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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1472

RONNIE KEITH WILLIAMS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Ronnie K. Williams ("Williams") submits this Reply Brief of Appellant in response to the State's Answer Brief in SC13-1472. Williams will not reply to every factual assertion, issue or argument raised by the State and does not abandon or concede any issues and/or claims not specifically addressed in the Reply Brief. Williams expressly relies on the arguments made in the Initial Brief for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

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REPLY TO APPELLEE'S STATEMENT OF THE CASE

At the beginning of the evidentiary hearing, the lower court gave the parties an opportunity to make opening statements. Because there were two distinct claims before the trial court—*Strickland*[1] and *Atkins*[2]—Williams set forth an overview of the standards of proof and the issues to be decided. (PCR. 3837-40.) Williams explained the role of the defense experts in the case in his opening statement,[3] in the post-hearing memorandum, and in his Initial Brief at pages 26-36. (PCR. 2673-2740.) But, instead of setting forth specific points

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

[2] *Atkins v. Virginia*, 536 U.S. 304 (2002).

[3] "Some of [Dr. Joette] James's testimony can also be used to support the finding that Mr. Williams is intellectually disabled, but her primary purpose [in] testifying is as to mitigation." (PCR. 3841.) Dr. Marc Tassé testified about the general standards in the field regarding mental retardation and intellectual disability. (PCR. 3841.) Dr. Philip Harvey conducted the neuropsychometric testing; the IQ scores obtained were within the range of mild mental retardation. "[Dr. Harvey's] testimony could be used either to present a low IQ or cognitive deficits to the jury." (PCR. 3841-42.) Dr. George Woods's testimony was presented for the purpose of "mitigation and Mr. Williams['s] upbringing, the poverty that he was exposed to, his brain development and how it impacted the crime. . . . his findings will be consistent with intellectual disability but he did not actually evaluate Mr. Williams for that." (PCR. 3842.) Dr. Thomas Oakland evaluated Mr. Williams for intellectual disability and he found that he met the criteria, both clinical and the Florida statutory definition for intellectual disability under *Atkins*." (PCR. 3843.)

of disagreement regarding the historical record,[4] the fact section in the State's Answer Brief only serves to mislead this Court. For example, the State asserted on page 11 that Williams presented several experts in support of his claim that his intellectual disability is a bar to his execution, but failed to acknowledge that the evidence also supported the Sixth Amendment violation due to the ineffective assistance of counsel.

Additionally, the State implied that (a) the defense mental health experts merely relied on Dr. Philip Harvey's IQ testing in reaching their own conclusions; (b) there was some problem or issue with either the administration or results of the IQ testing; and (c) that the State was in any way precluded from conducting its own IQ testing of Williams. Ans. Br. at 11-15. None of the foregoing is true.

Dr. Joette James is a pediatric neuropsychologist who came to her professional and unrebutted conclusion that Williams suffers from cognitive deficits that are "quite pronounced" based on a comprehensive review of records as well as her own administration of a neuropsychological battery of testing. (PCR. 3869-70.) She also opined that her findings were **consistent with** Dr. Oakland's diagnosis of intellectual disability. (PCR. 3940-44.) On

[4] *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1122 (Fla. 1984).

page 12 of the Answer, the State attempted to diminish Dr. James's expert opinion with the convoluted and misleading assertion that she "did not evaluate or diagnose Williams for mental retardation or adaptive functioning, but relied on Dr. Harvey's reported testing, including the erroneous r-BANS results, without obtaining his raw data." The State cites to the postconviction transcript at pages 3866-68, where Dr. James explained that she reviewed many documents including school records as well as Dr. Harvey's report. That does not mean that her conclusions were **dependent upon** Dr. Harvey's findings.

Part of the problem is that the State does not recognize the legal and/or clinical difference between concepts such as competency, cognitive deficits,[5] intellectual disability/mental retardation, adaptive behavior, and executive functioning. The fact that Dr. James did not personally "evaluate or diagnose Williams for mental retardation or adaptive functioning" is as irrelevant as it is confusing given that it is necessary to find deficits in adaptive behavior before making a diagnosis of mental retardation. **Dr. James was never asked to evaluate Williams for mental retardation;** she was retained to conduct "a neuropsychological evaluation of Mr. Williams and assess his functioning

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[5] Dr. Prichard testified that he did not test for cognitive impairment because "somebody can have cognitive deficits and not be mentally retarded." (PCR. 5349.)

in different neurocognitive domains including language, memory, executive functioning and academic skills." (PCR. 3866.)

Dr. James explained the concept of "executive functioning" the way it should have been explained to the jury:

> I would like to think of it as an umbrella concept under which there are many different skills. Good executive functioning allows individuals to operate effectively in their day-to-day world. . . .The way I think about it is it's a number of skills such as inhibition, the ability to control impulses, your ability to be flexible with problems to solve easily in different situations or when difficulties come up when you are problem solving you are able to use an alternative solution. It also involves the ability such as sustained attention, working memory or short-term memory as well as organizational and planning abilities and the ability to monitor oneself and to make corrections and interactions based on the feedback that they are given.

