IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-1880

STATE OF FLORIDA,

APPELLANT

VS.

RAYMOND MORRISON

APPELLEE

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

REPLY BRIEF/CROSS ANSWER BRIEF OF APPELLANT/CROSS-APPELLEE

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PRELIMINARY STATEMENT

Appellant, State of Florida, will be referred to as "State" and Appellee, Raymond Morrison, Defendant below, will be referred to as "Morrison." Reference to the records will be:

> **Direct Appeal** – case number SC60-94666 - *Morrison v. State*, 818 So.2d 432 (Fla.), *cert. denied*, 537 U.S. 957 (October 15, 2002) "ROA;"
> **Postconviction Relief Appeal** - "PCR;"

Supplemental records will be identified with an "S." The record citation will be followed by the appropriate volume and page number(s). Morrison's Answer Brief/Cross Initial Brief will be identified as "AB/CIB."

STATEMENT OF THE CASE AND FACTS

The State relies on its recitation of the case and facts included in its initial brief.

SUMMARY OF THE ARGUMENT ON APPEAL

Issue I - The trial court erred in not finding this claim procedurally barred and its analysis under *Strickland v. Washington*, 466 U.S. 668 (1984) is unsupported by the evidence and law. The trial court failed to address the fact that Morrison had testified at trial that he did not confess and that he took an inconsistent position on collateral review without testifying to the new allegations. There was no finding that Morrison's confession would have been found to be involuntary by the trial court or jury and that the result of the proceedings would have been different. This Court should find the trial court erred; Morrison did not carry his burden under *Strickland.* The convictions should be reinstated.

Issue II – The trial court erred in granting a new trial on the claim of ineffective assistance of guilt phase counsel for not investigating and presenting evidence on an alibi defense, challenging the State's timeline, voluntary intoxication defense, and the Victim's alleged relationship with Sandra Brown. When the trial and postconviction records are considered in light of one another, it is clear the granting of relief was not supported by the evidence and the trial court failed to make a finding of *Strickland* prejudice. This Court should reverse and reinstate Morrison's convictions.

Issue III – The trial court erred in finding counsel

rendered ineffective assistance in the penalty phase. With respect to mental health issues, the trial defense expert did not opine that he would have changed his opinion and the trial court did not find that any statutory mental health mitigation would have been found. Likewise, the trial court's assessment of the change in lay witness testimony and the defendant's change in strategy from showing a more positive side to now a more negative mitigation case does not support either *Strickland* deficiency or prejudice. Also, the trial court erred in finding deficiency arising from counsel not giving an opening statement for the penalty phase especially in light of a finding that but for that omission, the result of the penalty phase would have been different. Finally, the trial court erred in assessing the claim of failure to challenge the prior violent felony aggravator in its "conclusion" as the trial court had specifically found that such was not deficient performance. The trial court's legal conclusion of Strickland prejudice is erroneous as a matter of law. This Court should vacate the decision and reinstate the death sentence in this case.

SUMMARY OF THE ARGUMENT ON CROSS-APPEAL

ISSUE IV – The trial court rejected the claim of *Brady v. Maryland*, 373 U.S. 83 (1963) violations. Morrison did not carry his burden of proving each prong of his *Brady* claim; either he failed to show that the material was exculpatory, suppressed, or

that he was prejudice.

ISSUE V – The rejection of the newly discovered evidence claim based on allegations that Sandra brown was untruthful and new DNA testing was rejected properly. Brown was not shown to have recanted her trial testimony or to have given false testimony implicating Morrison such that an acquittal would be obtained on retrial. Likewise, the DNA evidence was not newly discovered and would not have place the case in such a posture at to render an acquittal on retrial.

ISSUE VI – The trial court's determination that Morrison failed to prove intellectual disability because he did not show significant subaverage intellectual ability manifested before age 18 is supported by the record.

ISSUE VII – Morrison is not entitled to relief on this claim. The trial court determined correctly that Morrison was essentially claim his 1991 conviction was invalid as it was based on an allegedly false confession. The conviction remained valid and Morrison is not entitled to challenge a valid conviction. Moreover, the prior violent felony aggravator was supported by another valid prior violent felony conviction from 1988.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN GRANTING RELIEF ON THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE SUPPRESSION HEARING

The trial court granted relief on Morrison's claim that trial counsel was ineffective in not presenting: (1) mental health experts to show his police statement was not voluntary, (2) cocaine use within hours of interrogation to explain why his story to the police kept changing,[1] and (3) evidence that he would take responsibility for the crimes others committed. The court made the legal determination even though Morrison did not testify at the evidentiary hearing. In fact, no witness with personal knowledge, testified in support of his claim that he did confess to police during the encounter.

As detailed in the initial brief, Morrison testified at the

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[1] Addressing a challenge to the voluntariness of a confession, this Court has stated:

> The mere fact that a suspect was under the influence of alcohol when questioned does not render his statements inadmissible as involuntary. "The rule of law seems to be well settled that the drunken condition of an accused when making a confession, unless such drunkenness goes to the extent of mania, does not affect the admissibility in evidence of such confession, but may affect its weight and credibility with the jury." Lindsey v. State, 66 Fla. 341, 343, 63 So. 832, 833 (1913).

Thomas v. State, 456 So.2d 454, 458 (Fla. 1984). *See Rigterink v. State*, --- So.3d ---, 2016 WL 1592714 (Fla. 2016).

suppression hearing that after receiving his *Miranda* warnings, he exercised his right to remain silent and did not make any inculpatory statements to the police. Yet, the trial court, in granting relief herein, did not conduct a meaningful analysis regarding these mutually exclusive defenses. Indeed, Morrison's own testimony at the suppression hearing is diametrically opposite of this newest theory of defense. This glaring deficiency requires reversal of this order.

In his answer brief, Morrison takes issue with the State's argument that the claim is procedurally barred, Morrison also suggests that the State's focus on Morrison's suppression hearing testimony was misplaced. However, Morrison does not directly answer how counsel was deficient for not putting on evidence of alleged mental deficiencies where Morrison testified he knew his rights, averred that he had asked to call his father, told the police he did not want to talk, and testified that he did not confess. The pith of Morrison's answer is that counsel should have ignored his client's suppression hearing testimony and taken a different tact in challenging the confession. Such does not prove ineffectiveness and the trial court erred in likewise ignoring Morrison's statement that he never confessed.

As explained previously, the ineffective assistance of counsel claim is barred. In *Miller v. State*, 161 So. 3d 354

(Fla. 2015), this Court found:

> On direct appeal, we rejected Miller's claim that the trial court erred when it denied the motion to suppress his confession on the basis that the officers who conducted the interrogation failed to advise him that he had the right to appointed counsel during questioning. *Id.* at 219–20. Miller now attempts to relitigate the voluntariness of his confession on the basis that evidence of his mental impairments and substance abuse was not uncovered until the postconviction proceedings. Since the voluntariness of Miller's confession was addressed and rejected by this Court on direct appeal, he cannot now relitigate a substantially similar claim under the guise of ineffective assistance of counsel.

Miller, 161 So. 3d at 372. This Court should find the bar here as Morrison challenged the suppression ruling on direct appeal.[2] During postconviction litigation, Morrison again challenged the suppression hearing result, but on new grounds claiming, now argueing that counsel did not use mental health and substance abuse in challenging the voluntariness of the confession.

In order to address the main thrust of Morrison's challenge to the State's argument, a reiteration of the facts of the suppression hearing are necessary. During the suppression hearing in 1997, Morrison testified that he had not confessed to

[2] In the suppression hearing, Morrison challenged the confession on the grounds he did not confess and the police refused to give him an attorney. On direct appeal, this Court found unpreserved the claim the confession should have been suppressed as it was given after the police obtained the confession only after making "illicit appeals" to Morrison's religious beliefs. This Court found that Morrison had testified that he had not confessed; and did not make a finding of fundamental error. Morison, 818 So.2d at 446.

the police. This Court found on direct appeal that "Morrison … testified at the motion to suppress hearing that he did not provide any inculpatory statements to police," *Morrison*, 818 So.2d at 446.

Morrison also testified that he was arrested at about 3:30 P.M. and that he last had any drugs or alcohol at 2:30 A.M. on the morning of his arrest (some 13 hours before). (ROA.8 1392, 1405). With respect to the effects of smoking crack cocaine, Morrison stated he did not know how long the effects take to wear off, but it does not take 13 hours. (ROA.8 1409-10). He admitted being given his *Miranda*[3] rights, but testified that he told the police immediately he did not want to talk and wanted to call his father to get a lawyer. Throughout his direct examination, Morrison maintained that he reiterated to the police that he did not want to talk to them (ROA.8 1394-96, 1401-02, 1404-06). Morrison stated that he understood he could have a lawyer appointed to him at no cost. (ROA.8 1394-95). It was Morrison's testimony he was read his rights upon his arrest and that the detective reviewed them with the written *Miranda* form which he signed acknowledging that he understood his rights and that he did not have to talk to anyone. (ROA.8 1406, 1408).

On cross-examination, Morrison testified:

[Prosecutor] Did you not ultimately tell them that you

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966)

had been in Albert Dwelle's apartment?
[Morrison]: No.
[Prosecutor]: You never told them you went in there?
[Morrison]: Never.
[Prosecutor]: You never said that Mr. Dwelle cut his own throat?
[Morrison]: No, sir.
[Prosecutor]: You never said that you wanted to get money out of his shirt?
[Morrison]: No, sir, I didn't.
[Prosecutor]: But you signed a confession saying that?
[Morrison]: Yes. But I didn't-at the time I didn't know-I didn't even read the confession.

(ROA.8 1407-08) *See Morrison*, 818 So. 2d at 446, n.7. Morrison maintained that he did not answer any questions. (ROA.8 1408-09)

Judge Henry Davis presided over Morrison's trial and postconviction litigation. Following the suppression hearing, the trial court found that Morrison testified that "he had [last] consumed alcohol and cocaine at 2:30am, which was about 13 hours prior to his arrest at 3:30pm (ROA.5 797); Morrison "was not threatened" (ROA.5 798); Morrison was advised of *Miranda* Rights by Officer Richardson (ROA.5 797); Officer Short also advised Morrison of *Miranda* rights (ROA.5 798-79); Morrison refused to speak with Officer Davis (ROA.5 799-800); Morrison requested to speak with Officer Richardson again (ROA.5 800); after requesting to be taken to jail, Morrison "called him [Richardson] back in to talk" (ROA.5 800); Richardson honored the confidentiality of Morrison's communications at this juncture (ROA.15 800-801); Morrison agreed to speak to officer Short, who again reminded Morrison of his *Miranda* rights (ROA.5

801); and then, Morrison made the statement (ROA.5 800-11), which included seeking to steal money from the victim and claiming that the victim's throat being accidentally cut twice during their struggle (ROA.2 374-75 Morrison's confession); Morrison led the police to the knife (ROA.5 801).

