who was 17 years old and he was 22, does [not] mean that he's not mentally retarded" (PCR2. 1700). Dr. McClaren then opined that he "thought it was noteworthy that [Mr. Oats] was able to develop an enduring relationship" (PCR2. 1700). Dr. McClaren nonetheless admitted that it was not "uncommon for mentally retarded individuals to have relations with - -

Q What sort of language are you talking about, doctor?

> A 5/14/90, letter: "Dear Carol: Hi there. So how is the diva of the Big Apple is doing today? Just wonderful I hope and pray."
>
> And it goes on to describe himself as a person -- "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."

(PCR2.1435). However as Dr. McClaren acknowledged in cross-examination, he did not know if Mr. Oats had actual written and/or composed the letters in question.[46] Dr. McClaren was aware that prison records from the 1970s contained

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sexual relations with someone of the opposite sex" (PCR2. 1700).

[46] In fact, Dr. McClaren admitted that he had wondered whether Mr. Oats had really drafted the letters:

> Q Do you recall testifying in the deposition in reference to some of the letters may have been written by other people?
>
> A I think there was some discussion about that. I think you asked me something about writers or –
>
> Q I mean, do you recall indicating that you thought some of them probably were?
>
> A I wondered.
>
> Q Why did you wonder?
>
> A Because when I evaluated him and saw him writing in front of me, I mean, even his motor control was poor, like he had some neurological impairment that wasn't looking like his writing years before.

the notation that Mr. Oats "communicated as one having rather low intelligence" (PCR2. 1504). At one point, prison officials indicated that Mr. Oats could not take a standardized test due to his inability to read sufficiently (PCR2. 1496). Accordingly, he explained: "who[ever] was writing these letters - - this was not the writing of a mentally retarded person" (PCR2. 1601).[47]

Thus, of the top five reasons given by Dr. McClaren, only reasons 2 through 5 could possibly be construed as relating to the second prong - deficits in adaptive behavior. Of those 4 reasons (2-5), Dr. McClaren conceded that he himself had concerns about the authorship of the letters, and that he did not know whether Mr. Oats had written and composed those letters. This reduced the significance of reason number 4 (the "letter writing") to essentially nothing since Dr. McClaren admitted that he did not know if Mr. Oats had written the letters in question.

The other three reason (the escapes, traveling to New York, and getting a girlfriend while in New York), all arose from Mr. Oats' 1980 criminal escape with his co-defendant, traveling to New York where Mr. Oats had family, and while

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(PCR2. 1600). However, Dr. McClaren admitted that he had never shown the letters to Mr. Oats and asked him if he had written them (PCR2. 1603). In response to an inquiry as to why not, Dr. McClaren testified: "I don't think I've done that, **but it sounds like a real good idea**." (PCR2. 1603) (emphasis added).

[47] In the transcript, the word "who" appears. However, counsel immediately asked: "You said whoever was writing these letters? Is that what you said." Dr. McClaren answered: "Yes. Yes." (PCR2. 1601).

there got a 17-year-old girlfriend with whom he could have sexual relations. As to the details of the 1980 events, *i.e.* whether Mr. Oats' co-defendant Don Williams was the driving force behind the crime and the escape or was Mr. Oats "the one who came up with the ideas," Dr. McClaren answered: "We don't know." (PCR2. 1587). As to what assistance Mr. Oats received from his family in traveling to New York or while he was there, Dr. McClaren testified that he did not know (PCR2. 1598). Thus, the reasons that Dr. McClaren gave in his top five list that could be construed as relevant in any way to the second prong all concerned events during a couple of months in 1980 while Mr. Oats was a fugitive on the lam, which undeniably was maladaptive behavior demonstrating deficits in the level social responsibility displayed by Mr. Oats.[48]

In cross-examination, Dr. McClaren was asked about whether he was using maladaptive behavior as evidence of adaptive functioning:

Q Yeah. My understanding from the direct was that you identified

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[48] In the course of his testimony, Dr. McClaren also referenced a burglary committed by Mr. Oats in 1976 when he was 19 years old. Dr. McClaren testified that he thought the manner in which the burglary was committed by Mr. Oats was "sophisticated" (PCR2. 1593-94). Dr. McClaren explained: "he brought an axe to the scene, went in through the roof, gathered up .357 magnum, some clothes, put them into something hidden in the woods. And I am not aware of how he was apprehended." (PCR2. 1593). However later in cross-examination, he admitted that he did know how Mr. Oats was caught - "Mr. Oats was caught because he left his wallet behind" in the store (PCR2. 1696). When he asked if this demonstrated "sophistication," Dr. McClaren answer: "I would say 'no.'). Not surprisingly, this 1976 burglary did not make Dr. McClaren's top five list.

-- I think you were asked to identify the top reasons for why you weren't finding retardation.

My understanding, you were relying on the escapes and his other, you know, criminal activity -- like the axe on the roof with the burglary -- as reasons for finding that he could adapt.

And so my question was going towards whether criminal behavior -- I mean, I've got to show deficits in adaptive behavior. My understanding is you were finding [] there were not deficits in adaptive behavior because of his actions in the criminal conduct. And so my question was about - -

A Not - -

Q - - that being maladaptive.

A I guess what I was trying to get across, it's not linked with a lack of the intellect. I don't believe that he could do the things that apparently he did if he was functioning in the lowest two, two-and-a-half percent.

Q Okay. Maybe I misunderstood. I thought that was being cited in reference to the adaptive functioning prong.

THE COURT: Well, isn't all criminal acts, I mean, substandard of what's expected? I mean, it's not –

THE WITNESS: Sure. Of course, it is.

THE COURT: So, I mean, you can't just consider the act and freeze the time around it.

BY MR. McCLAIN:

Q I don't think I was doing that. I think I was trying to address, in your direct examination, what you had identified was a reason for not finding mental retardation, which was his behavior in the escapes, his behavior in the burglary; not this case, but those cases as showing he had the ability of adaptive -- good adaptive behavior and there was no

deficit. That's what I thought.

A And taken together with the lack of evidence for the onset of intellectual functioning at 70 or below before 18.

Q Okay. But under the statute, since there has to be deficits in adaptive behavior, adaptive behavior is defined as good personal independence and social responsibility, isn't criminal conduct, itself, a deficit in adaptive behavior under the statute because it's maladaptive?

A Obviously, it's maladaptive. We all agree it's maladaptive, but I think you have to look at the kind of maladaptive behavior –

Q Does it say that in the statute?

MR. NUNNELLEY: Let him finish his answer.

A You have to look at the kind of maladaptive behavior that is reflected in a particular criminal's pattern of conduct. And some is clearly -- suggests more intellect than others.

To me, the things that I mentioned about the escapes, the manner of the burglary, this sort of thing, the increase in his academic skills, and the lack of evidence for the onset of low IQ -- or I mean lower than two standard deviations below the mean before 18 leads me not to believe that the man is mentally retarded.

Q And I guess my question is which prong -- are you talking about the test scores, are you talking about the onset or are you talking about the adaptive functioning when you are referencing the criminal conduct?

A The criminal conduct showed, obviously, lack of social responsibility, which is a legal thing. But the nature of someone's criminal conduct does show guile, planning, learning from experience, the kinds of things that are, in a non-criminal world, adaptive behavior. Put it that way.

Q If I'm confused, I'm sorry. Are you indicating then that the lack

of social responsibility in the criminal conduct is, in fact, evidence of deficits of adaptive behavior?

A Yes, but -- I'm sorry. I think, obviously, criminal behavior, such as he has shown in his life, is not good adaptive behavior. However, 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.

(PCR2. 1584-87) (emphasis added).[49]

During cross-examination, Dr. McClaren was brought back around to a discussion of the three prongs of Florida's definition of mental retardation which mirror the prongs set forth in the definition of mental retardation appearing in the DSM-IV. *See Jones v. State*, 966 so. 2d at 326-27. It was during this questioning that Dr. McClaren revealed that he was unaware of "any real objective definition of the adaptive functioning part" of the definition of mental retardation:

Q Under the statute, adaptive functioning, deficit in adaptive functioning and the IQ score are totally different things?

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[49] During the cross, Dr. McClaren was asked about the statutory language:

Q 921.137. What's the language that's used in the statute to define what is meant by "deficits of adaptive functioning"?

A "The term 'adaptive behavior' for purpose of this definition means the effectiveness of degree with which an individual meets the standards of personal independence and social responsibility expected of his age, cultural group and community."

(PCR2. 1520). When Mr. Oats' counsel sought to ask, "So maladaptive behavior would then not qualify; is that correct?", the State's objection was sustained and the question was precluded (PCR2. 1520-21).

A They are different, yes.

Q And they are defined differently?

A Yes, they are.

Q And what's required to show them is different in the statute?

A **I'm not sure that there is any real objective definition of the adaptive functioning part of it.**

(PCR2. 1610) (emphasis added).

With that revelation, Dr. McClaren was asked about the specific language in *Jones v. State* and the DSM-IV providing an objective definition of the adaptive behavior prong of the mental retardation definition:

> Q Okay. Well, are you familiar with the Florida Supreme Court opinion in Jones v. State, indicating that the place to look is the American Psychiatric Association, which provided the following criteria for mental retardation?
>
> I mean, in terms of understanding what's meant by the statutory language, are you aware the Florida Supreme Court has pointed to the American Psychiatric Association's DSM?
>
> A Okay.
>
> Q I mean - - and under that, the way that you measure adaptive functioning is to find deficits in two of ten areas; is that correct?
>
> A Right. And then to what degree must the deficits be, I guess that's the question.
>
> Q Well, I mean, the areas are communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, and safety. And

the deficits don't have to be in all ten, only two of the ten; is that correct?

A That's right, the APA rule.

Q And so did you assess it under that? I mean, did you look at those ten areas and assess were there deficits in two of the ten?

