IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO. 1982-CF-5467

STATE OF FLORIDA,
Plaintiff,

vs.

DONALD DUFOUR,
Defendant.
_____/

ORDER DENYING AMENDED SUCCESSIVE MOTION FOR
DETERMINATION OF MENTAL RETARDATION AS A BAR TO EXECUTION

This matter came before the Court for consideration of Defendant Donald Dufour's Amended Successive 3.851 Motion for Determination of Mental Retardation as a Bar to Execution, filed August 9, 2005. After reviewing the Motion, file, and record, together with the State's Response, filed August 25, 2005; conducting an evidentiary hearing; considering arguments of counsel; and being otherwise fully advised, the Court concludes that Mr. Dufour is not entitled to relief.

Procedural History

Mr. Dufour was convicted of first-degree murder, and on July 3, 1984, the trial court sentenced him to death based on four aggravating circumstances and the jury's unanimous recommendation. The Florida Supreme Court affirmed the judgment, struck one of the aggravating circumstances, and affirmed the sentence in light of the three remaining aggravators and the complete lack of mitigation; *Dufour v. State*, 495 So. 2d 154 (Fla. 1986).

Mr. Dufour filed a timely Motion for Postconviction Relief, alleging ineffective assistance of counsel (13 sub-claims), failure of the court-appointed psychiatrist to conduct appropriate tests for organic brain damage and mental illness, introduction of prejudicial and irrelevant evidence, use of unconstitutional and inaccurate jury

instructions, the State's violation of *Brady v. Maryland*, the State's destruction of exculpatory physical evidence, the unconstitutionality of the death penalty statute and rules of criminal procedure, and cumulative error. The Court conducted an evidentiary hearing on November 18-21, 2002, and denied relief in an order filed on May 30, 2003. The Florida Supreme Court affirmed in an opinion issued April 14, 2005; *Dufour v. State*, 905 So. 2d 42 (Fla. 2005). The Mandate issued on June 30, 2005.

On November 24, 2004, while the appeal was still pending, Mr. Dufour filed a Successive Motion for Postconviction Relief - Motion for Determination of Mental Retardation as a Bar to Execution. Despite appellate counsel's attempts to relinquish jurisdiction, the request was never granted. Thus, this Court lacked jurisdiction to consider the Motion until June 30, 2005, when the Florida Supreme Court issued its Mandate. Meanwhile, the State filed a Response on December 21, 2004.

Mr. Dufour filed the instant Amended Motion on August 9, 2005, which superseded and replaced the November 24, 2004 pleading, and the State filed a second Response on August 25, 2005. Extensive discovery proceedings and mental evaluations followed.

The Court conducted the evidentiary hearing on August 6-7, 2007; October 11-12, 2007; February 25-26 and 28-29, 2008. Mr. Dufour filed his written closing argument on August 22, 2008; the State filed its written closing argument on September 5, 2008; and Mr. Dufour filed his reply on September 18, 2008.

CLAIM I

Mr. Dufour alleges that based on evidence presented at the evidentiary hearing, and the applicable statutory and case law, he has proved by clear and convincing evidence that he is mentally retarded. Therefore, he asks the Court to vacate his death sentence and sentence him to life in prison.

Clear and convincing evidence is more than a preponderance, but less than "beyond a reasonable doubt." This standard:

> requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise

> and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), cited by *In Re: Davey*, 645 So. 2d 398, 404 (Fla. 1994), and *Standard Jury Instructions - Criminal Cases (99-2)*, 777 So. 2d 363, 373 (Fla. 2000).

To restate the generally accepted definitions set forth in the parties' written closing arguments, mental retardation is a condition characterized by "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." §921.137(1), Fla. Stat.; Fla. R. Crim. P. 3.203(b). "Significantly sub-average general intellectual functioning" is "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." *Id.* "Adaptive behavior" is "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." *Id. See also Atkins v. Virginia*, 530 U.S. 304 (2002).

