IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1880

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

RAYMOND MORRISON,

Appellee/Cross-Appellant.

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

CROSS REPLY BRIEF

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Preliminarily, the State argues that "[c]laims of *Brady* violations should foreclose claims of ineffective assistance of counsel." Cross Answer Brief at 16, n.6 (hereinafter "CAB at ___".). However, this Court has recognized and analyzed claims presented in the alternative as Brady or ineffective assistance of counsel on numerous occasions. See Guzman v. State, 868 So. 2d 498, 509-10 (Fla. 2003)(analyzing, in the alternative, claims involving *Brady* and *Youngblood*, as well as an ineffective assistance of counsel claim); Freeman v. State, 761 So. 2d 1055 (Fla. 2000)(analyzing claim presented in the alternative as Brady or ineffective assistance of counsel claim).

Indeed, this Court has recognized that petitioners, like Mr. Morrison are not in a position to know whether evidence that existed at the time of trial was disclosed to his trial counsel. In Rivera v. State, 995 So. 2d 191, 204 (Fla. 2008), this Court discussed the claims in the alternative, refuting the State's argument that one claim forecloses the other:

> As an alternative to his Brady and newly discovered evidence claims, Rivera argues that to the extent that trial counsel knew or should have known of the undisclosed and unpresented evidence, trial counsel rendered ineffective assistance of counsel. The trial court did not err in summarily denying this claim. The trial court correctly found that counsel could not be deficient for not discovering before April 1987 evidence that did not exist at that time. Thus, counsel was not ineffective for failing to discover the June

> 1987 memorandum by Corporal Iglesias, the DNA evidence, or the newspaper articles and investigations questioning the propriety of Broward Sheriff's Office personnel.
>
> As for the other previously unpresented items, the ineffective assistance of counsel claim was correctly summarily denied because Rivera's allegations do not establish prejudice. Prejudice has already been analyzed relating to the alleged Brady materials because the materiality prong of Brady has been equated with the Strickland prejudice prong. *Derrick v. State*, 983 So.2d 443, ---- (Fla. 2008) (explaining that *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), expressly applied the Strickland standard of "reasonable probability" to Brady cases).

Moreover, contrary to the State's position (CAB at 18, 34), the notion of alternative claims relating to the evidence that did not reach the fact finder, and thus, caused confidence in the verdict to be undermined, is the reason that this Court has required that a cumulative review of the evidence is required. See State v. Gunsby, 670 So. 2d 920, 924 (Fla. 1996)(granting a new trial on the basis of the combined effect of newly discovered evidence, the erroneous withholding of evidence, and ineffective assistance of counsel) See also Hildwin v. State, 141 So. 3d 1178 (Fla. 2014); Swafford v. State, 120 So. 3d 760 (Fla. 2013).

Thus, given the legal landscape concerning the several due process violations, and the analysis of alternative claims, including cumulative review, the State's arguments concerning the exculpatory evidence that Mr. Morrison's jury did not have the benefit of hearing is entirely misguided.

Initially, as to the condom found in Mr. Dwelle's shirt

pocket, the State argues that the evidence was not suppressed because it was equally accessible to Mr. Morrison (CAB at 19). More specifically, the State points to the fact that Kent Holloway's name was disclosed to Mr. Morrison's part as a potential witness in arguing that diligence on Mr. Morrison was required (CAB at 19). However, as the State well knows, or should, this Court and the United States Supreme Court have "squarely place[d] the burden on the State to disclose to the defendant all information in its possession that is exculpatory." Hoffman v. State, 800 So. 2d 174, 179 (Fla. 2001); See also Kyles v. Whitley, 514 U.S. 419, 432 & 437 (1995)("But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); Strickler v. Greene, 527 U.S. 263, 280-1 (1999). Supplying Holloway's name, but failing to disclose his report, does not satisfy the prosecutor's "broad duty of disclosure". Strickler, 527 U.S. at 281.

