IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 09-262

DONALD WILLIAM DUFOUR,

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Any claims not argued are not waived and Appellant relies on the merits of his Initial Brief.

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STATEMENT OF THE CASE

Appellant objects to the characterizations of the following facts presented in Appellee's Answer Brief as misleading, argumentative, and/or inaccurate. The specific objections are as follows:

1) The State claims that "Dr. McClain admitted that as rescored, Dr. Merin's 2002 WAIS yielded a 74." (Answer Brief at p. 2). However, reading Dr. McClain's testimony in context, she never admitted that *as rescored*, the 2002 WAIS yielded a 74. Her complete answer to the question was:

> Well, the reason I pause on this is it's not as simple as - - I'm not trying to not answer your question. I have clarified that there were some scoring calculation errors and also some possible qualitative issues based upon the way the profile was reviewed. So the reason I'm hesitating is not to do with holding back on saying, yes, in fact, he has a 74. It's got to do with, in fact, if those things turn out to be problematic, we may have a problem with the actual IQ score. So that's why I'm careful what I'm saying here. But according to date, according to what I have reviewed, he has scored a 74 on a standardized IQ test.

ROA Vol. 15, p. 2451. In addition, it is clear that the lower court found Dr. Merin's IQ testing to be invalid and not credible. In part because of the gross scoring and administration errors, the postconviction court found that Dr. Merin's "testimony, diagnosis, and opinion carry little weight with respect to the actual IQ test result." ROA Vol. 9, p. 1452. All of the experts, including Dr. Merin himself

(only after being confronted with video evidence) agreed that he had made those errors, which render his score unreliable.

2) The State claims, "Dr. McClain acknowledged reviewing a WRAT-III taken by Dufour in 1971 in the seventh grade which gives achievement scores for a student's reading, arithmetic and spelling ability." (Answer at p. 3). However, it appears that the State has misapprehended her testimony. The cite it references is part of Dr. McClain's discussion about the WRAT-III, but Dr. McClain was referring to her and Dr. Zimmerman's administration of the WRAT-III. Mr. Dufour did not take the WRAT-III in the 7th grade. The State appears to be referring to the testimony about the CTSB, an achievement test that Mr. Dufour took in 7th grade. ROA Vol. 15, p. 2469. The State focuses on this testing, claiming that Mr. Dufour scored too highly on this test for him to be mentally retarded. (Answer at p. 3-4). The State fails to acknowledge that Mr. Dufour was 16 years old in the 7th grade, and his test results were being compared to other 12 and 13 year olds. Id. at 2471. Moreover, the test given was a *third grade test.* ROA Vol. 16, p. 2675. Still, the highest he scored on any subtest was in the 38th percentile. ROA Vol. 15, p. 2472. It is not surprising that a 16 year old Mr. Dufour taking a third grade test scored marginally higher than 12 or 13 year olds on some of the subtests.

3) The State claims that "Dr. Gutman who had extensive experience working with the Gateway School and setting up the program for referral of children with mental retardation did not consider Dufour mentally retarded." (Answer at p. 9). However, the State fails to acknowledge that Dr. Gutman did not evaluate Mr. Dufour for mental retardation. He made a ballpark estimate on Dufour's intelligence based on the mini-mental status exam, which consists of five to ten questions. ROA Vol. 16, p. 2757. He described his estimate of Mr. Dufour's IQ to be the "the least reliable of all the mental status exam parameters." Id. at 121-22. Dr. Gutman further stated that if there is a question as to someone's IQ, it is proper for a *psychologist* to conduct IQ testing. Supp. ROA Vol. 1, p. 120. Dr. Gutman is not a psychologist. Further as argued in the Initial Brief, the Gateway School that Dr. Gutman worked with handled children who were violent and had outbursts in class. Mr. Dufour did not fall into that category.

4) The State claims that on Dr. Merin's IQ testing, Mr. Dufour scored in the "average" range on the Comprehension subtest. (Answer at p. 11). This is inaccurate. Before the scoring errors were even brought to light, Dr. Merin's raw data show that Mr. Dufour's "age adjusted scaled score" on the Comprehension test was an 8, which is in the low average range. ROA Vol. 37, p. 6006, 6105. Moreover, after correcting the errors he made on the Comprehension test, Mr.

