IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-726

VICTOR TONY JONES,

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

SUPPLEMENTAL BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

During the appeal of the summarily denial of the successive motion for post conviction relief, this Court relinquished jurisdiction solely for the lower court to hold an evidentiary hearing on the motion. (PCR2-SR2. 47)[1] During an argument concerning whether Defendant was entitled to appointment of an expert since he had already been evaluated in connection with this motion, Defendant stated that a new evaluation was done because the lower court had already determined that all his prior experts and lay witnesses were incredible and that he wanted to have a new evaluation so that his motion would be "sufficient to pass the laugh test." (PCR2-ST. 8)

At the evidentiary hearing, Defendant presented the testimony of Dr. Hyman Eisenstein. (PCR2-ST. 181) He stated that he had originally evaluated Defendant in April 1991, at the request of trial counsel. (PCR2-ST. 181) He evaluated Defendant again in 1993 and 1999, and had testified twice previously in this matter. (PCR2-ST. 181-82) Because he had give Defendant WAIS IQ tests in 1991, 1993 and 1999 and other experts had given WAIS IQ tests in 2003 and 2005, Dr. Eisenstein decided not to test Defendant's IQ again. (PCR2-ST. 182-83) Further, Dr.

[1] The symbols "PCR2-SR2." and "PCR2-ST." will refer to the supplemental record and transcript of proceedings prepared after the relinquishment proceedings.

Eisenstein did not believe there were any "formal test instruments" to determine adaptive functioning so he did no testing. (PCR2-ST. 184)

Dr. Eisenstein stated that he believed Defendant's performance on the IQ tests given over time had been consistent. (PCR2-ST. 186) He averred that the mean on the IQ tests given was 100 and the standard deviation was 15. (PCR2-ST. 187) As such, a score of 70 or below was required have an IQ score two or more standard deviations below the mean. (PCR2-ST. 187-88) He stated that there was a margin of error in the test scores so that if the test was given 100 times, the score would fall within 10 points of the score 95 times. (PCR2-ST. 188)

Dr. Eisenstein acknowledged that he had previously given Defendant a number of other tests, including the MMPI. (PCR2-ST. 189) He stated that the data obtained in this testing was "certainly relevant" to determining whether Defendant was mentally retarded. (PCR2-ST. 189) He admitted that all of the MMPI's Defendant had been given yielded invalid results but chose to believe that this was not an indication of malingering. (PCR2-ST. 281-88)

During his current evaluation of Defendant, Dr. Eisenstein spent six to seven hours over two separate days interviewing Defendant. (PCR2-ST. 190-91) He wanted to determine Defendant's

mental status before the age of 18 because he believed the criteria for mental retardation was onset before the age of 18. (PCR2-ST. 191-92)

Dr. Eisenstein stated that he had interviewed Pamela Mills, Defendant's sister; Michael Jones, Defendant's brother; Valerie Mills Johnson, another of Defendant's sisters; Carl Leon Miller, Defendant's cousin; and Laura Long, the aunt who raised Defendant during his previous evaluations. (PCR2-ST. 192, 194) He had interviewed Ms. Long originally at the time of trial and interviewed the other family members and Ms. Long again at the time of the original post conviction proceedings. (PCR2-ST. 192-94)

Dr. Eisenstein acknowledged that Ms. Long had told him that Defendant was a good child at the time of trial and that she had changed her version of Defendant's childhood and claimed Defendant was slow at the time of the post conviction proceedings. (PCR2-ST. 194-95) Pamela claimed that Defendant was unable to do his schoolwork so she did it for him. (PCR2-ST. 199-200) Pamela also claimed to have taken care of Defendant when he moved to New York to live with his mother at the age of 11. (PCR2-ST. 201) Valerie claimed that Defendant was forced to raise himself because of the lack of parental care. (PCR2-ST. 203)

Dr. Eisenstein stated that he interviewed Pamela and Leon again in 2005. Pamela again claimed that Defendant was slow in school, that Defendant was placed in classes for the learning disabled, that Defendant stuttered, slurred his words and have difficulty in articulation and that Defendant was a loner. (PCR2-ST. 202) Leon claimed that Defendant was slow, that directions had to be repeated to Defendant before he could follow them, that a great-uncle had referred to Defendant as retarded and that Defendant lacked social skills and had trouble communicating. (PCR2-ST. 204-05)