A No, I didn't look at it that way.

PCR2. 1610-11) (emphasis added).

Shortly thereafter in his cross-examination, Dr. McClaren admitted that there were in fact deficits in Mr. Oats' adaptive behavior:

Q So if you're not relying on the SIB-R, do you see deficits, deficits in adaptive behavior?

A Well, I think that he's certainly not in the average range, like 90 to 100, like the correctional officers would see it, at least not now.

Q You said he certainly is not, is that -- I just want to make sure I - -

A Right. I would be surprised if he was that high.

Q So you would -- would it be fair to say that you would see some deficits in his adaptive –

A I'm sure he's got some deficits.

(PCR2. 1616).[50]

[50] In the course of the cross-examination, Dr. McClaren revealed that new mental health records from the prison had been provided to him the day before (PCR2. 1620) ("Q - When did you receive these records? A - Yesterday."). This testimony was given on September 28, 2010. In the new mental health records concerning Mr. Oats, Dr. McClaren noticed a change. The prison records now

Dr. McClaren also acknowledged Florida's definition of mental retardation did not contain any language requiring that the deficits in adaptive behavior must be two standard deviations below the mean:

> Q Okay. Well, under the statutory definition, is it what is required is deficits in adaptive functioning?
>
> A And I suppose that could be up to the clinician.
>
> Q Pardon?
>
> A And I suppose that would be up to the clinician to decide what his opinion would be in this kind of case.
>
> Q But unlike with the IQ score, there is no requirement of two standard deviations below the mean; correct?
>
> A Not in the statute.
>
> Q It just uses the words "deficits;" correct?
>
> A In the statute.

(PCR2. 1608).

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provided "a rule out diagnosis" (PCR2. 1621). This meant that the prison's mental health staff had concluded "there's a question about whether he's mentally retarded" (PCR2. 1621). These same new prison records showed that Mr. Oats had a fear of the dark for which Mr. Oats had "finally signed a consent to - - consent for treatment with psychology, or mental health services" (PCR2. 1620). Dr. McClaren explained that Mr. Oats "has anxiety that apparently is interfering with him going to get some help" (PCR2. 1621-22). In fact, the records indicated "a history of anxiety and phobia," as well as "irregular heartbeats and panic attacks" and a "history of self harm" (PCR2. 1668). The records also noted: "Inmate shows signs of mild to moderate mental or emotional impairment" (PCR2. 1669). Clearly, these prison records showed deficits in adaptive functioning.

Later in cross-examination, Dr. McClaren was again asked about whether he applied the DSM-IV when he evaluated Mr. Oats. Dr. McClaren again stated that he did not:

> Q Okay. But in terms of the adaptive functioning, I mean, I thought you would recognize that there were deficits?
>
> A Everybody has got deficits.
>
> Q But isn't the statute, I mean, as explained by the Florida Supreme Court just concerned with: Are there deficits?
>
> A That's what the language is and that's what it is.
>
> Q So there are deficits in the adaptive functioning?
>
> A Yes.
>
> Q But yet you are not finding - - you are finding that that element is not present?
>
> A I don't believe that, as a whole, that - - if you look at the big picture, that his adaptive behavior is so poor over time.
>
> Q Well, does the statute say how poor it has to - - how poor is poor?
>
> A Well, I think that's the question. It's not defined.
>
> Q Well, didn't the Florida Supreme Court in Victor Jones say you look to the DSM for the definition, and that's two of ten areas that there's deficiency in?
>
> A If that's what you're talking about, yes, that's what I read.
>
> Q Did you do that?
>
> A No. I couldn't find a way to quantify it.

Q So you have not done the determination of whether there is a deficiency in at least two of the following areas?

MR. NUNNELLEY: Do we have a date for this he is talking about?

MR. MCCLAIN: Victor Jones. It's 2007.

A No.

(PCR2. 1701-02) (emphasis added).

So by the end of his cross-examination, Dr. McClaren had not only conceded that he had not done an adaptive functioning assessment in conformity with the DSM-IV and in conformity with the language of this Court's opinion in *Jones v. State*, he had also conceded that Mr. Oats had deficits in his adaptive behavior.[51] Not surprisingly, Judge Stancil's order denying Mr. Oats Rule 3.851 was not premised upon a want of proof as to the second prong of the statutory mental retardation definition, *i.e.* deficits in adaptive functioning (PCR2. 1280).

3. Onset before age 18 years

As to the third prong of the mental retardation definition, this Court in *Jones v. State* explained:

The third prong – "and manifested during the period from conception

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[51] Moreover in the course of the cross-examination, Dr. McClaren indicated that the only prong of the three prong definition of mental retardation that he found problematic was the one concerning the onset of mental retardation before the age of 18 (PCR2. 1513) ("you don't have compelling evidence that the onset of any mental retardation was before 18").

> to age 18" – specifies that the present condition of 'significantly subaverage general intellectual functioning" and concurrent "deficits in adaptive behavior" **must have first become evident during childhood**.

Jones v. State, 966 So. 2d at 326 (emphasis added).

At the 1990 evidentiary hearing,[52] Dr. Carbonell testified regarding the available information that showed that Mr. Oats' "significantly subaverage general intellectual functioning" manifested prior to Mr. Oats' eighteenth birthday. In her testimony, Dr. Carbonell explained:

> A. Yes. He did. There are reports from his family that he was slow developing, that he didn't do well - - slow walking, slow talking - - to reach those developmental milestones.
>
> He did poorly in school and more and more poorly as he got older, which is what you see with people with mild mental retardation; that is, they do okay for a little bit but their learning curve is just incredibly slow and then eventually, unless something special is done, flunk out.
>
> There was a - - something called a Slosson Quick Test that was given to him, I think, way back in the first or second grade and he hit right at about 70. His achievement levels always lagged behind. IQ tests that were given to him about 10 years ago are very similar to this and he's consistently looked retarded.

(PCR1. 246-47). Dr. Carbonell further testified:

> Q. During his youth did Mr. Oats suffer any impairments?
>
> A. Yeah.

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[52] The testimony from the 1990 evidentiary hearing was stipulated as evidence in the 2010-11 proceedings by the parties.

Q. - - was he - -

A. He was retarded.

Q. - - mentally retarded before - -

A. Yeah.

Q. - - the age of 10?

A. Of course. He was retarded. He was enuretic until probably - - it's been reported until probably he was about 12-years old. He had trouble functioning in school. He reports having some, what he calls, falling-out spells. After the incident where he was hit in the head with the cane, he had reported fairly consistent headaches and those continued to this day. It's in almost all of his records you'll see somewhere that he has headaches.

Q. And that type of - - I'll just call it - - outburst behavior, such as the incident with the chicken, is that consistent with a person suffering from mental retardation?

A. Yes. I mean, one of the problems with people with mental retardation is that they have trouble coping with certain kinds of tasks. They may become easily frustrated particularly if the environment is not good, particularly if the environment is not essentially helpful for them, supportive for them or structured for them, that many times the tasks that they were asked to do and just simply the world they confront is beyond there [sic] capabilities. It's a very complex thing with that little intellectual functioning.

Q. Was Mr. Oats impaired developmentally?

A. Yes. I mean it's - - it's clear from early on he was having problems. His IQ starting in the first grade were very low and his family reports that he was doing very poorly.

Also his, the - - the pattern of scores he gets on the tests is consistent with a developmental kind of impairment in that there is virtually no

scatter.

(PCR1. 263-64).

Mr. Oats' Putnam County school records were introduced into evidence at the 1990 evidentiary hearing. These records show that Mr. Oats was held back and required to repeat the second grade (PCR1. 3498). They also show the administration of the Slosson in 1970 and Mr. Oats' IQ score of 70, as well as the administration of Lorge-Thorndike Cognitive Ability Test in 1965 and the First Reader Test later that same year (PCR1. 3498). The school records show that in the 9th grade in the 72-73 school year, Mr. Oats' grades D's and F's; and in the 10th grade in the 73-74 school year, Mr. Oats' grades were mostly F's (PCR1. 3499).

Dr. Krop wrote in his 1987 that: "Mr. Oats has always done poorly academically. He attended elementary school in Palatka. His grades were mostly C's and D's and he was retained in the second grade." (PCR1. 3471).

Dr. Phillips also testified at the 1990 evidentiary hearing about the available information that demonstrated that the onset of Mr. Oats' mental retardation was well before age 18:

> A. - - as a person.
>
> No. These things - - these are things which I believe are longstanding but one needs to sort of develop clinical chronology of the cards you're dealt and then how you play them.
>
> I think when we look at Mr. Oats from a developmental standpoint, it's very clear that his retardation is something that is genetic in

origin. It's one of the cards that he was dealt.

So there's little that he can do with that and that chronologically was with him from the point of conception on.

(PCR1. 31-32).

In his written report, Dr. Phillips set forth details from Mr. Oats' school records:

> Review of his academic records reveals a longstanding history of academic difficulty. His elementary record is riddled with entries of "d's" and "C's" subsequent to which his predominant grades were "F's" once he began his secondary education. He was retained in the second grade and repeated the tenth grade, when he withdrew from Palatka Central High School to enroll in Marion County High School when he went to stay with his parents. Subsequently he dropped out of school.

(PCR1. 3443).

At the conclusion of the 1990 hearing, the State submitted a written closing. Based on the evidence presented in 1990, the State conceded that "Under the DSM-III criteria, the defendant falls in the mildly mentally retarded area. No doubt about that." (PCR1. 3248).[53] This was admission by a party opponent that the

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[53] At the time of the State's 1990 concession, the controlling definition of mental retardation propounded by AAMR (then identified as the American Association on Mental Deficiency) in 1983, provided:

> Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

American Association on Mental Deficiency, Classification in Mental Retardation

criteria set forth in the DSM-III (which included deficits in adaptive functioning and onset before the age of 18) were present in Mr. Oats' case as to the question of whether he was mentally retarded. *See* Fla. Stat. §90.803(18).