The State also argues that the condom was insignificant and therefore no Brady violation was established (CAB at 20-1). The

State relies on the faulty and biased memory of trial counsel[1], who the circuit court ultimately found to be ineffective in his representation of Mr. Morrison, and that the condom did not establish that Mr. Dwelle and Sandra Brown were intending to have sex on the night of the crime (CAB at 20)("The mere fact that Dwelle carried a condom does not necessarily lead to the conclusion he was having sex with Brown and that she killed him").

However, the State's position ignores the import of the condom. First, the existence of the condom, by its very nature, could have been used to attack the reliability of the investigation in failing to consider any other potential perpetrator. Kyles, 514 U.S. at 446. Clearly, the investigation was "insufficiently probing". Id. at 454. Indeed, the condom that was readily available to Mr. Dwelle undercuts the State's theory that he was a recluse and provides a reasonable basis for him having contact with someone with whom he intended to have sex.

Furthermore, the State fails to acknowledge that in assessing prejudice, this Court must consider whether "the favorable evidence could reasonably be taken to put the whole

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[1]Trial counsel did testify that the presence of the condom suggests that the victim was "prepared for somebody to come visit" and that others' presence at the apartment was significant (PC-R. 2321).

case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435. Here, the condom would have dually impacted the investigation and presentation of evidence: As to the prosecution's case, the condom would have provided Mr. Morrison an opportunity to undercut the representation that Mr. Dwelle was a recluse with very little contact with others, as well as undercutting the credibility of Brown[2] and Mr. Morrison's statement to law enforcement[3]. And, as to the defense, Mr. Morrison could have presented a plethora of evidence linking Brown and Mr. Dwelle in a sexual relationship. This, combined with Brown's know tendency for violence and addiction to alcohol would have provided a reasonable possibility that Brown killed Mr. Dwelle for money.[4]

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[2]Brown's testimony, and thus, credibility, was a large part of the prosecution's case against Mr. Morrison. Brown established Mr. Morrison's opportunity to commit the crime and the unusual circumstance of his departure at 9:00 p.m. from her apartment on the night of the crime (T. 390-8). Brown also denied any relationship with Mr. Dwelle (T. 391).

[3]The State relies on Mr. Morrison's statement to law enforcement despite the fact that the circuit court found that Mr. Morrison's statement was not reliable in light of the evidence presented at the evidentiary hearing. See PC-R. 1547-52.

[4]At the evidentiary hearing, Mr. Morrison presented evidence that Brown, who was not employed, turned to prostitution to support her alcohol habit (PC-R. 3171, 3184, 3248, 3445-6). Brown kept a bowl of condoms in her apartment and insisted that her "Johns" wear one when having sex with her (PC-R. 3395, 3446-6).

And, witnesses report that Brown knew the victim well and he had previously given her money (PC-R. 3172, 3243-4, 3249). Brown told "Gillis" that Mr. Dwelle was her "sugar daddy", which meant

Contrary to the State's argument, Mr. Morrison is not required to prove that Brown killed Mr. Dwelle (CAB at 21-22). Rather, Mr. Morrison presented evidence that undermined confidence in his conviction. Evidence that was clearly admissible to impeach Brown's testimony at trial that she did not have a relationship with Mr. Dwelle.[5]

As to Officer Richardson's threats to Brown, the State argues that Mr. Morrison presented no evidence of a threat, and that even if Brown was threatened, there was no evidence that she testified falsely (CAB at 24). First, Tims specifically overheard Richardson tell Brown that he would have her locked up for the crime, when he spoke to her in on January 10, 1997 (PC-R. 3237). Likewise, Brown specifically told Tims that her son would be taken away (PC-R. 3232, 3245), and that she would be locked-up for the crime if she did not cooperate (PC-R. 3232). Brown also

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

Brown was also known to carry a blade or box cutter with her at all times (PC-R. 3174, 3184,3394). The first time Allen met Brown, she carried a razor blade in her mouth (PC-R. 2832).

[5]The testimony of Gilda Louden, Delores Tims, Tangy Allen, Paula Morrison and Charlene Wright is admissible, relevant and highly credible evidence which establishes Brown's close relationship to Mr. Dwelle through the witnesses' observations and Brown's statements to them.

told her sister she was afraid that the police would take away her son and her public housing unless she helped them prove it was Mr. Morrison (PC-R. 3332). Thus, there was certainly evidence that Brown was threatened.

