IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1752

WILLIAM LEE THOMPSON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

In its resentencing opinion,[1] this Court summarized the procedural history and facts of proceedings prior to resentencing:

> The procedural history of this cause reflects that on April 14, 1976, [Defendant] and Rocco Surace were charged by indictment with the first-degree murder, kidnapping, and involuntary sexual battery of Sally Ivester. [Defendant] entered a plea of guilty in the trial court but, on appeal, this Court allowed him to withdraw his plea and remanded the case for further proceedings. *Thompson v. State*, 351 So. 2d 701 (Fla. 1977). [Defendant] entered a second plea of guilty and a penalty phase jury recommended the death penalty. The trial judge imposed the death penalty and this Court affirmed the trial judge's order in *Thompson v. State*, 389 So. 2d 197 (Fla. 1980). [Defendant] then filed a Florida Rule of Criminal Procedure 3.850 motion, which this Court denied in *Thompson v. State*,

[1] The symbols "R.," "SR1.," "SR2." and "SR3." will refer to the record on appeal and transcript of proceedings and supplemental records on appeal from Defendant's resentencing appeal, FSC Case No. 75,499. The symbols "PCR." and "PCR-SR." will refer to the record on appeal and supplemental record on appeal from the third motion for post conviction relief, FSC Case No. SC87481. The symbol "PCR2." will refer to the record on appeal in case no. SC03-2129. The symbols "PCR3." and "PCR3-SR." will refer to the record on appeal and supplemental record on appeal in the FSC Case No. SC05-279. The symbols "PCR4." and "PCR4-SR." will refer to the record on appeal and supplemental record on appeal in FSC Case No. SC07-2000. Because the clerk did not consecutively paginate the transcripts contained in volumes 8, 9 and 10 of the record, these transcripts will be referred to as "PCR4-V[volume number]. [page number]." The symbol "PCR5." and "PCR5-SR." will refer to the record on appeal, which includes the transcripts of proceedings, and supplemental record on appeal in Florida Supreme Court case no. SC09-1085. The symbol "PCR6." will refer to the record on appeal in Florida Supreme Court case no. SC11-493. The symbols "PCR7." and "PCR7-SR." will refer to the record and supplemental record in the instant appeal.

410 So. 2d 500 (Fla. 1982). After this Court denied the rule 3.850 motion, [Defendant] sought federal habeas corpus relief. Both the United States District Court and the Eleventh Circuit Court of Appeals denied [Defendant] relief. *Thompson v. Wainwright*, 787 F.2d 1447 (11th Cir. 1986). [Defendant] then filed a second rule 3.850 motion, asserting the failure of the sentencing judge to allow presentation and jury consideration of nonstatutory mitigating circumstances in the penalty phase. The trial court denied relief, but this Court reversed under the authority of *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987), and remanded for resentencing. *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987), *cert. denied*, 485 U.S. 960, 108 S. Ct. 1224, 99 L. Ed. 2d 424 (1988). This second sentencing proceeding is the subject of this appeal.

The pertinent facts, as articulated by this Court in *Thompson v. State*, 389 So. 2d 197, 198 (Fla. 1980), are as follows:

> [Defendant], Rocco Surace, Barbara Savage, and the victim Sally Ivester were staying in a motel room. The girls were instructed to contact their homes to obtain money. The victim received only $25 after telling the others that she thought she could get $200 or $300. Both men became furious. Surace ordered the victim into the bedroom, where he took off his chain belt and began hitting her in the face. Surace then forced her to undress, after which the appellant [Defendant] began to strike her with the chain. Both men continued to beat and torture the victim. They rammed a chair leg into the victim's vagina, tearing the inner wall and causing internal bleeding. They repeated the process with a night stick. The victim was tortured with lit cigarettes and lighters, and was forced to eat her sanitary napkin and lick spilt beer off the floor. This was followed by further severe beatings with the chain, club, and chair leg. The beatings were interrupted only when the victim was taken to a phone booth, where she was instructed to call her mother and request additional funds. After the call,

> the men resumed battering the victim in the motel room. The victim died as a result of internal bleeding and multiple injuries. The murder had been witnessed by Barbara Savage, who apparently feared equivalent treatment had she tried to leave the motel room.

In the second penalty phase proceeding, the State introduced into evidence the prior testimony of the eyewitness, Barbara Savage, whom the State was unable to locate to testify in person. The trial court found that the State had made a diligent effort to locate this witness prior to the resentencing proceeding. Next, the State introduced [Defendant's] prior testimony at the trial of his codefendant, Rocco Surace, in which [Defendant] admitted hitting the victim with a chain belt and battering her with a chair leg and a billy club. In this testimony, [Defendant] denied Surace's participation and confessed to the repeated beating of the victim.

[Defendant] presented numerous witnesses who testified in mitigation of his conviction, including a former church pastor, a church elder, a church member, an elementary school principal, and several family members. [Defendant's] former church pastor described [Defendant's] as a slow learner and a follower who did not exhibit any violent or aggressive behavior. A church elder described [Defendant] as someone needing to be led, while the elder's wife described him as very faithful. Testifying from school records, an elementary school principal stated that [Defendant] had an IQ of seventy-five, had been recommended for special educational placement, and had been a follower, not a leader. Family members testified regarding the filthy home and affectionless environment in which [Defendant] had been raised. [Defendant's] ex-wife and mother of his two children described [Defendant] as a loving and gentle husband who was never physically violent or abusive. She also described [Defendant] as mentally slow and a follower and that their marriage failed partly because of his alcoholism.

In an affidavit introduced by [Defendant], Barbara Savage characterized the codefendant, Rocco Surace, as the gang-leader, who knew how to manipulate people. She described [Defendant] as a gullible and

easygoing person, who was easily manipulated. However, Savage's characterization of [Defendant] as a person dominated by Surace was contradicted by her testimony at the original trial.

A psychologist who examined [Defendant] stated that [Defendant] was a battered child and characterized him as an extremely depressed person. The psychologist stated that [Defendant's] IQ was at the lowest possible level of low-average intelligence. The psychologist also found [Defendant] to be brain-damaged and that his touch with reality was so loose and fragile that she could not tell whether [Defendant] was aware of what he was doing during the assault.

A psychiatrist testified that he found [Defendant] to be retarded and easily led and threatened by Surace. He believed [Defendant] to have been brain-damaged since childhood, possibly since birth. He diagnosed [Defendant] as having organic brain disease and suffering from personality and stress disorders. A neurologist also testified that [Defendant] suffered from organic brain disease.

In rebuttal, the State called the codefendant, Rocco Surace. Surace blamed [Defendant] for the attack on the victim, while acknowledging that he had entered guilty pleas to the same offense. A psychiatrist presented by the State testified that he had evaluated [Defendant] after the incident in 1976. He found that [Defendant] could process information and that his memory was intact. The psychologist concluded that [Defendant] suffered from an inadequate personality disorder and a long-standing pattern of antisocial and impulsive behavior.

The State called another psychiatrist as an expert witness, who had seen [Defendant] in 1976, and, while he stated that "there was tremendous anger, rage, aggression, and diminished control with the involvement of alcohol and a number of drugs that were used," he did not feel that [Defendant's] conduct resulted from a mental disorder. He stated his belief that [Defendant] had the capacity to know what was right and what was wrong. A psychiatrist presented by the prosecution stated that he had examined [Defendant] in November of 1988 and had found no indication of organic brain disease or any serious deficiencies in [Defendant's] ability to reason,

> understand, or know right from wrong. He also stated that he did not believe that [Defendant] acted under the influence of extreme mental or emotional disturbance or that [Defendant's] capacity to appreciate the criminality of his conduct was substantially impaired. Furthermore, the psychiatrist stated that he did not believe [Defendant] acted under the substantial domination of another. Another psychologist presented by the State testified that [Defendant] had adequate communication skills and good general memory. He did not find [Defendant] to be overly susceptible to suggestion and found no evidence of major mental illness.
>
> The jury, by a vote of seven to five, recommended the imposition of the death penalty. The trial judge imposed the death sentence, finding four aggravating circumstances, specifically that: (1) the crime was committed while [Defendant] was engaged in the commission of the crime of sexual battery; (2) the crime was committed for financial gain; (3) the crime was especially heinous, atrocious, or cruel; and (4) the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial judge expressly rejected, in detail, each of the mitigating circumstances, including that [Defendant] lacked the capacity to appreciate the criminality of his conduct. The trial judge noted in this regard that, although [Defendant's] IQ score was in the dull-normal range, there was evidence that [Defendant] functioned on a higher level. The trial judge concluded that "the aggravating factors in this case far outweighed any possible mitigating circumstances."

Thompson v. State, 619 So. 2d 261, 262-64 (Fla. 1993).

During his testimony at resentencing, William Weaver, Defendant's elementary school principal, admitted that Defendant's eligibility for special education was based on a showing that he had an IQ score below 80 and that the IQ tests used had been group IQ tests. (R. 2172, 2178, 2180) He stated

that he had begun corresponding with Defendant after he heard Defendant had been sentenced to death. (R. 2187) He admitted that the letters he received from Defendant exceeded his expectation of what a person with Defendant's IQ scores could have written. (R. 2196) He acknowledged that the IQ scores obtained by Defendant's experts had exceeded the score obtained during Defendant's childhood and suggested that this was true because Defendant had educated himself through reading books while incarcerated. (R. 2196-97) He admitted that the adult IQ scores were above the level of retardation. (R. 2199)

Donna Adams, Defendant's ex wife, testified that Defendant had been a loving husband and father who put his family's needs before his own. (R. 2331, 2334) She admitted that Defendant had held several jobs during their time together, including being an armed security guard. (R. 2348) She acknowledged that Defendant was capable of doing anything he wanted to do when they were together but claimed it took Defendant longer to do things. (R. 2354)

Dr. Joyce Carbonell, a psychologist, testified that Defendant's school records had described him as mildly retarded and revealed IQ scores ranging from 70 to 90. (SR1. 13-15, 17) On the WAIS-R she administered, Defendant received a full scale IQ of 85, a verbal IQ of 87 and a performance IQ of 84, which

placed in the dull normal range. (SR1. 20-21) She admitted that Defendant was not retarded. (SR1. 44, 56-59) She averred that the reason Defendant had been labeled as retarded in his school records was that they had used a definition under which people with IQs below 85 were considered retarded. (SR1. 56-57)

Dr. Dorita Marina, a psychologist, testified that Defendant had studied and obtained his GED while in prison. (R. 2496-97, 2500) She admitted that Defendant's scores on the IQ test she administered were in the low average range and averred that his scores were scattered. (R. 2509-10)

Dr. Arthur Stillman, a psychiatrist, testified that an individual with an IQ score of 85 would not be considered retarded but in the dull normal range. (R. 2552, 2592) He averred that he believed that Defendant was retarded without conducting any testing and that he believed that anyone with IQ of 80 or below was retarded. (R. 2592-93)