(PCR. 3860.) On the other hand, in the context of intellectual disability, the clinician evaluating "adaptive functioning" looks at whether the individual has deficits in "conception, social, or practical domains." (PCR. 3975); *See also Dufour v. State*, 69 So. 3d 235, 245 (Fla. 2011) (explaining that adaptive behavior "means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community."). Executive functioning refers to ability or how the brain works, while adaptive behavior refers to how the

individual actually functions in society. The record is replete with evidence that Ronnie Williams has deficits in both. (PCR. 3891-96, 4397-4400, 4469-71, 4642-45, 4694-4700, 4700-03, 4708-10, DE1, DE59.)

Dr. James administered the following tests to Williams: Delis-Kaplan Executive Functioning System (D-KEFS), California Verbal Learning Test (CVLT), Boston Naming Test, Wechsler Memory Scale, fourth edition, Wisconsin Card Sort, Rey-Osterrieth Complex Figure, Wide Range Achievement Test, fourth edition (WRAT-4), and the Beck Depression and Anxiety Inventories. (PCR. 3873-74.)[6] Dr. James explained that Williams has a "highly variable neurological profile" which includes strengths as well as "pronounced deficits." (PCR. 3869.) Even as to his relative strengths, there were no areas in which Williams performed "above the norm for his age." (PCR. 3869.) The testing revealed significant deficits with respect to executive functioning skills which are governed by the frontal lobe and directly impacts impulse control, planning and organization, and flexibility in

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[6] Of course, this is precisely the kind of battery that Dr. Glen Caddy recommended when he evaluated Williams in connection with the prior murder. (PCR. 6587, DE 59.) At the evidentiary hearing, Dr. James explained in detail the purpose of each test as well as how Williams performed in relation to the rest of the population. (PCR. 3873-3914.) Her raw data was turned over to the State but there were no State witnesses who were competent to challenge her results on the battery. Dr. Prichard is not a neuropsychologist. He could not explain the tests nor did he know how some of the tests correlated with the WAIS-IV. (PCR. 5437-41.)

problem solving. (PCR. 3859-61; 3874-75.) Williams had the most difficulty with timed tasks that required him solve problems, tasks that required organization, and verbal abstraction. (PCR. 3876.) On some of the subtests he scored in the lowest fifth percentile as compared to the general population. (PCR. 3876.) Williams performed abysmally on the Tower Test, which evaluates efficiency, planning and the ability to organize. Williams scored in the first percentile. "He essentially became stuck and was unable to move. He was aware of the rules, but he couldn't generate a strategy." (PCR. 3881.) He also struggled with working memory, which also implicates primarily the frontal lobe of the brain. (PCR. 3890.)

Dr. James corroborated her test results with a complete review of Williams's school records and affidavits of former teachers, thereby confirming that the deficits were developmental in nature. (PCR. 3918-28.) She also reviewed records of close relatives that revealed a pattern of cognitive impairment within the family. (PCR. 2928-30.)[7] Any suggestion that Dr. James relied only on Dr. Harvey's testing is absurd.

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[7] As a matter of fact, the results of her testing were similar to the screening tests administered in 1984 by Dr. Caddy: Williams's "thinking is essentially concrete in nature and suggestive of a limited ability to anticipate, plan, or engage in behaviors that will serve his best interest." (PCR. 6590, DE 59.)

Dr. Thomas Oakland was accepted by the lower court as an expert in the fields of intellectual disability, adaptive behavior, test development and use, special education, and school psychology. (PCR. 4651-61.) Dr. Oakland is the author of the ABAS and the ABAS-II,[8] the standard tools for the evaluation of adaptive functioning. (PCR. 4677-84.) Dr. Oakland's opinion was that Williams met all three prongs of the definition of mental retardation based on the clinical standards and Florida law. (PCR. 4723-24.)

The State's assertion on page 13 that Dr. Thomas Oakland did not "assess" Williams IQ in making his diagnosis of mental retardation is simply a game of semantics and irrelevant to the ultimate issue. There is no requirement, legal or otherwise, that the clinician making the diagnosis actually administer the IQ test; in fact, the State's psychologist, Dr. Gregory Prichard, admitted that he has done the same in the past. (PCR. 5357-59). While the State finds it important that Dr. Oakland never obtained Dr. Harvey's raw data, the fact is that Dr. Pritchard did, and he was not able to point to any issues in the administration or scoring of either the results in the WAIS-III or WAIS-IV. (PCR. 5428-30.)

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[8] *The Adaptive Behavior Assessment System – Second Edition* (ABAS-II; Harrison & Oakland, 2003).

The State seems to argue in its fact section that the alleged failure of Dr. Oakland to "assess" all three prongs of intellectual disability is fatal to Williams's claims. The State ignores the testimony that the first time Dr. Harvey went to see Williams it was for the purpose of an initial screening and he did not know that he might be intellectually disabled. (PCR. 4046-51.) He did not do any formal tests of effort because (1) there was nothing to suggest that Williams was not putting forth effort and (2) research shows that such tests result in a high false positive for persons with low IQ. (PCR. 4096-99.) Dr. Harvey is a psychologist who specializes in schizophrenia; he is not an expert in intellectual disabilities. (PCR. 4037-46.) Once it was clear that Williams's IQ was in the range of mild ID, Dr. Oakland, an internationally renowned expert in the field, was retained to conduct further assessments.