The Florida Supreme Court has consistently interpreted the definition set forth in the statute to "require a defendant seeking exemption from execution to establish that he has an IQ of 70 or below." *Phillips v. State*, 984 So. 2d 503, 510 (Fla. 2008), *citing Cherry v. State*, 959 So. 2d 702, 711-714 (Fla. 2007) (finding the statute provides a strict

cutoff of an IQ score of 70), and *Jones v. State*, 966 So. 2d 319, 329 (Fla. 2007) (significantly sub-average general intellectual functioning correlates with an IQ of 70 or below). In *Jones*, the Florida Supreme court found that scores ranging from 67 to 72 did not equate to significantly sub-average general intellectual functioning.

Furthermore, the trial court's finding that a defendant committed a murder in a cold, calculated, and premeditated (herein "CCP") manner weighs against a finding of mental retardation. "The actions required to satisfy the CCP aggravator are not indicative of mental retardation." *Phillips*, 984 So. 2d at 512. It is undisputed that the Florida Supreme Court upheld the trial court's finding that Mr. Dufour committed the murder in a cold, calculated, and premeditated manner. *Dufour v. State*, 495 So. 2d 154, 164 (Fla. 1986). The facts of the case are set forth in detail in that opinion.

Taking into consideration the definitions set forth in the statute and rule, as well as the applicable case law, the Court now evaluates the evidence and testimony presented at the evidentiary hearings.

Discussion - expert witnesses and IQ test results

Mr. Dufour's first witness at the evidentiary hearing on August 6, 2007 was Dr. Michael Gutman, a forensic psychiatrist who conducted an evaluation prior to the trial in 1984. It appears that Dr. Gutman was called primarily to provide an explanation for his prior statement that he believed Mr. Dufour to be of average intelligence. He testified

that he "could have been mistaken," asserting that his prior assessment was only a "ball park estimate" and the "leakiest thing in the whole exam."

Dr. Gutman's testimony was limited and drew attention to the fact he once expressed an opinion that does not support the current claim of mental retardation. He offered only the possibility that the prior opinion was incorrect, but little or no support. His testimony carries little weight.

One of Mr. Dufour's expert witnesses was Dr. Valerie McClain, a forensic neuropsychologist. She found his full scale IQ score to be 67, with a verbal IQ of 68 and a performance IQ of 72, which placed him more than two standard deviations below the mean. She explained that the average IQ is assumed to be 100, and the standard deviation is 15 points; thus, two standard deviations below the mean equals 70. She concluded that although two tests suggested malingering, his pattern of responses indicated that he was giving his best effort. In addition to her clinical interview, she spoke with Mr. Dufour's brothers George and Gary, as well as several other individuals, to assess his adaptive functioning, finding that he was consistently described as "being somewhat slow and a follower, that he had some problems in school and ... basic functional activities." She found his school records and the testimony of his teachers at the evidentiary hearing significant to show limited intellectual functioning prior to the age of 18. Dr. McClain concluded that Mr. Dufour has mental retardation.

Dr. McClain conducted a very thorough evaluation of Mr. Dufour and review of the numerous records available in this case. However, she discounted her own results that tended to show malingering. Her testimony, diagnosis, and opinion carry moderate weight.

Mr. Dufour's other expert witness was Dr. Denis Keyes, a professor of special education who has been qualified as an expert in mental retardation and educational psychology. Dr. Keyes testified about definitions, descriptions, and characteristics of mental retardation, and discussed the strengths and weaknesses that may be possessed by individuals so diagnosed. He also explained the standard error of measure inherent in any IQ testing, and the existence of a "band of confidence" of plus or minus five points with respect to the score achieved. (For example, if the score is 75, the band of confidence for the actual true score would be between 70 and 80.) Dr. Keyes reviewed the other experts' IQ test results, school records, and trial/sentencing testimony. He also interviewed several lay witnesses and met with Mr. Dufour twice. Like Dr. McClain, he found the school records significant because he did not believe a first-grader would get D's or F's unless something was developmentally wrong. He also noted the existence of risk factors such as a traumatic brain injury and a combination of deplorable conditions during Mr. Dufour's childhood (such as abuse). He found "reason to be concerned" that Mr. Dufour has mental retardation.

