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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC13-1472

RONNIE KEITH WILLIAMS

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Ronnie Keith Williams, Defendant below, will be referred to as "Williams" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate records will be:

> 1996 Direct Appeal - "96ROA" – Case #SC60-89668
> 2004 Retrial Direct Appeal – "04ROA" case #SC04-857
> Postconviction record - "PCR" – case #SC13-1472
> Supplemental materials - "S" preceding the type of record referenced.

Each will be followed by the appropriate volume and page number(s). Williams's initial brief will be notated as "IB"

STATEMENT OF THE CASE

On March 4, 1993, in a single count indictment, Williams was charged with first-degree murder for the January 26, 1993 attack upon Lisa Dyke ("Dyke") which resulted in her February 14, 1993 death (04ROA.1 1-2). His first conviction and death sentence were reversed. *Williams v. State*, 792 So.2d 1207 (Fla. 2001) ("*Williams I*") (finding error to replace juror during deliberations). Retrial commenced November 3, 2003, but ended December 3, 2003 in a mistrial (04ROA.4 352-60). On January 27, 2004 Williams' third trial began and on February 12, 2004, the jury convicted him as charged, finding both premeditated and felony murder (04ROA.4 382).

The penalty phase commenced on March 1, 2004 and ended with the jury recommending death by a vote of ten to two. (04ROA.5

399). On April 8, 2004, a *Spencer v. State*, 615 So.2d 688 (Fla. 1993) hearing was held and on April 16, 2004, the trial court sentenced Williams to death (04ROA.5 413-28). He appealed his conviction and sentence, and this Court affirmed. *Williams v. State*, 967 So.2d 735 (Fla. 2007). Subsequently, on March 24, 2008 certiorari review was denied.[1] *Williams v. Florida*, 128 S. Ct. 1709 (2009).

On March 12, 2009, Williams filed his motion seeking postconviction relief under Florida Rule of Criminal Procedure 3.851. (PCR.5 686-782) Following additional public records litigation, on April 8, 2011, Williams filed an amendment to his 2009 motion. (PCR.9 1367-1707) On February 7, 2012, Williams served his Motion to Amend along with an unverified Second Amendment to Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend. Williams served his verified Second Amendment to Motion for postconviction relief. The Case Management Conference was held on May 18, 2012 and the evidentiary hearing was conducted on September 18-21, 2012 and on September 25, 2012. (PCR.36; PCR.37; PCR.42-54). On December 3, 2012 post-hearing memoranda were submitted and oral arguments on the memoranda were heard.

[1] There, Williams raised the sole question of "Whether being tried for felony murder where the charging document (a Grand Jury indictment) charges only premeditated murder violates the Due Process Clause of the United States Constitution?"

(PCR.16 2673-2740, 2741-27) The order denying postconviction relief was issued on May 10, 2013 (PCR.17 2837-2925) and this appeal followed.

STATEMENT OF THE CASE

On direct appeal, this Court found:

> On March 4, 1993, a grand jury indicted Williams on one count of first-degree premeditated murder for the murder of Lisa Dyke. The charges against Williams arose as a result of the death of Dyke nineteen days after she was stabbed multiple times with a knife in a Wilton Manors apartment complex. The evidence presented at trial established the following:
>
> On Tuesday, January 26, 1993, at approximately 8:30 a.m., a call was made to 911 from a woman who identified herself as Lisa Dyke. Dyke stated that she had been stabbed in her heart and back, and she was more than seven months pregnant. When the operator inquired of Dyke as to who stabbed her, she responded with a name that sounded to the operator like "Rodney." Dyke then informed the operator that her attacker was a black male and, although she did not know his last name, she could provide a phone number from which that information could be obtained. Dyke provided the phone number and stated that it belonged to the girlfriend of the man who had stabbed her.
>
> When Dyke opened her door for the police, Officer Brian Gillespie observed an eighteen-year-old black female who was nude, bloody, and wet, "as if she tried to take a shower." Dyke was holding clothing in front of herself in an attempt to cover her nudity. According to Gillespie, Dyke was upset and beginning to lose consciousness. Gillespie observed stab wounds on Dyke's upper torso and back and noticed that there was blood "pretty much everywhere." As she lay on the couch, Dyke stated repeatedly to Gillespie that she did not want to die. While the paramedics were treating Dyke, Gillespie asked who had stabbed her. Through the oxygen mask that covered Dyke's face, and over the sounds of numerous police and paramedic radios, Gillespie heard Dyke say the name "Rodney."

FN2 When Gillespie asked Dyke who Rodney was, Dyke replied, "Ruth's sister's boyfriend." Dyke gave Gillespie the telephone number of "Ruth's sister." Dyke then made the unsolicited statement to Gillespie, "He raped me." Soon after, the paramedics transported Dyke to the hospital. Hospital personnel were unable to perform a rape examination or collect evidentiary samples for analysis before Dyke was rushed into surgery.

FN2. However, Detective Daniel James, who was also at the scene, testified that he heard Dyke say the name "Ronnie."

***

Detective Anthony Lewis determined that Ruth Lawrence rented the apartment where the stabbing had occurred. He met with Ruth, and she stated that Lisa Dyke had been babysitting Ruth's nine-month-old son in the apartment. Dyke had been living with Ruth for approximately two weeks. *** The detective discovered that Ruth's sister was named Stefanie Lawrence, and the name of Stefanie's boyfriend was Ronnie Williams. At the time of the attack, Stefanie and Ronnie had been dating for approximately six months. Stefanie lived with her father and Julius, and her telephone number was the number that Dyke provided to police and the 911 operator to identify her attacker. Ruth testified at trial that when she left the apartment that morning to go to school, there was no blood in the apartment where Dyke was found, and Williams had never before bled in her apartment.

Subsequent investigation revealed that on the night before the crime, *** Ruth prompted Stefanie to break her relationship with Williams, and Stefanie proceeded to do so during the phone conversation. Stefanie then advised Williams that he was not to return to Ruth's apartment again. According to Stefanie, Williams was upset *** he paged her four or five times that night. Stefanie did not respond to the pages, and the last page from Williams was around midnight.

*** Officer David Jones went to the house identified by Stefanie and encountered Williams's sister, Clinita Lawrence,FN3 who informed Officer Jones that she had

transported Williams to a mental health crisis facility earlier that day when she noticed that he was acting bizarrely. Officer Jones proceeded to the crisis center and located Williams. Officer Jones observed that Williams had several fresh bandages on both of his hands. Williams was transported to the police station, and Officer Jones advised him of his MirandaFN4 rights.

FN3. Clinita Lawrence is not related to Stefanie, Ruth, or Julius Lawrence.

*** Detective James produced a photographic lineup of six individuals and asked Dyke if she recognized the person who attacked her. Dyke tapped on the photo of Ronnie Williams with her finger.

At the police station, Williams admitted to Officer Jones that he knew Dyke, but stated that he had not been in Ruth's apartment at the time Dyke was stabbed. With regard to the bandages on his hands, Williams stated that he had cut his fingers on a knife as he was washing dishes. He mentioned that he was having problems with his girlfriend, and that Dyke had been "kind of the go-between person." When Williams was informed that Dyke had identified him as the person who stabbed her, Williams requested an attorney, and the interview was terminated. At that time, Williams was arrested for the attack on Dyke.

*** James photographed bite marks on Dyke's chest, arm, breast, and the back of her shoulder. Dyke also indicated a bite mark in her groin area, but James was unable to photograph that area because Dyke was again taken into surgery to deliver her baby by cesarean section. Dyke died on February 14, 1993, nineteen days after the stabbing.

At trial, forensic pathologist Ronald Wright noted that Dyke had sustained six stab wounds in her back, *** one stab wound had penetrated Dyke's sternum and was at least four inches deep. *** The doctor noted that Dyke had defensive wounds on her hands and bite marks on her body. Dr. Wright ultimately concluded that the cause of Dyke's death was multiple stab wounds which, over a period of nineteen days, produced a fatally high level of toxicity in Dyke's body.FN6

Dr. Wright further reviewed the photos of the cuts on Williams's hands, and concluded that the cuts were consistent with slippage-a phenomenon that occurs when a person hits a hard surface ****

Fingerprint analyst Fred Boyd testified that a fingerprint found in a reddish substance that was located on the bathroom door of Ruth's apartment matched the known print of Williams's left ring finger. DNA testing on blood samples taken from two pieces of clothing collected from the apartment generated DNA profiles that matched the profile of Williams at four genetic locations. According to a DNA analysis expert, the frequency of occurrence of finding the same profile in two unrelated individuals who matched at four of these points would be one in 120 million African-Americans. Finally, forensic dentist Richard Souviron compared the photographs of the bite mark on Dyke's breast with dental casts made from the mouth of Williams and concluded with reasonable certainty that the bite on Dyke's breast was made by Williams.

At trial, Williams testified that on the night before the stabbing he was upset that Stefanie had severed their relationship. This caused him to begin using drugs, specifically, crack cocaine, powder cocaine, and marijuana. He also consumed a fifth of rum that night. When he started to feel unwell, he went home and lay in bed. The next morning, Williams awoke around 7 a.m. and proceeded to consume a half of a fifth of vodka and use more crack cocaine, powder cocaine, and marijuana in his backyard. Williams testified that between the night prior to the stabbing and the morning of the stabbing, he consumed approximately fifteen rocks of crack cocaine. The last thing he remembered was walking back into his house, and then he awakened in the mental health facility. Williams remembered being brought to the police station and being questioned; however, he had no recollection of the questions asked because he was not feeling well.

Williams's sister, Clinita Lawrence, testified that on the morning of the stabbing, Williams appeared as if he was hallucinating. He was talking nonsensically and had trouble controlling his limbs. Before she went to

work, Clinita took Williams to the mental health facility so that he would not hurt himself. Clinita stated that while she was driving to the facility, Williams attempted to exit the car. Clinita testified that upon arrival at the mental facility, Williams attempted to break out of the facility, and he was eventually placed in a straitjacket.

In rebuttal, the State presented the testimony of Michael Elwell, who was director of mental health services in Broward County during 1993. Elwell testified that the mental health facility to which Williams was brought never used straitjackets or anything that resembled a straitjacket. Elwell also stated that, had an individual arrived at the facility hallucinating, incapable of controlling his limbs, and attempting to break out of the facility, the guidelines in place at that time would have required that the individual be medically cleared at a local emergency room prior to admission to the facility.

After hearing all of the evidence, the jury rendered a verdict finding Williams guilty of the murder of Lisa Dyke. *** The jury indicated that it found Williams guilty of both premeditated murder and felony murder with sexual battery as the underlying felony.

During the penalty phase, the State presented testimony regarding Williams's prior convictions for second-degree murder and indecent assault. With regard to the second-degree murder conviction, *** Dr. Ongley testified that the body of Gaynel Jeffrey was found at a construction site with eight stab wounds in the back and one stab wound in the front. *** Robin Jeffrey, who was Gaynel's sister, testified that in 1984, Williams was her boyfriend. Robin testified that on September 11, 1984, she was in the process of severing her relationship with Williams. *** Gaynel informed Williams that he was not to come back to the house or call Robin. The next morning Sybil French, the mother of Gaynel and Robin, found “blood all over” the house in a path that “dragged around” from the front door to the garage. Later that day, French found blood in the backseat of her vehicle.

With regard to Williams's 1982 conviction for indecent assault, *** the victim was nine years old. According

to a statement from the victim, Williams came into her residence, forced her into a room, and told her that he would kill her if she did not comply with his commands. Williams then proceeded to penetrate the victim's vagina with his finger, and the victim sustained bleeding as a result of Williams's conduct. The victim stated that at the time of the assault, she was in fear for her life.

The defense presented the testimony of six witnesses at the penalty phase. Arthur Lewis, a lifetime friend of Williams, testified that Williams had difficulty while growing up because of his small stature. According to Lewis, Williams was constantly attacked by the other schoolchildren (earning him the name "the punching bag"), had money taken from him, and was accused of things he did not do. Dorothea Simmons, who counsels individuals in religion, testified that when she counseled Williams in January 1993, she suspected he was on drugs because she had difficulty obtaining his attention. Carter Powell, a corrections deputy with the Broward County Jail, testified that Williams was a model inmate with no disciplinary problems who attended religious services at the jail once a week. Corrections Officer Herman Ruise testified that while incarcerated in the Department of Corrections, Williams was a model prisoner, he was never involved in trouble, and he had amicable relationships with the other inmates.

Williams's sister, Clinita Lawrence, testified that Williams's mother died in childbirth when Williams was seven years old, and that Williams's father was never involved in his life. After his mother's death, Williams went to live with Clinita, who was nineteen years old at the time. Clinita had four other children in her care, one of which was her own child. Clinita stated that she was unable to obtain benefits for the children because she did not have the necessary paperwork to make proper application. For approximately three months, Clinita and the children lived in an abandoned car, and they had to cover themselves with plastic when it rained because the car did not have a roof. Clinita testified that Williams did not do well in school, did not start first grade until he was ten years old, and did not finish high school. She stated that the other children often beat

him up and teased him about not having a mother and father. Clinita testified that Williams is "the closest brother that anyone could ever have," and she loves him and depends on him.

Finally, psychologist Dr. Michael Walczak testified concerning Williams's extremely troubled childhood, and concluded that Williams lacked the necessary parental role models to teach him right from wrong. Dr. Walczak concluded that the daily beatings that Williams suffered at the hands of other children were the source of his anger and hostility. Dr. Walczak noted that Williams started using alcohol around the age of eighteen and started using crack cocaine around age twenty. He testified that Williams held a series of jobs, but was fired from them for stealing money to buy drugs. Dr. Walczak opined that it is possible for an individual who consumed ten or fifteen rocks of crack and a fifth of alcohol to have a blackout and to have his or her memory affected. Dr. Walczak ultimately concluded that, at the time of the stabbing, Williams was under the influence of a significant amount of intoxicants and was unable to function normally. He further opined that Williams's capacity to appreciate the criminality of his conduct was substantially impaired in that Williams had no recollection of the stabbing.

After considering the evidence, the jury returned a recommendation of death by a vote of ten to two. *** At the *Spencer* hearing, the defense presented no additional evidence ****

The trial judge sentenced Williams to death for the murder of Dyke. In pronouncing Williams's sentence, the trial court determined that the State had proven beyond a reasonable doubt the existence of four statutory aggravators: (1) [prior violent felony] *** (great weight); (2) [felony murder] *** sexual battery *** (great weight); (3) *** heinous, atrocious, or cruel *** (great weight); and (4) *** cold, calculated, and premeditated *** (moderate weight). The trial court further determined that there was "some" evidence of two statutory mitigating circumstances, that Williams was under extreme mental or emotional disturbance at the time of the crime, *see* § 921.141(6)(b), Fla. Stat., and that the capacity of

> Williams to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, *see* § 921.141(6)(f), Fla. Stat.; however, the trial court accorded each of these circumstances little weight. The trial court found a total of five nonstatutory mitigating circumstances,FN10 each of which the Court assigned slight weight. The trial court concluded:
>
> FN10. The trial court found the following nonstatutory mitigating circumstances: (1) while housed in the Broward County Jail, Williams was a model prisoner; (2) while housed in the Broward County Jail, Williams attended religious services; (3) Williams had a deprived childhood because he did not know his father, he lost his mother at an early age, he was raised in poverty by his sister, he did not start school until adolescence, and he had difficulty finding work after his two prior criminal convictions; (4) Williams is a loving person who never fought with his relatives, and was a good brother to his sister; and (5) Williams was slight in stature and was frequently beat up and robbed of his bus money on his way to school.
>
> [S]uch circumstances fail to produce any effect upon the defendant, relative to his character, or relative to the circumstances of his murder of Lisa Dyke. The Defendant's abusive childhood did not vitiate or influence his murder of Lisa Dyke. There is simply no nexus between the adversities of the Defendant's youth, and his vicious and brutal murder of Lisa Dyke. Clinita Lawrence, the sister of *** Williams was subject to many of the adversities thrust upon the Defendant, and she managed to obtain a college degree and become a productive member of society.
>
> *** In imposing a sentence of death, the trial court expressly noted that "the imposition of the sentence in the present case is not contingent upon the Court's finding of the statutory aggravating factor of cold, calculating and premeditated."

Williams, 967 So.2d at 741-47 (footnotes omitted). In his direct appeal, Williams raised 22 issues.

Following the Case Management Conference on his Rule 3.851 Fla. R. Crim. P. motions, the trial court granted an evidentiary hearing on Amended Claim VII (mental retardation and ineffective assistance); Claim VIII (*Ake v. Oklahoma*, 470 U.S. 68 (1985) claim); and Claim IX (ineffectiveness of penalty phase counsel). Williams presented defense counsel: Hale Schantz and Evan Baron; mental health experts: Dr. James, Dr. Tasse, Dr. Harvey, Dr. Woods, Dr. Oakland, and Dr. Caddy; handwriting expert, Charles Haywood; family members/friends: Patricia Johnson, Michael Johnson, Anthony Bowan, Clinita Lawrence; and others who had contact with Williams or worked on his case: Janice O'Loughlin, Lisa Wiley, Sandra Sticco, Heather Barrow, Sarah Ellersick, and Alisha Hurwood. The State called Dr. Prichard.