In addition, Dr. Eisenstein also interviewed Frank Mills, another of Defendant's brothers, and Shirley Anthony, one of Defendant's former girlfriends, in 2005. (PCR2-ST. 206-08, 210) Frank Mills was not raised with Defendant and only saw Defendant at family gatherings held "[e]very several years" at which Defendant stayed only briefly and did not socialize (PCR2-ST. 208-10) Frank Mills had only a minimal relationship with Defendant as an adult and had not seen Defendant for 15 years. (PCR2-ST. 210)

Dr. Eisenstein claimed that Ms. Anthony, who was 20 years older than Defendant, stated that she had lived with Defendant in a common law marriage when Defendant was 16 and lived in Atlanta. (PCR2-ST. 210) Ms. Anthony "had a hard time recalling"

her relationship with Defendant but remembered Defendant working at different jobs, and that she provided a home for Defendant and trusted him. (PCR2-ST. 210-11) Dr. Eisenstein believed that there were no substantial discrepancies in all of the information from all of the interviews he had ever conducted. (PCR2-ST. 212)

Dr. Eisenstein also reviewed a discharge summary from Jackson Memorial Hospital, Defendant's school records, Defendant's prison records and the Wide Range Achievement Tests (WRAT) that Defendant had been given over the years. (PCR2-ST. 212-17) The WRAT had a mean of 100 and a standard deviation of 15. (PCR2-ST. 216) There are two forms of the WRAT, a blue and a tan form. (PCR2-ST. 217) Dr. Eisenstein did not believe that it was appropriate to give both forms during a single administration. (PCR2-ST. 217-18) As such, he believed that Dr. Suarez had acted improperly in doing so and in averaging the scores of the two forms. (PCR2-ST. 217) Dr. Eisenstein believed that Defendant's performance had been consistent on the WRAT's administered by both Drs. Caddy and Suarez but that both of these doctors had calculated their scores incorrectly. (PCR2-ST. 218-22) Dr. Eisenstein also believed these performances were consistent with Defendant's performance on the WRAT when he twice administered it. (PCR2-ST. 223-24)

Defendant's prison records indicated that he had been given a BETA IQ test in 1988 and scored 76. (PCR2-ST. 225) Dr. Eisenstein believed that this was consistent with all of the other IQ scores he had reviewed. (PCR2-ST. 225) Dr. Eisenstein had observed that Dr. Suarez administered the Test of Nonverbal Intelligence (TONI) and obtained a full scale IQ of 76. (PCR2-ST. 227) Dr. Eisenstein opined that the TONI was a screening test but that the score was consistent with the other IQ scores he had seen. (PCR2-ST. 227-29)

Dr. Eisenstein believed that the discharge summary was important because it included a statement that Defendant had been "labeled as borderline mentally retarded." (PCR2-ST. 234-35) Dr. Eisenstein believed that this meant that Defendant had been evaluated and diagnosed as retarded at some other institution to which Defendant had been committed even though he had seen no records to substantiate such a diagnosis. (PCR2-ST. 235-36, 374-77) However, he admitted that nothing else in the report supported this reading and that the report indicated Defendant had average intelligence, which he discount because it was not written by a psychologist. (PCR2-ST. 378-79)

Dr. Eisenstein had reviewed the raw data from a 2005 administration of the WAIS-III. (PCR2-ST. 239) He believed that the range of subtest scores showed that Defendant had actually

been attempting to do his best on the test and that he was demonstrated his true level of ability. (PCR2-ST. 239-40) Dr. Eisenstein also acknowledged seeing data associated with the administration of the Test of Memory Malingering (TOMM) that was given at the same time as this WAIS. (PCR2-ST. 243-45) The results indicated that Defendant was malingering. (PCR2-ST. 245) However, Dr. Eisenstein chose to believe that the WAIS score was valid and the TOMM results were invalid. (PCR2-ST. 245-47)