Dr. Keyes testified in his 2010 deposition about the third prong of Florida's mental retardation definition. He explained:

> When you're looking at the person's background data, you have to see whether or not the school records support the kinds of problems that they are having now. And for the diagnosis to be extended backwards prior to age 18 and upwards to today, you have to see how well that person has functioned over the time period.

(SPCR2. 44).

Dr. Keyes testified that Mr. Oats "failed" the second grade and was held back (SPCR2. 44). Dr. Keyes explained that the school district "where he went to school should have realized as early as second grade, when he failed" that something was amiss:

> Children, young children particularly, don't fail first and second grade. If they fail first and second grade, it's a huge red flag. And he should have been given a full-scale assessment in second grade, if not first.

(SPCR2. 44). Dr. Keyes also testified:

> I don't think there is any doubt when he was 13 years old and he had a Slosson, S-l-o-s-s-o-n, when he had a Slosson intelligence test at 13,

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11 (Herbert J. Grossman ed., 8th ed. 1983) . Thus, the State's concession in 1990 was that all three of the criteria, including onset in the developmental years, was present.

and he came up with a 70 IQ, that should have been enough to at least get him a full-scale assessment, which he never had.

Q And is that a valid test?

A It's often used a screener.

(SPCR2. 45). In his written evaluation of Mr. Oats, Dr. Keyes wrote:

> As previously stated, Sonny obtained an IQ score of 70 on the Slosson Intelligence Test in November, 1970, at age 12. This test is inadequate as a precise indicator of Sonny's actual functioning, but can serve as a guideline to how he was functioning at the time. The general thought is that **the Slosson tends to test a bit high**, and as such, his actual intelligence score at the time was probably a bit lower.

(SPCR2. 189) (emphasis added).

Dr. Keyes reviewed Mr. Oats' school records and wrote in his written evaluation:

> Academically, Sonny had difficulty in school from the beginning, and was retained at the suggestion of his second grade teacher, Mrs. Joanne Florence. Mrs. Florence had noted that Sonny was not achieving normally, having obtained grades of "N" (Needs Improvement") in virtually all areas, save art and music. From then on, Sonny was in the same grade (and most often in the same classroom) as his younger brother, Freddie. In 1970, Sonny's IQ was tested using the *Slosson Intelligence Test*, and determined to be 70, then considered well below the intellectual cut-off of mental retardation (Heber, 1959; Heber, 1961). Later testing on Sonny's academic achievement consistently showed him significantly below the level expected of a child his age.

(SPCR2. 187). In his written evaluation, Dr. Keyes noted that he had been able to speak with Ms. McCrae, Mr. Oats's fifth grade teacher:

> In an interview with Sonny's fifth grade teacher, Mrs. Florence Mills

> McCrae, she noted that, based upon the school records she reviewed, including grades and comments she made about Sonny, he clearly had difficulty learning. He was dropped out of the basal reading program the other children were all using, and put into a program called "Trade Winds," a "high interest, low readability" program for much younger children. She noted that he improved in this area, but that he needed one-on-one attention that was typically only available in special education.

(SPCR2. 187). Dr. Keyes testified that from his review of the school records and his interview of Mrs. McCrae, it was clear that except for the year that Mr. Oats was retained in the second grade, "[h]e was, essentially, socially promoted all along. And social promotion, as I am sure you might know, is a way for them to move people out, just get them out of their classrooms." (SPCR2. 112).

Thus, Dr. Keyes testified that Mr. Oats' mental retardation was clearly manifested prior to his 18th birthday (SPCR2. 45).

The State's expert, Dr. McClaren, did acknowledge in his testimony that school records demonstrated that Mr. Oats had been given a Slosson:

> Q So the Slosson was given the year that he got the best grades?
>
> A Okay.
>
> Q Is that correct?
>
> A Yes.

(PCR2. 1492). Dr. McClaren testified that Mr. Oats had as a matter of fact received an IQ score of 70 on the Slosson administered by the Putnam County school district:

Q And the school records contain an IQ score of 70, do they not?

A They have a Slosson IQ - -

Q Which is an IQ score, is it not?

A It is an IQ score.

Q And it's 70, is it not?

A It is 70 in 1970 when he was 13.

Q When he was 13. So that's two standard deviations below the mean?

A But not on a test that would be used to diagnose mental retardation.

Q Are you - - well, let me ask you this. **Are you saying the statute requires, when it says "manifested before the age of 18," the statute requires that there have been an IQ test approved by the Department of Children and Family Services to do an individualized assessment of whether or not he was mentally retarded**?

A **The statute doesn't say that.**

Q Okay. So the statute doesn't say that.

THE COURT: But the doctor is saying, okay, if we assume, or I guess we could assume that his IQ was 70 at that point in time, when he examined him, he did not find him to be mentally retarded.

MR. McCLAIN: Well, Your Honor, there is three components. There's the IQ score –

THE COURT: I understand.

(PCR2. 1488-89) (emphasis added).

Dr. McClaren also testified, in response to questioning by Judge Stancil, that the school records showed Mr. Oats received "pretty poor" grades:

> THE COURT: Do you know what - - excuse me. Do you know what grades, report card, what grades he received during this time that he went to school?
>
> THE WITNESS: Pretty poor.
>
> THE COURT: Do what?
>
> THE WITNESS: His grades were relatively poor, like - -
>
> THE COURT: But he was able to pass the subject or got promoted, I guess.
>
> THE WITNESS: He had to repeat the second grade.
>
> THE COURT: Right. But other than that - -
>
> THE WITNESS: He was promoted. I didn't see social promotion or anything like that, you know, like "passed" or something like that, administratively or something like that. I didn't see that in his school records that I knew of.

(PCR2. 1426-27).

Dr. McClaren acknowledged that the third prong of Florida's mental retardation definition required that the retardation to have shown itself before the age of 18:

> Q The word "manifests," which is used in the statute, refers to an indication of mental retardation prior to the age of 18; correct?
>
> A The way I interpret it, it means it shows itself.
>
> Q Shows itself. But there is some evidence of it? I mean –

A This may be semantics. To me, it means –

Q It's not -- I don't mean to be semantic. I just want to understand, because given there's a statutory –

THE COURT: **"Manifest" means made known, so I guess, you know, if you had some indication or some reason to suspect.**

BY MR. McCLAIN:

Q I mean, isn't the purpose to have -- so it's not somebody making it up now, without any indication in childhood, that they were retarded?

A Right; **there is not zero evidence of it.**

Q And in this instance, there is some information that would be consistent with retardation, or not? I mean, this is not a case -- this is why you –

THE COURT: Well, all the information is going to be consistent or it's not consistent. I mean, it's a factor.

BY MR. McCLAIN:

Q Isn't this why you called it a close case?

MR. NUNNELLEY: I'm going to object because I don't know what the question is.

THE COURT: Well, he wanted - - well, but you call it a close case. Just put that on the record. Why do you call it a close case?

THE WITNESS: Because this was one where there was lacking information about his true cognitive abilities prior to 18 years, keeping in mind that he goes to prison for the first time at - - let me see - - '76, at about 19, 18 or 19.

(PCR2. 1493-94) (emphasis added).

Despite Judge Stancil's statement that the statutory language simply required "some indication or some reason to suspect" and despite Dr. McClaren's own statement that the statutory language meant that there was "not zero evidence" mental retardation before the age 18, Dr. McClaren in his testimony rested his inability[54] to conclude Mr. Oats was mental retarded on the third prong - onset before the age of 18:

> [A] Before that, before 18, **there is not compelling evidence** that he had an IQ or intelligence [test result] more than two standard deviations below the mean, 70 or below.
>
> THE COURT: You didn't find credible evidence, I guess is what you're saying?
>
> THE WITNESS: That's a good way to put it.

(PCR2. 1511) (emphasis added).[55]

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[54] Dr. McClaren did acknowledge that the question of Mr. Oats' mental retardation was a "close case" and that it was "debatable" (PCR2. 1458).

[55] Oddly, Dr. McClaren at times suggested that the IQ score of 70 on the Slosson and Mr. Oats' poor performance at school could have been the result of severe child abuse and malnourishment due to poverty (PCR2. 1469-71). Dr. McClaren acknowledged that if the subaverage intellectual functioning and deficits in adaptive behavior before the age of 18 were due to child abuse, head injuries, and/or malnutrition, the definition of mental retardation would still be met as long as the onset is before the age of 18 (PCR2. 1468-69) ("[Q] ... if they were under the age of 18 when it happens, it's mental retardation? A[:] Yes, could be called mental retardation."). Thus, whether the IQ score of 70 and the poor school performance was caused by genetic conditions present at birth, or by damage to the brain caused by child abuse, head injuries and/or malnutrition during the developmental years, does not matter for purposes of Florida's definition of mental retardation.

In subsequent questioning by Mr. Oats' counsel, Dr. McClaren explained his conclusion as to the third prong and again repeated his opinion that there was a want of "compelling evidence" of onset before 18:[56]

Dr. McClaren went on to testify that Mr. Oats was beaten regularly and the beatings often involved whippings with extension cords. On occasion, Mr. Oats was screaming with blood pouring from his head. On occasion, he was required to, spreading his legs so his aunt could beat him with a board between his legs until swelling occurred and he was unable to walk for a time afterward. He also would on occasion have his hands tied behind his back, be tied to a bed and beaten. He would be beaten until he urinated on himself. After these regular and routine beatings, Mr. Oats received no medical attention as a matter of course (PCR2. 1472-74). Dr. McClaren testified that he "perceived [this] as very severe child abuse" (PCR2. 1473).

