

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1085

WILLIAM LEE THOMPSON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

BILL MCCOLLUM
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655

TABLE OF CONTENTS

<u>TABLE OF CONTENTS</u>	i
<u>TABLE OF AUTHORITIES</u>	ii
<u>STATEMENT OF CASE AND FACTS</u>	1
<u>SUMMARY OF THE ARGUMENT</u>	49
<u>ARGUMENT</u>	49
I. THE LOWER COURT PROPERLY DETERMINED THAT DEFENDANT IS NOT RETARDED.	49
II. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING DR. GREENSPAN'S TESTIMONY.	57
III. THE CLAIM THAT DEFENDANT WAS DENIED A FULL AND FAIR HEARING SHOULD BE DENIED	63
IV. THE REQUEST TO OVERRULE <i>CHERRY</i> SHOULD BE REJECTED.	74
V. THE ARGUMENT THAT THE STATE SHOULD BEAR THE BURDEN OF PROOF SHOULD BE REJECTED.	75
<u>CONCLUSION</u>	75
CERTIFICATE OF SERVICE	76
<u>CERTIFICATE OF COMPLIANCE</u>	76

TABLE OF AUTHORITIES

Cases

<i>Arbelaez v. State</i> , 775 So. 2d 909 (Fla. 2000).....	68
<i>Asay v. State</i> , 769 So. 2d 974 (Fla. 2000).....	64, 67, 68
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	7
<i>Beasley v. State</i> , 18 So. 3d 473 (Fla. 2009).....	63
<i>Brown v. State</i> , 959 So. 2d 146 (Fla. 2007).....	50
<i>Burdick v. State</i> , 594 So. 2d 267 (Fla. 1992).....	74
<i>Burns v. State</i> , 944 So. 2d 234 (Fla. 2006).....	50
<i>Caban v. State</i> , 9 So. 3d 50 (Fla. 5th DCA 2009).....	60
<i>Carlton v. Bielling</i> , 146 So. 2d 915 (Fla. 1st DCA 1962).....	60
<i>Chamberlin v. State</i> , 881 So. 2d 1087 (Fla. 2004).....	64
<i>Cherry v. State</i> , 959 So. 2d 702 (Fla. 2007).....	9, 49, 50, 51, 57, 59
<i>Devin v. City of Hollywood</i> , 351 So. 2d 1022 (Fla. 4th DCA 1976).....	59
<i>Doorbal v. State</i> , 983 So. 2d 464 (Fla. 2008).....	70
<i>Duest v. Dugger</i> , 555 So. 2d 849 (Fla. 1990).....	63

<i>Hitchcock v. Dugger</i> , 481 U.S. 393 (1987).....	1
<i>Jackson v. State</i> , 599 So. 2d 103 (Fla. 1992).....	67
<i>Johnston v. State</i> , 960 So. 2d 757 (Fla. 2006).....	50, 56
<i>Jones v. State</i> , 966 So. 2d 319 (Fla. 2007).....	50, 54, 57, 59
<i>Lee County v. Barnett Banks, Inc.</i> , 711 So. 2d 34 (Fla. 2d DCA 1997).....	59, 74
<i>Lindsey v. Allstate Ins. Co.</i> , 561 So. 2d 427 (Fla. 3d DCA 1990).....	59, 74
<i>Linn v. Fossum</i> , 946 So. 2d 1032 (Fla. 2006).....	73, 74
<i>McCrae v. State</i> , 510 So. 2d 874 (Fla. 1987).....	68
<i>Network Publications, Inc. v. Bjorkman</i> , 756 So. 2d 1028 (Fla. 5th DCA 2000).....	60
<i>Nixon v. State</i> , 2 So. 3d 137 (Fla. 2009).....	50, 57, 74, 75
<i>Phillips v. State</i> , 984 So. 2d 503 (Fla. 2008).....	50, 51, 54, 57, 59
<i>Ragsdale v. State</i> , 720 So. 2d 203 (Fla. 1998).....	68
<i>Ray v. State</i> , 755 So. 2d 604 (Fla. 2000).....	58
<i>Rhines v. Webber</i> , 544 U.S. 269 (2005).....	8
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002).....	5

<i>Rivera v. State,</i> 717 So. 2d 477 (Fla. 1998).....	67
<i>Rodgers v. State,</i> 948 So. 2d 655 (Fla. 2006).....	50
<i>Rodriguez v. State,</i> 919 So. 2d 1252 (Fla. 2005).....	64
<i>State v. DiGuilio,</i> 491 So. 2d 1129 (Fla. 1986).....	62
<i>Steinhorst v. State,</i> 636 So. 2d 498 (Fla. 1994).....	64
<i>Thompson v. Crosby,</i> 544 U.S. 957 (2005).....	8
<i>Thompson v. Dugger,</i> 515 So. 2d 173 (Fla. 1987).....	1
<i>Thompson v. Moore,</i> 320 F.3d 1228 (11th Cir. 2003).....	4
<i>Thompson v. Sec’y for the Dept. of Correction,</i> 517 F.3d 1279 (11th Cir. 2008).....	8
<i>Thompson v. Sec’y for the Dept. of Corrections,</i> 425 F.3d 1364 (11th Cir. 2005).....	8
<i>Thompson v. State,</i> 15 So. 3d 581 (Fla. 2009).....	48
<i>Thompson v. State,</i> 3 So. 3d 1237 (Fla. 2009).....	16, 69
<i>Thompson v. State,</i> 351 So. 2d 701 (Fla. 1977).....	1
<i>Thompson v. State,</i> 389 So. 2d 197 (Fla. 1980).....	1
<i>Thompson v. State,</i> 410 So. 2d 500 (Fla. 1982).....	1

<i>Thompson v. State</i> , 619 So. 2d 261 (Fla. 1993).....	3
<i>Thompson v. State</i> , 759 So. 2d 650 (Fla. 2000).....	4, 67
<i>Thompson v. State</i> , 880 So. 2d 1213 (Fla. 2004).....	6, 65, 68
<i>Thompson v. State</i> , 962 So. 2d 340 (Fla. 2007).....	9
<i>Thompson v. Wainwright</i> , 787 F.2d 1447 (11th Cir. 1986).....	1
<i>Tibbs v. State</i> , 397 So. 2d 1120 (Fla. 1981).....	56
<i>Trotter v. State</i> , 932 So. 2d 1045 (Fla. 2006).....	50
<i>Vining v. State</i> , 827 So. 2d 201 (Fla. 2002).....	70
<i>Waterhouse v. State</i> , 792 So. 2d 1176 (Fla. 2001).....	64, 67
<i>Willacy v. State</i> , 696 So. 2d 693 (Fla. 1997).....	64, 66, 67, 68
<i>Zack v. State</i> , 753 So. 2d 9 (Fla. 2000).....	58
<i>Zack v. State</i> , 911 So. 2d 1190 (Fla. 2005).....	50, 57

Statutes

§90.706, Fla. Stat.....	74
§921.137(1), Fla. Stat.....	59, 74
Fla. Admin. Code 65G-4.011.....	16, 17, 22
Fla. R. Crim. P. 3.203.....	40, 57, 59
Fla. R. Crim. P. 3.851.....	10

Fla. R. Jud. Admin. 2.330.....	64, 66, 67
--------------------------------	------------

STATEMENT OF CASE AND FACTS

In its resentencing opinion, this Court summarized the procedural history and facts of proceedings:

The procedural history of this cause reflects that on April 14, 1976, [Defendant] and Rocco Surace were charged by indictment with the first-degree murder, kidnapping, and involuntary sexual battery of Sally Ivester. [Defendant] entered a plea of guilty in the trial court but, on appeal, this Court allowed him to withdraw his plea and remanded the case for further proceedings. *Thompson v. State*, 351 So. 2d 701 (Fla. 1977). [Defendant] entered a second plea of guilty and a penalty phase jury recommended the death penalty. The trial judge imposed the death penalty and this Court affirmed the trial judge's order in *Thompson v. State*, 389 So. 2d 197 (Fla. 1980). [Defendant] then filed a Florida Rule of Criminal Procedure 3.850 motion, which this Court denied in *Thompson v. State*, 410 So. 2d 500 (Fla. 1982). After this Court denied the rule 3.850 motion, [Defendant] sought federal habeas corpus relief. Both the United States District Court and the Eleventh Circuit Court of Appeals denied [Defendant] relief. *Thompson v. Wainwright*, 787 F.2d 1447 (11th Cir. 1986). [Defendant] then filed a second rule 3.850 motion, asserting the failure of the sentencing judge to allow presentation and jury consideration of nonstatutory mitigating circumstances in the penalty phase. The trial court denied relief, but this Court reversed under the authority of *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987), and remanded for resentencing. *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987), cert. denied, 485 U.S. 960, 108 S. Ct. 1224, 99 L. Ed. 2d 424 (1988). This second sentencing proceeding is the subject of this appeal.

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

[Defendant], Rocco Surace, Barbara Savage, and the victim Sally Ivester were staying in a motel room. The girls were instructed to contact their homes to obtain money. The victim received only \$25 after telling the

others that she thought she could get \$200 or \$300. Both men became furious. Surace ordered the victim into the bedroom, where he took off his chain belt and began hitting her in the face. Surace then forced her to undress, after which the appellant [Defendant] began to strike her with the chain. Both men continued to beat and torture the victim. They rammed a chair leg into the victim's vagina, tearing the inner wall and causing internal bleeding. They repeated the process with a night stick. The victim was tortured with lit cigarettes and lighters, and was forced to eat her sanitary napkin and lick spilt beer off the floor. This was followed by further severe beatings with the chain, club, and chair leg. The beatings were interrupted only when the victim was taken to a phone booth, where she was instructed to call her mother and request additional funds. After the call, the men resumed battering the victim in the motel room. The victim died as a result of internal bleeding and multiple injuries. The murder had been witnessed by Barbara Savage, who apparently feared equivalent treatment had she tried to leave the motel room.

* * * *

The jury, by a vote of seven to five, recommended the imposition of the death penalty. The trial judge imposed the death sentence, finding four aggravating circumstances, specifically that: (1) the crime was committed while [Defendant] was engaged in the commission of the crime of sexual battery; (2) the crime was committed for financial gain; (3) the crime was especially heinous, atrocious, or cruel; and (4) the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial judge expressly rejected, in detail, each of the mitigating circumstances, including that [Defendant] lacked the capacity to appreciate the criminality of his conduct. The trial judge noted in this regard that, although [Defendant's] IQ score was in the dull-normal range,

there was evidence that [Defendant] functioned on a higher level. The trial judge concluded that "the aggravating factors in this case far outweighed any possible mitigating circumstances."