Dr. Eisenstein acknowledged that it was important to know the level of effort that the subject was actually exhibiting and whether the results are not invalid for reasons associated with effort and test conditions. (PCR2-ST. 241) He admitted that a person's attitude about the testing would have an effect on the person's performance on the test. (PCR2-ST. 280) He admitted that this was one reason why tests of malingering were given. (PCR2-ST. 241) He acknowledged that he believed that Defendant had problems with concentration, attention and focus and that the gunshot wound contributed to these problems. (PCR2-ST. 242) However, Dr. Eisenstein believed that it was virtually impossible for the results Defendant achieved on the WAIS's he had taken to be the result of malingering. (PCR2-ST. 280) He did not conduct any malingering tests. (PCR2-ST. 280) He did believe that people with low IQ's generally malinger. (PCR2-ST. 288)

Dr. Eisenstein stated that the DSM-IV-TR required (1) significantly subaverage intellectual functioning, (2) concurrent deficits in present adaptive functioning and (3) onset before 18 for a person to be considered retarded. (PCR2-ST. 289, 333) However, he then stated that he limited his investigation of Defendant's adaptive functioning to how Defendant functioned before the age of 18 because the level of functioning before the age of 18 was the focus of the third prong. (PCR2-ST. 290-91) Dr. Eisenstein stated that he made no attempt to determine how Defendant was functioning as an adult because it was not relevant to his functioning before the age of 18. (PCR2-ST. 291-92) He stated that if present adaptive functioning actually meant functioning at the present time, he had not assessed the prong at all. (PCR2-ST. 335)

Analyzing adaptive functioning in that light, Dr. Eisenstein found deficits in communications, functional academics, self-direction and interpersonal skills. (PCR2-ST. 292-94) The finding of deficits in communications was based on interview responses that Defendant was non-verbal, inarticulate, stumbled over words, had difficulties in comprehension and was a slow learner. (PCR2-ST. 292) The finding of deficits in functional academics was based on the family descriptions of Defendant as retarded, lacking in street smarts, mentally slow

and in need of special education, the WRAT results and the school records, which allegedly showed failing grades. (PCR2-ST. 293) The finding of deficits in self-direction was based on Pamela's claims about her assistance to Defendant and the fact that Ms. Anthony was 20 years older than Defendant. (PCR2-ST. 294) Dr. Eisenstein also believed that Dr. Suarez's administration of the ABAS to Corrections Off. Robert Snow confirmed that Defendant had deficits in self-direction. (PCR2-ST. 295)

Dr. Eisenstein stated that his opinion regarding Defendant had changed since his previous testimony because the definition of retardation had changed. (PCR2-ST. 298) He claimed that before the publication of the DMS-IV-TR in 2000, it was not possible to diagnose retardation if the IQ scores were higher than 70. (PCR2-ST. 298)

On cross, Dr. Eisenstein admitted that he had reviewed the reports of all the other experts who had ever been involved in the case and had conducted his own previous evaluations. (PCR2-ST. 324-28) Neither he nor any of the other experts had ever been of the opinion that Defendant was retarded. (PCR2-ST. 328-30) He acknowledged that retardation was an important issue even at the time of trial. (PCR2-ST. 328-29) He insisted that the reason why was that the definition of retardation had changed

after the first post conviction hearing. (PCR2-ST. 330-31)

In terms of how Defendant was presently functioning, Dr. Eisenstein was aware that Defendant communicates in writing using more than one and two syllable words and that Defendant had an entire routine for cleaning him cell. (PCR2-ST. 338) He was aware that Defendant had established an exercise routine and fashioned exercise equipment himself out of the furnishing of his cell. (PCR2-ST. 338-39) He was aware that Defendant attended to his personal hygiene. (PCR2-ST. 339) He acknowledged that the grievance concerning Defendant's prison account evidenced knowledge of his finances. (PCR2-ST. 340) He acknowledged that Defendant had remembered meeting with him previously and had discussed when their last meeting occurred. (PCR2-ST. 341) He admitted that Defendant recounted the medications he was presently taking, their dosages, the medications he had taken in the past and his understanding of why the medications had changed. (PCR2-ST. 343) Defendant also evidenced a desire to remain alert while incarcerated and his concerns for his safety when he was not alert because of medication or his physical condition. (PCR2-ST. 344-35)

Dr. Eisenstein was aware that Defendant stated that he went to the law library twice a week. (PCR2-ST. 346) However, Dr. Eisenstein did not inquire about this because he was sure the IQ

tests results were accurate measure of Defendant's ability. (PCR2-ST. 346-48)