At the evidentiary hearing, Williams presented several mental health experts to support his claim of mental retardation/intellectual disability ("ID") to bar the imposition of the death penalty under rule 3.203 Fla. R. Crim. P. However, none of Williams' doctors assessed all three prongs of the ID finding. Dr Harvey focused on the first prong and administered a WAIS-III IQ test in 2008 yielding a full scale score of 75[2] and 13 months later gave the WAIS-IV exam which yielded a full scale score of 65. (PCR.43 4048-52) Dr. Harvey did not give any tests

[2] Initially, Dr. Harvey mis-scored the test and reported a IQ of 74, but found his error before the hearing and testified that the correct full scale IQ score was 75.

to assess malingering. (PCR.43 4093, 4097). The Repeatable Battery for the Assessment of Neurological Status ("RBANS") was given to Williams by Dr. Harvey. Such testing assesses how a person's brain works in various areas including problem solving and communications and generally the RBANS results are consistent with WAIS-III and WAIS-IV results. (PCR.43 4080). However, in scoring the RBANS, Dr. Harvey made some twelve scoring errors; nine of those scores should have been higher than reported. (PCR.43 4113-22). The doctor noted that Williams could fail some of the RBANS tests merely by saying "I don't know", working slowly, or refusing to respond. He also noted that the results may be influenced by such factors as motivation, anxiety, depression, lack of sleep, distractions (PCR.7 4325; PCR.50 5038; PCR.52 5264, 5268-69).

Dr. James did not evaluate or diagnose Williams for mental retardation or adaptive functioning, but relied on Dr. Harvey's reported testing, including the erroneous RBANS results, without obtaining his raw data. (PCR.42 3866-68, 3940). Williams was given a neuropsychological examination and testing by Dr. James who then concluded Williams had difficulties in working memory – executive functioning. (PCR.1 3931-32, 3939). According to Dr. James, Williams has varying levels of strength and weakness in cognitive ability, but ultimately passed his reading and math tests. (PCR.42 3855-3977).

Like Dr. James, Dr. Oakland merely relied upon Dr Harvey's reported IQ scores without getting the raw data and noted that the WIAS-IV satisfied the first prong of rule 3.203. Dr. Oakland testified that he found no evidence of organic brain damage. (PCR.48 4736, 4747). According to Dr. Oakland, a mildly mentally retarded person can express pain, display emotion, seek medical attention, keep himself clean and groomed, get employment, have children, get a driver's license, write letters, feed a pet, graduate from high school, and get a GED. (PCR.48 4692-94, 4710-12). Dr. Oakland administered the Adaptive Behavior Assessment System ("ABAS") test to Williams and his sisters, Clinita Lawrence and Althamese Bowen, to assess the second prong of the rule and determine Williams' adaptive behavior. Dr. Oakland explained that the ABAS was not normed for those in prison and was not designed for retroactive application (PCR.48 4681, 4691-92, 4695-4700, 4727).

Nonetheless, Dr. Oakland administered the ABAS even though he thought it was "silly" and irrelevant because Williams is in prison and inmates are not permitted to do very much. His choice would have been not to use the ABAS on a 50 year old inmate. However, because Florida law requires an adaptive behavior assessment, the ABAS was given. Dr. Oakland found Williams was deficient in nine of the ten areas tested, however, he did not review Williams' prison records which indicated he

asked for medical, psychological, and other types of assistance using the proper Department of Corrections ("DOC") procedures. (PCR.48 4708-09, 4726, 4745; PCR.61 Def. 46 6276-6353) Also, Dr. Oakland did not consider Williams' actions taken/decisions made during the two murders and when confronted by the police[3] because, Dr. Oakland asserted, criminal acts are not part of the adaptive behavior scales. (PCR.48 4708-09) Dr. Oakland found mental retardation under Florida law in spite of the fact that he would not want to use the ABAS on a 50-year old inmate such as Williams or rely upon a self-report. He acknowledged that a finding of mental retardation could not be based on the IQ or adaptive behaviors individually, then voiced that he was not comfortable making a judgment on Williams intellectual ability in his youth based on his adult scores. (PCR.48 4724, 4736-37, 4741-44). Dr. Oakland was not comfortable with his offered opinion. (PCR.48 4743-44).

Dr. Oakland administered achievement tests to Williams and found the scores to be consistent with mild mental retardation and that the scores ranged from six-and-a-half year old ability to approximately 14 years old ability. (PCR.48 4714-15). The results of the Woodcock-Johnson achievement tests revealed that

[3] Those factors showed Williams planned the Jeffrey's murder and took precautions to avoid detection and that he developed an excuse for the cut on his finger revealed after the Dyke murder. As Dr. Pritchard noted, such showed adaptive ability and abstract though. (PCR.52 5275-76)

Williams scored in the seventh and eighth grade level on the reading, comprehension, calculation, and broad math areas. (PCR.48 4745-46).

Dr. Prichard, the State's mental health expert, evaluated Williams, but did not give any IQ tests due to the fact Dr. Harvey had done testing recently and the possibility of a practice effect. Dr. Prichard found Williams to comprehend and interact well during the comprehensive interview/evaluation and that Williams did not seem to have any problems communicating. Dr. Prichard inquired of Williams as to his personal history, educational background, and work history. (PCR.52 5270-74). In the interview, the doctor assessed whether Williams exhibited goal-oriented behavior and whether he had the ability to handle abstraction. As examples of abstraction and rationalization, Dr. Prichard pointed to Williams giving an excuse, such as self defense in the killing of Gaynel Jeffrey and Williams' statement to the police following the instant murder where he claimed to have cut his finger while washing dishes to explain the wound. (PCR.52 5275-76) Dr. Prichard explained that in the United States, those with ID, are found in the lowest two percentile. Williams' responses to Dr. Prichard and his reports of the murders suggested to Dr. Prichard that Williams was not ID (PCR.52 5276-77).

Also considered by Dr. Prichard were Williams' results on

the WRAT test Dr. James gave in July 2012. There Williams received a score of 80 in reading (grade equivalent of 6.9) and 84 in spelling (grade equivalent of 7.3), and 88 in math (grade equivalent of 6.8). Those scores were important to Dr. Prichard as there is a high correlation with IQ scores and they are high academic achievement scores for someone considered ID. Such indicated to Dr. Prichard that Williams is in the "**low average**" range for intelligence. Most mildly mentally retarded persons function at the third to fourth grade level and Williams was above that level. (PCR.52 5281-82). More telling from the WRAT score was that Williams was in the low average range and demonstrated skills in the 9th to 21st percentile which is inconsistent with an ID person who has skills in the first two percentiles. Someone with the skills exhibited by Williams can read a job application, balance a check book, and read any document with sufficient proficiency to make a decision about that document. (PCR.52 5283). Dr. Prichard explained that Williams' scores were one standard deviation above that expected of an ID individual and do not support deficiencies in adaptive behavior sufficient to meet ID under rule 3.203 or §921.137. (PCR.52 5284)

Also, Dr. Prichard reviewed the raw data collected by Dr. Oakland on the ABAS. (PCR.52 5287) Dr. Prichard agreed that assessing adaptive behavior of someone who has spent his entire

adult life in prison is difficult in part because the person's behavior is more limited in prison. The assessment is of how the person functions in prison relative to other inmates, however, the ABAS was not designed for that evaluation. (PCR.52 5288-89) Such activities, exhibited by Williams, as submitting a request for a medical visit, self care, seeking help for an ingrown toenail and eye problems, desire for pen pals, looking for correspondence courses all indicated to Dr. Prichard that Williams can identify a problem and take the necessary steps to address it appropriately. ID individuals do not have the capacity to function independently. Again, these actions by Williams indicated his adaptive capacity. (PCR.52 5289-90)

With respect to the ABAS, Dr. Prichard had concerns about Clinita's completion of the ABAS on Williams. Clinita, Williams sister/surrogate mother, had a history of misrepresenting facts about Williams such as his starting school as an adolescent which Williams started when he was six or seven years old. Also, in her trial testimony, Clinita had indicated Williams helped raise his siblings, looked for food, and was helpful to her. However, her answers on the ABAS were inconsistent with that earlier testimony. Clinita related Williams as having "essentially" no independent skills in seven of the nine areas tested. (PCR.52 5318-19). The ABAS Clinita completed was inconsistent with all Dr. Prichard had reviewed in the prison

records, former testimony, employment history, and fact Williams, in his late teens, started spending nights away from home. For similar reasons, Dr. Prichard thought Williams' self-report appeared to lack credibility and spoke to Williams' motivation to establish he was extremely impaired. For Dr. Prichard, this also implicated Williams' results on the WAIS-III and WAIS-IV. As Dr. Prichard noted, one "can't fake smart." (PCR.52 5319-21, 5324-26). Dr. Prichard, looking at all of the data and test results, testified that on the "vast majority" of the data, Williams was functioning above the 2nd percentile which contraindicates ID. (PCR.52 5331)

The fact Williams obtained his GED was an important factor in Dr. Prichard's analysis as a mentally retarded individual "cannot demonstrate the academic proficiency" or "academic mastery to get a high school diploma." Mentally retarded individuals are in the lower two percentiles, maximum sixth grade level. In order to get a GED, one must demonstrate proficiency at the twelfth grade level. Dr. Prichard had yet to meet a legitimately mentally retarded person, of the thousands he evaluated, that was able to pass even one section of the GED exam, much less the entire exam. (PCR.52 5332-33) Williams' scores on the WRAT are consistent with one who is able to get his GED. (PCR.52 5335).

It was Dr. Prichard's opinion that the ABAS reports were

skewed downward based on the ABAS answer that Williams could not give the correct amount of change for purchases over $10.00. Yet, Williams answered correctly Dr. Prichard's question seeking what the proper change for a transaction of $62.75 less $5.75 would be; Williams correctly calculated $56.37 as the proper result. Dr. Prichard concluded that answer indicated Williams was able to go to a store and exchange money for goods. (PCR.52 5336-37).

Also, Dr. Prichard recognized that Williams did not do well academically at first getting a 61 on the Slosson IQ test and 73 on the Peabody which are abbreviated IQ tests. However, When the WRAT was administered in the fourth grade, Williams was reading and doing math at grade level. Williams reached his senior year and his school records did not indicate he was in any special education classes. (PCR.52 5337).

Dr. Prichard found other evidence that Williams has adaptive abilities and abstract thinking from the facts of the Gaynel Jeffrey's murder. There Williams removed the body of his victim using the Jeffrey family car, dumped her body at a construction site, and returned the car which shows planning and forethought. Dr. Prichard reasoned that such acts indicated Williams recognized the situation he was in, and that he took steps to cover it up. (PCR.52 5339).

Based on the fact Williams got his GED, Dr. Prichard discounted both WAIS IQ tests. He concluded that the IQ testing was wrong as a person with a 65 IQ is unable to obtain his GED. Likewise, Dr. Prichard found that Williams does not have significant deficiencies in adaptive behavior, thus, Dr. Prichard concluded that Williams is not ID. (PCR.52 5340-41)

On the related issue of ineffective assistance of penalty phase counsel, Hale Schantz ("Schantz"), for not investigating/presenting additional mitigation and that Williams was ID, Schantz reported that he had tried six or seven capital penalty phases to verdict and represented several others and had been practicing since 1982. Schantz took one or two capital seminars annually (PCR.43 4163-66; PCR.44 4294-95). Because this was a re-trial for Williams, Schantz spoke to prior counsel and reviewed the file on this murder as well as the 1984 murder of Gaynel Jeffries. Also, Schantz obtained the services of a private investigator to investigate for mitigation and had Dr. Michael Walczak, a psychologist with a degree in neuropsychology appointed (04ROA.21 1631-33) and provided him access to Williams, family members, and school, medical, and some prison records. (PCR.43 4167-68, 4175-76, 4188, 4191, 4207-12; PCR.44 4233, 4241-43, 4298-1500). Schantz asked Dr. Walczak to determine whether Williams was competent to stand trial and to present mental health mitigation. It was important for Schantz

to have such a forensic mitigation expert as Dr. Walczak. All records requested were supplied to the expert and they had numerous conversations and/or meetings (PCR.44 4247-49, 4252-56, 4303-04) It was Schantz' intent to have Dr. Walczak involved from the early stage and Schantz kept the doctor apprized of employment history and new information as gathered from family and friends. (PCR.43 4190; PCR.44 4307-08; PCR.45 4342-43).

During the numerous conversations with Williams, Schantz never got the impression Williams did not understand the legal process. Furthermore, neither Williams, Clinita nor any family members/friends indicated Williams may be mentally retarded or have mental deficiencies other than being "slow." In fact, Williams denied having any mental problems. None of the prison guards noted any problems with Williams dressing himself or keeping his cell neat. (PCR.44 4259, 4359). Williams always answered Schantz's questions and the answers were responsive to the questions. Based on Schantz's experience with capital cases, he had no concerns about Williams' mental capacity or that he may be ID. Had Schantz had concerns he would have asked for more testing. Other than the school records, Schantz had nothing to bring to Dr. Walczak's attention. (PCR.45 4259-61, 4360-61)

Also, Dr. Walczak never indicated to Schantz that Williams was ID and Schantz saw nothing that would indicate Williams lacked understanding or could not relate his relevant history.

Likewise, Dr. Walczak did not inform Schantz that he had found any particular deficits. Schantz did everything and everything he could to save Williams' life, but there was little to work with as Williams had been in prison for most of his adult life. (PCR.43 4190-4203; PCR.44 4258-72; PCR.45 4359-61).

With respect to lay witnesses presented at Williams' penalty phase, Schantz testified that he presented Arthur Lewis to report that he knew Williams all his life and that Williams was beaten by other children. Lewis told the penalty phase jury that Williams had trouble in school and in his neighborhood. (PCR.44 4325-26, 4335) Schantz also recalled that Carter Powell's deposition was read into the record and established that he knew Williams from the Broward County Jail. Williams was a religious person. Schantz recalled that Dorothea Simmons' prior testimony was read into the record at the 2004 penalty phase as she was deceased. Simmons had reported knowing Williams for 20 years and thought he was on drugs and had a drug problem which only got worse. (PCR.44 4325-26).

The allegation of sexual abuse was not presented at trial and Schantz did not recall hearing anything about sexual abuse although the "book" prepared by private investigator, Sandy Sticco, relates that Williams reported two incidents of sexual abuse by his aunt, Betty Jo. Williams was inconsistent as to

his age, 10 or closer to adulthood) when the incidents happened. (PCR.44 4278-79).

Schantz was aware of the allegation that Beamon Lawrence ("Beamon"), Clinita's husband, physically abused Williams, however, the family was not interested in bringing that information before the jury. Beamon did not want to testify, and Williams did not want Beamon to testify. (PCR.44 4278). Also, Schantz testified that Beamon had a bad heart and the family was directing him not to call Beamon. While Schantz issued a subpoena, he felt it was better not to call Beamon; this was a group decision. (PCR.44 4312-13).

During the evidentiary hearing, Clinita, Williams' older sister/surrogate mother reported she raised Williams as if he were her own son. They lived in deplorable living conditions and Williams had an extensive drug problem. (PCR.44 4325-35).

Upon this evidence and trial record, postconviction relief was denied. (PCR.17 2837-2941) This appeal follows.[4]

[4] The State notes that Williams has not filed a state habeas petition. Such should have been filed along with the initial brief. *See* Rule 9.142(b)(4)(B) Fla. R. App. P. Having chosen not to file such a petition, Williams is barred from doing so at this juncture.

SUMMARY OF THE ARGUMENT

Issue I – Following an evidentiary hearing, the trial court's factual findings rejecting the claim of ineffective assistance of penalty phase counsel are supported by competent, substantial evidence. Further, the legal conclusions follow *Strickland* where the trial court found that the new mitigation does not undermine confidence in the sentence.

Issue II – Following an evidentiary hearing, the trial court found that Williams' WAIS-III score of 75 was more credible that the WIAS-IV result and that Williams had not shown he had current adaptive deficits and that his low IQ and adaptive deficits manifested before age 18. The factual findings are supported by the record and relief was denied properly.

Issue III – Although granted an evidentiary hearing, Williams has not shown he is intellectually disabled as he has failed to prove each of the three prongs of Rule 3.203 Fla. R. Crim. P. and §921.137, Fla. Stat.

Issue IV – Williams has failed to show that he has a valid claim of ineffective assistance of counsel from a conviction that was vacated and a new trial and penalty phase conducted.