Dr. Keyes provided a great deal of substantive information about mental retardation, which was very useful to the Court, and although he could not conduct his own IQ testing, he conducted a thorough review of the available records. His testimony and opinion carry moderate weight.

The State called Dr. Robert Berland, a forensic psychologist who had been retained by the defense during the 2002 postconviction proceedings, over defense objection. Dr. Berland testified that Mr. Dufour's IQ could have been lowered by brain damage incurred after the age of 18, although he acknowledged that Mr. Dufour inhaled the substance Tuolane before his teen years and that he suffered many accidents and abused drugs prior to the age of 18.

As with Dr. Gutman, Dr. Berland's testimony was limited. The answers he provided on direct and cross-examination provided some support for both Mr. Dufour and the State. His testimony and opinion carry little weight.

One of the State's expert witnesses was Dr. Sidney Merin, a psychologist with specializations in clinical psychology and neuropsychology. Dr. Merin concluded that Mr. Dufour has a full scale IQ score of 74, with a verbal IQ of 85 and a performance IQ of 64. His scores were challenged by Mr. Dufour's experts based on errors in the manner he conducted the testing as well as scoring errors. Adjusting for these errors, Dr. McClain concluded that Dr. Merin's results should have reflected a verbal IQ of 79 and a performance IQ of 72. Even Dr. Merin agreed that with certain corrections, the full scale

IQ score would be 73 and that a person with such a score would be considered mentally retarded if he also had adaptive deficits. However, he did not believe that Mr. Dufour fell within the range of mental retardation and stated he could have a "good brain compromised by long use of alcohol."

Dr. Merin has extensive experience, but he deviated from the standard procedure to be followed in administering the WAIS III exam and also made scoring and calculation errors, but he downplayed or even dismissed the significance of these irregularities. His testimony, diagnosis, and opinion carry little weight with respect to the actual IQ test result; otherwise, his opinions carry moderate weight.

The State's other expert witness was Dr. Harry McClaren, a forensic psychologist. He acknowledged that Mr. Dufour performed poorly on the test he administered, receiving only a full scale IQ score of 62. He believed the score was too low to be accurate and opined that Mr. Dufour was not giving his best effort, perhaps because of illness or poor rapport. He also noted that Mr. Dufour had been told by Dr. McClain that he was being evaluated for mental retardation.

Dr. McClaren discounted the low score he calculated, but he also believed Mr. Dufour could be malingering and also feeling sick. It is noteworthy that Dr. McClain had given the same IQ test the previous week. Dr. McClaren's testimony, diagnosis, and opinion carry moderate weight.

In summary, with respect to the IQ scores, this Court finds that Dr. Merin was not a highly credible witness, due in large part to his testing irregularities and scoring errors and cavalier responses to questions about those errors. Dr. McClain and Dr. Keyes provided the strongest testimony and evidence in support of a finding of mental retardation, and the Court finds the substantive information they provided was very useful in arriving at a legal conclusion. However, their diagnoses were not persuasive. It is necessary to take all of the scores into account, along with the supporting testimony provided by each of the experts. Dr. Merin's "corrected" score of 72 to 74 (depending on which witness provided the most accurate "rescoring") must be considered along with Dr. McClain's score of 67 and Dr. McClaren's score of 62. Furthermore, although the results indicate Mr. Dufour is at or near the mildly mentally retarded range, other test results indicate the possibility of malingering, and "it is reasonable to believe that a person in [his] situation has a strong motivation to perform poorly on examinations in order to be declared mentally retarded." *Brown v. State*, 959 So. 2d 146, 148 (Fla. 2007).