Dufour's "age adjusted scaled score" went down to a 7, which is consistent with mental retardation. Id. at 6105.

5) The State argues that at the 2008 Evidentiary hearing, Dr. Merin questioned Mr. Dufour's level of motivation during Dr. Merin's 2002 testing. (Answer at p. 11). However, at the 2002 hearing, which was judicially noticed by the postconviction court and is part of this record, Dr. Merin testified that Mr. Dufour was not malingering, that he gave a valid effort, and that his score "placed him at the lower end of the borderline into the mentally retarded range." IPC ROA Vol. III, p. 441, 423-424; ROA Vol.12, p. 1937, 1919-1920. Dr. Merin gave this testimony before Mr. Dufour raised mental retardation as a bar to execution. Any testimony at the 2008 evidentiary hearing from Dr. Merin that Mr. Dufour was malingering in 2002, when he explicitly stated otherwise in 2002, is patently unreliable and arguably contrived.

6) The State mentions several incongruous facts in an effort to show that Mr. Dufour's adaptive functioning is normal. By way of example, the State suggests that Mr. Dufour was mentally capable of performing in a Broadway musical because Donald told Dr. Lipman that he toured in the musical "Hair" in the role of Paul. There is no such role in the musical. http://www.hairbroadway.com/tribe

(last visited December 18, 2009).[1] This is just one of the many examples in the record of the cloak of competence. Dr. Keyes explained "that a person with mental retardation would go to incredible lengths to try to make themselves look smart." ROA Vol. 16, p. 2661. The "cloak of competence" is something that needs to be taken into account when evaluating and reviewing data in a mental retardation case. Id. Any other significant factual inaccuracies will be discussed in the argument below.

ARGUMENT I

THE LOWER COURT'S FINDING THAT MR. DUFOUR IS NOT MENTALLY RETARDED IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE, AND VIOLATES ATKINS AND THE FIFTH AND EIGHTH AMENDMENTS.

Significantly Subaverage Intellectual Functioning

The State asserts that "Dufour simply has no qualifying IQ score from a valid test which can meet the intellectual functioning prong." (Answer at p. 44). This statement is patently false and unsupported by the record. Mr. Dufour was administered three IQ tests, all of which were the WAIS, an expressly accepted test for mental retardation under Florida Statutes. He received a 72-74, a 67, and a 62.

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[1] The State offered similar incongruous testimony: Donald called the police because someone had sold him fake drugs; Donald complained about going to the dining hall at the prison because "they make you sit with people you don't want to eat with and I lost my appetite because I had to sit with a hamster like Delancy." ROA Vol. 18, 2999, 3121.

Throughout its Answer Brief, the State urges this Court to consider Dr. Merin's score as the most reliable. However, the State fails to acknowledge the postconviction court's finding "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." ROA Vol. 9, p. 1453. The postconviction court found that Dr. Merin's "testimony, diagnosis, and opinion carry little weight with respect to the actual IQ test result." Id. at 1452. Therefore, any further discussion of Dr. Merin's score should be unnecessary.

The State claims that the "lower WAIS scores obtained by Dr. McClaren and Dr. McClain on subsequent tests were simply unreliable." (Answer at p. 44). This was not the postconviction court's finding. Dr. McClain expressed confidence in her score and felt Mr. Dufour was giving a valid, consistent effort and was not malingering. Dr. McClaren testified that he could offer no criticisms of her testing or her data. While Dr. McClaren expressed some concern that Mr. Dufour may not have been giving his best effort during Dr. McClaren's testing, either because of illness or lack of motivation, Dr. McClaren's score is still consistent with Dr. McClain's score. The postconviction court's finding that Dr. McClain discounted her own testing is inaccurate and not supported by the record. ROA Vol. 9, p. 1453-1454.