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

Prior to the resentencing proceeding, Defendant moved to preclude the death penalty on the grounds that he had the mental capacity of a child, which was denied. (R. 146-48)¹ In its sentencing order, the trial court rejected Defendant's claims of mitigation based on his intelligence level. (R. 707-08)

Defendant appealed his sentence to this Court, raising 6 issues, including a claim that the trial court erred in rejecting statutory and nonstatutory mitigation based on Defendant's mental condition. Initial Brief of Appellant, FSC Case No. SC75499, at 73-77. Defendant also asserted that Florida capital sentencing scheme was unconstitutional because it was arbitrarily applied and HAC was vague. *Id.* at 85. However, Defendant did not claim that it was unconstitutional to execute him because he was mentally retarded. This Court affirmed Defendant's death sentence, specifically rejecting the claim that the trial court had erred in rejecting the proffered mitigation. *Thompson v. State*, 619 So. 2d 261 (Fla. 1993).

Defendant then filed his third motion for post conviction

¹ The symbol "R." will refer to the record on appeal, which includes the transcripts of proceedings, from Defendant's resentencing appeal, FSC Case No. 75,499.

relief, raising 45 claims, including a claim that counsel was ineffective for failing to have Defendant's mental health adequately evaluated to show, *inter alia*, that he was retarded.² (PCR-SR. 62-233)³ However, Defendant did not claim that it was unconstitutional to execute him because he was mentally retarded. *Id.* The lower court denied the motion. (PCR-SR. 274-89) This Court affirmed the denial of the motion for post conviction relief and denied a contemporaneously filed habeas petition. *Thompson v. State*, 759 So. 2d 650 (Fla. 2000). This Court specifically found that Defendant had not alleged any new evidence of mental disabilities. *Id.* at 665-66.

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

While the federal habeas petition was pending, on November 15, 2001, Defendant served the original version of this fourth

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

³ The symbols "PCR." and "PCR-SR." will refer to the record on appeal and supplemental record on appeal from the third motion for post conviction relief, FSC Case No. SC87481.

motion for post conviction relief. However, Defendant never properly served this motion. Defendant took no action to remedy the improper service or to have the motion heard. On June 18, 2003, Defendant served his amended motion for post conviction relief, which exceeded the page limits, without requesting leave to amend. (PCR2. 3-37)⁴ The motion raised not only a retardation claim but also a claim based on *Ring v. Arizona*, 536 U.S. 584 (2002). The State filed a response to the amended motion and moved to strike it on July 8, 2003. (PCR2. 38-65) Defendant did not file a response to the motion to strike and had never filed a notice of appearance in this matter.

The lower court held a hearing on the motion to strike on July 29, 2003, and noticed the last attorney to file a notice of appearance on Defendant's behalf for this hearing. At this hearing, the lower court granted the State's motion to strike without hearing argument. The lower court rendered its written order to this effect on August 1, 2003. (PCR2. 66, 100-03)

Defendant then moved to disqualify the lower court, asserting that the hearing was an *ex parte* communication. (PCR2. 67-82) The State filed a response, in which it noted that Defendant was aware that he had to file a notice of appearance to receive notices of hearing because the issue had previously

⁴ The symbol "PCR2." will refer to the record on appeal in case no. SC03-2129.

arisen in other case to which Defendant's counsel was assigned. (PCR3-SR. 60-69) The State also noted that the order granting its motion to strike was a dismissal without prejudice. *Id.* The lower court denied the motion for disqualification in a written order rendered on September 4, 2003. (PCR2. 88)

Defendant then filed a notice of appeal on October 1, 2003, seeking to appeal both the non-final order granting the State's motion to strike and the denial of the motion for disqualification. The State moved to dismiss the appeal because the orders were not final and the notice was untimely. Defendant filed a response, asserting that he was unaware that the order granting the State's motion to strike was without prejudice. This Court granted the State's motion to dismiss the appeal of the order granting the State's motion to strike on July 9, 2004. *Thompson v. State*, 880 So. 2d 1213 (Fla. 2004). It ordered Defendant to file an amended motion that complied with the page limitation. It treated the appeal of the order denying the motion to disqualify as a petition for writ of prohibition and denied it on the merits. *Id.*

On August 9, 2004, Defendant served his second amended successive motion for post conviction relief. (PCR3. 6-25)⁵

⁵ The symbols "PCR3." and "PCR3-SR." will refer to the record on appeal and supplemental record on appeal in the FSC Case No. SC05-279.

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

Defendant again appealed to this Court. On appeal, Defendant claimed that the lower court had erred in holding that *Atkins v. Virginia*, 536 U.S. 304 (2002), did not apply retroactively, finding that the claim was procedurally barred and finding the claim was conclusively refuted by the record. Initial Brief of Appellant, FSC Case No. SC05-279. In raising these claims, Defendant insisted that the issue of retardation had not been adequately presented at resentencing, in contradiction to his assertion before the lower court that the issue had been "well developed."

On April 4, 2005, the United States Supreme Court granted Defendant's petition for writ of certiorari regarding the

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

On remand, the district court determined that Defendant was not entitled to a stay under *Rhines*, particularly finding that the claim that he was retarded was not meritorious. Defendant then elected to withdraw his retardation claims, the district court considered the remaining claim and the district court denied Defendant's federal habeas petition on July 20, 2006. Final Judgment and Order Denying Petition for Writ of Habeas Corpus, S.D. Fla. Case No. 01-2457. Defendant was permitted to appeal two issues regarding the denial of his federal habeas petition to the Eleventh Circuit. Upon consideration of this appeal, the Eleventh Circuit affirmed the denial of Defendant's federal habeas petition. *Thompson v. Sec'y for the Dept. of Correction*, 517 F.3d 1279 (11th Cir. 2008).

On July 9, 2007, this Court entered an order on the appeal of the lower court's summary denial of the third version of the

retardation claim, finding that the claim was not procedurally barred and remanding to the lower court to give Defendant another opportunity to plead his claim again in compliance with *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), within 30 days. *Thompson v. State*, 962 So. 2d 340 (Fla. 2007).

On August 8, 2007, Defendant served a third amended version of his successive motion for post conviction relief. (PCR4. 545-620)⁶ The motion was again not properly served. *Id.* This version was 72 pages long and sought to raise three additional issues. *Id.* In support of his retardation claim, Defendant cited two IQ scores: a 75 from 1958, when Defendant was in the first grade, and a 74 from second grade. (PCR4. 554) He also referred to testing done by Dr. Dorita Marina in 1988, and stated that Dr. Marina had found Defendant's IQ to be at the "lowest possible level of low average." (PCR4. 555)

Defendant simultaneously filed a motion to exceed the page limitations on successive motions. (PCR4. 621-22) The motion asserted that several named defendants were similarly situated and had been permitted to file oversized motions. *Id.* On August 15, 2007, the State responded to the motion to exceed the page

⁶ The symbols "PCR4." and "PCR4-SR." will refer to the record on appeal and supplemental record on appeal in FSC Case No. SC07-2000. Because the clerk did not consecutively paginate the transcripts contained in volumes 8, 9 and 10 of the record, these transcripts will be referred to as "PCR4-V[volume number]. [page number]."

limits and moved to strike the third amendment successive motion for post conviction relief. (PCR4. 623-41) The State argued that this Court's remand order only allowed Defendant to re-plead his retardation claim and that allowing Defendant to add claims would be in contravention to Fla. R. Crim. P. 3.851(f)(4). *Id.* It also pointed out that the allegedly similarly situated defendants were not similarly situated. *Id.*

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

the latest version of his motion. (PCR4-V8. 11) The lower court indicated that the parties should be prepared to discuss all the issues and asked the State to prepare a response to the retardation claim before the hearing. (PCR4-V8. 11-12)

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

The lower court then asked Defendant if he could direct it to where in the retardation claim he had complied with *Cherry* and plead that he had an IQ below 70. (PCR4-V9. 11-12) Defendant indicated that he could not answer that question without reviewing the State's response because he "didn't respond about

the Cher[r]y case" in the motion. (PCR4-V9. 13) As such, he requested additional time to prepare a memo about *Cherry*. (PCR4-V9. 13) The State objected to the provision of additional time as Defendant had been expressly ordered by this Court to file a motion in compliance with *Cherry* within 30 days. (PCR4-V9. 13) The lower court decided to allow Defendant to file "a very brief, two page response showing me how and why you have complied" with this Court's order regarding *Cherry*. (PCR4-V9. 15) It directly ordered Defendant to fax his reply "by noon Monday, which is the 27th of August." (PCR4-V9. 16) It indicated that it would prepare an order by noon Tuesday. (PCR4-V9. 16) At no point during these proceedings did Defendant indicate that he needed to be evaluated by an expert. This is true, even though the State indicated that it would need an expert appointed if an evidentiary hearing was ordered. (PCR4-V9. 17)

When the State realized shortly before 4 p.m. on August 27, 2007, that it had not received a copy of Defendant's pleading, it attempted to contact Defendant's counsel to inquire about being served by fax. (PCR4-SR. 30) When the State reached Defendant's counsel at approximately 4 p.m., Defendant's counsel indicated that the pleading had not been sent to the lower court because Defendant's counsel asserted that she had not heard the order for the pleading to be faxed by noon. (PCR4-SR. 30-31)

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

At approximately 4:15 p.m., Defendant did fax the State his reply to the State's response. (PCR4-SR. 31, 2-4) In the reply, Defendant did not point to anything in his motion that complied with *Cherry*. (PCR4-SR. 2-4) Instead, Defendant argued that *Cherry* was wrongly decided and sought to plead additional childhood IQ score of 75 Stanford Binet-6/11/58 age 6; 74 Cal. M.M.-10/16/58 age 6; 90 Cal M.M.-11/3/59 age 7; 74 Stanford Binet-5/11/61 age 9; 79 Cal M.M.-11/8/63 age 11; 73 Henmon Nelson-11/18/66 age 14; 70 Henmon Nelson-10/68 age 16." *Id.*

On September 10, 2007, Defendant filed a "Motion to Get Facts." (PCR4. 684-90) In this motion, Defendant claimed his counsel had not heard that the reply was due by noon and was unaware of this deadline until the State called. (PCR4. 684-85) He acknowledged that the lower court's JA had called before noon

and that counsel had spoken to the JA about faxing the reply. (PCR4. 685) However, Defendant blamed the JA for not reminding him of the noon deadline. (PCR4. 685)

Defendant then asserted that the State and lower court must have engaged in an *ex parte* communication because the State had called counsel about the reply close to the time referenced in the lower court's order. (PCR4. 686) He insisted that an evidentiary hearing needed to be held about the content of the *ex parte* hearing. (PCR4. 686) He asserted that there was a "history of *ex parte* communications" because his counsel had phoned the JA about a hearing date at a time when a prosecutor was in the judge's chamber and the prosecutor had been aware of the August 22, 2007 hearing date. (PCR4. 686) He claimed that "[n]o hearing had been held to determine this date." (PCR4. 686) He asserted that the lower court's order was based on the "State's assessment of the merit of the case." (PCR4. 687) In a footnote, he asserted that the lower court should disqualify itself for the purpose of holding this evidentiary hearing. (PCR4. 688)