Dr. Charles Mutter, a psychiatrist, testified that the range of IQ scores he had seen suggested that Defendant had borderline intellectual functioning. (R. 2745-46, 2793) Dr. Albert Jaslow, a psychiatrist, testified that he believed that how a person actually functioned was more important than an numerical IQ score. (R. 2807, 2815-16) In this case, he observed nothing in Defendant's functioning that suggested the

need for psychological testing. (R. 2836-37) Dr. Lloyd Miller, a psychiatrist, testified that he believed that Defendant was of about average intelligence and averred that he found Defendant to be functioning better than would be expected of a person with an 85 IQ. (R. 2886, 2898, 2901, 2905) Dr. Leonard Haber, a psychologist, testified that one needed to consider not only an IQ test score but also a person's functioning in determining their intellectual abilities. (R. 2932, 2960-61) He averred that the ability to be deceptive required a level of intelligence above retardation and noted numerous incidents in which Defendant had been deceptive. (R. 2965-69) Other information he learned during his evaluation, including the range of IQ scores Defendant had achieved during his life, suggested Defendant had adequate intelligence. (R. 2971-79)

During its closing argument, the State argued that the mental health evidence Defendant had presented should be rejected because of inconsistencies in the evidence concerning his mental state between the experts and inconsistencies with the facts of the case. (R. 3062-74) In the course of doing so, the State expressly argued that Defendant was not retarded and noted that the defense experts wanted the jury to "think he's a bump on a log just sitting there, has no idea what's going on,

not responsible," even though such a concept was contrary to the evidence. (R. 3070, 3071, 3072)

Later, the State addressed the contention that Defendant should not be sentenced to death because his codefendant was not. (R. 3083-86) It argued that contention should be rejected because Defendant was responsible for the discrepancy because he had testified on the codefendant's behalf. *Id.* In the course of doing so, the State commented, "The tragedy was that this retarded bump-on-a-log fooled 12 good Americans and now his lawyers will ask you to give him the same sentence." (R. 3084-85)

In sentencing Defendant to death, the trial court found that Defendant's IQ scores were an underestimate of his intellectual functioning. (R. 768) It noted that Defendant's ability to testify and obtain a GED indicated that he functioned at a higher level. *Id.*

On resentencing appeal, Defendant raised 6 issues. This Court affirmed Defendant's death sentence. *Thompson v. State*, 619 So. 2d 261 (Fla. 1993). Defendant sought certiorari review in the United States Supreme Court, which was denied on November 3, 1993. *Thompson v. Florida*, 510 U.S. 966 (1993).

Defendant then filed his third motion for post conviction relief, raising 45 claims, including a claim that counsel was

ineffective for failing to have Defendant's mental health adequately evaluated to show, *inter alia*, that he was retarded.[2] (PCR-SR. 62-233) However, Defendant did not claim that it was unconstitutional to execute him because he was mentally retarded. *Id.* The post conviction court denied the motion. (PCR-SR. 274-89) This Court affirmed the denial of the motion for post conviction relief and denied a contemporaneously filed habeas petition. *Thompson v. State*, 759 So. 2d 650 (Fla. 2000). It specifically found that Defendant had not alleged any new evidence of mental disabilities. *Id.* at 665-66.

On June 13, 2001, Defendant filed a federal habeas corpus petition. On December 14, 2001, the district court dismissed the petition, because it was a mixed petition. Defendant appealed the dismissal of the petition to the Eleventh Circuit, which affirmed the dismissal. *Thompson v. Moore*, 320 F.3d 1228 (11th Cir. 2003). Defendant subsequently sought certiorari review of this opinion.

While the federal habeas petition was pending, on November 15, 2001, Defendant served the original version of his fourth motion for post conviction relief. However, Defendant never properly served this motion. Defendant took no action to remedy the improper service or to have the motion heard. On June 18,

[2] The final amended version of this motion was served on November 8, 1995.

2003, Defendant served his amended motion for post conviction relief, which exceeded the page limits, without requesting leave to amend. (PCR2. 3-37) The motion raised not only a retardation claim but also a claim based on *Ring v. Arizona*, 536 U.S. 584 (2002). The State filed a response to the amended motion and moved to strike it on July 8, 2003. (PCR2. 38-65) Defendant did not file a response to the motion to strike and had never filed a notice of appearance in this matter.

The post conviction court held a hearing on the motion to strike on July 29, 2003, and granted it without hearing argument. The lower court rendered its written order to this effect on August 1, 2003. (PCR2. 66, 100-03) Defendant then moved to disqualify the post conviction court, asserting that the hearing was an *ex parte* communication. (PCR2. 67-82) The post conviction court denied the motion for disqualification in a written order rendered on September 4, 2003. (PCR2. 88)

Defendant then filed a notice of appeal on October 1, 2003, seeking to appeal both the non-final order granting the State's motion to strike and the denial of the motion for disqualification. The State moved to dismiss the appeal because the orders were not final and the notice was untimely. This Court granted the State's motion to dismiss the appeal of the order granting the State's motion to strike on July 9, 2004.

Thompson v. State, 880 So. 2d 1213 (Fla. 2004). It ordered Defendant to file an amended motion that complied with the page limitation. It treated the appeal of the order denying the motion to disqualify as a petition for writ of prohibition and denied it on the merits. *Id.*

On August 9, 2004, Defendant served his second amended successive motion for post conviction relief. (PCR3. 6-25) However, Defendant again improperly served this motion only on the Office of the Attorney General. This version of the motion raised only the retardation claim. At the *Huff* hearing on the motion, Defendant argued that evidence of Defendant's retardation had been "very well developed" at resentencing. (PCR3. 108) After considering the parties' arguments, the post conviction court entered its order denying the motion, finding it procedurally barred as the issue of retardation had been raised and rejected at resentencing and refuted by the record based on the testimony presented at resentencing that Defendant was not retarded. (PCR3. 26-33)

Defendant again appealed, claiming that the lower court had erred in holding that *Atkins v. Virginia*, 536 U.S. 304 (2002), did not apply retroactively, finding that the claim was procedurally barred and finding the claim was conclusively refuted by the record. Initial Brief of Appellant, FSC Case No.

SC05-279. In raising these claims, Defendant insisted that the issue of retardation had not been adequately presented at resentencing, in contradiction to his assertion before this Court that the issue had been "well developed."

On April 4, 2005, the United States Supreme Court granted Defendant's petition for writ of certiorari regarding the dismissal of his federal habeas petition, vacated the Eleventh Circuit's opinion and remanded the matter for reconsideration in light of *Rhines v. Webber*, 544 U.S. 269 (2005). *Thompson v. Crosby*, 544 U.S. 957 (2005). The Eleventh Circuit then vacated the order dismissing the federal habeas petition and remanded the matter back to the district court for reconsideration in light of *Rhines*. *Thompson v. Sec'y for the Dept. of Corrections*, 425 F.3d 1364 (11th Cir. 2005).

On remand, the district court determined that Defendant was not entitled to a stay under *Rhines*, particularly finding that the claim that he was retarded was not meritorious. Defendant then elected to withdraw his retardation claims, the district court considered the remaining claim and the district court denied Defendant's federal habeas petition on July 20, 2006. Final Judgment and Order Denying Petition for Writ of Habeas Corpus, Case No. 01-2457 (S.D. Fla. Jul. 20, 2006). Defendant was permitted to appeal two issues regarding the denial of his

federal habeas petition to the Eleventh Circuit. Upon consideration of this appeal, the Eleventh Circuit affirmed the denial of Defendant's federal habeas petition. *Thompson v. Sec'y for the Dept. of Correction*, 517 F.3d 1279 (11th Cir. 2008).

On July 9, 2007, this Court entered an order on the appeal of the lower court's summary denial of the third version of the retardation claim, finding that the claim was not procedurally barred and remanding to the post conviction court to give Defendant another opportunity to plead his claim again in compliance with *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), within 30 days. *Thompson v. State*, 962 So. 2d 340 (Fla. 2007).

On August 8, 2007, Defendant served a third amended version of his successive motion for post conviction relief. (PCR4. 545-620) The motion was again not properly served. *Id.* This version was 72 pages long and sought to raise three additional issues. *Id.* In support of his retardation claim, Defendant cited two IQ scores: a 75 from 1958, when Defendant was in the first grade, and a 74 from second grade. (PCR4. 554) He also referred to testing done by Dr. Dorita Marina in 1988, and stated that Dr. Marina had found Defendant's IQ to be at the "lowest possible level of low average." (PCR4. 555)

Defendant simultaneously filed a motion to exceed the page limitations on successive motions. (PCR4. 621-22) On August 15,

2007, the State responded to the motion to exceed the page limits and moved to strike the third amendment successive motion for post conviction relief. (PCR4. 623-41) The State argued that the remand order only allowed Defendant to re-plead his retardation claim and that allowing Defendant to add claims would be in contravention to Fla. R. Crim. P. 3.851(f)(4). *Id.*

That same day, the post conviction court held a telephonic status hearing regarding this matter. (PCR4-V8. 1-14) At the hearing, it indicated that it had only learned of this Court's order on August 12, 2007, that it had contacted the parties to set the status hearing the previous day, that it had received the State's response to the motion to exceed page limitations but that it had not received Defendant's pleadings. (PCR4-V8. 3-5) After obtaining the State's agreement to email Defendant's pleadings, it indicated that it wanted to review the documents before proceeding further and set another telephonic status hearing for August 22, 2007. (PCR4-V8. 5-10) It asked the parties to consider when an evidentiary hearing could be scheduled in the meantime. *Id.* At the conclusion of the hearing, Defendant inquired whether he needed to be prepared to discuss only the motion to exceed page limits or whether he needed to be prepared for a *Huff* hearing regarding the latest version of his motion. (PCR4-V8. 11) The post conviction court indicated that

the parties should be prepared to discuss all the issues and asked the State to prepare a response to the retardation claim before the hearing. (PCR4-V8. 11-12)

On August 21, 2007, the State filed its response to the retardation claim and faxed copies to Defendant's counsel. (PCR4. 642-68) At the beginning of the status conference held on August 22, 2007, Defendant claimed not to have had a chance to review the State's response before the hearing. (PCR4-V9. 4-5) As such, he asked the court to defer consideration of argument on the retardation claim. (PCR4-V9. 5-6) The court decided that it would first consider argument on the motion to exceed page limits. (PCR4-V9. 6) After considering the parties' argument on this motion, it struck the additional claims that did not regard retardation. (PCR4-V9. 6-11) Because doing so caused the motion to be within the page limitation, it determined that the motion to exceed page limits was moot. (PCR4-V9. 11)

The court then asked Defendant if he could direct it to where in the retardation claim he had complied with *Cherry* and plead that he had an IQ below 70. (PCR4-V9. 11-12) Defendant indicated that he could not answer that question without reviewing the State's response because he "didn't respond about the Cher[r]y case" in the motion. (PCR4-V9. 13) As such, he requested additional time to prepare a memo about *Cherry*. (PCR4-

V9. 13) The court decided to allow Defendant to file "a very brief, two page response showing me how and why you have complied" with this Court's order regarding *Cherry*. (PCR4-V9. 15) It directly ordered Defendant to fax his reply "by noon Monday, which is the 27th of August." (PCR4-V9. 16) It indicated that it would prepare an order by noon Tuesday. (PCR4-V9. 16) At no point during these proceedings did Defendant indicate that he needed to be evaluated by an expert. This is true, even though the State indicated that it would need an expert appointed if an evidentiary hearing was ordered. (PCR4-V9. 17)

On August 27, 2007, the post conviction court entered its order denying the motion. (PCR4. 679-83) The order noted that it had not received Defendant's reply by 4 p.m., despite its order to file by noon and its receipt of a phone call from Defendant's counsel indicating that the reply would be filed by 1 p.m. (PCR4. 680) It determined that Defendant had failed to comply with the remand order because the three references to IQ scores all exceed the cutoff score recognized in *Cherry*. (PCR4. 681-82)

Defendant again appealed, raising an issue about the denial of the retardation claim and an issue about the striking of his other claims. On February 27, 2009, this Court affirmed as without merit the claims that the lower court had stricken. *Thompson v. State*, 3 So. 3d 1237, 1238-39 (Fla. 2009). However,

it remanded the retardation claim for an evidentiary hearing. *Id.* at 1238. It specifically required that the matter "shall proceed in an expedited manner, and an evidentiary hearing on his mental retardation claim shall be held and an order entered within 90 days of this order." *Id.* at 1239.