In addition, Dr. McClain also considered and relied on the testing and affidavit of Dr. Zimmerman, who concluded in 1989 that Mr. Dufour was mentally retarded based on the results of a Slosson IQ test. Dr. McClain explained that even though the Slosson is not an instrument specifically accepted by the Florida Statutes, it was an individually administered test by a trained neuropsychologist as part of a complete neuropsychological battery. Dr. McClain also testified that Mr. Dufour's Slosson score was predictive of Donald's actual functioning and consistent with her testing.

The State alleges that Dufour's 2005 scores "run counter to what you would expect from the practice effect" and are therefore unreliable. (Answer at p. 48). However, the State distorts the practice effect and how it applies in Mr. Dufour's case. The State's argument is disingenuous on two grounds. First, the testimony about the practice effect was as follows:

> Well, technically the IQ testing should not be readministered for approximately six months to one year for accurate results. There's what they call a practice effect. And you're looking at an increase in the test scores of approximately five points if it's administered...within six months to a year.

ROA Vol. VIII, p. 1205.

Dr. Merin's testing was conducted in November of 2002. Dr. McClain tested Mr. Dufour on December 2, 2005. Dr. McClaren tested Mr. Dufour four days later on December 6, 2005. The State speculates that an "undisclosed expert"

allegedly conducted IQ testing on February 4, 2004. As will be discussed further below, there is nothing in the record to support this assertion. However, assuming for the moment that Mr. Dufour's IQ was tested in February of 2004, this was 15 months after Dr. Merin's testing, thus the practice effect would not apply since there was over a year in between the two tests. Then, Dr. McClaren and Dr. McClain tested Mr. Dufour's IQ in December of 2005, 22 months after the "undisclosed expert's" alleged testing and almost 3 years after Dr. Merin's 2002 testing. For the State to argue that the practice effect from Dr. Merin's 2002 testing or the "undisclosed expert's" alleged 2004 testing had any effect on the 2005 IQ testing is absurd.

Arguably, Dr. McClaren's testing of Mr. Dufour could be subject to the practice effect. Dr. McClaren was aware that Dr. McClain had administered the WAIS a few days before he administered the test. Dr. McClaren should have eliminated the possibility of the practice effect by administering the Stanford-Binet. He chose not to because as the State's expert, it was a win-win situation for him to re-administer the WAIS:

> Q: ....Now, for you then going in knowing that if you administer the WAIS within such a short time frame that you would expect, although it is certainly not - - it's not a guarantee, but it is a possibility that the score may go up, right?
>
> A: Yes.
>
> Q: So what you said - -

> [interrupting] A: Yes, five to seven points it says in the WAIS Manual.
>
> *****
>
> A: Had I gotten a score of five to seven points greater than Dr. McClain, I would have noted in my report that this increase might have been as one possibility, a practice effect.
>
> Q: But you would agree would you not, that the Cherry decision doesn't account for those types of differences, and I think as you explained the other day, the legal criteria differentiates from the psychological criteria which takes into account the standard error of measure and things like that, correct?
>
> A: No. As I recall, the Cherry decision was in existence at the time that I did this.[2]
>
> Q: Which regardless, even if Cherry wasn't in existence, you would have had a higher score possibly?
>
> A: Possibly, but I would have explained it in the report.
>
> Q: I understand that, and you have made that clear.
>
> A: Okay.
>
> Q: But you would agree, would you not, that you could possibly have had a higher score and you were aware of that going in?
>
> A: Yes. You could have gotten a higher, quote, measured IQ?
>
> Q: And if, in fact, Mr. Dufour's score went down, you could have also made the argument that this is part of the puzzle, him not showing effort, correct?

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[2] Cherry v. State was decided in April of 2007. Dr. McClaren tested Mr. Dufour's IQ in December of 2005.

> A: Well, that's exactly what happened.
>
> Q: Right. So going in it was a win/win for you. You would either have a higher score or you could say he's not making effort, correct?
>
> A: I do not agree with the win/win. I was there to follow the judge's orders to assess Mr. Dufour to the best of my ability in regard to whether or not he met the criteria for mental retardation.
>
> Q: And yet you chose to administer the WAIS within a couple of days and not give an alternative test such as the Stanford-Binet, correct?
>
> A: That's correct.