ARGUMENT

ISSUE I

PENALTY PHASE COUNSEL RENDERED CONSTITUTIONALLY EFFECTIVE ASSISTANCE (restated)

In Claim IX below, Williams pointed to *Strickland v. Washington*, 466 U.S. 668 (1084) and asserted that his penalty phase counsel, Hale Schantz ("Schantz"), rendered ineffective assistance of counsel for failing to investigate Williams' background and to develop and present mental health mitigation and mitigating circumstances arising from Williams' background. The trial court rejected the claim following an evidentiary hearing. On appeal, Williams disagrees with the factual findings of the trial court ostensibly where the trial court resolved conflicts in the testimony and credited the State's expert over the defense testimony. Williams also challenges the trial court's analysis of the *Strickland* prejudice prong. Contrary to Williams' assertion's here, the trial court's factual and credibility findings are supported by competent, substantial evidence and the proper law was applied. Williams' has not carried his burden under *Strickland* and the denial of postconviction relief should be affirmed.

A. STANDARD OF REVIEW – Where an evidentiary hearing is held, the following standard of review is applied:

> This Court accords deference to the postconviction court's factual findings following its denial of a

> claim after an evidentiary hearing. . . . "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" . . . The postconviction court's legal conclusions, however, are reviewed *de novo*....

Jackson v. State, 127 So.3d 447, 459-60 (Fla. 2013) (citations omitted). *See Pagan v. State*, 29 So.3d 938, 949 (Fla. 2009); *Arbelaez v. State*, 898 So.2d 25, 32 (Fla. 2005); *Davis v. State*, 875 So.2d 359 (Fla. 2003).

To establish ineffective assistance of counsel, a defendant must prove (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different; a reasonable probability means that confidence in the outcome is undermined. *Strickland*, 466 U.S. at 687-89. This Court reiterated:

> * * * to establish a claim of ineffective assistance of trial counsel, a defendant must prove two elements:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the

> conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla. 2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). In *Valle*, we further explained:

> In evaluating whether an attorney's conduct is deficient, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'" and the defendant "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternate courses of action have been considered and rejected. Moreover, "[t]o establish prejudice, [a defendant] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"

Id. at 965-66 (citations omitted)(quoting *Brown v. State*, 775 So.2d 616, 628 (Fla. 2000), and *Williams v. Taylor*, 529 U.S. 362, 391 (2000)).

Arbelaez v. State, 898 So.2d 30, 31-32 (Fla. 2005). See *Davis v. State*, 875 So.2d 359, 365 (Fla. 2003); *Kennedy v. State*, 547 So.2d 912, 913 (Fla. 1989). Prejudice under *Strickland* requires proof that "the deficiency in counsel's performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined." *Davis*, 875 So.2d 365.

At all times, the defendant bears the burden of proving not only that counsel's representation fell below an objective standard of reasonableness and was not the result of a strategic decision, but also that actual and substantial prejudice resulted from the deficiency. *See Orme v. State*, 896 So.2d 725, 731 (Fla. 2005) (Fla. 2005) (quoting *Strickland*, 466 U.S. at 694 that "a defendant has the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the complained about conduct was not the result of a strategic decision"); *Gamble v. State*, 877 So.2d 706, 711 (Fla. 2004); *Johnston v. Singletary*, 162 F.3d 630, (11th Cir. 1998); *Roberts v. Wainwright*, 666 F.2d 517, 519 n.3 (11th Cir. 1982). When considering a claim of ineffectiveness of counsel, a court "need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla.), *cert. denied*, 479 U.S. 972 (1986).

With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *Davis*, 875 So.2d 365; *Chandler v. United States*, 218 F.3d 1305, 1313 n.12 (11th Cir. 2000). "The test

for ineffectiveness is not whether counsel could have done more; perfection is not required." *Id.*, at 1313 n. 12. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The ability to create a more favorable strategy years later, does not prove deficiency. *See Patton v. State*, 784 So.2d 380 (Fla. 2000); *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). From *Williams v. Taylor*, 529 U.S. 362 (2000), it is clear the focus is on **what** efforts were undertaken and **why** a specific strategy was chosen over another. Additionally, as noted in *Chandler*, 218 F.3d at 1318, "...counsel need not always investigate before pursuing or not pursuing a line of defense. Investigation (even a nonexhaustive, preliminary investigation) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. *See Strickland*, [466 U.S. 690-91] ("Strategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.")"

It must be noted that under *Strickland*, it is the defendant's burden to come forward with evidence that counsel was deficient and that such prejudiced him.

> The Court of Appeals was required not simply to "give [the] attorneys the benefit of the doubt," 590 F.3d, at 673, but to affirmatively entertain the range of

> possible "reasons Pinholster's counsel may have had for proceeding as they did," *id.*, at 692 (Kozinski, C.J., dissenting). *See also Richter, supra*, at 1427, 131 S.Ct., at 791 ("*Strickland* ... calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind").

Cullen v. Pinholster, 131 S.Ct. 1388, 1407 (2011). Moreover, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. *See Strickland*, 466 U.S., at 690, 104 S.Ct. 2052 (counsel is "strongly presumed" to make decisions in the exercise of professional judgment)." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). As set out in *Wong v. Belmontes*, 558 U.S. 15, 16-17, (2009), "In light of 'the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant,' the performance inquiry necessarily turns on 'whether counsel's assistance was reasonable considering all the circumstances.' *Id.*, at 688–689, 104 S.Ct. 2052."

With respect to *Strickland* prejudice, *Harrington v. Richter*, 131 S.Ct. 770, 787-88 (2011) provides:

> It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*, at 693, 104 S.Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., at 687, 104 S.Ct. 2052.
>
> "Surmounting *Strickland*'s high bar is never an easy

> task." *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

Harrington v. Richter, 131 S.Ct. at 787-88.

B. THE TRIAL COURT RULING – The trial court rejected Williams' claim of ineffective assistance of penalty phase counsel for not completing a comprehensive investigation and mitigation presentation of Williams' social history and mental health including whether Williams is intellectually disabled. The trial court's order provided that the strategy of penalty phase counsel, Hale Schantz "Schantz," was to portray Williams as "a nice person who was worthy of a life sentence." (PCR.17 2900). Toward this end, Schantz "spent hours with the family trying to develop Defendant's social history" and that he hired

an investigator and neuropsychologist. (PCR.17 2900).

The postconviction court found:

> During the evidentiary hearing, Defendant presented the testimony of Dr. Woods, who was hired by the defense team to address the issue of mitigation in connection with possible cognitive impairment. (EH Vol. 4 at 563). According to Dr. Woods, Defendant met the extreme mental or emotional disturbance mitigator and the inability to conform his conduct to the requirements of the law mitigator. It was his opinion that Defendant also met a few non-statutory mitigators, such as the poverty he grew up in, his special needs as a child, and cognitive deficits which were consistent with his physical impairments. (EH Vol. 4 at 565-66; 663-65).
>
> Dr. Woods attributed the existence of the two statutory mitigators to Defendant's cognitive deficits and frontal lobe impairment. *** **He also conducted a neurological exam because there were physical signs that could lead one to conclude that Defendant might have some brain impairments. (EH Vol. 4 at 601). However, his testimony did not establish such a connection**. *** He never rendered an opinion as to whether Defendant's heart murmur had an impact on his cognitive functioning. He only noted that the heart murmur had an impact on his stamina, and prevented him from playing sports. (EH Vol. 4 at 573; 603). Furthermore, he could not make any determination as to whether his small stature had any impact neurologically speaking. (EH Vol. 4 at 608).
>
> Dr. Woods testified that one of the tests he administered assessed the communication between the right and the left side of the brain, the midline area called corpus callosum. *** Based on that test, Dr. Woods found that "somewhere around that midline area [Defendant] has some difficulty in terms of that communication." (EH Vol. 4 at 604). He concluded that Defendant had "impairment of language, impairment of academics, impairment of memory, impairment of midline neurological function." (EH Vol. 4 at 604).
>
> When asked to express the conclusion of his evaluation, Dr. Woods stated that the important part

for him is that it was consistent with the social history of Defendant having difficulty in school, consistent with the additional testing conducted by Dr. James, consistent with the DOC Beta IQ score of 76,FN16 and consistent with someone who is mentally retarded. (EH Vol. 4 at 608-13). Although Dr. Woods testified generally about the subtests of the Montreal Cognitive Assessment, he did not specify how Defendant performed on those subtests. He supported his conclusion that Defendant had impairment of language by reference to a comment made by one of Defendant's teachers who thought that English was Defendant's second language and by reference to the way Defendant read the letter to Judge Seay when interviewed by Dr. Prichard. According to Dr. Oakland, when reading that letter Defendant exhibited the same sort of "paraphrasic error" (that is, adding or taking away words from a sentence) he did on the Montreal Cognitive Assessment. He also found that Defendant exhibited "expressive aphasia," which he explained as being inability to express language. He offered as an example of "expressive aphasia" Defendant's response to the question whether he wrote the letter to Judge Seay: "I don't know, but I am absolutely sure." (EH Vol. 4 at 598-600; 682-84).

> FN16 According to Dr. Woods, the Beta test is a non-standardized IQ test that assesses non-verbal functioning. (EH Vol. 4 at 610-11).

The trial court in this case had already found and gave little weight to the two statutory mitigators found by Dr. Woods. Although an argument could be made that the trial court might have given more weight to those mitigators had additional reasons been provided to support them, this Court finds that this is not the case here. **Dr. Woods, explained that Defendant's impairments appeared early in his life and they would lead to extreme mental disturbances, which are always present, and therefore they would have been there at the time of the offense as well. (EH Vol. 4 at 664). This explanation is highly implausible**, since it suggests that Defendant is always under some sort of extreme mental disturbance because of his impairments. Dr. Woods further explained that the frontal lobe impairments that Defendant allegedly has, account for

> his inability to conform his conduct to the requirements of the law because they impact his ability to control his impulses. (EH . Vol. 4 at 665-66). However, Dr. Woods's finding that Defendant is significantly unable to inhibit his impulses was based on Defendant's self-description as impulsive. (EH Vol. 4 at 662-63). Dr. Woods opined that Defendant's impulsivity, his inability to stop and solve a problem, and his desire "to jump from one attempt to another" are also noticeable in Dr. James's evaluation. (EH Vol. 4 at 663). To the contrary, Dr. James testified that Defendant was able to sustain his attention throughout the testing period, for two and a half hours of testing prior to lunch, and for two and a half hour of testing after lunch. She described him as eager, willing, and cooperative, persisting on tasks that were challenging for him. (EH Vol. 1 at 38). Thus, **this Court does not find Dr. Woods's opinion regarding Defendant's inability to control his impulses very reliable**. This Court concludes that there is no reasonable probability that the sentence would have been different had these additional reasons been provided in support of the two statutory mitigators already found by the trial court.

(PCR.17 2904-07)(emphasis supplied)

With respect to alleged cognitive deficits as additional mitigation, the trial court found Dr. James' assessment was based on neurological testing of Williams, reliance on Dr. Harvey's report on IQ WAIS-III and WAIS-IV test scores and the RBANS results. The trial court discounted Dr. James' conclusion as Dr. Harvey's report provided erroneous RBANS results ("the RBANS scores reflected in Dr. Harvey's raw data were higher than the ones in his report") and Dr. James had not had access to Dr. Harvey's raw data. The court found, "[b]ased on the results of the tests [Dr. James] administered, Defendant showed

difficulties in the area of working memory, language, and planning and organization. (EH. Vol 1 at 100)." (PCR.17 2908).

The trial court reasoned:

> The fact that Defendant was able to find new experts who could identify cognitive deficits at the postconviction stage is not grounds for finding trial counsel ineffective. . . .
>
> Even assuming that Defendant has established he has some cognitive deficits in the area of language, work memory, and planning and organization, the finding of such a non-statutory mitigator would not alter the balance of the aggravators and the mitigators. The Supreme Court of Florida found that the evidence in this case supported three aggravators: prior violent felony, felony murder, and HAC. The Court struck the CCP aggravator, but determined that there was no reasonable probability that the finding of that aggravator affected the death sentence in this case. Williams, 967 So. 2d at 762-65. In addition, the trial court found two statutory mitigators and accorded them little weight, and five non-statutory mitigators, assigning them slight weight. (ROA Vol.22 at 17 47-49; 1750-51): The death penalty was upheld in cases where the trial court found two aggravators (prior violent felony and HAC), two statutory mitigators (extreme mental or emotional disturbance and impaired capacity to appreciate the criminality of conduct or to conform conduct to the requirements of law) and six non-statutory mitigators. See, e.g., Spencer v. State, 691 So. 2d 1062, 1063-66 (Fla. 1996). Furthermore, the HAC aggravator is considered one of the most serious aggravators in the statutory sentencing scheme. Larkin v. State, 739 So. 2d 90, 95 (Fla. 1999) (explaining that both the HAC and CCP aggravators are "two of the most serious aggravators set out in the statutory sentencing scheme").
>
> **This Court finds that there is no reasonable probability that Defendant would have received a different sentence, especially given the similarities between the murder in the instant case and the murder of Gaynel Jeffrey** in case number 84-010364CF10A. Gaynel Jeffrey was the sister of Robin Jeffrey who had

> a relationship with Defendant. Defendant stabbed Gaynel Jeffrey to death several days after Robin Jeffrey had broken up with him. Moreover, Defendant committed the murder in the instant case approximately eight months after he had been released from the Florida Department of Corrections for the murder of Gaynel Jeffrey. (ROA Vol. 20 at 22-33; 40-51).

(PCR.17 2908-10)

The trial court relied on its analysis of Claim VII.A (*mental retardation*; PCR.17 2871-2894) in rejecting the claim of ineffectiveness of counsel for not raising the alleged condition as mitigation. Also, the court found "that contrary to Defendant's allegations in the initial motion for postconviction relief, he could not establish that he has organic brain damage. In fact, Dr. Oakland testified that during his involvement in this case he could not discover any evidence of organic brain damage. (EH Vol. 7 at 915)" (PCR.17 2910).

Likewise, the trial court rejected the assertion that Williams was exposed to and adversely affected by pesticides and that counsel was ineffective for not pressing the living conditions of migrant workers as mitigation reasoning:

> *** there was no testimony that Defendant himself was exposed to pesticides or that such exposure impacted his development in any way. Anthony [Bowan] testified that Defendant did not work in the fields because he was too young; (EH Vol. 8 at 1023). Although Clinita testified that her mother worked in the fields while pregnant, she did not specify whether the mother was pregnant with Defendant or with Althamease when she did that. (EH Vol. 9 at 1122). Thus, Defendant could not show that he was exposed to toxins during fetal development, which was one of the prenatal risk

> factors for mental retardation mentioned by Dr. Tasse. (EH Vol. 1 at 165).
>
> Through Clinita's testimony during the evidentiary hearing, Defendant presented part of the documentary Harvest of Shame, by Edward R. Morrow, documenting the, living and working conditions of the migrant workers in the Pahokee and Belle Glade areas, where Defendant and his family used to live. (EH Vol. 9 at 1128-1142; 1148-56). The documentary and the testimony were offered to show that Mr. Schantz could have easily obtained such mitigation material to present to the jury the poverty in which Defendant grew up. (EH Vol. 9 at 1153). However, even if this information were added to the testimony already presented at trial, this Court finds that there is no reasonable probability that he would have received a different sentence, because the trial court found and weighed the non-statutory mitigator that Defendant had a deprived childhood, being raised in poverty. (ROA Vol. 22 at 1750-51).

(PCR.17 2910-11)

With respect to the allegation that counsel was ineffective for failing to bring to the attention of the jury or the judge at the *Spencer* hearing that at the age of eight or nine, Williams was sexually abused twice by his aunt, the trial court denied relief. The trial court noted that defense investigator for Schantz, Sandra Sticco, had tried to corroborate Williams' allegation, but was unable to locate Williams' aunt and Schantz could not recall any details or if he discussed them with his mental health expert. (PCR.17 2911-12) Assuming Schantz rendered deficient performance; the trial court found no *Strickland* prejudice because the allegations of sexual abuse were "weak and uncorroborated" and given the strong aggravations discussed

earlier in the order, the trial court concluded there was "no reasonable probability that the sentence would have been different." (PCR.17 2909-12).

Also rejected was the allegation that Schantz was ineffective for not presenting Beamon Lawrence ("Beamon") to show he physically abused Williams. (PCR.17 29-12-13) The trial court found that Schantz had a reasoned strategy for not making such a presentation as he was aware of the allegations, had Beamon under subpoena, but eventually decided not to call Beamon after consultation and at the direction of Williams and his family. (PCR.17 2913).