On March 2, 2009, the post conviction court attempted to schedule a telephonic status hearing for that day. However, Defendant claimed to have no one available to attend such a hearing. As a result, the court entered an order scheduling the evidentiary hearing for April 13, 2009, and a status hearing for March 13, 2009. (PCR5. 20) On March 4, 2009, it revised the scheduling order to require Defendant to provide the State with a witness list prior to the March 13, 2009 status hearing, the State to provide a witness list to Defendant within one week of receiving the defense witness list, Defendant to have his expert conduct an evaluation before the status hearing and Defendant to provide the State with his expert's report promptly. (PCR5. 21-22) It noted that the parties had more than 4 years to prepare for the hearing and that it would not seek an extension of the 90 day deadline. *Id.*

Also on March 9, 2009, Defendant moved to continue the status hearing and discovery deadlines. (PCR5. 33-37) In this motion, Defendant claimed that he had been unable to begin

looking for a mental health expert to evaluate him until March 6, 2009, because his counsel was allegedly in a "four-day evidentiary hearing in Roy Clifford Swafford v. State."[3] Despite the fact that the scheduling order clearly required the State to provide its witness list within a week of receiving Defendant's witness list, Defendant averred that the court had not provided any time limits for the State at all. *Id.* He alleged that he had not had four years to prepare for the hearing because his claims had been summarily denied and that his lead counsel was unavailable to be at the hearing because she would be "out of the country from March 11-17, 2009." *Id.*

On March 10, 2009, the court granted Defendant's motion and continued both the status hearing and Defendant's discovery deadline until March 26, 2009. (PCR5. 38) However, it did not extend the requirement that the State provide a witness list within a week of receiving Defendant's list. *Id.*

On March 12, 2009, Defendant moved to disqualify the lower court. (PCR5. 40-48) According to Defendant, the bases for the motion were that the lower court had directed his counsel to review an ethical rule in its August 2007 order summarily denying the retardation claim, that the lower court had engaged

[3] This statement was false. The evidentiary hearing in *Swafford* was not a four day hearing. Instead, the hearing was held only on March 2, 2009, and the morning of March 5, 2009.

in "repeated ex parte communications" with the State, that the lower court had been employed by the State Attorney's Office at the time of his resentencing and that the lower court had allegedly set unreasonable time limitations on the defense while setting none on the State. *Id.* The lower court denied the motion. (PCR5. 49)

At the status hearing on March 26, 2009, the State noted that it had not received the witness list that it was supposed to have received before the hearing. (PCR5. 1235, 1237) When the court asked Defendant about the witness list, Defendant provided a list that contained the names of 13 individuals without providing any addresses or contact information for these individuals. (PCR5. 55-56, 1237-38) Moreover, it identified three individuals (Dr. Faye Sultan, Dr. Stephen Greenspan and Dr. Mark Tasse) as post conviction experts. (PCR5. 55-56) When the State complained about the lack of addresses and contact information and the lack of reports from the experts, Defendant responded that he did not have addresses for his witnesses and that none of his experts had provided reports, as Dr. Sultan was still conducting her evaluation. (PCR5. 1236, 1241, 1251-54) During this discussion, the State disclosed that its expert would be evaluating Defendant on April 6, 2009. (PCR5. 1255) When the State complained that the lack of reports was

preventing it from preparing for the hearing, the court ordered Defendant to provide the reports by March 30, 2009. (PCR5. 1254) It ordered that the State to provide its expert's report by April 9, 2009. (PCR5. 1270)

On March 27, 2008, Defendant sent a letter indicating that Dr. Sultan could not draft a report by March 30, 2009, and asking for another continuance of the due date for the report. (PCR5-SR. 1) Over the State's objection, the lower court granted the continuance until April 1, 2009. (PCR5. 65)

On the morning of the evidentiary hearing, Defendant provided the State with notes regarding interviews that Dr. Sultan had conducted. (PCR5. 863) Prior to the beginning of testimony, the State made an oral motion to compel Defendant to provide a report from Dr. Greenspan. (PCR5. 858-59) The court granted the motion and required Defendant to provide the report by April 17, 2008. (PCR5. 863-64)

Defendant then presented the testimony of William Weaver, Defendant's eighth grade teacher. (PCR5. 866-68) Mr. Weaver identified records from the school system in which he taught Defendant and an adjacent school district that Defendant had attended prior to his attendance in the district in which Mr. Weaver taught. (PCR5. 868-69)

Mr. Weaver stated that at the time he taught Defendant, Defendant did not do his homework or complete tests, received failing grades and was somewhat disruptive during class in that he would talk and fidget. (PCR5. 882-83, 891-93) He described Defendant as friendly but dressed poorly with a "kind of clunky walk," poor motor skills and a short attention span. (PCR5. 891-92, 894, 898) He stated that Defendant was a follower who would imitate the other students, that the other children made fun of Defendant and that Defendant interacted more with adults. (PCR5. 892, 893) Mr. Weaver described an incident in which Defendant brought Christmas trees into school for his class and other classes, which Mr. Weaver later learned Defendant had cut from a neighbor's yard. (PCR5. 892)

Mr. Weaver stated that Defendant's school records reflected that Defendant's mother had been advised to delay Defendant's entry into school for a year but rejected the advice and started Defendant in school at age 5. (PCR5. 884) They also reflected that Defendant received speech therapy when he was young. (PCR5. 893) They also revealed Defendant was given the Stanford-Binet on June 11, 1958, and achieved an IQ score of 75; the California Mental Maturity test on November 11, 1959 and scored 90; the Stanford-Binet on May 11, 1961, and scored a 74; the California Mental Maturity test on November 8, 1963, and scored a 79; the

Henmon-Nelson test on November 11, 1966, and scored a 73; and the Henmon-Nelson in October 1968, and scored a 70. (PCR5. 884-85) He averred that these scores made Defendant eligible for special education at the time in Ohio because the Ohio schools used a score less than 80 to determine eligibility. (PCR5. 885) Mr. Weaver stated that the Henmon-Nelson scores "kind of correlate with IQ." (PCR5. 885) He stated that the California Mental Maturity test was more of an achievement test, but it correlated with IQ. (PCR5. 887) He did not know if the tests were individually administered. (PCR5. 887-90)

Mr. Weaver stated that Defendant was in a special education class in the third grade but in a regular class in the fifth and sixth grades. (PCR5. 885-86) Mr. Weaver stated that Defendant repeated the first and eighth grades and was socially promoted to the sixth grade and after his second year in the eighth grade. (PCR5. 883, 886) Mr. Weaver stated that Defendant did worse the second time he took eighth grade because he was putting forth less effort. (PCR5. 896) After the second eighth grade year, Defendant dropped out of school. (PCR5. 896)

Mr. Weaver stated that when he heard about Defendant's conviction around 1986 or 1987, he had a secretary find an address for Defendant and began writing Defendant. (PCR5. 899)

He stated that Defendant's responsive letters were childlike and included drawings. (PCR5. 899)

On cross, Mr. Weaver admitted that he only taught Defendant for one year and that he liked Defendant. (PCR5. 900) He denied having described Defendant as always smiling and laughing. (PCR5. 900-01) He acknowledged that Defendant had been described as a very good reader in a progress report from the first grade and as restless and uninterested in school in 1960. (PCR5. 902) The comments about being a good reader and having good reading comprehension at grade level continued in 1961 and 1962. (PCR5. 902-03) In 1963, Defendant's poor writing ability was attributed to his lack of coordination and his poor performance was attributed to his short attention span. (PCR5. 904) He acknowledged that notes showed that Defendant did not want to do his work and had to be forced to do it. (PCR5. 904)

Mr. Weaver admitted that a hearing deficit could account for Defendant's speech problems but could not say whether it would affect his coordination. (PCR5. 905-07) He acknowledged that he had no idea how the Hemon-Nelson tests were administered. (PCR5. 908)

Dr. Faye Sultan, a clinical psychologist, testified that she was first asked to interview Defendant in 1996. (PCR5. 917-25) She stated that she had given IQ tests many times but that

her evaluation of Defendant was the first time she had ever administered the WAIS-IV. (PCR5. 922-23)

Rather than having Dr. Sultan testify regarding her understanding of the definition of retardation, Defendant attempted to have Dr. Sultan read a definition for an AAMR manual. (PCR5. 925-27) The lower court permitted Dr. Sultan to testify regarding her understanding of the definition of retardation but sustained the State's objection to Dr. Sultan reading the AAMR definition. (PCR5. 925-27) Dr. Sultan stated that her understanding of the definition of retardation was that Defendant had to have an IQ score that was at least two standard deviations below the mean, deficits in adaptive behavior and onset before the age of 18. (PCR5. 928-29, 931) She stated that she looked at Defendant adaptive behavior during the developmental period and justified doing so because Defendant had been incarcerated since the age of 24. (PCR5. 929-31) Dr. Sultan admitted that she knew that Defendant was required to have an IQ of 70 or below and current deficits in adaptive functioning under Florida law. (PCR5. 932) She acknowledged that she did not use the definition in Florida law in reaching her conclusions. (PCR5. 942)

Defendant then attempted to inquire about Dr. Sultan's opinion of the legal definition, and the lower court sustained

the State's objection. (PCR5. 932-34) Defendant then argued that he needed to be able to have Dr. Sultan testify regarding her opinion of Florida law to support an argument that the legal definition of retardation was incorrect. (PCR5. 935-38) The State responded that the appropriateness of a legal standard was a matter of legal argument. (PCR5. 939) The lower court agreed with the State. (PCR5. 940-42)