ROA Vol. 19, p. 3179-82. It is disingenuous for the State to allow their expert to deliberately administer the same test that he knew Mr. Dufour had just been given and then argue that Mr. Dufour was malingering because there was no increase in the score as would be expected with the practice effect. [3]

Second, the state compounds this already disingenuous argument by offering an inadmissible and purely speculative argument that the alleged testing by the "undisclosed expert" rendered Dr. McClaren and Dr. McClain's testing invalid.

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[3] See Thomas v. Allen, 614 F.Supp. 2d 1257,1293 (N.D. Ala. 2009)(Rejecting Dr. McClaren's opinion as not credible and finding "his approach to forensic report writing leaves a great deal to be desired, especially in cases such as this one, where important societal and legal policies collide." The Court also found it significant that in the ten to fifteen of his cases involving Atkins evaluations, all were done at the request of the State. Moreover, the Court noted, "[i]n those few instances in which Dr. McClaren found people to be retarded, the finding had been 'stipulated to' by the State." Id. at 1289.

On March 31, 2008, the Assistant State Attorney handling Mr. Dufour's case, filed a document in the postconviction court asking, among other things, that counsel for Mr. Dufour be referred to the Bar ROA Vol 7, p. 1069-1121. In response, counsel for Mr. Dufour filed a "Motion to Strike State's Motion Filed March 31, 2008." ROA Vol 9, p. 1421-144. The postconviction court entered an order on the Motion to Strike on October 6, 2008, finding that throughout the hearing, "both the State and CCRC made numerous objections to each other's pleadings, actions, and statements. While the Court does not condone the contentious behavior of the parties, it finds no basis to report either side to the Florida Bar based on pleadings filed, objections made, or allegations asserted." ROA Vol. 9, p. 1442-43.

The State's accusations regarding this allegedly "undisclosed expert" are baseless. As set forth in the Motion to Strike, it is entirely proper for defense counsel to consult a non-testifying expert to assist in its case and the Sixth Amendment provides that neither the name of the expert nor the substance of the communications are subject to disclosure. The State found out about the expert through Dr. McClaren's special relationship with the Florida Department of Corrections, when he examined Mr. Dufour's visitation logs in December 2005 or early 2006.

The State had years of discovery and protracted litigation in this case to raise this issue if it were so concerned about it. The evidentiary hearing took place more

than three years after this expert allegedly examined Mr. Dufour and more than *two years* after the State had seen the prison logs suggesting the expert had seen Mr. Dufour. If the State was truly concerned about discovering the substance of the expert's contact or opinion, it certainly could have raised the issue to the postconviction court by seeking to depose the expert or by asking for records. Instead, the State chose to sandbag defense counsel on the last day of a contentious eight day hearing. The Assistant State Attorney was a prosecutor with 30 years of experience on capital cases. The Assistant Attorney General has extensive appellate experience. Were they even remotely convinced that this was a legitimate issue, they would have raised it below in an appropriate and timely fashion. Instead, it was done at the last minute in desperate attempt to malign defense counsel before the court and to present inadmissible evidence to try to support their already flimsy case.[4] Raising this issue in its Answer Brief is an improper attempt to put extraneous and irrelevant information before this Court, knowing there is no support for it in the record and that the issue is not properly before this Court.

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[4] In addition, at the evidentiary hearing, the State did not name the expert, since it never introduced any evidence that the meeting even took place, other than the word of Dr. McClaren who supposedly saw the entry of the visitation log. Yet, in its Answer, the State, in a footnote, names the expert and uses the vague cite "through DOC records."