Williams also alleged Williams' brother, Anthony Bowan ("Bowan"), should have been called by Schantz during the penalty phase and that it was ineffective assistance not to do so. The postconviction court found Bowan's testimony regarding their living conditions would not have changed Williams' sentence as "the fact that the Defendant had a deprived childhood and grew up in poverty was established as a mitigator and [had been] given weight by the trial court." Likewise, the postconviction court rejected the argument that Bowan should have been called to discuss his drug addiction finding:

> Defendant argues that had Mr. Schantz presented information at trial about Anthony's drug addiction, the trial court could have compared Defendant with Anthony, who struggled with addiction, rather than with Clinita who had managed to obtain a college

> education and become a productive member of the society. Even assuming that this argument has some merit, and the trial court would have given the non-statutory mitigators more weight, this Court's confidence in the sentence is not undermined.

(PCR.17 2913). The court relied on its previous analysis of the aggravators and mitigators (PCR.17 2909-10, 2913) in determining that confidence in the verdict was not undermined by not calling Bowan to discuss his drug addiction problems. (PCR.17 2913-14)

Williams' final allegation of ineffectiveness was addressed to counsel's alleged failure to obtain Dr. Glen Caddy's deposition given in the 1984 murder case involving the victim Gaynell Jeffrey where Dr. Caddy found Williams "dull" and "allegedly recommended neurological testing." In rejecting this claim, the postconviction court relied on its discussion of the neurological testing conducted throughout its order. The court found that "even assuming" deficient performance, Williams could not show *Strickland* prejudice as "the neurological testing performed during postconviction proceedings shows that such testing would not have changed the balance of the aggravators and mitigators in this case, therefore, confidence in the sentencing was not undermined." (PCR.17 2914)

C. MERITS – Williams asserts the trial court erred in not finding ineffective assistance arising from the penalty phase investigation and presentation conducted by Schantz. It is Williams' position that Schantz failed to: (1) obtain the 1984

defense second-degree murder file containing mental health information from Dr. Caddy (IB 37-38); obtain a complete history by talking to other family/friends or collecting documents (IB 41-42); collect information about Pahokee where Williams was born/lived until his mother's death (IB 43); obtain additional prison records indicating Williams had a 76 Beta IQ score, heart defect, and a brother with a "troubled history" (IB 43); present information intellectual disability ("ID") (IB 44); and present Williams' alleged sexual abuse, "academic difficulties, drug activity, impulsiveness, inability to learn from mistakes, communication difficulties, and impairments" (IB 49).[5] Williams

[5] To the extent Williams' claim can be read to raise an *Ake v. Oklahoma*, 470 U.S. 68 (1985), his challenge fails. "*Ake* requires that a defendant have access to a 'competent psychiatrist [or other mental health professional] who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.' *Id.* at 83, 105 S.Ct. 1087." *Jones v. State*, 845 So.2d 55, 67 (Fla. 2003). To prove an *Ake* claim, the defendant must establish that the psychological examination was "grossly insufficient" and that the expert "ignore[d] clear indications of either mental retardation or organic brain damage" before a new sentencing hearing is required. *State v. Sireci*, 502 So.2d 1221, 1224 (Fla. 1987) Such was not shown here, rather, the pith of Williams' claim that counsel did not provide the appropriate records to Dr. Walzak or ask him to evaluate certain areas for guilt and penalty phase. Williams' claim fails on its face for three reasons. First, a qualified expert was appointed, Dr. Walczak. Second, that expert was not called to support the factual allegations made in the postconviction motion (Original Motion at 46). *See Pooler v. State*, 980 So.2d 460, 469 (Fla. 2008) (reasoning that "because Pooler did not call any of his trial experts to testify at his postconviction hearing, he failed to demonstrate that they would have changed their opinions had they conducted more in-depth psychological evaluations or been

posits that the trial court erred in not finding Schantz's investigation and presentation deficient and that his deficiency prejudiced him as defined by *Strickland*. He argues that the trial court improperly discounted his offered mitigation and that the court's prejudice analysis was insufficient as each allegation of deficiency was address in turn instead of considering "the entire picture" presented on collateral review. (IB 50-51). The order denying postconviction relieve establishes that the court made factual findings supported by competent substantial evidence and the prejudice analysis comported with the law as set forth in *Strickland* and its progeny. This Court should affirm.

In order to assess this claim, it is necessary to consider what mitigation investigation and presentation was made by Schantz. By the time of Williams retrial in 2004, Schantz had done six or seven capital cases, had been practicing criminal law since 1982, and has taken two capital seminars annually s took one or two capital seminars annually. (PCR.43 4163-66; PCR.44 4294-95). For the retrial, Schantz spoke to prior

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provided with his records. Under these circumstances, a new sentencing proceeding is not mandated.") Third, the claim is really an attack on counsel's performance and must be analyzed under *Strickland*. *See Wyatt v. State*, 78 So.3d 512, 528, n.14 (Fla. 2011) (recognizing "[b]ecause this claim focuses on defense counsel's alleged deficiencies rather than the deficiencies of his mental health expert, it is properly analyzed under *Strickland*).

counsel and reviewed the file on this murder as well as the 1984 murder of Gaynel Jeffries. He also obtained the services of a private investigator to investigate for mitigation and had Dr. Michael Walczak, a psychologist with a degree in neuropsychology appointed (ROA.21 1631-33) and provided him access to Williams, family members, and school, medical, and some prison records. (PCR.43 4167-69; 4175-76; 4188-91, 4207-12; PCR.44 4241-43, 4298-4300). Schantz asked Dr. Walczak to determine whether Williams was competent to stand trial and to present mental health mitigation. All records requested were supplied to the expert and they had numerous conversations and/or meetings (PCR.43 4190; PCR.44 4247-56, 4303-08, 4342-44).

Schantz testified at the evidentiary hearing that he presented **Arthur Lewis** to testify that he knew Williams all his life and that Williams was beaten by other children. Lewis also told the penalty phase jury that Williams had trouble in school and in his neighborhood. (PCR.44 4325-363) Lewis testified that Williams was a very quiet-low key person who likes to laugh. Lewis described Williams as "the punching bag of the neighborhood," "always picked on" and "beat up." Lewis reported Williams was a "very quiet, low key" person who "likes to laugh." (04ROA.20 1600-01; PCR.17 2900).

Carter Powell, a corrections deputy testified at the penalty phase via a reading of his deposition. Such showed that

Williams was a religious person, attending services regularly and trying to follow the teachings of Christ. Williams was a model inmate at the Broward County Jail with no disciplinary incidents. (PCR.44 4325-26; 04ROA.20 1604-07)

Dorthea Simmons' prior testimony was read into the record at the new penalty phase as she was deceased. The record shows she had known Williams for 20 years and thought he was on drugs and had a drug problem which only got worse. Simmons testified she ministered/counseled others and spoke to Williams about his life. Simmons related that she could not get Williams' attention once in 1993; he was laughing and grinning and she though he was on drugs. (PCR.44 4325-26; 04ROA.20 1609-10). Simmons spoke to Williams after he got out of prison before the instant murder and thought he was worse after prison although he was trying to help himself and find a job. Williams could not find steady work. (04ROA.20 1610-11).

Clinita Lawrence, Williams' older sister/surrogate mother reported that she raised Williams as if he were her own son. They lived in deplorable conditions and Williams had extensive drug problem. (PCR.44 4325-35). Clinita reported that Williams' father was never involved in his son's life and that Clinita had to raise four siblings as well as her own child after their mother's death. They were unable to get government assistance because their birth certificated and other papers had been

stolen and she did not know where to get replacements. As a result, the family had to live out of a car which had a leaky roof and allowed them to get wet in the rain. Williams was afraid of lightning. (04ROA.20 1612-17, 1619). The family could not afford the things they needed. To survive, the family sold bottles they collected. Williams never went to nice restaurants and had to wear hand-me-down clothes of clothes from the trash. (04ROA.20 1617-18) Williams did not start first grade until he was ten years old. He did not do well in school and did not finish. Also, Williams was beaten and picked on by other students. He had a very hard life and used alcohol and drugs (cocaine, crack cocaine) as he was growing up. Clinita took her brother to both public and private clinics to get him off drugs, but to no avail. (04ROA.20 1617-20). According to Clinita, Williams helped her raise their siblings and helped search for food. He helped with his infant sister after their mother died giving birth to her. Clinita depended upon Williams. (04ROA.20 1620-23).

Corrections Officer, **Herman Ruise**, had supervised Williams for three years without incident. (PCR.44 4325-26) Ruise witnessed Williams interact with other inmates, play basketball and play cards. Williams got along well with other inmates. While Williams had three disciplinary reports, he stayed out of trouble when Ruise supervised him. (04ROA.20 1629-30).

Dr. Walczak testified that he spoke to Clinita and Beamon, her husband, about Williams. Defense psychologist, Dr. Walczak, met with Williams, Clinita, and a defense investigator regarding mitigation. He reviewed the probable cause affidavit and police statements, including Williams'; he had a collection of material including school records. The doctor opined Williams had a troubled background due to the death of his mother, growing up in a "bad area", being taken in by his pregnant 19 year-old sister, and having to live out of a car for more than three months while the paperwork could be straightened out for government assistance. Due to Williams' small stature, he was abused in school, causing him to skip school. He started drinking at age 18 and taking cocaine by 20. Williams worked for grocery stores, but lost his jobs for stealing money for drugs. (04ROA.20 1632-36, 1656).

Dr. Walczak thought taking 15 crack rocks and a fifth of rum would create mind altering experiences, possible blackouts, but it was unlikely someone would blackout, remember an event, and blackout again. Given the amount of intoxicants Williams self-reported, he was unable to function normally. When asked about Williams' capacity to appreciate the criminality of his conduct, Dr. Walczak stated Williams was religious, but just could not remember events, which did not mean he did not commit something. Dr. Walczak conceded Williams' self-report to the

intake clerk was that he had not done drugs for 48 hours before January 26th. (04ROA.20 1636-39, 1649-52).

From the foregoing it is clear that Schantz conducted a reasonable mitigation investigation, had the assistant of an investigator, presented Williams social history through friends/family/corrections officer, and utilized a mental health professional. Here, Williams alleges other mitigation should have been uncovered by counsel and that the mental health presentation was qualitatively better on collateral review which the trial court failed to recognize. (IB 45-59)

Dr. James and Dr. Woods testified at the evidentiary hearing and discussed possible cognitive impairments. Both relied upon Dr. Harvey's WAIS and RBANS testing, and the low IQ scores he reported. However, as the trial court found, Dr. Harvey made numerous errors in scoring the RBANS, and those results were relied upon by other defense experts. Moreover, Dr. Woods made no connection between the cognitive deficits and the statutory mitigation he claims exists. (PCR.17 2904-05). Also, Dr. Woods' testimony that Williams' impairments were omnipresent was found to be "highly implausible" by the trial court. Dr. Woods claimed Williams could not control his impulses, but Dr. James reported that Williams able to sustain his attention throughout the five hours of testing. (PCR.42 3870; PCR.45 4494-98) Based on this conflict in between defense

experts, it is well within the trial or fact's discretion to find Dr. Woods' testimony not very reliable. (PCR.17 2907-08).

Williams suggests that the trial court did not appreciate the testimony related to risk factors and subsequent cognition problems. (IB 51-52). Such misconstrues the court's order, which finds Williams did not establish a connection between his environment, heart problems, and poverty with later cognitive problems. (PCR.17 2903-09, 2911)

Schantz may not be faulted for not uncovering this as he retained the services of a neuropsychologist and was not told that Williams had any impairment. Also, Schantz saw nothing in Williams' interaction with him to question his cognitive ability. Hence, Schantz should be labeled ineffective for not presenting such information to the jury. Drs. James and Woods did additional testing and offered Williams as having cognitive impairments. Yet, "[m]erely proving that someone--years later--located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort." *See Elledge v. Dugger*, 823 F.2d 1439, 1446 (11th Cir.), *modified on other grounds*, 833 F.2d 250 (11th Cir. 1987).

Furthermore, given the conflicts between defense experts,

erroneous scoring by Dr. Harvey, and fact that Dr. Oakland testified that he found no evidence of organic brain damage (PCR.48 4747) the inpact of the testimony on cognitive deficits was reduced greatly. Coupling this with the fact that the two statutory mitigators were found by the sentencing court shows that *Strickland* prejudice has not been proven; confidence in the verdict is not undermined. Merely because Williams has found experts to give additional reasons for the statutory mental mitigators does not change the fact that were found and weighed in the sentencing.

Moreover, even if impaired cognitive functioning is considered a stand-alone non-statutory mitigator, confidence in the sentencing had not been lost. Through Clinita testimony, the jury was aware Williams did not do well in school. Also Williams committed the almost identical murder in 1984 for similar reasons (breaking up with girlfriend) and killed Lisa Dyke just a few months after his early release for the first murder conviction supporting the prior violent felony aggravator. Not much weight is due this mitigator as the supporting evidence/opinion was described as "highly implausible" and not "very reliable." The sentencing calculus would not change given the strong aggravation[6] which includes a

[6] Additionally, the HAC aggravator, a weighty aggravator, applies in this case. *See Rivera v. State*, 859 So.2d 495, 505 (Fla.

prior murder. *See Williams*, 967 So.2d at 741-47, 765 (affirming prior violent felony, felony murder, and HAC aggravators); *Spencer v. State*, 691 So.2d 1062, 1063-66 (Fla. 1996).

Williams also suggests that his alleged ID should have been offered as mitigation. The trial court found ID was not proven. The State relies on its discussion of the evidence set forth in Issue II and incorporates that here to show that ID was not proven. Nonetheless, Dr. Walczak had Williams' school and arrest records, access to family and the defendant, background information, and any other documents requested. Schantz chose Dr. Walczak for his specialty and the fact they had worked together previously. They met several times. However, Dr. Walczak did not report a basis for additional testing or suggest that there were mental retardation issues. Likewise, Schantz saw no indication that Williams had difficulty comprehending information and neither the family members nor corrections officers gave any indication Williams may be ID. (PCR.43 4190, 4196-4202, 4208-12; PCR.44 4248, 4253-63, 4267-72, 4310-11; PCR.45 4342-43, 4353-60). Such shows that Schantz rendered reasonably professional assistance. He obtained the appropriate expert, supplied him with records and had him evaluate Williams. *Reese v. State*, 14 So. 3d 913, 918 (Fla. 2009) (rejecting

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2003) (finding HAC and prior violent felony aggravators are weighty factors)

ineffectiveness claim for failing to conduct additional testing where counsel relied on mental health expert and interactions with defendant were normal); *Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007) holding counsel is permitted to rely on expert's opinion in making decisions on representation-evidence).

Williams complains the trial court discounted improperly Bowan's account of Pahokee and the scenes depicted in the, *The Harvest of Shame*. Contrary to Williams' position, the trial court found Williams had not shown exposure to toxins/pesticides in Pahokee's agricultural field, but that poverty was explored. (PCR.17 2910-14) Counsel is not ineffective in failing to offer cumulative evidence. *Stewart v. State*, 37 So.3d 243, 258 (Fla. 2010) (finding "[b]ecause the evidence that Stewart argues should have been presented is cumulative, Stewart has demonstrated neither deficiency nor prejudice.")[7] Williams' poverty as a child growing up in South Florida without his

[7] *See also, Rutherford v. State*, 727 So. 2d 216, 225 (Fla. 1998)(finding additional evidence offered at postconviction evidentiary hearing was cumulative to that presented during penalty phase, thus, claim was denied properly); *Van Poyck v. State*, 694 So. 2d 686, 692-94 (Fla. 1997) (finding defendant failed to prove ineffective assistance of counsel where the life-history account argued for in postconviction litigation was, in large measure, presented to the jury); *Woods v. State*, 531 So.2d 79, 82 (Fla. 1988) (reasoning "[t]he jury, however, heard about Woods' [psychological] problems, and the testimony now advanced, while possibly more detailed than that presented at sentencing, is, essentially, just cumulative to the prior testimony. More is not necessarily better."); *Card v. State*, 497 So.2d 1169, 1176-77 (Fla. 1986) (holding counsel cannot be deemed ineffective for failure to present cumulative evidence).

parents was explored in detail with the jury. The mitigator, deprived childhood, was found and given slight weight. (04ROA.5 413-28; PCR.57 5597-Defense Ex. 5 at 16). The fact Williams was living in poverty from birth instead of from the age a six when his mother died does not undermine confidence in the sentence.

With respect to Schantz's failure to offer testimony that Williams had been abused sexually, Schantz could not recall details of the matter or discussing it with Dr. Walczak. (PCR.44 4278-79). However, Sandra Sticco, the defense trial investigator, testified that she was unable to corroborate Williams' self-report as she could not locate his Aunt Betty Jo. (PCR.49 4892-93) Counsel should not be faulted for being unable to secure such evidence. *See Pooler v. State*, 980 So.2d 460, 469 (Fla. 2008) (rejecting *Strickland* claim as counsel's investigator attempted, but was unsuccessful in securing mitigation evidence).

Moreover, as the trial court found, aggravation in this case, including a prior murder conviction, is not called into question by not finding and presenting the issue that Williams was abused sexual by his aunt. The information was uncorroborated, thus, confidence in the outcome is not undermined.