Dr. Eisenstein admitted that Defendant told him Pamela was not living with his mother when he lived with his mother in New York. (PCR2-ST. 360) He admitted that he accepted what was told to him during his various interviews at face value. (PCR2-ST. 362) He believed that this was appropriate because he considered the statements to be consistent. (PCR2-ST. 362) He had not asked Defendant if he understood the effect of being found to be retarded but believed that Defendant was probably aware. (PCR2-ST. 362-63) He did not ask because he believed that he was able to discern whether someone was truthful without considering their motivation. (PCR2-ST. 363-64) He insisted that a motivation could not have been shared by a group of people. (PCR2-ST. 364-65)

Dr. Eisenstein did not consider the fact that Defendant had runaway and actually made it to his family in New York to be an indication of sophistication because Defendant had claimed to have stowaway on an airplane. (PCR2-ST. 366) He insisted that this was easy because young children can fly on planes. (PCR2-ST. 366-67)

Dr. Eisenstein admitted that he had never seen any school records showing that Defendant was in special education classes.

(PCR2-ST. 367) However, he insisted that this was because the school records were incomplete. (PCR2-ST. 368) When confronted with the fact that Defendant's third grade teacher had testified that Defendant was a good student and had above average intelligence, Dr. Eisenstein eventually claimed that Defendant only did well because Pamela helped him. (PCR2-ST. 370-71) Dr. Eisenstein admitted that the decline in Defendant's grades in school coincided with an increase in disciplinary problems and truancy. (PCR2-ST. 372)

When confronted with the fact that Defendant was in juvenile detention when he assumed Defendant was in Atlanta, Dr. Eisenstein insisted that the discrepancy did not matter because it would have been within a couple years of when he thought. (PCR2-ST. 373) He also ignored the fact that Defendant had several different girlfriends at that time. (PCR2-ST. 373-74)

Dr. Eisenstein admitted that the prison records he had reviewed showed that Defendant's functioning was average, that his IQ score was an underestimate and that Defendant's true level of intellectual functioning was in the low average range. (PCR2-ST. 381-83) However, Dr. Eisenstein did not believe that the functioning level indicated anything about Defendant's adaptive functioning. (PCR2-ST. 381)

Lisa Wiley testified that she was a psychological

specialist for the Department of Corrections for 16½ years and had been just been reassigned from death row a couple week before the hearing after having been there for 13 years. (PCR2-ST. 249) Ms. Wiley holds a master's degree in clinical psychology. (PCR2-ST. 250)

In her position on death row, she provided frontline clinical psychological services to the death row inmates. (PCR2-ST. 249-50) She explained that in making weekly rounds she checked to see if the inmates were acting strangely, appeared withdrawn or had their cells in disarray. She stated that inmates were required to keep their cells clean by mopping and sweeping the floors, throwing out their garbage, changing their linens and uniforms when the laundry carts came and keeping their personal effects in their lockers. (PCR2-ST. 253)

Ms. Wiley had known Defendant since his arrival on death row in 1993. (PCR2-ST. 250-51) Ms. Wiley did not recall Defendant ever having a dirty cell or behaving in anything but an appropriate and polite manner. (PCR2-ST. 253) While Defendant rarely conversed with Ms. Wiley during rounds, she recalled him requesting assistance in having his television repaired. (PCR2-ST. 254) The only time that the staff had ever suggested that Defendant needed treatment was in response to a call from one of Defendant's sister suggesting that Defendant was depressed.

(PCR2-ST. 254-55) On the occasions when Defendant chose to speak to Ms. Wiley, Defendant had been able to communication in a rational, coherent and logical manner. (PCR2-ST. 256) The language Defendant used in these conversations was not elementary. (PCR2-ST. 261) Ms. Wiley had never had any concerns that Defendant might be mentally retarded and no other member of corrections staff had ever suggested to Ms. Wiley that they had such concerns. (PCR2-ST. 256-57)

Ms. Wiley was familiar with Defendant's handwriting from seeing requests that Defendant had written her. (PCR2-ST. 259) As such, she was able to identify the handwriting on several informal grievances as his. (PCR2-ST. 261-62) In one grievance Defendant had complained about not receiving mail. (PCR2-ST. 262) Ms. Wiley recalled that Defendant was receiving medications for diabetes and lipator, which Defendant administered himself. (PCR2-ST. 264) She did not recall there ever being an issue of Defendant being unable to do so. (PCR2-ST. 264-65)