The State focuses the remaining portion of its argument on intellectual functioning on the fact no expert had concluded that Mr. Dufour was mentally retarded prior to his incarceration. (Answer at p. 51). The fact that Mr. Dufour was not formally diagnosed as mentally retarded or placed in a special program is not dispositive. The State wholly fails to address the testimony of the teachers who testified there were no special programs for mentally retarded children at the time Donald went to Lockhart Elementary and Middle School. Mrs. Cutts said there was not even an EMR teacher at the elementary school until the late 1960s. By that time, Donald was already at the end of his elementary years and heading to middle school. Children could easily slip through the cracks. Mr. Cutts would often have students in his class that were mentally retarded and he would do what he could to encourage them and push them along. Students with behavior problems who disrupted class were given priority. Donald was never a disturbance in class and was not violent or hostile. His brother John, on the other hand, had violent outbursts in class that were so disruptive that he ultimately was kicked out of Lockhart and sent to Gateway. Moreover, the State minimizes Dr. Zimmerman's finding of mental retardation and claims it was biased because it was a part of his clemency proceedings in Mississippi.[5]

[5]The State of Mississippi has never granted clemency to anyone. http://www.deathpenaltyinfo.org/state_by_state (last visited December 10, 2009). Moreover, the State of Mississippi recently executed Earl Wesley Berry on May

The State wholly fails to address the arguments by Mr. Dufour and the amicus regarding the standard error of measurement and the fact that Cherry is in conflict with Atkins as well as accepted science. Every single expert in this case, including both state experts, agreed that the standard error of measurement is something that cannot be ignored and that an IQ between 70 and 75 indicates evidence of mental retardation. Dr. McClaren, the state's own expert, conceded that the Cherry decision is in conflict with accepted psychological definitions and established science.

To the extent that the post conviction court found that Mr. Dufour's IQ scores of 67 and 62 did not establish mental retardation, such a finding is inconsistent with the United States Supreme Court's holding in Atkins. Further, a finding that Mr. Dufour did not establish this prong is not supported by competent, substantial evidence, especially when the postconviction court's order lacks specific supporting facts or reasoning to support this assertion.

Dr. McClain's score was uncontradicted, and at a 67, demonstrates clear and convincing evidence that he satisfies the subaverage intellectual functioning prong.

Adaptive Functioning

21, 2008, after denying him an opportunity to present evidence of mental retardation at an Atkins hearing. Berry v. State, 882 So.2d 157 (Miss 2004); http://deathpenaltyinfo.org/executions (last visited December 14, 2009). Berry was also denied clemency despite evidence of mental retardation.

The State focuses most of its argument regarding adaptive functioning on the facts of the crime, Mr. Dufour's criminal history, and hearsay from Department of Corrections paperwork. (Answer p. 53-63). First, the facts of the crime and Dufour's criminal history are not relevant to the issue of mental retardation. Maladaptive behavior does not demonstrate adaptive strengths. AAMR, Mental Retardation – Definition, Classifications, Systems of Support, 10th Edition CH. 5, Pg. 79 (2002).

The State argues that the mere presence of the CCP aggravator, as a matter of law, precludes a finding of mental retardation. This conclusion is not supported by science, nor is it consistent with Atkins.

> The presence of weakness – not the absence of strengths – determines mental retardation. Consequently, relying on the 'sophistication' of a defendant's crime to disprove adaptive functioning deficits, except in extraordinary circumstances, would not be consistent with accepted clinical practice because the 'sophistication' of the crime is irrelevant to the existence of weaknesses. Another important precept is that strengths and weaknesses must be assessed in the context of the individual's community environment. Thus, evidence of an inmate's activities in prison is of little value, because the clinical definition of mental retardation commands that adaptive behavior must be assessed in 'typical community environments,' not in circumstances of 'legal restraint,' such as prison.

John Blume, Sherri Lynn Johnson, & Christopher Seeds, *An Empirical Look at Atkins v. Virginia and its Application in Capital Cases*, 76 TNLR 625, 635 (2009).

While this Court did uphold the CCP aggravator in Mr. Dufour's case, his crime was certainly not sophisticated. The State's reliance on Phillips v. State, 984

So.2d 503 (Fla. 2008), is misplaced. This Court did mention Phillips' crime in passing, which was the premeditated shooting of his parole officer, where Phillips had lain in wait for him, emptied his gun and reloaded, and then retrieved the shell casings and fled the scene. However, this Court focused its discussion of Phillips' lack of adaptive deficits on the fact that Phillips supported himself as a short order cook, dishwasher and garbage collector. Id. at 511. He functioned well at home paid the bills, cooked, and went grocery shopping. Id. The testimony at Phillips' evidentiary hearing also "demonstrated that he is healthy, wellnourished and wellgroomed, and exhibits good hygiene." Id. at 512.