Also, the evidence undermines Brown's credibility, and therefore, the reliability of Mr. Morrison's statement. First, if the jury knew that Brown was threatened they may have disregarded her testimony which was the centerpiece of the State's case and created the time line that was used at trial. Not coincidentally, the same time line was adopted by Mr. Morrison in what was clearly a false statement to law enforcement. Thus, Brown's motivation for her statements to law enforcement and testimony was important for the jury to hear so that her credibility and the credibility of the State's case could be accurately assessed. See Davis v. Alaska, 415 U.S. 308, 315 (1974).

As to Detective Davis' handwritten notes, the State argues that the notes were not subject to disclosure and/or Davis discussed his notes during his deposition (CAB at 25, 26, 31). The State's argument that handwritten notes need not be disclosed is absolutely false. See Smith v. Cain, 132 S.Ct. 627, 630 (2012). Also, here, the specific information that Mr. Morrison contends is material and exculpatory was not memorialized in Detective Short's report or discussed during Davis' deposition.

Compare DE 2 with DE 9 and 22.[6] Contrary to the State's assertion, Davis' deposition makes clear that trial counsel was not provided Davis' handwritten notes (CAB at 25). In fact, during the deposition, trial counsel inquired:

> Q: Is there anything in the report that is not in your notes or is there anything that's in your notes that's not in that paragraph of that report?
>
> A: Nothing that I can find this morning, sir. I reviewed this at home this morning and I didn't find any discrepancies.
>
> Q: Did you review it carefully?
>
> A: Yes, sir, to the best of my ability. I'll be happy to go back and check.
>
> Q: No, I'm just trying to find out – I mean, I'm not trying to, I don't want you to have to sit there and read it to me, I mean, okay?

DE 22, p.8. Thus, trial counsel did not have the benefit of Davis' handwritten notes, as the State suggests but instead, trial counsel relied on Davis to identify any discrepancies. Davis' testimony in this regard was false. As trial counsel stated at the evidentiary hearing, there were discrepancies between the handwritten notes and the report (PC-R. 2341).

Specifically, Davis' reference to Brown as "S" cannot be

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[6]It bears repeating that the State's suggestion that suppression of the information contained in the notes did not occur because trial counsel did not request the notes at Davis' deposition or witnesses were equally accessible to Mr. Morrioson (CAB 26, 32, 33), is legally unsupportable because the burden to disclose exculpatory evidence is "squarely place[d] ... on the State". Hoffman v. State, 800 So. 2d 174, 179 (Fla. 2001); See also Kyles v. Whitley, 514 U.S. 419, 432 & 437 (1995).

dismissed as meaningless or a "typo" (CAB at 29-30). And, it was well within Mr. Morrison's prerogative to question Davis or Brown about the characterization of her as a suspect rather than a witness as it may well have motivated Brown to provide false information about Mr. Morrison. See Davis v. Alaska, 415 U.S. 308, 315 (1974).

Critically, as to Charlene Wright's statements to law enforcement confirming that Mr. Morrison was in Marietta on the evening of the crime, and Mr. Morrison's drug use shortly before his arrest, the State argues that its deception cannot establish a Brady violation because Mr. Morrison was aware of Wright and his drug use (CAB at 33, 34). However, by hiding the fact that law enforcement actually knew of the exculpatory evidence provided by Wright and concerning Mr. Morrison's drug use, the State violated Mr. Morrison's right to due process.

Indeed, the State's argument is illogical. First, whether or not Mr. Morrison was aware that Wright saw him in Marietta or that he used drugs shortly before his arrest makes no difference to the State's obligation to turn over the exculpatory evidence. Trial counsel could have presented the exculpatory evidence, that severely undermined the State's evidence linking him to the crime, had Wright's statements and Richardson's observations been disclosed.