Ms. Wiley was aware that inmates had accounts in which their friends and family could place money for their use. (PCR2-ST. 260) While inmates would not be handling in money in the same way that a free person would, they would need to be able to deal with their accounts in order to purchase items from the canteen. (PCR2-ST. 265) Ms. Wiley stated that inmates sent

deposit slips to the people who sent them money and the donors enclosed the slips with the money so that it would be deposited in the inmates account. (PCR2-ST. 278) Ms. Wiley identified to grievances Defendant had written concerning failures of the inmate bank to have credited money transfers to his account in a timely fashion. (PCR2-ST. 275-77)

Ms. Wiley recalled having received a court order permitting Dr. Suarez to speak to her and her to testify at the hearing. (PCR2-ST. 270-71) She stated that she had consulted with DOC legal about the order but did not recall if she was specifically named in the order. (PCR2-ST. 271) Ms. Wiley stated that she had indicated that Defendant had some deficits in social skills to Dr. Suarez because Defendant had a flatter affect than normal people. (PCR2-ST. 271)

Dr. Enrique Suarez testified that one needed to consider the possibility of malingering in a forensic evaluation, as the DSM-IV requires. (PCR2-ST. 399-400) Not all psychological tests include malingering or validity checks. (PCR2-ST. 400) While the MMPI does have internal checks of validity, the IQ tests do not. (PCR2-ST. 400) Because professionals are not good judges of whether a person is giving their optimal level of performance, tests specifically designed to determine motivation have been developed. (PCR2-ST. 401-02) Dr. Suarez administered these

tests. (PCR2-ST. 402)

Dr. Suarez decided not to give the WAIS because Defendant had already taken the WAIS on many occasions. (PCR2-ST. 402-03) In fact, Dr. Suarez did not believe that additional intelligence tests were necessary. (PCR2-ST. 531) Dr. Suarez chose to give a test of non-verbal intelligence because he did not believe Defendant would be familiar with the test and because it corresponded with a validity test that Dr. Suarez was also administering. (PCR2-ST. 403-04) The test Dr. Suarez chose was the TONI. (PCR2-ST. 405) Defendant completed the TONI quickly because he met the discontinuation criteria quickly. (PCR2-ST. 537-38)

Dr. Suarez stated that the TONI was normed and validated using the same method as the WAIS. (PCR2-ST. 405) However, the TONI tested only reasoning ability and avoids measurement errors caused by language problems, sensory deficits and the practice effect. (PCR2-ST. 405-06) Dr. Suarez did not consider it to be a screening test. (PCR2-ST. 531)

Dr. Suarez interviewed Defendant for 1½ before he started testing. (PCR2-ST. 406) Dr. Suarez believed that interviewing Defendant was important because retardation had behavioral consequences at all levels that should be noticeable to a professional. (PCR2-ST. 406-07) If fact, most people are

referred for evaluation of whether they are retarded because teachers, parents, friends or employers notice that something is wrong with the person. (PCR2-ST. 407) Dr. Suarez's interview of Defendant indicated that Defendant was normal. (PCR2-ST. 407)

On the TONI, Defendant score 76. (PCR2-ST. 408) The 95 percent confidence interval for this score was 68 to 84. (PCR2-ST. 409) This score was in the borderline range. (PCR2-ST. 408) Dr. Suarez explained that a borderline score is not in the retarded range but in the range above retarded. (PCR2-ST. 410) Because borderline is above retarded, there is no such thing as borderline mentally retarded. (PCR2-ST. 410) As such, the notation of the JMH report is a misnomer. (PCR2-ST. 410)

Dr. Suarez stated that the criteria for mental retardation were significantly subaverage intellectual functioning, concurrent deficits in present adaptive functioning and onset before the age of 18. (PCR2-ST. 411, 433-34) To have significantly subaverage intellectual functioning, a person needs to have an IQ score that it two standard deviations below the mean. (PCR2-ST. 411-12) Because the IQ tests given to Defendant had a mean of 100 and a standard deviation of 15, a score below 70 was required. *Id.*