Unlike in Phillips, the testimony at Mr. Dufour's evidentiary hearing revealed that Mr. Dufour never lived alone and always relied on others for help and support. He was not in charge of paying bills, he never held a job for more than a few months, and he never had a checking account. He worked as a prison janitor at one point. ROA Vol. 18, p. 3108. Even the State's expert, Dr. McClaren, agreed that Mr. Dufour's history of academic failure and menial jobs, along with his "really poor" relationships could be a justification for the diagnosis of mental retardation. ROA Vol. 19, p. 3197-3201. Mr. Dufour's hygiene was described by Dr. Keyes, Dr. McClaren and Mr. Kormondy as very poor. He was filthy for the examinations with Dr. McClaren and Keyes. Mr. Kormondy explained that Mr.

Dufour did not understand that his yard shirt needed to be washed with soap in order to get clean.

The State concedes that Mr. Dufour's brother John is mentally retarded. (Answer at 57). The State then fails to acknowledge Dr. McClain's testimony that John's retardation "is significant because it can go to the issue of some genetic basis for the mental deficiency." ROA Vol. 14, p. 2392. The State, while conceding his mental retardation, notes that "John married, drove a car, and, until he hurt his back, was gainfully employed, and able to function in everyday life." (Answer at p. 57). The State cannot have it both ways. It cannot argue that Dufour is not mentally retarded because he drove a car, had personal relationships, and functioned in daily life, and at the same time argue that John had those qualities *in spite of* his mental retardation.

The State's inconsistent argument demonstrates its (as well as the postconviction court's) lack of understanding about the skills of people with mental retardation. As noted in the Initial Brief, people with mental retardation can drive. People with mental retardation can be taught carpentry skills and taught to fix complex items. People with mental retardation often seek to be the center of attention. People with mental retardation can have street smarts. People with mental retardation could learn and participate in a small engine repair course. People with mental retardation have career goals. In addition, the State's assertion

that there is something inherently inconsistent with a diagnosis of anti-social personality disorder and mental retardation is unsupported by the record. People with mental retardation can also be diagnosed as antisocial, it is called comorbidity. ROA Vol. 19, p. 3279-3280. Both the postconviction court and the State failed to address any of the objective functioning measures administered by Dr. Keyes. Mr. Dufour has shown by clear and convincing evidence that he has adaptive deficits in two or more areas.

Onset before 18

The State wholly fails to address the third prong of mental retardation, other than a blanket statement at the end of Issue I that says "In sum, Dufour has failed to prove any of the elements of mental retardation by clear and convincing evidence, or, for that matter, even a preponderance of the evidence." (Answer at p. 63). The State, as well as the postconviction court, fails to adequately address the testimony from Joyce Jones, William Cutts, and Nancy Cutts, which established the significance of Mr. Dufour's school records. He received Ds and Fs in the first and second grades. He failed the second grade, and he was placed or socially promoted every year thereafter. Nancy Cutts testified that in all her years of teaching, she had never seen a report card in which a child was placed so many times. Dr. Keyes testified that in his 30 years of experience, he has not seen a

situation where a first grader got Ds or Fs unless there was something developmentally wrong.

In addition, there was undisputed testimony that Mr. Dufour began abusing drugs and alcohol in his late childhood and throughout his teens. There was testimony that he inhaled Toulane as early as age 10. Toulane is a volatile hydrocarbon that that can cause brain damage and psychosis from just one exposure. In addition, Mr. Dufour suffered numerous head injuries and insults prior to age 18, including a motorcycle accident and having his head pushed through a glass aquarium. The post conviction court and the State wholly failed to address the precise, explicit, and extensive testimony detailed above that Mr. Dufour presented about the onset of his mental retardation prior to age 18.