Also, Judge Davis found Morrison had waived his *Miranda* rights "knowingly and voluntarily" (ROA.5 801); Morrison's consumption of alcohol and cocaine "does not support a finding that he was under the influence at pertinent times, including at the time he gave his statements ***almost 24 hours after*** his last consumption (ROA.5 801-802); and, Morrison's behavior was "sober and rational" (ROA.5 802) (emphasis supplied). These rulings were considered by this Court on direct appeal. *Morrison*, 818 So.2d at 446.

It is well settled that counsel may not be found ineffective where his client's actions, admissions, or the evidence circumscribe his decisions. *See Rivera v. State*, 717 So.2d 477, 485 (Fla. 1998) (opining, "[w]hen a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made."); *Squires v. State*, 558 So. 2d 401, 402-03 (Fla. 1990) (noting counsel's decisions circumscribed by defendant's admissions to counsel and evidence).

Morrison's suppression hearing testimony that he did not

confess circumscribed counsel's actions from that point forward. The fact that Morrison told the trial court that he did not confess, but asked to call for an attorney rendered his mental abilities irrelevant. Morrison has not offered what foundation could be laid for admission of his alleged mental abilities at the suppression hearing or at the 1998 trial when he testified he did not confess and that his drug experience was that the effects of cocaine did not last 13 hours. The trial court's order does not address this glaring evidentiary chasm.

Equally important, for Morrison's cognitive abilities, intoxication, and alleged propensity for taking the blame for others to become relevant at trial, Morrison would have had to testify that he did confess. Without such testimony, witnesses supporting these allegations have no foundation or relevance for the trier of fact. Moreover, Morrison runs the risk of being cross-examined with his suppression hearing testimony where he then would have to admit he lied to the trial court. Morrison has not addressed this conundrum; how to put his mental health and the voluntariness of the confession at issue before the jury without admitting he lied previously and in actuality confessed to the police.

Because of Morrison's suppression hearing testimony, counsel's options were limited. He could not allege that Morrison's confession was false as Morrison testified he did not

confess. Defense counsel could not show how Morrison's alleged mental abilities/intoxication[4] were relevant to voluntariness as Morrison said he understood his rights and exercised them by telling the police he did not want to talk, but instead wanted to call for an attorney.[5] *Davis v. State*, 990 So.2d 459, 464 (Fla. 2008) (rejecting ineffectiveness claim where there was 15-hour gap between drug use and confession). While Morrison asserts that there was coercive police conduct (AB/CIB at 77), a portion of the statement to Officer Richardson had been suppressed pre-trial, this Court resolved the issue when raised on direct appeal, *Morrison*, 818 So.2d at 446, and Morrison did not call any witnesses who had direct knowledge of the interrogation during the postconviction evidentiary hearing.

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[4] Morrison asserts that *Davis* is not relevant here as counsel should have shown the prolonged effects of intoxicants on his mental abilities. However again, Morrison testified that he knew his rights and exercised them not to talk to the police; Morrison denied that he confessed.

[5] This is further evidence that counsel should not have been found ineffective. Morrison said he exercised his rights and did not confess, as such, he is unable to show coercive police conduct. *See Baker v. State*, 71 So.3d 802, 814 (Fla. 2011) (recognizing for there to be a finding of an involuntary confession "there must be a finding of coercive police conduct." (*citing Schoenwetter v. State*, 931 So.2d 857, 867 (Fla. 2006)) *See Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) (opining "Coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."). "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Connelly*, 479 U.S. at 164, 107 S.Ct. 515.

This Court should reject Morrison's attempt to re-litigate the claim here.

As noted above, the suppression hearing testimony had a direct impact on what options defense counsel had at trial without exposing Morrison to a perjury charge or counsel to an ethical dilemma of suborning perjury. Counsel should not be deemed ineffective years later where his client limits the options counsel may pursue at the suppression hearing and at trial in challenging a confession his client affirmatively testified he did not make. As such, counsel was not deficient for not presenting evidence which would require Morrison to admit to lying to the trial court and confessing to the murder. Likewise, given Morrison's testimony, not recanted or explained in postconviction, there is no reasonable probability of a different outcome at either the suppression hearing or trial, thus confidence in the result of those proceedings has not been undermined. This Court should find that the trial court erred in its analysis, vacate the postconviction rulings, and reaffirm the original ruling that the confession was knowing and voluntary. *See Henry v. State*, 937 So.2d 563, 571 (Fla. 2006) (recognizing attorney's decisions and tactics are impacted greatly by testimony of defendant; counsel not ineffective where postconviction defense clearly rebutted by actions/statements of defendant)

ISSUE II

THE TRIAL COURT ERRED IN GRANTING RELIEF ON THE CLAIM OF INEFFECTIVE ASSISTANCE OF GUILT PHASE COUNSEL

Morrison alleged counsel rendered ineffective assistance for failing to investigate and present: (1) an alibi defense; (2) challenges to the State's timeline; (3) evidence of voluntary intoxication; and (4) cross-examination of Sandra Brown on her alleged relationship with 82-year old victim, Albert Dwelle. The trial court's findings and *Strickland* analysis are in part unsupported by the evidence and law. While a prejudice finding was made with respect to the voluntary intoxication claim, the record is devoid of evidence of intoxication to support such a defense. The trial court's ultimate conclusion was that counsel failed to do an adequate investigation, therefore, his strategic decisions were unreasonable. However, the trial court did not make a prejudice finding. This does not satisfy *Strickland*, and relief should have been denied. Even were this Court to conduct an independent prejudice analysis, Morrison should be found not to have proven his case in light of the trial record and his evidentiary failing during the postconviction evidentiary hearing. This Court should reverse the trial court and deny collateral relief.

Morrison asserts that the State cannot rely on his confession in its analysis because the trial court found the

confession involuntary and unreliable. (AB/CIB). He cites to the trial court's order (PCR.8 1541-52) to make this assertion. However, the trial court did not find the confession involuntary or unreliable, only that *Strickland* deficiency and prejudice were shown and that "[i]t is reasonable to find this evidence, had it been presented, could have changed the outcome of the proceedings. However, as discussed above, that ruling was error and the confession must be included in the deficiency and prejudice evaluation.

ISSUE III

THE TRIAL COURT ERRED IN FINDING INEFFECTVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE

The trial granted postconviction relief on a finding that Morrison received ineffective assistance arising from counsel's lack of a diligent investigation into the social history and mental health matters and failure to give an opening statement. This was error as the trial court did not announce what mental mitigation was proven on collateral review that had not been presented previously. Likewise, the court did not analyze the impact of Morrison's change in strategy from presenting Morrison in a favorable light to now highlighting negative mitigation was deficient and prejudicial under *Strickland*. A proper assessment of the mitigation offered on collateral review in light of what was presented at trial shows that Morrison has not carried his

burden under *Strickland* and that relief should not have been granted. The State relies on its Initial Brief.

ANSWER BRIEF ON CROSS-APPEAL

ISSUE IV

THE TRIAL COURT'S DENIAL OF MORRISON'S *BRADY* CLAIMS WAS PROPER

Morrison asserts that the trial court erred in not granting relief on his claims of *Brady* violations for the State not disclosing: (1) an un-used condom found in Dwelle's pocket; (2) Officer Richardson's directions to Sandra Brown; (3) Detective Davis' handwritten notes; (4) Charlene Wright's statements to law enforcement; and (5) Morrison's drug use at time of arrest (AB/CIB at 110-16) Also, Morrison argues in a single sentence that "[t]o the extent that counsel was or should have been aware of this information, counsel was ineffective in failing to discover it and utilizing (sic) it." (AB/CIB at 109)[6] He also

[6] Claims of *Brady* violations should foreclose claims of ineffective assistance as counsel. *See Roberts v. State*, 568 So.2d 1255, 1259 (Fla. 1990) (finding "counsel cannot be considered deficient in performance for failing to present evidence which allegedly has been improperly withheld by the state."). Moreover, this Court has found that a single sentence allegation of "to the extent trial counsel failed to discover and litigate this issue" was insufficient pleading to raise ineffective assistance of counsel claim. *See Foster v. State*, 810 So.2d 910, 915 (Fla. 2002). *See also, Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient

makes a cumulative error argument pointing to the allegation raised in the ineffective assistance of counsel and newly discovered evidence claims. (AB/CIB at 120). Under this Court standard of review of *Brady* claims, the record establishes that the claims were denied properly. Either the material was not withheld as Morrison had the information or was not entitled to it, the information was not exculpatory, or he was not prejudiced.

A. STANDARD OF REVIEW:

With respect to a *Brady* claim, this Court has stated:

> To successfully raise a claim of a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), Bolin must show that (1) the evidence was favorable to him, either because it was exculpatory or impeaching; (2) the evidence was suppressed by the State; and (3) that the suppression resulted in prejudice. *Conahan v. State*, 118 So.3d 718, 729 (Fla.2013) (*citing Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *Johnson v. State*, 921 So.2d 490, 507 (Fla. 2005); *Rogers v. State*, 782 So.2d 373, 378 (Fla. 2001)). "To establish the materiality element of *Brady*, the defendant must demonstrate 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* at 730 (*quoting Guzman v. State*, 868 So.2d 498, 506 (Fla. 2003)). The review of a postconviction court's denial of this claim is under a mixed standard where this Court defers to the lower court's factual findings that are supported by competent, substantial evidence and reviews the application of law de novo. *Id.*

Bolin v. State, 184 So. 3d 492, 501 (Fla. 2015), *cert. denied*,

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and issue will be deemed waived).

136 S. Ct. 790 (2016). Under *United States v. Bagley*, 473 U.S. 667, 675 (1985) and *Kyles v. Whitley*, 514 U.S. 419 (1995), only suppressed exculpatory, favorable evidence enters into the prejudice analysis to determine whether that evidence was material demonstrating a reasonable probability that the case would be put in a different light that confidence in the result was undermined. Clearly, non-suppressed or non-favorable evidence would not enter the materiality analysis.

B. ANALYSIS

Morrison points to five items he claims established *Brady* violations. Each will be taken in turn including his cumulative error claims. However, the record supports the trial court's rejection of the claim as the challenged information was either not suppressed or was not favorable. Relief should be denied.

1. **Un-used Condom** – The pith of the trial court's rejection of the *Brady* claim addressed to the un-used condom found in Dwelle's pocket, but not disclosed to the defense, was that it was not favorable or exculpatory evidence as there was no evidence linking the condom, to sex planned with Sandra Brown on the night of the murder, leading to Sandra Brown killing Dwelle. The trial court found the claim that the condom established that Brown killed Dwelle was "rank speculation." (PCR.8 1571) Additionally, the trial court found that the condom was not exculpatory or favorable evidence to support Morrison's

suggestion that carrying an un-opened condom would show that Dwelle was not feeble or a recluse. Morrison failed to overcome the record evidence from Dwelle's cousin, William Brinson, the care-givers from Meals-on-Wheels, Rosetta Bonner and Margaret Key, that Dwelle was feeble as he suffered from Polio, could not use his left arm or hand, could not bathe, shave, or dress himself, could not stand well, and had trouble walking. (ROA.2 370-71; ROA.3 414-15, 433-35; PCR.8 1571-72). This decision is supported by the facts and law. Moreover, given the ruling, it should not be considered in a cumulative analysis for prejudice.