On September 11, 2007, Defendant moved for rehearing. (PCR4-SR. 6-25) In the motion, Defendant argued that the August 22, 2007 hearing should not be considered the *Huff* hearing because it was first hearing in the case and he was only on

notice that the motion to exceed page limits and motion to strike would be heard. *Id.* He further asserted that this alleged lack of notice prevented him from pleading in accordance with *Cherry*. *Id.* He asserted that he had pled his claim in accordance with *Cherry* because he had pled that he had an IQ of 70 on the Henmon Nelson in 1968. *Id.* He further asserted *Cherry* was wrongly decided. *Id.*

The State filed a response to the motion to get facts, asserting that the motion was an improper attempt to draw the lower court into an adversarial position regarding alleged grounds for disqualification without complying with the disqualification procedures and that it was untimely and facially insufficient as a motion for disqualification. (PCR4-SR. 26-74) On September 19, 2007, the lower court held another status hearing. (PCR4-V10. 1-6) At this hearing, the lower court announced that it was denying Defendant's motions for rehearing and to get facts. *Id.* In its order denying the motion for rehearing, the lower court noted that its decision was based on the fact that Defendant's motion failed to comply with this Court's order to plead the claim in accordance with *Cherry*. (PCR4. 712-13) The motion to get facts was summarily denied. (PCR4. 714)

Defendant again appealed to this Court, raising a issue

about the denial of the retardation claim and an issue about the striking of his other claims. Regarding the retardation issue, Defendant asserted that he had plead that he was retarded under *Cherry* because he had obtained a 70 on a Henmon-Nelson IQ test in 1968. *Id.* at 16. After the State pointed out that the Henmon-Nelson was not an individually administered IQ test and was, therefore, not properly considered under Fla. Admin. Code 65G-4.011 (Answer Brief of Appellant at 33), Defendant argued that he had not been able to show that it was a qualifying test. Reply Brief at 6-7.

On February 27, 2009, this Court affirmed as without merit the claims that the lower court had stricken. *Thompson v. State*, 3 So. 3d 1237, 1238-39 (Fla. 2009). However, this Court remanded the retardation claim for an evidentiary hearing. *Id.* at 1238. This Court specifically required that the matter "shall proceed in an expedited manner, and an evidentiary hearing on his mental retardation claim shall be held and an order entered within 90 days of this order." *Id.* at 1239.

On March 2, 2009, the lower court attempted to schedule a telephonic status hearing for that day. However, Defendant claimed to have no one available to attend such a hearing. As a result, the lower court entered an order scheduling the evidentiary hearing for April 13, 2009, and a status hearing for

March 13, 2009. (PCR5. 20)⁷ On March 4, 2009, the lower court revised the scheduling order to require Defendant to provide the State with a witness list prior to the March 13, 2009 status hearing, the State to provide a witness list to Defendant within one week of receiving the defense witness list, Defendant to have his expert conduct an evaluation before the status hearing and Defendant to provide the State with its expert's report promptly. (PCR5. 21-22) It noted that the parties had more than 4 years to prepare for the hearing and that it would not seek an extension of this Court's 90 day deadline. *Id.*

As a result of this order, the State moved, on March 5, 2009, to preclude Defendant from having his expert administer both the WAIS and Stanford-Binet IQ tests. (PCR5. 24-27) The State argued that if Defendant was permitted to use both tests, the State would effectively be precluded from having Defendant evaluated using a test specified by Fla. Admin. Code 65G-4.011 due to the practice effect. *Id.* The lower court ordered Defendant to respond to the State's motion by 5 p.m. on March 9, 2009. (PCR5. 28) In his response, Defendant argued that the motion was premature because he had not yet retained an expert and that the practice effect had not been proven to exist.

⁷ The symbol "PCR5." and "PCR5-SR." will refer to the record on appeal, which includes the transcripts of proceedings, and supplemental record on appeal in the instant appeal.

(PCR5. 29-32)

Also on March 9, 2009, Defendant moved the lower court to continue the status hearing and discovery deadlines. (PCR5. 33-37) In this motion, Defendant claimed that he had been unable to begin looking for a mental health expert to evaluate him until March 6, 2009, because his counsel was allegedly in a "four-day evidentiary hearing in Roy Clifford Swafford v. State."⁸ Despite the fact that the scheduling order clearly required the State to provide its witness list within a week of receiving Defendant's witness list, Defendant averred that the lower court had not provided any time limits for the State at all. *Id.* He alleged that he had not had four years to prepare for the hearing because his claims had been summarily denied and that his lead counsel was unavailable to be at the hearing because she would be "out of the country from March 11-17, 2009." *Id.*

On March 10, 2009, the lower court granted the State's motion and required that Defendant's expert use either the WAIS or Stanford-Binet but not both tests. (PCR5. 39) It also granted Defendant's motion and continued both the status hearing and Defendant's discovery deadline until March 26, 2009. (PCR5. 38) However, it did not extend the requirement that the State

⁸ This statement was false. The evidentiary hearing in *Swafford* was not a four day hearing. Instead, the hearing was held only on March 2, 2009, and the morning of March 5, 2009.

provide a witness list within a week of receiving Defendant's list. *Id.*

On March 12, 2009, Defendant moved to disqualify the lower court. (PCR5. 40-48) According to Defendant, the bases for the motion were that the lower court had directed his counsel to review an ethical rule in its August 2007 order summarily denying the retardation claim, that the lower court had engaged in "repeated *ex parte* communications" with the State, that the lower court had been employed by the State Attorney's Office at the time of his resentencing and that the lower court had allegedly set unreasonable time limitations on the defense while setting none on the State. *Id.* The lower court denied the motion. (PCR5. 49)

On March 16, 2009, the State wrote to Defendant, requesting that it be informed of the date and time on which Defendant intended to have his expert conduct the evaluation so that the State could be present during the evaluation. (PCR5. 50) The State also informed Defendant of the name of its expert and that it intended to have its evaluation conducted during the first week in April. *Id.* Defendant waited until 4:30 p.m. on March 18, 2009, to respond that his expert, Dr. Faye Sultan, would be conducting the evaluation beginning at 8:30 a.m. on March 20, 2009.

On March 20, 2009, the State moved to compel Defendant to provide all records, reports, test data and notes from Dr. Sultan and any other expert who had evaluated Defendant after resentencing, his corrections records, any documents reviewed by the experts in preparing for the hearing and the documents regarding the Henmon-Nelson test. (PCR5. 52-54) After 5 p.m. on March 25, 2009, Defendant served a response to this motion. (PCR5. 57-61) He agreed to provide the report and data from Dr. Sultan and the corrections records. *Id.* He assumed that the request for documentation regarding any expert who evaluated Defendant after resentencing was a request for information regarding the experts who testified at resentencing and indicated that he would provide any documentation he received from these experts. *Id.* He insisted that he had no documentation regarding Henmon-Nelson test and that he should not be required to obtain the documentation because the State should be required to obtain its own rebuttal evidence. *Id.* In the response, Defendant also moved the lower court to continue the evidentiary hearing so that he could continue to investigate his claim. *Id.*

At the status hearing on March 26, 2009, the State noted that it had not received the witness list that it was supposed to have received before the hearing. (PCR5. 1235, 1237) When the lower court asked Defendant about the witness list, Defendant

provided a list that contained the names of 13 individuals without providing any addresses or contact information for these individuals. (PCR5. 55-56, 1237-38) Moreover, it identified three individuals (Dr. Sultan, Dr. Stephen Greenspan and Dr. Mark Tasse) as post conviction experts. (PCR5. 55-56) When the State complained about the lack of addresses and contact information and the lack of reports from the experts, Defendant responded that he did not have addresses for his witnesses and that none of his experts had provided reports, as Dr. Sultan was still conducting her evaluation. (PCR5. 1236, 1241, 1251-54) During this discussion, the State disclosed that its expert would be evaluating Defendant on April 6, 2009. (PCR5. 1255) When the State complained that the lack of reports was preventing it from preparing for the hearing, the lower court ordered Defendant to provide the reports by March 30, 2009. (PCR5. 1254) It ordered that the State to provide its expert's report by April 9, 2009. (PCR5. 1270)

During argument on the motion to compel, the State pointed out that the request regarding the Henmon-Nelson test was not for rebuttal evidence. (PCR5. 1258-59) Instead, the State was requesting the documentation required to lay a predicate for the admission of results of that test under Fla. Admin. Code 65G-4.011. (PCR5. 1258-59) Defendant insisted that he did not have

the documentation and did not believe that he should be required to show that the test was admissible. (PCR5. 1257-58, 1259-62) The State further clarified that it wanted to get the corrections records directly from the custodians and simply needed an order allowing it to subpoena the records directly. (PCR5. 1233) After considering these arguments, the lower court granted the motion to compel and entered orders providing that the documents would be provided to the State by April 2, 2009. (PCR5. 62, 64, 1231-33, 1263, 1267-68, 1273-74, PCR5-SR. 2)

Regarding the motion to continue the evidentiary hearing, the State argued that Defendant should have fully investigated his claim before he first filed it in 2001, more than 7 years earlier. (PCR5. 1244, 1246) It further noted that Defendant had already obtained a continuance of the status hearing by making a false claim about a four day evidentiary hearing in Swafford when the evidentiary hearing actually only took a day and half. (PCR5. 1244-45) It noted that Defendant had already obtained additional time to provide it with reports by simply ignoring the scheduling order. (PCR5. 1247) As such, it objected to continuing the hearing further. (PCR5. 1248) During the argument, Defendant indicated that he believed the evidentiary hearing could be accomplished in a day. (PCR5. 1237) After looking at Defendant's witness list, the lower court stated that

it believed the hearing would take longer than a day. (PCR5. 1238) It then decided to begin the evidentiary hearing on April 13, 2009, and continue with the hearing beginning on April 27, 2009. (PCR5. 1242-43) It stated that it would not allow the hearing to last more than one week. (PCR5. 1242) On March 27, 2008, Defendant sent a letter indicating that Dr. Sultan could not draft a report by March 30, 2009, and asking for another continuance of the due date for the report. (PCR5-SR. 1) Over the State's objection, the lower court granted the continuance until April 1, 2009. (PCR5. 65)

When Defendant finally produced documentation about the Henmon-Nelson test on April 8, 2009, the only documentation regarding the nature of the test that was produced was the article upon which the State had relied during the last appeal showing that Henmon-Nelson was a group IQ test. (PCR5. 69, 71-100) As a result, the State filed a motion in limine at the beginning of the evidentiary hearing to exclude evidence about this test. (PCR5. 67-100, 852-53) However, because Defendant insisted that he would have some evidence that the test qualified and that he did not have sufficient time to respond, the lower court decided to permit the testimony. (PCR5. 854-58)