ARGUMENT II

FLORIDA STATUTE 921.134(4) IS UNCONSTITUTIONAL AND VIOLATES MR. DUFOUR'S DUE PROCESS RIGHTS AS PROTECTED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State relies on Clark v. Arizona, 548 U.S. 735, 126 S.Ct. 2709 (2006), which addressed Arizona's procedural due process for an insanity defense. The State claims that in Clark, the United States Supreme Court has "reaffirmed that the states could require a defendant to carry the clear and convincing burden of proof." (Answer at p. 65). However, a fair reading of Clark demonstrates that the

defendant was not even challenging the clear and convincing burden of proof. The Court found that "Clark presses no objection to Arizona's decision to require persuasion to a clear and convincing degree before the presumption of sanity and normal responsibility is overcome." Id. at 771, 2733. Instead, Clark was challenging Arizona's narrowing of the M'Naghten test and its exclusion of evidence of mental illness on the issue of mens rea. Id. at 742,2716. Therefore, the constitutionality of a burden of clear and convincing evidence to overcome a presumption of sanity was never squarely raised.

Moreover, a determination of sanity is different than a determination of mental retardation for several reasons. Insanity is an affirmative defense to a crime. If a defendant proves he is insane, he will be found *not guilty* by reason of insanity, and can in some states, avoid punishment completely. A finding of mental retardation only protects a defendant from the most extreme punishment, death. It does not excuse conduct or create a defense to conduct. Because insanity absolves a person of guilt, a higher standard can be justified. A finding of mental retardation does not absolve a person of guilt in a capital case. It merely restricts the imposition of the ultimate punishment.

The state also relies on Vasquez v. State, 84 P. 3d 1019, (Colo. 2004). In Vasquez, the Colorado Supreme Court upheld the clear and convincing standard specifically because the procedure in Colorado is to have a *pre-trial* determination

of mental retardation, which thus "obviates any further capital offense proceedings in some cases. Imposing upon the defendant the burden of proving his retardation by clear and convincing evidence *for that purpose* offends no constitutional mandate." Vasquez at 1023(emphasis added). In Florida, the determination of mental retardation is not made pre-trial, but instead is handled after the penalty phase. Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure 875 So.2d 563, 568 -569 (Fla. 2004)(citing § 921.137, Fla. Stat. (2001).

While the State cites two states that have a higher burden than mere preponderance, Colorado and Georgia, the State fails to acknowledge that the statutes in California, Idaho, Illinois, Nevada, Utah, and Virginia all impose a preponderance standard.[6] The following states, through case law, have set preponderance as the appropriate standard: State v. Williams, 831 So.2d 835, 860 (La.2002)(receded from on other grounds); Russell v. State, 849 So.2d 95, 148 (Miss.2003); State v. Lott, 779 N.E.2d 1011, 1015 (2002); Commonwealth v. Mitchell, 839 A.2d 202, 211 n. 8 (2003); Franklin v. Maynard, 588 S.E.2d 604, 606 (2003); Myers v. State, 130 P.3d 262,265(Okla.Crim.App.2005);

[6] See Cal.Penal Code § 1376; Idaho Code Ann. § 19-2515A; 725 Ill. Comp. Stat. Ann. 5/114-15 ; Nev.Rev.Stat. Ann. § 174.098; Utah Code Ann. § 77-15a-104; Va.Code Ann. § 19.2-264.3:1.1

Ex parte Briseno, 135 S.W.3d 1,12 (Tex.Crim.App.2004).

As noted in the Initial Brief, because the interests of the defendant are more substantial and the interests of the State more modest when dealing with *eligibility* for the death penalty, imposing a standard of clear and convincing evidence violates due process. Additionally, "requiring the defendant to prove [mental retardation] by clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is [not mentally retarded]." Cooper v. Oklahoma, 517 U.S 348,363 (1996). As such, Mr. Dufour urges this Court to address this issue on the merits and reject the clear and convincing standard imposed by the trial court and institute a preponderance of the evidence standard.

Finally, the state claims that the postconviction court "determined that Dufour has not met even the lesser preponderance of the evidence standard." (Answer at p. 66). However, the State wholly fails, as the postconviction court did, to identify what the preponderance standard is and how the evidence fails to meet it.[7] Such a sweeping conclusion unaccompanied by any reasoning or legal analysis, wholly deprives this Court of meaningful appellate review and violate Mr. Dufour's Fifth and Eighth Amendment Due Process rights.

