IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1880

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

RAYMOND MORRISON,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

ANSWER BRIEF/CROSS INITIAL BRIEF

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INTRODUCTION

In 1998, Mr. Morrison's trial lasted less than 4 days, and his penalty proceedings comprised just a few hours. In stark contrast, in 2015, his evidentiary hearing lasted 10 days and he presented numerous witnesses relating to a multitude of issues. The Honorable Henry E. Davis presided over both proceedings and on September 18, 2015, in a 122 page order, he granted Mr. Morrison a new trial and new penalty phase due to the ineffective assistance of trial counsel, Refik Eler[1].

At his trial, Mr. Morrison maintained that he did not kill Mr. Dwelle, despite his alleged oral statements and his written statement. Mr. Morrison urged his trial counsel to locate the witnesses and evidence that would demonstrate that he was not at

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[1]Eler has been previously found deficient by this Court in two capital cases. See Shellito v. State, 121 So. 3d 445, 456 (Fla. 2013)("We conclude, however, that Shellito has satisfied his burden of showing that Eler's performance in mounting a limited investigation and presentation of Shellito's substantial mental health problems was "unreasonable under prevailing professional norms." *Arbelaez v. State*, 898 So.2d 25, 34-35 (Fla.2005)(quoting *Valle v. State*, 778 So.2d 960, 965 (Fla.2001)), and Douglas v. State, 141 So. 3d 107, 121 (Fla. 2012)("We conclude that there were sufficient facts in this case to place counsel on notice that further investigation of mental health mitigation was necessary. Consequently, counsel's failure to investigate this line of defense was not reasonable under prevailing professional norms."). Shellito was tried in 1995 and Douglas was tried in 2002. What is clear from Shellito and Douglas is that between the two trials, Eler made the same critical mistakes and missteps in preparing for a capital penalty phase like Morrison's. Indeed, in Douglas, this Court specifically found Eler's dealings with Dr. Harry Krop deficient in that Eler failed to follow up on Krop's request for additional materials. 141 So. 3d at 120-1.

Mr. Dwelle's apartment on the evening or night of his death. Such evidence would also conclusively demonstrate the unreliability of Sandra Brown's testimony and Mr. Morrison's alleged statements. Further, had trial counsel investigated, he would have discovered that Brown and Mr. Dwelle had a relationship in which Brown ran errands for him and exchanged sexual favors for money. Brown, who was a violent alcoholic, known for carrying a blade or box cutter, and who was an original suspect in law enforcement's investigation had a substantial motive to point law enforcement in the direction of Mr. Morrison.

And, while no physical evidence linked Mr. Morrison to Mr. Dwelle's apartment, the results of the DNA testing on the handle of the knife that had traces of Mr. Dwelle's blood, showed that neither Mr. Dwelle's or Mr. Morrison's DNA was found on the handle, other people's DNA was present. Those DNA profiles have not been compared to Brown's or anyone else's DNA profile.

The circuit court correctly concluded that the reliability of Mr. Morrison's conviction and sentence of death was undermined.

If there is a flaw in the circuit court's order it is that the court did not conduct the required cumulative analysis in assessing the prejudice of the various claims for relief. Parker v. State, 89 So. 3d 844, 860, 867 (Fla. 2011); see also Hurst v. State, 18 So. 3d 975, 1015 (Fla. 2009)(stating that this Court

"considers the cumulative effect of evidentiary errors and ineffective assistance claims together" (quoting Suggs v. State, 923 So. 2d 419, 441 (Fla. 2005))); see also State v. Gunsby, 670 So. 2d 920, 924 (Fla. 1996)(granting a new trial on the basis of the combined effect of newly discovered evidence, the erroneous withholding of evidence, and ineffective assistance of counsel); cf. Mordenti v. State, 894 So. 2d 161, 174 (Fla. 2004)(reversing for a new trial after conducting cumulative prejudice analysis of withheld favorable information implicating Brady and asserted misrepresentations involving Giglio). Thus, while the circuit court correctly found that Mr. Morrison was entitled to relief on the basis of his ineffective assistance of counsel claims, the Court did not consider the combined effects of all of the favorable evidence when considering the claims. Due to the circuit court's finding that relief is warranted, the error is harmless.

STATEMENT OF THE CASE AND FACTS[2]

A. Pre-trial, Trial, Sentencing and Direct Appeal Proceedings.

On January 23, 1997, Raymond Morrison was indicted for the first degree murder, robbery and burglary of Albert Dwelle (R. 7-8).

A few days later, the Office of the Public Defender requested that Dr. Harry Krop be appointed to conduct a "penalty phase assessment." (R. 19-21); the motion was granted (R. 23-4).

On July 25, 1997, Morrison filed a motion to suppress the statements he made to law enforcement (R. 329-34).

On November 13, 1997, a hearing was held. During the hearing Officer Antonio Richardson, who was also a minister, explained how he had arrested Morrison and spoken to him about his congregation and how he was willing to help Morrison repent as he drove him to the police station and sat with him before he was interviewed by the detectives (R. 1266-75). Later, Richardson was called back to the police station to speak with Morrison (R. 1277). During their conversation, Morrison asked Richardson for a bible and told Richardson some details about the night of the crime (R. 1281-2). Later, Richardson sat in when Morrison was

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[2]The following abbreviations will be utilized to cite to the record: "R. _." - record on direct appeal; "T. __" - transcript of the trial on direct appeal; "PC-R. _." - record on appeal on postconviction; "SPC-R. ___" - supplemental record on appeal on postocnviction; "DE/SE. __." - defense or state exhibit from the evidentiary hearing.

interviewed by Detective Terry Short (R. 1284). It was at this time, that according to Richardson and Short, Morrison made inculpatory statements (R. 1287; 1347-8).

Morrison signed a written statement (R. 374-5). During the hearing he acknowledged that he signed the statement but testified that he did not read it (R. 1407).

After the hearing, the trial court granted the Office of the Public Defender's motion to withdraw and Refik Eler was appointed to represent Morrison (R. 785-6).

Eler requested that the suppression hearing be re-opened and submitted a stipulation – Fred Austin would testify that Morrison was "high" in the early morning hours of January 10, 1997, and that he had used cocaine or cocaine derivatives (R. 795).

On March 19, 1998, the trial court granted Morrison's motion to suppress as to statements made to Richardson, but denied as to the other statements (R. 796-803). The trial court found that Morrison's statements to Short were knowing and voluntary (R. 802).

On September 14, 1998, Eler file a notice of alibi, listing Reginald Early, AKA "Big Man" (R. 919-20).

On September 18, 1998, Eler moved for the appointment of a second chair – Christopher Anderson, whom he indicated had "substantial trial experience" (R. 927). The trial court granted the motion (R. 1519).

Trial commenced on September 21, 1998. The following day, after the jury was selected, the trial court questioned Eler about the alibi witnesses Morrison requested be called (T. 334-5). Eler indicated that though his investigator had not been able to locate Gillis Seels, her testimony was duplicative of Early's (T. 335-6). The trial court also inquired as to whether a voluntary intoxication defense would be advanced (T. 337). Eler indicated that he intended to assert the defense "through a number of witnesses", including Austin (T. 337). When Eler referenced the prior stipulation concerning Austin, the trial court pointed out that the stipulation would not apply to the trial (T. 337). Eler stated that: "I would prefer to have Mr. Austin testify at trial, which my understanding he's being transported for purposes of trial." (T. 337). Eler concluded by assuring the trial court that he intended to call witnesses to testify in relation to an intoxication defense (T. 337-8).

During the prosecution's case, the State presented evidence that on January 9, 1997, Margaret Key, a Meals on Wheels employee, discovered Mr. Dwelle on the floor of his apartment (T. 431-2).[3] Mr. Dwelle had suffered incise and stab wounds as well as blunt trauma (T. 785-6). The incise and stab wounds caused Mr. Dwelle to lose blood and were the cause of death (T. 809).

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[3]Dannett Jackson had delivered a meal to Mr. Dwelle the previous day, at 11:35 a.m., and spoke to him at that time (T. 423-4).

The prosecution presented the testimony of Sandra Brown. Brown testified that she and Morrison had a son together (T. 369). In January, 1997, she and her son lived in the Ramona Apartments, across from Mr. Dwelle (T. 390). However, Brown stated that she never knew Mr. Dwelle's name (T.391).

On January 8, 1997, Morrison was at Brown's apartment (T. 394-5). According to Brown, the two went to buy beer that evening about "9:00 or a little after 8:00, or something like that" (T. 395). Brown and Morrison went back to her apartment and drank the beer (T. 396), then, Morrison put some steaks in the oven and said he was going to take out the trash (T. 397). Morrison never returned (T. 397).

Brown testified that twenty minutes later, she went to look for Morrison (T. 398). She went to Big Man's apartment, which was also in the Ramona Apartments, but Big Man and Morrison were not there (T. 399, 409). Brown did not see Morrison again that night (T. 408).

Philip Talamo, an evidence technician with the Jacksonville Sheriff's Office explained that some items, including two knife sheaths, a wooden handle knife, a Medicaid card and a senior citizen card were collected from a rug next to Mr. Dwelle (T. 442). Those items, as well as others, were processed for fingerprints (T. 441-2), but no fingerprints were ever identified as Morrison's.

The State presented Morrison's statements about the day of the crimes through both Richardson and Short. Essentially, Morrison told Short that he had gone to Mr. Dwelle's apartment for a cigar (T. 524, 568). When Mr. Dwelle went to get the cigar for Morrison, Morrison attempted to take some money out of the pocket of a shirt that was hanging on a chair (T. 524, 581). Mr. Dwelle responded by backing Morrison into a corner with a knife (T. 524, 581). Mr. Dwelle attempted to stab Morrison and he wound up cutting himself (T. 524, 581). Morrison left the apartment with money and the knife and threw the knife down (T. 525). Morrison signed a statement to this effect which was written by Short (T. 537-8, 586-9).

Later, Morrison took them to the knife (T. 526, 591-3). The knife was in plain view, near Big Man's apartment, i.e. Apartment 15 (T. 744-5). PCR DNA testing showed similarities between six characteristics of Mr. Dwelle's blood and the blood found on the knife (T. 766). The frequency calculation was 1 in 3200 for the Caucasian population (T. 766).

Also, the State presented the testimony of Harry Hills, who testified that, at some point, possibly on January 9 or 10, 1997, Morrison asked Hills if he wanted to buy some coins (T. 492).[4] Hills described them as "silver dollars" and Morrison had 3 or 4

[4]On cross-examination, Hills could not even recall the month when Morrison asked him to buy the coins (T. 500).

of them (T. 492). When shown a bag of coins, Hills believed that the ones he saw may have been darker, but were similar in weight (T. 495). Hills could not identify the coins he was shown in court as being the coins that Morrison tried to sell to him (T. 495).[5]

The State rested and Eler called Reginald Early, AKA Big Man, who testified that in January, 1997, he lived in the Ramona Apartments (T. 843, 845). He knew Morrison and sometimes gave him rides (T. 845). One evening, Early recalled that Morrison requested that Early give him a ride (T. 847). Though Early could not remember the date, he knew it was the day that Brown came to his apartment looking for Morrison (T. 855). Morrison came by at 4:00 or 4:30 p.m. and Early took Morrison to someone's house (T. 847-8). He also took him to the grocery store and a shoe store (T. 849). Early recalled that the shoe store was about to close when they arrived (T. 850). Early later dropped off Morrison in the back of the Ramona Apartments (T. 851).

On September 25, 1998, the jury convicted Mr. Morrison of all charges (R. 983-5).

On the afternoon of October 8, 1998, penalty phase commenced. The State presented evidence related to the prior violent felony aggravator – a 1988 conviction for attempted

[5]Georgia Morrison testified that her son had taken coins from her home in January, 1997 (T. 913-4).

robbery and a 1991 conviction for an aggravated battery. The State also presented victim impact testimony from Mr. Dwelle's cousin.

Eler presented the testimony of Morrison's mother, father and sister. Essentially, Morrison was described as a good brother who helped his neighbors and around the house (T. 1130-1). When his grandmother moved into the home with him, Morrison helped get her medicine and feed her (T. 1200-1). Morrison's mother explained that he dropped out of school in the 7th grade to help at the house (T. 1204).

Morrison's father was convicted of murder and incarcerated for ten years when Morrison was two (T. 1174).

Morrison was a good father (T. 1179).

Dr. Harry Krop's deposition was introduced, having been taken the day before the penalty phase, due to his availability on October 8th. Krop testified that Morrison had a low IQ and a substance abuse problem and both of these issues would cause him to exercise bad judgment (T. 1225). However, the prosecutor, discredited Krop's testimony because it was based on Morrison's self report and Krop had limited information about the crime. Furthermore, the prosecutor questioned Krop about the opportunity for substance abuse treatment and that most individuals with a low IQ did not commit crimes (T. 1230). Krop agreed that "[c]riminality is a behavior that's chosen by an individual." (T.

1230). There was no redirect.

Eler also presented the testimony of Dr. Peter Lardizabal, a pathologist, who explained that, due to Mr. Dwelle's wounds, he was likely unconscious within a minute (T. 1144). An unconscious individual does not feel pain (T. 1149).

The jury recommended a sentence of death by a vote of 12-0 (R. 1058).

A Spencer hearing was held on November 12, 1998, at which no additional evidence was presented by either party (R. 1645-73).

On December 18, 1998, the trial court sentenced Mr. Morrison to death, finding that Mr. Morrison had previously been convicted of a prior violent felony; that the crime was committed in the course of an armed robbery and/or burglary with an assault; that the crime was committed for pecuniary gain; that the crimes was especially heinous, atrocious or cruel; and that the victim was particularly vulnerable (R. 1178-88). The trial court found no statutory mitigation and much of the proposed non-statutory mitigation was rejected as not having been established. See R. 1184-87. The trial court accorded Morrison's low intellectual capacity combined with his drug and alcohol abuse which would result in bad judgement, great weight, but it was not enough to outweigh the aggravating circumstances (R. 1186-7).

On direct appeal, this Court affirmed Morrison's convictions and sentence of death. Morrison v. State, 818 So. 2d 432 (2002).

The United States Supreme Court denied certiorari review on October 15, 2002. Morrison v. Florida, 123 S.Ct. 406 (2002).

B. Postconviction Proceedings[6]

On September 18, 2003, Morrison filed an admittedly incomplete Rule 3.851 motion, and requested that he be permitted to file a complete motion once he received the public records to which he was entitled (PC-R. 198-241).

On March 28, 2014, Morrison filed an amended Rule 3.851 motion (PC-R. 835-924). The State filed an answer opposing Morrison's request for relief (PC-R. 933-1013).

On June 16, 2014, the circuit court directed the parties to file supplemental briefs relating to the United States Supreme Court's decision in Hall v. Florida, 134 S.Ct. 1986 (2014)(PC-R. 1018-20). The parties complied. See PC-R. 1026-37; 1038-41.

A case management conference was held on August 13, 2014, after which the circuit court granted Morrison an evidentiary hearing on several of his claims (PC-R. 1080-1).

An evidentiary hearing was held on January 12-15, February 17-20, and March 18-19, 2015. During the evidentiary hearing, the

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[6]In the statement of facts in the Initial Brief, Appellant, the State, fails to include critical facts relating to the evidence that was presented at the evidentiary hearing. For example, Appellant fails to include any information about the horrific abuse Morrison suffered as a child. And, Appellant fails to mention the evidence that Morrison often confessed to crimes that he did not commit. Through his statement of facts, Morrison has attempted to correct Appellant's failure to include critical facts which clearly bear on the determination of his claims.

circuit court permitted Morrison to amend his Rule 3.851 motion (PC-R. 1228-41). Over the course of the ten day hearing, evidence was presented concerning the following areas:

1. Morrison's Alibi & the Prosecution's Timeline.

Morrison presented evidence relating to his whereabouts on the evening of the crimes which conflicted with Brown's trial testimony and Morrison's alleged statements to law enforcement. At trial, the jury only heard Early's testimony and did not hear from several witnesses, including Carla Reynolds, who told law enforcement that she had seen Morrison in the evening on January 8th (DE 18). Morrison had gone into Early's apartment (DE 18).[7]

Also, Gilda Louden, who was also known as "Gillis", testified that in January, 1997, she lived on the property next to Morrison's mother in Marietta (PC-R. 3163).[8] Gillis recalled Morrison coming to her home on January 8, 1997, after dark[9] (PC-R. 3164).[10] Morrison asked her to borrow money so he could buy

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[7]Later, Reynolds saw Brown in the community and Brown asked if she had seen Morrison (DE 18). Reynolds directed Brown to Early's apartment (DE 18).

[8]Louden testified that "Seels" was her married name in 1997 (PC-R. 3161).

[9]On January 8, 1997, the sun set at 5:43 p.m. in Jacksonville. See www.timeanddate.com.

[10]Charlene Wright, Brown's sister, testified that she saw Morrison in the same time frame as Gillis and Randall Seels (PC-R. 3328, 3330). At the time, Wright's family lived close to Gillis' home and Wright was there visiting (PC-R. 3329, 1333). Wright testified that she told the police this information when

drugs (PC-R. 3166). Morrison came into the house and talked for a bit (PC-R. 3166). Gillis' sixteen year old son, Randall Seels was at the house, too (PC-R. 2255). In fact, on January 8, 1997, Seels recalled opening the gate to allow Morrison to enter the property between 7:45 and 8:30 p.m. (PC-R. 2257-8, 3165). Morrison did not have any blood on him or signs that he had been in a scuffle (PC-R. 2258-8, 3166). He was already high and Gillis knew he would never pay the money back, so she told him he could not borrow money (PC-R. 3165-7). Morrison left.[11]

Reginald "Fred" "Cap" Austin recalled that two nights before Morrison was arrested, he was at the Ramona Apartments at his brother, Robert's apartment (PC-R. 3261). Robert lived below Early, though at the time Austin did not know Early's name (PC-R. 3263). Robert had told Austin that Morrison had been looking for him that day (PC-R. 3261-2). Austin recalled that he was in the back of the apartments with some girls when Morrison "pops up"; Morrison had been with Early (PC-R. 3261-3). Austin gave Morrison a ride back to Marietta where they went to a club (PC-R. 3261-2). He believed it was 8:00 or 9:00 p.m. (PC-R. 3261-2).

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questioned (PC-R. 3330).

[11]Gillis' memory of the date of her encounter with Morrison is reliable because the following day was Gillis' birthday and she walked to the grocery store near her house to buy some cake mix (PC-R. 3164, 3167). While in the grocery store she was approached by two police officers (PC-R. 3167).

2. Challenging Morrison's Statement.

At trial, Morrison requested that his alleged statements be suppressed. Trial counsel failed to retain any experts to challenge Morrison's statement.

The circumstances surrounding Morrison's alleged statements were complex. Law enforcement used typically coercive techniques like manipulation, intimidation and promises throughout Morrison's interrogation. However, in addition to the tactics by law enforcement, Morrison had a long-standing addiction to alcohol and crack. And, shortly before his arrest, he had been using crack (PC-R. 3257, 3449). Dr. Hyman Eisenstein testified that Morrison's abuse of substances could have effected his interrogation (PC-R. 2974). Morrison would not have been thinking clearly or rationally and his statements may not have been truthful (PC-R. 2974-5).

Morrison is also intellectually disabled (ID) and suffers from organic brain damage (OBD), which has been characterized as moderate to extreme (PC-R. 2944-5). Individuals with ID are vulnerable and susceptible to being the "fall guy" (PC-R. 3036). Under pressure, one's veracity could be compromised (PC-R. 3036). Morrison's OBD could have effected the interrogation. (PC-R. 2969-70).

Furthermore, Morrison's alleged statements were based on the story that law enforcement was told by Rosetta Bonner, within a

few hours of finding Mr. Dwelle's body. See DE 9. Bonner was Mr. Dwelle's care taker. She stated that Morrison, whom she described as the boyfriend of the tenant across the hall, had robbed the victim the previous week. Id. Her version of what had happened was strikingly similar to the version Morrison allegedly told Short about the murder, in that Bonner stated that Morrison had gone to the victim's apartment and requested a cigar. Id. While the victim went to get cigar, Morrison stole the victim's money from his pocket. Id. Morrison's alleged statement was a regurgitation of the story Bonner told police, but modified as to the date of the crime.

And, while Morrison denied showing law enforcement where the knife was, he reasonably could have seen the knife outside of Early's apartment because he was at or near Early's apartment on January 8th, looking for Austin and also requesting a ride from Early. See PC-R. 3261-2; R. 847-55. (And, Brown was also at Early's apartment, looking for Morrison (T. 399)).

In addition, Morrison's written statement conflicts with other evidence relied upon by law enforcement. For example, Morrison never placed himself with Brown or her uncle on the evening of January 8th. Instead, he said he was with Early. See R. 374-5.