Dr. McClaren acknowledged that the testimony in the case provided numerous accounts of "head injuries" to Mr. Oats. Additionally, Dr. McClaren noted "there are scars on his head" (PCR2. 1716). Dr. McClaren did not specifically recall the testimony from Mr. Oats' brother regarding Mr. Oats severe headaches which only got worse following additional head injuries (PCR2. 1478) ("May have been. * * * And the whole list of insults to Mr. Oats, I don't know all of them and I don't know how you can know for sure"). Dr. McClaren conceded that if "the injury [from any one of these incidents] was severe enough to cause brain damage" which led to subaverage intellectual functioning and deficits in adaptive behavior as required by the statutory language, Florida's mental retardation definition would be met (PCR2. 1478). Thus if Mr. Oats poor grades and an IQ score of 70 on the Slosson all before the age of 18 was due to brain damage caused by severe beatings, head injuries and/or malnutrition, Dr. McClaren conceded that the resulting subaverage intellectual functioning on qualifying IQ tests and deficits in adaptive functioning constituted mental retardation under Florida's statutory language.

[56] Dr. McClaren described the evidence of onset before 18 as not sufficiently "compelling," even after Judge Stancil had suggested to Dr. McClaren the he found the evidence of onset before the age 18 not sufficiently credible (PCR2. 1511). In any event, the evidence of an IQ of 70 on a Slosson was undisputed - its credibility was beyond reproach. The same is true of the "poor grades" reflected in the school records and the fact that Mr. Oats was forced to repeat the second grade

Q Okay. So of the three elements, the first element, current test results, that's present. Your concern is you don't have test results that are satisfactory to you prior to the age of 18; is that correct?

A You don't have - - to me, you don't have **compelling evidence** that the onset of any mental retardation was before 18, or scores to indicate, that would be consistent with retardation had an onset before 18.

Q Okay. I mean, we're in agreement, there are the three things. One is the test results, one is the onset, and one is the adaptive functioning; correct?

A Yes.

(PCR2. 1513) (emphasis added).

Dr. McClaren was asked what evidence he required to satisfy the third prong of Florida's mental retardation definition:

Q What would be necessary to manifest the onset before the age of 18?

A That there be some indication before 18 that didn't seem to diminish as the person got older.

Q That didn't seem to diminish what?

A Diminish as the person got older, where you would have the two prongs, the test score, some of it as to that, as evidence for, in the vernacular, the poor adaptive behavior, but not really quantified, or deficits in adaptive behavior, and you didn't see evidence that the adaptive behavior improved later in life.

Q Are you suggesting then that that is a subjective evaluation of the onset then?

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with little improvement in his grades (PCR1. 3498).

> A I'm saying that in this case there is not good, strong evidence for the onset before 18. And that's the unfortunate thing about this kind of case.

(PCR2. 1580) (emphasis added).[57]

It was apparently on the basis of Dr. McClaren's testimony as to the third prong of Florida's definition of mental retardation that Judge Stancil apparently rested his finding that Mr. Oats was not entitled to relief:

> 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.

(PCR2. 1280) (emphasis added).[58]

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[57] Collateral counsel attempted to ask in follow up to Dr. McClaren's use of the word "unfortunate": "So then the defendant is - - a capital defendant is the one who bears the risk of a wrongful determination of mental retardation?" (PCR2. 1580). The State's objection to the question was sustained (PCR2. 1581). However, counsel was permitted to proffer the answer to the question: "I think that 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." (PCR2. 1581). Presumably because the State's objection to the testimony was sustained and this testimony was presented in a proffer, Judge Stancil in denying Rule 3.851 relief did not consider Dr. McClaren's concession "some evidence" supporting the third prong existed.

[58] While Dr. McClaren had recognized that there was evidence of onset before the age of 18, he said at one point there was not "good, strong evidence," and another pointing he said the evidence was not "compelling." Judge Stancil in his order denying relief said "[t]here was no competent evidence" of onset before the age of 18. Judge Stancil's statement is not consistent with Dr. McClaren's testimony, nor the testimony of Dr. Keyes, the school records, and the transcripts

Dr. McClaren's waffly testimony does not alter the fact that the undisputed school records were conclusive of poor grades, repeating the second grade, and an IQ score of 70 on the Slosson. Certainly, the evidence was "competent evidence" of the third prong of Florida's mental retardation definition, as was the testimony of Dr. Keyes and the transcripts and exhibits from the 1990 evidentiary hearing which were introduced as evidence before Judge Stancil. Thus, Judge Stancil's order was simply wrong in saying that "no competent evidence" regarding the third prong was presented.

C. Judge Stancil's Erroneous Analysis

In denying Mr. Oats Rule 3.851 relief on his mental retardation, Judge Stancil found that: "[t]here is no competent evidence that the defendant suffered from any mental retardation prior to the age of 18." (PCR2. 1280). In reaching this conclusion, Judge Stancil: 1) failed to properly construe what the statute required as to the statutory third prong, and 2) erred as a matter of law in concluding that "[t]here is no competent evidence" that third prong was present in Mr. Oats' case.

During the evidentiary hearing, both Dr. McClaren and Judge Stancil expressed various and diverse opinions as to what the third of the statutory definition of mental retardation required. At one point, Dr. McClaren testified that

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and exhibits from the 1990 evidentiary hearing which were stipulated into evidence by the parties before Judge Stancil.

"[t]he way I interpret it, it means it shows itself." (PCR2. 1493). He was the asked: "Q I mean, isn't the purpose to have - - so it's not somebody making it up now, without indication in childhood, that they were retarded?" Dr. McClaren responded: "Right; there is not zero evidence of it." (PCR2. 1493).

At another point, Dr. McClaren testified in cross-examination as follows:

> Q Are you - - well, let me ask you this. Are you saying the statute requires, when it says "manifested before the age of 18," the statute requires that there have been an IQ test approved by the Department of Children and Family Services to do an individualized assessment of whether or not he was mentally retarded?
>
> A The statute doesn't say that.

(PCR2. 1488).[59]

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[59] The language used by Judge Stancil in his order ("[t]here is no competent evidence that the defendant suffered from any mental retardation prior to the age of 18") could be read as reflecting a belief by Judge Stancil that evidence of a diagnosis of mental retardation before the age of 18 was required by the third prong of the statutory definition. However for such a construction to be correct, it would require the administration of an approved IQ before the age 18. However as Dr. McClaren noted in his testimony, such a requirement is not contained in §921.137(1). Judge Stancil's construction would also mean only those mental retarded individuals who had the good fortunate to be diagnosed with mental retardation before the age of 18 would receive the benefit of *Atkins v. Virginia*. Surely such a distinction, which would adversely impact the poor, downtrodden and disadvantaged without access to treatment and diagnosis before the age 18, would violated the Equal Protection Clause of th 14th Amendment.

However, such a construction runs smack into language in this Court's opinion in *Jones v. State*, 966 So. 2d at 327. There, this Court in relying upon the testimony from the State's expert in that case indicated that the mental retardation diagnosis cannot be made until an individual is an adult:

> [B]ecause mental retardation is lifelong, a child may meet the criteria

Thus, Dr. McClaren's various statements reflected an understanding that the statutory language, also appearing in Rule 3.203, requiring the subaverage intellectual functioning and deficits in adaptive behavior to be manifest before the age of 18, meant that there "[wa]s not zero evidence" of the mental retardation before the age of 18. It did not require the administration of a specifically identified standardized intelligence test prior to the age of 18. It did not require a diagnosis of mental retardation prior to the age 18.[60] Thus, the question raised by the third prong is when was the onset of the first two prongs, *i.e.* before the age of 18 or after the age of 18? One gets to the third prong after the first two prongs are shown.

Judge Stancil, during the evidentiary hearing, discussed the meaning of the word "manifest" as used in the statutory language setting forth the third prong: "'Manifest' means made known, so I guess, you know, **if you had some**

> for the diagnosis because of developmental delays without being mentally retarded. Unless the person also meets the criteria as an adult, the individual is not mentally retarded.

Thus as this Court noted, the diagnosis of mental retardation cannot be made prior to the age of 18.

[60] Yet in the course of his testimony, Dr. McClaren also spoken of whether the evidence of onset prior to the age of 18 was or was not compelling (PCR2. 1513). This notion of evidence of the third prong being or not being compelling is at odds with his testimony that what was required by the third prong was something more than "zero evidence" of onset before the age of 18.

indication or some reason to suspect." (PCR2. 1493) (emphasis added).[61] In another words, this construction of the word "manifest" would mean that there be a showing that there was "some indication or reason to suspect" that Mr. Oats had subaverage intellectual functioning and deficits in adaptive behavior before his 18th birthday.[62]

In *Jones v. State*, 966 So. 2d at 326, this Court indicated that Florida's definition of mental retardation was "consistent with the definition of the American Psychiatric Association." The third prong of the definition of mental retardation set forth in the DSM IV provides simply: "The onset is before 18 years." *Id.* The purpose of this component of the definition of mental retardation is to distinguish mental retardation, a developmental impairment (PCR1. 32, 264), from organic brain damage, brain injury or dementia first occurring in a fully developed adult (PCR2. 1469) ("There would be some label for it, but it's not - - the label is not

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[61] However in his order denying relief, Judge Stancil used a very different construction of the statutory language ("[t]here is no competent evidence that the defendant suffered from any mental retardation prior to the age of 18") .

[62] Judge Stancil in his order denying the claim did not indicate if the definition of the word "manifest" which he expressed during the hearing was in fact the definition he was using when he stated that "[t]here is no competent evidence that the defendant suffered from any mental retardation prior to the age of 18." (PCR2. 1280). In his order denying relief, all Judge Stancil said about the third prong was that "[t]he third component of mental retardation is that is that [sic] it was onset prior to the age of 18." (PCR2. 1277). In the language he used in his order, it does not appear Judge Stancil was employing his previously stated construction of the statutory language, *i.e.* the meaning of the word "manifest" as used in the statute.