Dr. Sultan then testified that she administered the WAIS-IV to Defendant in the presence of a representative of the State on March 20, 2009, and that Defendant score 71 on that test. (PCR5. 945, 946) She admitted that there was a discrepancy in Defendant's performance on the processing speed portion of the WAIS-IV, which was indicative of a learning disability, but stated that she used the full scale score in reaching her conclusion because she believed that doing so was professionally appropriate. (PCR5. 957) She believed that Defendant was fully cooperative with the testing but was somewhat distracted by the observer being present. (PCR5. 947-48) She did not see any behavior that led her to believe that Defendant was malingering. (PCR5. 948-49)

In addition to her IQ testing, Dr. Sultan also reviewed Defendant's school records and records of prior evaluations and spoke to Mr. Weaver; Helen Thompson, Defendant's mother; and

Donna Adams, Defendant's common law wife. (PCR5. 950-51) She opined that the scores recorded in the school records were consistent with the score she obtained on the WAIS-IV. (PCR5. 950, 953-54) She stated that she did not perform adaptive functioning testing because the people she was interviewing did not interact with Defendant on a daily basis. (PCR5. 958-59) She chose these individuals to speak to because she was conducting a retrospective analysis of Defendant's adaptive functioning. (PCR5. 963)

Defendant then attempted to elicit what Dr. Sultan learned from her interviews, and the State objected on hearsay grounds. (PCR5. 963) The lower court indicated that it would allow Dr. Sultan to testify about the sources she used to gather information for her opinion and what her opinion was based on that information but would not allow her to testify simply to what she was told. (PCR5. 963-64) It added that Defendant would be able to elicit the hearsay directly on redirect if the State opened the door on cross. (PCR5. 965)

Dr. Sultan then testified that based on her interview with Mr. Weaver, she believed that Defendant had deficits in academic performance, coordination, motor skills and the ability to make friends and interact with peers socially. (PCR5. 969) From Ms. Adams, who allegedly knew Defendant from his late teenage years

through his early adulthood, Dr. Sultan learned that Defendant had difficulty attending to his own grooming without being reminded, handling money and performing household tasks. (PCR5. 971) When Dr. Sultan resorted to repeating what Ms. Adams told her, the State renewed its hearsay objection, and the lower court again sustained the objection and renewed its instructions regarding the proper scope of Dr. Sultan's testimony. (PCR5. 971-73) Dr. Sultan then stated that the information that she received from Ms. Thompson reinforced her opinions that Defendant had deficits in social skills and self-care skills. (PCR5. 974) She stated that she elected not to speak to the prison personnel who were in contact with Defendant on a daily basis because she believed the prison environment was too restrictive for Defendant to demonstrate his adaptive functioning. (PCR5. 975-77) Dr. Sultan also believed that Defendant had evidenced gullibility and naiveté from her records review and interviews. (PCR5. 978-81) She also found Defendant's behavior in court inappropriate to the situation and supportive of her belief that Defendant was retarded. (PCR5. 982-83)

Dr. Sultan also opined that Defendant's school records showed that Defendant's alleged problems in intellectual functioning and adaptive behavior onset before the age of 18.

(PCR5. 984-85) As a result, Dr. Sultan opined that Defendant was retarded. (PCR5. 985)

On cross, Dr. Sultan claimed not to have a strong personal opinion about the death penalty but asserted that the American Psychological Association had taken a position against the death penalty. (PCR5. 991-92) When confronted with the fact that she had previously testified that she had a strong personal opposition to the death penalty, Dr. Sultan stated that she had changed her opinion as she grew older. (PCR5. 993-94) She admitted that she had testified exclusively for the defense in death penalty cases. (PCR5. 998) When asked if she had ever said that any psychologist who testified on behalf of the government in a death penalty case was unethical, she admitted that she probably did say that but claimed that she would not call such a psychologist unethical. (PCR. 998-99)

Dr. Sultan admitted that the subscores she obtained on the WAIS-IV were an 83 in verbal comprehension, an 81 in perceptual reasoning, a 77 in working memory and a 56 in processing speed. (PCR5. 1008) When the State attempted to ask if the low processing speed score deflated the full scale score, Dr. Sultan insisted upon stating that the full scale score was obtained using the appropriate methodology for scoring a WAIS. (PCR5. 1008-12)

Dr. Sultan stated that the practice effect is expected to result in an increase of 5 points in an IQ score. (PCR5. 1014) She opined that the practice effect would still be influencing Defendant's performance on her IQ test even though Defendant had last taken a WAIS in 1988. (PCR5. 1014) Dr. Sultan stated that Defendant had taken the WAIS in 1987 and 1988, and had scored 85 and 82, respectively on these tests. (PCR5. 1015) She opined that the fact these results were contrary to the practice effect showed that Defendant was severely disabled. (PCR5. 1015)

Dr. Sultan stated that she saw nothing in the school records indicating a hearing deficit or hearing testing but did see notations of a speech impediment and speech therapy, which was beneficial. (PCR5. 1016-17) She admitted that there was frequently a correlation between hearing loss and speech deficits. (PCR5. 1017) She admitted that in the 1950's and 1960's, students with hearing deficits were sometimes misdiagnosed as being retarded and that hearing loss affected motor coordination. (PCR5. 1017-18) She also acknowledged that such a misdiagnosis tended not to get corrected. (PCR5. 1018) She acknowledged that by the time Mr. Weaver was teaching Defendant, Defendant was no longer putting forth much effort in school. (PCR5. 1018) She acknowledged that it was possible that Defendant had a hearing loss that was misdiagnosed but believed

that the school records were inconsistent with this possibility because Defendant did most things badly and was good at music. (PCR5. 1022-23)

Dr. Sultan opined that the type of deficits in self-care and helping around the house identified by Ms. Adams were more severe that would be typical of someone who was simply raised not to engage in such behavior. (PCR5. 1024-25) She admitted that Defendant's abilities had increased during his incarceration. (PCR5. 1025-26)

Early during Dr. Sultan's testimony, Defendant indicated that he had no issues regarding the timing of Dr. Sultan's testimony. (PCR5. 955) When she finished testifying, Defendant indicated that he did not need her to remain "unless there's something new." (PCR5. 1032)

The State presented the testimony of Dr. Greg Prichard, a psychologist with a specialization in assessments. (PCR5. 1033-36) Dr. Prichard stated that there were two IQ tests that were generally accepted: the WAIS and the Stanford-Binet. (PCR5. 1037) The most current version of the WAIS was the WAIS-IV, which Dr. Prichard was not yet administering because he had yet to familiarize himself with the new version. (PCR5. 1037) Dr. Prichard stated that it was important to be thoroughly familiar with an IQ test before administering it in practice because

variations in the manner in which the test was administered invalidated the results. (PCR5. 1038-39)

Dr. Prichard stated that he administered the Stanford-Binet, Fifth Edition to Defendant on April 6, 2009, in the presence of representatives from the State and defense. (PCR5. 1040-41) He used the Stanford-Binet because Dr. Sultan had just given Defendant the WAIS and the practice effect would affect the results of a second administration in such a short period of time. (PCR5. 1042) Dr. Prichard stated that a 1987 administration of the WAIS would not have created a practice effect because the effect disappears after a year. (PCR5. 1042-43)

Defendant received an 85 in fluid reasoning, a 91 in knowledge, an 86 in quantitative reasoning, a 100 in visual-spatial reasoning and an 86 on working memory on the Stanford-Binet. (PCR5. 1043) The subscale scores converted to a nonverbal IQ of 86, a verbal IQ of 91 and a full scale IQ of 88. (PCR5. 1043-44) There was no significant difference in the subscale scores, which was important because a significant difference in a subscale score changed the interpretation of the overall score. (PCR5. 1044) Dr. Prichard stated that Defendant's scores all placed him in the low average range of functioning. (PCR5. 1044)

In addition to administering the IQ test, Dr. Prichard also reviewed documentation regarding Defendant. (PCR5. 1048) Dr. Prichard stated that based on his testing and document review, Defendant was not retarded. (PCR5. 1048)

Dr. Prichard explained that the IQ score he obtained was well above a score of 69, which was necessary to find retardation. (PCR5. 1048-49) He stated that Dr. Carbonnel had administered a WAIS in 1987, on which Defendant obtained a verbal IQ of 87, a performance IQ of 84 and a full scale IQ of 85, which was consistent with the scores Dr. Prichard obtained. (PCR5. 1049-50) Additionally, Dr. Marina had administered a WAIS in 1988, on which Defendant obtained a verbal IQ of 85, a performance IQ of 80 and a full scale IQ of 82, which was consistent with both his and Dr. Carbonnel's results. (PCR5. 1050) He noted Dr. Marina and Dr. Carbonnel had given their tests approximately 10 months apart and Defendant had done worse on the second test. (PCR5. 1051-52) He stated that this showed that the practice effect did not always occur. Id.

Dr. Prichard stated that the mean on the present versions of the WAIS and Stanford-Binet was 100 and the standard deviation was presently 15 on both tests. (PCR5. 1049) He stated that the standard deviation on the versions of the Stanford-Binet prior to the Stanford-Binet IV had been 16, which resulted

in a score of 68 being necessary for a score that was two standard deviations below the mean on these versions of the test. (PCR5. 1052-53) Dr. Prichard stated that Defendant's school records showed that he had been administered the older versions of the Stanford-Binet and scored 75 and 74. (PCR5. 1054) Since these tests had a standard deviation of 16, these scores were above the level for retardation. (PCR5. 1054-56)

Dr. Prichard had reviewed the raw data from Dr. Sultan's administration of the WAIS-IV and her report. (PCR5. 1056-57) He stated that the subtest scores on Dr. Sultan's WAIS were all statistically similar to the scores that he, Dr. Carbonnel and Dr. Marina had achieved except for the processing speed score. (PCR5. 1057-59) He stated that the processing speed score was significantly different than the other scores and lowered the full scale IQ. (PCR5. 1059) He stated that given this one low score, the full scale score should not have been interpreted as indicating retardation. (PCR5. 1057, 1060-61) Instead, this pattern of results indicated that either Defendant lacked attention, was tired or had a specific diffuse processing problem and not retardation. (PCR5. 1061)

When the State asked Dr. Prichard to define the terms average, low average and borderline, Defendant objected that Dr. Sultan had not be allowed to testify regarding definitions.