Morrison also presented the testimony of Joseph Turner who testified that he and Morrison were convicted of the aggravated

battery with a deadly weapon that arose from a fight that occurred outside of a bar (PC-R. 2554).[12] When Turner was questioned about the crime, he took full responsibility and confessed to shooting the victim (PC-R. 2555). Morrison was not involved, but started running with Turner as Turner ran from the scene (PC-R. 2555). Four days after Morrison pleaded guilty to the crime and was sentenced, Turner pleaded guilty (PC-R. 2556). Later, he learned that Morrison had also confessed to the crime, even though he (Morrison) was not involved in the crime in any way (PC-R. 2556).

Indeed, Morrison often "copped to" crimes that he did not commit; drug dealers wanted him around because he was the perfect "do boy" and "fall guy" (PC-R. 2552, 2873). Morrison would confess to having drugs, even though they weren't his (PC-R. 2875).

3. Voluntary Intoxication Defense.

In the months leading up to the death of Mr. Dwelle, witnesses were available to testify that Morrison was using drugs and alcohol on a daily basis (PC-R. 2560). On January 8th, Tangy Allen, Morrison's fiance, spoke to him by phone numerous times throughout the day (PC-R. 2841-2). She was expecting their second child and wanted him to come home (PC-R. 2841). Allen could tell

[12]The State used this conviction as an aggravator at the penalty phase.

that Morrison was high and using by the way he talked (PC-R. 2842). Others who saw Morrison that evening also recalled him being high (PC-R. 3165-7, 3262-3). And, Brown indicated that Morrison drank at least four tall cans of beer in the early evening.

Additionally, Morrison presented testimony from a mental health expert in order to explain the chronic and acute effects of crack on the brain and how intoxicants impair one's judgment (PC-R. 2973).[13]

4. Failure to Adequately Cross Examine Witnesses.

Brown's behavior on January 9, 1997, was suspicious. According to Key, Brown was not shocked to learn that her neighbor had been killed (DE 9). And, when Brown was initially questioned by Davis she revealed that she was watching the parking lot when the Meals on Wheels' employees arrived, but could not explain why she was watching (DE 2, DE 9, DE 22). Brown then asked Key what was wrong when she (Key) left Mr. Dwelle's apartment (DE 9). After being told that Mr. Dwelle was killed, Brown did not seem surprised and went back into her apartment and shut the door (DE 2). Davis interviewed Brown and described her

[13]Several witnesses testified that Morrison had a long standing drug problem and was using crack on a daily basis in the weeks leading up to the crime (PC-R. 3257). Also, Al Chipperfield, a preeminent attorney in capital litigation, testified that substance use should be considered as a defense, including presenting the testimony of an expert (PC-R. 4176).

as "very defensive" (DE 2). She was also very "unspecific" (DE 2). Davis believed that Brown was being untruthful and knew more about the crime than she revealed (Id.).

Brown was also never questioned about the fact that she and Morrison were both drunk on the night of January 8th. According to Davis, she had told him that they had been drinking and Davis understood that they were both drunk (DE 22).

And, Brown was never questioned about the true nature of her relationship with the victim. According to those who had regular contact with Mr. Dwelle, Raymond III, was often in the victim's apartment. Brown told law enforcement that her contact with Mr. Dwelle was minimal – waving as they passed in the hallway. Brown was not confronted with the fact that her statement was not credible in light of the close relationship between Mr. Dwelle and Raymond, III (DE 17).

5. Undisclosed, Exculpatory Evidence.

a. condom

On the day Mr. Dwelle's body was found, Kent Holloway, a Forensic Investigator from the Medical Examiner's Office (ME), reported to the scene. There were four crime scene technicians from the Jacksonville Sheriff's Office (JSO), present (P. Talamo, J. Anstett, M. Laforte and K. Webster), who photographed, processed and collected evidence, and diagramed the scene. Short and Davis were present when evidence was collected and provided

direction to the crime scene technicians as to the scope of the technician's investigation.

In his typed scene investigation report, Holloway cataloged evidence that he observed. Holloway stated: "A shirt is observed lying on a chair near the bed. The shirt pocket contained an ID card, **as well as a condom**." (DE 1)(Emphasis added).[14] None of the crime scene technicians or detectives cataloged the condom in the evidence collected or mentioned it in their reports, despite the fact that the ID card and other items from the shirt pocket were collected, processed for fingerprints and maintained as evidence. See DE 9, 16, 24.

The report also indicated that information had been obtained that sounds had been made in the victim's apartment at 9:00 p.m. (DE 1). Further, Holloway documented that there was no forced entry (DE 1).

Trial counsel could not recall if he was provided with Holloway's statement (PC-R. 2318). However, the discovery responses did not include a reference to the report being disclosed and he did not recall knowing that a condom had been found (PC-R. 2317-8, 2319).

Trial counsel also testified that the presence of the condom suggests that the victim was "prepared for somebody to come

[14]The Holloway statement was disclosed in postconviction when the ME sent records to the repository (PC-R. 3436). The report was not contained in the trial attorney file (PC-R. 3437).

visit" and that others' presence at the apartment was significant (PC-R. 2321). Thus, trial counsel believed it was worth investigating (PC-R. 2321-2).

Further, based on the discovery of the condom, Morrison learned that Brown, who was not employed, turned to prostitution to support her alcohol habit (PC-R. 3171, 3184, 3248, 3445-6). Brown kept a bowl of condoms in her apartment and insisted that her "Johns" wear one when having sex with her (PC-R. 3395, 3446-6).

And, witnesses report that Brown knew the victim well and he had previously given her money (PC-R. 3172, 3243-4, 3249). Brown told "Gillis" that Mr. Dwelle was her "sugar daddy", which meant that he gave Brown money in exchange for sex (PC-R. 3172-3, 3244). Brown was frequently seen leaving Mr. Dwelle's apartment (PC-R. 2837-8). Even Brown's sister knew that Brown and the victim had a relationship (PC-R. 3339, 2837). Wright was aware that Brown bought the victim's cigarettes and beer (PC-R. 3337). Raymond, III, was close to the victim and spent time in his apartment (PC-R. 3394, 3443).

Brown was also known to carry a blade or box cutter with her at all times (PC-R. 3174, 3184,3394). The first time Allen met Brown, she carried a razor blade in her mouth (PC-R. 2832). Additionally, Brown had previously attempted to have Morrison arrested when she became upset (PC-R. 2839).

b. sandra brown's contact with law enforcement

Richardson threatened Brown when he questioned her the day that Morrison was arrested (PC-R. 3227). According to Delores Tims, Richardson told Brown that she would be "locked-up" if she didn't cooperate (PC-R. 3237). Further, Brown confirmed that she was threatened. Specifically, she was told that her son would be taken away if she did not cooperate (PC-R. 3232, 3245), and that she would be locked-up for the crime if she did not cooperate (PC-R. 3232). Tims testified that Brown was "terrified" and confided that the police had told her how the victim was killed and that it had to have been Morrison (PC-R. 3229, 3231). Indeed, Tims overheard Richardson chastising Brown for telling others how the victim was killed (PC-R. 3237-8). Richardson did not report his conversation with Brown or his threat.

c. davis' handwritten notes

Davis' handwritten notes were introduced at the evidentiary hearing. The notes reflected that information obtained during the investigation was not disclosed to Morrison. See DE 2.[15]

The notes reveal much about Davis' interview with Brown. First, Davis designated Brown as "S" indicating that she was a

[15]The trial prosecutor testified that he "typically did not ask for handwritten notes" and he "would not normally seek [the notes] out" (PC-R. 2275-6). Trial counsel testified that he normally did not receive handwritten notes (PC-R. 2326). And, he did not recall having Davis' notes in Morrison's case (PC-R. 2344).

suspect and not just a witness. Trial counsel testified that such a designation could have been significant (PC-R. 2353-4).

Further, Davis also specifically documented his impressions of Brown's demeanor. See DE 2. And, Davis told Brown that it was her "last chance to tell the truth" (DE 2). Trial counsel testified that he wanted to show that Brown was not credible, so information about her demeanor and that Davis believed she was not telling the truth were significant and he would have brought that out at the trial (PC-R. 2327-8, 2355-6). Trial counsel compared Davis' notes with Short's typewritten report and testified that Davis' observations and statements to Brown were not included in the report (PC-R. 2341).

Additionally, other details were not included in the typewritten report. For example, during Davis' interview with Isaia Medina, Medina told Davis that the noise he heard occurred between 8:30 and 9:00 p.m. (DE 2, p.8). However, Davis' report only included 9:00 p.m. for the time that the noise was heard.

d. charlene wright's statements to law enforcement

Wright[16] is Brown's sister and knew Morrison for many years (PC-R. 3320). On January 8, 1997, Wright's mother lived in the Marietta area and she frequently visited her home (PC-R. 3320-1).

[16]Wright's name was mentioned in Davis' handwritten notes as "Christine Wright" in relation to Brown's interview in which she stated that witnesses saw Morrison in Marietta on the night of the crime (see DE 2).

On January 9, 1997, Wright spoke to Brown by telephone and Brown explained that the police were at her neighbor's apartment because his body had been found (PC-R. 3326). Brown confided that the police told her that Morrison had done something (PC-R. 3327). In response, Wright indicated that she had seen Morrison "last night" (PC-R. 3328).

Sometime after her conversation with Brown and after Morrison had been arrested, the police came to Wright's apartment and asked her to come to the police station (PC-R. 3322). At the police station, officers showed her photos of the victim with a cut across his neck; there was some blood visible, too (PC-R. 3323).

The police asked if she had seen Morrison on the night of the crime and she told them she had seen him in Marietta between 8:00-9:00 p.m., while visiting her mother (PC-R. 3329-30).[17] Morrison was about a block away and she waved and yelled "Hey" (PC-R. 3329-30). Morrison said "Hey" and kept walking (PC-R. 3330). Wright was specifically asked if Morrison had any money; she responded that he did not (PC-R. 3330, 3335). She was also asked if he had blood on him and she told them "No" (PC-R. 3331). The police requested that she take them to the area where she had seen Morrison, so she accompanied them to Marietta and pointed

[17]Wright's mother lived near Gillis' house in January, 1997 (PC-R. 3333).

out where she was and where she saw Morrison (PC-R. 3331).

Thereafter, Wright asked Brown why she had given the police her name and Brown said that she was afraid that the police would take away her son and her public housing (PC-R. 3332). Brown seemed worried (PC-R. 3332).

There was no report relating law enforcement's contact with Wright in any of the files obtained by Morrison, including the trial file (SPC-R. 18-20). According to Daniel Ashton, the investigator in postconviction, there were no reports prepared by JSO after Short's report in which the last entry related to the autopsy on January 10, 1997 (Id.).

e. morrison's arrest

Richardson failed to report that when he entered the trailer where Morrison was arrested, Morrison was "smoking" crack. Richardson told him that he would let him finish smoking (PC-R. 3227, 3239, 3246).

6. Newly Discovered Evidence.

In 2013, serological and DNA testing was conducted on the knife handle which had previously not been tested (PC-R. 2606), though it had been analyzed to determine if there were any latent fingerprints; none were obtained. Dr. Julie Heinig explained that handles of weapons were often tested for DNA in order to "identify who handled the weapon during the crime." (PC-R. 2610).

The 2013 DNA testing established that there were areas on

the knife handle that produced a presumptively positive result for blood (PC-R. 2607, 2610). In those same areas the DNA profile reflected a mixture of two individuals, neither of whom were Mr. Dwelle or Morrison (PC-R. 2611, 2614-5). Furthermore, on another area of the knife handle, a DNA profile was obtained that was a mixture of three individuals, none of whom were Mr. Dwelle or Morrison (PC-R. 2612-3, 2614-5).

Trial counsel testified that the results of the DNA testing would have been helpful to Morrison's defense (PC-R. 2303).

In addition to the newly discovered DNA results, following Morrison's conviction and sentence, Brown confessed that she had lied at the trial and that she only testified against Morrison because she had been threatened about losing her son (PC-R. 3241).

7. Morrison's Background, Social History & Mental Health.

Morrison presented a plethora of evidence about his background, social history and mental health.[18]

a. background and social history

Raymond Morrison's father, Ray Sr., was born on January 17, 1949, in Jacksonville, Florida (PC-R. 3132). His family was not unlike many families of his generation: several children, a single mom, poor living conditions, lack of educational

[18]Because of the references to several family members, in this section, witnesses' first names are used to make clear to whom is being referred.

opportunities and frustration with their attempts to navigate the extremely racist policies and attitudes of the south in the pre-civil rights era (PC-R. 3133). Ray Sr., had three brothers and five sisters (PC-R. 3132).[19] As a child, Ray Sr., experienced difficulties in school and ultimately, dropped out.

Raymond Morrison's mother, Georgia Bell Moore, was born on January 20, 1948, in Americus, Georgia (PC-R. 3269, 3270). Like Ray Sr., Georgia had several siblings, twelve in all (PC-R. 3269). Georgia's family was horribly poor. Due to the family's financial situation, Georgia had to quit school and work the land – picking cotton and peaches, chopping peanuts and shucking corn (PC-R. 3270-1). As a teenager, Georgia found herself pregnant and unmarried (PC-R. 3272). Georgia left Americus for Jacksonville to follow her mother, shortly after her son, Eddie James Moore, was born (PC-R. 3271).

Upon arriving in Jacksonville, Georgia met Ray Sr., and the two started dating (PC-R. 3134, 3273). They were married on December 13, 1967, but soon separated because they "couldn't get along" (PC-R. 3134). Georgia went to New York to look for work (PC-R. 3274). While Georgia was in New York, Eddie, who remained with his grandmother, became sick and died (PC-R. 3135, 3274-5).

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[19]Ray Sr.'s mother, father and three of his sisters suffered from alcoholism, while two brother suffered from drug addiction (PC-R. 3137). Ray Sr., was an alcoholic before he turned 20 (PC-R. 3136-7).

Georgia described Eddie's death as him "suffocating, choking" (PC-R. 3275).

Ray Sr. and Georgia reconciled and soon learned that she was pregnant (PC-R. 3135, 3276). However, even the expectation of a child did not keep Ray Sr., and Georgia from fighting (PC-R. 3277). Georgia testified that both she and Ray Sr., had tempers and they would argue and physically fight each other (PC-R. 3278).

Raymond Morrison's life inauspiciously began on October 16, 1968, in the same dark and dismal confines where the State has requested his life end: prison. On August 1, 1968, Georgia was arrested for one count of breaking and entering and one count of grand larceny on July 28, 1968 (DE 39). One week before Ray's birth, she was arraigned and pled not guilty. On October 16, 1968, Ray was unexpectedly born, two months early (PC-R. 3138, 3280). Georgia was taken to the infirmary to give birth and shortly thereafter, Ray was taken from Georgia and sent to a hospital where he was placed in an incubator for an extended period of time to help him survive (PC-R. 3138, 3279). Ray Sr., recalls seeing Ray at the hospital: "he was so small" (PC-R. 3139). Upon his release from the hospital, Ray Sr., took him to his grandmother's home (PC-R. 3139). It would be almost four months before Georgia would hold her son again when she pled guilty and was sentenced to two years of probation (DE 39).

Upon Georgia's release, she and Ray Sr. reconciled, again. and moved into a small apartment in Marietta (PC-R. 3140). However, their marital troubles continued and Ray Sr. learned that Georgia was dating other men (PC-R. 3135). So, while Ray Sr. drank at home and went out to bars, Georgia went to the clubs and partied (PC-R. 3136-7, 3282).

Georgia found herself expecting once again and on September 18, 1969, Ray became a big brother to his sister, Michelle (PC-R. 3140-1, 3283-4). However, Ray soon lost another sibling – this time, Georgia's child died in her sleep at only four months of age (PC-R. 3126-7, 3283). Ray was again an only child.

Georgia's instability and wild ways continued even though she was on probation and had been pregnant and lost another child. Georgia wanted to be by herself (PC-R. 3284). The couple separated, again (PC-R. 3141). Georgia's unpredictable behavior and desire to party culminated with several violent episodes.[20] One afternoon, Georgia and her sister were fighting and a bottle broke and some shards may have gotten in Ray's eye (PC-R. 3141-2, 3147-8). Georgia called Ray Sr., and told him to come home so he could take Ray to the doctor (PC-R. 3142). When Ray Sr., arrived, Georgia told him she was going to the beach (PC-R. 3142). Georgia had a gun and aimed at Ray Sr. (PC-R. 3142). Ray Sr., attempted to take the gun and Georgia shot him in the leg (PC-R. 3142).

[20]Georgia had a temper and was violent (PC-R. 3142).

Georgia soon found herself pregnant with her fourth child, Willie, who was born on December 17, 1970 (PC-R. 3285-6). The father of the child was Harry Hills (PC-R. 3286).

On September 6, 1970, when Ray was just two years old, his father was charged with murder (PC-R. 3142). Ray Sr., was an alcoholic who found himself in a typical drunken dispute (over a girl and a glass of liquor), and ended up shooting his friend (PC-R. 3142). Ray Sr., would spend the next nine years in prison with little contact with his only child (PC-R. 3143). While Ray Sr., was incarcerated, Georgia sought a divorce and cut all ties with him. Ray's only contact with his father occurred on the few occasions his aunt picked him up and took him to see his father (PC-R. 3144).

Ray Sr.'s incarceration had an immediate impact on the family's financial situation. Georgia was working, but it was difficult to make ends meet (PC-R. 3288). The family moved quite a bit and had to rely on government aid (PC-R. 3036-7, 3288).

Soon, Georgia was pregnant with her fifth child. The father of the child was Harry Hills, but he was not living with Georgia or providing support.

Georgia soon found herself having problems with her "nerves". She was quick tempered and she frequently took her frustrations out on Ray - physically and mentally (PC-R. 3031, 3179-80, 3289). In retrospect, she admitted that her treatment of

Ray was criminal (PC-R. 3032). She used belts, switches and brooms to beat Ray for simply being too "noisy" or for minor infractions (PC-R. 3032, 3179, 3290, 3381). Georgia often slapped Ray in the head (PC-R. 3293, 3367). Georgia attempted to hide the abuse, sometimes keeping the children home from school if she had left marks on them (PC-R. 3292-3).

Georgia also abused Willie and Paula (PC-R. 3360). Willie explained that Georgia would use "three switches braided together, garden hose cut in half, belt, extension cords" to beat her children (PC-R. 3360).[21] Willie believed that she beat the children out of spite because she never wanted them (PC-R. 3361). The beatings occurred three to four times a week (PC-R. 3361). Willie described how Georgia would try to make the beatings even more painful:

> She take you in the bathroom, you know what's fixing to happen, she's fixing to put like three inches of water in the tub and pour rubbing alcohol on you and tell you to lay down in the tub and she going to whip you until her arm get tired.

(PC-R. 3361).[22] Willie stated that there were "plenty of marks"

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[21]No one spoke to Willie about his brother's background in 1997 or 1998 (PC-R. 3371). Eler suggested that he would not bring a witness from prison if he was able to obtain the same information from another source (PC-R. 3825). But, since Eler did not interview Willie he had no idea what information Willie possessed.

[22]Willie tearily testified that the beatings were so bad that he ran away several times (PC-R. 3364). Once, he even made it to the highway before he was picked up by a couple who took him home (PC-R. 3364). Willie wished that couple would have kept

left from her beatings and he confirmed that he was kept home or sent to school in long sleeves to hide the marks (PC-R. 3362). The children saw each other being beaten (PC-R. 3363).

And, when she was too tired to physically abuse Ray, she held nothing back in insulting him by telling him he was "no good", cursing and calling him a "nigger", "retard" and a "bastard" and telling him and his siblings that she did not want them (PC-R. 3179, 3294). And, Georgia often locked Ray in a closet and refused to let him out, even if he begged her (PC-R. 3031, 3181, 3290-1, 3385). Betty Harris[23] recalled arriving at Georgia's home one weekend to find Ray crying in a small, dark, hot closet (PC-R. 3181-2). He was sweaty and she believed he had been in the closet for some time (PC-R. 3182). Georgia's abuse spanned several years and could occur as frequently as every other day (PC-R. 3292). Years later, Georgia realized the damage she had done to Ray and his siblings with her cruelty and abuse. She vowed that she would never cause that kind of pain again and to this day has never laid a hand on her grandchildren.

Ray Sr., was released from prison when Ray was eleven (PC-R.

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him (PC-R. 3364). Willie also testified that he did not call Georgia "mom" because "I cannot call her mom ... the way she treated me or treated us. I know a mom wouldn't treat their kids like that." (PC-R. 3369).

[23]Harris was present during a potion of the trial, but no one spoke to her about Ray's background (PC-R. 3186). Eler testified that there was no reason not to speak to Harris about Ray's background (PC-R. 3987).

3142-3). Ray Sr., spent his first year outside of the penitentiary in a work-release program and had little opportunity to see Ray (PC-R. 3143-4).

Later, Georgia attempted to give Ray to his father. After Ray Sr., visited, Georgia set Ray's belongings on the porch and told Ray Sr., to take him (PC-R. 3146). Ray Sr., took Ray to his sister's house and got him some clothes and enrolled him in school. However, shortly thereafter, while Ray Sr., was at work, Georgia came to the house with a knife and demanded Ray back (PC-R. 3144). After that incident, Ray Sr., did not see Ray very much (PC-R. 3146).