The full scale IQ scores vary along a range of approximately 10 points, and the Court has found some credibility to the testimony supporting each score (including the testimony of the experts who did not conduct their own testing but reviewed the results of the other experts). The Court cannot express "a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established" with respect to the IQ scores. Dr. McClain's testing was thorough, but she discounted her own results that

indicated a possibility of malingering. Dr. Merin made the aforementioned scoring errors. Dr. McClaren did not believe the validity of his own scoring results. Taking Dr. McClain's score of 67, which is approximately halfway between the scores of Dr. McClaren and Dr. Merin, the band of confidence still ranges from 62 to 72, with the upper range being above the *Cherry* cut-off score of 70. The Court finds there is no clear and convincing evidence that Mr. Dufour's IQ score establishes "significantly sub-average general intellectual functioning."

As a final note on intellectual functioning, the Court finds it significant that the Florida Supreme Court has already concluded that in his original Rule 3.851 proceedings, Mr. Dufour "failed to demonstrate that he did not receive a competent mental evaluation" at the time of his trial. *Dufour v. State*, 905 So. 2d 42, 66 (Fla. 2005).

As set forth in the statute, rule, and case law, IQ test results are not the sole factor to consider in determining whether an individual has mental retardation. Any limitations in intellectual functioning must also be considered in tandem with that person's adaptive behavior, i.e., the degree to which he "meets the standards of personal independence and social responsibility expected of his age, cultural group, and community." *See* §921.137(1), Fla. Stat.; *see also Atkins v. Virginia*, 530 U.S. 304 (2002).

The expert witnesses offered some testimony about this prong of the test, although other testimony regarding adaptive functioning came from lay witnesses, to be discussed later. Dr. McClain noted that Mr. Dufour had not held a job for more than two months,

he had only sporadic relationships, and he did poorly in school. She acknowledged that he obtained a GED and helped teach a motorcycle mechanics or small engine repair class while in Lantana Correctional Institution, but opined that people with mental retardation benefit from such a structured environment.

Dr. Keyes noted that with respect to Mr. Dufour's trip to Texas with his then-girlfriend Stacy Sigler, there was evidence of some long-range planning. He opined that such planning is "exceedingly rare" for someone with mental retardation, but also pointed out it was possible that he had assistance. (Dr. Keyes decided that Ms. Sigler was not a reliable witness, so he did not interview her.) He also acknowledged that Mr. Dufour's purported plan to murder Ms. Sigler to eliminate her as a witness, if true, could be an example of long-range planning. He candidly admitted that this is "a difficult case," and that Mr. Dufour is "on or near" the line.

Dr. Merin found Mr. Dufour to be very capable, albeit in a narrow range of areas, with "a lot of street smarts." He noted that Mr. Dufour's mother said he was a good talker and salesman but did not hold jobs well due to the use of drugs. He also reviewed the depositions of Ms. Sigler and Gary Dufour and found they gave insight into Mr. Dufour's adaptive functioning.

Dr. McClaren testified that Mr. Dufour demonstrated anticipation, judgment, guilt, planning, knowledge, and concern for his health. He explained that the various

documents[1] in the case were "pieces of a mosaic" that reflected behavior and actions unlikely to be engaged in by a person with mental retardation. He was concerned about Dr. McClain telling Mr. Dufour he was being evaluated for mental retardation, because he believed Mr. Dufour could comprehend the concept and be motivated to behave in a manner to support such a diagnosis.

The lay witnesses provided more testimony with respect to Mr. Dufour's adaptive behavior and whether his deficits in intellectual functioning and adaptive behavior manifested themselves prior to age 18.