(PCR5. 1062) The lower court overruled the objection and indicated that it had not restricted Dr. Sultan's testimony regarding definitions and had only refused to allow her to read a definition from a book into the record. (PCR5. 1062-63)

Dr. Prichard then testified that borderline indicated an IQ score from 70 to 80, low average indicated an IQ score from 80-90, average indicated an IQ score from 90 to 110, high average indicated an IQ score from 110 to 120, and superior indicated an IQ of 130 and above. (PCR5. 1063-64) He stated that retardation was defined as below 70. (PCR5. 1064)

Dr. Prichard stated that he had worked with retarded individuals for years and was able to discern behaviors suggesting the possibility of retardation. (PCR5. 1064-65) In his interactions with Defendant, Defendant displayed vocabulary and comprehension skills that far exceeded retarded individuals. (PCR5. 1065) Additionally, the records showed that Defendant was able to enlist him the Marine and obtain his GED, which were both inconsistent with retardation. (PCR5. 1065) Further, Defendant's work history included jobs such a being a security guard that required a level of independent functioning that was inconsistent with retardation. (PCR5. 1066-68)

Dr. Prichard stated that everything he had reviewed indicated that the issue of whether Defendant was retarded was

not even a close question. (PCR5. 1068) Instead, all of the information showed that Defendant functioned in the low average range. (PCR5. 1068)

After direct, Defendant claimed that he was unable to cross examine the expert because he had received the State's expert's raw data several hours earlier. (PCR5. 1069) The State averred that it had attempted to provide the raw data the previous week but could only confirm receipt that morning. (PCR5. 1069-70) As such, the lower court recessed the proceedings, offering to continue the next day. (PCR5. 1070-74) Defendant declined the offer and indicated that he would rather conduct a telephonic cross examination on April 27, 2009, when he had already planned to present other witnesses. (PCR5. 1074-76) The lower court permitted Defendant to do so. (PCR5. 1076)

After 4 p.m. on April 17, 2009, Defendant finally provided the report from Dr. Greenspan. (PCR5. 753-68) In the report, Dr. Greenspan admitted that he had no opinion regarding whether Defendant was retarded. (PCR5. 753) Instead, he proposed to testify about "the proper criteria and methods to use in diagnosing MR in the criminal context" and "whether or not [he] believes [Dr. Sultan and Dr. Prichard's] conclusions are supported by their findings and other evidence." (PCR5. 753) The State then moved in limine to exclude such testimony, as

improper testimony about a legal definition and improper comment on the credibility of other witnesses. (PCR5-SR. 3-23)

On April 23, 2009, Defendant served a response to the motion. (PCR5. 770-81) In the response, Defendant claimed that there was no disagreement about the legal definition of retardation and that Dr. Greenspan would merely be commenting on the opinions of the other doctors in explaining his opinion on the matter in controversy. Id. He also asserted that Fla. R. Crim. P. 3.203 allowed the presentation of anything he wanted to present and that the lower court would deprive him of a full and fair hearing by excluding the evidence. Id. On April 24, 2009, the lower court entered an order denying the State's motion. (PCR5. 804)

When the proceedings recommenced on April 27, 2009, Dr. Prichard stated that doing the testing in the presence of observers and while Defendant was handcuffed was not optimal. (PCR5. 1088) He had reviewed documents, which included the prior testimony of defense experts, school records and Dr. Sultan's report and raw data before he conducted his testing. (PCR5. 1088-89) He did not recall if he had seen any Department of Corrections records but was sure he had not seen the full records. (PCR5. 1089) He admitted that he had noted Defendant's smiling inappropriately to his counsel at the time of the

evaluation but did not consider the smiling significant in assessing retardation. (PCR5. 1090)

Dr. Prichard acknowledged that he conducted a clinical interview with Defendant for 45 minutes to an hour before he started the IQ test. (PCR5. 1090) He stated that this was to evaluate Defendant's ability to response and any psychological conditions that might affect his testing and to obtain background information. (PCR5. 1090-91) He stated that his only basis for evaluating the truthfulness of Defendant's statement was to compare them to information Defendant had previously provided, some of which was consistent and some of which was not. (PCR5. 1091-92) However, Dr. Prichard stated that the accuracy of the information Defendant reported did not affect his assessment. (PCR5. 1092-93)

Dr. Prichard stated that the WAIS was more commonly used than the Stanford-Binet and was easier to administer. (PCR5. 1093-94) The tests were similar in the factors they were assessing and their scores correlated well but were not similar in how they assessed the factors. (PCR5. 1094, 1098-99) He admitted that it was better practice to give the most recent version of an IQ test. (PCR5. 1094) He admitted that the Stanford-Binet V was published in 2003, and was six years old. (PCR5. 1095-96) He acknowledged that there was research

suggesting that the age of the test affected its scores. (PCR5. 1096) He admitted that an argument could be made that there was a practice effect based on the administration of different IQ tests within a short period of time but that the effect was identifiable and quantifiable based on research only regarding the readministration of the same test. (PCR5. 1096-98) This was true because the task demands on different tests were different. (PCR5. 1098) He stated that the practice effect could inflate a score by as much as 8 points but that it did not occur in all cases, which made the interpretation of scores difficult. (PCR5. 1099) He was not concerned about the practice effect in this case because he and Dr. Sultan did not administer the same test and the tests were sufficiently different in their task requirements. (PCR5. 1100)

Dr. Prichard admitted that he had been involved in the Cherry case and had decided against administering his own IQ test in that case. (PCR5. 1100-01) This was because Cherry had just been tested by a doctor whose work Dr. Prichard trusted. (PCR5. 1101) He acknowledged that he could have given Cherry a different IQ test if he had not trusted the work of the other doctor. (PCR5. 1101-02)

Dr. Prichard stated that he had not felt the need to do further testing in this matter because his IQ score was

consistent with the scores obtained by Dr. Marina and Dr. Carbonnel, those scores were not consistent with retardation, they were consistent with low average functioning and a failure to establish any one of the elements of retardation negated the claim. (PCR5. 1103-04) He acknowledged that Dr. Sultan's IQ score was interesting to him but stated that it was explained by the low processing speed score. (PCR5. 1105) He reiterated that he believed that Dr. Sultan's use of her full scale score to assert that Defendant was retarded was a misinterpretation of the score. (PCR5. 1105) He asserted that the manuals of the tests themselves indicated that such a significant difference in subtest scores supported his belief. (PCR5. 1105-06) He stated that the difference in this subtest score would not be associated with problems with adaptive functioning. (PCR5. 1106-08) Instead, such a different subtest score suggested the possibility of a focused learning disability. (PCR5. 1108) If he had been doing a more general assessment of Defendant's functioning, he would have done further testing to identify the exact problem represented by this subtest score. (PCR5. 1109-11) However, since he was only assessing whether Defendant was retarded, he did not do so. Id.

Dr. Prichard stated that a number of factors could affect a person's performance on an IQ test, such a sleep, rapport with

evaluator and motivation, but a person cannot outperform their true intellectual level. (PCR5. 1111-12) As such, the scores in the 80's were more representative of Defendant's true level of functioning. (PCR5. 1112-13) He admitted that Defendant appeared to be attentive, motivated and giving his best effort during his testing. (PCR5. 1114)

Dr. Prichard admitted that Defendant had claimed to have been helped by the recruiter on the military entrance exams and that he was aware that Defendant did not remain in the military for long. (PCR5. 1118-21) However, this did not affect his opinion. Id. He also stated that Defendant's claim that he only managed to pass the GED exam by cheating on the third time he took the test also did not affect his opinion. (PCR5. 1122-27)

Dr. Prichard stated that he has evaluated individuals who had been incarcerated for long period of time previously. (PCR5. 1129) He was aware of some information that indicated that Defendant had functioned poorly. (PCR5. 1129) He stated that this information could suggest a person might be retarded but that all the information about Defendant negated that suggestion. (PCR5. 1130)

On redirect, Dr. Prichard stated that he had been hired by both the State and defense to conduct retardation evaluations. (PCR5. 1162) In the Cherry case, he was hired by the State and

opined Cherry was retarded. (PCR5. 1162) When Dr. Prichard asked if there was any question in his mind that Defendant was not retarded as a clinician and someone familiar with Florida law, Defendant objected that Dr. Prichard was not qualified as a legal expert. (PCR5. 1163-64) The lower court overruled the objection. (PCR5. 1165)

When Defendant called Dr. Greenspan, the State renewed its objection that Dr. Greenspan had no opinion on the matter in controversy and was merely being called to testify concerning the credibility of the other experts, which was not admissible. (PCR5. 1166) The lower court remarked that it had denied the State's motion in limine despite being concerned that Dr. Greenspan's testimony was not appropriate because this Court had ordered an evidentiary hearing that the lower court had felt was not necessary. (PCR5. 1166) As such, it was allowing the testimony in an abundance of caution and would disregard it if it was not appropriate. (PCR5. 1166-67)

Dr. Greenspan then testified about his qualifications and his general understanding of the definition of retardation and learning disabilities. (PCR5. 1173-84) During this general testimony about subjects other than retardation, the State objected that the testimony was not relevant. (PCR5. 1180-81, 1184-85) Defendant responded that the testimony was somehow

relevant to discussing Dr. Prichard's testimony. *Id.* The lower court first directed Defendant to question Dr. Greenspan directly about issues Dr. Prichard had actually discussed and then directed Defendant to discuss Dr. Greenspan's actual opinion. (PCR5. 1181-82, 1184)

Dr. Greenspan then explained that he had done no testing on Defendant. (PCR5. 1185) Instead, he stated that he was hired to review materials, including the reports of the other experts, and that he was asked to testify regarding the definition of retardation, his opinion on how retardation should be evaluated and his opinion on the manner in which the other experts had conducted their evaluations. (PCR5. 1185) Dr. Greenspan then testified regarding what he saw in the records he reviewed, and the State again objected. (PCR5. 1190-91) The lower court stated that since it was unsure of what opinion Dr. Greenspan would be offering and it appeared that he was simply reciting records, it wanted Dr. Greenspan to offer his opinion first and explain it thereafter because it thought it might have misunderstood the nature of Dr. Greenspan's testimony. (PCR5. 1191-92) When Defendant then asked if Dr. Greenspan had an opinion on Defendant's intellectual functioning, he stated that he did not. (PCR5. 1192) The lower court then inquired about the purpose of Dr. Greenspan's testimony, and Defendant responded that he was

being called merely to comment on the evaluations by the other experts. (PCR5. 1193) The lower court informed Defendant that it would not permit testimony about the legal definition of retardation or testimony that merely concerned the propriety of the other experts' opinions. (PCR5. 1194-95) The State argued that under the law, a expert could not be called merely to comment on other experts, that such comment was only permissible in discussing the expert's own opinion on the matter in controversy (whether Defendant met the legal definition of retardation) and that Dr. Greenspan had no opinion on that matter. (PCR5. 1195-96) The lower court reiterated its ruling, and Defendant stated that he disagreed. (PCR5. 1196-98)

Defendant then proffered that Dr. Greenspan would testify that Dr. Sultan did a proper evaluation and that Dr. Prichard's evaluation was incomplete because he did not adjust his IQ and other IQ scores and did not test adaptive functioning. (PCR5. 1199-1201) He also proffered Dr. Greenspan's report. (PCR5. 1203)

On May 7, 2009, Defendant moved to disqualify the lower court. (PCR5. 805-15) According to the motion, the lower court had demonstrated bias by allegedly commenting that it did not believe that Defendant's motion warranted an evidentiary hearing on April 27, 2009, by setting deadlines for Defendant while

allegedly not setting deadlines for the State, by sustaining objections to Dr. Sultan's testimony on April 13, 2009, and by ruling on the admissibility of evidence on April 27, 2009. *Id.* Defendant further reasserted the grounds raised in his prior motions to disqualify the lower court. *Id.* The motion made no mention of the lower court allegedly coaching the State. *Id.* The lower court denied the motion that same day. (PCR5. 818)

On May 12, 2009, Defendant filed a petition for writ of prohibition in this Court. Petition, FSC Case No. SC09-833. He also moved the lower court to stay entry of its order on the post conviction motion pending disposition of the petition. (PCR5. 819-22) After requesting and receiving a response from the State, this Court dismissed this petition as moot without prejudice to raising the issue in this appeal. *Thompson v. State*, 15 So. 3d 581 (Fla. 2009).