The record shows that Ken Holloway, the person who found the condom, was listed as a Category C witness on the State's April 7, 1997 First Supplemental Response to Demand for Discovery. (ROA.1 29; PCR.12 2281-82). Former prosecutor, Jay Taylor, stated he would not have invoked the rule barring depositions of Category C witnesses as this was a homicide case. (PCR.12 2288) *Provenzano v. State*, 616 So.2d 428, 430 (Fla. 1993) (noting "[t]here is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence" and finding no *Brady* violation where defendant could have obtained his jail records from officials and could have reviewed the notes of State's expert upon request). As such,

the information was equally available to the parties and was not suppressed. Taylor also averred that he complied with his discovery obligations including verifying what his predecessor disclosed in discovery. As noted by Taylor, oft times, reports are disclosed at depositions and there may be no documentation of that event. (PCR.12 228184) However, even assuming the condom was not disclosed, a Brady violation did not occur.

Defense counsel, Rifik Eler, testified he did not recall seeing Holloway's report of the condom. However, Holloway was part of the Medical Examiner's Office and the office was open with their files with the defense. (PCR.12 2317). Eler dismissed the notion that the condom would have any significance to undermine the vulnerable victim aggravator or suggest Dwelle was having sex with Brown. (PCR.12 2320)

As the trial court found, Morrison did show the condom was exculpatory, impeaching, or material. Morrison presented no testimony that Brown was having sex with Dwelle on the night of the murder. The mere fact Dwelle carried a condom does not necessarily lead to the conclusion he was having sex with Brown and that she killed him. Furthermore, it does not undercut in the least the testimony from Brinson and Dr. Arruza that eighty-year old Dwelle suffered a childhood illness which caused a stroke and resulted in his partial paralysis, deformity, and atrophy of his limbs on his left side causing him trouble

walking and necessitating the assistance of others.[7] (ROA.12 369-72; ROA.14 788-89; ROA.15 804-05). The witnesses from Meals-on-Wheels reported Dwelle kept his door unlocked. Morrison confessed Dwelle answered his door and even though told he could not enter, Morrison followed Dwelle inside. As such, there would be no forced entry and the fact Dwelle had a condom in his pocket would not cast any doubt on Brown or undercut Morrison's guilt or sentence.

Morrison has offered nothing but speculation of a sexual relationship between Dwelle and Brown leading to murder. In fact it takes a Herculean leap to go from condom, to sex with Brown, to Brown killed Dwelle. One fact does not follow the other. However, even if Brown were offering sexual favors to Dwelle, as Morrison suggests from the testimony of Tangy Allen, Gillis Louden, Delores Timms (PCR.14 2838; PCR.16 3171-74; PCR.173242-44), Morrison has not shown in fact that such a relationship existed[8] and that Brown killed because of it. Morrison did not call Brown to testify about her alleged

[7] This Court found on direct appeal, "Dwelle was disabled for many years, having suffered a stroke during a bout of typhoid fever at age six or seven. He could not use his left hand or arm, he could hardly stand up and walk, and he needed assistance to bathe, dress, and cook. Meals on Wheels delivered his meals once a day." *Morrison*, 818 So.2d at 438. Morrison offered no evidence at the postconviction hearing to undercut that finding.

[8] Morrison asserts that he showed Brown turned to prostitution (AB/CIB at 117) and had a relationship with Dwelle.

relationship. Instead he called Ms. Gillis to offer rank hearsay as to what Brown may have said to Gillis regarding Dwelle. Even so, the State did not bar the defense from talking to any of Dwelle's neighbors or Brown's associates. The issue was and is whether an un-used condom was suppressed, favorable evidence. In this case, it was not and disclosure would not have put the case in such a different posture that confidence in the verdict and sentence were undermined.

Likewise, the mere fact Dwelle carried a condom or may have been able to have sex with someone, does not negate the finding he was a particularly vulnerable victim. As noted above, it is undisputed, Dwelle could not use his left arm and it was difficult for him to walk. *Morrison*, 818 So.2d at 438. The aggravator has not been undermined, thus, the sentencing foundation remains. Morrison has failed to show that the existence of an un-used condom was exculpatory, favorable evidence for him. Relief was denied properly.

2. Officer Richardson's directions to Sandra Brown – Morrison alleged Brown was threatened by Officer Richardson and that this was suppressed in violation of *Brady*. Following the evidentiary hearing, the trial court found the testimony showed:

> . . . According to Ms. Timm, Ms. Brown was terrified she would go to jail and her baby would be taken from her if she did not cooperate with the police. (E.H., Feb 17, 2015 at 30-33.) Ms. Timm explained Ms. Brown "wasn't supposed to come out there (Marietta

neighborhood) and say anything to none of us about [the murder]." According to Ms. Timm's account of the exchange between Ms. Brown and Officer Richardson:

> He say we told you about Raymond, he said, but that wasn't for you to go out and say anything to no one about it …I didn't tell you to tell anybody about the cut….And he was like I told you that I had wanted you to cooperate and he was like if you don't cooperate and stop telling, you know….He was just telling her he wanted her to keep her mouth closed and said what did I tell you, I have you locked up for this here.

(E.H., Feb. 17, 2015 at 37-38)

(PCR.8 1573-74)

The trial court concluded that Morrison did not present evidence of a threat made by Officer Richardson to Brown, i.e., there was no exculpatory/favorable evidence suppressed. The trial court determined that Brown feared consequences for not following Richardson's instruction "not to talk to anyone about the murder." Morrison had not proven to the trial court that Richardson had threatened Brown to cooperate when she gave her police statement. This finding was bolstered by the trial court's review of the record showing Detective Davis, in his deposition, "acknowledged Ms. Brown never told him 'at any point that Raymond Morrison killed Mr. Dwelle[.] Or that she either saw him do it or talked to him and he told her he did it, seen him go in the apartment or anything like that[.]' (ROA, Vol. IV at 599) There is no evidence of Officer Richardson threatening

Ms. Brown so as to lead her to testify untruthfully at Defendant's trial." (PCR.8 1574) Given this, there is no proof of favorable evidence suppressed by the State. The record supports that determination. Likewise, the trial court quoted directly from the witness's testimony and reasonably interpreted her account that there was no threat for Brown to testify untruthfully. Again, the record supports the conclusion.

Furthermore, Brown was not called by the defense to testify and substantiate that she feared the police, and would not have testified as she did absent those threats. Moreover, there is no substantive evidence of a recantation and her sworn testimony stands. Given the state of this record, any threats to Brown, perceived or imagined, does not call into question her testimony as she may have been merely reluctant to implicate the father of her child and fearful that she faced consequences should she talk about the murder before an arrest was made as Ms. Timm reported. Likewise, the alleged threats do not call into question the veracity of Morrison's confession to entering Dwelle's apartment uninvited, taking Dwelle's money, and when caught fighting with Dwelle resulting in his murder. A *Brady* violation was not proven as Brown's alleged fear was not suppressed favorable information. Relief was denied properly.

3. Detective Davis' handwritten notes – Morrison states that Detective Davis' handwritten notes were admitted into

evidence during the postconviction hearing and that they contained an "S" indicating Brawn was considered a suspect by the police, but this fact was not disclosed to the defense. Morrison accurately notes that the trial court did not address this allegation. (AB/CIB at 116). This claim was not identified in the postconviction motion, as such it was not pled properly and the trial court did not err in not identifying it as a claim and ruling on it. However, Davis' notes were made part of the final police report, thus the State was not required to disclosed the hand-written copy. More important, the deposition conducted by an Assistant Public Defender and provided to Morrison's trial counsel, Rifik Eler, specifically references Davis' notes and counsel went through those notes in detail with Davis and discussed how the police viewed Brown. As such, the notes and the information they contained were not suppressed. This Court should find that the claim was not presented below and even if it had been presented, the record refutes the claim of a *Brady* violation.

In order to raise a *Brady* claim and receive an evidentiary hearing, "'[t]he defendant must allege specific facts that, if accepted as true, establish a prima facie case that (1) the State possessed evidence favorable to the accused because it was either exculpatory or impeaching; (2) the State willfully or inadvertently suppressed the evidence; and (3) the defendant was

prejudiced. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)." Allen v. State, 854 So.2d 1255, 1258-59 (Fla. 2003). The allegation that Davis' notes referencing Brown as an "S" for suspect were suppressed was not included in the Amended Postconviction relief Motion. (PCR.5 855-63). Morrison did not plead in his motion that he did not have Davis' hand-written notes, which contained favorable evidence suppressed by the State, and that such prejudiced him. *See Thompson v. State*, 759 So. 2d 650, 668 n.12 (Fla. 2000) (finding a claim procedurally barred because it was not alleged in the postconviction motion filed in the trial court).

Even had that pleading been made, relief is not appropriate. This Court has stated: "Notes from which a police or investigative report were compiled are not subject to disclosure under Florida Rule of Criminal Procedure 3.220(b)(1)(B). *See Terry v. State*, 668 So.2d 954, 959–60 (Fla. 1996); *Geralds v. State*, 601 So.2d 1157 (Fla. 1992)." *Green v. State*, 975 So. 2d 1090, 1102–03 (Fla. 2008). In Davis' deposition (Defense Exhibit 22 – PCR.24 597-695), Davis explained that Detective Short developed his written report from Davis' notes as well as his own. (PCR.24 603-04). A review of the deposition establishes that Davis had his written notes in hand during the deposition and defense counsel did not ask to see those notes although he questioned Davis closely about his

notes and delved into how the police viewed Brown. (PCR.24 597-695; for example, 603-06, 608, 610-15, 623, 625-28, 631-33, 636-38, 650-52, 664, 673, 686).

Morrison makes much of the "S" that is contained in Davis' report in two locations when taking notes of Brown's interview at the police station. (AB/CIB 113; PCR.22 14) It must be noted that Morrison failed to call Davis or another officer familiar with Davis' note-taking to explain Davis' notes and whether the "S" notation at that point meant he truly considered Brown a suspect or whether it was a typographical error. This is a significant evidentiary failure especially in light of his deposition testimony as discussed below. As such, Morrison has failed to prove that the "S" had any significance, much less favorable and material significance.