Additionally, it is disingenuous for Williams to point to the alleged physical abuse he suffered at the hands of Clinita's

husband, Beamon Lawrence. The record reflects that Schantz was aware of this information, however, Williams did not want the evidence presented. Although Schantz had Beamon under subpoena, after consultation with Williams and family, it was decided that Beamon would not be called to testify to that evidence. (PCR.17 2912-13; EH.3 446, 480-81 EH.8 1058, 1062). Deficiency and prejudice have not been shown as Schantz made a reasoned decision not to present Beamon. *See Occhicone v. State*, 768 So.2d 1037. 1048 (Fla. 2000) (opining "strategic decision do not constitute ineffective assistance of counsel if alternate courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.")

On page 56 of his initial brief, Williams alleges that a portion of Anthony Bowen's answer to the question whether he knew of the 1984 murder conviction highlights the different experiences of Clinita and Williams. Claiming Bowen's answer is consistent with his history of schizophrenia, Williams argues that the State's question prejudiced him. Williams does not explain how this is so. Nonetheless, when the entire exchange is considered, it shows that Bowen did not have an intimate knowledge of the 1984 murder, but that he knew his brother and "how he is" and that he might act out "hatred" or hold a grudge. Such makes perfect sense in the context of both the 1984 and 1993 murders. Both were committed following a break with a

girlfriend and the victim was involved in or witness to that breakup, so Williams took his hatred/grudge out on the victim. The fact Bowen knew his brother's mind-set is neither misleading nor prejudicial.

The trial court conducted a proper review of the postconviction testimony and its findings are supported by substantial competent evidence. When Shantz's representation is viewed it is clear that he conducted a constitutionally professional mitigation investigation. His actions fall within professional norms as he collected records, spoke to family and friends to garner Williams' history, and hired a mental health expert to evaluate Williams and present mitigation. Such does not run afoul of Strickland or its progeny - *Porter v. McCollum*, 558 U.S. 30 (2005); *Rompilla v. Beard*, 545 U.S. 374 (2005) and *Wiggins v Smith*, 539 U.S. 510 (2002). Moreover, the mitigation alleged to have been missed is either unproven as mitigation, cumulative to that which was presented to the jury, or is of such minor significance that it does not undermine confidence in the sentence. This was a highly aggravated case. This Court affirmed that the State had proven the prior violent felony aggravator including a eerily similar second-degree murder where Williams had been out of prison for mere months before killing again. That killing was done in the course of a felony and committed in a heinous, atrocious, and cruel manner. Williams

failed to show that he was ID or that any of his other claimed mitigation would undermine confidence in the sentence. The trial court denied relief properly and this Court should affirm.

ISSUE II

WILLIAMS FAILED TO CARRY HIS BURDEN OF PROVING HE IS MENTALY RETARDED/INTELLECTUALLY DISABLED (restated)

Williams asserts that he in intellectually disabled ("ID"), and therefore, not eligible for the death penalty. It is his position that the trial court erred in finding that he failed to prove his claim of ID. Additionally, Williams maintains that the State's expert, Dr. Prichard should not have been permitted to testify as he was not qualified to render an opinion, did not conduct a proper evaluation, and his conclusion were not supported by the evidence. The trial court granted an evidentiary hearing on this matter and made findings on each of the three prongs of an ID claim and those findings are supported by competent substantial evidence. Moreover, the trial court did not abuse its discretion in finding Dr. Prichard qualified to render an opinion or in relying upon Dr. Prichard's testimony in rejecting the instant claim. This Court should affirm the determination that Williams failed to prove he is intellectually disabled.

A. STANDARD OF REVIEW – With regard to the qualifications of an expert to testify, this Court has stated: "The

determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error." *Ramirez v. State*, 542 So.2d 352, 355 (Fla. 1989). *See Johnson v. State*, 393 So.2d 1069, 1072 (Fla. 1980), *cert. denied*, 454 U.S. 882 (1981).

With respect to ruling on intellectual disability, this Court opined:

> Florida law includes a three-prong test for mental retardation as a bar to imposition of the death penalty. *See* § 921.137(1), Fla. Stat. (2009); Fla. R.Crim. P. 3.203; *Nixon v. State*, 2 So.3d 137, 141 (Fla. 2009); *Cherry v. State*, 959 So.2d 702, 711 (Fla. 2007). This Court has "consistently interpreted section 921.137(1) as providing that a defendant may establish mental retardation by demonstrating all three of the following factors: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen." *Nixon*, 2 So.3d at 142. At trial, the defendant "carries the burden to prove mental retardation by clear and convincing evidence." *Franqui v. State*, 59 So.3d 82, 92 (Fla. 2011); see § 921.137(4), Fla. Stat. (2009). "We review the circuit court's determination that a defendant is not mentally retarded for competent, substantial evidence, and we do not reweigh the evidence or second guess the circuit court's findings as to the credibility of the witnesses." *Franqui*, 59 So.3d at 91 (internal quotations marks omitted). But "to the extent that the circuit court decision concerns any questions of law, we apply a de novo standard of review." *Dufour v. State*, 69 So.3d 235, 246 (Fla. 2011).

Snelgrove v. State, 107 So.3d 242, 252 (Fla. 2012).

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme

Court left it to the states to define mental retardation and Florida did this in §921.137, Fla. Stat. and rule 3.203 Fla. R. Crim. P. However, recently, the Supreme Court found Florida's bright line cutoff IQ score of 70 to be unconstitutional, thereby, requiring an evidentiary hearing if the inmate's IQ falls within the standard error of measurement, plus/minus five points. *See Hall v. Florida*, 134 S.Ct. 1986 (2014). Hall has no impact on the instance matter as Williams was granted an evidentiary hearing and the trial court made factual findings on the second and third prongs of § 921.137(1), Fla. Stat. (2009); Fla. R.Crim. P. 3.203 addressing: (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen.

B. THE TRIAL COURT RULING – As a preliminary matter, the trial court rejected Williams' constitutional challenge to §921.137, Fla. Stat. and Fla.R.Crim.P. 3.203 based on *Ring v. Arizona*, 536 U.S. 584 (2002) finding that this Court had repeatedly upheld the constitutionality of those provisions citing *Franqui v. State*, 59 So.3d 82, 92-94 (Fla. 2011); *Cherry v. State*, 959 So.2d 702 (Fla. 2007).[8] (PCR.17 2872).

The trial court conducted an evidentiary hearing on

[8] The impact of *Hall v. Florida*, 134 S.Ct. 1986 (2014) on the constitutionality of Florida's Mental Retardation/Intellectual Disability provisions will be discussed below. However, as noted above, it has no impact on Williams' case.

Williams' claim of intellectual disability. In analyzing the claim, the trial court recognized the matter was governed by §921.137, Fla. Stat. and Fla.R.Crim.P. 3.203, which required Williams to prove "the following three prong test: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition during the period from conception to age eighteen" (PCr.17 2873). Each prong was address separately before the trial court determined that Williams had not carried his burden of proof. (PCR.172871-94)

(1) <u>Intellectual functioning</u> – The trial court determined that of the two IQ tests given, the WAIS-III and WASI-IV, the WAIS-III with the corrected full scale score of 75 was the more credible result. The trial court opined:

> Based on the totality of the testimony presented during the evidentiary hearing, this Court finds that Defendant has not established by clear and convincing evidence that he meets the first prong of the mental retardation definition pursuant to Florida law. First; this Court finds unpersuasive the reasons offered by Dr. Harvey in support of the fact that the IQ score of 65 is the valid score and the only one that should be considered when determining whether Defendant meets the first prong. Dr. Harvey's explanation that the WAIS-III was at the end of its lifespan when administered to Defendant, which implies that the WAIS-IV is more reliable, is not particularly persuasive. Dr. Harvey was aware that the WAIS-Ill was at the end of its lifespan when he decided to administer the test to Defendant on June 12, 2008. Although the release date of the WAIS-IV was unknown at that point in time, the WAIS-IV was being advertised. (EH Vol. 11 at 267). Clearly, the

implication was that the WAIS-III was nearing the end of its lifespan. If Dr. Harvey had any concerns regarding the validity of the WAIS-III score he had the option under Florida law to evaluate Defendant by using the Stanford-Binet Intelligence Scale. In addition, Dr. Harvey's testimony that the results of the RBANS were consistent with the IQ score of 65 was greatly undermined on cross-examination when it was revealed that he had made several errors when reporting Defendant's scores, the majority of which were lower scores than reflected in the raw data. Although Dr. Harvey testified that the errors would not change the IQ score of 65, he did not specify whether the correct, higher scores on the RBANS would still be consistent with an IQ score of 65, or whether they would support the higher IQ score of 75.

Second, there are several reasons that support a finding by this Court that the IQ score of 75 obtained on the WAIS-III is more credible. When Dr. Harvey first went to evaluate Defendant there was no discussion of mental retardation. However, when Dr. Harvey was asked to reevaluate him, Defendant had already filed a motion to determine mental retardation, yet the reported IQ score on the WAIS-III was above the 70 cut-off score required under the Florida law. This Court finds the 75 score more indicative of Defendant's real abilities, since he could not achieve a higher score than his abilities would allow, but there are several reasons why he could have scored lower on the WAIS-IV. As explained by Dr. Prichard, Defendant's performance on the WAIS-IV could have been impacted by anxiety, depression, lack of sleep, medication, and motivation.

Dr. Harvey's explanation as to why he did not administer any malingering tests is not entirely persuasive. If his major concern was that such tests yield a 40% false positive rate when administered to mentally retarded individuals then there was no reason not to administer such a test when he first evaluated Defendant and mental retardation was not yet an issue. Although Dr. Harvey testified that Defendant exerted effort throughout the test, thus implying that he was not motivated to underperform, he did not address any other causes that might have affected Defendant's performance on the WAIS-IV such as depression,

> medication, and/or lack of sleep. Finally, the fact that Defendant got a GED, and scored in the low average range on the achievement test administered by Dr. James, also supports a finding that the 75 IQ score is the more credible one.

(PCR.17 2879-80).

(2) <u>Adaptive Behavior</u> – In determining Williams failed to prove deficiency in Adaptive Behavior, the trial court reasoned:

> In this case, Dr. Oakland administered the test to three respondents: Defendant and his two sisters, Clinita and Althamease. (EH Vol. 7 at 860). Dr. Oakland's administration of the ABAS test to Defendant's two sisters was limited to eliciting information regarding Defendant's adaptive behavior prior to the age of eighteen. (EH Vol. 7 at 867; 873). *** While the information provided by the two sisters might be relevant to establishing the third prong of the statutory definition of mental retardation, it is not relevant to the second prong because it does not address Defendant's current adaptive behavior.
>
> Defendant's self-report is the only part of the ABAS test administered by Dr. Oakland that assessed Defendant's current adaptive behavior. However, as pointed out by Dr. Tasse, self-reports are not very reliable. In addition, Dr. Oakland testified that it is "[d]ownright silly to try to acquire adaptive behavior information on persons who are incarcerated." *** He assessed all ten skill areas and based on Defendant's self-report, he was deficient in nine out of ten, obtaining the lowest possible score. (EH Vol. 7 at 876). In Dr Oakland's opinion, the score merely confirms the fact that Defendant's adaptive behavior in prison is extremely restricted, which renders "the assessment of adaptive behavior irrelevant" and "downright silly." (EH Vol. 7 at 876) This Court cannot attach more meaning to the ABAS score obtained based on Defendant's self-report, than Defendant's own expert did.
>
> Dr. Prichard pointed out that Defendant scored himself in the fifteenth percentile of the entire two percent of mentally retarded people, which would place

him in the moderate to severe rate of mental retardation. (EH Vol. 11 at 1491-92). Defendant indicated in his responses to the ABAS test that he could not order his own meal when eating out, he cannot find a restroom in a public place, he cannot look both ways before crossing a street or a parking lot. Yet, as Dr. Prichard pointed out, in the past Defendant worked at Publix, Winn-Dixie, and at a hospital; could drive a car; take a bus; cook; could buy his own clothes and manage his own money. (EH Vol. 11 at 1492-93). Defendant also obtained a GED.

This Court finds that the evidence presented at the evidentiary hearing rebuts Defendant's alleged limitations and therefore, those limitations may not serve as a justification for finding that Defendant has a deficit in adaptive behavior. ****

Dr. Prichard testified that it is difficult to assess the adaptive behavior of someone who has spent almost his entire adult life in prison, like Defendant, because of the restrictions imposed on the person's behavior. (EH Vol. 11 at 1456-57). The assessment should be of how that person functions in prison relative to other inmates. (EH Vol. 11 at 1457). According to Dr. Prichard, the behavior displayed by Defendant in prison, such as submitting requests for a medical visit and seeking help for an ingrown toenail and eye problems, indicates that Defendant is capable of recognizing a medical issue and going through the proper procedure to get it addressed. (EH Vol. 11 at 1457-58). In addition, Dr. Oakland, Dr. Woods, and Dr. James testified that when they met with Defendant in prison he was clean, well groomed, well mannered, polite, and cooperative. (EH Vol. 1 at 133; Vol. 6 at 751; Vol. 7 at 873-74). The behavior displayed by Defendant in prison reflects positively on his abilities in the area of self-care and health, which is one of the adaptive behavior domains. (EH Vol. 7 at 1457; 1459).

In Dr. Prichard's opinion, the fact that Defendant expressed a desire to have pen pals and an interest in correspondence courses, indicates a capacity for independent functioning and adaptive proficiency that is not present in someone with mental retardation. (EH Vol. 7 at 1458). During Dr.

Prichard's interview, Defendant mentioned that he reads the Bible, and his favorite part is the Book of Ephesians. Defendant also mentioned that he likes reading spiritual books by Smith Riddlesworth and Randall Kendall, which according to Dr. Prichard are too advanced for mentally retarded individuals. (EH Vol. 11 at 1482-84). Dr. Prichard testified that he had mentally retarded people tell him that they read the Bible, but when asked to perform the task they were not able to do it. (EH Vol. 11 at 1484). Dr. Prichard did not ask Defendant to read from the Bible. However, judging by how well Defendant could read a letter addressed to Judge Seay in 1987, written in cursive, and signed by him, Dr. Prichard was sure Defendant could read the Bible as well. (EH. Vol. 11 at 1484). Dr. Prichard asked Defendant to read the letter which was purportedly written by him to Judge Seay, to assess his reading ability. (EH Vol. 11 at 1467; 1481). In his opinion, mentally retarded people cannot read fluently cursive writing. (EH Vol. 11 at 1468). However, Defendant was able to read the letter well and pronounce difficult words and phrases such as "incarceration," "presently," "mitigation," "enmity," "glorious light," and "no longer walking in darkness." (EH Vol. 11 at 1481-82). This Court had the opportunity to review that portion of Dr. Prichard's interview with Defendant and finds that his observations that Defendant could read the letter well were accurate. (Defense Exhibit 52).

The court finds that these strengths in the area of self-care and health and his ability for independent functioning undermine Defendant's self-reported limitations on the ABAS. ***

Dr. Prichard also analyzed Defendant's ability to think abstractly and rationalize his actions and their consequences. He found that Defendant displayed such behavior when he offered self-defense as a justification for killing Gaynell Jeffrey and when he told the police that he had cut himself while washing dishes in an attempt to cover-up the stabbing of the victim in the instant case. (EH Vol. 11 at 1443-44). Dr. Prichard found this conduct relevant because it showed that Defendant was capable of recognizing what type of information the police were seeking and he

could make up a story to protect himself. (EH Vol. 11 at 1444).

Dr. Oakland attempted to disregard Defendant's criminal behavior as having no place in the assessment of adaptive functioning, because it is maladaptive behavior. (EH Vol. 7 at 877). However, this Court finds the conduct relevant because it shows not only that Defendant had the ability to orchestrate and carry out his crimes, but also that through his acts of self-preservation he had the ability to adapt to his surroundings. ***

Dr. Prichard found the fact that Defendant obtained a GED to be one of the most compelling factors in his assessment that Defendant is not mentally retarded. (EH Vol. 11 at 1500). He explained that the GED has five (5) sections: math, reading skills, English, writing, and science and social studies. The candidate has to score a minimum of 40 for each section and obtain an aggregate score of 225. (EH Vol. 11 at 1501). When Defendant took the test the first time in 1988, he obtained the minimum score of 40 in each section, but he did not obtain the necessary aggregate score to pass the test. When he retook the test in 1994, he scored 55 in reading, 40 in writing, 47 in math, 45 in English, 46 in science and social studies. His aggregate score was 233, which was above the aggregate score of 225 required in order to pass the GED test. (EH Vol. 11 at 1501). Although Dr. Oakland testified that a mentally retarded person can get a GED, Dr. Tasse's response to the question whether a mildly mentally retarded person could graduate from regular high school and could get a GED, was evasive: "I want to say those who are graduating from high school in that 30 to 35 percent, the Department of Education puts out I would imagine most of them have mild mental retardation. The likelihood of graduating from high school diminishes substantially as your IQ drops." (EH Vol. 1 at 164-65; Vol. 7 at 862).

