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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-749

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SONNY BOY OATS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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# REPLY BRIEF OF APPELLANT

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## REPLY TO THE STATE'S OVERVIEW

In setting forth its short overview of this appeal, the State fails to address the basis of the circuit court's ruling which is before this Court. The circuit court denied Mr. Oats relief on his claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), and explained its reasoning 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). At issue then is the third prong of the statutory definition of mental retardation and whether the circuit court properly concluded that there was "no competent evidence that the defendant suffered from any mental retardation prior to the age of 18."

## REPLY TO RESPONSE TO INTRODUCTION

The State begins with the assertion that Mr. Oats "sets out a histrionic and factually inaccurate 'introduction' which seems to have heaping *ad hominem* abuse on the State and the Court as its primary purpose." (Answer Brief at 1). There are no citations to Mr. Oats' initial brief and no specific references to any specific passage or statement in the introduction set forth in the initial brief on which the State's accusation is based. It appears to be simply rhetoric on the State's part

reminiscent of the old law school adage—when you have the law on your side, pound the law; when you have the facts on your side, pound the facts; when you have neither on your side, pound the table.

## REPLY TO STATEMENT OF THE CASE AND FACTS

In the seven-page Statement of the Case and Facts set forth in the State's Answer Brief, a total of ten lines are not part of block quoting from the Eleventh Circuit's decision affirming the denial of Mr. Oats federal habeas petition in 1998, *Oats v. Singletary*, 141 F.3d 1018 (11th Cir. 1998). (Answer Brief at 2-9). Over six-and-a-half pages of the Answer Brief are nothing but block quotes of the 1998 Eleventh Circuit opinion which issued more than four years before the U.S. Supreme Court recognized that the execution of a mentally retarded defendant violates the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304 (2002).

The first four pages of the blocked quoting comes from the initial portion of the Eleventh Circuit opinion setting forth the procedural history of the state and federal proceedings in which Mr. Oats challenged his conviction and sentence of death.[1] Then suddenly the State switches over to block quote footnote 12 and 13 of

[1] Presumably, the State wants to focus on the Eleventh Circuit's opinion affirming the denial of federal habeas relief in order to divert attention from what Judge Angel said in his order denying relief in 1990 following an eleven-day evidentiary hearing over which he presided. In addressing Mr. Oats' claim that trial counsel was ineffective for failing to adequately challenge Mr. Oats' competency to stand trial, Judge Angel wrote: "Even assuming that the Defendant is mentally

the Eleventh Circuit opinion (Answer Brief at 6-7): these footnotes are from an entirely different section of the opinion[2]--the portion addressing Mr. Oats' guilt phase ineffective assistance claim that contended trial counsel was deficient in not challenging Mr. Oats' competency to stand trial or waive his *Miranda* rights:

> They also opined that Oats was incompetent to stand trial in 1980,[] incompetent at resentencing in 1984, and incapable of knowingly waiving his Miranda rights at the time of his confessions. However, the conclusions reached by the defense experts were challenged by Drs. Charles Mutter and Leonard Haber, who testified on behalf of the State at the Rule 3.850 hearing.

*Oats v. Singletary*, 141 F.3d at 1024.

The Eleventh Circuit denied the guilt phase ineffectiveness claim addressing only the prejudice prong saying:

> We conclude that Oats fails this prejudice prong of *Strickland*. After the eleven day Rule 3.850 hearings in which Oats was able to fully introduce the evidence concerning his family background, his mental health history, and the opinions of defense mental health experts, the state court judge found "no reasonable doubt about [Oats'] competency." FN15 The state court's finding that Oats was competent to stand trial is a factual finding entitled to a presumption of correctness, and thus will not be overturned on federal habeas review unless the state court's finding is not fairly supported by the record.

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retarded under the DSM-III criteria, because he scored 61 and 57 . . . on the intelligence tests and has deficits in adaptive functioning, that does not mean the Defendant was incompetent." (11/21/90 Order Denying 3.850 Relief, p. 3).

[2] This portion of the Eleventh Circuit opinion began with the caption: "A. The Ineffective Assistance of Counsel Claims." *Oats v. Singletary*, 141 F.3d at 1023. The Eleventh Circuit explained: "Oats claims that his attorneys failed to adequately and fully present evidence of his mental deficiencies at numerous proceedings in the state trial court." *Id.*

*Oats v. Singletary*, 141 F.3d at 1025. Thus, the footnotes (12 & 13) set out in block quotes in the State's Answer Brief were written through the prism of the guilt ineffectiveness claim and with deference to the state court finding that the prejudice prong had not been satisfied.