'mental retardation'").[63] Thus when subaverage intellectual functioning is present along with deficits in adaptive behavior, the third prong is concerned with whether the impairment began in the developmental years (and is mental retardation) or was it an impairment that first arose in a fully developed adult (and is more properly labeled organic brain, a brain injury or some type of dementia). Thus, the proper diagnostic label for the condition depends up whether the impairment was development or not. As a result, if there is evidence that the onset was before 18 years of age, the diagnosis is mental retardation; if not and the evidence suggest the impairment (subaverage intellectual functioning and deficits in adaptive behavior)began after the age of 18, it gets a different diagnostic label. Under the

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[63] Professor James Ellis, a recognized expert in the field, has written:

> Age of onset is the requirement in many definitions of mental retardation that the disability have manifested during the developmental period. Most states have identified this as age 18. The purpose of this third prong of the definition is to distinguish mental retardation from those forms of brain damage that may occur later in life. (Such later-developing mental impairment could result from causes such as traumatic head injury, dementia caused by disease, or similar conditions.) This distinction is considerably more relevant to clinicians designing habilitation plans and systems of supports for an individual than it is to the criminal justice system, since later-occurring disabilities (assuming that the disability developed during adulthood but prior to the commission of the offense) would involve comparable reduction in culpability for any criminal act.

Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*.Death Penalty Information Center, February 23, 2011, http://www.deathpenaltyinfo.org/documents/MREllisLeg.pdf.

DSM-IV, it is an "either or" situation; did the impairment begin before the age of 18 or after. Here in Mr. Oats' case, there is evidence of onset before 18; there is no evidence of onset after 18. Nothing has been presented to suggest the impairment as to the first two prongs did not begin until after 18. The State has offered nothing explaining or showing the impairment arose after Mr. Oats' 18th birthday.[64] This is consistent with the statement by Judge Stancil during the evidentiary hearing that "'[m]anifest' means made known, so I guess, you know, if you had some indication or some reason to suspect" subaverage intellectual functioning and deficits in adaptive functioning prior Mr. Oats' 18th birthday (PCR2. 1493).

The undisputed evidence, the school records, established Mr. Oats received poor grades in school, was held back in second grade, and scored a 70 IQ on a Slosson Intelligence Test in 1970. This evidence was competent evidence of onset (of both subaverage intellectual functioning and deficits in adaptive behavior) before age 18, contrary to Judge Stancil's order denying the claim. This evidence

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[64] Dr. McClaren, while testifying that he did not personally finding the evidence of onset before 18 compelling, conceded that there were qualifying IQ scores and deficits in adaptive behavior that met the first two prongs of Florida's definition of mental retardation. The admitted presence of these two prongs means that Mr. Oats has significant mental dysfunction; the only questioning being what diagnostic label properly applies. While showing an onset before 18 is necessary for a mental retardation diagnosis - a developmental condition, if the impairment did not occur before the age 18, there should be evidence of what brought about the impairment after the age of 18, *i.e.* a trigger or an explanation of how it began. Dr, McClaren pointed to no evidence to suggest that the impairment as reflected by those two prongs did not start until after the 18th birthday.

clearly shows that the impairment (subaverage intellectual functioning and deficits in adaptive behavior) began before, not after, Mr. Oats' 18th birthday.

The denial of Mr. Oats' mental retardation claim on the basis of the third prong was erroneous as a matter of law, and as a matter of fact. Judge Stancil failed to recognize the purpose of the third prong - to distinguish mental retardation (a development affliction that is life long) from mental dysfunction that develops in an adult as a result of injury or disease that results in subaverage intellectual functioning and deficits in adaptive behavior. He failed to recognize that competent evidence of onset before the age 18 was presented and in the record before him. He failed to recognize that there was absolutely no evidence that the subaverage intellectual functioning and deficits in adaptive behavior had an onset after the age 18, and no evidence of an event, illness or condition, to explain an onset after the age of 18.

Judge Stancil erred in his analysis of third prong.

D. Conclusion

The three prongs of the Florida mental retardation definition, which appear in §921.137(1), and Rule 3.023(b), are met in Mr. Oats' case. There is no question that IQ testing resulted in scores more than two standard deviations below the norm, nor that he has deficits in adaptive functioning (as even Dr. McClaren conceded in the course of his cross-examination). The only prong found wanting

by Judge Stancil was third prong, regarding the onset of the first two prongs. However, Judge Stancil's conclusion was premised upon a misconstruction of what the prong requires and what constitutes competent evidence of onset before the age of 18. It is clear that there is competent evidence of onset before the age of 18, and absolutely no evidence that the subaverage intellectual functioning and deficits in adaptive behavior first began after the age of 18. This Court should reverse and remand for the imposition of a life sentence.

ARGUMENT II

MR. OATS WAS DEPRIVED OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WHEN THE EXPERT APPOINTED BY THE COURT UNDER RULE 3.203(c)(2) ACTED AS ARM OF THE PROSECUTORIAL TEAM, AND NOT AS A COURT EXPERT.

On June 2, 2005, the circuit court entered an order appointing Dr. McClaren "pursuant to Florida Rule of Criminal Procedure 3.203(c)(2) to test, evaluate or examine the defendant for retardation as defined in rule 3.203(b)." (PCR2. 349). The order further provided: "Dr. McClaren shall submit a written report of his findings and opinions to the parties and to the court." (PCR2. 349). Finally, the order provided:

> Dr. McClaren shall receive expert fees for his services in this cause. The Justice Administration Commission is hereby authorized and directed to pay said sum in accordance with the laws of Florida and provided for such cases.

(PCR2. 350).

Dr. McClaren traveled to Union Correctional Institution on October 19, 2005, to test and interview Mr. Oats, and at that time he administered the WAIS-III to Mr. Oats on October 19, 2005 (PCR2. 1457). At a hearing on January 30, 2006, the State reported that Dr. McClaren had yet to write his report concerning his evaluation of Mr. Oats (PCR2. 384). According to the State, Dr. McClaren had "promised to have his report finished and completed and mailed to all of us by the middle of February" (PCR2. 385). Upon its completion, Dr. McClaren's report, which was addressed to the "Honorable Carven D. Angel," was dated April 21, 2006 (PCR2. 939A).

Mr. Oats' counsel was permitted to depose Dr. McClaren. The deposition was conducted on September 4, 2008 (PCR2. 671).

Following the questioning conducted during the deposition, Dr. McClaren prepared a document titled: "SONNY BOY OATS." Following the title, the document began "11/6/08 Addendum" (PCR2. 944, 983). It then proceeded to discuss an interview of Mary Rich on "10/30/08" regarding her observations of Mr. Oats while acting as his probation officer in 1980 (PCR2. 944).[65] The "11/6/08

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[65] The 5-page PSI prepared by Ms. Rich in 1980 was introduced into evidence at the 1990 evidentiary hearing (PCR1. 5184-88). The information contained in the 1980 PSI prepared by Ms. Rich directly contradicted statements made in the "11/6/08 Addendum" that Dr. McClaren attributed to Ms. Rich when he interviewed her 28 years later regarding her recollection of Mr. Oats (PCR2. 944).

Addendum" was four pages in length and gave details of Dr. McClaren's interview of "John Wagner, New York State Police Investigator" conducted "[o]n 11/5/08" (PCR2. 944). The addendum then described Investigator Wagner's claims of interviews that he conducted at some unstated time during the proceeding 28 years of people who had come in contact with Mr. Oats in 1980 (PCR2. 944-46). There was no indication that Investigator Wagner had any actual contact with Mr. Oats or any direct knowledge of him.

At the end of the two pages covering Dr. McClaren's conversation with Investigator Wagner, the "11/6/08 Addendum" using the word "we" then discussed investigation that should be conducted "to locate observers of Sonny Boy's behavior" as "the best approach to learning details indicative of the degree of Mr. Oats' adaptive behavior" (PCR2. 946).

Dr. McClaren claimed that Ms. Rich recalled that Mr. Oats "was polite and always clean. She went on to say that he lived with his sister, Shirley, at the time and the house was tidy" (PCR2. 944). Ms. Rich wrote in the PSI in 1980 contemporaneous with her observations that "[t]he defendant was verifiably residing . . . [in] a two bedroom Block construction apartment that his mother has resided in since 1968. This residence is unkempt and dilapidated" (PCR1. 5187). The PSI also indicated that Mr. Oats had three sisters, including Shirley who had an arrest record of her own that Ms. Rich was familiar with. The sisters resided in Ocala with Mr. Oats and his mother in the "dilapidated" "two bedroom" apartment (PCR1. 5186; PCR2. 1646). Dr. McClaren acknowledged in his testimony that he did not go over the PSI report that Ms. Rich had prepared in 1980 with her when he talked with Ms. Rich telephonically in 2008 (PCR2. 949, 1624). Indeed, Dr. McClaren had no knowledge of whether Ms. Rich, who in 2008 was no longer employed by the Department of Corrections, had any access to the PSI report that she had written 28 years earlier (PCR2. 1624).

Referencing only the October 2008 interview of Mary Rich, Dr. McClaren wrote a supplemental report addressed to Rock Hooker, the Assistant State Attorney assigned to Mr. Oats' collateral case. It was dated June 16, 2010 (PCR2. 949). This two page report discussing the October 30, 2008, telephone conversation that Dr. McClaren had with Ms. Rich included alleged statements made by Ms. Rich which were not recorded in the "11/6/08 Addendum" (PCR2. 944, 949).[66]

On June 15, 2010, a day before the supplemental report was dated, the State advised Mr. Oats' collateral counsel "had provided the State with a supplemental report regarding Mr. Oats" (PCR2. 816). On June 18, 2010, the State provided collateral counsel with a copy of Dr. McClaren's supplement report. This was 10 days before the evidentiary hearing on Mr. Oats' mental retardation claim was scheduled to begin (PCR2. 817). Mr. Oats requested and granted a continuance and another opportunity to depose Dr. McClaren. This second deposition was conducted on September 3, 2010 (PCR2. 1664-65).