This Court finds that the fact that Defendant persevered and obtained a GED diploma further rebuts his alleged limitations in academic achievement and adaptive behavior. *See Dufour*, 69 So. 3d at 250-52 (noting that "[s]uccessfully passing a GED exam has

traditionally been no simple matter" and finding that defendant's successful mastering of the rigorous test revealed individual cognitive strengths that rebutted his asserted limitations of poor academic performance, and constituted direct proof that defendant did riot have deficits in adaptive behavior). For the reasons set forth above, this Court finds that Defendant has failed to establish by clear and convincing evidence the second prong of the statutory definition of mental retardation, which requires a showing that Defendant's adaptive deficits are current and concurrent with subaverage intellectual functioning.

(PCR.17 2885-89)(citations omitted).

(3) <u>Onset Prior to Age Eighteen</u> – The trial court found:

Since Defendant was not formally diagnosed with mental retardation prior to the age eighteen, a retrospective assessment was conducted by Dr. Oakland. He administered the ABAS test to Defendant's two sisters, focusing on information regarding Defendant's adaptive behavior between the age of sixteen and seventeen. (EH Vol. 7 at 867; 873).

***

This Court has serious concerns regarding the validity of Dr. Oakland's retrospective analysis of Defendant's adaptive deficits prior to age eighteen. His testimony did not reveal that he used his clinical judgment to weigh the information provided by the respondents against information from other sources to determine their consistency and reliability. As Dr. Prichard noticed after reviewing some of the records in this case, Clinita is not the most accurate or reliable respondent, especially since she had a history of misrepresenting facts about Defendant. (EH Vol. 11 at 1486). One example provided by Dr. Prichard was that she previously testified that Defendant started school as an adolescent, which is inaccurate. Although there is some uncertainty as to Defendant's birth date, he started school when he was six or seven years old. (EH Vol. 11 at 1486). In addition, Clinita's reporting on the ABAS was inconsistent with her prior testimony at trial that Defendant was pivotal in helping her raise the other

siblings, looking for food, and doing other things that children his age should not have to do. (EH Vol. 11 at 1486). Dr. Prichard also found the results of Clinita's ABAS exaggerated to the point of being absurd. (EH Vol. 11 at 1509). She rated Defendant one, in seven out of the nine skill areas assessed, indicating that he has major adaptive deficits that would require him to be institutionalized because he would have no independent skills. (EH Vol. 11 at 1487). Dr. Prichard explained that Defendant's significant drug issues may have impacted his adaptive functioning at that age. (EH Vol. 11 at 1489). This Court also questions the reliability of Althamease's reporting, since she was significantly younger than Defendant, and had less of an opportunity to interact with him and observe his behavior.

The evidence presented during the evidentiary hearing established that in his early years of school Defendant did not do very well academically. Dr. James testified that in his first year, Defendant got "N" in ·his core academic subjects like reading, writing, spelling, social studies, which indicated that he needed improvement. (EH Vol. 1 at 87). Defendant was retained in the second grade, which according to Dr. James was an indication that he had learning problems. (Eh Vol. 1 at 89-90). When he repeated the second grade Defendant had satisfactory grades across the board. (EH Vol. 1 at 90). In the fourth and fifth grade, the majority of his grades were D's and C's. (EH Vol. 1 at 90). In 1973, Defendant was administered the Peabody picture and vocabulary test, and the score placed him lower than the first percentile. (EH Vol. 1 at 91).

Dr. Prichard admitted that Defendant did not do very well academically in his first years of school, but then he started improving. In the fourth grade, when the Wide Range Achievement Test (WRAT) was administered to Defendant, he performed at grade level, obtaining a reading score of 4.1 and an arithmetic score of 3.9. (EH Vol. 11 at 1505). Dr. Prichard also noted that Defendant achieved into the twelfth grade, passing some areas but not others, and more significantly, that he was not placed in any special education classes. (EH Vol. 11 at 1505-06). Defendant offered the testimony of one of his math

> teachers, Janice O'Loughlin, to show that. Special education classes did not exist when he was enrolled in school. However, Ms. O'Loughlin's testimony was vague, she merely stated that she did not remember if they had special education classes when Defendant was in school, and she believed those types of classes were offered later. (EH Vol. 2 at 322).
>
> This Court finds that Defendant failed to establish by clear and convincing evidence the last prong of the statutory mental retardation definition.

(PCR.17 2889-94)

C. MERITS – Williams asserts that the trial court erred in several respects: (1) permitting Dr. Prichard to testify; (2) finding the WAIS-III score the more credible score; (3) finding Williams had not met the "deficits in adaptive functioning" prong; and (4) in rejecting the claim that Williams had low IQ and adaptive deficits before age 18. The record supports the trial court's acceptance of Dr. Prichard as an expert as well as the factual and credibility findings regarding each prong of the intellectual disability claim. Williams has failed to establish error and this Court should affirm.

(1) Dr. Prichard – *Chavez v. State*, 12 So.3d 199, 205 (Fla. 2009) addresses the inquiry required before a witness is permitted to render an expert opinion.

> Before an expert may render an opinion, the witness must satisfy a four-prong test of admissibility. Section 90.702, Florida Statutes (2007), provides:
>
> > If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in

> determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.
>
> This section requires the court to make two preliminary determinations: (1) whether the subject matter will assist the trier of fact in understanding the evidence or in determining a disputed fact, and (2) whether the witness is adequately qualified to express an opinion on the matter. *See Huck v. State*, 881 So.2d 1137, 1149 (Fla. 5th DCA 2004). Once these threshold determinations are affirmatively satisfied, two more requirements must be satisfied ***.
>
> . . . A witness may be qualified as an expert through specialized knowledge, training, or education, which is not limited to academic, scientific, or technical knowledge. An expert witness may acquire this specialized knowledge through an occupation or business or frequent interaction with the subject matter. *** The witness must possess specialized knowledge concerning the discrete subject related to the expert opinion to be presented. See Charles W. Ehrhardt, Florida Evidence § 702.1, at 686-87 (2008 ed.).

Chavez, 12 So.3d at 205.

Williams asserts that Dr. Prichard should not have been permitted to testify in a *Atkins* hearing because he was not qualified to render an opinion on intellectual disability (ID), did not conduct a proper evaluation, and his conclusion were not supported by the evidence. (IB at 60). Only the first assertion has any bearing on the issue of whether Dr. Prichard should have been permitted to testify, i.e., whether Dr. Prichard had "specialized knowledge, training, or education" to assist the

trier of fact. The challenges based on the evaluation conducted and the conclusion drawn each go to weight, not admissibility of an expert opinion.

Extensive *voir dire* was conducted with Dr. Prichard. The testimony revealed that in 1994, Dr. Prichard was awarded a doctorate in clinical psychology,[9] received his Florida license in 1996, and started a forensic practice that year as he continued to conduct a clinical practice at the Florida State Hospital. Since 2011, almost all of Dr. Prichard's practice entailed forensic, sanity, and competency assessments including mental retardation and sexual predator evaluations. By the 2012 evidentiary hearing, Dr. Prichard had conducted approximately 2000 ID evaluations. His subspecialty is forensic psychology and he has a "specialization in assessing for mental retardation," resulting in completing at least two to three ID evaluations per week since 1996. (PCR.51 5188-90, 5195, 5201-02) Dr. Prichard is associated with the American Association of Intellectual Development Disabilities (AAIDD), the Florida Psychological Association, and the American Psychological Association. (PCR.51 5193). He has been qualified as an expert throughout the state – from Key West to Tallahassee. Dr. Prichard has never been denied the opportunity to qualify as an

[9] Dr. Prichard chose to seek a Psy.D. degree versus the Ph.D degree because he was more interested in the "applied psychology" than the researcher/academic endeavor. (PCR.51 5192)

expert and render an opinion in the field of psychology or mental retardation. (PCR.51 5193-94) Bi-annually, psychologists in Florida are required to achieve 40 hours of continuing education and Dr. Prichard had met this licensing requirement. (PCR.51 5197-98)

Following *voir dire*, counsel for Williams stated that she had no objection to Dr. Prichard's "expertise as a psychologist to testify in a general case," that she knew he had been accepted numerous time with respect to competency,[10] sanity, and *Atkins* cases. (PCR.51 5231-32) Williams asserted that a higher level of expertise was required in Atkins cases and that specifically Dr. Prichard should not be allowed to testify because he was not affiliated with a teaching university, he does not teach, he does not conduct research, he does not publish, that he could not recall the last seminar on ID that he attended, he is not a member of a special group on ID. Williams' counsel argued "Dr. Prichard just has not been shown to have the expertise to testify in a high stakes case like this." (PCR.51 5232-34).

Here, Williams reasserts similar challenges to Dr. Prichard's expertise and suggests that a mental health expert should be held to a higher standard of "expertise" when testify

[10] Dr. Prichard had testified that his competency evaluations involve assessment of mental illness **and mental retardation**. (CPR.51 5203)

in a capital case involving ID similar to an attorney must have additional experience before representing a capital defendant. The standard offered by Williams is not supported by the law. The testimony established that Dr. Prichard had the proper educational background,[11] licensing, and expertise in clinical/forensic psychology including conducting some 2000 ID evaluations since 1996. The trial court properly found Dr. Prichard qualified as an expert and that all of Williams' challenges went to the weight of his testimony, not its admissibility. The trial court did not abuse its discretion. *See Chavez*; *Ramirez*.

(2) <u>Subaverage Intellectual Functioning</u> – It is Williams' contention that he is intellectually disabled, and thus, exempt from the death penalty. However, he has not carried his burden of proving each of the three prongs under §921.137(1), Fla. Stat. and Fla.R.Crim.P. 3.203 to prove mental retardation.[12] He

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[11] Williams takes issue with the accreditation of the school from which Dr. Prichard earned his doctorate and the fact that he obtained a Psy.D. Yet, Dr. Prichard explained the misunderstanding Williams suffered regarding the accreditation and the basis for the Psy.D. instead of the Ph.D. Dr. Prichard's interests lay with application of psychology, not the academics, and he became licensed in 1996 and has never lost his license. Williams' focus on these factors is disingenuous and in no way diminishes Dr. Prichard's expertise. This is especially true as he had conducted some 2000 mental retardation evaluation at that time and was never denied the status of testifying expert in Florida courts.

[12] Rule 3.203 provides that:

has not shown that his full scale IQ score was 70 or below[13] concurrently with deficits in his adaptive behavior which exists

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> 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 65G-4.011 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.

(emphasis supplied). In *State v. Herring*, 76 So.3d 891, 895 (Fla. 2011), the Florida Supreme Court announced that in order for a defendant to be exempt from the death penalty under rule 3.203(b) and §921.137, he bears the burden of proving by convincing evidence all three criteria of the three-prong standard. *See also, Franqui v. State*, 59 So.3d 82, 92 (Fla. 2011) (holding that "[a] defendant who raises mental retardation as a bar to imposition of a death sentence carries the burden to prove mental retardation by clear and convincing evidence.")

[13] It must be noted that the trial court held a hearing on Williams' ID claim; the IQ score of 75 did not preclude evidentiary development. Equally important, the trial court assessed the other two prongs under rule 3.203 addressed to adaptive functioning and made findings that Williams did not carry his burden here. As a result, the Supreme Court's recent review of Florida's ID assessment in *Hall* does not impact the instant matter. Williams obtained that which *Hall* requires, i.e., an opportunity for evidentiary development. What the trial court was left to assess was the weight and value of that evidence in determining whether Williams was ID. The trial court made that assessment as the trial of fact and its findings are supported by the record.

presently and had manifested before age 18.

Williams takes issue with the trial court's determination that the WAIS-III score of 75 was the more credible score and argues that the WAIS-IV is the only valid score. The trial court found the WAIS-III more credible because it was given before Williams had decided to pursue ID as a bar. Further, the trial court reasoned, that had Dr. Harvey had any questions as to the validity of the WAIS-III, given the anticipated publication of the WAIS-IV, he could have given the Sanford-Binet IQ test. Moreover, Dr. Harvey's opinion that the RBANS test supports the WAIS-IV score was undermined completely by the approximate 12 scoring error Dr. Harvey committed, most of which would have resulted in a higher score that Dr. Harvey reported. The trial court found that Dr. Harvey testified that the errors in the RBANS would not change the IQ scores; however, Dr. Harvey had used the RBANS score to support the WIAS-IV findings.[14] Clearly, with that contention undermined by the errors, the support for the WAIS-IV score was called into question. Furthermore, as Dr. Prichard testified, the WAIS-III cannot simply be ignored. (PCR.52 5247). The trier of fact and

[14] Williams claims the trial court misconstrued Dr. Oakland's testimony regarding the Flynn Effect. Such is not the case. The trial court was referencing Dr. Harvey's opinion that the difference in the WAIS-II and WAIS-IV may have been due to the Flynn Effect, however, that was not the basis for the rejection of the claim. (PCR.17 2876)

credibility, reasonably resolved the difference in scores finding the WAIS-III more indicative of Williams' ability[15] and noted that Williams could score no higher than his ability allowed; Williams was able to score a 75 on the WAIS-III, and this was found to be the more credible result. However, this did not end the inquiry, nor was it the deciding factor.

(3) Adaptive Functioning Deficits Current and Manifested before 18 - As the trial court found, Williams has not shown that he has deficiencies in his adaptive behaviors currently and manifested before age 18. Dr. Oakland merely relied upon Dr Harvey's reported IQ scores without getting the raw data and

[15] The trial court conclusion is supported by the evidence that when Dr. Harvey was sent to evaluate Williams initially, it was not specifically for ID, but he opted not to give any tests assessing whether Williams may be malingering. (PCR.43 4093, 4097) Yet, when he returned in **July 2009**, it was to determine mental retardation, and even before the WIAS-IV was given, Williams had filed, in **March 2009**, his motion claiming he was ID although he had an IQ score of 74 (based on a scoring error). (PCR.43 4095-96) Also, Dr. Harvey offered that RBANS testing assessed how a person's brain works in various areas including problem solving and communications and that the RBANS results generally are consistent with WAIS-III and WAIS-IV results. (PCR.43 4080). However, Dr. Harvey made some twelve scoring errors; nine of those scores should have been higher than those reported. (PCR.43 4113-22). Furthermore, Williams could fail some tests merely by saying "I don't know", working slowly, or refusing to respond. Likewise, the results may be influenced by such factors as motivation, anxiety, depression, lack of sleep, distractions (PCR.47 4625; PCR.50 5038; PCR.52 5268-69). An additional factor weighing on the side of the WAIS-III is that no malingering assessment was made of Williams on the offered excuse that mentally retarded individuals will give false positive results for malingering. Yet, as noted above, no malingering tests were given in June 2008 even when Dr. Harvey had no knowledge that Williams may be ID.

noted that the WIAS-IV satisfied the first prong of rule 3.203. (PCR.48 4736) Williams relies on Dr. Oakland's testimony that a mildly mentally retarded person can express pain, display emotion, seek medical attention, keep himself clean and groomed, get employment, have children, get a driver's license, write letters, feed a pet, graduate from high school, and get a GED. (PCR.48 4692-94, 4710-12). Yet, Dr. Prichard rejected such contention noting that those with ID are in the lowest two percentiles and some of these accomplishments require a much higher ability.

Dr. Oakland administered the ABAS test to Williams and his sisters, Clinita Lawrence of Althamease to assess the second prong of the rule and determine Williams' adaptive behavior because he thought Florida law so requires and even though he thought it was "silly" and irrelevant because Williams is in prison and inmates are not permitted to do very much. His choice would be to not use the ABAS on a 50 year old inmate. The ABAS was not normed for those in prison and is not designed for retroactive application (PCR.48 4681, 4691-4700, 4727). As such, the trial court reasonably relied on other factors. *See Phillips v. State*, 984 So.2d 503, 511-12 (Fla. 2008) (providing "trial court does not weigh a defendant's strengths against his limitations in determining whether a deficit in adaptive behavior exists" but rather considers the experts' findings and

other evidence, to resolve whether the defendant has adaptive functioning deficits by assessing the evidence of limitations and evidence rebutting such evidence of limitations).

However, Dr. Oakland did not review Williams' prison records which indicated he asked for medical, psychological, and other types of assistance using the proper procedures. (PCR.48 4708-08, 4726, 4745; PCR.61 Def. 46 6276-6353) Also, Dr. Oakland did not consider Williams actions taken/decision made during the two murders and when confronted by the police because criminal acts are not part of the adaptive behavior scales. (PCR.48 4708-09) In spite of the fact Dr. Oakland would not want to use/rely on the ABAS on a 50-year old inmate, such as Williams, and noting he was not comfortable making a judgment on Williams intellectual ability in his youth based on adult scores, Dr. Oakland did just that. He found mental retardation under Florida law even though he was not comfortable with his finding. (PCR.48 4724, 4736-44).