Following the block quote of the footnotes from the guilt phase ineffectiveness section of the opinion, the State includes a nearly two-page quote from the penalty phase ineffectiveness section of the opinion. (Answer Brief at 7-9). Interestingly, the quote set forth by the State leaves out important context:

> **We reject this aspect of Oats' ineffective assistance of counsel argument because he is unable to satisfy the prejudice prong of *Strickland*. First, a great deal of evidence regarding potential mitigating circumstances was introduced during the penalty phase, and apparently rejected by the jury and the judge. The record reveals that Dr. Carrera testified at length about the mistreatment that Oats suffered at the hands of his aunt during his abusive childhood, the emotional and impulse disorders that Oats developed as a result of his upbringing, and Oats' history of alcohol and substance abuse.** Dr. Carrera also testified regarding his conclusion that Oats was functioning at either the "very low average range or possibly the upper part of the borderline range of intelligence" and at a seventh-grade level in terms of classroom information. Furthermore, four relatives testified at the penalty phase regarding Oats' mistreatment as a child, the head injury he suffered during childhood as a result of his aunt's mistreatment, and his frequent headaches and strange behavior. Following this testimony, trial counsel argued in closing summation that Oats should not receive the death penalty because he functioned at a "borderline level," that the mitigating circumstance of age applied, that Oats was under an extreme mental or emotional disturbance at the time of the offense, and that Oats was unable to appreciate the criminality of his conduct.

*Oats v. Singletary*, 141 F.3d at 1028 (the highlighted sentences were omitted from the first paragraph of the block quote in the answer brief). Here, once again, the block quotes in the State's Answer Brief (at pages 7-9) were written by the Eleventh Circuit through the prism of the penalty phase ineffectiveness claim with deference to the state court finding that the prejudice prong had not been satisfied.[3]

Through the use of bold typeface, the State highlights certain passages in the block quoting from the Eleventh Circuit opinion seemingly to suggest that the

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[3] While the State seeks to draw meaning from the Eleventh Circuit's affirmance of the denial of habeas relief and its decision to defer to the state court's finding that Mr. Oats failed to show that he suffered sufficient prejudice as a result of trial counsel's deficient performance, the State ignores Dr. McClaren's testimony during cross that Mr. Oats' low score on the Slosson intelligence test in 1970 occurred at a time Mr. Oats was "being savagely abused by all accounts" (PCR2. 1489). Dr. McClaren explained 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 spread 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). The details of the "very severe" and "savage" abuse noted by Dr. McClaren were not heard by Mr. Oats' jury and not mentioned by the Eleventh Circuit when considering the prejudice to Mr. Oats from his counsel's deficient performance. *Oats v. Singletary*, 141 F.3d at 1028 (the Eleventh Circuit noted that Dr. Carrera had testified before the jury that Mr. Oats suffered "mistreatment" by his aunt). Furthermore, the "very severe" and "savage" abuse, as Dr. McClaren acknowledged during his cross, could result in brain dysfunction before the age of 18 (PCR2. 1492). It could be the reason for Mr. Oats' IQ scores

Eleventh Circuit made factual findings relevant to the *Atkins v. Virginia* claim currently before this Court. However, the issues being addressed by the Eleventh Circuit concerned whether Mr. Oats could satisfy the prejudice prong of the *Strickland* standard and gave deference to this Court's and the trial court's finding that Mr. Oats had not shown sufficient prejudice under *Strickland*.

Following its decision in *Atkins v. Virginia*, the U.S. Supreme Court addressed whether the resolution of pre-*Atkins* litigation of a capital defendant's mental retardation as a mitigating circumstance in the penalty phase of a capital trial precluded relitigation of the defendant's mental retardation following *Atkins* and the statutory standards adopted in the wake of that decision. *Bobby v. Bies*, 556 U.S. 825, 834 (2009). There, the U.S. Supreme 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 omitted). The *Bies* Court found that pre-*Atkins* determinations of mental retardation did not preclude post-*Atkins* litigation of mental retardation. The U.S. Supreme Court further explained in *Bies*:

> Moreover, even if the core requirements for issue preclusion had been met, an exception to the doctrine's application would be warranted due

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now consistently in the low 60's to upper 50's.

> to this Court's intervening decision in *Atkins*. Mental retardation as a mitigator and mental retardation under *Atkins* and *Lott* are discrete legal issues. The *Atkins* decision itself highlights one difference: "[R]eliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 536 U.S., at 321, 122 S.Ct. 2242. This reality explains why prosecutors, pre-*Atkins*, had little incentive vigorously to contest evidence of retardation. *See* App. 65 (excerpt from prosecutor's closing argument describing as Bies' "[c]hief characteristic" his "sensitivity to any kind of frustration and his rapid tendency to get enraged"); *id*., at 39–54 (cross-examination of Bies' expert witness designed to emphasize Bies' dangerousness to others). Because the change in law substantially altered the State's incentive to contest Bies' mental capacity, applying preclusion would not advance the equitable administration of the law. *See* Restatement § 28, Comment c.
>
> The federal courts' intervention in this case derailed a state trial court proceeding "designed to determine whether Bies ha[s] a successful *Atkins* claim." 535 F.3d, at 534 (Sutton, J., dissenting from denial of rehearing en banc). **Recourse first to Ohio's courts is just what this Court envisioned in remitting to the States responsibility for implementing the *Atkins* decision.** The State acknowledges that Bies is entitled to such recourse, but it rightly seeks a full and fair opportunity to contest his plea under the postsentencing precedents set in *Atkins* and *Lott*.

*Bobby v. Bies*, 556 U.S. at 836-37 (emphasis added).[4] Thus, under *Bies*, the Eleventh Circuit decision rejecting Mr. Oats' ineffectiveness claims are irrelevant.[5]

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[4] The State's reliance on the Eleventh Circuit decision in *Oats v. Singletary* as of significance in the Argument section of its Answer Brief is contrary to the explicit directive from the U.S. Supreme Court in *Bobby v. Bies*, 556 U.S. at 837 ("Recourse first to Ohio's courts is just what this Court envisioned in remitting to the States responsibility for implementing the *Atkins* decision."). (Answer Brief at 33-36).