In the deposition, Davis described his conversations with Brown, what he thought about her interaction with him, her veracity, why she was brought to the police station and whether she was a suspect. Davis explained that Brown said she was watching the parking area the day Dwelle's body was found which he chalked up to Brown being bored so she was looking at the lot as the Meals-on-Wheels delivery was made to Dwelle. Once the delivery was made and the body found, Ms. Key of that service told Brown of the death. (PCR.24 608-10). Davis discussed his observations of Brown, for example that she did not make eye-

contact with him, she held a defensive posture, and that she claimed not to know "nothing about nobody" in the complex. (PCR.24 611-12). Davis clarified a discrepancy between his report and the type final report by Detective Short; Davis' notes had that Brown's child with Morrison (Ray III) had last visited Dwelle three or four days before the murder which Short had misinterpreted as Morrison having been at Dwelle's three or four days before. (PCR.24 613). Even so, Davis reported to defense counsel that he "believed wholeheartedly" that Brown knew more than she was willing to tell him during that first interview and it was only after asking a pointed question that Brown admitted seeing Morrison at 9:00 PM the evening before Dwelle's body was found. (PCR.24 614-15). Davis later disclosed to defense counsel that he felt Brown was not telling him the truth. (PCR.24 620)

It was Davis' deposition testimony that on the second day of the investigation (January 10, 1997), he and Short decided to re-interview Brown and that Brown had the same attitude of not wanting to be involved. However, once she was read her rights[9]

[9] Later Davis reconsiders his notes on reading Brown her rights, thinking it was at the station, not at her home. (PCR.24 633-36) What Davis explained was that Brown was given her rights at the station at 1650 hours, not 1350 hours and when Brown asked why she was given her rights she was told that the police were investigating a crime and that if she said she did it, they could not use that statement against her if she had not been given her rights and that she did not have to talk to the

and the longer they talked to her it became obvious to Brown that the police thought she knew more than she was saying that she eventually revealed more. (PCR.24 623, 625-27). Davis was not sure why Short had read Brown her rights, but he said he would have done the same. Davis explained:

> . . . I was convinced from the previous day that I didn't think she was telling me everything she knew and the answers she did give me even though she finally admitted her boyfriend had been there the previous evening at 9:00 o'clock, it was like pulling teeth to get it out of her. That indicated to me that she's not being open and honest.

(PCR.24 627-28)

While Davis cannot recall how they handled getting Brown to go to the police station, he knew she was not arrested and was never told she was under arrest. (PCR.24 632). Davis thought she was asked to accompany the police to the station so they could compare what Morrison, who was on his way to the station, would say against her version of events. It was Davis' testimony that he did not "feel in any way she was made to come down" to the station. (PCR.24 632) At no time did Davis view Brown as a suspect for the murder.[10] (PCR.24 632-33) At no point

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police. In response to Davis' question whether Brown wanted to talk to the police, she said she did want to talk because she did not do anything. (PCR.24 636-37)

[10] Based on this testimony alone, it is obvious that the "S" notation twice identified with Brown (PCR.22 14) shows that Davis mis-used the notation. Further confirmation of this comes from the balance of the hand-written notes where it was Morrison who was identified as the "S" throughout and when Brown and

did Brown admit to knowing of the killing. She never stated Morrison killed Dwelle; never said she saw the killing; never said Morrison had admitted to the killing. (PCR.24 638)

Davis also opined that he thought Brown was not being honest with the police because Morrison was living with her at the apartment and she did not want management to know for fear of losing the apartment. Brown had mentioned that several times to Davis. (PCR.24 650)

From the foregoing, it is clear that the information in Davis' hand-written notes were included in Detective Short's typed report, were discussed in detail by Davis in his deposition, and that the police thought Brown was not being entirely open and honest with them, she was not a suspect. Irrespective of the two "S" notations associated with Brown, it has not been shown that those notations would have established that Brown was a suspect and that this was suppressed favorable evidence. This Court should find that the claim was not pled, thus, the trial court did not err in not addressing it.

To the extent that this Court may conclude that a claim was presented during the evidentiary hearing in support of the other

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Morrison are discussed together, Morison was the "S" and Brown the "W" (PCR.22 15). Any significance Morison places on the notation is dissipated by Davis' other notations and his testimony. The two un-explained "S" notes to not rise to the level of favorable, suppressed evidence supporting a *Brady* violation.

Brady claims, for judicial economy, it should find that the defense was not entitled to Davis' notes. *Green*, 975 So. 2d at 1102-03 (holding "[n]otes from which a police or investigative report were compiled are not subject to disclosure" under Rule 3.220(b)(1)(B). *Cf. Provenzano*, 616 So.2d at 430 (finding no *Brady* violation where defendant could have reviewed the notes of State's expert upon request). Alternately, given Davis' deposition, the notes were not suppressed and to the extent that Davis did not clarify his "S" notation, this Court should find that given the balance of the deposition, it was clear Brown was not a suspect, and therefore, the "S" was not exculpatory/favorable evidence which was suppressed. Furthermore, those arguable "typographical errors" would not have put the case in such a different light as to undermine confidence in the verdict given Brown's consistent testimony, Davis' explanation of his interaction with Brown and her non-suspect status, and Morrison's confession. Relief should be denied.

Morrison also points to Davis' notes on his interview with Medina as stating noises were heard between 8:30 and 9:00 p.m., but "Davis' report" (not given a record cite only listed the 9:00 PM hour.[11] Again, defense counsel deposed Davis and had

[11] The State believes Morrison is referring to the final report by Detective Short as Davis had testified that he gave his notes

Davis refer to his notes throughout the testimony. Medina was discussed (PCR.24 616-17) Defense counsel had equal access to Medina and could have verified the time he heard the noise directly with the ear-witness irrespective of the time noted in the police typed and hand-written reports. The information was not suppressed. Moreover, Morrison has not shown that an earlier time for Medina hearing noise was indicative of the murder occurring at an earlier time. As noted previously, earlier noise may have been unrelated to the murder. Nonetheless, given Morrison's confession, which confirmed Brown's account that he left her apartment around 9:00 P.M., and admitted he killed Dwelle after first stealing his money belies the claim that that this was suppressed favorable information.

4. Charlene Wright's statements to law enforcement – The trial court found that Wright's testimony did not undermine Brown's credibility nor motivation for cooperating with the police or disclosing Wright's name (PCR.8 1576) Given that, the trial court found the "evidence was not material, and it is unreasonable to conclude disclosing Ms. Wright's statements to Defendant would have changed the outcome of the proceedings." (PCR.24 1576). While Morrison recounts Wright's statement to the police and asserts no report was made of this contact which included the fact she had talked to Morrison in Marietta on the

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to Short to be included in the report.

evening of the murder, Morrison does not explain how the trial court erred in rejecting the *Brady* claim. *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived). *See Cooper v. State*, 856 So.2d 969, 977 n.7 (Fla. 2003); *Roberts v. State*, 568 So.2d 1255 (Fla. 1990).

Alternately, Wright testified that she had seen Morrison on the night of the murder and that he spoke to her. (PCR. 3329-30) To the extent that Wright's account is credited, Morrison cannot show that the witness' information was suppressed as he would have known she was a potential witness and could have investigated her.

5. Morrison's drug use at time of arrest – The trial court found that the allegation of Morrison's drug use at the time of his arrest was not suppressed as Morrison would have known he was smoking crack at the time of his arrest. While Morrison references Timm's evidentiary hearing testimony for support, he does not challenge the trial court's finding nor does he include it in his prejudice analysis. For completeness, Morrison cannot claim there was a suppression of his crack use, as arguably if he were using crack at the time of his arrest, he would have known it. There is no Brady violation when the defendant knew

of the alleged evidence or could have found it with due diligence. *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000) (reasoning that "[a]lthough the "due diligence" requirement is absent from the Supreme Court's most recent formulation of the *Brady* test [in *Strickler*], it continues to follow that a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.") Second, Timm's testimony is in direct contradiction of Morrison's sworn testimony from the suppression hearing as to the last time he smoked crack cocaine and has no bearing on the confession, guilt, or penalty.[12]

6. Prejudice – Morrison has failed to prove that any of the trial court's rulings were erroneous as explained above. Where the individual allegationa are unproven, then there is no basis for a cumulative analysis for materiality as only suppressed favorable evidence enters that calculus. *Bagley*, 473

[12] January 10, 1997 at about 2-3:30pm, the time Timm claimed Morrison was smoking crack, is inconsequential to either the January 8, 1997 crime or Morrison's statement to police on January 11, 1997 at 2:55am (ROA.8 1290-91; ROA.13 509, 534, 561; ROA.14 640-42, 648, 653-54; ROA.8 1405), especially where there was already evidence of Morrison's crack use (ROA.8 1272 1292, 1359) and all the other evidence indicates Morrison was not under the influence when he gave the statement (ROA.8 1268, 1315-17, 1339-40) Further proof rests on Morrison's assertions that he recalled details of the police questioning (ROA.8 1392-1410), and did not claim he was under the influence at the time (ROA.8 1409-10).

U.S. at 675. However, assuming this Court reaches the prejudice prong of the Brady claim, Morrison focuses on the un-used condom and alleged pressure Brown perceived to undercut her veracity. Again, it is important to remember that Brown was not called to testify during the evidentiary hearing. As such, it has not been shown what she felt in response to her police contact, whether she had a sexual relationship with Dwelle, whether she planned to have sex with him that night, that her testimony was influenced in the least, or that it was untruthful. As the trial court concluded in part, Morrison's allegation with respect to the condom and Brown were "rank speculation." (PC$R.8 1571). The condom was not favorable, exculpatory evidence.

Additionally, Morrison has not made the link that the condom and Brown's alleged feeling of pressure to cooperate developed favorable evidence for Morrison. He did not show that the condom meant Brown and Dwelle were having or planning to have sex and that she killed him. Likewise, he failed to show that whatever pressure Brown may have felt caused her to testify untruthfully or that she was in fact the one who killed Dwelle. The State reincorporates its discussion above about the alleged threats to show that confidence in the outcome has not been undermined. The *alleged* Brady material does not undermine in the least Morrison's confession where he concurred that he left Brown's apartment near 9:00 PM, stole money from Dwelle, got

into a knife fight with the victim when the theft was discovered, resulting in Dwelle being killed, and Morrison fleeing and hiding the murder weapon. As the trial court found, "[t]here is no evidence of Officer Richardson threatening Ms. Brown so as to lead her to testify untruthfully at Defendant's trial." As such, Morrison has not carried his burden under *Brady v. Maryland*.

Morrison also asserts that his Brady claim evidence must be considered in light of postconviction testimony that he was seen in Marietta on the evening of the murder, that he has mental health issues impacting the reliability of his confession and that the murder weapon contained DNA from an unidentified person, not Dwelle or Morrison. (AB/CIB at 120). Although Morrison does not discuss this more than to suggest an analysis should consider this evidence,[13] the State reincorporates its analysis from its initial brief pages 53-62. Additionally, Morrison's sworn testimony from the suppression hearing was that he did not confess, and he did not testify at trial or the evidentiary hearing recanting his prior testimony, as such, his mental abilities and argued in Issue I of this appeal (IB) and

[13] Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived). See Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990)

Issue V below, should have no impact or place in this analysis. Likewise, the fact that Dwelle's knife may have had DNA from another person on the handle does not undercut Morrison's confession as to how Dwelle was killed. Relief was denied properly.