Also that morning, Defendant provided the State with notes regarding interviews that Dr. Sultan had conducted. (PCR5. 863)

Prior to the beginning of testimony, the State made an oral motion to compel Defendant to provide a report from Dr. Greenspan. (PCR5. 858-59) The lower court granted the motion and required Defendant to provide the report by April 17, 2008. (PCR5. 863-64) During this discussion, Defendant indicated that he had planned to call witnesses on April 13 and 27, 2009, and never requested additional hearing time. (PCR5. 859, 861, 849-66) Defendant also indicated that he did not object to the State recalling Dr. Sultan for additional cross examination based on the late disclosure of her notes. (PCR5. 863)

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

Mr. Weaver stated that at the time he taught Defendant, Defendant did not do his homework or complete tests, received failing grades and was somewhat disruptive during class in that he would talk and fidget. (PCR5. 882-83, 891-93) He described Defendant as friendly but dressed poorly with a "kind of clunky walk," poor motor skills and a short attention span. (PCR5. 891-92, 894, 898) He stated that Defendant was a follower who would

imitate the other students, that the other children made fun of Defendant and that Defendant interacted more with adults. (PCR5. 892, 893) Mr. Weaver described an incident in which Defendant brought Christmas trees into school for his class and other classes, which Mr. Weaver later learned Defendant had cut from a neighbor's yard. (PCR5. 892)

Mr. Weaver stated that Defendant's school records reflected that Defendant's mother had been advised to delay Defendant's entry into school for a year but rejected the advice and started Defendant in school at age 5. (PCR5. 884) They also reflected that Defendant received speech therapy when he was young. (PCR5. 893) They also revealed Defendant was given the Stanford-Binet on June 11, 1958, and achieved an IQ score of 75; the California Mental Maturity test on November 11, 1959 and scored 90; the Stanford-Binet on May 11, 1961, and scored a 74; the California Mental Maturity test on November 8, 1963, and scored a 79; the Henmon-Nelson test on November 11, 1966, and scored a 73; and the Henmon-Nelson in October 1968, and scored a 70. (PCR5. 884-85) He averred that these scores made Defendant eligible for special education at the time in Ohio because the Ohio schools used a score less than 80 to determine eligibility. (PCR5. 885) Mr. Weaver stated that the Henmon-Nelson scores "kind of correlate with IQ." (PCR5. 885) He stated that the California

Mental Maturity test was more of an achievement test, but it correlated with IQ. (PCR5. 887) He did not know if the tests were individually administered. (PCR5. 887-90)

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

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

On cross, Mr. Weaver admitted that he only taught Defendant for one year and that he liked Defendant. (PCR5. 900) He denied having described Defendant as always smiling and laughing. (PCR5. 900-01) He acknowledged that Defendant had been described as a very good reader in a progress report from the first grade and as restless and uninterested in school in 1960. (PCR5. 902)

The comments about being a good reader and having good reading comprehension at grade level continued in 1961 and 1962. (PCR5. 902-03) In 1963, Defendant's poor writing ability was attributed to his lack of coordination and his poor performance was attributed to his short attention span. (PCR5. 904) He acknowledged that notes showed that Defendant did not want to do his work and had to be forced to do it. (PCR5. 904)

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

Dr. Faye Sultan, a clinical psychologist, testified that she was first asked to interview Defendant in 1996. (PCR5. 917-25) She stated that she had given IQ tests many times but that her evaluation of Defendant was the first time she had ever administered the WAIS-IV. (PCR5. 922-23)

Rather than having Dr. Sultan testify regarding her understanding of the definition of retardation, Defendant attempted to have Dr. Sultan read a definition for an AAMR manual. (PCR5. 925-27) The lower court permitted Dr. Sultan to testify regarding her understanding of the definition of retardation but sustained the State's objection to Dr. Sultan

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

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

Dr. Sultan then testified that she administered the WAIS-IV

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

In addition to her IQ testing, Dr. Sultan also reviewed Defendant's school records and records of prior evaluations and spoke to Mr. Weaver; Helen Thompson, Defendant's mother; and Donna Adams, Defendant's common law wife. (PCR5. 950-51) She opined that the scores recorded in the school records were consistent with the score she obtained on the WAIS-IV. (PCR5. 950, 953-54) She stated that she did not perform adaptive functioning testing because the people she was interviewing did not interact with Defendant on a daily basis. (PCR5. 958-59) She chose these individuals to speak to because she was conducting a retrospective analysis of Defendant's adaptive functioning.

(PCR5. 963)

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

Dr. Sultan then testified that based on her interview with Mr. Weaver, she believed that Defendant had deficits in academic performance, coordination, motor skills and the ability to make friends and interact with peers socially. (PCR5. 969) From Ms. Adams, who allegedly knew Defendant from his late teenage years through his early adulthood, Dr. Sultan learned that Defendant had difficulty attending to his own grooming without being reminded, handling money and performing household tasks. (PCR5. 971) When Dr. Sultan resorted to repeating what Ms. Adams told her, the State renewed its hearsay objection, and the lower court again sustained the objection and renewed its instructions regarding the proper scope of Dr. Sultan's testimony. (PCR5. 971-73) Dr. Sultan then stated that the information that she

received from Ms. Thompson reinforced her opinions that Defendant had deficits in social skills and self-care skills. (PCR5. 974) She stated that she elected not to speak to the prison personnel who were in contact with Defendant on a daily basis because she believed the prison environment was too restrictive for Defendant to demonstrate his adaptive functioning. (PCR5. 975-77) Dr. Sultan also believed that Defendant had evidenced gullibility and naiveté from her records review and interviews. (PCR5. 978-81) She also found Defendant's behavior in court inappropriate to the situation and supportive of her belief that Defendant was retarded. (PCR5. 982-83)

Dr. Sultan also opined that Defendant's school records showed that Defendant's alleged problems in intellectual functioning and adaptive behavior onset before the age of 18. (PCR5. 984-85) As a result, Dr. Sultan opined that Defendant was retarded. (PCR5. 985)

On cross, Dr. Sultan claimed not to have a strong personal opinion about the death penalty but asserted that the American Psychological Association had taken a position against the death penalty. (PCR5. 991-92) When confronted with the fact that she had previously testified that she had a strong personal opposition to the death penalty, Dr. Sultan stated that she had changed her opinion as she grew older. (PCR5. 993-94) She

admitted that she had testified exclusively for the defense in death penalty cases. (PCR5. 998) When asked if she had ever said that any psychologist who testified on behalf of the government in a death penalty case was unethical, she admitted that she probably did say that but claimed that she would not call such a psychologist unethical. (PCR. 998-99)

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

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

Dr. Sultan stated that she saw nothing in the school records indicating a hearing deficit or hearing testing but did see notations of a speech impediment and speech therapy, which was beneficial. (PCR5. 1016-17) She admitted that there was frequently a correlation between hearing loss and speech deficits. (PCR5. 1017) She admitted that in the 1950's and 1960's, students with hearing deficits were sometimes misdiagnosed as being retarded and that hearing loss affected motor coordination. (PCR5. 1017-18) She also acknowledged that such a misdiagnosis tended not to get corrected. (PCR5. 1018) She acknowledged that by the time Mr. Weaver was teaching Defendant, Defendant was no longer putting forth much effort in school. (PCR5. 1018) She acknowledged that it was possible that Defendant had a hearing loss that was misdiagnosed but believed that the school records were inconsistent with this possibility because Defendant did most things badly and was good at music. (PCR5. 1022-23)

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

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

The State presented the testimony of Dr. Greg Prichard, a psychologist with a specialization in assessments. (PCR5. 1033-36) Dr. Prichard stated that there were two IQ tests that were generally accepted: the WAIS and the Stanford-Binet. (PCR5. 1037) The most current version of the WAIS was the WAIS-IV, which Dr. Prichard was not yet administering because he had yet to familiarize himself with the new version. (PCR5. 1037) Dr. Prichard stated that it was important to be thoroughly familiar with an IQ test before administering it in practice because variations in the manner in which the test was administered invalidated the results. (PCR5. 1038-39)

Dr. Prichard stated that he administered the Stanford-Binet, Fifth Edition to Defendant on April 6, 2009, in the presence of representatives from the State and defense. (PCR5. 1040-41) He used the Stanford-Binet because Dr. Sultan had just given Defendant the WAIS and the practice effect would affect the results of a second administration in such a short period of time. (PCR5. 1042) Dr. Prichard stated that a 1987

administration of the WAIS would not have created a practice effect because the effect disappears after a year. (PCR5. 1042-43)

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

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

Dr. Prichard explained that the IQ score he obtained was well above a score of 69, which was necessary to find retardation. (PCR5. 1048-49) He stated that Dr. Carbonnel had administered a WAIS in 1987, on which Defendant obtained a verbal IQ of 87, a performance IQ of 84 and a full scale IQ of

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

Dr. Prichard stated that the mean on the present versions of the WAIS and Stanford-Binet was 100 and the standard deviation was presently 15 on both tests. (PCR5. 1049) He stated that the standard deviation on the versions of the Stanford-Binet prior to the Stanford-Binet IV had been 16, which resulted in a score of 68 being necessary for a score that was two standard deviations below the mean on these versions of the test. (PCR5. 1052-53) Dr. Prichard stated that Defendant's school records showed that he had been administered the older versions of the Stanford-Binet and scored 75 and 74. (PCR5. 1054) Since these tests had a standard deviation of 16, these scores were above the level for retardation. (PCR5. 1054-56)

Dr. Prichard had reviewed the raw data from Dr. Sultan's administration of the WAIS-IV and her report. (PCR5. 1056-57) He

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

When the State asked Dr. Prichard to define the terms average, low average and borderline, Defendant objected that Dr. Sultan had not be allowed to testify regarding definitions. (PCR5. 1062) The lower court overruled the objection and indicated that it had not restricted Dr. Sultan's testimony regarding definitions and had only refused to allow her to read a definition from a book into the record. (PCR5. 1062-63)

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

was defined as below 70. (PCR5. 1064)

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

Dr. Prichard stated that everything he had reviewed indicated that the issue of whether Defendant was retarded was not even a close question. (PCR5. 1068) Instead, all of the information showed that Defendant functioned in the low average range. (PCR5. 1068)

After direct, Defendant claimed that he was unable to cross examine the expert because he had received the State's expert's raw data several hours earlier. (PCR5. 1069) The State averred that it had attempted to provide the raw data the previous week but could only confirm receipt that morning. (PCR5. 1069-70) As such, the lower court recessed the proceedings, offering to

continue the next day. (PCR5. 1070-74) Defendant declined the offer and indicated that he would rather conduct a telephonic cross examination on April 27, 2009, when he had already planned to present other witnesses. (PCR5. 1074-76) The lower court permitted Defendant to do so. (PCR5. 1076)