Indeed, in Banks v. Dretke, 540 U.S. 668 (2004), the United

States Supreme Court confronted a similar argument made on behalf of the government in attempting to fault petitioner in his federal habeas proceedings. The Supreme Court explained:

> The State here nevertheless urges, in effect, that 'the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence," so long as the 'potential existence' of a prosecutorial misconduct claim might have been detected . . . A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process.

540 U.S. at 696 (citations omitted).

Likewise, the United States Supreme Court vacated the death sentence in Brady v. Maryland, based on the suppressed confession of Brady's co-defendant. 373 U.S. 83 (1963). At Brady's trial, he testified and admitted to being present during the commission of the charged crimes, however, he claimed that his co-defendant "did the actual killing." Id. at 84. Despite, Brady's protestations that his co-defendant had committed the murder, the U.S. Supreme Court held that the suppressed statement of Brady's co-defendant admitting to the murder was exculpatory and in that case material. Id. at 90. So, here, even if Mr. Morrison had alerted his trial counsel to Wright's knowledge of his whereabouts at the time of the crime and admitted to his drug use, the State still violated Brady in failing to disclose the evidence to support Mr. Morrison's assertions. As in Brady, the State in Mr. Morrison's case played "the role of an architect of a proceeding that does not comport with standards of justice ...

" Id at 88.

Furthermore, the notion that a drug-addicted, intellectually disabled individual could reliably describe or explain the impact of crack on brain functioning, both acute and chronic, in order to determine whether Mr. Morrison's drug use impacted the voluntariness of his statement is ridiculous. See CAB at 34. At the evidentiary hearing, Mr. Morrison presented testimony from a mental health expert in order to explain the chronic and acute effects of crack on the brain and how intoxicants impair one's judgment (PC-R. 2973). The circuit court credited that testimony in determining that evidence existed to undermine the reliability of Mr. Morrison's statement to law enforcement.

In arguing that no due process violation occurred because prejudice is lacking, the State again relies on Mr. Morrison's statements to law enforcement (CAB 32), ignoring that the circuit court held that, in the context of the evidence presented at the evidentiary hearing, Mr. Morrison's statements are not reliable. Indeed, Mr. Morrison's statements are contradicted by the evidence presented at the evidentiary hearing.

Furthermore, a cumulative review of the evidence establishes that Mr. Morrison could have presented a very different case at trial, undermining the State's evidence and presenting affirmative evidence relating to his whereabouts and Sandra Brown's relationship with Mr. Dwelle that would certainly have

undermined confidence in his conviction and sentence of death. Mr. Morrison is entitled to relief.

ARGUMENT V: THE NEWLY DISCOVERED EVIDENCE ARGUMENT.

The State, like the circuit court, asserts that the DNA results form the testing of the knife's handle is not newly discovered because it could have been tested at the time of the trial (CAB at 37, 39, 40). However, this position ignores Dr. Julie Heinig's unrebutted testimony at the evidentiary hearing, in which she stated that whi1e knife handles would have been tested for blood at the time of Mr. Morrison's trial, if there was any "reddish-brown" staining, as to DNA, it was not routine to conduct DNA testing of knife handles until "late 90s, 2000" (PC-R. 2609). Therefore, the testing was newly discovered.

The State also argues that because Mr. Morrison did not link the DNA results to Brown, that relief was properly denied (CAB at 41). However, the fact that the DNA excluded Mr. Morrison as contributing to the DNA found on the handle was in and of itself exculpatory. It was not Mr. Morrison's burden to prove who's DNA profile had been revealed by the analysis. In sum, the State contended that the knife was the murder weapon as it was linked to Mr. Dwelle by the DNA testing conducted on the blood located on the knife blade. Thus, the exclusion of Mr. Morrison's DNA on the knife handle, while including unknown contributors would have impacted the jury's assessment of the evidence, including Mr.

Morrison's alleged statements.

Undoubtedly, the new DNA evidence, when considered in conjunction with the evidence from trial and the evidentiary hearing, establishes that Mr. Morrison is entitled to a new trial.