After considering the evidence, the post conviction court denied the claim, finding that Defendant had not proven any of the elements of retardation, that Dr. Sultan's IQ score of 71 was artificially lowered by a low process speed score and that Defendant's true IQ was probably in the 80's. (PCR5. 833-35)

Defendant again appealed the denial of the claim, asserting that the post conviction court had erred in denying his claim, that it had abused its discretion in refusing to admit Dr.

Greenspan's testimony, that he was denied a full and fair evidentiary hearing because he was not permitted to present hearsay, the remand period was limited and the post conviction court was allegedly biased against him, that it was unconstitutional to require him to prove that his IQ was 70 or below and that the State should have been required to prove that he was not retarded. On May 6, 2010, this Court affirmed the denial of the fourth motion. *Thompson v. State*, 41 So. 3d 219 (Fla. 2010). It agreed that the evidence showed that Defendant's IQ was in the 80's and that he had also failed to prove the other two elements of retardation. *Id.* It also found Defendant's claims regarding the exclusion of Dr. Greenspan's testimony and the alleged denial of a full and fair hearing meritless. *Id.*

On November 29, 2010, Defendant filed a fifth motion for post conviction relief, claiming that *Porter v. McCollum*, 558 U.S. 30 (2009), was a retroactive change in constitutional law regarding how the denial of claims of ineffective assistance of counsel were reviewed after an evidentiary hearing that affected the rejection of the claims in his third motion for post conviction relief. (PCR6. 46-74) On February 7, 2011, the post conviction court denied the fifth motion for post conviction relief, finding that *Porter* did not change the law and that any

change in law that might have occurred would not be retroactive or applicable to Defendant. (PCR6. 102-13) Defendant appealed the denial of this motion to this Court, which affirmed on April 26, 2012. *Thompson v. State*, 94 So. 3d 499 (Fla. 2012).

On February 29, 2012, Defendant served a sixth motion for post conviction relief, *pro se*, claiming that the court lacked jurisdiction over him because of alleged defects in manner which he was charged and arraigned and that his trial counsel had been ineffective in failing to raise these assertions. On March 23, 2012, the post conviction court struck these pleadings because Defendant was represented by counsel.

On May 26, 2015, Defendant served a seventh motion for post conviction relief, raising one claim:

> [DEFENDANT'S] SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS UNDER *ATKINS V. VIRGINIA* AND *HALL V. FLORIDA*.

(PCR7. 74-99) In support of this claim, Defendant insisted that he had been prevented from presenting evidence to support his retardation claim because he had failed to show that his IQ was 70 or below and that his retardation claim had been denied merely because he did not prove he had an IQ of 70 or below. *Id.* He asserted that *Hall v. Florida*, 134 S. Ct. 1986 (2014), was a retroactive change in law that required that the retardation claim be revisited. *Id.*

On June 5, 2015, the State filed its response to this motion. (PCR7. 100-24) In the response, it argued that *Hall* was not a retroactive change in law such that Defendant's motion was untimely and successive. *Id.* It further averred that Defendant would not be entitled to any relief even if *Hall* applied because Defendant was permitted to present evidence on all three elements of retardation and was found not to be retarded not only because his IQ was found to be in the 80's but also because he had not proven the other two elements of retardation. *Id.*

At the *Huff* hearing, Defendant argued that he was entitled to a new evidentiary hearing under *Hall* because this Court had ordered Defendant to plead and prove his claim under *Cherry* in 2007. (PCR7. 167) He insisted that the fact that he had been able to present evidence regarding his adaptive functioning and age of onset, that his claim had been denied on all three prongs and that his IQ had been found to be in the 80's did not prevent him for having a new hearing because the State's expert had allegedly not considered the other two elements of retardation, he did not believe the 2009 hearing had been full and fair, the trial court had mentioned *Cherry* in its order and he had Stanford-Binet IQ score from his childhood that were 74 and 75. (PCR7. 169-74) He averred that *Hall* had also required that

adaptive functioning be considered in accordance with the medical community's criteria and that *Hall* permitted a determination that a defendant was retarded even if he had an IQ in the high 80's. (PCR7. 172-73, 175)

Defendant also argued that *Hall* should be applied retroactively because it allegedly forbad the State from imposing a death sentence on a class of defendants (PCR7. 178-80) He further asserted that the United States Supreme Court's decision in *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), somehow showed that *Hall* was retroactive. (PCR7. 180-81)

The State responded that *Hall* merely held that defendants whose IQ scores were above 70 but within the standard error of measure of 70 had to be permitted to present evidence on the other two elements of retardation. (PCR7. 183) It noted that Defendant had been given this opportunity and had failed to prove that his IQ scores were even within the standard error of measure of 70. *Id.* In doing so, it noted that Defendant's assertions regarding the childhood Stanford-Binet scores still did not show that Defendant had an IQ score two or more standard deviations below the norm before the age of 18 as the standard deviation on those tests was 16. (PCR7. 184) It averred that the testimony that had been excluded at the evidentiary hearing on retardation had been excluded because it was not admissible

under Florida's evidence law and not because Defendant failed to prove the first element of retardation. (PCR7. 185-86) It also argued that *Hall* did not meet the standard for retroactivity because it had merely recognized a new procedural right to present evidence. (PCR7. 187)

On July 10, 2015, the lower court denied the motion. (PCR7. 126-28) It determined that *Hall* did not create any new rights, that Defendant had already been permitted to present evidence on all of the elements of retardation and that he had failed to prove any of them. *Id.* He noted that because Defendant had been found to have an IQ in the 80's, considering the standard error of measure to be five points would still not prove the first element of retardation. *Id.* It also noted that Dr. Greenspan's testimony had been excluded because it was inadmissible under the evidence code and not because it was irrelevant under the interpretation of retardation under *Cherry*. *Id.*

In rebuttal, Defendant again insisted that he could be found retarded regardless of how high his IQ scores were and that the prior hearing had not been full and fair because Dr. Greenspan was not allowed to comment on the credibility of the other witnesses. (PCR7. 188-201) He also insisted that the fact his IQ had been found to be in the 80's and that the other

elements of retardation had been found not to be proven should be ignored. *Id.*

On July 27, 2015, Defendant filed a motion for rehearing. (PCR7. 129-43) In this pleading, Defendant expanded on his version of the procedural history of the case and reiterated his arguments that he was entitled to another evidentiary hearing regarding retardation because he was allegedly prevented from presenting evidence on the second and third elements of retardation because his IQ was above 70 and his retardation claim was allegedly denied merely because his IQ score was above 70. *Id.* On August 12, 2015, the lower court denied this motion. (PCR7-SR. 15) This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied Defendant's fourth motion for post conviction relief, which sought to relitigate a retardation claim, because the motion was untimely, successive and meritless. Defendant's attempts to relitigate issues regarding the denial of motions to disqualified the prior judge and the admissibility of evidence from the prior evidentiary hearing are unpreserved and present an improper attempt to obtain a second appeal. Moreover, the claims remain meritless.

ARGUMENT

I. THE LOWER COURT PROPERLY SUMMARILY DENIED DEFENDANT'S UNTIMELY, SUCCESSIVE AND MERITLESS MOTION FOR POST CONVICTION RELIEF.

Defendant first asserts that the lower court erred in summarily denying his seventh motion for post conviction relief, in which he sought to relitigate the claim that he was retarded in light of *Hall v. Florida*, 134 S. Ct. 1986 (2014). He insists that he should have been permitted to relitigate the issue because his retardation claim was allegedly previously denied merely because he failed to show that he had an IQ score of 70 or below and he was allegedly prevented from presenting evidence regarding the other elements of retardation based on the same lack of a qualifying IQ score. He further contends that the fact that the other two elements were actually considered and rejected in the prior determination that he was not retarded should be ignored because the lower court was not required to make those findings under the law as it existed at the time.

In making his arguments regarding *Hall* and its alleged effect on this case, Defendant insists that *Hall* requires states to conform the legal definition of retardation to the views of the scientific community. However, this assertion is contrary to the express language in *Hall* itself. There, the Court expressly stated that the work of the medical community "do[es]

not dictate the Court's decision," and that the "legal determination of intellectual disability is distinct from a medical diagnosis." *Hall*, 134 S. Ct. at 2000. Instead, it merely stated that it was appropriate for legal authorities to "consult" and be "informed" by the views of the medical community. *Id.* at 1993. These statements are entirely consistent with the Court's prior recognition that "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law." *Kansas v. Crane*, 534 U.S. 407, 413 (2002). Thus, any assertion that *Hall* required Florida to adopt the AAIDD definition of retardation and interpret the definition so adopted in accordance with that organization's views is simply false. Instead, the actual holding of *Hall* was limited to a determination that it was unconstitutional for Florida to refuse to allow defendants to present evidence of their alleged deficits in adaptive behavior throughout their lives when their IQ scores were above 70 but within the standard error of measure of 70. *Hall*, 134 S. Ct. at 2001.

Given the actual holding of *Hall*, the lower court was correct to deny Defendant's attempt to relitigate his retardation claim. Pursuant to Fla. R. Crim. P. 3.851(d), a

motion for post conviction relief must be filed within one year of when the defendant's convictions and sentences became final. Here, Defendant's sentence became final on November 3, 1993, when the United States Supreme Court denied certiorari after resentencing. *Thompson v. Florida*, 510 U.S. 966 (1993). As that was well more than one year before the filing of this motion, the motion was not timely unless one of the exceptions to Fla. R. Crim. P. 3.851(d) applied.

While Fla. R. Crim. P. 3.851(d)(2)(B) does recognize an exception to the one year limitations period, that section provides "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." Defendant does not suggest that *Hall* has been held to be retroactive, and no court has held that it is. In fact, the Eleventh Circuit held that *Hall* is not a retroactive change in constitutional law. *Kilgore v. Sec'y, Florida Dep't of Corrections*, 805 F.3d 1301, 1312-16 (11th Cir. 2015); *see also In re Hill*, 777 F.3d 1214, 1223-24 (11th Cir. 2015); *In re Henry*, 757 F.3d 1151, 1158-61 (11th Cir. 2014). Instead, he asked the lower court to make that determination in the first instance. However, as this Court has recognized, the use of the past tense in a rule conveys the meaning that an action has already occurred. *Sims v. State*, 753

So. 2d 66, 70 (Fla. 2000). Thus, Defendant could not use the assertion that the alleged change in law in *Hall* should be held retroactive to have the exception in Fla. R. Crim. P. 3.851(d)(2)(B) apply; he had to show that it has been held retroactive for the exception to apply. *See Tyler v. Cain*, 533 U.S. 656 (2001)(holding that use of past tense in federal statute regarding successive federal habeas petitions requires Court to hold new rule retroactive before it can be relied upon). As such, this motion was untimely and properly denied as such.