ISSUE V

MORRISON FAILED TO ESTABLISH NEWLY DISCOVERED EVIDENCE OF DNA RESULTS OR THAT BROWN WAS NOT TRUTHFUL (restated)

It is Morrison's claim that the trial court erred in determined that the newly discovered evidence claim involving DNA testing of the murder weapon and the offered hearsay testimony that Brown had said she had lied during the trial. The DNA testing is not newly discovered as Morrison could have asked for the handle of Dwelle's knife to be tested at the time of trial, but did not. Likewise, Brown was not called at the evidentiary hearing, thus, there was no testimony supporting the contention that her trial testimony was not truthful. The trial court's rejection of this claim should be affirmed.

A. STANDARD OF REVIEW

This Court has stated:

> To obtain relief based on a claim of newly discovered evidence, a defendant must meet two requirements. First, the evidence must not have been known, and it must appear that the evidence could not have been known through the use of due diligence. *See Jones v. State*, 709 So.2d 512, 521 (Fla. 1998). Second, the newly discovered evidence must be of such a nature

> that it would probably produce an acquittal on retrial. *Id.* Newly discovered evidence satisfies the second prong of this test if it weakens the case against a defendant so as to give rise to a reasonable doubt as to his or her culpability. *Id.* at 526. In determining whether a new trial is warranted, the reviewing court must consider all newly discovered evidence which would be admissible, and evaluate the weight of both the newly discovered evidence and the evidence which was introduced during trial. *See id.* at 521. This determination includes an evaluation of whether: (1) the evidence goes to the merits of the case or constitutes impeachment evidence; (2) the evidence is cumulative to other evidence presented; (3) there are any inconsistencies in the newly discovered evidence; and (4) the evidence is material and relevant. *Id.*
>
> When a postconviction court rules on a newly discovered evidence claim after an evidentiary hearing, this Court will affirm those determinations that involve findings of fact, the credibility of witnesses, and the weight of the evidence provided they are supported by competent, substantial evidence. *Melendez v. State*, 718 So.2d 746, 747–48 (Fla. 1998); *Blanco v. State*, 702 So.2d 1250, 1251 (Fla. 1997). As with other postconviction claims, this Court reviews the postconviction court's application of the law to the facts *de novo*. *Hendrix v. State*, 908 So.2d 412, 423 (Fla.2005).

Brooks v. State, 175 So.3d 204, 231 (Fla. 2015).

B. TRIAL COURT'S ORDER

1. DNA testing of knife – The trial court recognized that prior to the postconviction DNA testing of the murder weapon, only the knife blade had been tested for DNA evidence. The trial court noted Dr. Heinig's postconviction testimony that in the late 1990's-early 2000's, it was routine practice for a knife handle to be tested for DNA. (PCR.8 1620) Dr. Heinig's

testing of the handle revealed DNA from an unknow person and excluded Dwelle and Morrison as contributors. (PCR.8 1620). The trial court recognized that Eler's trial strategy was to emphasize the lack of physical evidence linking Morrison to the crime taking into account that only Dweele's blood had been found on the knife blade. (PCR.8 1620) It was the trial court's conclusion that the DNA found in 2013 was not newly discovered because the knife was available to Morrison at trial.

C. ANALYSIS

The trial evidence established PCR DNA testing was conducted on the knife Morrison led the police to following his confession, a bloody towel found at the crime scene, and a Styrofoam cup from which Morrison drank. Testing revealed Dwelle's DNA was on the knife and towel, but neither Morrison's DNA nor finger prints were found on the knife. Charlotte Allen explained that the knife handle had a rough surface and it was difficult to recover prints from that surface. The latent prints she recovered were of no value. (ROA.14 687-89, 694 724-26, 759). Dr. Tracy reported there was a 1 in 3200 chance another person could be the donor of the DNA on the knife and towel. (ROA.14 694, 766)

Dr. Heinig, at the 2015 evidentiary hearing, testified about her testing of the knife. (PCR.13 2603-14) Some samples revealed mixtures of more than one donor and some could not

eliminate a female as one of the donors. (PCR.13 2603-40). Although the knife was available to Morrison pre-trial, he did not ask for testing of other areas of the knife to be tested. The fact that he did so in 2013 does not establish newly discovered evidence. *Cf. State v. Thomas*, 570 So. 2d 1023, 1026 (Fla. 3d DCA 1990) (finding defendant does not have valid claim of newly discover DNA evidence where he could have had the item tested pre-trial) As such, Morrison has not carried the first prong of the test; he has not shown that he could not have discovered the DNA with due diligence.

The DNA testing at trial was PCR DNA testing. Morrison did not establish that such testing in 1997 would not have produced the results obtained during postconviction relief. As such, neither *Wyatt v. State*, 71 So.3d 86, 100 (Fla. 2011); *Preston v. State*, 970 So.2d 789, 798 (Fla. 2007); or *Hildwin v. State*, 951 So.2d 784, 788-89 (Fla. 2006) support a finding that Morrison's 2013 testing qualifies as newly discovered evidence. The trial court's focus on the fact that Morrison knew of the evidence and what portion of it had been tested is the precise question. Morrison has not shown that the he could not have discovered the DNA on the knife handle back then. Merely because a new area of testing was granted and results developed does not transform the evidence into "newly discovered" as defined by Jones.

Moreover, Morrison has not come forward with any evidence

the DNA belonged to Brown, thus, Morrison has not shown that had this information been known he would have been acquitted. Dwelle collected knives which he kept in his room. (ROA.12 377-79). Morrison has not shown that another female did not innocently leave her DNA on that knife. The fact that Morrison's DNA was not found on the handle of the knife is merely cumulative evidence to what the jury knew, namely, Morrison's DNA was not on the knife. Again, Morrison's suggestion on postconviction was that Brown committed the murder, but he neglected to test for her DNA. Without that sort of evidence, the evidence remains that Morrison had the opportunity to kill and confessed to the killing.

The jury knew Morrison's DNA was not found on any of the forensic items tested. However, he confessed and the jury convicted. Where additional testing is done and provides essentially the same information as produced at trial, i.e., the Morrison's DNA was not on the murder weapon, the defendant has failed to carry his burden under *Jones* as the DNA does not call into question the confession and does not add any information that the jury did not know. Relief was denied properly.

Turning to the suggestion Brown was untruthful at trial, Morrison attempted to prove this claim with hearsay evidence of an allege conversation Timm had with Brown regarding her truthfulness at trial. The trial court sustained the State's

hearsay objection. (PCR.8 1621). Morrison put on no evidence that Brown was not truthful at trial; Morrison did not call Brown during the evidentiary hearing. As the record stands, Brown has not recanted her testimony nor is there admissible evidence that she was not truthful. As this Court recognized in Armstrong v. State, 642 So.2d 730, 735 (Fla. 1994), the "[r]ecantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial" and that recanted testimony is exceedingly unreliable. Here, Morrison has not even met his initial burden of proving the Brown lied or was no longer standing by her sworn testimony. Relief was denied properly.

The State reincorporates its discussion above with respect to the condom and alleged pressure Brown felt to cooperate with the police. Even if these factors are included with the DNA and lack of recantation cumulative analysis, Morrison has not shown he would be acquitted on retrial. This Court should affirm the denial of relief.

ISSUE VI

THE TRIAL COURT'S DETERMINATION THAT MORRISION FAILED TO PROVE INTELLECTUAL DISABILITY IS SUPPORTED BY THE RECORD (restated)

It is Morrison's position that the trial court should have found him intellectually disabled ("ID") under *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Hall v. Florida*, 134 S.Ct.

1986 (2014). He takes issue with the trial court's determination that he failed to carry his burden of proving ID as he did not show manifestation before age 18. Morrison points to Dr. Eisenstein's opinion of ID and *Oats v. State*, 181 So.3d 457 (Fla. 2015). (AB/CIB at 128). *Oats* does not support reversal here and the trial court took into account the United State's Supreme Court's ruling in Hall. Relief was denied properly.

A. STANDARD OF REVIEW

> "Florida law includes a three-prong test for intellectual disability as a bar to imposition of the death penalty." *Snelgrove v. State*, 107 So.3d 242, 252 (Fla.2012). A defendant must establish intellectual disability by demonstrating the following three factors: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. *See Hurst v. State*, 147 So.3d 435, 441 (Fla. 2014) *rev'd, Hurst v. Florida*, ---- U.S. ----, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016); §921.137(1), Fla. Stat. The defendant has the burden to prove that he is intellectually disabled by clear and convincing evidence. *Franqui v. State*, 59 So.3d 82, 92 (Fla. 2011); § 921.137(4), Fla. Stat. If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled. *Nixon v. State*, 2 So.3d 137, 142 (Fla. 2009). In reviewing intellectual disability determinations, this Court has employed the standard of whether competent, substantial evidence supports the trial court's determination. *See Cherry v. State*, 959 So.2d 702, 712 (Fla. 2007); *Brown v. State*, 959 So.2d 146, 149 (Fla. 2007) ("This Court does not reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses."). "However, to the extent that the [trial] court decision concerns any questions of law, we apply a de novo standard of review." *Dufour v. State*, 69 So.3d 235, 246 (Fla.2011).

> In *Hall v. Florida*, --- U.S. ----, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), the United States Supreme Court invalidated Florida's interpretation of its statute as establishing a strict IQ test score cutoff of 70. Hall explained that "[a]n IQ score is an approximation, not a final and infallible assessment of intellectual functioning," and "[i]ntellectual disability is a condition, not a number." Id. at 2000, 2001. Accordingly, "[the Supreme Court] agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 2001.

Salazar v. State, 188 So.3d 799, 811–12 (Fla. 2016).

B. TRIAL COURT'S ORDER

After discussing the evolution of the law related to ID claims from *Atkins* to *Hall* including *Haliburton v. State*, No. SC12-893, 2015 WL 710683 (Fla. Feb. 5, 2015), the trial court applied the *Hall* dictates to his analysis of the facts developed during the evidentiary hearing. The trial court concluded:

> Notably, Haliburton has an IQ score of 74, which falls within the "70 and 75 or lower" range that, according to Hall, warrants consideration of hat defendant's adaptive functioning skills. In the instant case, however, the medical experts report Defendant's IQ scores are 78 (1976); 78 (1997); 79 (2008); and 70 (2012). (E.H., Jan. 13, 2015 Defense Exhibit 27; E.H., Jan. 14, 2015 at 537, 738-39, 741-42.) Although Defendant's score of 70 is certainly within the range of subaverage intellectual functioning, Defendant did not achieve this score until he was more than forty-years old. The only score that satisfies the third prong of intellectual disability – onset before age of eighteen – is Defendant's score in 1976 when he was eight-years old.
>
> This Court is constrained by caselaw and statute not

> to declare Defendant intellectually disabled despite significant deficits in adaptive functioning.[14] Defendant is not entitled to relief on Claim V.

(PCR.8 1626). However, the trial court held its ruling would not foreclose Morrison from raising the issue on re-trial. (PCR.8 1626 n.43)

C. ANALYSIS

The trial court properly determined that Morrison had not satisfied the third prong of the ID claim. That finding is supported by substantial, competent evidence. The State disagrees however with the finding of adaptive functioning deficits as Morrison's school records, DOC materials, testing completed, and witness accounts of Morrison's ability and history given at time of trial and the State's postconviction expert, Dr. Prichard, establish that Morrison has not met the criteria for ID as set forth in Rule. 3.203 Fla. R. Crim. P. and section 921.137, Fla. Stat. (2014).