Discussion - lay witnesses

The defense called William Cutts (a teacher who spent all but two years at Lockhart Middle School, and did not teach Mr. Dufour but knew his reputation); Joyce Jones (Mr. Dufour's seventh grade English teacher); Nancy Cutts (a teacher at Lockhart Elementary School, who did not teach Mr. Dufour but testified about the available educational programs at the school); Tammy Manning (a correctional sentence specialist at Union Correctional Institution); Allen Peterson (a librarian specialist at Union Correctional Institution); Johnny Kormondy (a death row inmate who was housed next door to Mr. Dufour for a little over one year); James Wright (a prison guard at Union Correctional Institution); Gary Dufour (Mr. Dufour's brother); Maxine Valle (whose

[1] CCRC posted numerous objections to the use of material from the 2002 evidentiary hearing, arguing they should not be used to bolster the expert's opinion, and the Court overruled the objections. The documents themselves are part of the record of the case, but have not formed the basis of the Court's ruling.

sister lived next door to Mr. Dufour); and Sheila Martin (who met Mr. Dufour through his stepsister, Donna Grant).

The three teachers (Mr. and Mrs. Cutts and Ms. Jones) testified about the policy of "placing" a child in the next grade rather than promoting or retaining him. The rationale for placement was that no further educational purpose would be accomplished by retaining a student in the same grade year after year and thus, it was more appropriate to socially promote him. Mr. Dufour was placed several times while in elementary school. The teachers concurred that at the time Mr. Dufour was in school, there were no programs for testing or assisting children with mental retardation, and there was only limited access to a psychologist who might have diagnosed him. Ms. Jones, the one witness who actually taught Mr. Dufour, thought he was "very possibly" mentally retarded, but she had no formal training to make such an assessment. She could only say that he was a low achiever who was playful and immature in class, which could describe many children who do not have mental retardation.

The teachers' testimonies carry little weight, because there could have been other factors (such as the deplorable home environment) contributing to Mr. Dufour's performance and because of the limited contact these witnesses had with him.

The four Union Correctional Institution witnesses (Ms. Manning, Mr. Peterson, Mr. Kormondy, and Officer Wright) testified about Mr. Dufour's behavior and activities in prison. Ms. Manning, who keeps track of property receipts, said there was no

indication Mr. Dufour owned a chess board, presumably to refute a claim that he played chess. Mr. Peterson, the librarian specialist, testified that Mr. Dufour never requested any library books or material from the law library. Mr. Kormondy, the death row inmate, described how he helped Mr. Dufour write inmate requests for canteen supplies; in addition, he averred that he did not know Mr. Dufour to read or play chess. He believed Mr. Dufour to be slow. He placed emphasis on an incident when Mr. Dufour said he believed his t-shirt was clean because he had sweated while wearing it. Officer Wright, the prison guard, needed to see Mr. Dufour's face to remember him. He did not know whether Mr. Dufour read books and although he had said Mr. Dufour played chess, he acknowledged he could be mistaken.

The Union witnesses' testimonies carry little weight, and do not establish significant deficiencies in adaptive behavior. It is likely that a number of prison inmates have difficulty reading and writing, and that many do not play chess.

The other lay witnesses called by the defense (Ms. Valle and Gary Dufour) testified about Defendant's personal background. Ms. Valle, who lived next door to Mr. Dufour in 1976, described how he would interact with her children. She was comfortable with that, but noted he had trouble reading children's books and was a poor driver. He claimed he knew how to hang drywall but when her husband gave him a job, it became obvious that he knew nothing about it. She believed his intellectual abilities were limited. Gary Dufour, Mr. Dufour's brother, characterized him as a follower and detailed the

extensive mental and physical abuse in their household, along with their poverty. He also testified about Mr. Dufour's accidents and abuse of drugs and alcohol, which began at a young age. He, too, felt comfortable when Mr. Dufour interacted with his daughter. He believed Mr. Dufour's co-defendant in other crimes, Robert Taylor, was more of an instigator. Finally, he testified about their brother John, who as a child was sent to Gateway, which he described as "a retarded school," but who now has a wife, drives a car, and held a job before being injured.