After 4 p.m. on April 17, 2009, Defendant finally provided the report from Dr. Greenspan. (PCR5. 753-68) In the report, Dr. Greenspan admitted that he had no opinion regarding whether Defendant was retarded. (PCR5. 753) Instead, he proposed to testify about "the proper criteria and methods to use in diagnosing MR in the criminal context" and "whether or not [he] believes [Dr. Sultan and Dr. Prichard's] conclusions are supported by their findings and other evidence." (PCR5. 753) The State then moved in limine to exclude such testimony, as improper testimony about a legal definition and improper comment on the credibility of other witnesses. (PCR5-SR. 3-23)

On April 23, 2009, Defendant served a response to the motion. (PCR5. 770-81) In the response, Defendant claimed that there was no disagreement about the legal definition of retardation and that Dr. Greenspan would merely be commenting on the opinions of the other doctors in explaining his opinion on the matter in controversy. *Id.* He also asserted that Fla. R. Crim. P. 3.203 allowed the presentation of anything he wanted to

present and that the lower court would deprive him of a full and fair hearing by excluding the evidence. *Id.* On April 24, 2009, the lower court entered an order denying the State's motion. (PCR5. 804)

When the proceedings recommenced on April 27, 2009, Dr. Prichard stated that doing the testing in the presence of observers and while Defendant was handcuffed was not optimal. (PCR5. 1088) He had reviewed documents, which included the prior testimony of defense experts, school records and Dr. Sultan's report and raw data before he conducted his testing. (PCR5. 1088-89) He did not recall if he had seen any Department of Corrections records but was sure he had not seen the full records. (PCR5. 1089) He admitted that he had noted Defendant's smiling inappropriately to his counsel at the time of the evaluation but did not consider the smiling significant in assessing retardation. (PCR5. 1090)

Dr. Prichard acknowledged that he conducted a clinical interview with Defendant for 45 minutes to an hour before he started the IQ test. (PCR5. 1090) He stated that this was to evaluate Defendant's ability to respond and any psychological conditions that might affect his testing and to obtain background information. (PCR5. 1090-91) He stated that his only basis for evaluating the truthfulness of Defendant's statement

was to compare them to information Defendant had previously provided, some of which was consistent and some of which was not. (PCR5. 1091-92) However, Dr. Prichard stated that the accuracy of the information Defendant reported did not affect his assessment. (PCR5. 1092-93)

Dr. Prichard stated that the WAIS was more commonly used than the Stanford-Binet and was easier to administer. (PCR5. 1093-94) The tests were similar in the factors they were assessing and their scores correlated well but were not similar in how they assessed the factors. (PCR5. 1094, 1098-99) He admitted that it was better practice to give the most recent version of an IQ test. (PCR5. 1094) He admitted that the Stanford-Binet V was published in 2003, and was six years old. (PCR5. 1095-96) He acknowledged that there was research suggesting that the age of the test affected its scores. (PCR5. 1096) He admitted that an argument could be made that there was a practice effect based on the administration of different IQ tests within a short period of time but that the effect was identifiable and quantifiable based on research only regarding the readministration of the same test. (PCR5. 1096-98) This was true because the task demands on different tests were different. (PCR5. 1098) He stated that the practice effect could inflate a score by as much as 8 points but that it did not occur in all

cases, which made the interpretation of scores difficult. (PCR5. 1099) He was not concerned about the practice effect in this case because he and Dr. Sultan did not administer the same test and the tests were sufficiently different in their task requirements. (PCR5. 1100)

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

Dr. Prichard stated that he had not felt the need to do further testing in this matter because his IQ score was consistent with the scores obtained by Dr. Marina and Dr. Carbonnel, those scores were not consistent with retardation, they were consistent with low average functioning and a failure to establish any one of the elements of retardation negated the claim. (PCR5. 1103-04) He acknowledged that Dr. Sultan's IQ score was interesting to him but stated that it was explained by the low processing speed score. (PCR5. 1105) He reiterated that he believed that Dr. Sultan's use of her full scale score to assert that Defendant was retarded was a misinterpretation of

the score. (PCR5. 1105) He asserted that the manuals of the tests themselves indicated that such a significant difference in subtest scores supported his belief. (PCR5. 1105-06) He stated that the difference in this subtest score would not be associated with problems with adaptive functioning. (PCR5. 1106-08) Instead, such a different subtest score suggested the possibility of a focused learning disability. (PCR5. 1108) If he had been doing a more general assessment of Defendant's functioning, he would have done further testing to identify the exact problem represented by this subtest score. (PCR5. 1109-11) However, since he was only assessing whether Defendant was retarded, he did not do so. *Id.*

Dr. Prichard stated that a number of factors could affect a person's performance on an IQ test, such as sleep, rapport with evaluator and motivation, but a person cannot outperform their true intellectual level. (PCR5. 1111-12) As such, the scores in the 80's were more representative of Defendant's true level of functioning. (PCR5. 1112-13) He admitted that Defendant appeared to be attentive, motivated and giving his best effort during his testing. (PCR5. 1114)

Dr. Prichard admitted that Defendant had claimed to have been helped by the recruiter on the military entrance exams and that he was aware that Defendant did not remain in the military

for long. (PCR5. 1118-21) However, this did not affect his opinion. *Id.* He also stated that Defendant's claim that he only managed to pass the GED exam by cheating on the third time he took the test also did not affect his opinion. (PCR5. 1122-27)

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

On redirect, Dr. Prichard stated that he had been hired by both the State and defense to conduct retardation evaluations. (PCR5. 1162) In the Cherry case, he was hired by the State and opined Cherry was retarded. (PCR5. 1162) When Dr. Prichard asked if there was any question in his mind that Defendant was not retarded as a clinician and someone familiar with Florida law, Defendant objected that Dr. Prichard was not qualified as a legal expert. (PCR5. 1163-64) The lower court overruled the objection. (PCR5. 1165)

When Defendant called Dr. Greenspan, the State renewed its objection that Dr. Greenspan had no opinion on the matter in controversy and was merely being called to testify concerning

the credibility of the other experts, which was not admissible. (PCR5. 1166) The lower court remarked that it had denied the State's motion in limine despite being concerned that Dr. Greenspan's testimony was not appropriate because this Court had ordered an evidentiary hearing that the lower court had felt was not necessary. (PCR5. 1166) As such, it was allowing the testimony in an abundance of caution and would disregard it if it was not appropriate. (PCR5. 1166-67)

Dr. Greenspan then testified about his qualifications and his general understanding of the definition of retardation and learning disabilities. (PCR5. 1173-84) During this general testimony about subjects other than retardation, the State objected that the testimony was not relevant. (PCR5. 1180-81, 1184-85) Defendant responded that the testimony was somehow relevant to discussing Dr. Prichard's testimony. *Id.* The lower court first directed Defendant to question Dr. Greenspan directly about issues Dr. Prichard had actually discussed and then directed Defendant to discuss Dr. Greenspan's actual opinion. (PCR5. 1181-82, 1184)

Dr. Greenspan then explained that he had done no testing on Defendant. (PCR5. 1185) Instead, he stated that he was hired to review materials, including the reports of the other experts, and that he was asked to testify regarding the definition of

retardation, his opinion on how retardation should be evaluated and his opinion on the manner in which the other experts had conducted their evaluations. (PCR5. 1185) Dr. Greenspan then testified regarding what he saw in the records he reviewed, and the State again objected. (PCR5. 1190-91) The lower court stated that since it was unsure of what opinion Dr. Greenspan would be offering and it appeared that he was simply reciting records, it wanted Dr. Greenspan to offer his opinion first and explain it thereafter because it thought it might have misunderstood the nature of Dr. Greenspan's testimony. (PCR5. 1191-92) When Defendant then asked if Dr. Greenspan had an opinion on Defendant's intellectual functioning, he stated that he did not. (PCR5. 1192) The lower court then inquired about the purpose of Dr. Greenspan's testimony, and Defendant responded that he was being called merely to comment on the evaluations by the other experts. (PCR5. 1193) The lower court informed Defendant that it would not permit testimony about the legal definition of retardation or testimony that merely concerned the propriety of the other experts' opinions. (PCR5. 1194-95) The State argued that under the law, a expert could not be called merely to comment on other experts, that such comment was only permissible in discussing the expert's own opinion on the matter in controversy (whether Defendant met the legal definition of

retardation) and that Dr. Greenspan had no opinion on that matter. (PCR5. 1195-96) The lower court reiterated its ruling, and Defendant stated that he disagreed. (PCR5. 1196-98)

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

During his closing argument, Defendant argued that this Court had wrongly defined retardation and urged the lower court to overrule this Court and find Defendant retarded despite his failure to present any evidence that his IQ was 70 or below. (PCR5. 1204-15) The State responded that the lower court was bound by this Court's decisions about the definition of retardation and that Defendant's claim should be denied as he had failed to prove any of the elements of retardation. (PCR5. 1215-18)

At the conclusion of the arguments, the lower court informed the parties that they could submit additional memoranda on the issues by May 4, 2009. (PCR5. 1218) The State did so (PCR5. 794-803), and Defendant did not. Instead, on May 7, 2009, Defendant moved to disqualify the lower court. (PCR5. 805-15)

According to the motion, the lower court had demonstrated bias by allegedly commenting that it did not believe that Defendant's motion warranted an evidentiary hearing on April 27, 2009, by setting deadlines for Defendant while allegedly not setting deadlines for the State, by sustaining objections to Dr. Sultan's testimony on April 13, 2009, and by ruling on the admissibility of evidence on April 27, 2009. *Id.* Defendant further reasserted the grounds raised in his three other motions to disqualify the lower court. *Id.* The motion made no mention of the lower court allegedly coaching the State. *Id.* The lower court denied the motion that same day. (PCR5. 818)

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

On May 21, 2009, the lower court denied the motion for post conviction relief. (PCR5. 823-37) It found that Defendant had failed to present any credible evidence that he was retarded and that Defendant had obtained IQ scores above 70 on every IQ test

in the record except for one 70 on a Henmon-Nelson test, which it determined was not a recognized test. (PCR5. 833-35) It rejected Defendant's arguments that it should not follow *Cherry*. (PCR5. 835-36) It finally found that Defendant had also failed to prove the other two elements of retardation. (PCR5. 836) This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court's order finding Defendant not to be retarded is supported by competent, substantial evidence. In fact, there is no evidence to support Defendant's claim in the record. The lower court did not abuse its discretion in excluding Dr. Greenspan's testimony. It also properly denied Defendant's repeated motions to disqualify it, which were untimely, facially insufficient and based on proper evidentiary rulings. The claims about the definition of retardation and the burden of proof are meritless.

ARGUMENT

I. THE LOWER COURT PROPERLY DETERMINED THAT DEFENDANT IS NOT RETARDED.

Defendant first asserts that the lower court erred in finding that he had failed to prove that he is retarded. However, the lower court properly rejected this claim and should be affirmed.