It was in the course of the cross-examination of Dr. McClaren on September 29, 2010, after Dr. McClaren had been deposed twice, that the State for the first time disclosed the November 6, 2008, "Addendum" to Dr. McClaren's 2006 report

[66] While the June 16, 2010 supplemental report was disclosed to Mr. Oats' collateral counsel in June of 2010, the "11/6/08 Addendum" was not disclosed until the second day of collateral counsel's cross-examination of Dr. McClaren.

(PCR2. 994, 1663).[67] In addressing its failure to disclose the addendum previously, the prosecutor stated on the record: "And that addendum, Dr. McClaren would say, was his work product, is what it was" (PCR2. 1665). When Mr. Oats' counsel asked for a continuance "so [he] can have a chance to pursue this information that's in these four pages and talk to [his] mental health expert about it" (PCR2. 1664), Judge Stancil directed counsel to finish the cross that he had been prepared for (PCR2. 1666). However, Judge Stancil further stated: "I think the Court would be inclined to give you a period of time to - - if you wanted to file anything supplemental or have any other hearing." (PCR2. 1666).

Following the conclusion of Dr. McClaren's testimony on September 29, 2010, Mr. Oats served a Motion to Reopen Evidentiary Hearing on November 27, 2010 (PCR2. 959-61). This motion was premised upon the previously undisclosed 2008 addendum authored by Dr. McClaren. The motion was granted, and the evidentiary hearing was reopened on June 17, 2011 (PCR2. 979).

At that time, Dr. McClaren testified that he drafted the "Addendum" on November 6, 2008, and sent it "to Rock Hooker who was the assistant State attorney assigned to this case" that same day (PCR2. 982). Dr. McClaren was asked if he had regarded the "Addendum" as work product, as Mr. Hooker had

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[67] This 4-page single-spaced addendum was ultimately introduced as an exhibit and appears in the record (PCR2. 943-47).

indicated when it was turned over to Mr. Oats' counsel on September 29, 2010, during the second day of the evidentiary hearing. Dr. McClaren answered: "Right, that was the intent. I was letting him know that I had gathered this additional information, and I think it ends by me requesting help." (PCR2. 984). He further explained: "I intended to be a communication between Mr. Hooker and myself; letting him know that I had done these extra things and might he help me find witnesses, he being in a better position to deal with New York State Police than me." (PCR2. 983).

When asked about the order appointing him to evaluated Mr. Oats, Dr. McClaren testified that he had been appointed "[a]s a court expert? A[:] That's the way I took it; that I was to report to all sides." (PCR2. 985). However, Dr. McClaren had to acknowledge that he didn't provide Mr. Oats' collateral counsel with a copy of the "Addendum" (PCR2. 986). Indeed, other than at the prison at the time of Mr. Oats' testing and at the two deposition, Dr. McClaren acknowledged that he did not communicate with Mr. Oats' counsel (PCR2. 986). When asked "[w]hy would this be confidential with regard to the State when you are a court expert?", Dr. McClaren responded:

> A I guess I felt more comfortable working with Mr. Hooker than I did with you in that I guess I knew him a little better. I was endeavoring to find information.

(PCR2. 988). When asked why he used the word "we" in the "Addendum," Dr.

McClaren responded: "I was thinking that I would get some help from Mr. Hooker who - - may be that's why I used 'we,' but I clearly wanted his help." (PCR2. 989).

According to the order appointing Dr. McClaren, he was a court expert appointed under Rule 3.203(2) to be paid by JAC and to submit written finding to the parties and the court (PCR2. 350). Dr. McClaren even acknowledged in his testimony that his appointment was as a court expert. Yet, he prepared a document that he viewed as confidential work product which he provided the State in which used the word "we" to discuss interviews of potential witnesses he wanted conducted in order to obtain and "use examples of the defendant's particular adaptive behavior" in order to defeat Mr. Oats' mental retardation claim (PCR2. 946).

Dr. McClaren's actions in this regard violated Mr. Oats' rights under the Sixth, Eighth and Fourteenth Amendments. Here, a court expert was reporting confidentially to the State and displayed an intent to assist them defeat Mr. Oats' mental retardation claim. While the State may hire a mental health expert to do just that, it is a violation of due process for a court expert to engage in such behavior. This Court recently wrote:

> In this case, **we have a neutral court-appointed expert owing no duty of loyalty or confidentiality to either party**. Although CCRC brought the competency issue to the attention of the trial court, it was the trial court that ultimately concluded that Mr. Jones should be evaluated. The court subsequently sought the State's and CCRC's recommendation as to which experts would be appointed. Both parties

were only allowed to suggest an expert from the court-approved list. *Miami-Dade Cty. v. Jones*, 793 So. 2d 902, 906 (Fla. 2001) (emphasis added). *See also Parkin v. State*, 238 So. 2d 817, 821 (Fla. 1970) ("Experts appointed by the Court to ascertain mental capacity are neither prosecution nor defense witnesses, but neutral experts working for the Court, and their findings and opinions are subject to testing for truth and reliability by both prosecution and defense counsel.").

Dr. McClaren was not and did not act as a neutral court-appointed expert. This is clearly shown by his belief that his "Addendum" was a confidential communication with the State in which he was providing suggested investigation that could be helpful in defeating Mr. Oats' mental retardation claim. His testimony should be stricken and not considered by this Court in this appeal.

ARGUMENT III

THE CIRCUIT COURT IMPROPERLY CURTAILED MR. OATS' CROSS-EXAMINATION OF DR. MCCLAREN AND LIMITED MR. OATS RIGHT TO PRESENT FAVORABLE EVIDENCE THROUGH DR. MCCLAREN IN VIOLATION OF MR. OATS' SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The proceeding below was determined whether Mr. Oats is death eligible under *Atkins v. Virginia*, 536 U.S. 304 (2002). The Sixth Amendment attaches to the determination of any fact necessary to render a criminal death eligible. *Ring v.*

State, 536 U.S. 584 (2002). The Sixth Amendment includes the right of confrontation. Thus, the Sixth Amendment right of confrontation attaches to proceeding to determine a criminal defendant's death eligibility, even when the proceeding is collateral in nature under Rule 3.203.

During the cross-examination of Dr. McClaren, the following exchange occurred between Mr. Oats' collateral counsel and Dr. McClaren:

> Q Are you suggesting then that that is a subjective evaluation of the onset then?
>
> A I'm saying that in this case there is not good, strong evidence for the onset before 18. And that's the unfortunate thing about this kind of case.
>
> 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 erroneous determination of mental retardation, because that evidence is insufficient to reach the level that you are requiring it to reach, then he bears the risk that he going to be executed?

(PCR2. 1580).

The State objected to the question saying: "That's a legal argument, not a psychological issue" (PCR2. 1581). Judge Stancil sustained the objection. Mr. Oats' counsel requested and was permitted to proffer the answer to the question:

> I think that 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.

(PCR2. 1581). Clearly in answering the question in the proffer, Dr. McClaren

acknowledged that there was evidence supporting Mr. Oats' mental retardation claim, he simply concluded it was not strong enough in his opinion "to convince" him of Mr. Oats' mental retardation.

Setting aside the Sixth Amendment right to confrontation, it was error for Judge Stancil to sustain the State's objection and exclude relevant testimony from Dr. McClaren acknowledging that there was in fact evidence supporting Mr. Oats' mental retardation claim.

Since Dr. McClaren was called as a witness by the State and testified regarding his view of the evidence supporting the third prong of Florida's mental retardation definition, Mr. Oats was entitled to cross Dr. McClaren as to his reasoning, and/or to present his testimony that there in fact evidence supporting Mr Oats' mental retardation claim. Presumably because the State's objection to the testimony was sustained and this testimony was presented in a proffer, Judge Stancil in denying Rule 3.851 relief did not consider Dr. McClaren's concession "some evidence" supporting the third prong existed. This was error infecting Judge Stancil's order finding "no competent evidence" was in support of the third prong (PCR2. 1280).

ARGUMENT IV

THE JUDGE BELOW FUNDAMENTALLY ERRED BY DEPARTING FROM HIS ROLE OF NEUTRALITY DURING THE EVIDENTIARY HEARING AND DEPRIVED MR. OATS OF DUE

PROCESS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AT THE EVIDENTIARY HEARING ON HIS MENTAL RETARDATION CLAIM.

Recently, the 5th DCA reversed a criminal conviction agreeing with convicted defendant on appeal that the circuit "court fundamentally erred by departing from its role of neutrality during the trial." *Johnson v. State*, 2012 WL 3758650 (Fla. 5th DCA 2012). In *Johnson*, the 5th DCA observed that "[f]or an error to be fundamental, it must be basic to the judicial decision under review and equivalent to a denial of due process." *Id.* at *1. The 5th DCA in overturning the criminal conviction at issue wrote:

> The requirement of judicial impartiality is at the core of our system of criminal justice. *Williams v. State*, 901 So.2d 357, 359 (Fla. 2d DCA 2005). "The judge must above all be neutral and his neutrality should be of the tough variety that will not bend or break under stress. He may ask questions to clarify the issues but he should not lean to the prosec[u]tion or defense lest it appear that his neutrality is departing from center." *Williams v. State*, 143 So.2d 484, 488 (Fla.1962). However, "[e]xtensive participation of the trial judge, such as by excessive questioning of witnesses, may amount to usurping the functions of counsel and be an abuse of the discretion and latitude of the court in such respects, with resultant injury to the rights of a party or parties." *Bumby & Stimpson, Inc. v. Peninsula Utils. Corp.*, 169 So.2d 499, 501 (Fla. 3d DCA 1964). "The very status of the judge as interrogator inevitably means that the answers given by the witness will assume an importance in the mind of jurors otherwise lacking if counsel had instead asked the questions." *Moton v. State*, 659 So.2d 1269, 1270 (Fla. 4th DCA 1995). **A trial judge who assumes the role of a prosecutor deprives the defendant of due process and commits fundamental error that may be raised for the first time on appeal.** *Padalla v. State*, 895 So.2d 1251, 1252 (Fla. 2d DCA 2005); *Sparks v. State*, 740 So.2d 33, 36 (Fla. 1st DCA 1999).