Even if making a request for retroactive application was proper under Fla. R. Crim. P. 3.851(d)(2)(B), the motion would still have been untimely because the alleged change in *Hall* would not be retroactive. In *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980), this Court set out the standard for determining whether retroactivity was warranted. Under this standard, a defendant can only obtain retroactive application of a new rule if he shows that the United States Supreme Court or this Court had made a significant change in constitutional law, which so drastically alters the underpinnings of Defendant's death sentence that "obvious injustice" exists. *New v. State*, 807 So. 2d 52, 53 (Fla. 2001). This Court has stated that new cases that merely refine or apply the law do not qualify. *Witt*,

387 So. 2d at 929-30. It further stated that new cases that merely concerned evidentiary standards and procedural fairness were evolutionary refinements that did not apply retroactive. *Id.* at 929.

Here, as noted above, the *Hall* Court merely held that it was unconstitutional for Florida to refuse to allow defendants to present evidence of their alleged deficits in adaptive behavior when their IQ scores were above 70 but within the standard error of measure of 70. *Hall*, 134 S. Ct. at 2001. In fact, the Court did not even find that Hall's own death sentence was unconstitutional. *Hall*, 134 S. Ct. at 2001. Thus, the new rule announced in *Hall* was merely a procedural requirement that Florida permit defendants with IQs between 70 and 75 the opportunity to present evidence regarding the other elements of retardation. *Kilgore*, 805 F.3d at 1314; *In re Henry*, 757 F.3d at 1161; *see also Mays v. Stephens*, 757 F.3d 211, 217-19 (5th Cir. 2014), cert. denied, 135 S. Ct. 951 (2015)(rejecting claim that *Hall* required states to define adaptive functioning deficits in any particular manner). Moreover, this Court had actually held that defendants could do so even before *Hall*. *Nixon v. State*, 2 So. 3d 137, 142-43 (Fla. 2009). Thus, *Hall* is a mere evolutionary refining regarding the admission of evidence and procedural fairness that does not apply retroactively.

Witt, 387 So. 2d at 929. The lower court was correct to find Defendant's motion untimely and should be affirmed.

Defendant's reliance on *Montgomery v. Louisiana*, 2016 WL 280758 (2016), does not compel a different. There, the Court held that it could require states to apply new substantive decisions retroactively. *Id.* at *5-*11. In doing so, it explained that a new rule was substantive when it sets "forth categorical guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *Id.* at *8. In contrast, a new rule is considered procedural when it is "designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability.'" *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). It justified requiring such retroactive application, despite its recognition that most new rules of constitutional law are not retroactive, by stating:

> As a final point, it must be noted that the retroactive application of substantive rules does not implicate a State's weighty interests in ensuring the finality of convictions and sentences. *Teague* warned against the intrusiveness of "continually forc[ing] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." 489 U.S., at 310, 109 S. Ct. 1060. This concern has no application in the realm of substantive rules, for no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose. *See Mackey*, 401 U.S., at 693, 91 S.Ct. 1160 (opinion of Harlan, J.) ("There is

> little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose").

Montgomery, 2016 WL 280758 at *11.

Here, while Defendant attempts to claim that *Hall* fits within the substantive category because it allegedly outlawed the execution of those with IQ scores of 71, this is not true. In *Hall*, the defendant has scored a 71 on an IQ test. *Hall*, 134 S. Ct. at 1986. While the Court determined that the claim that he was retarded was improperly denied merely because his score was 71, it did not find that his execution was unconstitutional. Instead, it held "Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." *Id.* at 2001. Thus, *Hall* did not create a new class of individuals who were exempt from the death penalty. *See In re Henry*, 757 F.3d at 1161. Instead, it merely regulated the manner in which a defendant's retardation claim was decided by requiring that a defendant be given the opportunity to present evidence regarding the other prongs of retardation if his IQ might be two or more standard deviations below the norm if the standard error of measure was considered. *Kilgore*, 805 F.3d at 1314. Thus, *Hall* fits within the procedural category described

in *Montgomery*. This is all the more true as retroactive application of *Hall* would require the State to continue to marshal resources to keep him on death row, as Defendant is seeking yet another evidentiary hearing so that he could attempt to prove that he is retarded, which as the Court noted is the reason why new decisions are generally not retroactive.[4] *Montgomery*, 2016 WL 280758 at *11. As such, Defendant's contention that *Montgomery* supports his position should be rejected, and the denial of the motion affirmed.

Defendant's reliance on *Oats v. State*, 2015 WL 9169766 (Fla. Dec. 17, 2015), also does not compel a different result. *Oats* came before this Court on direct review of the rejection of the retardation claim. *Oats*, 2015 WL 9169766 at *5-*8. Thus, the issue of whether this defendant was retarded was not yet final when *Hall* was decided. As the United States Supreme Court has held, decisions it renders before an issue is final apply to all cases pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Thus, there was no issue of retroactivity presented in these cases. In contrast, this Court affirmed the rejection of Defendant's retardation claim in 2010. *Thompson v. State*, 41 So. 3d 219 (Fla. 2010). As such, the fact that a

[4] Since *Hall* did not hold that individuals with IQ's above 70 were categorically exempt from the death penalty, Defendant's suggestion that new decisions regarding whether defendants are retardation would be involve an "easy analysis" is false.

defendant whose retardation determination was not final had *Hall* applied to them does not show that *Hall* is retroactive. The denial of the motion should be affirmed.

Further, considering the actual holding of *Hall*, this claim was barred. As this Court has held, claims raised in prior post-conviction proceedings cannot be relitigated in a successive post-conviction motion unless the movant can demonstrate that the grounds for relief were not known and could not have been known at the time of the earlier proceeding. See *Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Here, Defendant had already claimed to be retarded, and the claim was rejected finding that Defendant had failed to prove any elements of the claim that he is retarded. Thus, Defendant is doing nothing more than seeking to relitigate his claim. Since doing so is improper, the summary denied of the seventh motion for post conviction relief should be affirmed.

While Defendant attempts to avoid this result by suggesting that he was precluded from presenting evidence regarding the other elements of retardation because this Court had directed that Defendant be given the opportunity to plead and prove his claim in accordance with *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), and because he failed to present evidence that he had an adult IQ score of 70 or below, this is not true. While this

Court did direct that Defendant be given the opportunity "to plead and prove the elements necessary to establish mental retardation, specifically including the threshold requirements set forth in *Cherry*" when this Court reversed the summary denial of the retardation claim in 2007, *Thompson v. State*, 962 So. 2d 340 (Fla. 2007), this Court then ordered that Defendant be afforded an evidentiary hearing on his retardation claim when Defendant ignored that instruction and the lower court again summarily denied the claim. *Thompson v. State*, 3 So. 3d 1237, 1238 (Fla. 2009). While this Court did direct the lower court to consider *Cherry* in deciding whether Defendant proved his claim after conducting the evidentiary hearing, this does not show that Defendant was precluded from presenting evidence on the other elements of retardation as this Court had already held in *Nixon*, 2 So. 3d at 142-43, that *Cherry* was not a basis to exclude evidence relevant to the elements of retardation. Thus, Defendant's suggestion that he must have been denied the right to present evidence on the other elements merely because *Cherry* was mentioned should be rejected and the summary denial of the seventh motion for post conviction relief affirmed.

Moreover, Defendant's suggestion that he was prevented from presenting evidence on the other prongs of retardation is completely belied by the record. Despite the fact that he

presented no evidence that he ever had an IQ of 70 or below on a qualifying IQ test, Defendant was permitted to call Mr. Weaver regarding his school performance and childhood and to have Dr. Sultan testify regarding her opinion about whether the second and third elements of retardation were satisfied. Moreover, the lower court considered this evidence and made findings that these elements were not proven in her 2009 order denying the claim. Given these circumstances, the lower court properly summarily denied the successive motion and should be affirmed.

Defendant's continued reliance on *Oats* again does not compel a different result. Again, Oats was pending on an initial review of a retardation claim; not an attempt to relitigate a claim that had been finally rejected years earlier. Moreover, in *Oats*, this Court determined that the lower court had committed three errors in rejecting the defendant's retardation claim: (1) failing to consider all three elements of retardation; (2) failing to consider evidence that had been presented during prior proceedings in making its decision on retardation and (3) requiring that the defendant show that he had been diagnosed as retarded before the age of 18. *Oats*, 2015 WL 9169766 at *1-*2, *10-*12. Here, as a review of the lower court's prior order shows, it made rulings on all three elements of retardation, considered the testimony regarding Defendant's

intellectual functioning that had been presented during the prior proceedings and did not require that Defendant show that he had been diagnosed as retarded before the age of 18. (PCR5. 833-35) Thus, *Oats* does not show that the lower court erred in denying this successive motion. The lower court should be affirmed.

Defendant also attempts to make his case analogous to *Oats* by claiming that the State had made an "explicit concession" that he was retarded at resentencing. Initial Brief at 39. However, this is not true. In fact, the record reflects that the State repeatedly and expressly argued that Defendant was not retarded and was truly of average intelligence. (R. 3071, 3072) Since the State actually expressly argued that Defendant was not retarded, Defendant's suggestion that it explicitly conceded that he was retarded should be rejected.

This is all the more true as Defendant not only takes the comment he relies upon out of context but actually misquotes what the State say. While Defendant avers that the State commented that "[Defendant] is a retarded bump on a log," Initial Brief at 2, the record does not reflect that the State ever said that phrase. Instead, the record shows that during its discussion of the mental state evidence that had been presented, the State commented that the defense experts wanted

the jury to "think he's a bump on a log just sitting there, has no idea what's going on, not responsible," but that such a suggestion was inconsistent with Defendant's words and actions. (R. 3062-74) When it turned to discussing why the codefendant's conviction for second degree murder was not mitigating, the State noted that Defendant's testimony at the codefendant's trial had caused his codefendant's lesser conviction. (R. 3083-86) In doing so, the State argued, "The tragedy was that this retarded bump-on-a-log fooled 12 good Americans and now his lawyers will ask you to give him the same sentence." (R. 3084-85) Thus, when the actual words the State used in the context in which they were used is considered, the State was actually asserting that Defendant's ability to convince the codefendant's jury not to convict the codefendant of first degree murder showed that he was not retarded. Defendant's suggestion that the State explicitly conceded he was retarded should be rejected, and the lower court affirmed.