This Court has consistently held that a defendant claiming

to be retarded must prove three elements: (1) subaverage general intellectual functioning, (2) deficits in adaptive behavior existing concurrently with the adult IQ score, and (3) manifestation before age 18. *Cherry v. State*, 959 So. 2d 702, 711 (Fla. 2007); see also *Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009); *Phillips v. State*, 984 So. 2d 503, 509 (Fla. 2008); *Jones v. State*, 966 So. 2d 319, 325 (Fla. 2007); *Johnston v. State*, 960 So. 2d 757, 761 (Fla. 2006); *Brown v. State*, 959 So. 2d 146, 148-49 (Fla. 2007); *Burns v. State*, 944 So. 2d 234, 245 (Fla. 2006); *Rodgers v. State*, 948 So. 2d 655, 666-67 (Fla. 2006); *Trotter v. State*, 932 So. 2d 1045, 1049 (Fla. 2006). This Court has held that to prove the first element, a defendant must show that he has an IQ that is 70 or below. *Nixon*, 2 So. 3d at 142; *Phillips*, 984 So. 2d at 510; *Jones*, 966 So. 2d at 329; *Cherry*, 959 So. 2d at 711-14; *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005). It has further held that a retrospective diagnosis is insufficient to satisfy the second element. *Phillips*, 984 So. 2d at 511; *Jones*, 966 So. 2d at 325-27. Moreover, this Court has held that once a trial court has found that any one of the elements of retardation has not been proven, it is unnecessary for the lower court, or the experts evaluating the defendant, to consider whether the other elements have been satisfied. *Johnston*, 960 So. 2d at 761-62. Once a trial court

has conducted an evidentiary hearing on a claim of retardation, this Court reviews the lower court's decision to determine if the lower court's findings regarding these elements are supported by competent, substantial evidence. *Phillips*, 984 So. 2d at 509; *Cherry*, 959 So. 2d at 712.

Here, the lower court rejected this claim after conducting an evidentiary hearing, finding:

Defendant has failed to prove by clear and convincing evidence that he is mentally retarded. The Defendant's presentation does not demonstrate with any credible evidence that he is mentally retarded. Defendant's own expert, Dr. Sultan, testified that his IQ is 71, which is above the threshold of 70. However, even Dr. Sultan's full scale score of 71 is questionable. On Dr. Sultan's test, Defendant achieved a score of 83 on the verbal section and a score of 81 on the performance section. Defendant's full scale score was brought down by the 56 he obtained on the speed section. On cross-examination, Dr. Sultan never satisfactorily answered the question about the discrepancy between the speed score and the verbal and performance scores. In contrast, Dr. Prichard explained that the low speed score could be due to a learning disability. Dr. Sultan also testified that the Defendant has a learning disability. Dr. Marina had previously testified that the Defendant has slight brain damage, which could also cause the slow speed score.

In a prior proceeding, Dr. Stillman (Defendant's tab 21) testified that the Defendant was mentally retarded. Dr. Stillman did not do any testing. He reached this conclusion after speaking with the Defendant. Dr. Stillman also stated that the Defendant's IQ was below 80. This diagnosis does not meet the legal or clinical definitions of mental retardation.

Dr. Prichard explained that one must look at the big picture in determining IQ, to view the results not based on the score of one test or subtest, but based

on all the results. Dr. Stillman also testified that that is the correct procedure.

But, that's only one test. If you're talking about the overall picture, which is what we have to look at, and variables that the doctor has to look at the whole page. You can't look at one aspect and jump to a conclusion. So, if one test among 50, 30, 20 is out of line and all the others fall in line, to me, that sounds [sic] pretty good evidence.

Tab 21, page 100, Defendant's exhibit.

It appears that Dr. Sultan's opinion takes in less than the whole picture, only a small part of it. The educational records included in tab 8 of Defendant's exhibit, indicate that Defendant had IQ scores in the 70's on recognized tests. Those scores are above 70. Dr. Marina, Dr. Carbonell, and Dr. Prichard all obtained scores in the 80's. Every recognized IQ test result is above 70. The only score of 70 was on the "Henmon-Nelson" test which is not recognized. Additionally, Defendant scored a "90" in 1959 on the California Multi-Phasic test, also not recognized.

Dr. Sultan's testimony that the practice effect lasts for over 20 years is doubtful, and in this case, refuted by the record. The Defendant scored lower on Dr. Marina's IQ test conducted approximately 1 year after Dr. Carbonell's IQ test. Clearly the practice effect did not obtain there. Defense counsel's argument that the practice effect applies on different tests is not supported by the evidence or by logic.

Counsel for Defendant argued that Dr. Prichard was remiss for having failed to test adaptive functioning. Dr. Prichard explained that since the Defendant's IQ was above 2 standard deviations below the mean, and all 3 prongs of the test must be met, there was no need to test further. "Because we find that Cherry does not meet this first prong of the section 921.137(1) criteria, we do not consider the two other prongs of the mental retardation determination." *Cherry*, 959 So.2d at 741.

* * * *

Every expert, including Dr. Sultan, testified

that Defendant's IQ is above 70. That would put the Defendant in the borderline category, which is not mentally retarded. There is no reliable evidence in this case, from the time of the Defendant's first penalty phase 33 years ago when he was first sentenced to death, to this day, that the Defendant is mentally retarded. Certainly there is nothing to meet the clear and convincing standard required under the law, and this Court so finds: Defendant is not mentally retarded.

Having heard and reviewed the evidence, this Court finds the Defendant is not mentally retarded. His IQ not only exceeds 70, but evidence suggests strongly his actual IQ could be in the 80's. He does not have deficits in adaptive functioning and has failed to prove onset before the age of 18. Defendant has not demonstrated by clear and convincing evidence that he is mentally retarded under the laws of the State of Florida.

(PCR5. 833-35)

Here, these findings are supported by competent, substantial evidence. Dr. Sultan did testify that Defendant obtained a full scale score of 71, a verbal score of 83, a performance score of 81 and a processing speed score of 56 on the WAIS-IV IQ test she administered. (PCR5. 945-46, 1008) She also admitted that there was a discrepancy in the processing speed score, which was indicative of a learning disability. (PCR5. 957) Both Dr. Sultan and Dr. Prichard acknowledged that the record showed that Defendant had achieved full scale IQ score of 85 and 82 on IQ tests administered in 1987 and 1988, respectively, and this testimony was consistent with the testimony of Dr. Carbonell and Dr. Marina who administered these

tests. (R. 2496-97, 2509, Depo.⁹ at 21, PCR5. 1015, 1049-50) Further, Dr. Stillman did testify at resentencing that it was important to consider all of the test results to reach a reliable conclusion, that his opinion about Defendant was not based on testing and that he considered anyone with an IQ below 80 retardated. (R. 2590-93) Given that all four of the adult IQ scores that Defendant presented were above 70, the lower court properly determined that Defendant had failed to prove the first element of retardation. This is particularly true, as the one adult IQ score that was even close to 70 was decreased by a low processing speed score, which even Dr. Sultan acknowledged was indicative of a learning disability. The denial of the claim should be affirmed.

Further, the testimony about adaptive functioning that Defendant presented was the testimony of Dr. Sultan, who acknowledged that she conducted a retrospective evaluation of Defendant's functioning. (PCR5. 963) This Court had held that a retrospective evaluation of adaptive functioning is not sufficient to meet a defendant's burden of proving the second element of retardation. *Phillips*, 984 So. 2d at 511; *Jones*, 966 So. 2d at 325-27. As such, the lower court also properly

⁹ The symbol "Depo." will refer to the transcript of the videotaped deposition of Dr. Carbonell's resentencing testimony, which was admitted at resentencing. (R. 2131-33)

determined that Defendant had not proved this element. It should be affirmed.

Finally, the lower court's findings regarding Defendant's childhood IQ scores are also fully supported by the record. The school records that Defendant presented at resentencing do show that Defendant's intelligence was repeatedly tested when he was a child. (R. 468-504) They also show that on the two administrations of the Stanford-Binet IQ test he took as a child, he obtained scores of 75 and 74. (R. 481-82) Finally, they show that Defendant did consistently obtain scores above 70, once had a score of 70 on a Henmon-Nelson test and once had a score of 90 on the California Mental Maturity test. (R. 473, 491) Thus, the lower court's finding that Defendant did not show that his allegedly significantly subaverage intellectual functioning onset before the age of 18 is also supported by competent, substantial evidence. The denial of the motion should be affirmed.

In challenging these findings, Defendant first insists that they should be rejected because he believes that the lower court was biased against him and did not allow him to develop the record. However, as argued in Issues II and III, *infra*, Defendant's complaints about the lower court's denial of the motions to disqualify it and its evidentiary rulings were

proper. As such, this argument should be rejected.

Further, Defendant insists that the lower court erred in rejecting his claim because he believes that the competent, substantial evidence supports a contrary finding based on the opinions of his experts. However, this Court has held that this Court does not "retry a case or reweigh conflicting evidence" in determining whether a trial court's order is supported by competent, substantial evidence. *Johnston*, 960 So. 2d at 761 (quoting *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981)). Instead, this Court simply determines whether there is evidence to support the trial court's conclusions "after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal." *Id.* Given this body of precedent, Defendant's argument that the lower court should be reversed simply because he believes that the record supports a different conclusion should be rejected. This is particularly true in this case, as the record is devoid of evidence to support any element of retardation.

Here, Defendant presented no evidence that his adult IQ score was ever 70 or below. Further, the evidence regarding Defendant's childhood IQ scores showed that he had scored above 70 on all but one occasion. The one occasion in which Defendant achieved a score of 70 was on a Henmon-Nelson IQ test. However,

pursuant to Fla. R. Crim. P. 3.203 and Fla. Admin. Code. 65G-4.011, the IQ scores presented to support a claim of retardation must have been achieved on an individually administered IQ test. The only evidence that Defendant presented below about whether the Henmon-Nelson IQ test he took was individually administered was one article stating that the test was a group IQ test and the testimony of Mr. Weaver that he had no idea how the test was administered in this case. (PCR5. 69, 71-100, 887-90) As such, Defendant failed to show that he had significantly subaverage general intellectual functioning or that having such functioning onset before the age of 18. *Nixon*, 2 So. 3d at 142; *Phillips*, 984 So. 2d at 510; *Jones*, 966 So. 2d at 329; *Cherry*, 959 So. 2d at 711-14; *Zack*, 911 So. 2d at 1201 (Fla. 2005). Further, as noted above, the only evidence regarding the second prong was Dr. Sultan's retrospective analysis, which this Court had held is insufficient to prove the second prong. *Phillips*, 984 So. 2d at 511; *Jones*, 966 So. 2d at 325-27. Given these circumstances, the record contains no evidence to support his claim. Thus, the lower court properly rejected the claim and should be affirmed.

II. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING DR. GREENSPAN'S TESTIMONY.