[5] In Mr. Oats' case, *there was no prior resolution of Mr. Oats' mental*

During the course of the proceedings below, the State was aware of the effect of the decision in *Bies*. Before the *Bies* decision issued in 2009, Mr. Oats in filing his Rule 3.851 *Atkins* claim had initially relied upon the State's concession of mild mental retardation in its 1990 written closing following the evidentiary hearing on Mr. Oats' ineffective assistance of counsel claims as dispositive on the issue of his mental retardation under *Atkins*. Specifically, he relied upon the State's written closing in 1990 which stated: "Under the DSM-III criteria, the defendant falls in the mildly mentally retarded area. No doubt about that." (PCR1. 3248).[6] On the basis of that admission, Mr. Oats had argued, up until the decision in *Bies,* that the State was bound by its concession that Mr. Oats was and is mentally retarded.

The State rightly relied upon the *Bies* decision to counter Mr. Oats' argument on that point. And in fact, Mr. Oats conceded that the decision in *Bies*

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*retardation itself*, there was simply evidence presented of mental retardation as unpresented mitigation which constituted prejudice resulting from penalty phase ineffective assistance of counsel. The ineffectiveness claim was denied without specific resolution of Mr. Oats' mental retardation under any particular standard. In fact, Judge Angel in denying relief on Mr. Oats' competency claim said "[e]ven assuming that the Defendant is mentally retarded under the DSM-III criteria . . . that does not mean the Defendant was incompetent." (11/21/90 Order Denying Relief at 3).

[6] In that closing, the State also acknowledged that Mr. Oats "scored 61 and 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 a factual admission by the State. Mr. Oats has argued and continues to argue that this admission was and is relevant evidence to be considered as to whether the three prongs of the statutory definition of mental retardation are present.

meant that the State's concession of mental retardation at the conclusion of the 1990 evidentiary hearing was not binding on whether Mr. Oats was entitled to relief on the basis of his *Atkins* claim and did not preclude the State from contesting Mr. Oats' mental retardation at the 2011 evidentiary hearing.[7]

Given the decision in *Bies*, the Eleventh Circuit decision concerning Mr. Oats' ineffective assistance claims, giving deference to the state court findings that the *Strickland* prejudice standard was not met, is not relevant here. Indeed, the State did not rely on that opinion to argue that Mr. Oats was not entitled to an evidentiary hearing on his *Atkins* claim. Nor did it make any argument that the opinion was somehow admissible evidence--presumably, because it clearly isn't.

**REPLY TO SECTION TITLED: EVIDENTIARY HEARING FACTS**

In this section of its Answer Brief, the State asserts: "The 'statement of the facts' contained in Oats' brief is incomplete, inaccurate and argumentative. The State does not accept it, and submits the following in place of Oats' version of the

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[7] Mr. Oats does contend that this was an 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. In other words, 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 Florida Statutes § 921.141, does constitute evidence which bears on the question of whether the elements of a mental retardation under Florida Statutes § 921.137 are present, as does the testimony of numerous witnesses at the 1990 evidentiary hearing and the exhibits admitted at the 1990 hearing.

facts." (Answer Brief at 9). In this conclusory assertion, the State provides no guidance to either this Court or to Mr. Oats as to what exactly was left out and rendering the statement incomplete, what exactly was inaccurate and what is being dismissed as argumentative. By then inserting its own "version" of the facts, the State leaves to this Court and Mr. Oats to try to divine exactly where there is disagreement between the parties.

However, perusal of the State's "evidentiary hearing facts" reveals glaring omissions. First, there is no acknowledgment that the entire record of the 1990 evidentiary hearing was introduced into evidence. This included the testimony or sworn statements of eight mental health experts (six were presented by Mr. Oats and two were presented by the State), Mr. Oats' mental health evaluation by Dr. Krop (his evaluation was introduced although he did not testify at the 1990 hearing), and the testimony of numerous family members who testified concerning both Mr. Oats' childhood and his longstanding mental difficulties. 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). Indeed, the testimony from the 1990 evidentiary hearing was introduced and on equal footing with the live testimony from Dr. Keyes, Dr. McClaren, and Dr. Krop. Yet, it is entirely omitted from the State's statement of

the "evidentiary hearing facts."[8]

Besides ignoring the 1990 testimony and evidence which was introduced at the beginning of the 2010 evidentiary hearing, the State omits the numerous concessions and change of opinion that was elicited from Dr. McClaren during the cross-examination by Mr. Oats' counsel.[9] As to the first prong of the statutory definition of mental retardation,[10] Dr. McClaren acknowledged in cross that in Mr. Oats' case there are "a number of test results that are more than two standard deviations below the mean." (PCR2. 1451). Dr. McClaren acknowledged that there are 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.

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[8] The 1990 evidentiary hearing last eleven days. It was nearly three times as long as the evidentiary proceedings in 2010-11; yet, it is omitted from the State's "Evidentiary Hearing Facts."