As to Brown's recent admissions to others that she lied at Mr. Morrison's trial, the State argues that the testimony was inadmissible hearsay and that the lack of a recantation from Brown dooms Mr. Morrison's claim (CAB at 37, 42). However, Brown's inconsistent and exculpatory statements are admissible as they impeach her trial testimony. See State v. Mills, 788 So. 2d 249 (Fla. 2001).

Furthermore, Mr. Morrison submits that the statements were admissible in order to support his defense. Recently, in Holmes v. South Carolina, 547 U.S. 319, 324-25 (2006), the U.S. Supreme Court stated:

> "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States v. Scheffer*, 523 U.S. 303, 308 (1998); see also *Crane v. Kentucky*, 476 U.S. 683, 689-690 (1986); *Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 302, 303 (1973); *Spencer v. Texas*, 385 U.S. 554, 564 (1967). This latitude, however, has limits. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane*, *supra*, at 690 (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984); citations omitted). This right is abridged by evidence

> rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, *supra*, at 308 (quoting *Rock v. Arkansas*, 483 U. S. 44, 58, 56 (1987)).

See also Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (holding "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.").

Brown's statements to Tims and others about the truthfulness of her trial testimony are exculpatory and admissible. At a minimum, when combined with all of the other evidence presented, they demonstrate that Mr. Morrison's conviction cannot stand. See Parker v. State, 89 So. 3d 844, 860, 867 (Fla. 2011). Mr. Morrison is entitled to relief.

ARGUMENT VI: THE ATKINS v. VIRGINIA, 536 U.S. 304 (2002), ARGUMENT.

The State disputes that Mr. Morrison suffers from intellectual disability, arguing that he failed to establish onset before the age of eighteen, as well as adaptive deficits in his functioning (CAB at 43, 45).

As to adaptive functioning, the State's argument ignores the circuit court's finding that Mr. Morrison experienced "significant deficits in adaptive functioning" (PC-R. 2626).[7]

[7]As to the State's expert, Dr. Gregory Prichard, the circuit court found: "Dr. Prichard did not assess [Mr. Morrison's] adaptive functioning skills". (PC-R. 1590). Thus, Mr. Morrison's experts' opinions as to his deficits in adaptive functioning was unrebutted.

Instead the State, argues that the description of Mr. Morrison from his family members who testified at the penalty phase of the trial shifted at the evidentiary hearing and became more "advantageous" to Mr. Morrison (CAB 47-8, 53, 60).[8] However, in discussing Raymond Morrison, Sr., Georgia Morrison, and Paula Wilson's trial testimony and evidentiary hearing testimony, the circuit court made findings that the testimony was not contradictory of their trial testimony, as the State suggests, but rather focused on different aspects of Mr. Morrison's life (PC-R. 1598, 1599, 1603). These findings are amply supported by the record.

The State also attempts to undermine the testimony of Mr. Morrison's friends and family by relying on Prichard's comment that loved ones may be biased (CAB at 50, 60).[9] First, the State

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[8]It is worth noting that several of Mr. Morrison's friends and family did not testify at the trial and therefore the jury and judge never heard their description of Mr. Morrsion's functioning.

[9]Mr. Morrison's friend, Gilda Louden, testified that Mr. Morrison played with kids younger than himself and was picked on (PC-R. 3170). Louden also testified that when Mr. Morrison was an adult he had the mind of a fifteen or sixteen year old (PC-R. 3170). The State argues that Louden's assessment of Mr. Morrison's functioning cuts against a finding of intellectual disability (PC-R. 53). The State is incorrect. First, Louden is a lay person with no psychological training. Second, and more importantly, Louden described deficits in Mr. Morrison's adaptive functioning, specifically in the social domain. She indicate that he was picked on and that Mr. Morrison spent time with kids who were younger with him. Thus, Louden's testimony supported Eisenstein's conclusion that Mr. Morrison suffers from intellectual disability.

ignores the fact that Eisenstein conducted a formal adaptive skills assessment with Morrison and his result placed him in the mild to moderate level of impairment (PC-R. 2999). Second, the State discounts the consistency and quantity of the anecdotal evidence about Mr. Morrison's deficits. The testimony of Mr. Morrison's deficits was specific, corroborated and overwhelming.