Finally, the assertion on page 15 of the Answer Brief that the State's psychologist did not administer an IQ test "due to the fact Dr. Harvey had done testing recently and the possibility of a practice effect" is false. Dr. Prichard brought only the WAIS-IV with him to the prison because the prosecutors did not communicate with him prior to his travels. However, Dr. Prichard admitted that he certainly could have administered the Stanford-Binet, the other test that is approved under Florida law for evaluating whether

someone has an intellectual disability. (PCR. 5447.) There was no good reason for his failure to conduct independent testing.

The appellee is required to provide adequate citations to the record in setting forth the statement of facts. *Sabawi v. Carpenter*, 767 So. 2d 585 (Fla. 5th DCA 2000). Nevertheless, the State failed to offer record support for the misleading assertion that trial counsel reviewed the prior file regarding the 1984 murder conviction that was used as an aggravator in this case. Ans. Br. at 20, 42. The record reflects that Hale Shantz did not investigate the prior conviction at all:

> PC COUNSEL: Do you remember the State giving you documents concerning the prior crime, the 1984 crime, the homicide?
> SCHANTZ: Of course.
> PC COUNSEL: Were you aware that Attorney Jeff Harris represented Mr. Williams in the 1984 murder?
> SCHANTZ: Yes.
> PC COUNSEL: **Did you get his file?**
> SCHANTZ: **No.**
> PC COUNSEL: Why not?
> SCHANTZ: Because I looked at the record. **I knew Mr. Williams was convicted. I knew that was coming into evidence. I had no reason to get Jeff's file.**
> PC COUNSEL: No effort to rebut that aggravator?
> SCHANTZ: How do I rebut a conviction for murder, ma'am.
> PC COUNSEL: Aren't you obligated to explore the prior felony?
> SCHANTZ: **I had no interest in retrying that case again so the jury can hear in more detail how he**

killed another woman.
PC COUNSEL: Did you know whether or not there was mental health information about your client in Mr. Williams's file?
SCHANTZ: At the time I was trying the case?
PC COUNSEL: Yes.
SCHANTZ: No, because I knew he was convicted of murder. So if they had some type of insanity defense, that would have come out.
PC COUNSEL: **Had he been evaluated by a psychologist for that case?**
SCHANTZ: **I don't recall seeing that at the time.**
PC COUNSEL: You didn't look to get it?
SCHANTZ: **I didn't know it existed**.
PC COUNSEL: You didn't get the entire State Attorney's Office filed from the 1984 case, did you?
SCHANTZ: **Probably not.**
PC COUNSEL: And you did not get the Harris file?
SCHANTZ: No.
PC COUNSEL: There was no strategic reason not to explore the 1984 murder?
SCHANTZ: I had their police report, the conviction. I knew was my trial strategy was and that was to get those witnesses on and off as quickly as possible.
PC COUNSEL: How can you make a decision if you didn't [fully investigate the case?][9]
SCHANTZ: I said already that I fully investigated the case.
PC COUNSEL: Did you get the file?
SCHANTZ: **I have answered that question.**
PC COUNSEL: How can you make a decision if you don't have all of the documents?
SCHANTZ: Because he was convicted. If he was found innocent, I would[n't] be dealing with that as an aggravator.

[9] The transcript actually reads: "How can you make a decision if you didn't feel you evaluated the case?" However, in the context of the other questions, it appears that is a transcription error.

> PC COUNSEL: I will show you what has been marked as Defense Exhibit 5. This is the deposition of Dr. Caddy.[10]
> SCHANTZ: Okay.
> PC COUNSEL: You're saying that is the document that you did not have prior to trial?
> SCHANTZ: Yes, I did not.

(PCR. 4286-88.) (emphasis added). Evan Baron also testified that he was aware that that defense counsel is obligated to investigate the prior convictions that can be used as aggravators, but he did not obtain Harris's files. (PCR. 5113-17.) The trial lawyers' admitted failure to obtain the files from the 1984 trial is a material fact necessary to consider when evaluating the quality of the pre-trial investigation.

ARGUMENT I

WILLIAMS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Standard of Review and Burdens of Proof

This Court has held:

> We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact. The deference that appellate courts afford findings of

[10] (PCR. 6247-75, DE 45.)

> fact based on competent, substantial evidence is an important principle of appellate review. . . .
>
> Despite this deference to a trial court's findings of fact, the appellate court's obligation to independently review mixed questions of fact and law of constitutional magnitude is also an extremely important appellate principle. This obligation stems from the appellate court's responsibilities to ensure that the law is applied uniformly in decisions based on similar facts and that the defendant's representation is within constitutionally acceptable parameters.
>
> This is especially critical because the Sixth Amendment right to assistance of counsel is predicated on the assumption that counsel "plays the role necessary to ensure that the trial is fair." *Strickland,* 466 U.S. at 685, 104 S. Ct. 2052. "The Sixth Amendment . . . envisions counsel's playing a role **that is critical to the ability of the adversarial system to produce just results."** *Id.* (emphasis supplied).

Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999). Thus, this Court should accept factual and credibility findings regarding the pre-trial investigation and presentation of mitigation evidence only to the extent that they are supported by competent, substantial evidence. However, the State's position at page 25 of the Answer Brief regarding the standard of review with respect to the prejudice prong is a misstatement of federal law. Because the jury plays a unique role as fact-finder and sentencer in capital cases, the circuit court's opinion regarding the credibility and value of the postconviction mitigation

evidence is not owed the same deference normally afforded to the lower courts. *Porter v. McCollum*, 558 U.S. 30, 43 (2009).

Consistent with Eighth Amendment jurisprudence under *Lockett v. Ohio*[11] and *Eddings v. Oklahoma,*[12] Florida juries are routinely instructed that the defendant has a low burden of proof when it comes to establishing whether a mitigating factor should be applied. "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." *Hardwick v. Crosby*, 320 F.3d 1127, 1150 (11th Cir. 2003). On the other hand, Florida has determined that defendants must prove that they are mentally retarded/intellectually disabled by clear and convincing evidence in order to establish a categorical bar to their execution. Fla. R. Crim. P. 3.203*; see also Dufour*, 69 So. 3d at 245 ("Clear and convincing evidence means evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief, without hesitation, about the matter in issue.") (citation omitted).

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[11] *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

[12] *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

The State's position on page 25 of the Answer is that Williams has not carried his burden under *Strickland* and that "trial court's factual and credibility findings are supported by competent substantial evidence and the proper law was applied." However, when the record and trial court findings of fact are viewed with *Porter* and *Lockett* in mind, Williams can establish that he is entitled to relief.

<u>Deficient Performance</u>

Hale Schantz had a duty to conduct a reasonable investigation into his client's background for possible mitigation evidence. *Coleman v. State*, 64 So. 3d 1210, 1217 (Fla. 2011). "[S]trategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). On page 31 of the Answer, the State points out the lower court's finding that trial counsel's strategy was to "portray Williams as 'a nice person who was worthy of a life sentence.'" (PCR. 2900.) However, the "investigation leading to the choice of a so-called trial strategy must itself have been reasonably conducted lest the 'strategic' choice erected upon it rest on a rotten foundation." *Ramonez v. Berghuis*, 490 F.3d 482, 488 (6th Cir. 2007).

It seems that Schantz's strategy when it came to the prior violent felonies, including the 1984 murder of Gaynell Jeffrey, was to close his eyes and cover his ears and pretend that the jury would not hear the information. No other explanation can be made for the decision to simply show that Ronnie Williams is a "nice person" instead of conducting a complete social history investigation that would have included gathering the files of the prior felonies. A reasonable investigation includes reviewing the "readily available file on the prior conviction[s] in order "to discover any mitigating evidence the State would downplay." *Rompilla v. Beard*, 545 U.S. 374, 385 (2005). Of course, the State had a concomitant duty to give a copy of Dr. Caddy's 1984 report to trial counsel even if counsel did not ask for it. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Schantz's dogged refusal to deal with the actual evidence the State would use against his client meant that he never saw the red flags in Dr. Caddy's report and deposition that would have led any reasonably competent lawyer to seek a neuropsychological evaluation.

Dr. Caddy's February 5, 1984 report revealed that Williams reported recurring nightmares of hanging in a tree and that he had received prior psychological treatment. Williams also reported a serious head injury at the age of ten when he was hit with a baseball bat. Dr. Caddy also interviewed Clinita and Beamon Lawrence who admitted that Williams was immature and

"slower." (PCR. 6588.) The responses on psychological tests reflect that Williams could not provide "future oriented responses" and that his "thinking is essentially concrete in nature and suggestive of a limited ability to anticipate, plan, or engage in behaviors that will serve his best interest." (PCR. 6590, DE 59.) Dr. Caddy recommended a neurological work-up. (PCR. 6587, DE 59.) Because trial counsel did not have this information, the foundation for any purported strategy was "rotten." *See Ramonez*, 490 F.3d at 488.

The trial court found as facts that Schantz spent "hours with the family" and that he "hired an investigator and a neuropsychologist." (PCR. 2900.) In arguing that the pre-trial investigation was reasonable, the State ignores the testimony of the investigator, Sandy Sticco, about her experience with both Schantz and Dr. Walczak. After she submitted her report, the lawyers never asked her to follow up on any of her initial investigation. (PCR. 4916-18, 4939-40.) Sticco suggested to Schantz that someone should follow up with Williams regarding the allegations of abuse but she felt as though it was not a priority for the lawyer. "I was a little frustrated. That I remember." (PCR. 4889-92, 4931-33.) She also tried to reach Dr. Walczak about the sexual abuse: "I remember it took numerous phone calls and messages left to him." (PCR. 4933-35.) Sticco testified that Dr. Walczak "blew [her] off." (PCR. 4935.)