Moreover, it should be remembered that *Hall* would not entitle Defendant to relief even if it was retroactive. As noted above, the lower court considered all three elements of retardation and determined that none of them. It found that the first element was not proven not only because Defendant did not present a single qualifying IQ score of 70 or below but also

because Defendant's actual IQ was in the 80's given his multiple adult IQ scores in the 80's and the fact that Dr. Sultan's 71 IQ score had been based reduced by a single low subscale score of 56 in processing speed. In *Hall*, the Court only required that a defendant be permitted to present evidence on the other elements of retardation when his IQ was within the standard error of measure of 70, which the Court described as extending the upper end of the retardation range to 75. *Hall*, 134 S. Ct. at 1995-96, 2001. Since the lower found that Defendant's IQ score was in the 80's, Defendant's claim would have been properly denied even without consideration of the other elements of retardation even under *Hall*.[5] However, neither this Court nor lower court did so. Instead, both this Court and the lower court also determined that Defendant had not proven either of the two other elements. Thus, the error in the application of *Atkins* that the Court found in *Hall* simply did not occur in this case. Thus, *Hall* does not apply, and Defendant's claim that it is does is meritless. *In re Hill*, 777 F.3d at 1224; *Mays*, 757 F.3d at 218-

[5] While Defendant suggests that this Court held that doing so would be reversible error under *Oats*, this Court expressly recognized that a lack of finding on an element of retardation would not necessarily be reversible error depending on the facts of the case and the strength of the evidence on the elements. *Oats*, 2015 WL 9169766 at *10 ("We caution, however, that our decision should not be interpreted as establishing that this will necessarily constitute a per se reversible error.").

19. The denial of the successive motion should be affirmed.

II. DEFENDANT DID NOT PRESERVE THE ISSUE OF BIAS OR THE MERITS OF THE PRIOR EVIDENTIARY RULES AND IS IMPROPERLY ATTEMPTING TO RELITIGATE ISSUES THAT HAVE ALREADY BEEN REJECTED AND ARE MERITLESS.

Defendant next contends that he is entitled to relief because the judge who presided over the prior retardation hearing was allegedly biased against him and she allegedly improperly excluded evidence. However, this issue provides no basis for relief.

As this Court has held, issues that were not presented in a motion for post conviction relief will not be considered on appeal. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003). Here, while Defendant claimed below that the prior evidentiary hearing on his claim that he is retarded was not full and fair, he based that assertion exclusively on the contention that he had not been permitted to present evidence on the second and third element of retardation because he could not prove the first element. (PCR7. 74-75, 83, 84-85, 89, 170, 181) Defendant never mentioned any alleged bias of the lower court judge. As such, any issue regarding the alleged bias of the lower court judge or that the evidence that had been excluded from the first evidentiary hearing was actually admissible under Florida's evidence code was not presented below. Thus, these assertions are not properly presented in this appeal. They

should be rejected, and the lower court affirmed.

Even if Defendant had presented his arguments regarding the trial court's alleged bias and the other issues were considered, the claim should still be rejected. As this Court has held, it "will not entertain a second appeal of claims that were raised, or should have been raised, in a prior postconviction proceeding." *Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003).

Here, this Court treated a notice of appeal regarding the denial of a motion for disqualification that Defendant had filed in 2003, as a writ of prohibition and denied that petition on the merits. *Thompson v. State*, 880 So. 2d 1213 (Fla. 2004). During his appeal of the denial of his retardation claim after the 2009 evidentiary, Defendant argued that he had been denied a full and fair post conviction hearing and that the lower court had erred in finding Dr. Greenspan's testimony inadmissible. Initial Brief, FSC Case No. SC09-1085, at 51-71. In fact, the arguments that Defendant presents to this Court regarding the evidentiary hearing allegedly not being full and fair because of the alleged bias of the lower court and rulings regarding the admissibility of evidence through Dr. Sultan and Dr. Prichard in this appeal are almost a verbatim copy of the arguments Defendant previously presented. *Compare* Initial Brief at 47-57 *with* Initial Brief, FSC Case No. SC09-1085, at 61-71. In

affirming the denial of the retardation claim, this Court expressly determined that these claims were meritless. *Thompson v. State*, 41 So. Ed 219 (Fla. 2010). As such, Defendant's representation of these issues is nothing more than an attempt to obtain a second appeal of issues that were raised and rejected in the first denial of his retardation claim. *Wright*, 857 So. 2d at 868. This issue should be rejected, and the denial of the seventh motion for post conviction relief affirmed.

Moreover, even if Defendant could relitigate the issues, there would still be no basis for relief. While Defendant complains about a comment regarding an ethical rule, alleged ex parte communications, the prior employment of the judge, rulings regarding Dr. Sultan's testimony and the scheduling of the evidentiary hearing, Defendant did not file motions for disqualification within 10 days of when he was aware of these issues. As such, these claims were untimely. Fla. R. Jud. Admin. 2.330(e); *see also Rodriguez v. State*, 919 So. 2d 1252, 1274-78 (Fla. 2005); *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997). Moreover, this Court has repeatedly held that "[t]he fact the judge has made adverse rulings in the past, or that the judge has previously heard the evidence or 'allegations that the trial judge had formed a fixed opinion of the defendant's guilt,

even where it is alleged that the judge discussed his opinion with others,' are generally legally insufficient reasons to warrant the judge's disqualification." *Rivera v. State*, 717 So. 2d 477, 481 (Fla. 1998); *see also Asay v. State*, 769 So. 2d 974, 979-81 (Fla. 2000); *Thompson*, 759 So. 2d at 659-60; *Jackson v. State*, 599 So. 2d 103, 107 (Fla. 1992). It has applied this rule applies even when the trial court uses harsh wording against a defendant in issuing a ruling. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). Thus, Defendant's complaints about the lower court's orders, evidentiary ruling and alleged comments in orders and rulings does not provide a legally sufficient basis for recusal.

Additionally, as a review of Defendant's motion to get facts shows, Defendant's assertions that the State engaged in ex parte communications with the lower court in 2007 are based on nothing more than speculation that the State must have engaged in ex parte communications because the State was aware of hearing dates and deadlines that Defendant claimed his counsel did not hear the lower court announce in open court when it did so. However, this Court has held that a motion for disqualification cannot be based on mere speculation. *Asay*, 769 So. 2d at 981; *Willacy*, 696 So. 2d at 695 n.5; *McCrae v. State*, 510 So. 2d 874, 879-80 (Fla. 1987).

This Court has also held that a judge's prior employment is as a prosecutor is not a legally sufficient basis for recusal. *Arbelaez v. State*, 775 So. 2d 909, 916 (Fla. 2000). While Defendant acts as if the issue of whether a judge's prior employment alone requires disqualification is before the United States Supreme Court in *Williams v. Pennsylvania*, 136 S. Ct. 28 (2015), this is not true. Instead, the question presented in *Williams* is:

> Are the Eighth and Fourteenth Amendments violated where the presiding Chief Justice of a State Supreme Court declines to recuse himself in a capital case where he had personally approved the decision to pursue capital punishment against Petitioner in his prior capacity as elected District Attorney and continued to head the District Attorney's Office that defended the death verdict on appeal; where, in his State Supreme Court election campaign, the Chief Justice expressed strong support for capital punishment, with reference to the number of defendants he had "sent" to death row, including Petitioner; and where he then, as Chief Justice, reviewed a ruling by the state postconviction court that his office committed prosecutorial misconduct under *Brady v. Maryland*, 373 U.S. 83 (1963), when it prosecuted and sought death against Petitioner?

http://www.supremecourt.gov/qp/15-05040qp.pdf. As such, the issue in *Williams* actually involves a judge allegedly having personal involvement in the case. Here, Defendant has never alleged that Judge Scola was personally involved in his case. Thus, Defendant's claims that Judge Scola was biased provide no basis for relief.

Further, contrary to Defendant's assertion, the lower court did not preclude Dr. Sultan from testifying regarding her understanding of the legal and medical definitions of retardation, and her testimony on these subjects was admitted.[6] (PCR5. 925-32) The lower court only precluded Dr. Sultan from reading a definition from a book and from testifying that certain books were considered the "bibles of retardation." (PCR5. 927, 932-42, 943) However, since such testimony is inadmissible as improper bolstering, this ruling was correct. *Linn v. Fossum*, 946 So. 2d 1032, 1036-39 (Fla. 2006); §90.706, Fla. Stat.

While Defendant acts as if the lower court acted improperly by not allowing the admission of hearsay through Dr. Sultan because Dr. Sultan was an expert who could rely upon hearsay in formulating her opinion, Defendant ignores that this Court has held that the ability to rely on hearsay in formulating an opinion does not make the hearsay admissible through the expert. *Mendoza v. State*, 87 So. 3d 644, 666 (Fla. 2011); *Linn*, 946 So. 2d at 1037-38. Thus, again, the ruling was correct.

While Defendant continues to aver that Dr. Greenspan's testimony was excluded because he had not evaluated Defendant

[6] As such, the fact that the lower court also permitted the State's expert to testify about definitions does not evidence bias or convert the State's expert to a legal expert, as Defendant claimed. (PCR5. 1062-63, 1163-65)

personally, this is again not true. Instead, as Dr. Greenspan admitted during his testimony, he had no opinion regarding whether Defendant was retarded from any source. (PCR5. 1192) As Defendant thereafter admitted, he had called Dr. Greenspan to testify regarding the methodologies and opinions of the other experts. (PCR5. 1193) However, an expert's testimony that is either simply critical, or supportive, of another expert's opinion is not admissible. *Caban v. State*, 9 So. 3d 50, 53 (Fla. 5th DCA 2009); *see Carlton v. Bielling*, 146 So. 2d 915 (Fla. 1st DCA 1962). Instead, an expert is only supposed to comment on the methodology of other experts in "explain[ing] his opinion on an issue in controversy." *Caban*, 9 So. 3d at 53; *see Network Publications, Inc. v. Bjorkman*, 756 So. 2d 1028 (Fla. 5th DCA 2000). Thus, again, the lower court's ruling was correct.

While Defendant seems to suggest that *Hall* made this evidence admissible despite its inadmissibility under Florida law, this is not true. Instead, *Hall* merely held that a defendant must be given the opportunity "to present additional evidence of intellectual disability, including testimony regarding adaptive deficits," when his IQ scores fell with the standard error of measure of 70. *Hall*, 134 S. Ct. at 2001. It made no comment on allowing a defendant to present evidence in a manner that violated state evidence law. Moreover, the Court

had previously recognized that while the Eighth Amendment required that defendants be permitted to present evidence on certain subjects, it "does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings." *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994). As a result, the Court has noted that "the Eighth Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted." *Oregon v. Guzek*, 546 U.S. 517, 526 (2006). Thus, Defendant's argument that *Hall* permitted him to present evidence in a manner that violated Florida's evidence law is meritless. The denial of the successive motion should be affirmed.

CONCLUSION

For the foregoing reasons, the denial of the seventh motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by email to Marie-Louise Samuels-Parmer, marie@samuelsparmerlaw.com, 1 E. Broward Blvd., Suite 444, Ft. Lauderdale, Florida 33301, this 15th day of February 2016.

\s\Sandra S. Jaggard
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

\s\Sandra S. Jaggard
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