[9] It is interesting to compare the State's citations during its recitation of its summary of Dr. Keyes' testimony and Dr. McClaren's testimony. Most of the State's citations relating to Dr. Keyes' testimony are from the State's cross-examination, while the State focus its attention on its direct examination of Dr. McClaren and skips over his concessions and change of opinion that occur in the course of Mr. Oats' cross-examination of Dr. McClaren.

[10] The State omits from its statement of the "evidentiary hearing facts" any reference to the three prong statutory definition of mental retardation. This omission renders the statement of the "evidentiary hearing facts" a muddled collection of observations untethered to any of the three relevant prongs. It's the classic throw everything at wall and hope something sticks. The State shuns any discussion of the three prongs because clearly a rigorous analysis of the evidence establishes that the first two prongs (IQ score of 70 or below and deficits in

Carbonell, Dr. Keyes and Dr. McClaren. (PCR2. 1451).[11] Dr. McClaren also acknowledged that "those test results, they are all pretty consistent." (PCR2. 1452). Dr. McClaren 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: "I don't think there is any basis that forces one to reject them." (PCR2. 1514).

As to the second prong of the statutory definition of mental retardation, Dr. McClaren revealed during the cross 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?
>
> A They are different, yes.

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adaptive functioning) are uncontested by the State's expert, Dr. McClaren.

[11] During cross it came out that 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).

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). Following that statement, Dr. McClaren was then asked in cross about this Court's adoption in *Jones v. State*, 966 So. 2d 319, 326-27 (Fla. 2007) of the language set out in DSM-IV as providing an objective definition of the adaptive behavior prong of the mental retardation definition:

> 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). As the cross continued, 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).[12]

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[12] 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 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

Dr. McClaren also acknowledged Florida's definition of mental retardation did not contain any language requiring that the deficits in adaptive behavior were required to 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).

Later in cross, 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

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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).

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.[13] Yet, the State's statement of "evidentiary hearing facts" completely omits any discussion of these concessions and change in opinion that Dr. McClaren made during his cross-examination by Mr. Oats' counsel.

Otherwise, the State's recitation of its "evidentiary hearing facts" is an inaccurate and slanted recitation of what the State wants the facts to be, after the summary of Dr. McClaren's testimony has been culled of the concessions and changes in opinion elicited during cross.[14]

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[13] Moreover in the course of the cross, 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").

[14] The State also includes in its answer brief an apparent subsection entitled: "The Trial Court Order." (Answer Brief at 29). As best as Mr. Oats' counsel can determine this two page subsection is an effort to obfuscate the trial court's actual ruling. The 12 page order signed by Judge Stancil begins with a bit of procedural history (PCR2. 1270-71). It then contains a discussion of *Atkins v. Virginia* and Florida's legislative response (PCR2. 1271-72). Next is reference to Rule 3.203

## REPLY TO ARGUMENT

The State in its answer brief struggles mightily to ignore Judge Stancil's specific and limited ruling on Mr. Oats' mental retardation claim. Judge Stancil explained that he concluded that Mr. Oats had not substantiate his claim because "[t]here is no competent evidence that the defendant suffered from any mental retardation prior to the age of 18." (PCR2. 1280) (emphasis added).

The State also ignores that Rule 3.203(e) provides in pertinent part: "If the court determines that the defendant has not established mental retardation, the

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and this Court's opinions interpreting Rule 3.203 and Florida's statutory definition of mental retardation (PCR2. 1272-73). The order then references and quotes standard jury instructions regarding weighing evidence and the testimony of expert witnesses (PCR2. 1274-75). It is then at this point that the order has a caption: "September 28, 2010 Hearing." (PCR2. 1275). What follows is a five and a half page summary of the live testimony heard on September 28th, which was the direct testimony of Dr. McClaren, and the direct testimony only (PCR2. 1275-80). The order does not summarize or cite to any of the cross-examination of Dr. McClaren that began on September 28th and continued throughout the day of September 29th. Also no reference was made to Dr. McClaren's testimony when recalled on June 17, 2011. After summarizing Dr. McClaren's direct testimony on September 28th, Judge Stancil's actual findings and conclusion appear:

> 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). Thus, Judge Stancil only address the third prong of the statutory definition of mental retardation, and as to it ruled that "[t]here is no competent evidence that the defendant suffered from any mental retardation prior

court shall enter a written order setting forth the court's specific findings in support of the court's determination." This requirement that specific written findings be made is in keeping with this Court's jurisprudence requiring specific written findings in capital cases when a judge imposes a sentence of death. *Campbell v. State*, 571 So.2d 415, 419 (Fla. 1990) ("When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature."); *Van Royal*, 497 So.2d at 628 ("A court's written finding of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it.").

Just as this Court is not free to affirm a death sentence on the basis of aggravating circumstances not specifically addressed and found in a sentencing order, this Court is not free to assume that the presiding judge found a want of proof of prongs of the statutory definition of MR not addressed in its order.

Here, Judge Stancil's written findings under Rule 3.203(e) only specifically address the third prong the statutory definition of mental retardation - onset before the age of 18. Judge Stancil boiled the evidence down to that prong of the test, because the only evidence against a finding of mental retardation presented by the

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to the age of 18." That was the extent of Judge Stancil's ruling.