Dr. Oakland also administered achievement tests to Williams and found the scores to be consistent with mild mental retardation and that the scores ranged for six-and-a-half year old to approximately 14 years old. (PCR.48 4714-15). The results of the Woodcock-Johnson achievement tests revealed that Williams scored in the seventh and eighth grade level on the Reading, comprehension, calculation, and broad math areas.

(PCR.48 4745-46). However, Dr. Prichard testified that a mentally retarded person would not achieve such high scores, instead a mentally retarded person would be expect to barely reach the sixth grade level.

When Dr. Prichard evaluated Williams, he found Williams did not seem to have any problems communicating, and was able to comprehend and interact well. PCR.52 5270-74). Because the WAIS- III and WAIS-IV had been given, Dr. Prichard conducted a comprehensive evaluation. Dr. Prichard inquired of Williams as to his personal history, educational background, and work history. (PCR.52 5272-74). In talking with Williams, the doctor assessed whether there was goal-oriented behavior, i.e., whether Williams was able to handle abstraction. An example of abstraction would be Williams giving an excuse, such as self defense in the killing of Gaynel Jeffrey (1984 homicide victim)[16] or Williams' rationalization/abstract thought in telling the police following the instant murder that he had cut his finger while washing dishes. According to Dr. Prichard, ID individuals are found in the lowest two percentile. Williams' responses and

[16] Further evidence that Williams has adaptive abilities and abstract thinking comes for the facts of the Gaynel Jeffrey's murder. There he removed the body of his victim using the Jeffrey car, dumping the body at a construction site, and returning the car. Such showed planning and forethought. It indicates Williams recognized the situation he was in, and his taking steps to cover it up. (PCR.52 5339).

his reports of the murders suggested to Dr. Prichard that Williams was not ID. (PCR.52 5275-77).

Dr. Prichard considered the results of the WRAT test Dr. James gave to Williams in July 2012. On that test, Williams received a score of 80 in reading with a grade equivalent of 6.9 and 84 in spelling with a grade equivalent of 7.3, and 88 in math with a grade equivalent of 6.8. These scores are important because there is a high correlation with IQ test scores and they are high academic achievement scores for someone considered mentally retarded. Such indicate Williams is in the "low average" range for intelligence while most mildly ID persons function in the third to fourth grade level. (PCR.52 5281-82). More telling from the WRAT score[17] is that Williams was in the low average range and demonstrated skills in the 9th to 21st percentile range which is inconsistent with ID as such a person has skills in the first two percentiles. Someone with Williams' skills can read a job application, balance a check book, and read any document with sufficient proficiency to make a decision about that document. Williams' scores were one standard

[17] Dr. Prichard recognized that Williams did not do well academically at first getting a 61 on the Slosson IQ test and 73 on the Peabody which are abbreviated IQ tests. However, When the WRAT was administered in the fourth grade, Williams was reading and doing math at grade level. Williams achieved into his senior year and the school records did not indicate he was in any special education classes. (PCR.52 5337).

deviation above that expected of a mentally retarded individual and do not support a finding of deficiencies in adaptive behavior sufficient to meet the standard of rule 3.203 or §921.137. (PCR.52 5283-84).

Also telling was Williams' ability to read a 1987 letter to Judge Seay penned in cursive writing. This was to assess Williams' reading ability. Dr. Prichard explained that ID people usually do not read very well at all and most are unable to read cursive writing. The trial court reviewed the videotape of Williams interaction with Dr. Prichard and found Williams read the letter well, pronounced difficult words properly, and had little if any difficulty reading the cursive writing. Williams easily read such advanced words as "incarceration," "presently," "mitigation," and "enmity," and phrases "glorious light," and "no longer walking in darkness." Williams' reading ability as shown with the Judge Seay letter indicates that his reading ability is not conducive to ID. Also counter-indicative of ID is Williams reporting of the religious book authors he read and his recollection of a title. ID individuals are not able to read such authors; such books are too advanced for them. The same can be said of the Bible. On the video, Williams stated that his favorite book was Ephesians (PCR.52 5298-5316 1466-70, 1480-84; PCR.73 State Ex. 6 8500-03).

Dr. Prichard reviewed the raw data obtained on the ABAS and

agreed that assessing adaptive behavior of someone who has spent his entire adult life in prison is difficult in part because the person's behavior is more limited in prison. The assessment is of how the person functions in prison relative to other inmates, yet, the ABAS was not designed for that evaluation. (PCR.52 5287-89) Such activities as submitting a request for a medical visit, self care, seeking help for an ingrown toenail and eye problems, desire for pen pals, looking for correspondence courses all indicate that person can identify a problem and take the necessary steps to address the problem appropriately. ID individuals do not have the capacity to function independently. These actions by Williams indicated his adaptive capacity. (PCR.52 5289-90)

Williams takes issue with such an assessment. However, *Jones v. State*, 966 So.2d 319 (Fla. 2007) provides:

> Next, Jones argues that *Atkins* essentially prohibits a determination of an individual's current adaptive skills if that person, like Jones, is in prison. He claims that adaptive functioning has to be determined from an individual's adaptive functioning in the "outside world." To the contrary, as we stated above, the Court in *Atkins* left the definition and determination of mental retardation to the States. *See Atkins*, 536 U.S. at 317, 122 S.Ct. 2242 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)). Moreover, the State's expert did not base his opinion solely on his interviews with prison guards. In determining that Jones was not deficient in adaptive behavior, Dr. Suarez relied on his interview with and testing of Jones, his examination of records regarding Jones's life from his childhood to the time of the rule 3.203 hearing, and

> interviews and testing of DOC staffers who observed Smith on a regular basis. Thus, as Dr. Suarez admitted, while the adaptive skills test administered to DOC staff regarding Jones's adaptive functioning is not ideally suited to a prison environment, the test was not his sole source of information. Further, the evidence demonstrates that both in and out of prison, Jones understands and manages his own life.
>
> In prison, Jones follows a daily exercise regimen of his own devising and uses improvised equipment to gain, according to Jones, the benefits of health and stress relief. He understands his various medical problems, the related medication, and self-administers it on schedule. He writes requests to see doctors, specifically defining his medical problems, and suggests changes in diet or medication. He manages the finances of his inmate account, including obtaining appropriate documentation, following up on money transfers from foreign countries, and filing grievances when he finds a discrepancy in the account. He keeps himself and his cell clean and orderly and visits the prison library twice a week. His language skills in writing, speaking, and other intellectual skills are strong in light of his dropping out of school at an early age. In addition, in the "outside world" as a young adult from age 18 to 29 (before he committed the murders), Jones traveled alone, lived in several states, and supported himself through various jobs. He had girlfriends at various times and for several years lived with a "common law wife," as he correctly termed her.

Jones, 966 So.2d at 327-28.

Also with respect to the ABAS, Dr. Prichard had concerns about Clinita Lawrence's completion of the ABAS on Williams. Clinita, Williams sister/surrogate mother, had a history of misrepresenting facts about Williams such as his starting school as an adolescent which Williams started when he was six or seven years old. Also, in her testimony, Clinita had indicated

Williams helped raise his siblings, looked for food, and was helpful to her. However, her answers on the ABAS were inconsistent with that earlier testimony.[18] Clinita related Williams as having "essentially" no independent skills in seven of the nine areas tested. (PCR.52 5319-19). The ABAS Clinita completed was inconsistent with all Dr. Prichard had reviewed in the prison records, former testimony, employment history, and fact Williams, in his late teens, started spending nights away from home. For similar reasons, Williams self-report appeared to lack credibility and speaks to Williams' motivation to establish he is extremely impaired. For Dr. Prichard, this also implicated Williams' results on the WAIS-III and WAIS-IV. As Dr. Prichard noted, one "can't fake smart." (PCR.52 5319-26). As Dr. Prichard noted, looking at all of the data and test results, on a "vast majority" of the data, Williams was functioning above the 2nd percentile which contraindicates mental retardation. (PCR.52 5331)

The fact Williams obtained his GED was probably the most important factor in Dr. Prichard's analysis; a mentally retarded individual "cannot demonstrate the academic proficiency" or

[18] Further evidence that the ABAS reports were skewed downward came from the answer that Williams could not give the correct amount of change for purchases over $10.00. However, one of the questions Williams answered properly was that $56.37 was the proper change for a transaction of $62.75 less $5.75. Such indicates his is able to go to a store and exchange money for goods. (PCR.52 5336).

"academic mastery to get a high school diploma." Mentally retarded individuals are the lowed two percentiles, maximum sixth grade level. In order to get a GED, one must demonstrate proficiency at the twelfth grade level. Williams points to the testimony from Dr. Tasse' that there is a 30% to 35% graduation rate for those with ID. However, Dr. Prichard stated that he has yet to meet a legitimately mentally retarded person, of the thousands he evaluated, that was able to pass even one section of the GED exam, much less the entire exam. Williams' scores on the WRAT are consistent with one who is able to get his GED. (PCR.52 5332-35). The trial court, as fact-finder, was permitted to find Dr. Prichard more credible than the defense experts and Williams has not carried his burden to prove ID. This Court should affirm.

Also, during the evaluation, Dr. Prichard asked Williams to read a letter[19] written to Judge Seay in 1987. This was to assess Williams' reading ability. Mentally retarded people usually do not read very well at all and most are unable to read cursive writing which was used to write the Judge Seay letter. As this Court will recall from its viewing of the video of Dr. Prichard's evaluation, Williams read the letter well, pronounced

[19] Williams contends that he did not pen the letter and he offered Dr. Haywood to so attest. (PCR.49 4802) While the State does not concede the point, such is irrelevant as Dr. Prichard used the letter to assess factors other than the plea put forward either by Williams or someone on his behalf.

difficult words properly, and had little if any difficulty reading the cursive writing. Williams easily read such advanced words as "incarceration," "presently," "mitigation," and "enmity," and phrases "glorious light," and "no longer walking in darkness." This was a point not lost on the trial court. (PCR.17 2886-87) Williams' reading ability as shown with the Judge Seay letter indicates that his reading is not conducive to ID and supports the trial court's rejection of the ID claim. Also counter-indicative of ID is Williams reporting of the religious book authors he read and his recollection of a title. Mentally retarded individuals are not able to read such authors; such books are too advanced for the mentally retarded. The same can be said of the Bible. On the video, Williams stated that his favorite book was Ephesians (PCR.52 5298-5302, 5312-16; PCR.72 video; PCR.73 State ex. 6 8500-03). As the trial court found, Dr. Prichard's review of records, as well as his evaluation and interaction with Williams undercuts the defense case for ID. (PCR.17 2878-81, 2885-89, 2892-94) It supports the trial court's credibility and factual findings. Relief was denied properly and should be affirmed.

ISSUE III

RULE 3.852 FLA. R. CRIM. P. AND SECTION 27.7081, FLA. Stat. DO NOT VIOLATE ARTICLE I, SECTION 24 OF THE FLORIDA CONSTITUTION AND THE TRIAL COURT DID NOT ABUSE ITS DISCREDTION IN RULING ON WILLIAMS' PUBLIC RECORD REQUESTS (restated)

Williams makes two arguments: (1) that section 119.19, Fla. Stat.[20] and rule 3.852, Fla. R. Crim. P. violate Florida's Constitution on their face and as applied because capital inmates do not have access to records available to other citizens and the Department of Corrections ("DOC") public records disclosure was untimely and may not have disclosed all records; and (2) the trial court erred in concluding that Williams failed to identify the records sought, but denied. This Court has found repeatedly that these provisions are constitutional and Williams has not provided a basis for altering that conclusion. Additionally, extensive hearings were held on Williams' public record requests with the trial court entering detailed orders. Other than making speculative suggestion of wrongdoing by DOC, Williams has not identified harm he suffered by any delay by DOC in its disclosure, nor has he stated with specificity records which exist, but to which he was denied in error. Likewise, other than referencing ten orders on public records, Williams has not identified specifically where the trial court abused its discretion in ruling on the public records requests. Those orders gave specific reasons for the denial of records and or noted that

[20] As this Court has noted, "section 119.19 was renumbered as section 27.2081, Florida Statutes, on October 1, 2005. *See* ch. 2005-251, §39, Laws of Fla." *Wyatt v. State*, 71 So.3d 86, 111 n.18 (Fla. 2011).

there was no *Brady*[21] material contained therein. This Court should affirm.

A. STANDARD OF REVIEW – Pure questions of law, are reviewed de novo. *See State v. Glatzmayer*, 789 So.2d 297, 302 n.7 (Fla. 2001) (stating "If the ruling consists of a pure question of law, the ruling is subject to de novo review"). However, as provided in *Geralds v. State*, 111 So.3d 778, 801 (Fla. 2010): "'A circuit court's ruling on a public records request filed pursuant to a [postconviction] motion will be sustained on review absent an abuse of discretion.' *Coney*, 845 So.2d at 137."

B. THE TRIAL COURT RULING – The trial court conducted numerous hearings on Williams' public record requests and ruled on each of those matters. The trial court considered the requirements of rule 3.852 and the agencies' objections including claim that the records requested were not "public records", were exemption, relevance, over breadth, and undue burden. Additionally, the records were reviewed for *Brady* material. Specific ruling were entered on the requests made some of which included concessions by Williams that the objections/exemptions were proper. The State will address the trial court's rulings in more detail below.

C.1. MERITS - Constitutionality of Rule 3.852 and §27.2081

[21] *Brady v. Maryland*, 373 U.S. 83 (1963).

With respect to the "***on its face***" constitutional challenge, Williams asserts that as a death row inmate he has additional burden to carry than other citizen in order to obtain public records. This, he claims, violates Article I, Section 24 of Florida's constitution. This Court has held repeatedly that these sections are constitutional. In *Wyatt v. State*, 71 So.3d 86, 111 n.18 (Fla. 2011), this Court reasoned:

> Section 27.7081 and rule 3.852 pertain only to the production of records for capital postconviction defendants. *See* § 27.7081(13), Fla. Stat. (2009); Fla. R.Crim. P. 3.852(a)(1). These provisions do not prevent a capital defendant from making postconviction public records requests. In fact, upon the issuance of this Court's mandate, records relating to a capital defendant's case are automatically required to be delivered to the postconviction repository. § 27.7081(7)(b)(1), (3), Fla. Stat. (2009); Fla. R.Crim. P. 3.852(g)(3)(A), (D). Should the agency receiving an additional request object to that request, a hearing will be conducted, during which the agency will advise the defendant as to why it cannot comply and what narrowing information would be required in order to comply with such a request. *See Moore v. State*, 820 So.2d 199, 204 (Fla. 2002) ("When a capital defendant claims that a state agency is withholding pertinent public records, the trial court should hold a hearing regarding such claims."). This Court has "consistently held that a defendant must plead with specificity the outstanding public records he seeks to obtain." *Rodriguez v. State*, 919 So.2d 1252, 1273 (Fla. 2005). As the Court has acknowledged, "rule 3.852 'is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief.'" *Moore*, 820 So.2d at 204 (*quoting Glock v. Moore*, 776 So.2d 243, 253 (Fla. 2001)). Likewise, section 27.7081 provides for nearly identical methods of access to public records in capital postconviction cases. Requiring that a capital defendant's additional request be timely made after a diligent search and that this request not be overly

> broad or unduly burdensome places a reasonable restriction on access to these records. *See Allen v. Butterworth*, 756 So.2d 52, 66 (Fla. 2000) ("[T]he Legislature has the prerogative to place reasonable restrictions on the right of public records access...." (internal quotation marks omitted)). This is because a capital defendant's additional request follows the State agencies' initial delivery to the repository. We conclude the requirement that a defendant make a diligent search through records already produced and narrow his or her request to provide adequate notice to the agency from which he or she seeks information is reasonable in the context of capital postconviction claims.

Wyatt, 71 So.3d at 111. *See Lambrix v. State*, 124 So.3d 890, 895, n.2 (Fla. 2013) Williams has offered nothing to call into question the constitutionality of Florida public records law.

Turning to the "as applied" challenge, Williams implies that the agencies use the dictates of rule 3.851 and its requirement that the requests be relevant to a colorable claim, not overly broad, or unduly burdensome as a "shield" to deny access to records, thus rendering the provisions unconstitutional as applied. For support Williams points to Justice Anstead's admonition in *Sims v. State*, 753 So.2d 66, 72 (Fla. 2000), but offers not actual harm suffered. While Williams' argument may be read to claim that DOC was untimely in its disclosure and that that the multiple disclosures should be given a nefarious meaning,[22] he has not shown any records to

[22] With respect to Williams' challenge to DOC's public records disclosures, Williams offers nothing but supposition and speculation. Williams' reference to what may have taken place

which he was entitled that were not disclosed, but should have been. Any late disclosure caused Williams no harm as he was permitted to amend his postconviction motion and was granted an evidentiary hearing on his claims of ineffective assistance and intellectual disability.