ARGUMENT III

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[7] Preponderance of evidence is defined as evidence "which as a whole shows that the fact sought to be proved is more probable than not." State v. Edwards, 536 So.2d 288,292 (Fla 1st DCA 1988).

THE LOWER COURT'S ADMISSION OF CERTAIN EVIDENCE AT THE EVIDENTIARY HEARING WAS IMPROPER AND VIOLATIVE OF MR. DUFOUR'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS UNDER THE FLORIDA CONSTITUTION.

Unauthenticated letters:

The statement, "[a]ssuming for a moment that the State even has to authenticate letters or records used on cross-examination of a defense expert" demonstrates that the State misapprehends Mr. Dufour's argument. (Answer at p. 70). If the State had simply shown the letters to Dr. McClain and questioned how they were related to her opinion on whether or not Mr. Dufour was mentally retarded, there could be no error. Experts are allowed to rely on hearsay in forming their opinion, so long as it is a type that is reasonably relied upon in their field. Dr. McClain would still have offered her caveat that "assuming the letters were in fact written by him." But the State went further by admitting these items into evidence. By doing so, they must comply with the Rules of Evidence, which they failed to do. The letters were never properly authenticated and were improperly admitted. Mr. Dufour was prejudiced by the letters because the State used these letters to argue that Mr. Dufour possessed sufficient adaptive skills and therefore was not mentally retarded.

Dr. Berland's Testimony:

The State asserts that Dr. Berland's testimony at the mental retardation hearing "differed little, if at all, from his testimony during the first post-conviction hearing." (Answer at p. 73). While the substance of some of his testimony was similar, his purpose for testifying and the reason he was retained by the State was completely different. Supp. ROA Vol. 2, p. 301. He testified in 2002 that Mr. Dufour suffered from brain damage, a finding which the state vigorously challenged. During the mental retardation postconviction proceedings, the State retained Dr. Berland to "offer a possible alternative explanation for low intelligence."

Dr. Berland testified that Mr. Dufour's numerous head injuries and drug use after the age of 18 caused brain damage that could result in a lower IQ at the time of the 2005 testing. Thus, Dr. Berland's testimony allowed the State to argue an alternative explanation for the low IQ scores. Such testimony prejudiced Mr. Dufour and it was error for the postconviction court to admit the testimony when Mr. Dufour had not waived the attorney-client privilege.

Dr. McClaren:

Here, the State appears to misapprehend Mr. Dufour's argument. Mr. Dufour is not necessarily challenging Dr. McClaren's reliance on the hearsay documents in forming his opinion, but instead challenges their admissibility, the way they were displayed to the post conviction court, and the fact that Dr.

McClaren spent the bulk of his *six hour* direct examination reading from and/or relying on documents from the Department of Corrections that all were hearsay.

The State argues that because the "the trial court specifically stated that it did not rely on these documents in making its determination," any error must be considered harmless. (Answer at p. 74). As noted in the Initial Brief, to argue that the documents have not formed the basis of the court's ruling defies logic. The documents were the focus of and the primary evidence of adaptive functioning put forth by the State at the hearing. The State used the documents in its attempt to rebut Mr. Dufour's proof that he had adaptive deficits. As noted in the Initial Brief, Dr. McClaren did objective testing on adaptive functioning with only one corrections officer. He did not talk to Mr. Dufour's teachers or other people in the community who knew him prior to the age of 18. The other witnesses he talked to were either not credible or their testimony was given little weight. His conclusion on Mr. Dufour's adaptive functioning was based almost exclusively on these inadmissible records. The postconviction court erred in admitting these documents.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Dufour relief on his successive 3.851 motion. This Court should order that his sentences be vacated, and a life sentence imposed, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by Fed Ex and by U.S. Mail to all counsel of record on this 22nd day of December 2009.

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I hereby certify that a true copy of the foregoing Reply Brief of Appellant, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

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