Ray is consistently described as slow (PC-R. 2548-9, 2872, 3283, 3462). His school records reflect that he struggled from kindergarten until he dropped out in seventh grade, at the age of seventeen (DE 28). Ray was repeatedly held back and failed his courses. His academic plight was so obvious that he was one of the few students who was recommended for psychological testing (DE 27).[24] At eight, Ray was found to have an IQ of 78 which placed him "at the top end of the borderline range of mental retardation." (DE 27). Despite this finding, Ray was not placed is the exceptional student program and the recommendation for further evaluation never occurred. Ray soon found himself

[24]The records of the psychological testing were obtained in postconviction (PC-R. 3432-4).

slipping further behind. In his last few years in school, Ray was sent to an alternative school where he took courses in cabinet making, and still received unsatisfactory marks (DE 28).

Ray was considered childlike (PC-R. 3170). Ray struggled to make himself food when others were not around and could not do simple household chores (PC-R. 3355, 3390, 3392). When Ray was fourteen, he attempted to make himself a can of beans, but nearly burned down the house.

Ray's peculiar personality and tendency to be a "follower" caused him to be used by other children and teenagers (PC-R. 2550, 2553, 2872-3). Ray wanted to please the other kids and feel included, so there wasn't anything he wouldn't do (PC-R. 3357). In fact, Ray began "huffing" gasoline and using drugs because his friends goaded him into it (PC-R. 2875). But, it did not matter what Ray did, the other kids still picked on him (PC-R. 2548, 3170, 3358). Ray's "friends" called him a "dummy" and a "fruitcake" (PC-R. 2549, 2875).

Whether it was the abuse, neglect and dysfunction of his home life, the difficulties he was encountering at school or with his friends or his genetic pre-disposition to be drawn to alcohol and drugs, or a combination of everything, Ray soon found himself with a severe addiction to drugs and alcohol. Ray began huffing glue and gasoline (PC-R. 2548, 2870, 3358). Huffing caused Ray to act like a zombie (PC-R. 2548, 3359). At seventeen, Ray was

drinking alcohol heavily (PC-R. 2869, 3150).

In the following years Ray began to use more drugs. His substance abuse quickly progressed to cocaine and crack by the age of eighteen (as well as drinking alcohol)(PC-R. 2558, 3257). Ray also combined drugs, using crack, marijuana, alcohol, speed and acid interchangeably (PC-R. 2872). Ray began to live at the junkyard, which was not safe (PC-R. 2552). When Ray used drugs he acted crazy; crack made Ray paranoid (PC-R. 2559, 3258-9). Ray was also seen acting peculiarly, even when he wasn't on drugs. He would talk and laugh to himself constantly and howl at the moon (PC-R. 2550).

Drug dealers and other criminals soon wanted Ray around because he was the perfect "do boy" and "fall guy" (PC-R. 2552, 2873). Ray would confess to having drugs, even though they weren't his (PC-R. 2875).

Ray experienced two severe head injuries as a young adult. The first was sustained after crashing a car into a house and hitting his head against the windshield (PC-R. 3148). Ray ended up in the emergency room and was unconscious (PC-R. 3296). Later, Ray's sister's boyfriend smashed a bottle over Ray's head which caused a laceration and severe swelling (PC-R. 3148).

When Ray was twenty-four he met Tangy Allen at a club (PC-R. 2812-3). The two started dating (PC-R. 2813). Allen, who was twenty, had three children – all young boys (PC-R. 2812). Ray was

good with boys and played with them (PC-R. 2817). Allen liked having Ray around, even though she had to take care of him like another child (PC-R. 2819).

Ray moved-in with Allen (PC-R. 2816). Ray helped Allen with household tasks and with children, but she rarely allowed him to have responsibility of the children (PC-R. 2818). One time when she left him to care for her sons, he put beer in the baby's bottle (PC-R. 2818). Allen would usually prepare everything in advance, so she wasn't sure if Ray just didn't know what to give the baby (PC-R. 2818-9).

Allen would drive Ray to the labor pool in the morning and she or another friend would pick him up in the afternoon (PC-R. 2821). Allen had to manage Ray's money because he simply could not do it (PC-R. 2822). From her experience, Ray was limited (PC-R. 2823).

Ray was always willing to help Allen at the house and if she gave him instructions he would try to complete tasks to the best of his capability (PC-R. 2825). Ray and Allen had two children together – two girls – Tarayshia and Arjinia (PC-R. 2824). Again, Ray did his best to help Allen with their eldest daughter (their second daughter was born after Ray was arrested for this crime), but Ray was scared to hold the baby (PC-R. 2825).

Allen did not mind taking care of Ray because he was kind to her and her children (PC-R. 2825). Ray "was more caring, he was

understanding to [Allen's needs] ... cause he knew what happened in [her] previous relationship and he wasn't that way at all" (PC-R. 2825).[25]

Tangy learned of Ray's predilection for alcohol and drugs after she met him (PC-R. 2825). She believed that he did his best but his addiction often overpowered him and he would leave for periods of time to binge on crack and alcohol (PC-R. 2826, 2852).

In the weeks leading up to the day of the crime, Ray was on a crack binge. During this period, Ray was either with Brown or his mother (PC-R. 2827, 2832). Ray and Allen were expecting their second child and Allen was upset with Ray for not staying clean (PC-R. 2830). She knew that she would find Ray at Brown's apartment and often called there to speak to him.

Indeed, on January 8, 1997, Allen spoke to Ray by phone numerous times throughout the day (PC-R. 2841-2). She wanted him to come home (PC-R. 2841). Allen could tell that Ray was high and using by the way he talked (PC-R. 2842). Others who saw Ray that day and evening also recalled him being high and drunk (PC-R. 3165-7, 3262-3). And, according to law enforcement, Brown indicated that Morrison had drank at least four tall cans of beer in the early evening.

[25]Allen had been the victim of domestic abuse by her first husband (PC-R. 2812).

b. mental health mitigation

At the evidentiary hearing, Eisenstein testified that Morrison suffers from ID (PC-R. 2941). At the time of Morrison's trial, ID was considered mitigation.

Furthermore, a thorough neuropsychological examination reflects that Morrison suffers from moderate to severe organic brain damage (OBD)(PC-R. 2944-5). Specifically, there is damage to his frontal lobe which is the area of the brain that controls the executive functioning, i.e., the area of the brain used to exercise judgment, regulate emotions and understand consequences of actions (PC-R. 2945, 2968). OBD constitutes a major impairment (PC-R. 2940). Therefore, contrary to the evidence the jury heard, Morrison's behavior is not the product of his choice in the way that an individual with an unimpaired brain makes choices.

Morrison's history corroborates the testing (PC-R. 2964). Indeed, the fact that Morrison was born two months premature and kept in an incubator for several weeks constitutes a "red flag" for OBD due to the fact that Morrison may have suffered from anoxia, or a lack of oxygen at birth (PC-R. 2943-4).

A PET scan was conducted with Morrison. A PET scan allows one to look at the brain function and not just brain structure, like an MRI (PC-R. 2895). Dr. Joseph Wu's interpretation of the images obtained from the PET Scan corroborates the findings obtained from the neuropsychological testing (PC-R. 2915, 2965).

The images demonstrated an abnormal pattern of brain function; a pattern that is consistent with someone who has sustained a head injury or some other trauma (PC-R. 2906). Specifically, Morrison's images indicate problems with frontal lobe functioning (PC-R. 2908). Further, Morrison's images show a overall pattern of low functioning in his neocortex (PC-R. 2910-1). Wu explained that the images show an individual who is grossly cognitively impaired overall (PC-R. 2915). And, this impairment is consistent with someone who is ID and has impaired executive functioning (PC-R. 2915).

Furthermore, Morrison has not only suffered from severe OBD, but has also suffered from the disease of significant dependence on alcohol and other substances, including crack (PC-R. 2941-2, 2971). Morrison's dependency issues began when he was a child when he began to sniff glue and huff gasoline to achieve a high. His rapid progression over the next several years culminated in a severe addiction to crack.

Morrison's father and many of his aunts, uncles and siblings suffered from alcohol and drug dependence, making it more likely that Morrison's dependency issues are genetically linked (PC-R. 2971-2). And, the use of intoxicants impairs cognitive abilities both acutely and chronically (PC-R. 2973). Morrison used crack and drank alcohol on the evening of the crime.

Eisenstein testified that both statutory mental health

mitigators applied at the time of the crime (PC-R. 3023).[26] As to whether Morrison was under the influence of extreme mental or emotion disturbance at the time of the crime, Eisenstein believed the mitigator was established due to Morrison's history, OBD and substance abuse (PC-R. 3025). Specifically, Morrison's mental issues impair his ability to think and would substantiate the mitigating factor (PC-R. 3025). Likewise, Eisenstein testified that Morrison's ability to appreciate the criminality of his conduct was substantially impaired due to his alcohol and drug use (PC-R. 3026-7). Finally, Eisenstein opined that Morrison was under the duress or domination of other individuals (PC-R. 3029).

Furthermore, Prichard diagnosed Morrison with Anti-Social Personality Disorder (ASPD), another non-statutory mental health mitigator (PC-R. 3663).[27] Eisenstein did not believe that

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[26]Prichard disputed Eisenstein's opinion, though he did not conduct any evaluation in Morrison's case other than speaking to him for a few hours and reviewing some records hand selected by the State (PC-R. 3663). Prichard simply did not believe Morrison suffered from any psychological condition because he had no diagnosis of mental illness or treatment (PC-R. 3663-5). But, of course, OBD is major mental disorder and Prichard does not conduct assessments related to OBD (PC-R. 3671). And, on cross examination, Prichard rescinded his testimony and stated that OBD could cause substantial impairment that could reduce the capacity to appreciate the criminality of one's conduct (PC-R. 3674).

[27]Prichard relied largely on Morrison's self report. For example, though the school records did not indicate a single suspension or expulsion, Prichard believed that they occurred because when he asked Morrison about them he agreed that they occurred (PC-R. 3643, 3651). However, undersigned, who was present for the interview testified that Morrison did not know the meaning of "suspension" and appeared confused by the term

Morrison met the criteria for the diagnosis because Morrison's ability to maintain relationships with loved ones is antithetical to ASPD and Morrison did not meet the criteria for conduct disorder which is necessary to an ASPD diagnosis[28] (PC-R. 3017-8, 3020).[29]

Furthermore, Eisenstein cautioned that such a diagnosis is not appropriate when antisocial behaviors are caused by substance abuse issues, which was the case here (PC-R. 3019). See also DSM-V.

Likewise, it is necessary to consider sociological factors when diagnosing ASPD (PC-R. 3694). When Prichard made the diagnosis in Morrison's case, he had no history about Morrison's background and conducted no interviews in this regard (PC-R. 3694-5). And, he had no idea what was normal in the Marietta area for African American males (PC-R. 3787-8).

Micah Johnson, a sociologist who is the subject matter expert in social inequality at the University of Florida

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"expelled" (PC-R. 4194-6).

[28]Eisenstein pointed out that the single crime of petit theft for which Morrison was arrested and was included in his PSI was not pursued and therefore could not be considered (PC-R. 3022); see also DE 37. Prichard relied on the arrest to diagnose ASPD (PC-R. 3663).

[29]Eisenstein also noted that Morrison does not have a single DR since being incarcerated in the DOC in 1998. According to Eisenstein this would be quite unusual if Morrison truly suffered from ASPD (PC-R. 3023).

testified that in order to understand an individual's behavior you have to understand his environment (PC-R. 4065, 4089). Specifically, Johnson challenged Prichard's statement about Morrison's juvenile arrest being abnormal with empirical data showing that the arrests of young African Americans is 34.4% which is extremely disproportionate to the population statistics (PC-R. 4094-5). Indeed, an African American juvenile has a higher chance of being arrested than getting married or graduating college, two incidences that society considers normal (PC-R. 4096). And, the probability of being arrested increases in urban areas, like Marietta (PC-R. 4097). Several factors contribute to the high rates of arrest, including the institutional racism that causes particular neighborhoods to be targeted; the lack of conflict resolution strategies; and the economic deprivation that is prevalent in urban areas (PC-R. 4097-8). Prichard's opinion that it was not normal to be arrested was erroneous (PC-R. 4114).

Johnson also explained the myriad of factors that contribute to an individual's increased chance to encounter negative outcomes with law enforcement and the justice system, including, but not limited to, race, parents' education, neighborhood integration, single-parent home, low education, low economic status, violence in the home (PC-R. 4101-4, 4106). Thus, behavior that may be considered antisocial is entirely predicted by social context, a context which children do not choose (PC-R. 4105).

Therefore, the cautionary note in the DSM-V, related to cultural issues that often lead to the misdiagnosis of individuals from urban areas stems from sociological research and is applicable in the case at hand (PC-R. 4103-5).

Indeed, the flaw in Prichard's diagnosis was that he failed to consider the environment in which Morrison was raised and he described a sociological problem in psychological terms. See PC-R. 4107-9. Prichard's diagnosis is not support by the evidence.

c. prior violent felonies

At the evidentiary hearing, Turner testified that both he and Morrison were convicted of an aggravated battery with a deadly weapon that arose from a fight that occurred outside of a bar (PC-R. 2554). When Turner was questioned about the crime, he took full responsibility and confessed to shooting the victim (PC-R. 2555). Morrison was not involved, but started running with Turner as Turner ran from the scene (PC-R. 2555). Four days after Morrison pleaded guilty to the crime and was sentenced, Turner pleaded guilty (PC-R. 2556). Later, he learned that Morrison had also confessed to the crime, even though he (Morrison) was not involved in the crime in any way (PC-R. 2556).

8. Trial Counsel's Investigation and Defenses.

a. guilt phase

After being called as a State witness, trial counsel, Eler maintained that prior counsel had completed every aspect of the

investigation in the case and that it was ready for trial when he assumed Morrison's representation (PC-R. 3813; see also PC-R. 3915-6). Eler explained that at trial he attempted to establish that Brown was responsible for the crime, but because Morrison "had a child with her, he loved her" that he "didn't want her to go down." (PC-R. 2396, 3834).

As to his investigation, Eler conceded that defense counsel should speak to witnesses who knew Morrison's whereabout the day of the crime and could discuss Morrison's use of crack (PC-R. 2387). However, contradicting what he told the court at the time of the trial, he testified that he wanted to minimize Morrison's drug use as a defense because he was concerned that the jury would view it as an excuse (PC-R. 3821); see T. 336.

Also in contradicting his statements to the Court from trial, Eler stated that he investigated Morrison's alibi for the day and evening of the crime (PC-R. 3833). Eler testified that he had spoken to everyone who would talk to the defense (PC-R. 3855); see T. 335-6.

Eler also testified that he did not recall using an expert in false confessions (PC-R. 2391). He elaborated the second time he took the witness stand, maintaining that challenging confessions with the use of experts was brand new in 1998 and their testimony would not have been admissible (PC-R. 3837-8).

b. penalty phase

Eler requested the assistance of a second chair, Christopher Anderson, just three days before trial commenced (PC-R. 2366). Originally, Eler testified that he brought Anderson in order to be a fresh face for the penalty phase and "to conduct the penalty phase" (PC-R. 2367); see also (PC-R. 2405)(Anderson "was pretty much in charge of [the penalty phase]").[30] And, Eler deferred to Anderson as to the investigation that occurred for the penalty phase, including investigating Morrison's prior convictions and interviewing co-defendants (PC-R. 2392-3).

In addition to pointing the finger at Anderson, Eler maintained that when he received the file from the PD there was "basically nothing left to do but try the case." (PC-R. 2363). Eler boldly proclaimed that Alan Chipperfield and Ron Higbee completed virtually every aspect of the investigation in the case (PC-R. 3813, 3915, 3996).[31] Eler believed that Chipperfield was a highly skilled capital defense attorney who was preeminent in the field (PC-R. 3838, 4014). Eler relied heavily on two pages of handwritten notes that Eler claimed was Chipperfield's outline; Eler claimed that it "itemized every bit of mitigation and

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[30]Eler envisioned that Anderson would prepare for the Spencer hearing (PC-R. 2414).

[31]Eler admitted that he did not remember if Morrison's family was interviewed and he did not see anything reflecting family interviews in the PD's file (PC-R. 3824-5).

aggravation in this case." (PC-R. 3824, 3825, 4003-4, 4012-3); see also DE 70.[32] Eler claimed that the PD investigator, Lynn Mullaney, had conducted a very thorough investigation, but when confronted about the specifics of the investigation, Eler admitted that there were only four brief reports of Mullaney's interviews with employers and not a sigle report relating to a family interview (PC-R. 4003, 4004, 4009, 4010).

Anderson testified that he was "inclined to think that [Mr. Morrison's case was his] first death penalty trial" (PC-R. 2484, 2500). In fact, Anderson's criminal experience prior to Morrison's trial was confined to juvenile cases and a few criminal jury trials (PC-R. 2520). Contrary to Eler's testimony, Anderson recalled that he was primarily appointed to be "an additional set of eyes and ears" and to pick-up witnesses (PC-R. 2484, 2536).[33] He testified that the fact that he had no recollection of the penalty phase indicates to him that he was not involved in the investigation (PC-R. 2485). And, Anderson testified that before he came on board, the penalty phase investigation had been completed (PC-R. 2491). Anderson did not

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[32]When questioned about not presenting particular types of mitigation, he frequently relied on the fact that information was not contained in Chipperfield's notes (PC-R. 3837 (abuse info), 3844-5 (mental health info), 3845-6 (being locked in a closet info), 3854 (drug info)).

[33]In fact, Anderson candidly admitted that his appointment to Morrison's case was an effort to "get [him] on track to get death qualified..." (PC-R. 2539).

meet any of Morrison's family members before the penalty phase (PC-R. 2533).

Ken Moncrief was retained as a defense investigator, but he had no communication with witnesses regarding mitigation and did not speak to any co-defendant from Morrison's prior convictions (PC-R. 3206, 3210). The investigation Moncrief performed was in regard to the guilt phase (PC-R. 3207).

Both Eler and Anderson believed that drug use or other recognized mitigation could be considered aggravation (PC-R. 2509)("my experience jurors and judges always hate drug addiction.").

Between the time Eler was appointed and the trial, Morrison consistently complained that Eler was not consulting with him or returning phone calls from his mother or fiancé (R. 830, 909). Eler falsely asserted that he spoke to everyone who would talk to him (PC-R. 3853), but then admitted that there were no notes of interviews with Austin, Harris, Allen, Willie Morrison or co-defendants on prior convictions in the file (PC-R. 3985, 3987, 3988, 3989, 4045-6).[34]

When confronted about failing to obtain the information about Morrison's violent and abusive childhood and adolescence, Eler weakly suggested that Georgia never told him (PC-R. 3827).

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[34]The notes that Eler suggested were obtained from interviews with witnesses were actually his notes from the penalty phase witnesses testimony (PC-R. 4036-40, 4040-1).

He also indicated that the type of child abuse Morrison suffered may not constitute mitigation if Morrison deserved it (PC-R. 3827-8).

Eler also testified that Morrison's DOC records, if introduced, could have been used as aggravation because there were disciplinary reports (DRs), and information about an escape contained in them (PC-R. 3814, 3842-3). Similarly, he believed that Morrison's employment records could have been considered aggravation because they contained negative information (PC-R. 3843).

And, perhaps most tellingly, Eler testified, under oath, that he would not introduce Morrison's school records because they contained negative information and he wanted to paint a rosier picture of Morrison's life (PC-R. 3844, 3990). But of course, he did introduce them. See DE 65 (postconviction).

And, only after the jury returned a verdict convicting Morrison of first-degree murder did Eler make arrangements for him to be evaluated by Krop in preparation for penalty phase. This was so, despite Eler's testimony that he relied on Krop to advise him as to mental health issues (PC-R. 3820).

Chipperfield refuted Eler and Anderson's testimony. His records reflect that he was assigned to Morrison's case in 1997 (PC-R. 4137). 1997 was the busiest year he ever had at the PD's office; he tried one case per month between January and June,

including two trials that resulted in penalty phases (PC-R. 4138). Then in June, he was assigned a high profile homicide case and worked on that until it was tried in December, 1997 (PC-R. 4138). Chipperfield's actual involvement in Morrison's case was "minimal" (PC-R. 4141). Chipperfield explained that often investigation did not occur until much later in a case (PC-R. 4147). He also mentioned that he would have considered whether the State was really going to pursue the death penalty and if he thought the case may be worked out, he would delay the penalty phase investigation (PC-R. 4148-9). Issues relating to suppression of statements certainly may cause him to wait to see what would happen before investing time and resources in a case (PC-R. 4149-50).

Chipperfield identified the handwritten notes that Eler had characterized as an outline that "itemized every bit of mitigation and aggravation in this case" and stated that they were simply notes from a conference with Higbee (PC-R. 4141). Chipperfield testified that the notes made clear that Allen and Willie Morrison had not been interviewed and that Krop's evaluation was "ongoing" (PC-R. 4143). In fact, Chipperfield acknowledged that Krops' February 20th letter made clear that his evaluation was preliminary and he needed more information to form additional conclusions (PC-R. 4145).