State was Dr. McClaren, and Dr. McClaren himself obtained a test score from Mr. Oats well within the mental retardation range,[15] did not take exception to the MR-range test scores obtained by numerous other experts,[16] declined to adhere to the statutory test or the diagnostic instruments recognized by this Court in assessing adaptive functioning,[17] and then conceded that Mr. Oats had deficits in adaptive functioning such that the only prong left on which a denial of the claim could be premised was the third prong. Because the State spends the vast majority of its brief on the rather indisputable issues of IQ and adaptive functioning, Mr. Oats herein replies to the State's arguments on those ancillary matters after addressing the primary issue of early onset, the third prong.

**Onset Before the Age of 18**

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[15] Dr. McClaren administered a WAIS-III in 2005 and obtained from Mr. Oats an IQ score of 62 (SPCR2. 26).

[16] In cross, Dr. McClaren testified as to the qualifying test scores obtained by Drs. Krop (a 57 on the WAIS-R administered in 1987) and Carbonell (a 61 on a WAIS-R administered in 1989) "I don't think there is any basis that forces one to reject them," (PCR2. 1514), and acknowledged that "those test results, they are all pretty consistent." (PCR2. 1452).

[17] In cross, Dr. McClaren revealed that he did not conduct his assessment under the objective standard of the American Psychiatric Association's DSM (PCR2. 1610-11, he referred to it as "the APA rule," and when asked "did you assess it under that?," stating "No, I didn't look at it that way.") even though this Court has found that "Florida's definition of mental retardation is consistent with the definition of the American Psychiatric Association," and has looked to the definitions of the DSM in applying the statute. *Jones v. State*, 966 So. 2d 319, 326-27 (Fla. 2007). When asked in cross if he followed the DSM standard for adaptive functioning discussed in *Jones v. State*, Dr. McClaren responded "No. I couldn't find a way to quantify it." (PCR2. 1702).

The State in its brief makes a paradoxical argument that "Oats was never diagnosed as mentally retarded before the age of 18, *despite there being evidence that he had scored a 70 on a screening instrument at the age of 13*," (Answer Brief at 39-40 (emphasis in original), and from that the State asserts that "[t]he fact that Oats was *not* diagnosed as mentally retarded *despite this score* is the significant fact."[18] (Answer Brief at 40 n.25). Ignored in this is the simply fact that for there to be a DSM-III diagnosis of mental retardation, there must be full mental evaluation by a mental health professional who is equipped with the DSM and the training to make a diagnosis. The school district that gave Mr. Oats a Slosson intelligence test when he 13 years old did not refer him to a mental health professional in order to "get him a full-scale assessment."[19] (SPCR2. 45). The school district simply

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[18] It is clear from the State's argument in this regard that it believes that nothing short of a mental retardation diagnosis after a full evaluation before the age of 18 will met the third prong of the statutory definition. Of course this means, that the poor and disadvantaged who had no access to a mental health professionals for purposes of diagnosing mental retardation prior to the age of 18 will not be able to show their entitlement to the Eighth Amendment protection embodied in *Atkins v. Virginia*; and of course, they may be the very ones more likely to be mentally retarded due to the deprivation and malnutrition that accompanied there childhood, which are risk factors for brain dysfunction that if occurred before the age of 18 would be mental retardation. Surely, the Equal Protection and Due Process Clauses of the Fourteenth Amendment do not countenance that the protection afforded by *Atkins v. Virginia* only be extend to those privileged and prosperous enough to have mental health professionals able to conduct a full evaluation for mental retardation during the childhood.

[19] The State takes this position despite the simple explanation provide by Dr.

administered the Slosson as a screening device, which is common (SPCR2. 45).[20] Indeed, the Slosson is not a test recognized used for making a mental retardation diagnosis under either Florida law or the DSM-IV (PCR2. 1489; SPCR2. 45).

The State believes that the school's failure to get an individualized assessment of Mr. Oats's IQ despite an MR-range score on a screening test *means that he was not mentally retarded*. The more rational view is that the school's failure to get an individualized assessment *means that the school failed to get an*

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Keyes, that school systems at the time of Mr. Oats's education, and at the time that Mr. Oats presented the "huge red flag" of having failed the second grade, often failed to recognize the need to intervene with a struggling mentally retarded student because "special education was in its infancy." (SPCR2. 43-44). Additionally, no one was ever been eager to burden a child with the label - mentally retarded. Such a label itself was viewed as cruel. It was considered better to merely screen than obtain a full assessment that would stamp the child as "retarded."

[20] In cross, Dr. McClaren called the Slosson "a screening test" given to Mr. Oats at the age of 13 (PCR2. 1489). Dr. McClaren noted that during the time at which it was given, Mr. Oats was "being savagely abused by all accounts" (PCR2. 1489). Dr. McClaren further recognized that abuse and malnourishment could have caused damage to Mr. Oats' brain - "Malnourishment might, depending on what kind it is. If the abuse was of the type that caused a significant head injury, brain dysfunction, that could lower somebody's cognitive ability." (PCR2. 1492). Dr. McClaren conceded that testimony in Mr. Oats' 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

*individualized assessment*.