Dr. Suarez explained that the 95 percent confidence interval varied depending on the age of the subject and other

factors and was not always symmetrical. (PCR2-ST. 413) The confidence interval is designed to account for error in the measurement instrument and variations in performance based on level of attention and physical state. (PCR2-ST. 413) Thus, the confidence interval expresses what score one would expect with repeated testing. (PCR2-ST. 414, 591-92) Here, Defendant had been repeatedly tested and this repeated testing produced scores that all fell in the borderline range but one. (PCR2-ST. 414-15, 591-92)

In addition, most of the IQ tests were not accompanied by tests of validity. (PCR2-ST. 416) However, Defendant had been given the Test of Memory Malingering (TOMM) with the 2005 WAIS and Dr. Suarez had administered the Memory 15 Item Test (MFIT) and the Validity Indicator Profile (VIP) when he evaluated Defendant. (PCR2-ST. 416-17) The scores on the TOMM indicated a blatant tendency not to use one's best effort. (PCR2-ST. 416) The MFIT results were normal. (PCR2-ST. 416-17) The VIP indicated that Defendant was compliant in the verbal area and non-compliant and inconsistent on the nonverbal area. (PCR2-ST. 417-18) The interpretation of whether these results indicated malingering, confusion or interference from other psychological problems is a matter of clinical judgment. (PCR2-ST. 418-19) In this case, Dr. Suarez considered that Defendant would not be

executed if he was found to be retarded to be an indication Defendant was not performing optimally on purpose. (PCR2-ST. 419, 451)

This opinion was reinforced by the content of Dr. Suarez's interview with Defendant. (PCR2-ST. 420) Dr. Suarez explained that by definition, retarded people have a limited ability to learn beyond a certain level. (PCR2-ST. 420-21) Because of this limitation, the retarded are unable to be employed in more than menial tasks, to travel on their own or to living without supervision. (PCR2-ST. 421) They also frequently have difficulty communicating and understanding questions. (PCR2-ST. 421)

Defendant exhibited a surprising ability to articulate, use words, structure sentences, understand concepts and remaining internally consistent in his speech. (PCR2-ST. 422-24) Defendant's history of traveling independently, being employed, supporting himself through legal and illegal means and having relationships with women indicated a level of functioning that was inconsistent with being retarded. (PCR2-ST. 425-28) Defendant evidenced an ability to care for himself medically and an awareness of his needs at a level that was inconsistent with retardation. (PCR2-ST. 429-33) The information that Defendant provided was confirmed by a review of his medical chart at the jail. ***Id.***

Dr. Suarez explained that the requirement of concurrent deficits in present adaptive functioning referred to how the person was functioning at the time of the evaluation. (PCR2-ST. 433) He explained that this was necessary because a person may not have present problems and the problems he exhibited as a child may have been due to something else occurring then. (PCR2-ST. 434) If a person had problems as a child but not presently, the appropriate diagnosis would be developmental delay. (PCR2-ST. 434)

The requirement of onset before the age of 18 was to distinguish retardation from other diagnoses that were not associated with development. (PCR2-ST. 434-35) If a person developed problems with intelligence and functioning after the developmental period, the appropriate diagnosis would be dementia due to trauma, disease or other causes. (PCR2-ST. 435)

To evaluate whether Defendant had concurrent deficits in present adaptive functioning, Dr. Suarez spoke to Defendant and administered the Adaptive Behavior Assessment Scales (ABAS) to individuals familiar with Defendant’s abilities at the present time and in the last few years. (PCR2-ST. 435-36) The ABAS recognized that there were living situations in which the person being assessed would not have the ability to demonstrate a particular behavior and specifically allowed the person

completing the evaluation to guess whether a person could do the behavior based on the person's ability to do a related behavior. (PCR2-ST. 437-38) For example, a death row inmate would not be able to take a broken appliance to a repair shop but there is a process that the inmate can use to request that a broken appliance be repaired. (PCR2-ST. 438) Here, some of the officers believed that Defendant would be able to prepare food because they had seen Defendant use the microwave in the visiting area and believed that Defendant would be able to handle his finances because he keep track of his prison account. (PCR2-ST. 439)