Section 921.137(1) defines intellectual disability as "significantly subaverage general intellectual functioning,

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[14] In the event that this Court agrees that a new trial is warranted and that Morrison may again raise ID as an issue, the State likewise should be able to bring forward evidence countering the claim. As provided in its initial brief and again here, much of what Morrison's mother, father and other offered at trial as to Morrison's capabilities and helpfulness have been altered/modified during the postconviction evidentiary hearing held some 17 years after Morrison was sentenced to death. The trial court failed to factor in the change in testimony.

existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18."[15]

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[15] This Court has explained:

> Both Florida law and our rule state that the exception to the death penalty applies to a defendant who "is mentally retarded" or "has mental retardation." §921.137(2), Fla. Stat. (stating no person may be sentenced to death "if it is determined in accordance with this section that the defendant has mental retardation"); Fla. R.Crim. P. 3.203(e) (providing for an evidentiary hearing to consider "the issue of whether the defendant is mentally retarded"). Thus, the question is whether a defendant "is" mentally retarded, not whether he was. Both the statute and our rule define mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." § 921.137(1), Fla. Stat. (2005) (emphasis added); Fla. R.Crim. P. 3.203(b). Jones does not dispute that the intellectual functioning component must be based on current testing. . . . What Jones argues is that the second prong is concerned solely with an individual's adaptive behavior as a child under age 18. The legal definition, however, states that the intellectual functioning component must "exist[] concurrently with" the deficient adaptive behavior. The word "concurrent" means "operating or occurring at the same time." Merriam Webster's Collegiate Dictionary 239 (10th ed. 2001). Jones's analysis would require us to ignore the plain meaning of the phrase "existing concurrently with" that links the first two components of the definition. The third prong-"and manifested during the period from conception to age 18"-specifies that the present condition of "significantly subaverage general intellectual functioning" and concurrent "deficits in adaptive behavior" must have first become evident during childhood.

Jones v. State, 966 So.2d 319, 326 (Fla. 2007). *see Snelgrove v. State*, 107 So.3d 242, 252 (Fla. 2012); *State v. Herring*, 76 So.3d 891, 895 (Fla. 2011).; § 921.137(4), Fla. Stat. (2009).

Dr. Taub conducted a functional clinical interview with Morrison and administered the WAIS-IV and TOMM (Test of Memory Malingering). Morrison obtained a full scale score of 70 on the WAIS-IV. Dr. Taub did not feel Morrison was masking anything and opined that Morrison met the criteria for the first prong of ID (PCR.13 2658-59; PCR.14 2691, 2695, 2733, 2783). During the evaluation, Morrison was courteous and engaged; he was groomed properly and presented appropriately. (PCR.14 2754-55, 2760) Morrison's evaluation was the only time Dr. Taub administered an IQ test. (PCR.14 2808)

In 2008, Dr. Eisenstein, who always is called by the defense, conducted neuropsychological testing and interviewed family/friends (PRC.15 2934, 2999-3000). He administered the WAIS-III and obtained a full scale score of 79. (PCR.15 2978-79). He also gave the Texas Functioning Living Scales to Morrison for an assessment of adaptive functioning skills. The resulting score, Dr. Eisenstein offered, showed mild to moderate impairment; Morrison suffered deficits in **social interactions**;[16] he was gullible, let people take advantage of him, took the

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[16] The record refutes these findings and Morrison's family all related how he did things for others in the neighborhood, cared for his grandmother, went to the store for friends/family, took his children to the park and beach.

blame for others, did not understand the rules of football,[17] and he abused drugs (PCR.15 3006). Deficits in the **conceptual area** of adaptive function were found by Dr. Eisenstein. In support he pointed to Morrison's academic record/failings (PCR.15 3007-10) Other deficits cited were Morrison's organic brain damage ("OBD") limiting his cognitive flexibility and limitations as to planning. (PCR.15 3011). With respect to the practical area, Dr. Eisenstein found deficits related to Morrison's ability to handle his finances; Morrison could not pay his own bills, go to the store, make out a cheque, organize his clothes,[18] or make a check. (PCR.15 3010-12). Even though Morrison was not placed in special education because his test scores were too high for him

[17] This was a curios finding by Dr. Eisenstein in light of the fact and the penalty phase testimony was that Morrison taught the neighborhood children baseball. (ROA.17 1206) Surly, the fact that Morrison may not know the complexities of football, with its formations and limitations on what certain players are permitted to do, does not render him deficient in the social aspect of adaptive functioning especially in light of his teaching skill in the realm of baseball.

[18] Again this is a change from the penalty phase testimony where Morrison was doing laundry, dressing his siblings, cooking for them, and walking his sister to school. (ROA.16 1127-33; ROA.17 1173, 117880; 1198, 1199-1206, 1208-13) The changes in the pictures the witnesses painted at the penalty phase to the postconviction proceeding are startling. Now Morrison is under a death sentence and the issue is intellectual disability to escape his sentence requires showing him incapable of caring for himself, interacting with others, and adapting to his environment for example. It is advantageous for him to have his family paint a bleaker picture of his functioning skill than they offered at the penalty phase.

to qualify, and he had no difficulty understanding Dr. Eisenstein's test instructions, Dr. Eisenstein found ID.

Dr. Krop,[19] confirmed his penalty phase testimony and affirmed Morrison got a 78 IQ on the WIAS-R given by Dr. Risch in 1997 (SPCR.1 32, 36, 58); and the 2013 WAIS-VI yielded a 70 IQ. (SPCR.1 57-59) In 1997/98, Dr, Krop did not evaluate Morrison for ID, however, he found some deficits.[20] The IQ results obtained by Dr. Krop were 76 verbal (5th to 9th percentile); 87 performance (16-25th percentile); and 78 full

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[19] Merely because Morrison has found a new mental health doctor to opine that ID exists does not mean that Dr. Krop's opinion was incorrect or that Eler could not have relied on Dr. Krop's opinion. *See Sexton v. State*, 997 So.2d 1073, 1085 (Fla. 2008) (finding a postconviction mental health expert who disagrees with "the extent or type of testing performed, or the type of mitigation presented" does not render trial counsel ineffective automatically); *Stephens v. State*, 975 So.2d 405, 415 (Fla. 2007) (reasoning "[b]eing able to secure an expert witness to provide an opinion as to mental health mitigation during postconviction proceedings, which arguably could have been helpful to [the defendant], does not, in and of itself, render trial counsel's performance ineffective."); *Peede v. State,* 955 So.2d 480, 494 (Fla. 2007) (same). *See also*, *State v. Sireci*, 502 So.2d 1221, 1223 (Fla. 1987). "Even if the evaluation by Dr. Hercov, which found no indication of brain damage to warrant a neuropsychological workup, was somehow incomplete or deficient in the opinion of others, trial counsel would not be rendered ineffective for relying on Dr. Hercov's qualified expert evaluation" *Darling v. State*, 966 So.2d 366, 377 (Fla. 2007).

[20] Dr. Krop found only some deficits, not OBD; as was no significant neurological impairment and no neurological disease. Morrison had a 78 IQ (5th to 9th percentile), and read at the high school level, although Morrison had limited intellectual ability. (ROA.17 1221-22, 1225-27; PCR.18 3538-39, 3554 3555-56). In fact, Dr. Krop opined that IQ score obtained by Dr. Eisenstein did not fall within the intellectual disabled range. (PCR.18 3538-39, 3554 3555-56)

scale (5th to 9th percentile. (SPCR.1 59-60, 75) In 1998, Morrison would not have been classified as ID and Dr. Krop would not have found ID then. The 1998 score would have been a fairly reliable measure of Morrison's functioning at the time. (SPCR.1 76-77). With respect to Dr. Eisenstein's 2008 testing using the WAIS-III, Morrison obtained a 79 full scale score and again, would not have been classified as ID. Dr. Eisenstein's 2008 test results were close to Dr. Krop's 1997 results; Morrison fell within the 8th percentile. (SPCR.1 78-83, 91).

Refik Eler affirmed that throughout his representation, Morrison communicated well with the trial court through letters, and understood the court process; he gave Eler no reason to be concerned about mental retardation or disease. Had Morrison's actions caused Eler concern, he would have called Dr. Krop. (PCR.12 2439; PCR.20 3815-17, 3820). Similarly, private investigator, Ken Moncrief, testified he had no problem speaking with Morrison and Morrison did not cause Moncrief any concern regarding mental issues. (PCR.17 3213)

Dr. Prichard warned while loved ones who should know the defendant best may be the least reliable or objective witnesses as they may be biased. (SPCR.1 151-52). With that caveat in mind, the record shows that Joseph Turner, a convicted felon 12 times over offered his impression of Morrison whom he knew from growing up in the same neighborhood. Turner saw children making

fun of Morrison; found Morrison easily influenced, slow, and a follower. Morrison never lived on his own and Turner did not believe Morrison capable of taking care of himself. However, it was not until Morrison was 17 or 18 that Turner started associating with him and using drugs together. (PCR.13 2547-49, 2553, 2556, 2558)

School educator, Irving Huffingham, testified Morrison had been recommended for testing. His test results put him into the top end of the borderline range of mental retardation; however, Morrison did not qualify for special education classification or any special treatment. Morrison was not even assigned on a part-time basis to special education classes. (PCR.13 2576-80, 2584, 2586) There were multiple retentions noted in the school records indicating an academic problem. (PCR.13 2590).

Tangy Allen,[21] the mother of two of Morrison's children never knew him to drive a car. He was good with children and helped her around the house, however once Morrison put beer in

[21] Allen's testimony should be read in light of the trial testimony where the lay witnesses spoke of Morrison taking his children to the park/zoo, running to the store for neighbors, helping with yard work, and caring for his siblings and his sick grandmother. As this Court will recall, much was made of Morrison's drug abuse and Eler testified that one employer wrote a letter saying Morrison was a bad employee who stole checks. Given Morrison's drug use and theft from his employer, it would not be unexpected he would not have a bank account, would have trouble finding employment and may not care for a child properly while in a drunken/drug induced state.

the baby's bottle. (PCR.14 2815-18, 2824) Allen characterized Morrison as having another child in the house; he could not be sent to the store. Allen paid the bills; Morrison did not have any concept of having a bank account. She helped him with employment applications for day labor. Morrison was limited on the tasks he was able to do. Yet, according to Allen, Morrison constantly writes to her; she receives two letters from him weekly.[22] (PCR.14 2819-21, 2823-24, 2859-60) **Allen admitted she would do anything she could to help Morrison** (PCR.14 2850), so this testimony should be viewed with skepticism.