The State specifically attacks Tangy Allen's extremely compelling testimony about her fiancé's deficits by arguing that Mr. Morrison's inability to care for his children and manage money were related to his substance abuse (CAB at 51, n.21).[10] However, this argument discounts Allen's testimony that Mr. Morrison stayed clean while he was living with her; he would actually leave her home for periods of time to binge on crack and alcohol (PC-R. 2826, 2852). Thus, Mr. Morrison's deficits were not related to his use of drugs and alcohol.

Furthermore, Allen described the correspondence she receives from Mr. Morrison since he has been incarcerated as simplistic – he asks about her and the kids; he tells her that he loves her and she tells him what is going on with his family (PC-R. 2860). Despite the State's characterization (CAB at 52), the correspondence sounds very much like what one would expect of an

[10]The State generally argues that Mr. Morrison's drug use impairs functioning (CAB at 62-3), without acknowledging that abusing drugs and intoxicants is in fact relevant to an adaptive skills assessment because it demonstrates a deficit in adaptive functioing.

elementary school child.

Likewise, the State's attack of Terry Heatly, Mr. Morrison's cousin is equally flaccid. Heatly knew Mr. Morrison as a child because they were cousins and not "only" when Mr. Morrison "was on drugs" (CAB 52). See PC-R. 2868. Thus, Heatly, as Mr. Morrison's cousin and peer was able to observe Mr. Morrison's deficits early on and throughout their adolescence. And, Heatly interacted with Mr. Morrison and took advantage of him (and saw others do the same), due to the deficits in Mr. Morrison's social and practical areas of adaptive functioning.

The State also argues that trial counsel and his investigator had no concerns about Mr. Morrison suffering from intellectual disability (CAB at 50). However, this makes no sense in light of the fact that trial counsel was aware that, according to Sherry Risch's IQ testing, Mr. Morrison was functioning in approximately the bottom five percent of population as far as his intelligence, and Dr. Harry Krop was concerned enough that he wanted to conduct further neuropsycholgical testing. Certainly this fact, in and of itself, should have given trial counsel cause for concern.

Finally, in a last ditch attempt to suggest that Mr. Morrison was not intellectually disabled, the State argues that Prichard's opinion that Mr. Morrison would need constant care if he were intellectually disabled is evidence that Mr. Morrison

does not meet the criteria (CAB 61).[11] However, Prichard's opinion is not based on any psychological research. And, it is simply false. Many intellectually disabled individuals live somewhat independently and do not need "constant care".

Here, Dr. Hyman Eisenstein evaluated Mr. Morrison and opined that Mr. Morrison suffered from significantly subaverage deficits in his adaptive functioning (PC-R. 3014). Eisenstein provided specific areas of deficits based on his comprehensive evalaution. See Jones v. State, 966 So. 2d 319, 326 (Fla. 2007). And, Eisenstein's opinion was unrebutted.

The State also attempts to defeat Mr. Morrison's claim by citing to Krop, who conducted a preliminary evaluation with Mr. Morrison, at the time of his trial, and not a comprehensive evaluation for intellectual disability. In fact, contrary to the State's assertions, Krop did not rule out organic brain damage or intellectual disability (CAB at 49, n.20).[12] Krop testified that he requested additional neuropsychological testing because "[t]here were some deficiencies" (SPC-R. 38). See also SPC-R. 60

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[11]Prichard pointed to Mr. Morrison's self report concerning his work history (CAB at 61). However, Mr. Morrison's self report was refuted by other evidence and witnesses. Further, as the State conceded, "Prichard thought the adaptive functioning question was moot" (CAB at 61), and thus, he did not conduct an evaluation as to this issue.

[12]The State's citations relating to Krop's alleged testimony are actually portions of the postconviction record wherein Prichard testified.

(testifying that there are deficits in Mr. Morrison's intellectual functioning). But, he never received the information he requested or had an opportunity to conduct the additional testing.

Furthermore, also contrary to the State's assertion, (CAB at 49, n.20), Krop explained that an IQ score does not answer the question of whether someone suffers from an intellectual disability (SPC-R. 81-2).