Chipperfield mentioned that though the PD's office may have

obtained some records, that was just the beginning of the penalty phase investigation (PC-R. 4156). Normally, he would take the records and contact witnesses and try to develop mitigation (PC-R. 4156). And, he would certainly provide them to an expert to assist with interpretation of information (PC-R. 4157). Mullaney's preliminary investigation appeared to related to some interviews with employers, only (PC-R. 4162). See also DE. 67, 68, 69.

Fundamentally, Chipperfield testified that an adequate investigation requires interviewing as many people as you can about your client's life; talking to your client is not enough (PC-R. 4164-5). He would have interviewed Allen and Willie Morrison (PC-R. 4143, 4162-3). In fact, he thought Willie's information was particularly beneficial in that it established mental health issues and violence in the home (PC-R. 4166).[35]

Chipperfield also explained he was aware that Morrison had an addiction to alcohol and crack (PC-R. 4175). Contrary to Eler and Anderson, Chipperfield stated that it was common to use substance abuse as mitigation in Duval County; he had obtained a life recommendation relying on mitigation related to crack use in the summer of 1997 (PC-R. 4176, 4187). It would be important to explain what crack does to an individual (PC-R. 4176). Substance

[35]Chipperfield explained that Willie's testifying may have also made a mental impression on the jurors as to the security measures and miserableness of being incarcerated (PC-R. 4174).

abuse is not aggravation (PC-R. 4186). And, at a minimum it could be presented at the Spencer hearing (PC-R. 4187-8).

When asked if the case was trial ready, Chipperfield responded: **[A]bsolutely not ... I would not have wanted to go to a penalty phase with what we had [in the files]. It wasn't – wouldn't have been any good.**" (PC-R. 4179)(emphasis added). Chipperfield echoing the caselaw and ABA Guidelines lectured that an attorney is required to conduct a full investigation before making decisions (PC-R. 4188).

9. Intellectual Disability.

Morrison also presented evidence that he is intellectually disabled. In March, 2012, Dr. Gordon Taub administered the WAIS-IV to Morrison (PC-R. 2657). The results of the WAIS-IV establish that his full scale IQ score was two standard deviations below the mean, i.e. he obtained a 70 (PC-R. PC-R. 2691). Taub believed that the score was valid and reliable (PC-R. 2696; see also Krop, SPC-R. 58-9). Eisenstein, who conducted a comprehensive ID evaluation testified that Morrison's score on the WAIS-IV satisfies the first prong of the definition (PC-R. 2977, 2997).

Dr. Lawrence Weiss testified that he was involved with the development of the WAIS-IV (PC-R. 3108). Weiss explained that improvements were made to the WAIS-IV which included updating the norms, and "to keep the test current in terms of its content with advances in the field of cognition and intelligence syndrome

psychology" (PC-R. 3110). Weiss testified that the improvements were made to produce a more reliable and valid measure of intelligence (PC-R. 3111). Taub, whose research was relied upon in the restructuring of the WAIS-IV's scoring model, agreed with Weiss: "the WAIS-IV is a better measure of intelligence" than the previous measures (PC-R. 2661, 2791). In fact, Taub conducted research and determined that the WAIS-IV was a better measure of intelligence when compared to the WAIS-III (PC-R. 2666-7). Even Prichard conceded: "You can't argue with the fact that the WAIS-IV is a better instrument that the WAIS-III (PC-R. 3605).[36]

Significant changes were made to the WAIS-IV that made it a superior and more reliable and valid measure of intelligence: the norms were updated (PC-R. 2668, 3111); changes were made to the scoring of the test (PC-R. 2677, 3114); increased and improved measurements were added, including fluid reasoning, processing speed and working memory (PC-R. 2677-8); improvements were made to the developmental appropriateness of the test (PC-R. 2678-9); and improvements to clinical utility, i.e., adding more questions to the floors and ceilings in order to more precisely obtain a score in those areas (PC-R. 2680-1, 3111). Thus, due to the changes, comparing a score prior to WAIS-IV with a WAIS-IV score is impossible; it is comparing apples and oranges (PC-R. 2687-8)

[36]And, Morrison's score on the WAIS-IV is important for eighth amendment purposes (PC-R. 3606).

("the tests are not comparable").

Currently, the WAIS-IV provides the most accurate reflection of an individual's intelligence (PC-R. 2684, 2978, 3118). Indeed, Taub testified that when Morrison was administered the WAIS-III and the WAIS-R, the tests were in the last year of use and the scores would have been higher than if they were given when the test was newer (PC-R. 2699). Likewise, Weiss testified that the theoretical expectation was that Morrison would score lower on the WAIS-IV due to the timing of taking the WAIS-R (PC-R. 3114). Further, the WAIS-R and WAIS-III are inferior testing measures (PC-R. 2701). Weiss concluded his testimony by stating that if you have a collection of IQ scores, assuming that the testing measures were valid, a practitioner must recognize the Flynn effect in order to determine the effect on the various scores, as well as the standard error of measurement (PC-R. 3128). Krop agreed with Weiss, that it was not uncommon to see different IQ scores across time and that it was appropriate to consider the Flynn Effect, which in Morrison's case would suggest a lower score on the WAIS-IV than on the previous WAIS testing (SPC-R. 102, 107-8).[37]

Eisenstein also pointed out that Morrison's school records, demonstrating academic difficulties and consistent academic

[37]Prichard testified that he does not apply the Flynn Effect though he "recognizes" it (PC-R. 3554-5).

failures were consistent with ID and his WAIS scores (PC-R. 2984). Indeed, Eisenstein believed that the IQ testing in 1976 was significant because such a small group of students were singled out to receive such testing (PC-R. 2985). Krop agreed and testified that Morrison's school records established that he suffered from intellectual deficiencies (SPC-R. 123-4).

As to what individuals who suffer from ID "look" like, Morrison's experts testified that ID individuals can progress, especially with repetition (PC-R. 2711-2). They can have a job (PC-R. 2712). ID individuals can read and write (PC-R. 2727). "You won't know they're intellectually disabled unless you ask them to do a high-order task" (PC-R. 2712). "You wouldn't know, typically, that an individual has an intellectual disability unless you engaged in a formal assessment with them or spending a lot of time with them on a daily basis, especially somebody that's higher functioning within that range of intellectually disabled." (PC-R. 2713).

Prichard disputed that Morrison suffered from ID.[38] Contrary to Taub's testimony, Prichard testified that ID was pretty easy to identify and that he could tell with 15-20 minutes of speaking to someone what was his level of intellectual functioning (SPC-R. 138-9; PC-R. 3554). Prichard relied heavily

[38]It should be noted that Prichard admitted that his opinion was subjective (PC-R. 3760).

on Morrison's score on the Stanford Binet LM in 1976, characterizing it as the most reliable data in the case (SPC-R. 148), this was so even though he conceded that the Stanford Binet LM only measured one dimension and was not as comprehensive of a test as we have today (PC-R. 3611-2; see also 2704; 2988).[39] And, Prichard refused to acknowledge the research and limitations of the instrument, clinging to the abrogated notion that an ID score is solely made based on a score obtained on an IQ test (SPC-R. 148-9).[40] In fact, Taub testified that gifted individuals scores decreased by 10 points from the Stanford Binet LM to the Stanford Binet-IV (PC-R. 2703).

And, despite conceding that the WAIS and Stanford Binet were the only acceptable measures to determine IQ for purposes of diagnosing ID (SPC-R. 140), Prichard considered Morrison's scores on the Wechsler Memory Scale (WMS) and the BETA and claimed that they were too high for someone suffering from ID (SPC-R. 162). This was so, eventhough, he acknowledged the "limited utility" of

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[39]Prichard noted that Morrison was not placed in special education classes (ESE) (SPC-R. 145). Morrison was not placed in ESE classes because he produced a full scale IQ score of 78 on the Stanford Binet LM (DE 27). But of course, the decision as to which students were eligible for ESE was based entirely on bright-line score, as explained by Huffingham (PC-R. 2579). Thus, Prichard's opinion fails to consider the recognition in Hall that an IQ score is simply not the end of the inquiry as to the determination of ID for eighth amendment purposes.

[40]Indeed, despite the cataclysmic changes made to the WAIS-IV, Prichard maintained that there was no need to conduct additional testing in Morrison's case (SPC-R. 150-1).

the BETA (PC-R. 3536).[41]

Taub countered that the WMS was measuring something different that the WAIS instruments (PC-R. 2794). And, Taub testified that the BETA was not a reliable or valid measure of intelligence (PC-R. 2788-9, 2790). Taub explained that the BETA was a non-verbal test (PC-R. 2788-9).

Prichard also claimed that Morrison's scores on achievement tests are too high (SPC-R. 159). However, achievement does not correlate 1 to 1 to intelligence (PC-R. 2714). Weiss also clarified that achievement and intelligence are simply not the same thing and cannot be compared (PC-R. 3121). And, age norms should have been used, not grade norms, so the scores Morrison obtained are inflated (PC-R. 2715). Even so, Taub testified that the achievement scores are consistent with Morrison's IQ score (PC-R. 2717).

Prichard also relied on the WRAT III score which placed Morrison in a high school level for reading to claim that Morrison could not be ID. However, previously, Prichard had no problem with the fact that a defendant had been given the same

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[41]In State v. Cherry, Prichard testified that the BETA was not relevant to determining ID (PC-R. 3536); see also DE 57 (testifying that the BETA was "developed to assess individuals in settings like institutions where you're doing group testing." and "It's also for non-readers" ... "So, its utility in terms of saying whether a person is mentally retarded or not is extremely limited. **It's not accepted as a measure in the scientific community for determining retardation.**")(emphasis added).

designation when concluding that he met the criteria for ID (PC-R. 3545-6; DE 57, 58). And, Prichard admitted that the WAIS is not measuring reading (PC-R. 3548).

Again, Morrison presented testimony that the WRAT III was not a good measure of achievement (PC-R. 2722-3). Indeed, Weiss confirmed that WRAT III was not a valid or reliable instrument (PC-R. 3121). The WRAT III is not a comprehension assessment (SPC-R. 84). Weiss also clarified that achievement and intelligence are simply not the same thing and cannot be compared (PC-R. 3121).

Finally, Prichard hypothesized that Allen is of average intelligence (he based this opinion on hearing her testify), so she wouldn't be attracted to Morrison if he were truly ID (SPC-R. 157-8).

In addition to significantly subaverage intellectual functioning, Morrison has significantly subaverage deficits in his adaptive behavior (PC-R. 3014). Impairment in adaptive skills requires an examiner to determine how an individual has functioned in his environment and aspects of independent behavior. Eisenstein explained that in evaluating this, an expert considers and individual's level of functioning through collateral sources (PC-R. 3000-1). In Morrison's case, the anecdotal evidence of impairments was consist (PC-R. 3015). Eisentstein explained that according to the DSM-V and Florida

law, and examiner must consider the three domains of adaptive skills: conceptual, social and practical, and identify at least two impairments related to any of the areas (PC-R. 3001). Eisentstein conducted a formal adaptive skills assessment with Morrison and his result placed him in the mild to moderate level of impairment (PC-R. 2999). Eisenstein testified that Morrison exhibited historical deficits in conceptual areas (PC-R. 3007); deficits in practical areas (PC-R. 3011-2); and deficits socially (PC-R. 3004).

In the practical domain, Eisenstein explained that Morrison could care for himself in only the most basic ways; structure was necessary if Morrison was going to be able to manage (PC-R. 3013, 3014). Indeed, Willie Morrison, reported that his brother had difficulty with simple things and chores, like raking the yard and washing dishes (PC-R. 3355, 3390). If he was sent to the store with a list, he would not get the right items or even all of the items on the list (PC-R. 3356, 3392). Paula Morrison testified that Georgia made the food and her brother simply took it out of the refrigerator or "prepared" it because he could not cook (PC-R. 3391). Indeed, when Morrison was fourteen years of age he attempted to cook some beans for himself and nearly caused the house to burn down (PC-R. 3391).

Furthermore, no one knew Morrison to have a bank account or

driver's license (PC-R. 2815, 2876[42]). Morrison always lived with his mother or a girlfriend (PC-R. 2556). Morrison could not understand the concepts necessary to run a household, like budgeting money, saving money or paying bills (PC-R. 2820).

Morrison needed assistance filling out job applications and forms (PC-R. 2820). And, once in awhile, Morrison would be hired to do some menial work. Eisenstein testified that Morrison's employment history demonstrated some deficits (PC-R. 3003).

Socially, Morrison was a follower and often found himself being taken advantage of by younger, more savvy teenagers and young adults who amused themselves by cajoling him to partake of foolish and, sometimes, even dangerous behavior (PC-R. 2553, 3357). Morrison put himself at risk criminally at the urging of others (PC-R. 2553). Eisenstein testified that the descriptions of Morrison being taken advantage of, being the "fall guy" and being unable to be socially independent was consistent with deficits in Morrison's social skills (PC-R. 3004, 3005-6).

Eisenstein also pointed out that Morrison's use of drugs and alcohol appeared to be part of his self-medicating and yet

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[42]Terry Heatly, is Morrison's cousin and testified at the evidentiary hearing about Morrison's use of drugs and alcohol as well as his functioning. In order to minimize Heatly's testimony about Morrison's functioning, Appellant states that Heatly "knew Morrison only on drugs" (AB at 14), however, Appellant does not provide a citation for this statement. There is none. Heatly, spent a considerable amount of time with Morrison because they were cousins and Morrison was not always on drugs (PC-R. 2880).

another indication of deficits in his adaptive skills (PC-R. 3006). Morrison turned to drugs and alcohol because he was extremely concrete and limited (PC-R. 2820, 3006).

While Prichard did not conduct an adaptive skills assessment (SPC-R. 180), he asserted that Morrison's employment history was not consistent with deficits in adaptive functioning (SPC-R. 178).[43] However, Prichard relied entirely on Morrison's self-report and did nothing to verify what Morrison told him (PC-R. 3613-4). Further, Prichard recognized that ID individuals often want to appear less disabled which is commonly referred to as the "cloak of competence" (PC-R. 3521-2). Prichard acknowledged that most of Morrison's jobs were menial in nature (PC-R. 3652).

Finally, Prichard placed significant weight on what he believed to be Morrison's care for his grandmother, repeatedly stating that individuals with ID don't care for other but are cared for (PC-R. 3583). However, his opinion was based on his assumptions of what Morrison's grandmother could do or not do for herself (PC-R. 3585-7),[44] and ignored Georgia's testimony that

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[43]Prichard also relied on pleadings, including a sentencing memorandum prepared by the State in requesting that Morrison be sentenced to death in support of his rebuttal to Eisenstein's opinion (SPC-R. 155; PC-R. 3575-8). Such materials would not be the type a competent expert would rely upon as they are completely subjective and are not established or reliable facts.

[44]For example, Prichard repeated that Morrison's grandmother needed "changing" and she was an "invalid" (PC-R. 3714), yet this was simply not the testimony at trial or in postconviction. See T. 1197-1215.

her son was a companion for his grandmother (PC-R. 3298).

Finally, as to whether the onset of Morrison's ID was present before the age of 18, all of the information consistently demonstrates that Morrison was "slow" and challenged intellectually as a child and adolescent (PC-R. 3017).[45] Eisenstein relied on Morrison's school records which established that his grades were low and that he could not grasp the fundamentals (PC-R. 3016). Eisenstein explained that Morrison's academic difficulties and consistent academic failures was evidence that his ID existed prior to 18. School officials were so concerned that Morrison was recommended to be psychologically tested when he was eight years old. The reason for the referral was academic, including that Morrison was reading at a below pre-kindergarten level as a third grader and that his math skills were very low (DE 27).

At the evidentiary hearing, Irving Huffingham, the principal of the elementary school Morrison attended. Of the 600-700 students, usually only 25 or 30 would be recommended for testing (PC-R. 2574). Huffingham also testified that he placed a lot of credibility with particular teachers who recommended Morrison for testing. Out of the students recommended for testing, only 6 or 7 would actually receive the testing (PC-R. 2577). Morrison was one

[45]Willie recalls attempting to assist his brother with his homework, though Willie was younger than his brother (PC-R. 3353-4, 3356).

of those students (PC-R. 2577). In Huffingham's mind, this meant that the teachers had identified something significant enough to raise (PC-R. 2577-8).

Following the testing, the finding was made, based on the test result, that Morrison was functioning "at the top end of the borderline range of mental retardation." (DE 27). Despite this finding, Morrison was not placed is the exceptional student program. Huffingham explained that there was a strict cut-off and Morrison did not meet it (PC-R. 2579). However, additional evaluation was recommended which never occurred because there was no one at the school to conduct the evaluation (PC-R. 2579-80). Huffingham also testified that if a student was not promoted it meant that "[he] was not ready for the next grade level in terms of academics and to put that child ahead would cause him greater problems" (PC-R. 2582-3). So, retaining a student was also a way to assist him (PC-R. 2583).

Following the evidentiary hearing, closing arguments were filed on June 8, 2015 (PC-R. 1387-1447, 1450-1509).

On September 18, 2015, the circuit court granted Morrison a new trial and re-sentencing (PC-R. 1518-1640).

The State appealed (PC-R. 1641-2), and Morrison cross-appealed (PC-R. 1645-6).

SUMMARY OF THE ARGUMENT

1. A key piece of the State's prosecution of Morrison was the alleged statements he made to law enforcement upon his arrest. In challenging those alleged statements, both before the trial court and jury, trial counsel failed to present evidence about Morrison's chronic and acute use of drugs and alcohol. Readily available evidence would have established that in the days leading up to January 8, 1997, Morrison was on a crack binge. Indeed, on January 8th until January 10th, Morrison used drugs and alcohol.

In addition, trial counsel failed to consult with a mental health expert about the issue of Morrison's mental health and his drug and alcohol use and whether those issues may have impacted the voluntariness and reliability of the alleged statements.

The circuit court correctly found that trial counsel's performance was deficient in this regard. And, due to the importance of the alleged statement to the State's case, the circuit court also correctly held that the failure to investigate and present such evidence prejudiced Morrison.

2. Additional favorable evidence went undiscovered and unpresented due to trial counsel's unreasonable position that the case was ready for trial when he assumed representation of Morrison. Evidence related to the State's theory of the case, including Morrison's whereabouts and intoxication, was readily

available and completely undermined Brown's testimony and Morrison's alleged statements to law enforcement. Had the evidence been presented, the jury would have had much evidence to judge the reliability of Brown and her motivations, as well as, understand how an individual would confess to a crime he did not commit. The circuit court correctly concluded that the evidence placed the case in a whole new light, thereby establishing prejudice.

3. Morrison presented a compelling and horrifying story of his life, including mental health evidence which established that he suffered from ID, OBD and a severe alcohol and drug dependence. At trial, the jury was deprived of hearing the evidence that individualized Morrison and made him worthy of a sentence less than death.

The circuit court heard trial counsel weakly attempt to excuse his egregious lack of investigation. However, it was abundantly apparent to the circuit court that trial counsel failed to follow-up with Krop though he was on notice that Krop needed additional materials and that there were "red flags" relating to mental mitigation. Further, trial counsel's reliance of a page of notes comprising Chipperfield's preliminary ideas, before the penalty phase investigation began, was totally unreasonable.

There is no doubt that the reliability of Morrison's death

sentence was undermined, as found by the circuit court.

4. The State hid evidence that was exculpatory to Morrison and would have provided a reasonable and probable alternative that Brown was responsible for Mr. Dwelle's murder. The jury was unaware that Mr. Dwelle had a condom in his shirt pocket and that Brown referred to him as her "sugar daddy". Indeed, it was common knowledge among Brown's friends that she often traded sex for alcohol and did so with Mr. Dwelle.

The relationship between Mr. Dwelle and Brown provided her opportunity and potential motive to commit the crime, while also explaining why she would want to direct the investigation away from herself. Indeed, when Davis originally questioned Brown she exhibited suspicious behavior and he believed that she was not being forthcoming.

The State also failed to reveal the interviews between Richardson and Brown in which Richardson threatened to remove Brown's son from her custody. Brown confided that she felt threatened and was terrified that she would lose her son and her apartment.

Had the State revealed the exculpatory evidence to Morrison, the case against him would have been damaged and the evidence would have been entirely consistent with trial counsel's strategy to show that Brown was the perpetrator and not credible. Surely, when considering all of the evidence Morrison presented,

confidence would have been undermined.

5. New DNA testing revealed that a profile from presumptive blood found on the knife handle matched neither Morrison nor Mr. Dwelle. Because the State asserted that the knife had been used to fatally injure Mr. Dwelle the DNA evidence was significant and cast doubt on the theory that Morrison was the perpetrator.

Additionally, Brown revealed, after the trial that her testimony was not truthful and she was motivated by the fear of losing her son and her apartment when she implicated Morrison in the crime.

While the newly discovered evidence is significant individually, it has an even greater impact when considered cumulatively with the other favorable evidence that undermined the State's case.

6. Morrison suffers from intellectual disability. After a comprehensive evaluation was conducted, he met all of the criteria for the diagnosis and is not eligible for execution. The circuit court committed legal error in finding that Morrison could not meet his burden.