Defendant next asserts that the lower court abused its discretion in excluding the testimony of Stephen Greenspan.

However, the lower court did not do so.¹⁰

Initially, the State would note that Defendant misstates the State's argument and the lower court's ruling in making this argument. At no point did the State argue nor did the lower court rule that Dr. Greenspan's testimony was not admissible because he had not personally evaluate Defendant and was relying on data from others to reach a opinion. Instead, the State's objection to Dr. Greenspan's testimony was based on the fact that he wanted to testify about the definition of retardation and comment on the opinions of the other experts because he had no opinion whatsoever on whether Defendant was retarded regardless of its source. (PCR5-SR. 3-23, 1166-67, 1185) Similarly, the lower court did not rule that Dr. Greenspan could not testify about his opinion based on a review of materials from others. Instead, it ruled that it would not permit Dr. Greenspan to testify regarding the definition of retardation or his beliefs about the other experts' opinions. (PCR5. 1194-95) Since the issue was not whether Dr. Greenspan could offer an opinion without personally seeing Defendant, Defendant's argument that his opinion was improperly excluded based on his failure to have evaluated Defendant personally should be

¹⁰ A trial court's ruling on the admission of evidence is reviewed for an abuse of discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000).

rejected.

Further, the lower court did not abuse its discretion in ruling on the admissibility of Dr. Greenspan's testimony in the manner it actually did rule. Testimony that merely comments on the proper interpretation of statutory language is not admissible. *Lee County v. Barnett Banks, Inc.*, 711 So. 2d 34, 34 (Fla. 2d DCA 1997); *Lindsey v. Allstate Ins. Co.*, 561 So. 2d 427, 428 (Fla. 3d DCA 1990); *Devin v. City of Hollywood*, 351 So. 2d 1022 (Fla. 4th DCA 1976). As this Court has held, the meaning of the terms in the definition of retardation contained in §921.137(1), Fla. Stat. and Fla. R. Crim. P. 3.203 is an issue of statutory construction. *Cherry*, 959 So. 2d at 711-14; *Phillips*, 984 So. 2d at 509-13; *Jones*, 966 So. 2d at 325-30. Here, as Dr. Greenspan acknowledged in his report and Defendant freely admitted at the evidentiary hearing, he sought to have Dr. Greenspan testify to his opinion regarding the meaning of the terms of the statute. (PCR-SR. 8-23, PCR. 1193) Thus, the lower court did not abuse its discretion in excluding the testimony on this basis. It should be affirmed.

The lower court also did not abuse its discretion in excluding Dr. Greenspan's testimony because it was merely a commentary on the credibility of the other experts. An expert's testimony that is either simply critical, or supportive, of

another expert's opinion is not admissible. *Caban v. State*, 9 So. 3d 50, 53 (Fla. 5th DCA 2009); see *Carlton v. Bielling*, 146 So. 2d 915 (Fla. 1st DCA 1962). Instead, an expert is only supposed to comment on the methodology of other experts in "explain[ing] his opinion on an issue in controversy." *Caban*, 9 So. 3d at 53; see *Network Publications, Inc. v. Bjorkman*, 756 So. 2d 1028 (Fla. 5th DCA 2000).

Here, while Defendant insists that Dr. Greenspan's testimony would merely have commented on the methodology of the other experts in explaining his opinion on the issue in controversy, the lower court did not abuse its discretion in finding that this was not true. The matter in controversy here was whether Defendant was retarded. It was not, as Defendant appears to believe, which expert did a "better" job. As noted above, Dr. Greenspan had no opinion on whether Defendant was retarded. Instead, as Dr. Greenspan's report shows, his only opinion regarded which expert had done a better job and was, therefore, credible. (PCR5-SR. 8-23) Given these circumstances, the lower court did not abuse its discretion in excluding this testimony.

Additionally, Defendant's assertions that the State "withheld" Dr. Prichard's raw data and that it prevented him from presenting evidence criticizing his methodology is

unsupported by the record. As the State explained below, it had had Dr. Prichard's raw data e-mailed to Dr. Sultan during the week preceding the evidentiary hearing. (PCR5. 1069-70) Thus, the State did not withhold the information from Defendant.

Moreover, as Dr. Prichard's testimony shows, the only test that he administered such that any raw data would have been produced was the Stanford-Binet IQ test. (PCR5. 1040-41, 1103-04) A review of Dr. Greenspan's report shows that his criticisms of Dr. Prichard were not based on anything Dr. Prichard did in administering the Stanford-Binet IQ test or applying the scoring criteria to the answers he received. (PCR5-SR. 8-23) Instead, his criticism of Dr. Prichard's Stanford-Binet results was based the fact that Dr. Prichard administered the test shortly after Dr. Sultan had conducted her testing and did not adjust the score he obtained using the practice and Flynn effects. *Id.* However, Defendant's counsel was actually present during Dr. Prichard's evaluation and, therefore, knew when it occurred, and Defendant had been provided with Dr. Prichard's report, which informed Defendant of the tests given and the results obtained. (PCR5. 1040-41) Given these circumstances, Defendant's claim that the lack of the raw data prevented him from challenging Dr. Prichard's methodology through an expert such as Dr. Sultan who actually had an opinion on the issue in controversy should be

rejected. This is particularly true, as the lower court did nothing to prevent Defendant from recalling Dr. Sultan after she had reviewed the raw data to comment about it. The lower court should be affirmed.

Finally, it should be remembered that Defendant actually presented information about these matters at the hearing. Dr. Sultan commented briefly about the practice effect during her direct testimony and was questioned about it more fully on cross. (PCR5. 950, 1014-15) Moreover, Defendant actually questioned Dr. Prichard about both the Flynn and practice effects during cross. (PCR5. 1094-1100) Given all of these circumstances, the lower court did not abuse its discretion in excluding Dr. Greenspan's testimony. It should be affirmed.

Even if the lower court had abused its discretion in not permitting Dr. Greenspan to testify, any error would be harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Nothing in Dr. Greenspan's report or Defendant's proffer of his testimony changed the facts that Defendant had never received an IQ score of 70 or below on any individually administered IQ test or provided any evidence about Defendant's adaptive functioning concurrent with his adult IQ scores. As such, Defendant would still have not proven that he complied with *Cherry*, *Phillips* and *Jones* by Dr. Greenspan's testimony. Thus, his testimony could

not have had any effect on the outcome of this proceeding. The lower court should be affirmed.

III. THE CLAIM THAT DEFENDANT WAS DENIED A FULL AND FAIR HEARING SHOULD BE DENIED.

Defendant next asserts that he was denied a full and fair hearing on his claim. In the course of presenting this issue, Defendant continually comments about alleged rulings by the lower court. However, the only legal argument he presents under this issue concerns the lower court's denial of his repeated motions to disqualify the lower court. As such, any issue about the rulings is waived. Moreover, any issue about the rulings and the disqualification motions provides no basis to reverse the denial of the motion.

To the extent that Defendant is attempting to challenge the lower court's evidentiary rulings, the issue has been waived. While Defendant mentions a number of alleged evidentiary rulings, Defendant presents no argument and cites no legal authority regarding why the rulings were an abuse of discretion. As this Court has held, a defendant waives an issue when he fails to present legal argument or cite authorities regarding the issue. *Beasley v. State*, 18 So. 3d 473, 481 n.3 (Fla. 2009); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). Thus, any issue regarding the alleged rulings should be rejected as waived.

Regarding the motions for disqualification, the lower court properly denied the motions as they were untimely and insufficient as a matter of law.¹¹ For a motion to disqualify to be considered timely, it must be filed within ten days of when the information on which it is based was learned. Fla. R. Jud. Admin. 2.330(e); see also *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997). When a basis for disqualification is not raised within 10 days, it is considered waived. *Steinhorst v. State*, 636 So. 2d 498, 500 (Fla. 1994). Moreover, this Court has applied the time limit to each ground even where the defendant included multiple allegations of biased acts. *Rodriguez v. State*, 919 So. 2d 1252, 1274-78 (Fla. 2005). When the grounds for disqualification did not arise until after the matter was no longer before the lower court judge, the motion may be made in a subsequent proceeding before the same lower court judge. See *Asay v. State*, 769 So. 2d 974 (Fla. 2000). However, the motion must still be timely filed even when it is cognizable in a post conviction proceeding. See *Waterhouse v. State*, 792 So. 2d 1176, 1193-94 (Fla. 2001).

Here, Defendant filed the first of his post-remand motions for disqualification on March 13, 2009. (PCR5. 40-48) The motion

¹¹ This Court reviews the determination that a motion for disqualification was legally sufficient de novo. *Chamberlin v. State*, 881 So. 2d 1087, 1097 (Fla. 2004).

included four bases: (1) the lower court had commented about defense counsel's ethical obligations in an order entered in 2007; (2) the lower court had allegedly engaged in *ex parte* communications with the State in 2003 and 2007; (3) the lower court had previously been employed by the state attorney's office; and (4) Defendant believed that the scheduling order the lower court had entered on March 2, 2009, was unreasonable. *Id.* Defendant's only explanation of how any of these grounds were timely was his assertion that since he had learned on March 2, 2009, that the lower court would continue to preside over this matter on remand, the motion was timely. *Id.*

However, the record shows that the first three grounds in this motion were untimely. Defendant was clearly aware of the alleged *ex parte* communications for 2003. He filed a motion to disqualify the judge based on them at that time, had the motion denied, sought review in this Court of that motion and had this Court rule on the merits of that motion. *Thompson v. State*, 880 So. 2d 1213 (Fla. 2004); (PCR2. 67-82, 88). He was also clearly aware of the alleged *ex parte* communications from 2007 and the contents of the lower court's order from that time. Defendant filed a motion for rehearing of the order and a motion to "get facts, accusing the State and lower court of engaging in *ex parte* communications in 2007. (PCR4. 684-90, PCR4-SR. 6-25)

Because of the filing of these pleadings, the matter continued to be pending before the lower court in 2007. Further, the lower court judge handling this matter has been assigned to this case since 2003, and Defendant has never even claimed to have been unaware of her prior employment throughout these proceedings. Given that 2003 and 2007 were more than 10 days before March 12, 2009, Defendant's motion to disqualify on these bases was untimely. Fla. R. Jud. Admin. 2.330(e); *see also Willacy*, 696 So. 2d at 695.

Defendant filed his second post-remand motion for disqualification on May 7, 2009. (PCR5. 805-15) In this motion, Defendant asserted that the lower court had evidenced biased against him because (1) the lower court had allegedly stated that it did not believe that Defendant's motion merited an evidentiary hearing on April 27, 2009, (2) the lower court had allegedly entered unreasonable scheduling orders in March 2009, (3) the lower court had sustained the State's objections to some of Dr. Sultan's testimony during the April 13, 2009 hearing, (4) the lower court allegedly qualified Dr. Prichard as a legal expert over his objection during redirect and (5) the lower court sustained the State's objections to Dr. Greenspan's testimony. Again, more than 10 days had past between the entry of the scheduling orders and the rulings at the April 13, 2009

hearing and the filing of the motion to disqualify. As such, the allegations based on these orders and rulings were not timely and were properly rejected on that basis. Fla. R. Jud. Admin. 2.330(e); see also *Willacy*, 696 So. 2d at 695. The denial of the motion for disqualification on these bases should be affirmed.