Thrice convicted felon and drug user, Terry Heatly, averred he knew Morrison only on drugs. With that admission, Heatly claims Morrison's personality was very mentally slow and he was a follower It was Heatly's opinion Morrison did not have the capability of caring for himself and he never knew Morrison to have a driver's license. (PCR.14 2867-71; PCR.15 2872-76) Surely, judging Morrison's abilities while he was in a drug induced state is not the optimal method of assessing adaptive functioning skill. Likewise, Heatly's assessment is of little value as he admitted he made his assessment while he was on drugs.

Gillis Louden ("Gillis") could not be located at the time

[22] This is hardly consistent with one alleged to have scholastic skills of a third-grader.

of the trial in spite of Eler's and his investigator's best efforts. On collateral review, Gillis offered her opinion that even as an adult, Morrison has the mind of a 15 to 16 year old. (PCR.16 3170) As set forth below, Dr. Prichard explained that those with ID would present at five to seven year olds. (SPCR.1 136, 138, 140-41) Gillis' assessment cuts against an ID finding.

Georgia Morrison[23] modified, if not outright contradicted, her penalty phase testimony. She denied her son could cook or do laundry. After dropping out of school because of his grandmother's illness, Morrison's responsibilities were merely to watch his grandmother, give her medications Georgia set out, and to heat/serve the food Georgia prepared. (PCR.17 3289, 3301)

Willie Morrison, ("Willie"), Morrison's younger brother and thrice convicted felon reported that as a child, Morrison depended on others for help. Willie helped his older brother with homework. Morrison needed aid with simple chores such as raking the yard, doing dishes, and cleaning his room. According to Willie, on occasion, Morrison would forget why he was sent to the store. Morrison was a follower (PCR.17 3553-57) Paula Wilson Morrison's younger sister related that Morrison had left the stove on once and almost burned down the house. He could follow simple instructions. (PCR.17 3391-92)

[23] Georgia had misinformed Dr. Krop when she reported that Morrison had been in special education when in reality Morrison was merely placed in an alternative school. (PCR.17)

Since 1996, State's Expert, Dr. Prichard has conducted a few thousand ID assessments. Those person's with ID are in the lowest two percentile of the population; those functioning in the 5th to 10th percentile, like Morison, are not ID. A person with ID usually functions at the second to fourth grade level/five to seven years old. On December 3, 2014, Dr. Prichard evaluated Morrison and reviewed records from the school, DOC, and trial along with other materials. Morrison presented well and answered Dr. Prichard's questions even though Morrison was a little guarded. (SPCR.1 126, 138, 140-43). The most important set of information came from the school records (Def. Ex 27 – 28 – PCR.25 891-96; PCR.26 897-902). Morrison was not placed in a special education program even though he was referred and tested. In the 1976 referral when Morrison was eight years old, he attained a full scale IQ of 78 on the Stanford-Binet IQ test. The special education ("ESE") referral answered the prong of the ID analysis of whether there is sub-average intellectual functioning. According to Dr. Prichard, the Stanford-Binet is a full test and is a good assessment tool for the extremes of IQ analysis.[24] It was normed in 1973, and Morrison took it in 1976. The 78 IQ was in the high borderline range. For Dr. Prichard, this data point, the Stanford-Binet result, was the most

[24] In 1976, in order to be found ID, a score of 68 on the Standford-Binet was required. Morrison attained a score of 78.

reliable fact in this case. Even when the standard error of measurement ("SEM") is taken into account, Morrison's IQ range is 74 to 82/84 and above the two standard deviations mark (SPCR.1 143-48, 159) Dr. Prichard noted there are a lot of data points in this case and they all converge to a "convergent validity," meaning data points from different sources are reporting the same information. For Dr. Prichard, the question here was resolved, absent Dr. Taub's testing, as all of the factors that play into ID are consistent. The testing by the school and Drs. Krop and Dr. Eisenstein's are consistent; Dr. Taub's test is the outlier. (SPCR.1 151)

Morrison's five felony convictions yielded another valuable data point for Dr. Prichard. Having his first contact with the judicial system as a juvenile and having gone to prison multiple times, it was significant that Morrison had been seen by multiple professionals and none found ID. These professionals were trained to deal with persons of all intellectual abilities and get the person into the proper prison setting/program. Many professionals looked at Morrison, assessed him for placement, yet, none flagged him with special needs. (SPCR.1 153-54)

Another point significant to Dr. Prichard from the school records was the fact Morrison was given standardized achievement tests yielding national percentiles. Morrison's scores ranged from the 8th to the 30th percentile when he was 13 years old and

from the 3rd to 35th percentile when he was 14. That was very relevant as Morrison did not fall into the lowest two percentiles. (SPCR.1 159-60). Dr. Prichard noted Dr. Krop's testing put Morrison within the 5th to 9th percentile. The achievement testing is consistent with Dr. Krop's findings. Also, Dr. Krop's February, 1997 report (Def Ex 35; PCR.26 931-34) was consistent with Morrison being borderline functioning and consistent with the data from the school and Dr. Eisenstein. (SPCR.1 160-61)[25]

Another test of import to Dr. Prichard was the Wechsler

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[25] Dr. Prichard explained:

> So the IQ is a 78, which is exactly the IQ score on a different measure that he was administered at eight years old. It was also a 78. He was also administered the Wide Range Achievement Test, Third Edition. That's a screening measure, and academic screening measure. I mean Dr. Taub said that it's not a good measure. Well, it's not purported to be a comprehensive academic measure. And keep in mind that both Dr. Krop's office and Dr. Eisenstein used the measure. There's nothing wrong with the measure. You just can't over interpret it and you have to understand what it's for.
>
> What it's for is it's a screening measure to determine basic academic ability. So if you get, for example, a 67 on this achievement - - this wide range achievement test, it suggests the possibility of some deficit that you may want to look into further. However, if you get what Dr. Krop got and what Dr. Eisenstein got, which was reading score of 89 at the high school level and a spelling score of 81, you know, that says there is no deficit here.

(SPCR.1 160-62)

Memory Scale. "Memory is part of intelligence. Nobody has ever learned anything that they did not remember." Dr. Krop reported memory scores ranging from 79 to 93 which again places Morrison in the borderline to low average range. This is further evidence of convergence validity. (SPCR.1 162)

Dr. Prichard found Dr. Eisenstein's data important as a malingering scale had been given. This showed that the information was consistent with Dr. Krop's data, and consistent with the school data. Dr. Prichard noted that the 78 IQ was found when Morrison was eight years old; the 78 IQ was found in 1997 when Morrison was 29 years old; and a 79 IQ in 2008 when Morrison was 40 years old. Everything is consistent/in line Dr. Prichard noted. (SPCR.1 163-64). Also interesting to Dr. Prichard was the fact the numbers attained on the WAIS-IV, when considered individually, did not indicate ID, in fact, those numbers of 80, 88, 73, and 86 were "solidly consistent" with the other results. From the time Morrison was eight until he was 40, the tests were consistent. When both Beta-2[26] tests (of 90 in 1993 and 94 in 1993) are factored into the analysis, more convergent validity was found by Dr. Prichard. (SPCR.1 164-66)

The results obtained from Morrison's WRAT-III (St. Ex 2;

[26] Beta tests are used by DOC as screening tests to identify quickly whether the person tested may be ID requiring special placement. (SPCR.1 166) Dr. Prichard acknowledged that the Beta test results could not be used to say a person is not ID.

PCR.30 1527-30), WAIS—III (St. Ex 3, Weschler Memory Scale (St. Ex 4 and the Texas Functional Living Scale; PCR.30 1531-66) was further corroboration for Dr. Prichard that Morrison was functioning at a high borderline range which was consistent since he was eight years old. (SPCR.1 166-67). Of significance for the State's expert, Morrison could read words such as "inefficacious," "factitious," "regime,", "longevity," and "predilection." Dr. Prichard administered hundreds of WRAT tests to those with ID, and such person do not read that well. A person with ID does not read at the high school level as Morrison was able to do. (SPCR.1 168-69)

Both Dr. Eisenstein and Dr. Taub administered the TOMM (Test of Memory Malingering)[27] but unlike Dr. Eisenstein, Dr.

[27] Dr. Prichard explained the TOMM:

> It's a malingering scale. Okay? Each trial test contains 50 items. The expectation on this test is that on trial 32 and trial 3 that the person will achieve above a 45. When they were developing his test normal people, in other words, normal people who didn't have dementia or didn't have traumatic brain injury or didn't have asphasia, they scored a perfect 50 on trial 2 or a 49 on trial 2, 95 percent of the time. There was only one normal that scored below 45. Therefore the cut-off score for malingering is below 45. So if you get a score below 45, it suggests that the person was not putting forth maximum effort.
>
> Interesting point is traumatically brain injured individuals, even if they have legitimate brain injury and there were administered this instrument, there were 48 of them in the normative sample, 44 of them scored 45 or above on trial 2. So it's a very robust piece of information for us as clinicians to identify malingerers. (SPCR.1 171-73)

Taub assumed Morrison was ID, and did not administer all three sub-tests. According to Dr. Prichard, the mistake Dr. Taub made was stopping the TOMM when Morrison scored a 39 and 44. Those scores fell below the 45 cut-off score which indicated malingering. Later Morrison got a 70 on the WAIS-IV. On the TOMM given by Dr. Eisenstein, Morrison got a 46 and two perfect scores of 50 and a 78 IQ on the WAIS-R administered afterward (SPCR.1 171-73)

Answering Dr. Taub's criticism of the WRAT, Beta and Stanford-Binet, Dr. Prichard explained that such criticism is for academics, but for clinicians, those tests have their function. The Beta may have a more limited purpose, but it has a purpose nonetheless. (SPCR.1 172) Also, Dr. Prichard rejected Dr. Taub's application of the strict +/- 5 points for the SEM. Such is no longer the accepted practice as it is now recognized there is a "regression toward the mean" that must be factored. As such, the 95% confidence interval for the WIAS-IV IQ of 70 is actually 67 to 75. This new factoring was provided in the WAIS-IV manual, the book used by Dr. Eisenstein and important to those administering WAIS tests (SPCR.1 174-75) Dr. Prichard disagreed with Dr. Eisenstein's conclusion that the 2008 testing supported a finding of ID. Dr. Prichard opined that all of Dr. Eisenstein's data supports a finding of "borderline low average

and average." Also, having heard Dr. Krop's evidentiary hearing testimony, Dr. Prichard felt it was "probably the third most useful, behind school and Eisenstein" "because it says the same thing as everybody else." That data offered convergent validity. (SPCR.1 176-77)

Testimony from friends/family presents a double-edged sword for Dr. Prichard. Those persons, friends/family, who should know the person best, come to the case with biases in favor of their loved one which in turn calls into question the reliability of their accounts. (SPCR.1 151-52) For Dr. Prichard, in the penalty phase, Georgia Morrison provided good information on her son's adaptive functioning. When assessing ID, the evaluator may get data from what is said and what is not said. (SPCR.1 152-53). Here, the trial record and penalty phase, when ID was not at issue, evinced for Dr. Prichard that Morrison gave guidance to his younger sister. That sister testified Morrison helped her growing up and helped the family. Morrison dropped out of school to help his grandmother.