Dr. Keyes explained that "whether or not . . . a kid like Sonny Boy could have gotten a fair assessment is questionable . . . ," (SPCR2. 45), and that there wasn't any doubt that when Mr. Oats received a 70 IQ score on the Slosson screening test, "that should have been enough to at least get him a full-scale assessment . . . ." (*Id*.). Dr. Keyes testified that, rather than addressing Mr. Oats's obvious disability, the school system "essentially, socially promoted [him] all along" until he dropped out in the tenth grade (SPCR2. 112). In fact, he actually spoke with Mr. Oats's grade school teacher about this. She indicated that Mr. Oats "was a kid who needed improvement virtually in every area" (SPCR2. 43). Dr. Keyes opined that "the information indicates that this existed as long ago as his childhood and that the schools made a terrible mistake in not identifying him earlier, especially when they had an IQ of 70 on a screening test and did not follow up with an evaluation." (SPCR. 81).

Under Dr. McClaren's view and the State's current position, it is Mr. Oats who bears the risk of being executed despite his brain dysfunction because the school he attend failed to obtain an individualized assessment of Mr. Oats of his intellectual functioning following the IQ score of 70 on the Slosson. Both assert that the want of an actual diagnosis of mental retardation before the age of 18 casts

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the statute, Florida's mental retardation definition would be met (PCR2. 1478).

doubt on the third prong of the statutory definition of mental retardation. It is their view that the Slosson results, the failing of the second grade, the poor grades in school, the family testimony of Mr. Oats' mental deficiencies, simply are not sufficient evidence of onset before 18 absent an actual diagnosis of mental retardation before the age of 18. However, that is not the purpose that the third prong of the MR definition served when formulated in the DSM-IV, nor was it the purpose when the DSM definition was adopted by the Florida Legislature and inserted into § 921.137. *See Jones*, 966 So. 2d at 327. Certainly, the State does not address either the argument or the testimony set forth in Mr. Oats' initial brief regarding the proper construction of the statutory of the requirement that the subaverage intellectual functioning and the deficits in adaptive functioning are required to be "manifested during the period from conception to age 18."

Judge Stancil's "written order setting forth the court's specific findings in support of the court's determination," *see* Rule 3.203(e), contained only one specific finding: "There is no competent evidence that the defendant suffered from any mental retardation prior to the age of 18." (PCR2. 1280). This finding is contrary to the evidence. There was a wealth of competent evidence showing that Mr. Oats' subaverage intellectual functioning and his deficits in adaptive

functioning was manifested well before his 18th birthday.[21] This evidence certainly included, but was not limited to the IQ score of 70 on the Slosson intelligence test administered in 1970 when Mr. Oats was 13 years old. It also included his school records showing that he failed the second grade and was thus held back a year. Even after this when he in classes with younger classmates, he could not keep up, and his grades continuously deteriorated over time. The evidence included the testimony of family members describing Mr. Oats mental dysfunction in his childhood, both as to intellectual functioning and as to adaptive functioning. The evidence included the statements made by one of his grade school teachers to Dr. Keyes when he interviewed her. And, the evidence included the expert testimony

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[21] Dr. Keyes testified that "the primary cause in the world" of mental retardation is malnutrition—lack of nourishment or food both for the child and the mother during pregnancy (SPCR2. 21). He explained that traumatic brain injury and metabolism disorders are other potential causes (SPCR2. 21-22). Indeed, Dr. Keyes identified these as likely causes that were present in Mr. Oats's childhood. He explained that Mr. Oats's aunt would withhold food and lock it up so the children could not eat it (SPCR2. 24). Dr. Keyes and Dr. McClaren, both discussed the head traumas Mr. Oats suffered through child abuse, referencing the "histories of head injuries" (PCR2. 1716) suffered by Mr. Oats, including being beaten until he was screaming and urinating with blood running out of his head (PCR2. 1472-75) and "neuropsychological evidence that was well discussed in 1990, that kind of evidence is there" (PCR2. 1716). In summation, there were numerous likely causes of subaverage intellectual functioning and deficient adaptive functioning present in Mr. Oats's childhood. And there was evidence that this conditions were manifested before the age of 18: there were poor grades thoughout, he was held back in the second grade, he dropped out of school in the 10th grade, there were the observations made by his family and teachers, and there was even a standardized IQ test score of 70 at the age of 13.

of Dr. Keyes, Dr. Krop, Dr. Phillips and Dr. Carbonell. The only evidence suggesting that the third prong of the statutory definition of mental retardation was in anyway in doubt came from Dr. McClaren. Specifically, 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 (PCR2. 1513). He did not question whether there was evidence showing an onset before the age of 18, he only suggested whether the evidence was sufficiently "compelling."[22] Thus, Judge Stancil's only specific finding in writing in conformity with Rule 3.203(e) appears to be premised upon Dr. McClaren's testimony questioning how compelling the evidence was regarding the third prong.[23] However, Judge Stancil's specific

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[22] Of course, the word "compelling" or a requirement that "compelling" evidence must be present do not appear in the statute. *See* § 921.137, Fla. Stat.