Likewise, Williams' reference to *Brady* material is not supported with respect to his second-degree murder conviction. (IB at 82) He has not identified what records were exculpatory. In fact, he has not alleged that he did not have these records as he asserts that they were used in aggravation in the penalty phase of his initial trial. Williams has not shown that the records were not accessible to him or had not been disclosed previously. Equally important, he has not shown that the retention policy was unconstitutional nor has he advised this Court of how the alleged lack of records has "hampered" him in the preparation of his case. Williams does not plead materiality, thus, he cannot show either a *Brady* violation or that the retention policy renders rule 3.852 somehow unconstitutional as applied to his case. Williams' lack of

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in the Victor Jones and Joel Diaz cases has no bearing on the instant matter. He has not shown that some relevant document subject to public records disclosure was denied improperly by the trial court. Moreover, while there were multiple disclosures, each was explained by counsel for DOC and the trial court made rulings on such. Williams again fails to present any basis for challenging the resolution of the challenges to DOC's compliance with the public record requests in this case.

specificity precludes a more specific answer from the State.

Williams complains that DOC has destroyed records under its retention policy. The fact that some records may have been destroyed based on a set retention policy does not render the provisions unconstitutional. *Cf. Reese v. State*, 7 So.3d 651, 652 (Fla. 3d DCA 2009) (finding no error where Agency could not produce records as they had been destroyed under retention policy). His suggestion that DOC has given the State access to records, but not the defense in other cases is mere speculation and has no bearing on what transpired in the instant matter as Williams has not shown an erroneous denial of records here. Likewise, Williams' opinion as to what records were not "clinically appropriate" in Victor Jones' case, but provided by DOC to the State again has no bearing on the propriety of the disclosure made here. While Williams correctly reports that DOC claimed "inmate financial records and account balances" were not shown to be relevant for public records disclosure, Williams fails to advise this Court that that objection was overruled. The trial court ordered that "DOC is required to submit to the repository any inmate account balances and financial records that have not been previously provided to collateral counsel…." (PCR.14 2480).

Williams' complaint that "delay and/or denial of access to crucial public records" denied him due process and equal

protection and "continuously embarrassed" him lack specificity. It is important to recognize that Williams suffered no harm from any delay; he was given multiple opportunities to amend his postconviction complaint. Moreover, the trial court held multiple hearings on the issue, made detailed findings, and considered whether exempt records contained *Brady* material. (PCR.5 796-800; PCR.7 1034-35; PCR.8 1252-64, 1283-94, 1301-08; PCR.14 2479-89; PCR.15 2490-93) The rulings show that the trial court considered the arguments of the parties and regardless of any intent Williams may attribute to the agencies, the trial court ensured that the agencies followed the law and that Williams had time to review the records and amend him motion. (PCR.17 2846-47).

As his last point, Williams asserts that the trial court erred in finding that he had not identified the records that "were sought but denied." (IB 85-85). Such finding was made with respect to Williams' "as applied" challenge to §27.7081. (PCR.17 2846). Such ruling was in response to the argument: "Since the inception of Rule 3.852, capital litigants have repeatedly argued that Section 119.19, Florida Statutes,[23] and rule 3.852 violate the rights of capital litigants under Article I, section 24, of the Florida Constitution . . . because they

[23] As noted above, section 119.19 has been renumber section 27.7081.

impermissibly restrict his access to public records." (PCR.13 2168) Other than referencing §119.19 in the style of the claim, the balance of the argument referenced rule 3.852. Williams did not identify any specific record denied him in error under §119.19.

The trial court determined:

> As to Defendant's argument that section 27. 7081, Florida Statutes is unconstitutional as applied to him, he has not alleged any particular records that were sought but denied by this Court under that provision. Therefore, this Court finds Defendant's as-applied constitutional challenge to section 27.7081 without merit. *See Wyatt*, 71 So. 3d at 111 (rejecting defendant's argument that section 27. 7081 and rule 3.852 were unconstitutional as applied to him, because he failed to "allege any particular records that were sought but denied under either provision").
>
> With regard to Defendant's as-applied challenge to rule 3.852, he raises several issues and objections to this Court's denial of his public record requests. First, to the extent Defendant challenges the State's failure to timely notify the law enforcement agencies of their duty to submit their records to the records repository, this Court finds this contention without merit. This Court granted collateral counsel's request for extension of time to review the records and prepare supplemental demands for additional records. Defendant twice was able to amend the initial postconviction motion.
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> Second, Defendant objects to this Court's orders denying him access to records from the State Attorney's Office, issued September 21, 2009; January 15, 2010; January 19, 201 O; February 24, 201O; and February 23, 2012. However, Defendant has not shown any basis to revisit the Court's rulings on those requests or any abuse of this Court's discretion in denying those requests. Therefore, this Court stands by its rulings.

* * *

> Fourth, Defendant argues that the Florida Department of Corrections (the DOC) failed to comply with some of his public records requests. However, as of the date of this order, Defendant is in receipt of all the records that were ordered to be disclosed to Defendant by the DOC. Defendant takes issue with the DOC's failure to produce the records of Defendant's prior incarceration, because they were destroyed in accordance with the DOC's retention policy. Defendant argues that the DOC's failure to maintain and produce those records has hampered the presentation of his case in mitigation of the death sentence. This Court ruled on that issue and found that the DOC did not intentionally withhold Defendant's records of his prior incarceration and that the retention policy was reasonable. Defendant has not provided any reason for this Court to revisit its prior ruling and has not shown any abuse of this Court's discretion. Therefore, this Court will not disturb its prior ruling.

(PCR.17 2846-47). To date, Williams has not shown where the trial court erred in ruling on the constitutional claim or individual public record requests. This Court should affirm.

ISSUE IV

THE TRIAL COURT REJECTED PROPERLY THE CLAIM OF INEFFECTIVE ASSISTANCE OF FIRST TRIAL COUNSEL AND THE CLAIM OF CONFLICT OF INTEREST STEMMING FROM FIRST TRIAL COUNSEL'S HIRING OF DR. BRANNON FOR A PERSONAL MATTER AND THE STATE'S SUBSEQUENT CONSULTATION WITH DR. BRANNON DURING THE SECOND TRIAL (restated)

Here, Williams combines arguments made in his Amended Claim III and Claim XV. These claims were addressed to: (1) counsel's, Bruce Raticoff ("Raticoff") effectiveness in the first trial in 1996 leading to the loss of records, death of a witness, and fading memories infecting his 2004 retrial and (2)

an alleged conflict arising as a result of Raticoff's use of Dr. Brannon as his personal psychologist to advise the trial court of **Raticoff's** mental condition in 1996 and the State's subsequent use of Dr. Brannon as a consultant. As proof of prejudice, Williams points to the pre-trial delay, loss of evidence/witnesses, and conflict of interest. The trial court rejected these matters summarily and those rulings are supported by the record and law. This Court should affirm.

A. STANDARD OF REVIEW – "When evaluating claims that were summarily denied without a hearing, this Court will affirm "only when the claim is 'legally insufficient, should have been brought on direct appeal, or [is] positively refuted by the record.'" *Jackson v. State*, 127 So.3d 447, 459-60 (Fla. 2013) (citations omitted).

B. THE TRIAL COURT RULING – With respect for Amended Claim III (effectiveness of 1996 trial counsel), the trial court noted that Williams had successfully appealed his 1996 conviction resulting in a new trial with different counsel. Based on *Untied States v. Ewell*, 383 U.S. 116, 121 (1966), the trial court declined to include the time while that case was on appeal and he had taken numerous continuances between the 2001 Mandate and the 2004 retrial. (PCR.17 2850-51) The trial court analyzed the matter under *Barker v. Wingo*, 407 U.S. 514 (1972) for alleged speedy trial violation.

The trial court found that Williams' offer of prejudice was "merely speculative since he [had] not identified with specificity the medical, school, and correctional records that allegedly counsel not be located" by his 2004 counsel, nor had "he identified the information contained in those records;" and he did not provide "any explanation regarding how the information contained in the missing records benefited" his case or if the records "existed at the time of the first trial." (PCR.17 2851). Turing to the Death of Dorothea Simmons, the trial court found Williams did not state how her testimony would have been favorable to him, and nonetheless, her prior testimony had been read into the 2004 record. (PCR.17 2851-52) As a result, the trial court determined that there was no due process violation shown.

Turning to the allegation that the trial court and State violated Williams' due process rights by failing to ensue Raticoff was effective, the claim was found procedurally barred as the complaints could have been raised on direct appeal. Furthermore, the trial court found the claim of ineffective assistance addressed to Raticoff's representation "moot because Defendant has already received the very benefit he would have been entitled to had he prevailed on an ineffective assistance of counsel claim against Mr. Raticoff, that is, a new trial with different counsel." (PCR.17 2852)

In rejecting Claim XV of the 2011 amendment (*Brady* claim regarding conflict of interest in hiring Dr. Brannon), the trial court found that Williams had not shown good cause to add this claim as the information was known and facts discussed in the original motion. Alternately, the trial court concluded: "nothing supports the existence of a conflict in this case. Defendant does not allege that Dr. Brannon worked for, or had information about him."

C. MERITS – Bruce Raticoff ("Raticoff") represented Williams' during his first trial in 1996. Although Williams' first conviction and sentence were overturned in *Williams v. State*, 792 So.2d 1207 (Fla. 2001), and during his retrial he was represented by different counsel, and that conviction and sentence, were affirmed in *Williams v. State*, 967 So.2d 735 (Fla. 2007), Williams challenges Raticoff's performance and claims such infected the retrial to the point that he was denied due process and subsequent counsel, Hale Schantz ("Schantz") and Evan Baron ("Baron") were ineffective. Williams also asserts that he was denied due process because the State and trial court failed to ensure that Williams received the effective assistance of Raticoff during the 1996 trial. Williams has failed to establish a cognizable ineffectiveness claim against 1996 trial counsel, Raticoff, for Williams' 1996 conviction which was reversed for a new trial with new counsel, Schantz and Baron.

Williams is here based on a 2004 conviction and sentence rendered while he was represented by Schantz and Baron. Williams asserts that Raticoff was ineffective in 1996, however, by virtue of the 2004 retrial granted due to trial error Williams received the relief he would have received under *Strickland* anyway.

After outlining the continuances sought by Raticoff during the approximate three-and-one-half years (1993-1996) from indictment to sentencing, Williams asserts that by the time of his 2004 retrial[24] records had been destroyed, a witness died, and memories faded. With respect to the records that allegedly could not be located by the time of the 2004 trial, to date, other than in the most general terms, Williams has not asserted what these records allegedly are, what information beneficial to him they contained, that the records were available at the time of the first trial, and how, had they been produced and used that a different outcome at the guilt and/or penalty phases in the 2004 retrial would have resulted. All Williams alleges here, as he did below, is that there were unspecified records at various medical/mental health facilities, schools, and correctional facilities that were not available in 2004 to

[24] Williams neglects to remind this Court that the appeal of the first trial spanned some four years, with the mandate issuing in September 28, 2001, and that the retrial did not begin until late 2003 ending in a mistrial and the final trial began in January, 2004.

support an intoxication defense and mental retardation.

As the trial court found, such conclusory, insufficient pleading does not establish a due process or *Strickland* claim. *See Atwater v. State*, 788 So. 2d 223, 229 (Fla. 2001) (stating "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden."); *Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000) (same). This Court has affirmed the summary denial of a claim where the defendant alleged he had evidence, but "failed to detail the nature and/or source of that evidence" and failed to bring forward "proof of any additional evidence that counsel failed to discover." *LeCroy v. Dugger*, 727 So.2d 236, 239 (Fla. 1998).

Also, Williams maintains that the lapse of time between the 1996 trial and the 2004 re-trial (including the successful appeal)[25] equates to improper "pre-indictment delay" for his 2004

[25] The mere fact that Williams exercised his right to appellate review of his 1996 conviction and was successful in gaining a reversal and retrial does not result in a due process violation under a theory of pre-indictment delay. Although recognizing a denial of certiorari is not an adjudication on the merits, Justice Thomas' concurrence in *Knight v. Florida*, 120 S.Ct. 459, 460 (1999) is enlightening where he opined:

> I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed....

trial under *Baker v. Wingo*, 407 U.S. 514 (1972), *United States v. Townley*, 665 F.2d 579 (5th Cir. 1982) and *Scott v. State*, 581 So.2d 887 (Fla. 1991). Williams would have this Court find that Raticoff's actions in 1996 coupled with a successful appeal vacating the 1996 conviction amounts to pre-indictment delay for the 2004 retrial, thus, the State should be barred forever from bringing him to trial. In other words, Williams suggests that any continuances he took in order to prepare for his first trial and the time it took to succeed on direct appeal to obtain a new trial should be consolidated and amount to a "pre-indictment" delay barring the State from any retrial. Such is an absurd result and Williams has pointed to no case where a due process violation has been found under similar circumstances.

Williams points to cases where the government was instrumental in not indicting or not bringing the defendant to trial and as a direct result of the government's delay material evidence was lost. *Barker v. Wingo*, 407 U.S. at 532 (outlining government's multiple continuances over a course of five years, the last two years of continuances which were over defendant's objection, before defendant was tried for the first time,

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(footnotes omitted). As recognized by Justice Thomas, a defendant cannot seek appellate review and then complain about a subsequent delay. Williams has failed to offer any case law supporting a finding that continuances taken by his counsel in the original trial should preclude the State from prosecuting him after he successfully overturned the original conviction.

however, 5-year delay does not violate right to speedy trial); Scott, 581 So.2d at 892 (finding pre-indictment delay violated due process based on fact at time of crime State determined it could not prosecute, but after seven years and substantial loss of exculpatory evidence charged and convicted defendant). What all of these cases have in common is the fact that there was a delay before the initial indictment and/or trial attributable to government action. That is not the case here. The State did not delay the indictment, nor did it delay the trial. A review of the docket indicates that Williams took multiple continuances and did not file a demand for constitutional speedy trial in 1996. This was a first-degree murder case and extended time to investigate is not unreasonable or a violation of constitutional speedy trial.[26] Raticoff's actions cannot be attributed to the

[26] There was no state action causing any pre-indictment delay. Williams was arrested on the day of the 1993 attack resulting in the victim's death and brought to trial within constitutional speedy trial limits. It is the defendant's right to a speedy trial, thus, if he takes three years to prepare, it cannot be said that he has violated his own speedy trial rights. While Williams merely points to one area that is considered when assessing a constitutional speedy trial violation, the Supreme Court has recognized:

> A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade.

State or trial court. Williams has not alleged he wanted to go to trial earlier, nor has he shown that the State somehow precluded him from going to trial.[27] All he alleges it that there were some unspecified records containing unidentified information that might have been available in 1996. He merely speculates that that information would support his defense. Such is insufficient and was denied properly.

Likewise, the challenge involving Dr. Brannon was raised in an untimely fashion[28] and was insufficiently pled and meritless. Williams does not allege that Dr. Brannon worked for, evaluated, or had any confidential information about Williams. Hence, he has failed to set forth a basis for an alleged conflict or established that any exculpatory material evidence existed that

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Barker v. Wingo, 407 U.S. 514, 520-21 (1972).

[27] A due process challenge to a constitutional speedy trial delay by the government requires a defendant establish actual prejudice resulting from the delay. *Rogers v. State*, 511 So.2d 526, 531 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988) (approving *Howell v. State*, 418 So.2d 1164 (Fla. 1st DCA 1982), adopting *United States v. Townley*, 665 F.2d 579 (5th Cir. 1982)). The "outcome turns on whether the delay violates the fundamental conception of justice, decency and fair play...." *Id. See Scott v. State*, 581 So.2d 887, 891 (Fla. 1991)(balancing State's need for delay against defendant's actual prejudice). Williams is unable to show the State delayed trial.

[28] The trial court found that Williams knew of Dr. Brannon's involvement in the case at the time of his first postconviction motion filed in 2009, thus, he did not show good cause to add the new claim in the 2011 amendment. Such was proper under rule See Rule 3.851(f)(4) Fla. R. Crim. P. Nonetheless, the trial court reached the merits.

should have been disclosed or how he was prejudiced. *Cuyler v. Sullivan*, 446 U.S. 335, 347 (9180). Moreover, the record shows that Dr. Brannon was Raticoff's personal psychologist and rendered an opinion to the trial court as to Raticoff's mental health, not Williams' mental health. The fact that the State used Dr. Brannon as a consultant at a later date, does not establish a conflict of interest. Relief was denied correctly and should be affirmed.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic service to Roseanne Eckert at EckertR@ccsr.state.fl.us and Nicole M. Noël at NeolN@ccsr.state.fl.us this 13th day of August, 2014.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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