7. The circuit court erroneously ruled that Morrison's claim that trial counsel was ineffective for failing to challenge a prior violent felony was not a cognizable claim.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT CORRECTLY HELD THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO ADEQUATELY CHALLENGE MR. MORRISON'S STATEMENTS TO LAW ENFORCEMENT AND THAT SUCH FAILURE CAUSED PREJUDICE. (RESTATED)[46]

At the time of Morrison's trial, he filed a motion to suppress his statements to law enforcement, including his written statement (R. 329-34). The motion made clear that Morrison was challenging his alleged oral and written statements (R. 329). Indeed, though Morrison denied making any inculpatory oral statements, he testified that he had signed the written statement that was ultimately introduced at his trial (R. 1407).

After Eler assumed the representation of Morrison, he requested that the trial court reopen the hearing so that he could present testimony about Morrison's use of drugs prior to his statement (R. 1461-2). Indeed, Eler submitted a stipulation relating to the testimony of Fred Austin, Morrison's uncle, which related that Morrison had used cocaine or cocaine derivatives on the evening of January 9, 1997, and "in the early morning hours of January 10, 1997" and that Morrison was "'high'" (R. 795).

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[46]Argument I involves a mixed question of law and fact. The issues regarding the application of the law present questions of law and must be reviewed *de novo*. See Sochor v. State, 883 So. 2d 766, 772 (Fla. 2004). In regard to the facts, under Porter v. McCollum, deference is given only to historical facts. All other facts must be viewed in relation to how Morrison's jury would have viewed those facts. See Porter v. McCollum, 558 U.S. 30 (2009).

However, Eler presented no testimony about the effects of cocaine and/or Morrison's mental health.

In postconviction, Morrison claimed that trial counsel was ineffective for failing to adequately challenge his statement. Specifically, Morrison presented testimony about his chronic and acute drug use, his mental health, his propensity to confess to crimes he did not commit and circumstances which undermined the reliability of his statements.

The circuit court held that based upon the testimony of the mental health experts at the evidentiary hearing, "it is likely Defendant had a significantly impaired mental state at the time of the interrogation." (PC-R. 1547). The court also held that because Morrison's statement was a key piece of evidence, it was unreasonable for trial counsel to fail to investigate Morrison's mental state (Id.). The evidence could have been used at the suppression hearing or by the jury at trial to "evaluate the voluntariness and veracity" of Morrison's statement (Id.).

Likewise, the circuit court found that the testimony from Joseph Turner[47] as well as the mental health testimony about Morrison's susceptibility to be the "fall guy" could have explained why Morrison would inculpate himself in Mr. Dwelle's death" and was unreasonable for trial counsel not to investigate

[47]The State incorrectly identifies the testimony of Joseph Turner as Raymond Seels' (IB at 26).

(PC-R. 1551).

In requesting that this Court reverse the circuit court's order, the State argues that Morrison's claim was procedurally barred because it was inconsistent with the claim that Morrison raised at trial and on direct appeal (IB at 18, 29). Specifically, the State argues that because Morrison testified that he did not make any oral statements to law enforcement, he is precluded from arguing now that trial counsel failed to adequately investigate and challenge his statement (IB at 22-4).

However, neither the law nor the facts support the State's argument. First, neither Morrison nor the circuit court limited Morrison's claim to trial counsel's performance at the motion to suppress hearing. Rather, Morrison has always claimed that the evidence about his mental health, including his drug use, should have been investigated by trial counsel in order to challenge the statements he was alleged to have made at the motion to suppress and before the jury. The circuit court clearly understood that Morrison's claim was not as narrow as the State now argues because the court specifically found that the evidence impacted the voluntariness and reliability of the statement before the trial court and the jury (PC-R. 1552).

Furthermore, Morrison is not "repackag[ing]" his claim raised on direct appeal. See IB at 29. As the circuit court recognized, had trial counsel adequately investigated Morrison's

mental health, he would have been able to present evidence to "describe and explain how Defendant's mental state during his interrogation with the police would impact the voluntariness and reliability of that statement." (PC-R. 1552).

In Bruno v. State, 807 So. 2d 55, 63 (Fla. 2001), this Court held:

> The trial court concluded that this claim was barred because it either was, or could have been, raised on direct appeal. This was error. Whereas the main question on direct appeal is whether the trial court erred, the main question in a *Strickland* claim is whether trial counsel was ineffective. Both claims may arise from the same underlying facts, but the claims themselves are distinct and-of necessity-have different remedies ...

(Footnotes omitted); see also Kimmelman v. Morrison, 477 U.S. 365, 374 (1986)(holding that fourth amendment claim based upon an unreasonable search and seizure was distinct claim from sixth amendment claims relating to trial counsel's challenge to the search); Parker v. State, 89 So. 3d 844, 858 (Fla. 2011).

Likewise, in Lawrence v. State, 969 So. 2d 294, 313 (Fla. 2007), this Court explained the clear distinction between a substantive claim of error and a claim of ineffective assistance of trial counsel for failure to adequately represent a client:

> On direct appeal, Lawrence asserted that the trial judge erred because he failed to order a competency hearing after he learned about Lawrence's hallucinations. After noting that no competency hearing was requested, this Court denied the claim, particularly in light of the fact that defense counsel informed the trial court that some time before, Lawrence had been found competent to proceed, and they

> thought he was still competent to proceed. Of further importance to this Court was the fact that the trial court engaged in a lengthy colloquy with Lawrence and, based on his responses, found that "Lawrence was simply uncomfortable hearing certain portions of the evidence." *Lawrence*, 846 So.2d at 448. Accordingly, this Court denied the claim that the trial court abused its discretion in proceeding with the penalty phase without first ordering a competency hearing. *Id*.
>
> The State contends that because Lawrence already challenged the failure to hold a competency hearing, Lawrence's current claim is procedurally barred. We disagree. The only question that this Court faced on direct appeal was whether the trial court erred in failing to sua sponte order a competency evaluation. This is an entirely different legal question than whether defense counsel should have requested the hearing. Defense counsel has a different obligation to their client than the judge and has a much broader base of knowledge upon which to rely in determining whether a defendant may be incompetent. In this case, it is clear that in making his decision, the trial judge relied significantly upon counsel's representations and counsel's discussion with Lawrence as to whether Lawrence was truly experiencing hallucinations or flashbacks. **In order to resolve such a claim, this Court would need evidence pertaining to what Lawrence's counsel knew, including what they learned from their mental health experts, whether Lawrence's behavior changed during their representation, conversations counsel had with their client, and numerous other factors which would not be apparent on the face of the record at that time.** Accordingly, Lawrence could not have raised his current ineffective assistance of counsel claim on direct appeal. *See, e.g., Bruno v. State*, 807 So.2d 55, 63 n. 14 (Fla.2001)("A claim of ineffectiveness can properly be raised on direct appeal only if the record on its face demonstrates ineffectiveness."); *Desire v. State*, 928 So.2d 1256, 1257 (Fla. 3d DCA 2006) ("As a general rule, claims of ineffective assistance of counsel are not ordinarily cognizable on direct appeal. The exception is when the error is apparent on the face of the record, which is rarely the case.")

(Emphasis added). As in Lawrence, here, Morrison presented

evidence relating to his mental health that was not known to the trial court at the time of the motion to suppress or to the jury that convicted him, due to trial counsel's failure to investigate and prepare, which clearly impacted the voluntariness and reliability of his statement. Thus, contrary to the State's argument, Morrison's postconviction claim is completely cognizable at this juncture and not procedurally barred.

The State also suggests that Morrison's claim is inconsistent with his trial testimony (IB at 30). However, both at the motion to suppress and the trial, Short and Richardson testified that Morrison made inculpatory statements about the crime. Morrison did not dispute that he signed a statement which was largely consistent with Short and Richardson's testimony (R. 374-5), though he did not testify at trial. And, in his motion to suppress, Morrison acknowledged his oral and written statements to law enforcement. Thus, there is nothing inconsistent in investigating and presenting evidence of mental health problems, including drug use, to explain why Morrison would have made the statements Short and Richardson alleged that he made or why he signed a statement to that effect.

Certainly, at trial, the judge believed Short and Richardson's testimony and rejected Morrison's. And, Morrison's denial that he made inculpatory oral statements did not preclude trial counsel from investigating his mental health. Rather, in

light of the fact that Morrison admitted that he signed the written statement, but did not read it, and admitted to using crack the morning he was interrogated, reasonable counsel surely would have wanted to explain to the judge and jury what effects the drugs may have had on Morrison and why he would have signed a statement without reading it.[48] Morrison's actions should have dictated a reasonable investigation by trial counsel.

The State also argues that Morrison did not present evidence as to the amount of drugs or alcohol that he consumed (IB at 31). However, the case cited by the State, Reaves v. State, 942 So. 2d 874 (Fla. 2006), is a case that addressed the use of a voluntary intoxication defense to the substantive charges, and did not concern the voluntariness or reliability of a statement to law enforcement. Nonetheless, the State's premise, i.e., that Morrison did not substantiate his drug use is not supported by the record.

First, as the circuit court recognized, this Court has held that determining whether a statement is voluntary requires an examination of the totality of the circumstances. See Traylor v. State, 596 So. 2d 957, 964 (Fla. 1992). Such circumstances may

[48]The State's suggestion that Morrison's testimony about the length of time his drug use effected his functioning is a sufficient substitute for consulting with a mental health expert is absurd (IB at 30). Morrison, who dropped out of school in the 7th grade had no knowledge or understanding of the chronic or acute effects of crack on his functioning.

include the defendant's ability to overcome pressure brought against him, specifically, youth, lack of education, low intelligence, explanation of constitutional rights and length of interrogation. See Green v. State, 878 So. 2d 382, 382 (Fla. 1st DCA 2003). "In short, courts look at the conduct of the police and the defendant's ability to resist any pressure which the police may bring to bear." Id. at 384.

At the evidentiary hearing, Morrison presented unrebutted evidence of Morrison's organic brain damage. The circuit court relied on Eisenstein's testimony that Morrison suffered from "moderate to extreme impairment with his executive functioning skills, including areas of judgement, reasoning, problem-solving, flexible cognitive thinking, and decision making." (PC-R. 1546, citing PC-R. 2945). The circuit court also found, based on Eisenstein's testimony that "organic brain damage, like that of Defendant's, would impact an individual being interrogated by the police." (PC-R. 1546, citing PC-R. 2969-70). Thus, even without the evidence of Morrison's drug usage, the evidence of his organic brain damage could have been used to challenge the voluntariness and veracity of his alleged statements. The State ignores these findings by the circuit court.

Moreover, contrary to the State's argument, Morrison presented evidence relating to his chronic drug and alcohol use as well as his use of drugs on the day of the interrogation. See

IB at 31. As the circuit court indicated, Austin corroborated Morrison's use of drugs and alcohol on the day of the interrogation (PC-R. 1548). And, multiple witnesses testified about Morrison's longstanding battle with drugs and alcohol (PC-R. 2548, 2558, 2560, 2869, 2870, 2872, 2875, 3150, 3257, 3358). Eisenstein and Prichard both testified that Morrison's addiction caused impairment (PC-R. 2973, SPC-R. 181). The court held:

> The State argues that sufficient time had passed between the time of Defendant's arrest when he was admittedly using crack until the time he made his statement to clear any intoxicating effects of the crack. The experts' conclusions, however, challenge, that theory. Had counsel been more diligent, he would have addressed this point if not at the suppression hearing, than at trial. Dr. Eisenstein's and Dr. Prichard's testimonies about the effects of Defendant's alcohol and drug abuse on his brain functions lend credence to Defendant's instant claim that his substance abuse had a deleterious effect on his statement to the police. Counsel failed to present evidence that Defendant's crack use before Defendant's arrest undermined his statement to the Detectives.

(PC-R. 1549). The circuit court's order was supported by the testimony presented at trial.

Additionally, it is not the case, as the State suggests that based on the circuit court's order, "No drug addict could be found competent to make a knowing, intelligent, and voluntary waiver of his rights." (IB at 32). Here, the circuit court had evidence relating to Morrison's mental health and use of drugs and alcohol, including crack on the day of the interrogation. Under the specific circumstances in Morrison's case and testimony

of the mental health experts, the court correctly determined that trial counsel failed to investigate and present such evidence to the trial court and jury in order to argue that the alleged statements were neither voluntary nor reliable.

And, the State's reliance on Davis v. State, 990 So. 2d 459 (Fla. 2008), is misplaced. In Davis, the mental health expert addressed only Davis' use of LSD fifteen hours prior to being interrogated. Id. at 464. Nothing in this Court's opinion suggests that Davis presented any testimony about Davis' chronic use of LSD or the chronic effects of that drug on Davis in relation to the voluntariness or reliability of his statement.

At the evidentiary hearing, Morrison presented detailed testimony about his mental health, including his organic brain damage, intellectual disability, drug and alcohol addictions, use of crack and alcohol on the day of the interrogation and his propensity to admit to crimes he did not commit[49]. The circuit

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[49]As to the evidence of Morrison's propensity to admit to crimes he did not commit, the State argues that the circuit court employed an incorrect standard in its analysis (IB at 35). However, the circuit court specifically reviewed the evidence and concluded:

> This evidence was readily available to counsel given Mr. Turner's role in Defendant's previous felony conviction, and it was unreasonable for counsel not to investigate this information. Moreover, coupled with Dr. Eisenstein's conclusions, this evidence would have illustrated how Defendant could inculpate himself in Mr. Dwelle's death and could have aided the jury in weighing the veracity of Defendant's statement. As discussed, the State relied heavily upon Defendant's

court found this evidence credible and compelling and that undermined confidence in the proceedings (PC-R. 1549, 1551, 1552).

Indeed, the totality of circumstances in Morrison's case also includes coercive police conduct: Initially, Richardson, who moonlighted as a minister, engaged Morrison as to his belief in God and told him that he needed to get straight with God. Throughout the time Morrison spent with Richardson, there was consistent advice from Richardson relating to religion. Upon arrival at the police station, Short and Davis resumed the coercive technique of discussing religion and their belief in God. At one point, Short took Morrison to the chapel and prayed and cried with him.

More than seven hours after being picked-up, Richardson returned to the police station and resumed his interrogation. After more than an hour, Morrison refused to make any admissions and Richardson threatened to leave. It was at this point that Morrison allegedly made statements inculpating himself in killing the victim.

> confession at trial. Counsel's failure to present evidence of Defendant's propensity to take the blame for others undermines confidence in the outcome of the proceedings.

(PC-R. 1551). Clearly, the circuit court used the correct standard in analyzing Morrison's claim. See Strickland v. Washington, 466 U.S. 668 (1984).

Thus, during the twelve hours of interrogation, God was invoked throughout and Morrison was advised that he needed to get straight with God – the clear implication being that in order to get straight with God he need to confess to a murder. This was manipulation on law enforcement's part. Additionally, Davis intimidated Morrison by raising his voice and slamming his fist on the table, accusing Morrison of lying. And, law enforcement attempted to obtain a statement by telling Morrison about aggravating and mitigating circumstances in order: "to show him both sides of the fence there to give him the opportunity to decide in his mind if any of them applied." (DE 22). Law enforcement's tactics were coercive.[50]

The State argues that the circuit court erred in finding prejudice (IB at 35, n.9, 36). The State argues that Morrison's statements are corroborated by the forensic evidence, including the injuries to Mr. Dwelle and the location of the knife (IB at 35, n.9). However, Morrison's alleged statements about the altercation with Mr. Dwelle were generic, at best. Indeed, Morrison was well aware of the crime when he was arrested, as were many of the Ramona Park residents, including Brown and others from Marietta. Rather, Morrison's statement tracked the

[50]Even if the statements would not have been suppressed, the circuit court held that the testimony presented at the evidentiary hearing would have impacted the jury's consideration of the statement (PC-R. 1547, 1552).

story Bonner shared with law enforcement just hours after Mr. Dwelle's body was found. See DE 2, DE 9.

And, while Morrison denied showing law enforcement where the knife was, he reasonably could have seen the knife outside of Early's apartment because he was at the apartment on January 8th, as was Brown.[51] See PC-R. 3261-2; R. 847-55.

Also, Morrison's written statement conflicts with other evidence relied upon by law enforcement. For example, Morrison never placed himself with Brown or her uncle on the evening of January 8th. Instead, he said he was with Early. See R. 374-5. Thus, Brown's testimony is not "unassailed" (IB at 35, n.9). Rather, Brown's account of the evening of January 8, 1997, has been completely undermined. Numerous individuals saw Morrison in the Marietta area, including Brown's sister, Wright, Gillis, Randall Seels and Austin when Brown said that they were together. Further, Brown confided to Wright and Tims that she was afraid she was going to lose her son and apartment and that she had been threatened by Richardson. Brown also minimized her relationship with Mr. Dwelle when testifying at trial, but it is now clear that was friendly with him, ran errands for him and told others that he was her "sugar daddy". Brown's testimony has been completely undermined.

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[51]Also, the State ignores the recent DNA testing of the knife handle which demonstrated that someone other than Mr. Dwelle or Morrison's DNA was recovered.

Finally, the State argues, in an effort to minimize the evidence of Morrison's propensity to admit to crimes he did not commit, that such evidence would allow the State to admit evidence of Morrison's numerous arrests (IB at 35-6). However, the State fails to explain how Morrison's arrest record would be relevant to Morrison introducing the evidence which conclusively proved that Morrison was not guilty of the aggravated battery that Turner committed alone. Certainly, the State could attempt to rebut Turner and Heatly's testimony, but the State did not do so at the evidentiary hearing. And, the circuit court found Turner and Heatly's testimony credible.

The circuit court employed the correct legal standard in determining that trial counsel failed to investigate and prepare to adequately challenge Morrison's alleged statements. The circuit court's order is supported by competent and substantial evidence.

ARGUMENT II

THE CIRCUIT COURT CORRECTLY HELD THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AND PREPARE FOR THE GUILT PHASE OF MR. MORRISON'S TRIAL AND THAT SUCH FAILURE CAUSED PREJUDICE. (RESTATED)[52]

After considering the testimony presented at the evidentiary hearing, the circuit court, in a comprehensive order, addressed 4 areas of investigation that were not pursued at the time of trial: Morrison's alibi, the State's timeline, Morrison's intoxication on January 8th and trial counsel's failure to cross examine witnesses, including Brown about her relationship with Mr. Dwelle and motives to curry favor with the State. See PC-R. 1552-69. The court found that trial counsel was deficient in all of the areas stating:

> By Mr. Eler's admission, he did little in the intervening eight months to prepare for Defendant's trial. It was unreasonable for Eler to believe that Defendant's case was ready for trial when the Court appointed him to represent Defendant. The absence of any significant investigation by Mr. Eler renders his decisions unreasonable as they related to challenging the validity of Defendant's statement, introducing evidence of Defendant's mental health problems as well as Defendant's drug and alcohol abuse, and calling witnesses who would testify Defendant was not in proximity to Mr. Dwelle at the time the police say he was murdered.

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[52]Argument II involves a mixed question of law and fact. The issues regarding the application of the law present questions of law and must be reviewed *de novo*. See Sochor v. State, 883 So. 2d 766, 772 (Fla. 2004). In regard to the facts, under Porter v. McCollum, deference is given only to historical facts. All other facts must be viewed in relation to how Morrison's jury would have viewed those facts. See Porter v. McCollum, 558 U.S. 30 (2009).

> In light of these findings and the requirements of Strickland, the Court finds counsel did not thoroughly investigate the facts surrounding this crime. Consequently, counsel's strategic decisions not to pursue certain avenues were unreasonable.

(PC-R. 1568-9). The circuit court concluded that confidence in the outcome had been undermined and Morrison was entitled to a new trial (PC-R. 1569).

The State argues that the circuit court's findings are not supported by the evidence and that the prejudice analysis was flawed because the court ignored "Morrison's confession and the corroborating testimony and forensic evidence." (IB at 47).

First, the State illogically argues, that because the State's timeline establishing the crime occurring at approximately 9:00 p.m. was based upon Morrison's statement and Brown's testimony, that no evidence can undermine it (IB at 47-9). In making such an argument, the State refuses to acknowledge that the circuit court found that Morrison's statements to law enforcement were involuntary and unreliable.[53] See PC-R. 1541-52.

The State characterizes Morrison's statement as "powerful evidence" that has not been shown to be "untrustworthy" (IB at 47). However, this position ignores the very evidence that the circuit court relied upon when it determined that confidence in the verdict, and necessarily the evidence supporting the verdict,

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[53]This Court has held that cumulative analysis is required when analyzing claims for relief. Parker v. State, 89 So. 3d 844, 860, 867 (Fla. 2011)

i.e., Morrison's alleged statements and Brown, was undermined.

Indeed, in Escobedo v. Illinois, 378 U.S. 478, 488-90 (1964), the United States Supreme Court noted that confessions are not as powerful as independent evidence:

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said:
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> > (A)ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.' 8 Wigmore, Evidence (3d ed. 1940), 309. (Emphasis in original.)
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> This Court also has recognized that 'history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence * * *.' Haynes v. Washington, 373 U.S. 503, 519, 83 S.Ct. 1336, 1346.