On page 42 of the Answer Brief, the State claims that Dr. Walczak was provided with records but does not address the number of records that were obtained too late to be of any use, or never obtained at all. The record demonstrates that Schantz did not mail the school records to Dr. Walczak until September 30, 2003 and they never discussed the contents. (PCR. 4202, DE1.) The school records show that in 1973, when Williams was eleven or twelve, he was given the Peabody vocabulary test and scored a 61, which was less than the first percentile and he achieved a score of 73 on the Slosson IQ test. (PCR. 4202.) According to the Answer Brief at 42, Schantz provided some prison records to Dr. Walczak. The DOC records reveal that Williams was given a BETA IQ test in 1985 and his score was 76. (PCR. 5792, 5823-5840, DE 28, 29.) The State claims that "Schantz may not be faulted for not uncovering Williams's [low IQ and cognitive impairments] as he retained the services of a neuropsychologist and was not told that Williams had any impairment." Ans. Br. at 47. No competent capital defense lawyer would ignore IQ scores in the range of mild or borderline mental retardation in favor of a strategy to show that his client is a "nice guy."

Schantz may have spent hours chatting with Clinita Lawrence, but no one ever asked her for photographs, death certificates, letters, or any other family records before the trials. (PCR. 5064-66; DE 60-66, 58, 49.) The 1996

confidential pre-sentence investigation report (PSI) would have provided a wealth of information about his client. (PCR. 4186-88, 6236-45, DE 44.) The socioeconomic history indicates that Williams relied on family as his primary means of subsistence. Williams's father, Lonnie Williams, died of a heart attack and his mother, Kate Bowens died after giving birth to Williams's younger sister, Althamese Jones, in 1968. Jones was 29 years old in 1996 and she worked as a social worker in Fort Myers, Florida. Williams had a brother, Clair Anthony Bowen ("Anthony"), who was 40 at the time the PSI was prepared and he lived in Indiana. The PSI revealed that "Anthony Bowen is in and out of psychiatric hospitals, homeless and a drug addict." (PCR. 6241.)

Trial counsel's purported strategy was to show that Williams was a nice guy who came from a happy and loving family. (PCR. 4336-38.) "By neglecting to review [Williams's] school records and instead relying on [Dr. Walczak] to ascertain their import, counsel abdicated their responsibility." *Winston v. Pearson*, 683 F.3d 489, 505 (4th Cir. 2012). Instead of exploring the red flags that could have been used to reduce moral culpability, trial counsel, knowing his client had been convicted of a prior murder, decided on the objectively unreasonable strategy of showing that his client was a "nice guy." (PCR. 4336-38). Trial counsel failed to conduct the constitutionally required investigation into his client's life.

Prejudice

The State argues on page 41 that the trial court's factual and credibility findings were supported by competent, substantial evidence and the "prejudice analysis comported with the law as set forth in *Strickland* and its progeny." The State further argued on page 53 that Williams cannot establish prejudice because this is a "highly aggravated case" due to the prior murder. The logical extension of the wholesale application of this simplified kind of analysis would result in an automatic death sentence in any case where there was a prior murder. The Eighth Amendment requires more: "[J]ustice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." (citation omitted). *Woodson v. N. Carolina*, 428 U.S. 280, 304 (1976).

In *Torres-Arboleda v. State*, a Florida jury recommended a life sentence in a capital case even though the defendant had a prior conviction for homicide in California. This Court upheld the judicial override in that case. *Torres-Arboleda v. State*, 524 So. 2d 403, 413 (Fla. 1988). However, in postconviction, this Court engaged in the constitutionally required prejudice analysis and granted penalty phase relief even though the defendant had a prior murder conviction. *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1325

(Fla. 1994). A prior murder conviction does not result in an automatic death sentence and it should not provide an excuse not to engage in the "probing and fact-specific analysis" required by the Constitution. *Sears v. Upton*, 561 U.S. 945 (2010).

The State argues that the trial court rejected the testimony of the postconviction experts regarding what it refers to as "alleged cognitive deficits" and "possible cognitive impairments." Ans. Br. at 34, 46. The State further argues in support of the lower court's rejection of Williams's nonstatutory mitigation because the trial court found that there was no connection between his "environment, heart problems, and poverty with later cognitive problems." Both the State and the lower court "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing." *Porter*, 558 U.S. at 42.

The fact that Williams was born into impoverished living conditions in Pahokee, Florida is mitigating in and of itself. He and his brother slept on the floor of a rat-infested, rooming house with no electricity and no indoor plumbing. (PCR. 4125-28.) All experts agreed that being born into poverty is a risk factor for cognitive deficits,[13] but that does not mean that Williams could ever prove that his environment was the proximate cause of his

[13] (PCR. 3961-62, 4449-52, 4642-45, 5366-67.)

impairments. Obviously, not every person who is born into poverty is brain-impaired. The importance of the discussion of the risk factors is two-fold: one, Williams's documented history established risk factors that should have alerted competent counsel to possible cognitive impairments, and two, the presence of risk factors militates against a finding that Williams was malingering.[14] It is not necessary to know the etiology of any impairment before making a diagnosis of intellectual disability. The failure to establish whether it was the poverty, or stress, or pesticides, or head injuries, or genetics that caused Williams's deficits is irrelevant to whether a jury might be reasonably convinced that the mitigation was established.