> **The record before us reveals that the trial judge actively participated in examining the State's primary witness on substantive issues.** In ruling on objections, the court commented, in front of the jury, on what the evidence had shown, and at times, suggested testimony to the witness, which the witness then adopted. On several occasions, the trial court offered objections to questions when none had been stated by opposing counsel, and excessively criticized counsel for making arguments that it believed were not relevant.
>
> "A fundamental error is one that undermines the confidence in the trial outcome and goes to the very foundation of a case. Often, it is the equivalent of a denial of due process." *Jassan v. State*, 749 So.2d 511, 512 (Fla. 2d DCA 1999). We conclude that the trial court's conduct vitiated the validity of the proceedings, which requires a new trial before a different judge. *See Gonzalez v. Mercy Hosp., Inc.*, 738 So.2d 955 (Fla. 3d DCA 1999) (holding that trial court's comments on evidence and participation in cross-examination of witnesses to be reversible error); *Vaughn*, 907 So.2d at 1252 (reversing and remanding for new trial with new judge after judge improperly rebuked counsel and impermissibly commented on evidence); *Carr v. Crosby Builders Supply Co.*, 283 So.2d 60 (Fla. 4th DCA 1973) (reversing wrongful death action where judge's comment gave jury impression that opposing party did not act negligently); *see also Sparks*, 740 So.2d 33 (holding that state could not show harmlessness where judge pointed out inculpatory evidence in court file to prosecutor, which denied defendant's right to due process of law and trial by neutral and detached magistrate).

Johnson v. State, 2012 WL 3758650 at *4-5 (footnote omitted) (emphasis added).

The judge whose conduct was at issue in *Johnson* was the Honorable Hale R. Stancil, the same judge who presided over the evidentiary hearing in Mr. Oats' case that is the subject of this appeal. Granted there was no jury in the proceedings here, unlike the situation in *Johnson v. State*. However, that distinction should not

control where as here an examination of the transcript of the mental retardation evidentiary hearing shows that Judge Stancil engaged in the same pattern of behavior that was present in *Johnson v. State* and which was found to constitute fundamental error. Indeed, the record in Mr. Oats' case is rife with examples of Judge Stancil doing exactly as he did in *Johnson v. State*, interrupting Mr. Oats' counsel's attempt to cross-examine the State's only witness, taking over the questioning, answering questions for Dr. McClaren before giving him as the witness an opportunity to answer, explaining to counsel what Dr. McClaren meant to say, and generally acting as an advocate for the State. A fairly early example occurred when Mr. Oats' counsel sought to cross-examine Dr, McClaren regarding his testimony discounting Dr. Carbonell's finding in 1990 that Mr. Oats was mental retarded under the three prong standard contained in the DSM III:

> Q Well, did you read her testimony in that regard?
>
> A I read her testimony, yes.
>
> Q Well, didn't she specifically address the onset before the age of 18 and adaptive functioning?
>
> A I believe that she did, but what I'm trying to get at is that in those days - -
>
> THE COURT: You're telling us today you look at it - - give it more scrutiny?
>
> THE WITNESS: More scrutiny; and I think certainly 20 years ago most clinicians gave a lot more weight to a measured IQ score than - -

THE COURT: So I guess what you're saying, that today in 2010, you give it more thought than you did years ago when that opinion was - -

THE WITNESS: In capital litigation, for sure.

THE COURT: And you give it more scrutiny, so to speak?

THE WITNESS: Yes, sir.

BY MR. MCCLAIN:

Q Is there anything in Dr. Carbonell's testimony to indicate that she gave it less scrutiny than you're giving it?

THE COURT: If I understand what you're saying based upon the profession.

THE WITNESS: That's what I was trying to get across.

THE COURT: Yeah, based upon the profession standards today. You know, professionals, such as yourself, you treat it a little differently than you did back then.

THE WITNESS: Yes, sir.

THE COURT: Okay.

BY MR. MCCLAIN:

Q How did you treat it differently than she did?

A In 1990?

Q Well, I mean, her testimony, her testimony explains - -

THE COURT: No. He's saying, he's saying that they used mostly the IQ test back then.

MR. McCLAIN: But that's not her testimony.

THE WITNESS: That it was more common for people to put a lot more weight on the IQ scores.

COURT: And now, see, you're asking him to give an opinion based upon her opinion back then, which today the standards among the professionals are -- appears to be a little different, so - -

MR. McCLAIN: But that's not -- her testimony is based on the DSM, IQ score, onset before the age of 18 and adaptive functioning, the same three that are present today.

THE COURT: But he says they look at it differently today.

MR. McCLAIN: And I'm trying to ask him why - -

THE COURT: They do, he says they look at it differently today.

MR. McCLAIN: Given her testimony, what in her testimony is looking at it differently? That's what I'm trying to say.

THE COURT: Well, I mean, it's just like, you know, times change things. I mean, we look at - - you know, death penalty cases today in 2010 are a lot different than they did back in 1930, you know, and in the 1960s. I mean, it's all -- things change.
I realize it hasn't been that long ago, three years, but, I mean, he's saying that today it's looked at a little differently, they use a little more scrutiny because the -- I guess the retardation was not really an issue back then as it is today. Is that right?

THE WITNESS: The weight that it is.

THE COURT: Sir?

THE WITNESS: Not of the weight that it is.

THE COURT: That's what I meant.

THE WITNESS: Yes, sir.

MR. McCLAIN: What is not of the weight that it is? What? I didn't

understand.

THE WITNESS: Not given the weight that a determination of retardation or not gives today.

MR. McCLAIN: Well, statutorily, it wasn't given the weight, but Dr. Carbonell, are you saying Dr. Carbonell didn't properly do a mental retardation evaluation?

THE COURT: I don't know see how we can tell on what weight one doctor gave. I mean, she reached her opinion and testified to it and he's - -

MR. McCLAIN: But, **Your Honor, you have just indicated that he is saying that she didn't do it the way it's done now**. And I'm trying to find out - -

THE COURT: **Well, no, I didn't say "do" it. I mean, he's saying that the weight and the way they scrutinize the retardation issue is different today than it was back in 1990**. That's what I understand.

MR. McCLAIN: **I'm trying to ask him where in her testimony there is evidence to support that.**

THE COURT: Well, he says -- **I mean, he's saying it's a standard in the profession itself. At least that's the way I understood what Dr. McClaren was testifying to.**

THE WITNESS: What I was trying to get across is most of the time 20 years ago, while they were testing adaptive behavior, a lot of the determinations as to mental retardation were made with a lot more emphasis on a measured IQ, without validity tests or attempts at some objective and possible way to measure the - -

THE COURT: Well, **I think I understand what he's saying, but I think we've covered this matter for the record, so let's move** on.

(PCR2. 1531-35) (emphasis added). Thus, Judge Stancil interrupted the cross-

examination, told the witness, Dr. McClaren, what he, the judge, thought the answer should be, got Dr. McClaren to parrot back the answer, and then told Mr. Oats' counsel to move on. Judge Stancil did all this *sua sponte.*

Another example of exactly the same kind of judicial misconduct that was identified in *Johnson v. State* occurred at the reopened evidentiary proceeding in June of 2011. The proceedings were reopened because of the State's disclosure during the second day of Dr. McClaren's cross in September of 2010, that he provided the State with an "Addendum" to his report in November of 2008. When Dr. McClaren retook the witness stand, Mr. Oats' counsel sought to question him regarding the "Addendum" and its contents (PCR2. 990). When counsel asked Dr. McClaren why he did not contact the defense with the requests for assistance that were contained in the "Addendum," the State registered an objection. Rather than rule on the objection, Judge Stancil took over the questioning of Dr. McClaren:

> Q And is there any reason I couldn't have helped to find the people?
>
> A I guess - -
>
> MR. NUNNELLEY: Calls for speculation. I object.
>
> THE COURT: All right, look, Dr. McClaren, how many years have you been doing this?
>
> THE WITNESS: In private practice in Florida since '86.
>
> THE COURT: Well - - in this case you asked Mr. Hooker to, perhaps, assist you in getting additional information. Do you ask the other

lawyers sometimes - - I mean, the Defense to do the same thing?

THE WITNESS: Yes.

THE COURT: Well, I mean, do you - - but in this case you were appointed by the Court as a court expert, so you weren't really hired by the Defense or the State?

THE WITNESS: Right.

THE COURT: Well, had there been other instances in your career where you have done the same thing; asked the State for additional information?

THE WITNESS: Yes.

THE COURT: Well, do you normally cross - - I mean, give a copy to the other side of what you are requesting or do you normally don't do that?

THE WITNESS: I guess I think if it is something formal that's part of a report, I would do it; make sure both sides knew. If I thought it was merely a request for some help, I might not advise.

THE COURT: All right. If you were requesting additional information you may not communicate with both sides, but you give each side a copy of the report. Is that what you are saying?

THE WITNESS: Right, if I made an additional report that mattered.

THE COURT: All right. Well, I guess as I understand it, you are saying you would go wherever you thought you could to get the information that might be a benefit to you. But you may not - -

THE WITNESS: Right. I realize the limits of my investigation skills and abilities.

THE COURT: Right, but you may not request and let both sides know what you are requesting from the other?