Here, Morrison presented the testimony of Early (trial),

Reynolds (deposition), and Allen, Seels, Gillis, Wright, Austin in postconviction. The witnesses' testimony account for Morrison's whereabouts on January 8th, from approximately 4:30 p.m. until long after 10:00 p.m., specifically placing him in the Marietta area by 8:00 p.m.[54] And, noone saw any blood on him. Further, according to Early, he was with Morrison from about 4:30 p.m. until he dropped Morrison off in the back of the Ramona apartments where Austin was (PC-R. 3261-3). Thereafter, Morrison went back to Marietta with Austin (PC-R. 3261-3). The court found the witnesses' testimony to be credible. Therefore, the circuit court, unlike the State, determined that the readily available evidence that trial counsel did not investigate undermined both Morrison's alleged statements and Brown's testimony. Indeed, the witnesses' timeframes clearly conflicted with Morrison's alleged statements and Brown's testimony. The court concluded that "[s]uch evidence showing Defendant was not present at the scene of the crime at the time the State alleged the murder occurred could have raised reasonable doubt among jurors." (PC-R. 1558).

The State also urges this Court to minimize the testimony of Wright, who was Brown's sister, because she testified that Morrison didn't have any money or blood on his clothing when she

[54]In his deposition, Davis indicated that the 9:00 p.m. time frame for the homicide came from Medina's statements about the noises he heard as well as "the rigor and different things", including Brown's statement (DE 22).

saw him from a block away (IB at 48, n.12). However, this misses the point of Wright's testimony. At the evidentiary hearing, Wright explained that in speaking with her sister on January 9th, Brown told her about Mr. Dwelle's death and that law enforcment believed Morrison had something to do with it (PC-R. 3328). Wright mentioned seeing Morrison on January 8th (Id.). Unbeknownst to Wright, Brown told law enforcement that Wright had seen Morrison in Marietta with money (PC-R. 3331-2; DE 2). When she spoke to the detectives, Wright clarified that she did not see Morrison with money and when asked if he had blood on him, she said he did not (PC-R. 3331). Wright then took law enforcement to the area where she had seen Morrison (Id.). Therefore, Wright was simply responding to the questions law enforcement asked of her based on the information Brown provided them. She was not trying to cover for Morrison, as the State seems to suggest.

Likewise, the State misunderstands the importance of Medina and the information he provided. Morrison did not fix the time of the crime as 9:00 p.m. - law enforcement did. Medina was one of the first witnesses interviewed upon finding Mr. Dwelle's body. Medina was staying in his brother's apartment on January 8th, which was directly below Mr. Dwelle's apartment, and he heard noises at approximately 9:00 p.m. Law enforcement used the 9:00 p.m. time even though in Davis' handwritten notes Medina had

provided a range of time (DE 2). The noises sounded like a chair or piece of furniture being moved (DE 2, DE 8). Medina was able to recall the time because he was just sitting down to watch the program *The Abyss* on television (DE 2, DE 8).[55] Law enforcement took Medina's time line and made sure that Brown and Morrison's statements were consistent. However, when Medina appeared for his deposition, he recalled that the noises occurred between 7:30 and 8:00 p.m. (DE 8), throwing off the times with Brown's statements and Morrison's alleged statements. Neither the State nor trial counsel presented the testimony of Medina, though he clearly possessed information that was helpful to Morrison in that it undermined Morrison's statement and Brown's testimony. Thus, Morrison does not contend that the noises that Medina heard were conclusively related to the crime. Rather, it is clear that law enforcement used that time when interrogating Morrison and Brown because both of them used it, even though the independent witness testimony refutes it.

The State also argues that trial counsel's performance in relation to the alibi was not deficient because at the time of the trial, Eler told the court that he was speaking to everyone he could find about the alibi (IB at 49).[56] Again, the State

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[55]According to the TV listings, *The Abyss* began at 7:00 p.m. (DE 40).

[56]It is clear from Eler's own tetsimony as well as Moncrief's testimony that many of Eler's representations to the

would have this Court discount the testimony of the investigator, Moncrief, in which he admitted that he never even went to the Marietta area to locate Gillis (PC-R. 3221), and all of the other witnesses who testified that noone spoke to them prior to Morrison's trial. Further, despite the fact that Austin was at the jail, waiting to be called to testify, Eler never interviewed him (PC-R. 3260-1). The State's argument that trial counsel provided effective assistance of counsel is clearly refuted by the testimony from the evidentiary hearing.

The State also argues that Morrison failed to establish a voluntary intoxication defense (IB at 50).[57] However, the circuit

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trial court were false: Moncrief never went to an address and found an abandoned lot in his effort to locate Gillis, as Eler told the trial court; Eler could not have known that Gillis' information was duplicative of Early's because he never interviewed her; Eler never spoke to Austin or called him to testify, as he told the trial court he intended to do. Eler never spoke to Allen, after she contacted him about Morrison's case, despite the fact that she had spoken to Morrison throughout the day of January 8th. And, as the circuit court pointed out, Eler never sought to speak to Brown prior to her testimony (PC-R. 1567).

[57]The State suggests that Morrison failed to "come forward" with any evidence other than that he had "two or three beers and had been doing crack cocaine" so, it was not deficient for trial counsel not to have investigated a voluntary intoxication defense (IB at 51). First, the mere fact that Morrison referenced using crack in his alleged statement would reasonably lead trial counsel to investigate the intoxication issue. Moreover, Eler assured the trial court that he would advance a voluntary intoxication defense at the time of trial (T. 337-8). Eler indicated that he intended to assert the defense "through a number of witnesses", including Austin (T. 337). When Eler referenced the prior stipulation concerning Austin, the trial court pointed out that the stipulation would not apply to the

court outlined the testimony of Allen, Austin, Brown and Morrison's statements to Eisenstein relating to Morrison's intoxication on January 8th (PC-R. 1560-2), as well as pointing out the numerous witnesses who testified about Morrison's longstanding use of drugs and alcohol (PC-R. 1562-3). In addition, the court referred to Eisenstein's testimony about the effects of drugs and alcohol on Morrison (PC-R. 1563).[58] Thus, Morrison's case is not similar to Reaves v. State, 942 So. 2d 874 (Fla. 2006), upon which the State relies (IB at 50-1), because Morrison actually presented evidence of his intoxication that was corroborated by credible witnesses and was used by Eisenstein to explain the impact that Morrison's intoxication had on his cognitive abilities. Based on the substantial evidence, the circuit court held that trial counsel's failure to investigate and present the evidence of Morrison's intoxication undermines

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trial (T. 337). Eler stated that: "I would prefer to have Mr. Austin testify at trial, which my understanding he's being transported for purposes of trial." (T. 337). Thus, it simply cannot be said that Eler was unaware of the potential for the defense. Rather, Eler did not conduct any investigation into the issue and therefore, had no independent evidence to present at the time of the trial.

[58]The circuit court did not hold that Morrison's brain damage substantiated his voluntary intoxication defense, as the State suggests (IB at 52-3). Instead, while the court mentioned that alcohol and drug abuse causes brain damage, the court also referenced Eisenstein's testimony about the specific impact that the acute use of drugs and alcohol has on cognitive and reasoning abilities (PC-R. 1563). Thus, the State's argument is merely a red-herring.

confidence in the outcome of the proceedings (PC-R. 1564).

As to Brown's relationship to the victim, the State argues that even if she was "having some sort of relationship" with him, it does not mean that she was the perpetrator, and that Morrison's confession overshadows such evidence (IB at 53). First, it is not Morrison's burden to prove that Brown was the perpetrator. And, in any event, Brown was a critical State witness. In fact, trial counsel wanted to present evidence implicating Brown in the murder (PC-R. 2369, 3834). Davis designated Brown as a suspect and she was read her rights when questioned (DE 2). Also, Brown hid her close relationship with the victim when questioned by law enforcement. At a minimum, the evidence surrounding Brown's relationship with Mr. Dwelle, her access to his apartment and her behavior when his body was found impeaches her trial testimony and provides the motive and opportunity that she may have been the perpetrator. In addition, other evidence, including the condom found in Mr. Dwelle's shirt pocket, Brown's statements that she exchanged sex for money with her neighbor and the DNA evidence from the knife handle which belongs to someone other than Mr. Dwelle or Morrison undermines the evidence presented at trial, including Morrison's alleged statements.

Finally, the State argues that the circuit court did not conduct a proper prejudice analysis, again relying on Morrison's

alleged statements and the testimony about Mr. Dwelle's injuries (IB at 53-5). However, the circuit court correctly credited and found compelling the evidence Morrison presented about his whereabouts on January 8th, his drug and alcohol use and Brown's relationship with Mr. Dwelle. This evidence established an entirely different picture than the one painted at trial and significantly undermined confidence in Morrison's conviction.

ARGUMENT III

THE CIRCUIT COURT CORRECTLY HELD THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AND PREPARE FOR THE PENALTY PHASE OF MR. MORRISON'S TRIAL AND THAT SUCH FAILURE CAUSED PREJUDICE. (RESTATED)[59]

A. The Circuit Court's Order.

After hearing from a plethora of witnesses relating to mental and background mitigation and considering Eler, Anderson and Chipperfield's testimony the circuit court found that Eler's performance was deficient. The court specifically relied upon Eler's testimony that when he was appointed he believed that the "there was basically nothing left to do but try the case" (PC-R. 2363, 4003), so he relied on a page of notes, scribbled by Chipperfield, which the circuit court characterized as a "cursory

[59]Argument III involves a mixed question of law and fact. The issues regarding the application of the law present questions of law and must be reviewed *de novo*. See Sochor v. State, 883 So. 2d 766, 772 (Fla. 2004). In regard to the facts, under Porter v. McCollum, deference is given only to historical facts. All other facts must be viewed in relation to how Morrison's jury would have viewed those facts. See Porter v. McCollum, 558 U.S. 30 (2009).

attempt to come up with ideas for mitigation" (PC-R. 1617, see DE 70). The circuit court stated:

> Here, Mr. Eler's failure to investigate Defendant's mental health and social background mitigation does not amount to a reasonable strategic decision based on adequate investigation. Dr. Krop's communication with previous counsel, alone, should have alerted Mr. Eler and Mr. Anderson to pursue mental health mitigation. Although Mr. Eler testified he relied on Dr. Krop, he admittedly did not investigate the doctor's involvement in Defendant's case. Doing so would have revealed Dr. Krop's request for more information. Moreover, contacting Dr. Krop only days before the penalty phase was irresponsible especially because Mr. Eler's files contained the doctor's request for more information well before the penalty phase commenced.
>
> Mr. Eler misguidedly believed Defendant's case was ready for trial when he was assigned to represent Defendant. These attorneys believed previous counsel had completed the investigation of mitigation in Defendant's case. The only evidence of Mr. Eler's contact with the public defenders, however, is Mr. Eler's testimony that he thought he spoke with one Assistant Public Defender and did not think he spoke with Mr. Chipperfield (PC-R. 3918). Mr. Chipperfield, however, was forthright in his opinion that investigation for the penalty phase was in no way complete when Mr. Eler came on board.
>
> Looking at the notes Mr. Chipperfield scribbled on one piece of paper, which Mr. Eler testified he relied on, the Court finds an unreasonable lack of preparation and investigation for Defendant's penalty phase. Mr. Chipperfield's notes amount to no more than a very cursory attempt to come up with ideas for mitigation. There is nothing to show a well thought out strategy based on a reasonable investigation as characterized by Mr. Eler. The postconviction evidence of Defendant's mental health deficiencies and of his family background is far weightier and paints a far different picture of Defendant from the presented at trial. See Shellito, 121 So. 2d at 459. Clearly, Mr. Eler's inaction constitutes deficient performance.

(PC-R. 1616-7).

As to the prejudice, after outlining all of the testimony

presented at the evidentiary hearing and comparing it to the scant mitigation presented at trial, the circuit court concluded:

> This Court cannot state with confidence that the outcome of Defendant's case would have been the same had Mr. Eler diligently investigated - or even looked into - Defendant's compelling mental health and social history. There is a reasonable probability the jury would have considered the substantial amount of evidence from Defendant's troubled history for possible non-statutory mitigation and arrived at a different recommendation.

(PC-R. 1618). The circuit court's analysis is supported by the facts and law.

B. Relevant Background Information.

In order to address the State's arguments, Morrison provides the following outline of the trial and postconviction proceedings: Morrison was originally represented by Higbee through the Office of the Public Defender. On January 27, 1997, the State filed a Notice of Intent to Seek the Death Penalty (R. 13). Two days later, Higbee filed a motion to incur the costs of an expert (R. 19-21), which was granted the following day (R. 23-24).

However, on January 15, 1998, the trial court allowed the Office of the Public Defender to Withdraw and appointed Eler as trial counsel (R. 785-86).

Between January 15, 1998, and the day scheduled for the penalty phase, October 8, 1998, almost no preparation occurred for the penalty phase. Between the time Eler was appointed and

the trial, Morrison consistently complained that Eler was not consulting with him or returning phone calls from his mother or fiancé (R. 830, 909).

And, only after the jury returned a verdict convicting Morrison of first-degree murder did Eler make arrangements for Morrison to be evaluated by Krop in preparation for penalty phase. This was so despite the fact that almost a year before Morrison's penalty phase, Krop had reminded trial counsel that he needed additional records, including DOC records, medical records and depositions to complete his evaluation (DE 51). Krop also requested to speak to family members and wanted to meet with Mr. Morrison again to conduct neuropsych testing (DE 51).

On September 28, 1998, Krop met with Morrison briefly. Thereafter, on September 30, 1998, Krop was faxed four pages of Morrison's school records – the records that reflected his grades through the various years. Krop did not receive the records reflecting the psychological assessment that was performed when Morrison was eight years old. And, Krop had a brief telephone interview with Georgia Morrison. However, he received no DOC records, medical records or depositions, as requested.

Furthermore, because of the complete failure to communicate with Krop until after the conviction, Krop was not available to testify on the date of the penalty phase. Eler and the prosecutor agreed to a video taped deposition that was scheduled for October

7, 1998, and was played in court the following day. Because Krop had not been provided Morrison's DOC records, he was unaware that Morrison had been convicted of escape or any of the circumstances surrounding the escape. Thus, his testimony that Morrsion "would be a good candidate for long-term incarceration" was questioned on cross-examination and Krop admitted that his lack of knowledge about the escape could effect his opinion (T. 1096). The following day, Eler moved to exclude the prosecutor's question about the escape, but the trial court ruled that it was admissible (T. 1101). However, the court did suggest that the circumstances about the escape could be admitted to explain Krop's testimony since his testimony as to Morrison's adaptability appeared to be beneficial, even in light of the escape (T. 1103)[60]. However, because Krop was not available to

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[60]The trial court stated:

> THE COURT: So, he was on a furlough and didn't come back?
>
> MR. ELER: Yes, sir.
>
> THE COURT: I'll tell you, Mr. Eler, I would require that you talk to Mr. Morrison about that, because Dr. Krop's explanation as to why he thought Mr. Morrison would function better in a penal society would seem to be, from my standpoint and from my judgment, would be more beneficial that harmful.
>
> The fact that I's allow you to present evidence as to what happened; that he was on furlough and just didn't come back as opposed to shooting a guard and running across the fence or something.
>
> * * *

testify he could not explain the circumstances of the escape.[61] Thus, trial counsel requested that the questions about Morrison's adaptability be excised (T. 1104-5).

The jury heard Krop testify that Morrison had a low IQ and a substance abuse problem and both of these issues would cause him to exercise bad judgment (T. 1225). However, the prosecutor, discredited Krop's testimony because it was based on Morrison's self report and Krop had limited information about the crime. Furthermore, the prosecutor questioned Krop about the opportunity for substance abuse treatment and that most individuals with a low IQ did not commit crimes (T. 1230). Krop agreed that "[c]riminality is a behavior that's chosen by an individual." (T. 1230). There was no redirect.

Also, at Morrison's capital penalty phase, trial counsel presented the testimony of a few of Morrison's family members – his mother, father and sister. No investigation or preparation had been completed. In fact, trial counsel failed to speak to any

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> THE COURT: It seems to me that in light of what Mr. Morrison is facing here, the fact that he walked away from a work crew, or something, wouldn't see to make much difference.

[61]At the postconviction evidentiary hearing, Krop testified that had he known the circumstances of the escape, his opinion as to Morrison's ability to do well in a structured setting would not have changed and he could have explained the difference between work-release and incarceration to the jury in relation to his opinion (SPC-R. 49-50).

of Morrison's other siblings, numerous cousins and friends, or the mother of his daughters who Morrison referred to as his fiancé. This was so despite the fact that many of Morrison's family members had been present for the trial and were readily available to speak to trial counsel at the courthouse. The preparation of the witnesses who did testify was minimal.

Trial counsel failed to ask a single lay witness about the family's destitute financial situation or Morrison's abusive childhood, mental problems or use of drugs. Rather, the witnesses confined their testimony to some of he helpful things that Morrison did at the house and around the neighborhood and that he had three children.[62]

No additional witnesses testified at the Spencer hearing.

In sentencing Morrison to death, the circuit court found no statutory mitigation and specifically found that Morrison had not established that he suffered from organic brain damage or that "his father's absence or any other factors caused Defendant to be deprived as a child. He was reared by a single mother who provided adequately for him. This mitigating circumstance was not established and was accorded no weight." (R. 1185-8).

At his evidentiary hearing, Morrison presented "the kind of

[62]The prosecutor countered the evidence about Morrison's children by pointing out that he "was not married to the mother of any of these children" or "pay[ing] regular child support" (R. 1184).

troubled history" that has been "declared relevant to assessing a defendant's moral culpability." See Wiggins v. Smith, 539 U.S. 510, 534-5 (2003); see also Penry v. Lynaugh, 492 U.S. 302, 319 (1989)("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse' "); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982)(noting that consideration of the offender's life history is a "'part of the process of inflicting the penalty of death'").

Eisenstein diagnosed Morrison as suffering from organic brain damage (PC-R. 2944-5), intellectual disability (PC-R. 2941), as well as a severe substance abuse disorder (PC-R. 2941-2, 2971).[63] Eisenstein testified that both statutory mental health mitigators applied at the time of the crime (PC-R. 3023). As to whether Morrison was under the influence of extreme mental or emotion disturbance at the time of the crime, Eisenstein believed the mitigator was established due to Morrison's history, OBD and substance abuse (PC-R. 3025). Specifically, Morrison's mental issues impair his ability to think and would substantiate

[63]Wu testified that Morrison's PET scan results were consistent with the neuropsychological testing (PC-R. 2915, 2965). And, the imaging showed impairment that is consistent with someone who is ID and has impaired executive functioning (PC-R. 2915).

the mitigating factor (PC-R. 3025). Likewise, Eisenstein testified that Morrison's ability to appreciate the criminality of his conduct was substantially impaired due to his alcohol and drug use (PC-R. 3026-7). Finally, Eisenstein opined that Morrison was under the duress or domination of other individuals (PC-R. 3029).

The social history and background mitigation presented by Morrison included: the physical, mental and emotional abuse by his mother; his parent's unstable and violent relationship, fueled by the use of alcohol which led to instability and dysfunction in his early life and early adolescence; his premature birth in a prison hospital and his immediate separation from his mother while she served her sentence and he remained in an incubator; his father's incarceration for almost a decade when he was a youth; his family's poverty; his struggles with peers who bullied and took advantage of him; his struggles in school; his battle with intoxicants, including alcohol, "huffing", cocaine and crack; his intoxication on the day of the offense; and his low IQ. These factors have been widely recognized by both this Court and the United States Supreme Court as constituting mitigation.

Numerous courts, for instance, have found that background information such as child abuse and neglect constitute mitigation. See e.g., Wiggins v. Smith, 539 U.S. 510, 535-36

(2003); Penry v. Lynaugh, 492 U.S. 302, 319 (1989); Hitchcock v. Dugger, 481 U.S. 393, 399 (1987); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); Rompilla v. Beard, 545 U.S. 374, 391-2 (2005); Ragsdale v. State, 798 So. 2d 713, 719-20 (Fla. 2001); Walker v. State, 707 So. 2d 300 (Fla. 1997). Likewise, an individual's chemical dependency on drugs and alcohol constitutes valid mitigation. See Miller v. State, 770 So. 2d 1144, 1150 (Fla. 2000); Mahn v. State, 714 So. 2d 391, 400-01 (Fla. 1998); Kokal v. Dugger, 718 So. 2d 138, 142 (Fla. 1998); Robinson v. State, 684 So. 2d 175, 179 (Fla. 1996); Besaraba v. State, 656 So. 2d 441, 447 (Fla. 1995); Caruso v. State, 645 So. 2d 389, 397 (Fla. 1994); Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076, 1080 (Fla. 1992); Carter v. State, 560 So. 2d 1166, 1169 (Fla. 1990); Heiney v. Dugger, 558 So. 2d 398, 400 (Fla. 1990); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985); Hardwick v. Crosby, 320 F.3d 1127, 1163 n9 (11th Cir. 2003). And, intoxication at the time of the offense is mitigating. Parker v. Dugger, 498 U.S. 308, 315 (1991); Norris v. State, 429 So. 2d 688, 690 (Fla. 1983); Buckrem v. State, 355 So. 2d 111, 113-14 (Fla. 1978). This Court has recognized that being raised in dysfunctional family circumstanced is mitigating. Snipes v. State, 733 So. 2d 1000, 1008 (Fla. 1999); Mahn v. State, 714 So. 2d 391, 401-2 (Fla. 1998). And, this Court has recognized that a

defendant's impoverished background is mitigating. Blanco v. State, 706 So. 2d 7, 10-11 (1997); Brown v. State, 526 So. 2d 903, 908 (Fla. 1988). This type of background information has also been found to be mitigating by the U.S. Supreme Court. Wiggins v. Smith, 539 U.S. 510, 535-6 (2003); Penry v. Lynaugh, 492 U.S. 302, 319 (1989); Hitchcock v. Dugger, 481 U.S. 393, 399 (1987); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); Woodson v. North Carolina, 428 U.S. 280, 304 (1976)(plurality opinion).