Indeed, as to the first prong concerning a defendant's IQ, the State urges that this Court view Mr. Morrison's IQ scores in a vacuum and determinative of his claim (CAB at 50).[13] This is so despite the fact that this Court in Hall v. State, ___ So. 3d ___, 2016 WL 4697766, rejected such an approach when explaining the U.S. Supreme Court's ruling in Hall v. Florida, 134 S.Ct. 1986 (2015):

> The Court further explained that our decision in Hall IX disregards established medical practice in two interrelated ways. *Id.* at 1995. First, it takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity when experts in the field would also consider other evidence. *Id.* Second, it relies on the IQ score while refusing to recognize that the score may be imprecise. *Id.* Instead of using a fixed number IQ score as determinative of intellectual disability, Florida's courts must also use other indicative

[13]The State is essentially advocating for this Court to re-adopt the Cherry Rule, i.e., to impose a strict cut-off score for the IQ in order to show intellectual disability. See Cherry v. State, 959 So. 2d 702, 713-4 (Fla. 2007). As the United Supreme Court has held, such an approach is unconstitutional. Hall v. Florida, 134 S.Ct. 1986, 1995 (2015).

> evidence such as past performance, environment, and upbringing. Id. at 1996. In sum, when determining the eligibility for the death penalty of a defendant who has an IQ test score approaching 70, Florida courts may not bar the consideration of other evidence of deficits in intellectual and adaptive functioning.

In addition, the State relies exclusively on Prichard's testimony to argue that Mr. Morrison's IQ scores place him outside the range for intellectual disability (CAB at 54). However, in doing so the State ignores Hall and the evidence presented by Mr. Morrison. For example, the State cites to Prichard's testimony about the reliability of the Stanford Binet LM, which was administered to Mr. Morrison when he was a child (CAB at 54). However, even Prichard conceded that the Stanford Binet LM only measured one dimension and was not as comprehensive of a test to measure intellectual functioning like the one that are available today (PC-R. 3611-2; see also 2704; 2988). And, Dr. Gordon Taub explained that research demonstrated that the Stanford Binet was not a reliable measure of intelligence; Taub testified that gifted individuals scores decreased by 10 points from the Stanford Binet LM to the Stanford Binet-IV, when the test was improved and made more reliable (PC-R. 2703). Taub would expect the same amount of variation (and decline) as to scores in the intellectually disabled range.

And, though Prichard did not challenge the accuracy of the IQ score Mr. Morrison obtained on the WAIS IV – a 70, he

testified that it was an outlier (CAB at 55). The State blindly accepts Prichard's testimony in support of his contention though Mr. Morrison's conclusively rebutted the premise of his opinion. For example, Prichard suggests that because Mr. Morrison had "contact with the judicial system as a juvenile", he would have been diagnosed with intellectual disability previously. But of course, Prichard's belief that Mr. Morrison had "contact" with the juvenile justice system was in error. Mr. Morrison was never convicted of any crime as a juvenile. And, Prichard knew nothing about the qualifications or training of the individuals Mr. Morrison may have encountered in the Department of Corrections as an adult or what evaluations, if any, were performed.

Prichard also heavily relied on Mr. Morrison's performance on achievement tests, maintaining that it was inconsistent with an individual who suffers from intellectual disability (CAB at 55-6). However, achievement does not correlate 1 to 1 to intelligence (PC-R. 2714). Dr. Lawrence Weiss also clarified that achievement and intelligence are simply not the same thing and cannot be compared (PC-R. 3121). And, age norms should have been used, not the grade norms which were used to assess Mr. Morrison, so the scores Mr. Morrison obtained are inflated and not reliable (PC-R. 2715). Moreover, contrary to Prichard, Taub testified that the achievement scores are consistent with Mr. Morrison's IQ score (PC-R. 2717).