These witnesses' testimonies carry moderate weight, because their personal knowledge and observations are much more lengthy and substantive. They do not, however, establish significant deficiencies in adaptive behavior.

The State called Donna Risban Grant (Mr. Dufour's stepsister); Dorothy Sedgwick (the prosecutor at Mr. Dufour's trial); Rex Straw (a Winter Park police officer who prepared the arrest paperwork); Jay Cohen (one of Mr. Dufour's trial attorneys, who handled the penalty phase proceeding); and Stacy Sigler (Mr. Dufour's former girlfriend).

Ms. Sigler, who was once Mr. Dufour's live-in girlfriend, testified about their lifestyle, including their heavy drug use. She claimed he found and decorated their apartment, paid the rent and dealt with the landlord, planned and took her on a trip to Texas, encouraged her to work as a prostitute, and looked for people or places to rob, a venture with which she assisted him. Mr. Dufour challenges her testimony most vigorously, pointing out that she was a co-conspirator in the instant murder case with a

continuing immunity agreement, gave numerous inconsistent statements, and admitted having memory problems due to her drug use. Due to her inherent bias from the immunity agreement, as well as the inconsistencies, her testimony carries little weight.

Ms. Grant testified that Mr. Dufour heavily abused drugs before turning 18, but he could do household chores and drive. She claimed she double-dated with Mr. Dufour and her "best friend" Sheila Martin. She left home at age 14 because no one believed that Mr. Dufour had raped her; she added that Ms. Martin was with her when she reported being raped by another individual. She believed mental retardation was "very obvious." However, the defense called a rebuttal witness: Ms. Martin, who had met Mr. Dufour through Ms. Grant. Ms. Martin refuted Ms. Grant's testimony; in particular, she denied dating Mr. Dufour, spending time at his house, or being involved in the incident where Ms. Grant reported a rape.

Officer Straw prepared an arrest report on Mr. Dufour in 1979 but had no independent recollection of him. It appears his testimony was introduced primarily to establish that Mr. Dufour drove a car and had a driver's license. His testimony is limited and thus carries little weight.

Mr. Cohen, who was one of Mr. Dufour's attorneys at trial, testified that he believed Mr. Dufour understood their conversations about the case. He admitted he has no experience with people with mental retardation and would defer to expert testimony. Ms. Sedgewick was the prosecutor in the case. She observed Mr. Dufour speaking with

his attorneys, but had no knowledge of the content of their conversations. She believed Mr. Dufour could "handle humor" because of a joke he made. The testimonies of these witnesses carry little weight, primarily because they are limited in scope.

After considering the testimony of all the lay witnesses, including those which are limited, the Court finds that there is no clear and convincing evidence that Mr. Dufour's adaptive behavior is impaired to the degree necessary to support a finding of mental retardation. Furthermore, the evidence does not even meet the more lenient preponderance of the evidence standard.

There was ample testimony to support findings that Mr. Dufour experienced mental, physical, and sexual abuse as a boy; he became a heavy drug user at an early age; he performed very poorly in elementary school, resulting in placements rather than promotions, and only marginally better in junior high and high school before dropping out; and he had difficulty holding a job. While Dr. Keyes opined that "first graders do not get D's and F's unless there is something developmentally wrong," the Court finds that evidence derived from the teachers and Mr. Dufour's school records is insufficient to establish that his poor performance was attributable to mental retardation. The emotional strain caused by his deplorable home environment could have been a significant cause of the difficulties during his early school years, particularly when combined with a lower than average IQ.

Among the many points raised during the lay witness testimony, the Court makes the following findings: Mr. Dufour does not read or write much, if at all. He does not play chess in the Department of Corrections. He does not have good hygiene habits. In the past, he drove a car and possessed a driver's license. He participated in teaching a small engine repair class while in prison in the 1970's. He could be good with children. He was capable of interacting in social situations, and could be friendly and engaging. He appeared to understand discussions with his trial counsel.