[23] Oddly, the State in its answer brief asserts that Mr. Oats has brought up a federal district court decision finding Dr. McClaren's opinion regarding a capital defendant's mental retardation incredible. Having alleged that Mr. Oats has raised the matter before this Court, the State argues that the federal decision is irrelevant because Alabama mental retardation law is different than Florida's (Answer Brief at 19, n.13). The decision to which the State is referring is, *Thomas v. Allen*, 614 F. Supp. 2d 1257 (N.D. Al. 2009). Mr. Oats did not cite this decision in his initial brief, but perhaps he should have. In *Thomas v. Allen*, the federal court made devastating credibility findings against Dr. McClaren. The federal court made a point to note that Dr. McClaren's *Atkins* evaluations have all been at the request of the State and "[i]n those few instances in which Dr. McClaren found people to be retarded, the find[ing] had been 'stipulated to' by the State." *Id*. at 1289. The court

written factual finding that "[t]here was no competent evidence" of the third prong's present was and is contrary to the record and not supported by competent, substantial evidence that this Court must look for to affirm the trial findings on which a death sentence rests. *Campbell v. State*, 571 So.2d 415, 419 (Fla. 1990) ("When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the

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found Dr. McClaren's work in *Thomas* to be lacking and incomplete: "the report submitted by respondent's expert, Dr. McClaren, is most notable for what it does not contain." *Id*. at 1292. The federal court in *Thomas* explained:

> Regardless of Dr. McClaren's rationalizations, this court finds that his approach to forensic report writing leaves a great deal to be desired, especially in cases such as this one, where important societal and legal policies collide. Dr. McClaren's report stands in stark contrast to the careful analysis and well-documented statements contained in the reports of petitioner's witnesses. For such reasons, it is less persuasive.

*Thomas v. Allen*, 614 F. Supp, 2d at 1292-93. Clearly, the State is defensive about the decision in *Thomas* and how it reflects on Dr. McClaren, and understandably so. In *Thomas*, just as in this case, the "deficiencies of Dr. McClaren's written report are painfully obvious." *Id*. at 1293. In *Thomas*, just as in this case, there are numerous instances "encapsulate[ing] the contradictions inherent in Dr. McClaren's testimony." *Id*. at 1299. It is due to the stark parallels between Dr. McClaren's method and performance in *Thomas* and in this case that the State obviously felt compelled to address *Thomas* pursuant to its obligation of candor. *See* Rule 4-3.3, Fla. R. Prof. Conduct. Even though the decision in *Thomas* is not binding precedent, it is persuasive authority as to Dr. McClaren who viewed himself part of the State's litigation team and sent the State written communication that he asserted was confidential work product, even though he was appointed as a court expert. Clearly, Dr. McClaren as in *Thomas* is the State's go-to guy in capital MR cases who can be counted on to provide the State the opinion it wants to hear.

defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature."); *Van Royal v. State*, 497 So.2d 625, 628 (Fla. 1986) ("A court's written finding of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it.").

**Test Scores on Standardized Intelligence Test**

To be clear, the evidence in this case represents *four* qualifying test results that serve under the statute to satisfy the first prong of the test for mental retardation, requiring an IQ score of 70 or below. Those test scores are 57 (on the WAIS-R administered in 1987 by Dr. Krop), 61 (on a WAIS-R administered in 1989 by Dr. Carbonell), 54 (on a SBIS administered in 2005 by Dr. Keyes), and 62 (on a WAIS-III administered in 2005 by Dr. McClaren). The State's expert Dr. McClaren himself obtained one of those mental-retardation range scores, acknowledged that "those test results, they are all pretty consistent," (PCR2. 1452), and he testified that as to the qualifying test scores obtained by Drs. Krop and Carbonell, "I don't think there is any basis that forces one to reject them." (PCR2. 1514). The circuit court, presumably due to the fact that the State put on evidence consistent with subaverage IQ and its expert did not contest qualifying IQ scores, did not make any written finding under Rule 3.203(e) that the first prong of the statutory definition was not met, presumably because the evidence that this prong

was met was conceded by the State's expert, Dr. McClaren (PCR2. 1280).[24]

Despite this, the State in an effort to throw everything against the wall and see if something sticks, cites in its answer brief to minor facts in the record to suggest that there is some uncertainty as to the IQ prong. In referring to a Woodcock-Johnson test administered by Dr. Keyes (in addition to the qualifying SBIS test he also administered), the State argues that "Oats only produced two scores on the Woodcock-Johnson test that fell within the range of mild mental retardation. Oats' other scores fell within the low normal range. Oats' scored an 83 on the oral language portion and an 82 score on the broad written language portion" (Answer Brief at 11) (citations omitted)). But these were subscores of the Woodcock-Johnson test, not valid standardized intelligence tests for determining subaverage intelligence under the statute. The State's reaching and stretching and flailing to find some argument that will stick once again demonstrates that the State has neither the facts nor the law on its side, so it must instead pound the table.

**Adaptive Functioning**

Similar reaching can be seen in the State's answer brief with regard to the adaptive functioning prong of the mental retardation test. In another effort to pound the table because there are no facts or law for the State to pound, the State writes:

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[24] The State conceded at the 1990 hearing that "[u]nder the DSM-III criteria, the defendant falls in the mild mentally retarded area. No doubt about that."