Here, in comparing the mitigation evidence presented at the penalty phase to that presented at the evidentiary hearing, the circuit court concluded that "Defendant's mental health deficiencies and [] family background" is far weightier and paints a far different picture of Defendant from that presented at trial. See Shellito, 121 So. 3d at 459." (PC-R. 1617).

C. The State's Argument

In requesting that this Court reverse the circuit court's findings, the State argues that the circuit court did not consider the difference in strategy from presenting positive mitigation to negative mitigation and, as to prejudice, did not compare the mental health evidence presented at trial to the evidence presented in postconviction (IB at 56).

First, as to the notion that trial counsel was not deficient for failing to present "negative mitigation", the circuit court specifically noted that trial counsel failed to conduct a

reasonable investigation: "There is nothing to show a well thought out strategy based on a reasonable investigation as characterized by Mr. Eler." Thus, contrary to the State's position, trial counsel cannot be found to have made a strategic decision when he failed to fully investigate. Strickland v. Washington, 466 U.S. 668, 690-1 (1984); Henry v. State, 862 So. 2d 679, 685 (Fla. 2003)("A reasonable strategic decision is based on informed judgement.").

Further, the State's attempt to characterize the mitigation presented by Morrison at the evidentiary hearing as "negative" in an effort to suggest that it could harm Morrison is ridiculous and completely belied by the law (IB at 69-70).

Indeed, neither the U.S. Supreme Court nor this Court characterized mitigation in the way that the State urges upon this Court. Rather, in Lockett v. Ohio, 438 U.S. 586, 604 (1978), the U.S. Supreme Court described mitigation as: "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less that death." Thus, the circumstances of the defendant, his background and his crime are areas that **must** be considered for mitigation, whether the defendant was a choir boy or a drug user. See e.g. Spaziano v. Florida, 468 U.S. 447, 460 (1984); Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-2 (1982).

And, like the U.S. Supreme Court, this Court described mitigation as facts that are:

> capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed."

Cheshire v. State, 568 So. 2d 908 (Fla. 1990). This distinction of negative or positive mitigation has been thrust upon capital defendants by the State in an effort to excuse woefully deficient performances by trial counsel and it should not be accepted in Morrison's case or any other.

So, while the nature of Morrison's mother and father's testimony was different at the evidentiary hearing (see IB at 61), it merely brought out a more full and comprehensive picture of Morrison's "diverse frailties". See Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

The State also argues that the circuit court's order is deficient in a number of ways: First, the State argues that there was no deficiency in trial counsel's failing to make an opening statement during the penalty phase (IB at 66). However, the circuit court did not state that failing to make an opening statement was per se deficient. Rather the circuit court stated that, in Morrison's case, considering the "substantial amount of evidence" relating to Morrison's history, it would have benefitted Morrison had trial counsel presented an opening

statement (PC-R. 1618).

The State also argues that the circuit court erroneously considered Turner's testimony about the prior violent felony in its prejudice analysis (IB at 68). At the evidentiary hearing, Turner testified that Morrison had nothing to do with the crime and was only arrested because he began to run from the scene with Turner. See PC-R. 2254-6. Contrary to the State's argument, the evidence was not presented to challenge "the validity of the aggravator". Rather, it was appropriate to consider in the prejudice analysis because it related to the weight the jury and judge would allot to the aggravator. See Rompilla v. Beard, 545 U.S. 374, 386, n5 (2005)("... the sentencing jury was required to weigh aggravating factors against mitigating factors. We may reasonably assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest."). Therefore, the evidence was appropriately considered in the prejudice analysis in order to obtain a "total picture" of the case and "all of the circumstances of the case.". See Lightbourne v. State, 742 So. 2d 238, 247 (Fla. 1999)(quoting Armstorng v. State, 642 So. 2d 730, 735 (Fla. 1994)).

The State also challenges the circuit court's determination

that trial counsel was deficient in failing to investigate and prepare because he relied on prior counsel's investigation, which the circuit court did not consider, and he "conducted additional work" (IB at 68, 72). However, this line of attack completely ignores trial counsels' and Chipperfield's testimony as well as the circuit court's reliance on the same. Eler testified that when he received the file from the PD there was "basically nothing left to do but try the case." (PC-R. 2363). However, Chipperfield categorically refuted Eler's testimony explaining that the case was "absolutely not" ready for the penalty phase (PC-R. 4179), and that he was in the preliminary stages of investigation (PC-R. 4156, 4162). The circuit court's analysis and conclusions as to the inadequate investigation are supported by the record.

Moreover, contrary to the State's position, this was not a case where the family failed to reveal the abuse. Instead, the family was never asked about this kind of mitigation (PC-R. 3151-2, 3299-3300). There can be no doubt that trial counsel had an absolute obligation to investigate and prepare mitigation for his client. See Rompilla v. Beard, 545 U.S. 374, 387 (2005). Here, Eler failed at even the most basic tasks. The State's attempt to shift the obligations of trial counsel to Morrison's uneducated and unsophisticated family members is legally improper.

Likewise, the State's suggestion that the evidence at the

evidentiary hearing is any way cumulative of to that presented at trial is completely specious and belied by the record. See IB at 84. The circuit court made clear that the recent evidence "of Defendant's mental health deficiencies and of his family background is far weightier and paints a far different picture of Defendant from the presented at trial." (PC-R. 1617). Indeed, while minimal evidence of Morrison's drug and alcohol use was introduced at the trial, no evidence was presented about the origins, extent or chronic damage alcohol and drugs had on Morrison. In postconviction, Eisenstein explained the genetic link of addiction and Morrison's father identified his relatives, including him, who had battled with addiction as adults (PC-R. 3136-7). Nor was the jury aware of Morrison's abuse, family dysfunction and social struggles which may have caused him to turn to drugs an alcohol as a coping mechanism. Quite simply, the mitigation presented at the evidentiary hearing did not remotely resemble, in quantity or quality, the scant mitigation presented at the penalty phase.

Specifically addressing the mental health mitigation, the State initially argues that because Krop did not alter his opinion or his testimony as to mitigation, Morrison's claim fails (IB 70-1). The State is incorrect. Krop was not asked to provide opinions in postconviction, instead he testified about the circumstances surrounding his involvement at the time of the

penalty phase and the fact that he was never supplied the background materials he requested in order to conduct an adequate evaluation (SPC-R. 27-65). Further, the law does not require Morrison to show that Krop would have changed his testimony if adequately prepared. To the contrary, both the U.S. Supreme Court and this Court have found deficient performance and resulting prejudice in cases where capital defendants employed difference mental health experts than used at trial. See Porter v. McCollum, 558 U.S 30 (2009); Shellito v. State, 121 So. 2d 445 (Fla. 2013).

The State also argues that Eler's reliance on Krop and Krop's work was sufficient (IB 72-4). The circuit court detailed Krop's evaluation at the time of the penalty phase, citing Krop's testimony that his initial letter to Higbee was a "preliminary report based on a preliminary evaluation"[64], but that even so, Krop saw "red flags" and wanted additional information. See PC-R. 1580-1. From the time Krop sumbitted his preliminary report until after Morrison was convicted, Krop received no materials and had no further contact with Morrison (SPC-R. 36-41). Following the conviction, Krop identified a brief interview with Morrison and his mother and a few pages of school records showing Morrison's grades (SPC-R. 41). The circuit court found trial counsel's "failure to adequately investigate the mitigating nature of

[64]Krop had been provided two arrest and booking reports when initially retained by Higbee (SPC-R. 28).

Defendant's mental health was not reasonable and deprived Defendant of valuable mitigating evidence." (PC-R. 1591). The court's conclusion is amply supported by the record. See Douglas v. State, 141 So. 3d 107, 121 (Fla. 2012)("Despite having access to this information, there is no evidence that counsel sought to further investigate Douglas's mental health either by seeking background records or by consulting with a mental health expert. In fact, even after Dr. Krop's request for additional materials, the record does not disclose that counsel made any effort to provide Dr. Krop with readily available evidence."); Jones v. State, 998 So. 2d 573, 583 (Fla. 2008)("Because this is not a case where trial counsel was aware of, but rejected, possible mental mitigation in favor of a more favorable strategy, and instead demonstrates a serious lack of effort by trial counsel, we find counsel's performance unreasonable under the prevailing professional norms."); Hurst v. State, 18 So. 3d 975, 1012 (Fla. 2009).

In a last attempt to salvage an unconstitutional death sentence the State argues a lack of prejudice based on findings that were made by this Court in its proportionality analysis on direct appeal (IB at 84-5). But of course, that analysis occurred long before Morrison presented the mitigation evidence and testimony at his evidentiary hearing in 2015. Accordingly, the suggestion that the findings on direct appeal preclude finding

prejudice in postconviction makes no sense and must be rejected.

The circuit court provided a detailed and legally sound analysis of Morrison's ineffective assistance of counsel claim at the penalty phase.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN DENYING MR. MORRISON RELIEF PURSUANT TO BRADY v. MARYLAND. MR. MORRISON WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.[65]

Morrison's trial was afflicted with violations of Brady v. Maryland, 373 U.S. 83 (1963). In order to prove a violation of Brady, a claimant must establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" or "impeachment" and that the evidence was "material." United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Greene, 527 U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there

[65]Argument IV involves a mixed question of law and fact. The issues regarding the application of the law present questions of law and must be reviewed *de novo*. See Sochor v. State, 883 So. 2d 766, 772 (Fla. 2004). In regard to the facts, under Porter v. McCollum, deference is given only to historical facts. All other facts must be viewed in relation to how Morrison's jury would have viewed those facts. See Porter v. McCollum, 558 U.S. 30 (2009).

is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. Kyles, 514 U.S. at 433-434; Hoffman v. State, 800 So. 2d 174 (Fla. 2001); Rogers v. State, 782 So. 2d 373 (Fla. 2001); Young v. State, 739 So. 2d 553 (Fla. 1999). To the extent that counsel was or should have been aware of this information, counsel was ineffective in failing to discover it and utilizing it.

A proper materiality analysis under Brady also must contemplate the cumulative effect of all suppressed information. Further, the materiality inquiry is not a "sufficiency of the evidence" test. Kyles, 514 U.S. at 434. The burden of proof for establishing materiality is less than a preponderance. Williams v. Taylor, 529 U.S. 362 (2000); Kyles, 514 U.S. at 434. Or in other words: "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id. Rather, the suppressed information must be evaluated in light of the effect on the prosecution's case as a whole and the "importance and specificity" of the witnesses' testimony. United States v. Scheer, 168 F.3d 445, 452-453 (11th Cir. 1999).

A. The State's Theory Of The Case.

On January 9, 1997, the body of Mr. Dwelle was found in his apartment in the Ramona Park apartment complex. In 1997, the

complex was a HUD community with low income residents. Mr. Dwelle lived across the hall from Brown and her son, Raymond, III. Though it was clear that Mr. Dwelle knew his neighbors, the State minimized the contact with Brown and her son and made it seem like he simply gave Raymond, III, a piece of fruit or sweet, occasionally.

B. Exculpatory Evidence That Was Suppressed.

1. Condom

On the day Mr. Dwelle's body was found, Holloway, a Forensic Investigator from the Medical Examiner's Office (ME), reported to the scene. There were four crime scene technicians from JSO present, who photographed, processed and collected evidence, and diagramed the scene. Short and Davis were present when evidence was collected and provided direction to the crime scene technicians as to the scope of the technician's investigation.

In his typed scene investigation report, Holloway cataloged evidence that he observed. Holloway stated: "A shirt is observed lying on a chair near the bed. The shirt pocket contained an ID card, **as well as a condom**." (DE 1)(Emphasis added).[66] None of the crime scene technicians or detectives cataloged the condom in the evidence collected or mentioned it in their reports, despite the fact that the ID card and other items from the shirt pocket were

[66]The Holloway statement was disclosed in postconviction when the ME sent records to the repository (PC-R. 3436). The report was not contained in the trial attorney file (PC-R. 3437).

collected, processed for fingerprints and maintained as evidence. See DE 9, 16, 24.

The report also indicated that information had been obtained that sounds had been made in the victim's apartment at 9:00 p.m. (DE 1, PC-R. 2322-3). Further, Holloway documented that there was no forced entry (DE 1, PC-R. 2323).

Trial counsel could not recall if he was provided with Holloway's statement (PC-R. 2318). However, the discovery responses did not include a reference to the report being disclosed and he did not recall knowing that a condom had been found (PC-R. 2317-8, 2319).

Trial counsel also testified that the presence of the condom suggests that the victim was "prepared for somebody to come visit" and that others' presence at the apartment was significant (PC-R. 2321). Thus, trial counsel believed it was worth investigating (PC-R. 2321-2).

Further, based on the discovery of the condom, Morrison learned that Brown, who was not employed, turned to prostitution to support her alcohol habit (PC-R. 3171, 3184, 3248, 3445-6). Brown kept a bowl of condoms in her apartment and insisted that the "Johns" wear one when having sex with her (PC-R. 3395, 3446-6).

And, witnesses report that Brown knew the victim well and he had previously given her money (PC-R. 3172, 3243-4, 3249). Brown

told "Gillis" that Mr. Dwelle was her "sugar daddy", which meant that he gave Brown money in exchange for sex (PC-R. 3172-3, 3244). Brown was frequently seen leaving Mr. Dwelle's apartment (PC-R. 2837-8). Even Brown's sister knew that Brown and the victim had a relationship (PC-R. 3339, 2837). Wright was aware that Brown bought the victim's cigarettes and beer (PC-R. 3337). Raymond, III, was close to the victim and spent time in his apartment (PC-R. 3394, 3443).

Brown was also known to carry a blade or box cutter with her at all times (PC-R. 3174, 3184,3394). The first time Allen met Brown, she carried a razor blade in her mouth (PC-R.2832). Additionally, Brown had previously attempted to have Morrison arrested when she became upset (PC-R. 2839).

2. Sandra Brown's contact with law enforcement

Richardson threatened Brown when he questioned her the day that Morrison was arrested (PC-R. 3227). According to Delores Tims, Richardson told Brown that she would be "locked-up" if she didn't cooperate (PC-R. 3237). Further, Brown confirmed that she was threatened. Specifically, she was told that her son would be taken away if she did not cooperate (PC-R. 3232, 3245), and that she would be locked-up for the crime if she did not cooperate (PC-R. 3232). Tims testified that Brown was "terrified" and confided that the police had told her how the victim was killed and that it had to have been Morrison (PC-R. 3229, 3231). Indeed,

Tims overheard Richardson chastising Brown for telling others how the victim was killed (PC-R. 3237-8). Richardson did not report his conversation with Brown or threat.

3. Davis' handwritten notes

Davis' handwritten notes were introduced at the evidentiary hearing. The notes reflected that information obtained during the investigation was not disclosed to Morrison. See DE 2.[67]

The notes reveal much about Davis' interview with Brown. First, Davis designated Brown as "S" indicating that she was a suspect and not just a witness. Trial counsel testified that such a designation could have been significant (PC-R. 2353-4).

Further, Davis also specifically documented his impressions of Brown's demeanor. See DE 2. And, Davis told Brown that it was her "last chance to tell the truth" (DE 2). Trial counsel testified that he wanted to show that Brown was not credible, so information about her demeanor and that Davis believed she was not telling the truth were significant and he would have brought that out at the trial (PC-R. 2327-8, 2355-6). Trial counsel compared Davis' notes with Short's typewritten report and testified that Davis' observations and statements to Brown were

[67]The trial prosecutor testified that he "typically did not ask for handwritten notes" and he "would not normally seek [the notes] out" (PC-R. 2275-6). Trial counsel testified that he normally did not receive handwritten notes (PC-R. 2326). And, he did not recall having Davis' notes in Morrison's case (PC-R. 2344).

not included in the report (PC-R. 2341).

Additionally, other details were not included in the typewritten report. For example, during Davis' interview with Medina, Medina told Davis that the noise he heard occurred between 8:30 and 9:00 p.m. (DE 2). However, Davis' report only included 9:00 p.m. for the time that the noise was heard.

4. Charlene Wright's statements to law enforcement

Wright[68] is Brown's sister and knew Morrison for many years (PC-R. 3320). Wright's mother lived in the Marietta area and she frequently visited her home (PC-R. 3320-1).

On January 9, 1997, Wright spoke to Brown by telephone and Brown explained that the police were at her neighbor's apartment because his body had been found (PC-R. 3326). Brown confided that the police told her that Morrison had done something (PC-R. 3327). In response, Wright indicated that she had seen Morrison "last night" (PC-R. 3328).

Sometime after her conversation with Brown and after Morrison had been arrested, the police came to Wright's apartment and asked her to come to the police station (PC-R. 3322). At the police station, officers showed her photos of the victim with a cut across his neck; there was some blood visible, too (PC-R.

[68]Wright's name was mentioned in Davis' handwritten notes as "Christine Wright" in relation to Brown's interview in which she stated that witnesses saw Morrison in Marietta on the night of the crime (see DE 2).

3323).

The police asked if she had seen Morrison on the night of the crime and she told them she had seen him in Marietta between 8:00-9:00 p.m., while visiting her mother (PC-R. 3329-30).[69] Morrison was about a block away and she waved and yelled "Hey" (PC-R. 3329-30). Morrison said "Hey" and kept walking (PC-R. 3330). Wright was specifically asked if Morrison had any money; she responded that he did not (PC-R. 3330, 3335). She was also asked if he had blood on him and she told them "No" (PC-R. 3331). The police requested that she take them to the area where she had seen Morrison, so she accompanied them to Marietta and pointed out where she was and where she saw Morrison (PC-R. 3331).

Thereafter, Wright asked Brown why she had given the police her name and Brown said that she was afraid that the police would take away her son and her public housing (PC-R. 3332). Brown seemed worried (PC-R. 3332).

There was no report relating law enforcement's contact with Wright in any of the files obtained by Morrison, including the trial file (SPC-R. 18-20). According to Ashton, there were no reports prepared by JSO after Short's report in which the last entry related to the autopsy on January 10, 1997 (Id.).

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[69]Wright's mother lived near Gillis' house in January, 1997 (PC-R. 3333).

5. Morrison's arrest

Richardson failed to report that when he entered the trailer where Morrison was arrested, Morrison was "smoking" crack. Richardson told him that he would let him finish smoking (PC-R. 3227, 3239, 3246).

C. The Circuit Court's Order.

In denying Morrison's claim, the circuit court reviewed each piece of evidence individually - item-by-item, which is an incorrect analysis.[70] See Kyles, 514 U.S. at 434.

Specifically, as to the condom, the court determined that Morrison had failed to establish that "Mr. Dwelle planned to have sexual relations with Ms. Brown the night of the murder." (PC-R. 1571). The court did not address suppression, but merely held, in isolation, that the condom did not undermine confidence in the outcome.

As to Richardson's threats to Brown, the circuit court held that Morrison had not shown the exculpatory nature of Richardson's directions to Brown, i.e., they were not threats, but instructions to her not to discuss the details of the case with others (PC-R. 1574).

The circuit court held that the evidence of Morrison's crack use prior to his arrest, as witnessed by Richardson, could not be

[70]The circuit court did not address the suppression of Davis' handwritten notes.

suppressed, since the evidence was known to Morrison (PC-R. 1575).

Finally, the circuit court narrowly viewed the testimony of Wright and her statements to law enforcement, finding only that her statements did not impeach the credibility of Brown (PC-R. 1576).

D. Analyzing Morrison's Claim.

Brown was a key State witness at Morrison's trial. She placed Morrison at her apartment on January 8th and testified that he left at approximately 9:00 p.m. Brown also downplayed her relationship with Mr. Dwelle, claiming that she never knew Mr. Dwelle's name (T. 391). The suppressed evidence demonstrates that there was a great deal of evidence that undermined Brown's testimony.

Had the existence of the condom been disclosed, it would not have been long before trial counsel learned that there was more to Brown's relationship with Mr. Dwelle than the State revealed: Brown, who was not employed, turned to prostitution to support her alcohol habit (PC-R. 3171, 3184, 3249, 3445-6). Brown kept a bowl of condoms in her apartment and insisted that the "Johns" wear one when having sex with her (PC-R. 3395, 3445-6).