> THE WITNESS: Right. Every time I make a phone call to one side or the other, I may not make a phone call to the other side.
>
> THE COURT: Okay. Go ahead.

(PCR2. 990-92). Judge Stancil never ruled on the State's objection. He merely took the objection as an opportunity to ask Dr. McClaren a series of leading questions, *i.e.* questions that contained the suggested answer. Certainly, leading questions from a presiding judge is something quite different than a defense attorney's use of leading questions to probe a State's witness testimony and/or bias.

When Mr. Oats' counsel resumed his questioning, he tried to elicit testimony regarding the fact that the "Addendum" was not just a document asking for assistance, that it was also a documenting reporting information that Dr. McClaren had obtained through interviewing witnesses. But, counsel's questioning was short-lived:

> Q Now, the first paragraph, are you asking for help to get information or are you reporting information that you have received that you are going to consider in your evaluation?
>
> MR. NUNNELLEY: Your Honor, I going to object to that question for two reasons. First of all, the document speaks for itself. Secondly, this is going outside the reach of the April 5, 2011 order by this Court on Defense Counsel's motion to reopen the hearing, which on the Defendant's motion th Defendant said that "the November 6, 2008 addendum described interviews and contains information regarding witnesses not previously disclosed by the State and seeks to present further evidence in response to and addressing the addendum."

(PCR2. 993). At that point, a discussion primarily between Mr. Oats' counsel and

Judge Stancil consumed three and a half pages of the transcript (PCR2. 993-96). Then suddenly, Judge Stancil began to again question Dr. McClaren and continued to do so for 4 more pages of the transcript (PCR2. 997-1001). At that point after Judge Stancil had questioned Dr. McClaren extensively for 4 transcript pages, Judge Stancil announced he was inclined to sustain the State's objection:

> THE COURT: I tend to agree with Mr. Nunnelley on this.
>
> MR. MCCLAIN: Well, Your Honor, you have been able to ask this witness questions about the very topic that I wanted to ask about, and I would like to have the opportunity, on behalf of Mr. Oats, to ask questions of this witness.
>
> THE COURT: Well, you are asking questions - -
>
> MR. MCCLAIN: The State objected to the question that I asked and the Court seems to be inclined to sustain the objection and - -

(PCR2. 1001-02). Thereupon, there was a back and forth between Judge Stancil and Mr. Oats' counsel for almost 2 pages of transcript before Judge Stancil finally said: "Well, I guess we'll - - go ahead." (PCR2. 1003).

Mr. Oats' counsel then proceeded to question Dr. McClaren regarding the "Addendum" that he viewed as confidential work product that Dr. McClaren had shared with the State, but not with Mr. Oats' counsel. However, the questioning was soon again interrupted:

> Q Where on page one or page two do you ask for help?
>
> A I don't know that I do on page one.

Q My question was: Where on page one and page two were you asking for help or reporting the results of an interview?

MR. NUNNELLEY: Your Honor, he's badgering the witness.

THE COURT: He's already – you know, he's looking to see if there is additional information out there that might be of benefit to him. He got some names of some people in New York that may have some knowledge about Mr. Oats.
I mean it seems – that's what it seems to me like. It's pretty clear that's what he's talking about and he's relaying to Mr. Hooker, I guess, when he wrote him this letter that he should have sent you a copy of, of what he has uncovered.

MR. McCLAIN: **I'm not sure I understand, Your Honor. You are answering for the witness**?

THE COURT: Do what?

MR. McCLAIN: Was that the - -

THE COURT: **I mean, that's the – that's what I understand from – if I'm wrong, correct me.** Go ahead.

MR. McCLAIN: **I'm not in a position to correct you**, Your Honor. I'm sorry. I asked the question –

THE COURT: What do you understand it to be?

MR. McCLAIN: Well, that was my question. I had asked the witness a question.

THE COURT: He was saying if there was additional information out there that might be available to him; that's the way the Court takes it. And he spoke to Mr. Wagner in New York and he's relating what Mr. Wagner related to him.

MR. McCLAIN: And I asked the witness where on page one or page two there was a request for information. The State made an objection. Your Honor's indicated your position. I don't know what I can do

other than ask the question.

THE COURT: **He's giving you what he did.**

MR. McCLAIN: **He has not responded to my question, Your Honor. The State objected and you - -**

(PCR2. 1008-09) (emphasis added). Thereupon, Judge Stancil and the prosecutor while reading from the "Addendum" both began opining what they believed the answer to defense counsel's question was. During this attempt by the State and Judge Stancil to announce in front of the witness what the answer to defense counsel's question should be, defense counsel interrupted and said: "Dr. McClaren hasn't said that because he's not been able to answer my question because there has been an objection and the Court has addressed it." (PCR2. 1010). Ignoring defense counsel, Judge Stancil and the prosecutor continued reading through the "Addendum" aloud and opining what the witness' answer to defense counsel's question should be (PCR2. 1010-11). After the prosecutor told Judge Stancil: "But the fact of the matter is Mr. McClain has had this since September and he can't claim prejudice at this point." (PCR2. 1011). Thereupon, Judge Stancil said: "All right. Dr. McClaren, go ahead." (PCR2. 1011). Defense counsel then had the court reporter to read back the question so Dr. McClaren could answer the question after hearing Judge Stancil and the prosecutor first answer it for him.

Judge Stancil's conduct during Mr. Oats' mental retardation hearing was fundamental error under *Johnson v. State*. Just as he did in *Johnson*, Judge Stancil

gave up the mantel of neutrality when "actively participated in examining the State's primary witness on substantive issues," asking leading questions suggesting within the question what the answer should be. *Johnson v. State*, 2012 WL 3758650 at *5. Judge Stancil usurped the functions of counsel and deprived Mr. Oats of due process in the fashion in which he conducted the hearing. Before allowing the witness to answer counsel's question, Judge Stancil announced in front of the witness what he thought the witness' answer to the question should be. In light of his actions and apparent bias, his ruling against Mr. Oats must be reversed.

ARGUMENT V

THE BURDEN OF PROOF SET FORTH IN §921.137 AS APPLICABLE AT AN EVIDENTIARY HEARING DECIDING WHETHER A CAPITAL DEFENDANT IS ELIGIBLE FOR THE IMPOSITION OF A DEATH SENTENCE IN LIGHT OF HIS MENTAL RETARDATION CLAIM IS UNCONSTITUTIONAL SINCE ANY FACT NECESSARY TO RENDER A CAPITAL DEFENDANT DEATH ELIGIBLE CONSTITUTES AN ELEMENT OF THE OFFENSE AND IS SUBJECT TO THE DEFENDANT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Under Florida law, Mr. Oats is not eligible for the imposition of a sentence of death until his mental retardation claim has been heard and a determination finally made that he is not mental retarded as that phrase is defined in § 921.137(1)

and in Rule 3.203(b). Any fact that must be found in order to render a criminal defendant eligible for the imposition of a death sentence constitutes an element of the offense of a capital murder and is subject to all of the Sixth Amendment rights applicable to the State of Florida by virtue of the Fourteenth Amendment. *Ring v. Arizona*, 536 U.S. 584 (2002). Where there is a prima facie showing of mental retardation, a factual determination must be made that the defendant is not mentally retarded in order for him to be eligible for the imposition of a death sentence. *See* Rule 3.203.

This is analogous to a criminal defendant's age at the time of the offense - in order to be death eligible, the defendant must have been over the age of 18 at the time of the offense. While the issue of a defendant's age is more easily determined that an issue of his mental retardation, both are eligibility questions of fact within the meaning of *Ring v. Arizona*. As such, it is unconstitutional to impose a burden of proof by clear and convincing evidence upon a criminal defendant as to a factual issue that must be resolved in the State's favor to render the defendant death eligible. *In re Winship*, 397 U.S. 358 (1970). Imposing the burden of proof upon the defendant as to mental retardation as set forth in Rule 3.203 is unconstitutional.

Further, Mr. Oats had a right to a jury determination of his eligibility for the imposition of a sentence of death. Indeed, he was entitled to the full panoply of Sixth Amendment rights at a trial on the issue of his mental retardation and hence

death eligibility. This includes his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), *Strickland v. Washington*, 466 U.S. 668 (1984), as well as his right of confrontation under *Pointer v. Texas*, 380 U.S. 400 (1965). Indeed once a prima facie showing was made of his mental retardation, Mr. Oats' sentence of death could no longer be considered final or valid until the fact necessary for the imposition of a sentence of death had been made in compliance with the Sixth Amendment. For Mr. Oats to be death eligible, the State was required to demonstrate that he was not mental retarded. *Ring v. Arizona*. The Rule 3.203 procedure used in this case deprived Mr. Oats of his Sixth Amendment rights.

CONCLUSION

Mr. Oats respectfully requests that this Court grant relief from his death sentence due to the overwhelming evidence that Mr. Oats is mentally retarded and therefore constitutionally precluded from being executed by the State of Florida.

Respectfully submitted:

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CERTIFICATE OF FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that counsel has furnished true and correct copies of the foregoing has been served by email to CapApp@MyFloridaLegal.com which is the primary email address given for opposing counsel, Kenneth Nunnelley, Senior Assistant Attorney General, this 18th day of March 2013.

M. CHANCE MEYER FLA BAR # 56362

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March 18, 2013

Tangy Hardy
Capital Appeals Clerk
Clerk of the Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1927

RE: Oats v. State (SC12-749)

Ms. Hardy:

Enclosed for immediate filing in the above-style cause are:

1. The original and seven (7) copies of Appellant's Initial Brief;

2. Copies of the first and last pages of each document for date-stamp return; and,

3. A self-addressed, stamped envelope for use in returning the date-stamped pages to us.

Thank you for your assistance in this matter.

Regards,

M. Chance Meyer
Staff Attorney