The State argued on pages 46 and 47 that the trial court was not impressed with the Dr. George Woods. Nevertheless, the jury may very well have accepted Dr. Woods's testimony given his impressive credentials. Dr. Woods is a neuropsychiatrist who has taught at the Morehouse School of Medicine for the past ten years and previously taught at the University of California Davis Medical School and at California State University in the Department of Educational Leadership and Public Policies. (PCR. 4385-94.) In addition to his teaching responsibilities, Dr. Woods is a published author in

[14] Of course, the low IQ scores on the various IQ screening tests beginning in 1973 through 1985 also demonstrate that Williams was not malingering when he was tested during postconviction.

the fields of intellectual disabilities, fetal alcohol syndrome, trauma, neuropsychiatric assessment of forensic clients, and ethnopharmacology. Dr. Woods also maintains a clinical practice working with people with brain injuries or infectious diseases that impact the brain such as malaria or meningitis. (PCR. 4385-94.)

Dr. Woods testified that Williams grew up in poverty and has both physical and cognitive impairments that were never addressed by his caregivers, and characterized Williams as a "special needs" child. Dr. Woods concurred with the diagnosis of mental retardation and found that the statutory mitigators were present. Williams's frontal lobe impairments impact his ability to control his impulses, to learn from his mistakes, and to weigh and deliberate when making decisions. (PCR. 4496-4500.) Thus, the jury may have understood the nexus between the long-standing impairment and Williams's crimes.

In *Atkins,* the U.S. Supreme Court held that persons with mental retardation may not be executed because their "deficiencies diminish their personal culpability." *Atkins*, 536 U.S. at 318. The State simply argued on page 49 that Williams did not prove that he was intellectually disabled. Of course, had counsel presented evidence of intellectual disability at the 2004 trial, the jury would have only had to have been "reasonably convinced" of

the mitigator. *Hardwick v. Crosby*, 320 F.3d at 1150. Furthermore, the United States Supreme Court has recognized that even where the defendant is not intellectually disabled, the presence of cognitive deficits or "borderline mental retardation" may reduce moral culpability. *Williams v. Taylor*, 529 U.S. 362, 398 (2000); *see also Penry v. Lynaugh*, 492 U.S. 302, 322-28 (1989). As a matter of fact, in *Williams,* the Court found prejudice even though the defendant had a lengthy history of violence including prior convictions for armed robbery, arson, and an assault on an elderly woman that left her in a vegetative state from which she was not expected to recover. *Williams*, 529 U.S. at 368-69.

> The judge and jury at [Williams's 2004 penalty phase] heard almost nothing that would humanize [Williams] or allow them to accurately gauge his moral culpability. . . .Had [Williams]'s counsel been effective, the judge and jury would have learned of the "**kind of troubled history we have declared relevant to assessing a defendant's moral culpability.**" ("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable' "). Instead, they heard absolutely none of that evidence, evidence which "might well have influenced the jury's appraisal of [Williams's] moral culpability."
>
> On the other side of the ledger, the weight of evidence in aggravation is not as substantial as the sentencing judge thought. . .. Had the judge and jury

> been able to place [Williams]'s life history "on the mitigating side of the scale," and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the advisory jury—and the sentencing judge—"would have struck a different balance," and it is unreasonable to conclude otherwise.

Porter v. McCollum, 558 U.S. at 41-42 (internal citations omitted). Williams is entitled to a new penalty phase hearing.

ARGUMENT II

THE EIGHTH AMENDMENT PROHIBITS WILLIAMS'S EXECUTION BECAUSE HE IS INTELLECTUALLY DISABLED.

Hall v. Florida

In *Hall v. Florida*, 134 S. Ct. 1986 (2014), the United States Supreme Court found that this Court's statutory construction of Florida Statutes §921.137(1) adopted in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), and applicable to all Florida cases, was unconstitutional. The Court reiterated the basic concept that:

> The Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." To enforce the Constitution's protection of human dignity, this Court looks to the "evolving standards of decency that mark the progress of a maturing society." The Eighth Amendment's protection of human dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding

> purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force.

Hall, 134 S. Ct. at 1992 (internal citations omitted).

In its Answer, the State blithely asserts that *Hall* "has no impact on Williams' case." Ans. Br. at 56, fn. 8. The State's position completely disregards the impact of *Hall*. *Hall* stands for the proposition that this Court's *Atkins* jurisprudence cannot be more restrictive than the medical and clinical reality of diagnosing mental health conditions, because then "*Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id*. at 1999.

Incredibly, even post-*Hall*, the State continues to incorrectly assert that *Atkins* "left it to the States to define mental retardation." Ans. Br. at 56. *Hall* made it clear at long last that *Atkins* did no such thing. In fact, *Atkins* left to the States "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Hall*, 134 S. Ct. at 1998. The *Hall* Court recognized that "the States play a critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed. But *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection." *Id.* Thus, *Hall* finally

clarified that *Atkins* did not "leave it to the States" to define ID. Post-*Atkins*, the States were not free to define ID however they chose, disregarding the consensus in the scientific community in the process. In fact, the United States Supreme Court warned that giving states "complete autonomy to define intellectual disability as they wished," would "conflict[] with the logic of *Atkins* and the Eighth Amendment." *Id.* What *Atkins* **did** leave to the States was the task of **enforcing the categorical ban** against executing persons with ID.