The State also points to Prichard's testimony about Mr. Morrison's results on the Weschsler Memory Scale (WMS) and Beta assessments to argue that Mr. Morrison does not meet the first prong of intellectual disability (CAB at 56-7). This was so, eventhough, he acknowledged the "limited utility" of the BETA (PC-R. 3536), and previously testified in State v. Cherry, that the BETA was not relevant to determining intellectual disability (PC-R. 3536); see also DE 57 (testifying that the BETA was "developed to assess individuals in settings like institutions where you're doing group testing." and "It's also for non-readers" ... "So, its utility in terms of saying whether a person is mentally retarded or not is extremely limited. **It's not accepted as a measure in the scientific community for determining retardation**.")(emphasis added).

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

The State also cited Prichard's reliance on the WRAT III score which placed Mr. Morrison in a high school level for reading to claim that Mr. Morrison could not be intellectually disabled (CAB at 58). However, previously, Prichard had no problem with the fact that a defendant had been given the same

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

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

Thus, Prichard's reliance on these inaccurate measures demonstrates the flaw in his opinion, as well as his bias.

Further, as to the third prong - onset before the age of 18 - the State argues that Mr. Morrison's score on the Stanford Binet LM negates a finding on this prong (CAB at 63). However, such an argument ignores this Court's determination that "a defendant [need only] demonstrate that his 'intellectual deficiencies manifested while he was in the 'developmental stage'— that is, before he reached adulthood.'" Oats v. State, 181 So. 3d 457, 468 (Fla. 2015), citing Brumfield v. Cain, 135 S.Ct. 2269, 2282 (2015).

Mr. Morrison has presented competent and substantial evidence establishing that he suffers from intellectual disability. The eighth amendment prohibits the State from seeking

the death penalty in his case.

ARGUMENT VII: TRIAL COUNSEL'S INEFFECTIVENESS IN FAILING TO CHALLENGE THE PRIOR VIOLENT FELONY AGGRAVATOR.

The State argues that Mr. Morrison is precluded from arguing the the ineffectiveness of his trial counsel in relation to the challenge to his 1991 conviction for aggravated battery because it remains a valid conviction (CAB at 64).

As stated in his Answer Brief, Mr. Morrison's claim was not contingent upon vacating his prior conviction, rather, his ineffective assistance of counsel claim is based on clearly established U.S. Supreme Court precedent acknowledging his right to attempt to neutralize or minimize the weight give to a prior violent felony conviction. As the U.S. Supreme Court stated in Wiggins v. Smith, 539 U.S. 510, 524 (2003), "[I]nvestigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" (emphasis on original) (citations omitted). Further, as was reiterated by the U.S. Supreme Court in Rompilla v. Beard, 545 U.S. 374, 386, n.5 (2005):

> Nor is there any merit to the United States's contention that further enquiry into the prior conviction file would have been fruitless because the sole reason the transcript was being introduced was to establish the aggravator that Rompilla had committed prior violent felonies. Brief for United States as *Amicus Curiae* 30. The Government maintains that because the transcript would incontrovertibly establish the fact that Rompilla had committed a violent felony, the

> defense could not have expected to rebut that aggravator through further investigation of the file. **That analysis ignores the fact that the sentencing jury was required to weigh aggravating factors against mitigating factors. We may reasonably assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest.**

Thus, trial counsel was obligated to challenge the prior violent felony and urge the jury to find that the aggravators were insufficient to impose death, and that the aggravators did not outweigh the mitigation.

Contrary to the State's argument, the jury's consideration of this aggravator, without challenge, was prejudicial. The prosecutor made a point of presenting evidence concerning the aggravator and pointing out that there were similarities to the crime that the jury was considering in its recommendation of sentencing Mr. Morrison to life or death. Mr. Morrison is entitled to relief.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellee/cross-appellant, **RAYMOND MORRISON**, urges this Court to affirm the circuit's order as to the grant of a new trial and penalty phase and preclude the State from seeking the death penalty in any furture proceedings due to Mr. Morrison's intellectual disabililty.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Cross Reply Brief has been furnished by electronic service to Leslie Campbell, Assistant Attorney General, Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL 33401, on this 13th day of November, 2016

/s/ Linda McDermott_____
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CERTIFICATION OF TYPE SIZE AND STYLE

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