Even if all of Defendant's alleged bases for disqualification had been timely asserted, the lower court would still have properly denied the motions as legally insufficient. Defendant's claims about the scheduling orders, the evidentiary rulings and alleged comments in making rulings concern rulings of the lower court. However, this Court has repeatedly held that "[t]he fact the judge has made adverse rulings in the past, or that the judge has previously heard the evidence or 'allegations that the trial judge had formed a fixed opinion of the defendant's guilt, even where it is alleged that the judge discussed his opinion with others,' are generally legally insufficient reasons to warrant the judge's disqualification." *Rivera v. State*, 717 So. 2d 477, 481 (Fla. 1998); see also *Waterhouse*, 792 So. 2d at 1194; *Asay*, 769 So. 2d at 979-81; *Thompson*, 759 So. 2d at 659-60; *Jackson v. State*, 599 So. 2d 103, 107 (Fla. 1992). Moreover, this Court had held that this rule applies even when the trial court uses harsh wording against a defendant in issuing a ruling. *Ragsdale v. State*, 720

So. 2d 203, 207 (Fla. 1998). Given this body of precedent, Defendant's complaints about the lower court's orders, evidentiary ruling and alleged comments in orders and rulings does not provide a legally sufficient basis for recusal. Thus, the lower court properly denied the motions and should be affirmed.

Further, Defendant's other untimely bases for disqualification were also properly rejected. This Court has held that a judge's prior employment as a prosecutor is not a legally sufficient basis for recusal. *Arbelaez v. State*, 775 So. 2d 909, 916 (Fla. 2000). As such, the lower court properly rejected the claim about its prior employment. Moreover, this Court has already considered Defendant's claim that there was an allegedly improper *ex parte* from 2003 and rejected that claim. *Thompson*, 880 So. 2d at 1213. Finally, this Court has held that a motion for disqualification cannot be based on mere speculation. *Asay*, 769 So. 2d at 981; *Willacy*, 696 So. 2d at 695 n.5; *McCrae v. State*, 510 So. 2d 874, 879-80 (Fla. 1987). As a review of Defendant's motion to get facts shows, Defendant's assertions that the State engaged in *ex parte* communications with the lower court in 2007 are based on nothing more than speculation that the State must have engaged in *ex parte* communications because the State was aware of hearing dates and

deadlines that Defendant claimed his counsel did not hear the lower court announce in open court when it did so. Given these circumstances, the lower court properly denied Defendant's motions for disqualification and should be affirmed.

The lack of merit of Defendant's motions is demonstrated further by the fact that most of the bases on which Defendant claims bias are predicated on misstatements of the record and legally correct rulings. Thus, they should be rejected.

Throughout his brief, Defendant asserts that this Court's remand order gave him 90 days to prepare. As such, he complains that the lower court only gave him half of the time that this Court allotted him. However, this Court's remand order did not give Defendant 90 days to prepare for, and start, an evidentiary hearing. This Court's remand order required the lower court to complete all litigation regarding the claim that Defendant was retarded within 90 days. *Thompson*, 3 So. 3d at 1239. As such, it was not unreasonable for the lower court to allow time for the State to prepare a rebuttal case, it to conduct the evidentiary hearing and it to review the evidence presented and prepare an order within the time allotted.

Moreover, it should be remembered that while Defendant insists that the lower court was incorrect in stating that he had 4 years to be prepare for the hearing, the lower court's

only error was in underestimating the time Defendant had. This Court had held that motions for post conviction relief should be fully plead when filed. *Vining v. State*, 827 So. 2d 201, 212-13 (Fla. 2002). This Court has described the belief that it is appropriate to wait for an evidentiary hearing to be scheduled to beginning investigating claims as an "incorrect assumption" and held that it is not an abuse of discretion to deny a continuance where the reason the continuance was requested was that counsel had been dilatory in investigating his claim. *Doorbal v. State*, 983 So. 2d 464, 484, 486-89 (Fla. 2008). Here, Defendant claimed that his resentencing counsel had been ineffective for failing to investigate and present evidence that he was retarded in his third motion for post conviction relief, which was filed on November 8, 1995. (PCR-SR. 62-233) He filed the initial version of the claim that it was unconstitutional to execute him because he was retarded on November 15, 2001. As such, Defendant had not the 4 years the lower court noted in its order but almost 14 years. Given this period of time, the lower court's requiring that Defendant proceed expeditiously was not error.

Defendant also insists that the lower court limited the evidentiary hearing to 2 days. However, the record belies this position. At the status hearing on March 26, 2009, the lower

court responded to Defendant's statement that the evidentiary hearing would only take 1 day by stating that it did not believe that this was true and that it would allow up to a week to complete the hearing. (PCR5. 1238, 1242) After the lower court stated that it would begin the hearing on April 13, 2009, and continue it beginning on April 27, 2009, Defendant never requested any additional hearing time. (PCR5. 1242-43, 849-66) He did so despite the fact that the lower court actually offered to conduct proceedings on additional days. (PCR5. 1070-76)

Defendant also insists that the lower court never set deadlines for the State. However, the record shows that this is untrue. Not only was State provided with deadlines but its deadlines were shorter than the deadlines enforced against Defendant. Through its orders, the lower court gave Defendant a month to provide the State with a witness list but the State was given only a week to file a responsive list. (PCR5. 21-22, 38) Dr. Sultan was allowed more than 10 days after she evaluated Defendant to generate a report but the State's expert was required to produce a report in 3 days. (PCR5. 1254-55, 1270, 65) Further, Dr. Sultan produced notes on the morning she testified and Defendant did not produce Dr. Greenspan's report until April 17, 2009, after Dr. Prichard had already completed his direct testimony. (PCR5. 753-68, 863) Given all of these

circumstances, the lower court's scheduling orders not only do not evidence bias but were not an abuse of discretion. The lower court should be affirmed.

Defendant also states that the lower court's rulings about the admissibility of hearsay through Dr. Sultan evidenced bias. In raising this claim, Defendant asserts that the lower court stated that hearsay was admissible. Again, this is untrue. Instead, the lower court repeatedly stated that while an expert could rely on hearsay to form an opinion and could testify that they had done so while identifying the source of the hearsay, the expert could not testify about the content of the hearsay.¹² (PCR5. 962-64, 971-73) It added that Defendant would be able to bring out the details of the hearsay on redirect if the State challenged the information on cross. (PCR5. 965) Thus, the lower court never stated that it was excluding information that it believed was admissible.

Moreover, the lower court's ruling was correct. This Court has held that an expert witness may not serve as a conduit to admit inadmissible hearsay regardless of whether an expert can

¹² Further, the State would note that Defendant did not even attempt to introduce the packet of information Dr. Sultan reviewed through Dr. Sultan. Instead, he attempted to introduce this packet through Mr. Weaver, whom he had not called as an expert witness. (PCR5. 868-69) Further, the lower court actually allowed all of the information from the prior proceedings into evidence and only excluded documents that Defendant could not show were part of the prior records. (PCR5. 870-77, 955-56)

rely on such information in reaching an opinion. *Linn v. Fossum*, 946 So. 2d 1032, 1037-39 (Fla. 2006). Instead, this Court has stated that "experts can testify that they formed their opinions in reliance on sources that contain inadmissible information without also conveying the substance of the inadmissible information." *Id.* Given that this was exactly what the lower court ruled, its ruling not only did not evidence bias but was also not an abuse of discretion. The lower court should be affirmed.

Defendant's claim that the lower court precluded Dr. Sultan from testifying about definitions is also based on a misstatement of the record, and the lower court's ruling was proper under the law. While Defendant asserts that the lower court precluded Dr. Sultan from testifying about the definition of retardation, this is untrue. The lower court permitted Dr. Sultan to testify about her understanding of both the clinical and legal definitions of retardation.¹³ (PCR5. 925-32) The lower court only precluded Dr. Sultan from reading a definition from a treatise, from testifying that certain books were considered the "bibles of retardation" and from offering her opinion on whether the statutory definition was correct. (PCR5. 927, 932-42, 943)

¹³ As such, the fact that the lower court also permitted the State's expert to testify about definitions does not evidence bias or convert the State's expert to a legal expert, as Defendant claimed. (PCR5. 1062-63, 1163-65)

The lower court refused the questions about the books because a witness is not permitted to bolster his testimony based on a treatise. (PCR5. 927) This ruling was entirely consistent with the law. *Linn*, 946 So. 2d at 1036; §90.706, Fla. Stat. Moreover, the lower court was also correct in refusing to permit expert testimony on the correctness of the legal definition of retardation. *Lee County*, 711 So. 2d at 34; *Lindsey*, 561 So. 2d at 428. Thus, again, this ruling not only did not evidence bias but was also not an abuse of discretion. The lower court should be affirmed.

IV. THE REQUEST TO OVERRULE *CHERRY* SHOULD BE REJECTED.

Defendant next asks this Court to overrule its decision in *Cherry*. He insists that *Cherry* is allegedly contrary to the Legislature's intent and unconstitutional. However, this Court has already rejected Defendant's requests to overrule *Cherry* and rejected his evidence rule based and constitutional arguments.¹⁴ *Nixon*, 2 So. 3d at 142-44. As such, this issue should be

¹⁴ The legislative intent argument is particular specious. This Court decided *Cherry* in May 2007. In both the 2008 and 2009 legislative sessions, the Legislature readopted the Florida Statutes, including §921.137, Fla. Stat. Ch. 2009-19, Laws of Fla.; Ch. 2008-3, Laws of Fla. As this Court has held, when the Legislature readopts a statute after the Court construes the statute, the Court's construction becomes as much a part of the text of the statute as if the Legislature had written the construction itself. *Burdick v. State*, 594 So. 2d 267, 271 (Fla. 1992).

rejected, and the lower court affirmed.

**V. THE ARGUMENT THAT THE STATE SHOULD BEAR THE
BURDEN OF PROOF SHOULD BE REJECTED.**

Defendant finally asserts that the lower court erred in requiring him to prove that he was mentally retarded. Instead, he asserts that the State should have been required to prove that he was not mentally retarded beyond a reasonable doubt. However, this Court has already rejected this argument. *Nixon*, 2 So. 3d at 145-46. As such, this argument should be rejected, and the lower court affirmed.

CONCLUSION

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

Respectfully submitted,

BILL MCCOLLUM
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **Terri L. Backhus**, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this 23rd day of December 2009.

SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

SANDRA S. JAGGARD
Assistant Attorney General