Hall precludes statutory definitions of intellectual disability from being more restrictive than those used by the medical community. Indeed, *Hall* rejected *Cherry* because *Cherry* was more restrictive than the medical community in defining ID. Any legal standard that does the same is, of course, also unconstitutional under *Hall*. The *Hall* majority wrote:

> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

Hall, 134 S. Ct. at 2001.

In its Answer, the State argued that "Williams obtained that which *Hall*

requires, i.e., an opportunity for evidentiary development." Ans. Br. at 70, fn. 13. Thus, the State suggested that as long as a defendant is allowed to present additional evidence of intellectual disability, they are entitled to nothing more—not even a proper evaluation of the evidence based on a constitutional standard. This simplistic and myopic view completely ignores the constitutional import of *Hall*.

The State's argument appears to stem from the Court's statement that "when a defendant's test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Hall*, 134 S. Ct. at 2001. Following the State's false logic down the primrose path, there is no need for further consideration because Williams presented evidence of adaptive deficits at his evidentiary hearing. However, it is simply absurd to suggest that the trial court's findings should be allowed to stand when those findings were based on a misunderstanding of science and the Eighth Amendment. With that statement, the *Hall* Court merely adopted the scientific principle that when assessing whether someone is intellectually disabled, "[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." *Id.*

Significantly Subaverage Intellectual Functioning Prong

The trial court rejected Williams's evidence of significantly subaverage general intellectual functioning because the court found Williams's score of 75 on the WAIS-III "more credible" than the 65 he obtained on the WAIS-IV[15]. The lower court rejected the score of 75 based on the *Cherry* standard, which prohibited consideration of the standard error of measurement ("SEM"). However, as *Hall* made crystal clear, that approach is contrary to science and unconstitutional. The Court explained:

> The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range. Each IQ test has a "standard error of measurement," often referred to by the abbreviation "SEM." A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself.

Hall, 134 S. Ct. at 1995 (internal citations omitted). The *Hall* Court ruled as it did because "[t]he SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score." *Id*. Simply stated,

[15] The State's Answer incorrectly states that "Dr. Harvey had used the RBANS score to support the WIAS-IV [sic] findings." However, this is misleading and contrary to the evidence. Dr. Harvey merely stated that the score of 65 on the WAIS-IV was "**generally consistent**" with the R-BANS results. (PCR. 4080.) Of course, Williams's score of 65 on the WAIS-IV is also consistent with the IQ screening tests given to Williams throughout his life.

Hall recognized that "intellectual disability is a condition, not a number." *Id.* at 2000.

Cherry's strict cutoff of 70 prevented courts from considering

> substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances. This is so even though the medical community accepts that all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score about 70.

Id. at 1994. Thus, the *Hall* Court recognized that overreliance on a number—the IQ score—prevented courts from properly considering and giving effect to other evidence which supports a finding of intellectual disability.

The State's Answer makes much of the fact that the lower court found Williams's score of 75 on the WAIS-III to be the "more credible" score and therefore, Williams failed to carry his burden that he meets the first prong. The trial court's order denying relief is replete with references to the score of 75, and reasoning as to why that score is "more credible" than the 65 he obtained on the WAIS-IV. Incredibly, the State then goes on to assert that *Hall* has no relevance to Williams's case, even though the circuit court applied *Cherry* to disregard as legally irrelevant evidence that is scientifically and constitutionally relevant under *Hall*.

The lower court found that Williams is not intellectually disabled as a matter of law, in part because he had obtained a 75 on the WAIS-III. However, the lower court's credibility finding was based on an unconstitutional standard and a misunderstanding of scientific principles. The lower court must be given an opportunity to reevaluate the evidence in light of the fact that the score of 75 now places Williams squarely into the protected class of defendants whose execution is prohibited under *Atkins*.

Adaptive Deficits Prong

Central to the Court's holding in *Hall* is the concept that "[a]n IQ score is an approximation, not a final and infallible assessment of intellectual functioning." *Hall*¸134 S. Ct. at 2000. Thus, *Hall* clarified that the analysis cannot stop with an IQ score, but rather must include a more holistic consideration of adaptive deficits and early onset in conjunction with significantly subaverage intellectual functioning. The Court held that "an individual's ability or lack of ability to adapt or adjust to the requirements to daily life, and success or lack of success in doing so, is central to the framework followed by psychiatrists and other professionals in diagnosing intellectual disability." *Hall*, 134 S. Ct. at 1991.

Contrary to *Hall*, the trial court failed to consider the accepted clinical standards for the evaluation of adaptive functioning deficits. The AAIDD,

formerly the AAMR, published its most recent terminology and classification manual, known as "Green Book," in 2010. There is also companion to the 2010 manual referred to simply as the "User's Guide," which is also considered an authoritative source of information regarding the diagnosis of ID. The Green Book and the User's Guide are used exclusively by mental health professionals for the purpose of evaluating and diagnosing ID. (PCR. 3983-85.) The lower court improperly relied on evidence of Williams's adaptive strengths, rather than focusing on his deficits, an approach which is contrary to the standards set forth by the relevant scientific community in the Green Book and the User's Guide and therefore, contrary to the precedent set by *Hall.*

Justice Pariente shed light on this common mistake in her prescient dissent in *Dufour v. State*, 69 So. 3d 235 (Fla. 2011) (Pariente, J., dissenting). Justice Pariente wrote that "the focus in evaluating adaptive behavior should be on the individual's **limitations**, rather than his or her demonstrated adaptive skills." *Id*. at 256 (emphasis in original), citing Fla. Stat. § 921.137 and Fla. R. Crim. P. 3.203 ("[ID] means significantly subaverage general intellectual functioning existing concurrently with **deficits in adaptive behavior** . . ."). Justice Pariente went on to clarify that "a court cannot reject

a determination that deficits exist simply because a defendant has strengths in certain other areas." *Dufour,* 69 So. 3d. at 257.