At trial, Morrison's mother reported Morrison had dropped out of school and was helpful; he cooked, helped with his siblings, dressed them, took the children to the store, and shopped. Later, Morrison took his own children shopping. (SPCR.1 155) The picture Georgia painted of him was not one with having adaptive deficits; rather it was one where Morrison

had no adaptive deficits. An ID person has no personal and social sufficiency; an ID person cannot function independently. Such a person needs constant care. ID persons do not care for others, but are cared for by others. The 1998 penalty phase record showed Morrison was a helpful/resourceful person. (SPCR.1 155-56) With respect to Tangy Allen, the fact Morrison was not the primary caregiver did not reveal much to Dr. Prichard. What struck him was the social psychology of their relationship. Usually persons with dissimilar functioning levels do not "pair up." In his 18 years of practice, Dr. Prichard never saw an ID person marry a significantly smarter individual. From listening to Allen testify, it was clear she was likely of average intelligence; she was one of the most articulate lay witnesses. (SPCR.1 157-58)

Also of import in Dr. Prichard's assessment was the fact Morrison worked for a landscape company for a year, at a ship yard, as a day laborer, at a steel company, and in construction. Morrison had on occasion traveled to South Carolina to do asphalt work. He sought out work "and was doing things consistent with borderline IQ and low average IQ." (SPCR.1 178). Although Dr. Prichard thought the adaptive functioning question was moot, because Morrison could not show a disability before 18 years of age, he noted that the record negated adaptive

functioning deficits.[28] As Dr. Prichard noted, the record indicated Morrison had an $800/per day drug habit and "you have to be pretty resourceful to support" that habit resorting to criminal behavior to get enough cash, which Dr. Prichard thought the record showed. Dr. Prichard agreed that the fact Morrison used drugs would impair adaptive functioning; impair judgment;

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[28] *Jones v. State*, 966 So.2d 319, 327-28 (Fla. 2007) provides:

> Next, Jones argues that Atkins essentially prohibits a determination of an individual's current adaptive skills if that person, like Jones, is in prison. He claims that adaptive functioning has to be determined from an individual's adaptive functioning in the "outside world." To the contrary, as we stated above, the Court in Atkins left the definition and determination of mental retardation to the States. *** Moreover, the State's expert did not base his opinion solely on his interviews with prison guards. In determining that Jones was not deficient in adaptive behavior, Dr. Suarez relied on his interview with and testing of Jones, his examination of records regarding Jones's life from his childhood to the time of the rule 3.203 hearing, and interviews and testing of DOC staffers who observed Smith on a regular basis. ***
>
> *** [Jones] writes requests to see doctors, specifically defining his medical problems, and suggests changes in diet or medication. *** He keeps himself and his cell clean and orderly and visits the prison library twice a week. His language skills in writing, speaking, and other intellectual skills are strong in light of his dropping out of school at an early age. In addition, in the "outside world" as a young adult from age 18 to 29 (before he committed the murders), Jones traveled alone, lived in several states, and supported himself through various jobs. He had girlfriends at various times and for several years lived with a "common law wife," as he correctly termed her.

"going to impair a lot of things. Anybody with severe addiction is going to be impaired in terms of his adaptation." (SPCR.1 180-81) However, that did not establish ID.

The foregoing supports the trial court's determination that Morrison's IQ score from when he was eight-years old established that ID was not shown as Morrison did not have significantly subaverage general intellectual functioning" "manifested during the period from conception to age 18."

Morrison's citation to *Oats* does not call into question the trial court's conclusion. In Oats, the IQ scores ranged from a high of 70 to a low of 54. *Oats*, 181 So.3d at 459. As set forth above, Morrison's scores were 78 when he was eight-years old, 78 in 1997 at the time of trial, 79 in 2008 (TOMM test indicated no malingering), and 70 in 2012, when the aborted TOMM test indicated malingering. Neither *Hall* nor *Oats* removed the requirement that subaverage intellectual functioning be shown to have existed before the age of 18. While Morrison points to *Brumfield v. Cain*, 135 S.Ct. 2269, 2278 (2015) to suggest the IQ score should be discounted, or ignored in favor of the adaptive functioning findings files in the face of *Adkins* and *Hall* were deference is paid to how the mental health professionals define ID. That profession, as Dr. Prichard testified, continues to require a finding of sub-average intellectual functioning (IQ 75 or below when the SEM is considered) and that that existed

before 18 as a necessary prong in an ID finding. As such, the trial court identified the proper law, and applied it correctly to find that Morrison did not carry his burden. This Court should affirm.

ISSUE VII

THE TRIAL COURT DID NOT ERR IN DENYING MORRISONS *STRICKLAND* CLAIM ASSERTING COUNSEL SHOULD HAVE INVESTIGATED AND CHALLENGED the 1991 PRIOR VIOLENT FELONY OF AGGRAVATED BATTERY (restated)

Morrison asserts that it was error for the trial court to have rejected the ineffectiveness claim based on Eler's failure to call Joseph Turner to testify that Morrison was not involved in the 1991 aggravated battery to which he confessed falsely. (AB/CIB at 133). The record at the time of trial established that the 1991 conviction remained valid. Additionally, Morrison's 1988 attempted robbery conviction, also used to support the prior violent felony aggravator, was offered during the penalty phase and has not been shown to be in question. The trial court correctly determined that the capital defendant may not challenge the validity of a prior conviction as long as it remains a valid conviction. This Court should affirm.

A. STANDARD OF REVIEW

This Court has stated:

> In reviewing claims that allege ineffective assistance, this Court employs a mixed standard of review. *See State v. Woodel*, 145 So.3d 782, 791 (Fla. 2014). The Court reviews the factual findings of the

> circuit court for competent, substantial evidence, but reviews legal conclusions *de novo*. *Id*. Where one prong of the Strickland standard is not met, this Court need not address the second prong. *Henry v. State*, 862 So.2d 679, 683 (Fla. 2003).

Rigterink v. State, 193 So. 3d 846, 863 (Fla. 2016).

B. TRIAL COURT'S ORDER

The trial court determined:

> 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 violent 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 that had not been vacated); Melton v. State, 949 So.2d 994, 1005 (Fla. 2006) (rejecting claim trial counsel failed to challenge weight of prior felony aggravator). Moreover, to the extent Defendant is raising a residual or lingering doubt claim, "Florida does not recognize residual doubt, much less residual doubt as to the aggravators." Lukehart v. State, 70 So.3d 503, 513 (Fla. 2011). Here, unlike Defendant's earlier claim that Mr. Turner's testimony illustrated Defendant's propensity for admitting to crimes he did not commit, Defendant challenges the validity of his prior conviction. Defendant cannot do this, and counsel cannot be deemed ineffective for failing to pursue a meritless claim.

(PCR.8 1605-06)

C. ANALYSIS

The record indicates that Eler challenged the admissibility of the 1991 prior violent felony/Aggravated Battery conviction even though he acknowledged the validity of the conviction (confirmed by Morrison). (ROA.6 1106-12). Also, the record

established that Eler's billing records contained an entry for a call made to George Gray, counsel for Morrison on the 1991 case. Eler also recognized that if an argument were made that Morrison was not the shooter in that case, the State would argue he was a principal. (PCR.12 153-54). More important, during the penalty phase, the State presented Detective Horton, the lead investigator on the 1988 attempted robbery conviction. Horton testified that Morrison and Willie James did yard work for Mr. Peoples. After James left, Morrison returned and hit Peoples in the jaw, breaking his false teeth and taking his wallet. Peoples identified Morrison as the perpetrator. (ROA.6 1119-22)

The pith of Morrison's challenge here is that he did not commit the 1991 attempted robbery, but only confessed falsely. While Morrison suggests that this information should have been used to reduce the weight of the 1991 conviction, the trial court correctly recognized that the essence of the postconviction claim was that the 1991 conviction was not valid as it was based on a false confession. It is well settled that counsel is not ineffective for not challenging a prior conviction which remains valid in an attempt to show his client was not guilty of the charge.[29] *See Lukehart v. State,* 70 So.3d

[29] Morrison has not shown that he sought collateral review of his 1991 conviction on the grounds claimed here. However, even if he did, this Court has stated in *Remeta v. State*, 710 So. 2d 543, 548 (Fla. 1998):

503, 514 (Fla. 2011) (rejecting claim that "Lukehart wanted to use Page's testimony to relitigate the merits of his 1994 conviction"); *Melton v. State*, 949 So.2d 994, 1005-1006 (Fla. 2006)(stating "[t]o the extent that Melton is now claiming that the prior Saylor conviction is invalid or that his trial counsel was ineffective for failing to chase down leads that would have acquitted him on this charge, it is clear that this conviction is final and was properly invoked as an aggravator in this case" and distinguishing *Rompilla v. Beard*, 545 U.S. 374 (2005)); *Nixon v. State*, 932 So.2d 1009, 1023 (Fla. 2006)(rejecting that prior felonies invalid for aggravator "because the prior violent felonies used in Nixon's case have not been vacated and are still valid convictions"; (*distinguishing Johnson v. Mississippi*, 486 U.S. 578 (1988)); *Taylor v. State*, 3 So. 3d 986, 999 (Fla. 2009), *as revised on denial of reh'g* (Jan. 29, 2009) (same).

Furthermore, Eler had confirmed that the conviction

> a defendant is not entitled to relief simply because the defendant is seeking collateral review of a conviction used to establish the aggravating circumstance of prior violent felony. *Roberts v. State*, 678 So.2d 1232 (Fla. 1996); *Eutzy v. State*, 541 So.2d 1143 (Fla. 1989). To hold otherwise would undermine the concept of finality by providing defendants with the opportunity to forever contest judgments and sentences by filing for collateral relief, no matter how nonmeritorious, on other convictions.

remained valid, yet challenged the admissibility of the information. (ROA.6 1106-12). As such, he was not ineffective. *Mann v. State*, 770 So. 2d 1158, 1162 (Fla. 2000) (finding counsel not ineffective where he challenged admissibility of prior violent felony conviction).

Alternately, even if deficiency is found, prejudice does not lie as there is another prior violent felony conviction supporting the aggravator, i.e., the 1988 conviction for attempted robbery of Peoples where Morrison broke People's teeth during the theft. (ROA.6 1119-22). This conviction was used in sentencing Morrison to death. (ROA.7 1181) The trial court cited Detective Horton's testimony and the certified conviction exhibit in support of the aggravator which was given great weight. (ROA.7 1181). *See Henderson v. Singletary*, 617 So.2d 313, 316 (Fla. 1993)(rejecting challenge to prior violent felony aggravator as there was ample independent support for the aggravating factor based on other valid prior violent felony convictions). This Court should affirm the denial of relief.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court reverse the trial court's granting of relief in part and affirm the trial court's order denying postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the e-portal filing system to: Linda McDermott, Esq., at lindamcdermot@msn.com, this 19th day of September, 2016.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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