And, witnesses report that Brown knew the victim well and he had previously given her money (PC-R. 3172, 3243-5, 3249). Brown told "Gillis" that Mr. Dwelle was her "sugar daddy", which meant

that he gave Brown money in exchange for sex (PC-R. 3172-3; see also PC-R. 3244). Brown was frequently seen leaving Mr. Dwelle's apartment (PC-R. 2837-8). The evidence contradicted Brown's statements to Davis that she did not know Mr. Dwelle and "just kind of waved in passing." Brown's sister, Charlene Wright knew that Brown and the victim had a relationship (PC-R. 3339; see also PC-R. 2837). Wright was aware that Brown bought the victim's cigarettes and beer (PC-R. 3337). Raymond, III, was close to the victim and spent time in his apartment (PC-R. 3394, 3443). The victim provided candy and desert for the boy. On the day the victim's body was found, his food tray from the previous day had not been touched; the only item of food missing from the tray was the desert.

Brown was also known to carry a blade or box cutter with her at all times (PC-R. 3174, 3184, 3394). The first time Allen met Brown, she carried a razor blade in her mouth (PC-R. 2832). Additionally, Brown had previously attempted to have Morrison arrested when she became upset (PC-R. 2839).

Further, the jury did not hear of the threats and pressure that law enforcement placed on Brown. Brown originally told law enforcement that Morrison was not present at her apartment on January 8th. Thereafter, she was questioned by law enforcement and characterized as a suspect (DE 2).

Indeed, Brown's behavior on January 9th and 10th, was

suspicious. When she spoke to Davis, she revealed that she was watching the parking lot when the Meals on Wheels' employees arrived, but could not explain why she was watching. See DE 2. Brown then asked the Meals on Wheels' employee what was wrong. After being told that Mr. Dwelle was killed, Brown did not seem surprised and went back into her apartment and shut the door. See DE 2. Davis described Brown as "very defensive". She was also very "unspecific", though she denied knowing anything about the crime. See DE 2. Davis believed that Brown was being untruthful and knew more about the crime than she revealed. See DE 2.

Brown admitted that she was terrified that law enforcement would take her son and she would lose her apartment (PC-R. 3229, 3231).

Trial counsel was never informed about the pressure that was applied to Brown. Brown was a critical State witness. Trial counsel was entitled to learn of the true motives behind Brown's testimony. See Davis v. Alaska, 415 U.S. 308, 315 (1974) (recognizing "that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."). Had the jury known that Brown was not being honest and was fearful that if she did not cooperate with law enforcement she would lose her son, it would have discredited her testimony.

Moreover, the undisclosed evidence must also be reviewed in

conjunction with evidence Morrison presented in relation to his ineffective assistance of counsel and newly discovered evidence claim. Parker v. State, 89 So. 3d 844, 860, 867 (Fla. 2011). That evidence includes the credible testimony of witnesses who placed Morrison in Marietta on the evening of the crime, as well as the evidence of Morrison's mental health that has significant bearing on the unreliability of his alleged statements to law enforcement. And, the DNA evidence as to the profile that was obtained from an area that was presumptively positive for blood on the knife handle that matched neither Morrison or Mr. Dwelle. Clearly, when the evidence is considered cumulatively, there can be no doubt that confidence in Morrison's conviction is undermined.

ARGUMENT V

THE CIRCUIT COURT ERRED IN DENYING MR. MORRISON'S CLAIM THAT NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT HIS CONVICTION AND SENTENCE WERE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.[71]

In Jones v. State, 591 So. 2d 911, 915 (Fla. 1991), this Court held that two requirements must be met in order to set aside a conviction or sentence because of newly discovered

[71]Argument V involves a mixed question of law and fact. The issues regarding the application of the law present questions of law and must be reviewed *de novo*. See Sochor v. State, 883 So. 2d 766, 772 (Fla. 2004). In regard to the facts, under Porter v. McCollum, deference is given only to historical facts. All other facts must be viewed in relation to how Morrison's jury would have viewed those facts. See Porter v. McCollum, 558 U.S. 30 (2009).

evidence. First, the asserted facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979). Second, "the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial." Jones v. State, 591 So. 2d 911, 915 (Fla. 1991). In addition, Brady and ineffective assistance of counsel claims must be considered together with a claim of newly discovered evidence. See State v. Gunsby, 670 So. 2d 920, 923-4 (Fla. 1996).

On January 11, 1997, two days after Mr. Dwelle had been killed, Morrison allegedly led law enforcement to a knife near Apartment 15 in the Ramona Park apartment community. John Frascello, a crime scene technician from JSO collected the knife. Primitive DNA testing was conducted on the blood on the knife blade by FDLE Analyst Diane Hanson and determined to match Mr. Dwelle's DNA profile, but not Morrison.

Despite the fact that no physical evidence linked Morrison to the crime and that the police were suspicious about Brown's story, the State still presented Morrison's alleged statements to support the theory that he entered the victim's apartment and stabbed him in order to obtain money. Thus, though there was none of Mr. Dwelle's blood on Morrison's clothes and none of

Morrison's fingerprints, blood or hair in Mr. Dwelle's apartment, the State attempted to link Morrison to the crime through the knife to which he allegedly led law enforcement. The knife was laying in the apartment complex, unconcealed, at a minimum, for more than forty-eight hours. The State's theory relating to the knife was clear: Mr. Dwelle was killed with the knife and Morrison had killed Mr. Dwelle because he led law enforcement to the knife.

In 2013, serological and DNA testing was conducted on the knife handle which had previously not been tested (PC-R. 2606), though it had been analyzed to determine if there were any latent fingerprints; none were obtained. Heinig explained that handles of weapons were often tested for DNA in order to "identify who handled the weapon during the crime." (PC-R. 2610).

The 2013 DNA testing established that there were areas on the knife handle that produced a presumptively positive result for blood (PC-R. 2607, 2610). In those same areas the DNA profile reflected a mixture of two individuals, neither of whom were Mr. Dwelle or Morrison (PC-R. 2611, 2614-5). Furthermore, on another area of the knife handle, a DNA profile was obtained that was a mixture of three individuals, none of whom were Mr. Dwelle or Morrison (PC-R. 2612-3, 2614-5). Thus, Morrison was conclusively excluded from the biological material, including blood that was on the knife handle that, according to the State's theory, was

held when stabbing Mr. Dwelle and slashing his throat.

Trial counsel testified that the results of the DNA testing would have been helpful to Morrison's defense (PC-R. 2303). Obviously, the new DNA test results corroborate Morrison's position that he did not kill the victim. Indeed, the evidence not only excludes Morrison but also includes other suspects, like Brown.

In Morrison's case he has always denied making an inculpatory statement to law enforcement or leading them to the knife that was found outside of Apartment 15. At trial, Morrison attempted to point the finger at Brown. The newly discovered DNA evidence corroborates Morrison's defense.

Likewise, the newly discovered DNA evidence complements the evidence Morrison presented at the evidentiary hearing, including the witnesses who placed him in Marietta on the evening of the crime. And, the DNA evidence similarly supports the undisclosed evidence that relating to the condom and Brown's relationship with the victim.

In addition to the newly discovered DNA results, following Morrison's conviction and sentence, Brown confessed that she had lied at the trial and that she only testified against Morrison because she had been threatened about losing her son (PC-R. 3241).

At trial, Brown was the key witness against Morrison. Brown

established a time line as to Morrison's whereabouts until 9:00 p.m. on January 8, 1997. Brown told the jury that Morrison put some steaks in the oven and left her apartment to take out the trash, never to return. Morrison's departure made no sense and Brown's testimony clearly implicated him in the crime. However, Brown's account at trial of Morrison's whereabouts on January 8th conflicted with her original statement and Reginald Early's testimony. Brown originally told law enforcement that Morrison was not present at her apartment on January 8th. Brown's post-trial admission explains the evolution of her statement.

Brown's newly discovered admission, independently and in conjunction with the other evidence of her relationship with the victim, would have led the jury to the conclusion that Brown wanted to cast aspersions on Morrison because she did not want to be targeted as the perpetrator of the crime.

The newly discovered evidence, when considered independently and in cumulatively with the other evidence Morrison presented would probably produce an acquittal at trial.

In denying Morrison's claim, the circuit court incorrectly found that the DNA evidence did not qualify as newly discovered because the knife was available at the time of the trial (PC-R. 1621). And, as to Brown's post trial revelations that she lied at trial, the circuit court held that there was no evidence that Brown had lied (PC-R. 1621).

First, the circuit court misses the point of the DNA testing. While the knife was available prior to Morrison's trial, Heinig testified that knife handles would have been tested for blood, if there was any "reddish-brown" staining, however, as to DNA, it was not routine to conduct DNA testing of knife handles until "late 90s, 2000" (PC-R. 2609). Therefore, the testing was newly discovered.

In Wyatt v. State, 71 So. 3d 86, 100 (Fla. 2011), this Court recognized the propriety of newly discovered evidence claims "predicated upon new testing methods or techniques that did not exist at the time of trial, but are used to test evidence introduced at the original trial." See also Preston v. State, 970 So. 2d 789, 798 (Fla. 2007)("There is no dispute that the DNA evidence concerning the pubic hair, showing that it did not belong to the victim, is newly discovered evidence."); Hildwin v. State, 951 So. 2d 784, 788-89 (Fla. 2006)(holding that new DNA testing of evidence indicating that semen and saliva on victim's panties and washcloth excluding defendant as source and which refuted the trial serology evidence constituted newly discovered evidence). Thus, the circuit court's focus on the evidence rather than the DNA testing was error.

Likewise, Brown's recent admissions to others that she lied at Morrison's trial qualifies as newly discovered evidence because it did not exist at the time of trial and would be

admissible as impeachment, at a minimum. Brown's admissions qualify as newly discovered evidence. See Marek v. State, 14 So. 3d 985, 990 (Fla. 2009); State v. Mills, 788 So. 2d 249, 250 (Fla. 2001).

The circuit court erred in denying Morrison's newly discovered evidence claim. Relief is proper.

ARGUMENT VI

THE CIRCUIT COURT ERRED IN DENYING MR. MORRISON RELIEF PURSUANT TO HALL v. FLORIDA, 134 S.Ct. 1986 (2014), AND ATKINS v. VIRGINIA, 536 U.S. 304 (2002). MR. MORRISON IS INTELLECTUALLY DISABLED. THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROHIBITS HIS EXECUTION.[72]

Morrison is not eligible for execution due to the fact that he is intellectually disabled (ID). In Atkins v. Virginia, 536 U.S. 304 (2002), the U.S. Supreme Court established that it violates the Eighth and Fourteenth Amendments to execute the intellectually disabled. The Atkins Court used the clinical definitions of intellectual disability to distinguish this group of individuals who are ineligible to be executed:

> *Mental retardation* refers to substantial limitation in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following adaptive skill areas:

[72]Argument VI involves a mixed question of law and fact. The issues regarding the application of the law present questions of law and must be reviewed *de novo*. See Sochor v. State, 883 So. 2d 766, 772 (Fla. 2004). In regard to the facts, this Court must give deference to the circuit court's fact findings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001).

> communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

Atkins, 536 U.S. at 308, n.3 (quoting the definition of the American Association of Mental Retardation).

In Hall v. Florida, 134 S.Ct. 1986, 2001 (2014), the U.S. Supreme Court rejected Florida's strict cut-off score and indicated that it was imperative that the procedures and requirements promulgated by the States not interfere with a capital defendant's right to present evidence of intellectual disability:

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

Specifically, the U.S. Supreme Court held that psychological principles, like the standard error of measurement should be considered in a competent evaluation for intellectual disability:

> Florida's rule disregards established medical practice in two interrelated ways. It takes IQ as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms imprecise.

Id. at 1995.

At the evidentiary hearing, Morrison established that he meets to criteria for ID. After conducting a comprehensive evaluation, Eisenstein testified that Morrison is intellectually disabled (PC-R. 2941).

The circuit court denied Morrison's claim based on the mistaken belief that the bright-line rule established in Cherry v. State, 959 So. 2d 702, 713-4 (Fla. 2007), must be applied in Morrison's case and that standards set forth in Hall did not apply to Morrison's case (PC-R. 1626). Thus, because an 8 year old Morrison obtained an IQ score of 78 on the Stanford Binet LM, he could not meet the first or third prong of Florida's statute (PC-R. 1626).

However, a few months after the circuit court issued its order in Morrison's case, this Court decided Oats v. State, 181 So. 3d 457 (Fla. 2015). In Oats, this Court made clear that the dictates in Hall, applied to defendant's challenging their sentence of death based upon Atkins:

> [T]he Supreme Court has now stated that courts must consider all three prongs in determining an intellectual disability, as opposed to relying on just one factor as dispositive. *Hall*, 134 S.Ct. at 2001. ...
>
> * * *
>
> ...But as the Supreme Court has now recognized, because these factors are interdependent, if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of other prongs. *Id.* (holding that this is a "conjunctive and interrelated assessment" and relying on the DSM-5, which provides as an example that "a

> person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score").

Id. at 468.

Further, as to the third prong - onset before the age of 18 - this Court held that "a defendant [need only] demonstrate that his 'intellectual deficiencies manifested while he was in the 'developmental stage'— that is, before he reached adulthood.'" Id. at 468, citing Brumfield v. Cain, 135 S.Ct. 2269, 2282 (2015).

The circuit court erred as to the standards to apply to Morrison's claim.

A. Significantly Subaverage Intellectual Functioning.

In March, 2012, Morrison scored a 70 on the WAIS-IV (PC-R. (PC-R. 2657). Eisenstein, who conducted a comprehensive ID evaluation testified that Morrison's score on the WAIS-IV satisfies the first prong of the definition (PC-R. 2977, 2997).

Weiss and Taub testified at length about the improvements that were made to the WAIS-IV (PC-R. 2668, 2677-81, 2687-8, 3110, 3111, 3114), and that the improvements were made to produce a more reliable and valid measure of intelligence (PC-R. 3111). Even Prichard conceded: "You can't argue with the fact that the WAIS-IV is a better instrument that the WAIS-III (PC-R. 3605).

According to Eisenstein, Morrison's school records demonstrated academic difficulties and consistent academic

failures were consistent with ID and his WAIS scores (PC-R. 2984). Krop agreed and testified that Morrison's school records established that he suffered from intellectual deficiencies (SPC-R. 123-4).

B. Significantly Subaverage Deficits in Adaptive Skills

The circuit court held that Morrison exhibited significant deficits in adaptive functioning (PC-R. 1626). Eisenstein explained that according to the DSM-V and Florida law, and examiner must consider the three domains of adaptive skills: conceptual, social and practical, and identify at least two impairments related to any of the areas (PC-R. 3001). Eisentstein conducted a formal adaptive skills assessment with Morrison and his result placed him in the mild to moderate level of impairment (PC-R. 2999). Eisenstein testified that Morrison exhibited historical deficits in conceptual areas (PC-R. 3007); deficits in practical areas (PC-R. 3011-2); and deficits socially (PC-R. 3004). Eisenstein relied on consistent anecdotal accounts of Morrison's functioning (PC-R. 3015).

The circuit court found that Morrison exhibited significant deficits in adaptive functioning, but despite such a finding, felt constrained by this Court's ruling in Cherry. Clearly, this Court has clarified that Hall applies to defendants, like Morrison. See Oats, 181 So. 3d at 468.

C. Onset Before 18

As to whether the onset of Morrison's ID was present before the age of 18, all of the information consistently demonstrates that Ray was "slow" and challenged intellectually as a child and adolescent (PC-R. 3017). Eisenstein relied on Morrison's school records which established that his grades were low and that he could not grasp the fundamentals (PC-R. 3016). Eisenstein explained that Ray's academic difficulties and consistent academic failures was evidence that his ID existed prior to 18. School officials were so concerned that Morrison was recommended to be psychologically tested when he was eight years old. The reason for the referral was academic, including that Ray was reading at a below pre-kindergarten level as a third grader and that his math skills were very low (DE 27).

At the evidentiary hearing, Irving Huffingham, the principal of the elementary school Ray attended. Of the 600-700 students, usually only 25 or 30 would be recommended for testing (PC-R. 2574). Huffingham also testified that he placed a lot of credibility with particular teachers who recommended Morrison for testing. Out of the students recommended for testing, only 6 or 7 would actually receive the testing (PC-R. 2577). Morrison was one of those students (PC-R. 2577). In Huffingham's mind, this meant that the teachers had identified something significant enough to raise (PC-R. 2577-8).

Following the testing, the finding was made, based on the test result, that Morrison was functioning "at the top end of the borderline range of mental retardation." (DE 27). Despite this finding, Morrison was not placed is the exceptional student program. Huffingham explained that there was a strict cut-off and Morrison did not meet it (PC-R. 2579). However, additional evaluation was recommended which never occurred because there was no one at the school to conduct the evaluation (PC-R. 2579-80). Huffingham also testified that if a student was not promoted it meant that "[he] was not ready for the next grade level in terms of academics and to put that child ahead would cause him greater problems" (PC-R. 2582-3). Morrison was retained multiple times, as early as second grade (DE 27).

D. Conclusion.

Morrison has presented competent and substantial evidence establishing that he suffers from intellectual disability. The eighth amendment prohibits the State from seeking the death penalty in his case.

ARGUMENT VII

THE CIRCUIT COURT ERRED IN DENYING MR. MORRISON'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE PRIOR VIOLENT FELONY AGGRAVATOR AT THE PENALTY PHASE.[73]

At the penalty phase of his capital proceedings, the State introduced Morrison's 1991 conviction for aggravated battery (T. 1122).

At the evidentiary hearing, Morrison presented the testimony of Joseph Turner who was charged as Morrison's co-defendant in the aggravated battery. Turner explained that the charge arose from a fight that occurred outside of a bar (PC-R. 2554). Turner, alone, approached the victim and shot him. Turner then ran from the scene. When Turner was questioned about the crime, he took full responsibility and confessed to shooting the victim (PC-R. 2555).

Morrison, who was not involved in the shooting, started running with Turner as Turner ran from the scene, so Morrison was also arrested (PC-R. 2555). Four days after Morrison pleaded guilty to the crime and was sentenced, Turner pleaded guilty (PC-R. 2556). Later, he learned that Morrison had also confessed to

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[73]Argument VII involves a mixed question of law and fact. The issues regarding the application of the law present questions of law and must be reviewed *de novo*. See Sochor v. State, 883 So. 2d 766, 772 (Fla. 2004). In regard to the facts, under Porter v. McCollum, deference is given only to historical facts. All other facts must be viewed in relation to how Morrison's jury would have viewed those facts. See Porter v. McCollum, 558 U.S. 30 (2009).

the crime, even though he (Morrison) was not involved in the crime in any way (PC-R. 2556).

Despite the fact that the State presented the prior conviction as an aggravator, trial counsel did not investigate the circumstances of the crime, or speak to Turner (PC-R. 2560).

The circuit court denied this portion of Morrison's ineffective assistance of counsel claim stating:

> A defendant cannot, in a postconviction motion challenge the validity of a prior conviction "as long as the conviction underlying the aggravating factor is still a valid conviction." Johnson v. State, 104 So. 3d 1032, 1043 (Fla. 2012); see Nixon v. State, 932 So. 2d 1009, 1023 (Fla. 2006)(concluding trial court properly denied defendant's claim that prior felonies were invalid because they had not been vacated); Melton v. State, 949 So. 2d994, 1005 (Fla. 2006)(rejecting claim trial counsel failed to challenge weight of prior felony aggravator.

(PC-R. 1605-6). The circuit court erred.

Morrison's claim was not contingent upon vacating his prior conviction, rather, his ineffective assistance of counsel claim is based on clearly established U.S. Supreme Court precedent acknowledging his right to attempt to neutralize or minimize the weight give to a prior violent felony conviction. As the U.S. Supreme Court stated in Wiggins v. Smith, 539 U.S. 510, 524 (2003), "[I]nvestigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" (emphasis on original)

(citations omitted). Further, as was reiterated by the U.S. Supreme Court in Rompilla v. Beard, 545 U.S. 374, 386, n.5 (2005):

> Nor is there any merit to the United States's contention that further enquiry into the prior conviction file would have been fruitless because the sole reason the transcript was being introduced was to establish the aggravator that Rompilla had committed prior violent felonies. Brief for United States as *Amicus Curiae* 30. The Government maintains that because the transcript would incontrovertibly establish the fact that Rompilla had committed a violent felony, the defense could not have expected to rebut that aggravator through further investigation of the file. **That analysis ignores the fact that the sentencing jury was required to weigh aggravating factors against mitigating factors. We may reasonably assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest.**

The circuit court improperly construed Morrison's claim. This Court should consider trial counsel's failure to investigate and present evidence relating to Morrison's prior felony conviction in the context of deficient performance and prejudice.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellee/cross-appellant, **RAYMOND MORRISON**, urges this Court to affirm the circuit's order as to the grant of a new trial and penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by electronic service to Leslie Campbell, Assistant Attorney General, Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL 33401, on this 11th day of July, 2016

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CERTIFICATION OF TYPE SIZE AND STYLE

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