Just as in *Dufour*, the lower court here focused on Williams's adaptive abilities, rather than his deficits. The court found that because he is "clean, well groomed, well mannered, polite, and cooperative," "expressed a desire to have pen pals and interest in [Bible] correspondence courses," and "offered self-defense as a justification for killing [a prior victim] and told the police he had cut himself while washing dishes in an attempt to cover-up the stabbing," Williams does not have adaptive deficits. (PCR. 2887-88.) The court also relied on the fact that Williams said that he read the Bible (although Dr. Prichard did not bother to confirm whether he actually understood any of it), that he could read a letter aloud (with several mistakes),[16] and the fact that

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[16] Both the State and the trial court conveniently ignored the fact that Williams struggled to read the letter, mispronouncing several words and phrases in the process. The trial court noted that even though Dr. Prichard never confirmed whether Williams actually understood any of the Bible, he was sure Williams could read it "judging by how well Defendant could read a letter addressed to Judge Seay in 1987, written in cursive, and signed by him." (PCR. 2886-87.) Incredibly, the trial court also wrote that Williams correctly pronounced difficult words like "enmity, " when in fact, he did not: "I was at amenity with, amenity with . . . amenity with God.") (PCR. 4508-09.) Williams never pronounced it correctly, contrary to the State's assertion and the trial court's finding. Williams's struggles continued with the phrase "I work in," which he read as "I walk in." (PCR. 4509), and "I have overcome," which he read as follows: "I have every one—I have—I have overcome that—oh, I have overcome that problem." (PCR. 4509.)

Williams had obtained a GED[17] to determine 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." (PCR. 2885.)

Finally, the trial court improperly found that Williams's criminal, maladaptive behavior was "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.[18]" (PCR. 2888.)

However, as Justice Pariente correctly observed, "[t]his approach to assessing adaptive behavior is at odds not only with the statutory definition itself but also with the current consensus within the scientific community as to the proper method for assessing adaptive behavior in the criminal justice

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[17] Dr. Tassé and Dr. Oakland both testified that intellectually disabled people can obtain GEDs and in some cases, can even graduate with a regular high school diploma. (PCR. 3996-97, 4694.)

[18] The lower court's analysis of his criminal ability makes no mention of the fact that Williams's DNA, blood, and fingerprints were all found at the crime scene, and the victim identified him by name to police. Additionally, Dr. Oakland explained that the scientific approach to ID does not allow for consideration of criminal behavior as evidence of adaptive functioning because it is **maladaptive** behavior and thus by its very nature indicates an inability to function normally in society. (PCR. 4709.)

context." *Dufour,* 69 So. 3d at 258. The lower court made the same mistake as did the court in *Dufour* by relying "significantly on the adaptive skills [Williams] does possess, rather than his deficits." *Dufour*, 69 So. 3d at 257. Justice Pariente's concern that "[t]he failure to take an objective approach to deficits in adaptive behavior can result in the perpetuation of misunderstanding [intellectual disability]" is obviously well-founded, since the same failures continue to occur in the lower courts, intellectual disability continues to be misunderstood, and the State of Florida continues to risk executing intellectually disabled people. *See id.*

The lower court's analysis of Williams's claim that he is ineligible for execution due to his intellectual disability was contrary to science and unconstitutional under *Atkins* and *Hall*. As the *Hall* Court made clear, "[s]ociety relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue." *Hall*, 134 S. Ct. at 1993. As such, it is "unsurprising" that "[the United States Supreme Court], state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability." *Id*. Contrary to the dictates of science, the lower court rejected Williams's valid claim that he is intellectually disabled by disregarding his IQ scores of 65 and 75, which place him squarely within the category of defendants ineligible for execution. The improper

rejection of Williams's evidence of significantly subaverage intellectual functioning led to an erroneous focus on Williams's adaptive strengths rather than his deficits. This unconstitutional analysis is contrary to the statutory and scientific definitions of ID and cannot be allowed to stand.

CONCLUSION

Based on the foregoing, Williams respectfully requests relief in the form of a new trial and/or a new resentencing proceeding based upon the ineffective assistance of counsel and/or a life sentence due to his intellectual disability. In the alternative, Williams requests a remand for a hearing on the public records claim and further proceedings on his *Atkins* claim consistent with due process.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true copy of the foregoing has been provided to opposing counsel, Leslie T. Campbell, Assistant Attorney General, Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL via electronic service at capapp@myfloridalegal.com this 22nd day of September 2014.

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

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