"In a footnote on page 41 of his brief, Oats says that the State **did something improper** by asking Dr. McClaren to list reasons supporting his opinion that Oats is not mentally retarded. That suggestion, respectfully, is absurd." (Answer Brief at 37 n.24) (emphasis added). However, the State completely misread what was said in Mr. Oats' initial brief, or perhaps defensively projected something into Mr. Oats' words that simply wasn't there. Mr. Oats wrote in the footnote referenced by the State that: "The formulation of this question by the State avoided having Dr. McClaren [] address the issue within the framework of the three prongs contained in Florida's definition of mental retardation in a capital case" (Initial Brief at 41 n. 42).[25] The sentence contains no suggestion that the State's formulation of a question was improper. It merely made the obvious observation that the State's formulation avoided having Dr. McClaren address the issue within the framework of the three prongs. Of course that's not improper, as in objectionable, indeed no objection was made. Really, the point being made is that the direct examination of Dr. McClaren was not illuminating as to which of the three prongs of the statutory definition Dr. McClaren concluded were not met.[26] As a result, the direct testimony

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(PCR1. 3248).

[25] This question that the State asked Dr. McClaren that is referenced here was technically not a question but a request: "give us the top five reasons, if you will, that Sonny Boy Oats is not mentally retarded." (PCR2. 1435).

[26] The point being made was that if this Court wanted to know what Dr. McClaren said regarding the statutory definition of mental retardation and Mr.

of Dr. McClaren did not address the statutory definition of mental retardation. It then fell upon Mr. Oats' counsel in cross to elicit testimony from Dr. McClaren, which probably explained why the cross of Dr. McClaren lasted more than a day.

Then during the cross of Dr. McClaren, Judge Stancil seemed confused:

> MR. McCLAIN: My understanding is he was asked to give five top reasons, and that was one of the reason, for not being retarded.
>
> THE COURT: But they're all interrelated. I don't know if you can separate out and say just –
>
> MR. McCLAIN: Well, and I guess that's what I try to do in the cross, is to try to figure out how significant the prison records from that incarceration are in terms of his decision to reject the scores that are within the –
>
> THE COURT: Well, I don't understand him to say he rejected it. He – it's a factor to consider. And he may give it lesser weight than he gives other factors, but he did consider it. I mean, it was -- he did use it in formulating his opinion.

(PCR2. 1509-10). The Court seemed to view the top-five list that had been elicited

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Oats, it would not find that information in the direct examination because it was there. And it wasn't there because the State did not ask about whether Mr. Oats met the statutory definition of mental retardation. Indeed when Mr. Oats' counsel pursued this line of inquiry with Dr. McClaren, it became apparent that Dr. McClaren was not familiar with this Court's opinion in *Jones v. State* referencing the DSM-IV as providing guidance as to how to evaluate deficits in adaptive functioning. This led to Dr. McClaren's admission that he was unaware of "any real objective definition of the adaptive functioning part" of the definition of mental retardation (PCR2. 1610), and that he did not look to see if there were deficits in two of the ten areas that this Court found that the DSM-IV said were to be considered in determining if there were deficits in adaptive functioning. (PCR2. 1611) ("No, I didn't look at it that way.").

by the State in its direct as the appropriate weighing test of factors, as opposed to the actual statutory definition that requires the presence of three prongs.

Further when Dr. McClaren was pushed to express his opinion in terms of the three-pronged statutory test, he struggled and relied upon maladaptive behavior, like escape attempts, to demonstrate Mr. Oats's ability to adaptively function normally in the world, when in fact maladaptive behavior is evidence of deficits in adaptive behavior under the DSM criteria:

> COURT: But, I mean, you're not suggesting that the conduct of which he was convicted of was -- met the standards of social responsibility?
>
> WITNESS: No.
>
> COURT: You were saying that he, himself, demonstrated that he didn't -- he couldn't meet that standard.
>
> MR. McCLAIN: Yeah. My understanding from the direct was that you identified -- 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 adaptive -- 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.

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

WITNESS: Sure. Of course, it is.

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

MR. McCLAIN: 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?

State: 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. 1583-87) (emphasis added).

Dr. Keyes testified "maladaptive behavior is not adaptive," (SPCR2. 126-27), and explained ability to function and behave normally in the world cannot be

demonstrated by pointing to criminal behavior, because that demonstrates quite the opposite - deficits in adaptive behavior. Indeed, this Court in *Jones v. State*, explained what deficits in adaptive functioning meant quoting the DSM-IV:

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

966 So.2d at 326-27 (emphasis added). Thus, antisocial and criminal behavior may reflect deficits in relevant areas, as Dr. McClaren finally conceded, and certainly does not demonstrate good adaptive functioning under the DSM-IV and *Jones*.

In the course of his cross, Dr. McClaren when shown *Jones v. State* conceded that Mr. Oats had deficits in his adaptive function (PCR2. 1616). So, there was no evidence that Mr. Oats did not have deficits in adapting functioning.

## OTHER MATTERS

As to all other issues, Mr. Oats relies upon his arguments in his initial brief.

## CONCLUSION

For the reasons stated herein and in his Initial Brief, Mr. Oats respectfully requests this Court vacate the circuit court's denial of relief due to overwhelming evidence that Mr. Oats is mentally retarded and constitutionally precluded from execution by *Atkins*, or grant whatever relief the Court determines is warranted.

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 15th day of July, 2013.

/s/ Martin J. McClain
MARTIN J. MCCLAIN