Furthermore, when taken together, the impression given by all of the lay witnesses who had any real contact with Mr. Dufour is one of an individual with a certain degree of "street smarts." He does not have a high level of intelligence, but he has displayed a notable ability to adapt to circumstances and use, take advantage of, and even manipulate the people around him. The fact that others may have "taken care of him" in terms of providing housing and food or helping obtain his short terms of employment does not change this conclusion. While Dr. Keyes emphasized that people with mental retardation may have "street smarts" and be capable of owning and driving a car or engaging in basic auto mechanics, etc., the Court finds that the testimony relating to Mr. Dufour's adaptive behavior is inconsistent with a finding of mental retardation.

The final prong of the test is whether the sub-average general intellectual functioning and deficient adaptive behavior manifested themselves prior to the age of 18. It is undisputed that Mr. Dufour had an unusually poor school record, he suffered serious

accidents, and he engaged in heavy drug abuse, all of which occurred early in his life. However, the Court concludes that the record does not establish by clear and convincing evidence that he was suffering from mental retardation prior to the age of 18.

CLAIM II

Mr. Dufour alleges Florida Statute 921.137(4) is unconstitutional, because it requires him to present "clear and convincing evidence" that he has mental retardation, and argues this requirement poses a significant risk of an erroneous determination. In support, he cites *Cooper v. Oklahoma*, 517 U.S. 348 (1996), wherein the United States Supreme Court held that Oklahoma's practice of requiring a defendant to prove incompetence by clear and convincing evidence imposed a significant risk of an erroneous determination that the defendant was competent, and noted that a majority of jurisdictions require proof of incompetence by a mere preponderance of the evidence.

It appears Mr. Dufour has abandoned this claim, because in his written closing argument, filed August 22, 2008, he states that he is required to show by clear and convincing evidence that he is mentally retarded, citing *In Re: Davey*, 645 So. 2d 398, 404 (Fla. 1994). Furthermore, the Court concludes that "clear and convincing evidence" is the proper standard, and finds no legal basis to declare the statute unconstitutional.

CLAIM III

Mr. Dufour alleges his rights of confrontation were violated at his capital trial, relying upon the United States Supreme Court's decision in *Crawford v. Washington*, 541

U.S. 36, 124 S.Ct. 1354 (2004), which held that testimonial hearsay is inadmissible at trial unless the declarant is shown to be unavailable and the party against whom the statement is admitted had an opportunity for cross-examination.

After the instant Motion was filed, the Florida Supreme Court held that *Crawford* does not apply retroactively. *Chandler v. Crosby*, 916 So. 2d 728 (Fla. 2005); *Bowles v. State*, 979 So. 2d 182, 193 (Fla. 2008). Therefore, this claim is denied, because the judgment and sentence in this case were final long before *Crawford* was issued.

CONSIDERED, ORDERED AND ADJUDGED:

1. The Amended Successive 3.851 Motion for Determination of Mental Retardation as a Bar to Execution is hereby DENIED.

2. Mr. Dufour is advised that he may file a notice of appeal within 30 days of the date of rendition of this order.

3. The Clerk of Court shall promptly serve a copy of this order upon Mr. Dufour, including an appropriate certificate of service.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida this 19th day of December 2008.

Original Signed

DEC 19 2008

LAWRENCE R. KIRKWOOD
CIRCUIT COURT JUDGE

LAWRENCE R. KIRKWOOD
Circuit Court Judge

Certificate of Service

I certify that a copy of the foregoing Order Denying Amended Successive 3.851 Motion for Determination of Mental Retardation as a Bar to Execution has been provided this 19th day of December 2008 to the following:

— Maria D. Chamberlin, Marie-Louise Samuels Parmer, and Nathaniel E. Plucker (attorneys for Mr. Dufour), Assistant CCRC, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619

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DEC 19 2008

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