Dr. Suarez attempted to administer the ABAS to 5 corrections personnel but 2 had insufficient contact with Defendant. (PCR2-ST. 443) The scores obtained were 99, 102 and 108, all in the average range. (PCR2-ST. 444) Dr. Suarez acknowledged that one could look at the subscale scores to determine whether a person had weaknesses in particular areas. (PCR2-ST. 444-45) Dr. Suarez admitted that Ms. Wiley had rated Defendant's social skills as below average. (PCR2-ST. 448) However, Dr. Suarez did not believe that this indicated that Defendant was retarded as one needed to look at several people's evaluation because one evaluator might have a skewed experience with the person. (PCR2-ST. 448-49) Dr. Suarez further cautioned that the results of a test like the ABAS had to be considered in

light of the totality of the circumstances. (PCR2-ST. 449)

Dr. Suarez did not accept Dr. Eisenstein's hypothesis that Defendant's poor performance on the TOMM was due to brain damage. (PCR2-ST. 451) Dr. Suarez stated that the TOMM was specifically designed not to be affected by brain damage. (PCR2-ST. 451-52) Further, Defendant's highest score on any subtest of the WAIS was in picture completion. (PCR2-ST. 452-53) As such, Dr. Suarez believed that the correct interpretation of the TOMM results was that Defendant intentionally suppressed his level of effort. (PCR2-ST. 454)

Dr. Suarez also rejected Dr. Eisenstein's opinion that Defendant's good scores on some of the subtests of the WAIS indicated that Defendant was not malingering. (PCR2-ST. 457) In fact, most people who malinger do so in more subtle ways such that they are capable of performing well on some parts of the tests and not on others. (PCR2-ST. 458)

Dr. Suarez also gave Defendant the MMPI. (PCR2-ST. 460) He did so to have a measure of validity and to determine whether some other mental condition was interfering with Defendant's ability to perform optimally on the IQ tests. (PCR2-ST. 467) Defendant was able to read the test, which required a 6th grade reading level, and answer the questions quite quickly. (PCR2-ST. 458-60) Defendant's scores on the F scales were so high that the

results were invalid. (PCR2-ST. 461) These scales were designed to measure malingering, exaggeration and confusion. (PCR2-ST. 461) In Defendant's case, the results indicated that he was not randomly answering the questions but was grossly exaggerating. (PCR2-ST. 462-64) One of the F scales showed that Defendant was exaggerating even when his responses were measured against people in psychiatric hospitals, and another showed that the invalid profile was not the result of being unable to understand the questions. (PCR2-ST. 468-70) Based on these results, Dr. Suarez did not agree with Dr. Eisenstein's opinion as to why the MMPI yielded invalid results. (PCR2-ST. 465-66)

Another test that Dr. Suarez administered was the WRAT, an achievement test. (PCR2-ST. 478) He explained that IQ test measured one's intellectual capacity while an achievement test measured what one had done with that capacity. (PCR2-ST. 478) The WRAT consists of three subtests (spelling, math and reading) and has two forms, which may be administered individually or together. (PCR2-ST. 478) The WRAT manual specifically states that both forms can be administered to provide a more qualitative assessment of achievement and to provide finer scoring data. (PCR2-ST. 479) When both forms are used, the scores are not averaged. Instead, a separate scoring table is used. (PCR2-ST. 479-80) Defendant scored an 8.2 grade level in

reading, a 4.5 grade level in spelling and a 3.6 grade level in math. (PCR2-ST. 483, 484, 486) The difference between the reading and spelling score was significant and was inconsistent with the ability to write that Defendant had demonstrated in writing grievances. (PCR2-ST. 484-85) The math score was very low and indicated that either Defendant was malingering or that he did not have much exposure to doing math on a regular basis. (PCR2-ST. 486) Comparing the raw data between the WRAT a defense expert had given and the data for the same form of the test when Dr. Suarez gave it, there were discrepancies in Defendant's performance in that Defendant was able to answer questions correctly one time and not a second time. (PCR2-ST. 487-89) Dr. Suarez did not believe that Defendant's performance on the WRAT, particularly the reading score, were consistent with retardation. (PCR2-ST. 493)

In addition to his interviews and testing, Dr. Suarez also reviewed the reports of Drs. Jane Ansley, Lloyd Miller, Ruth Lattener, Steven Sevsush and Jorge Herrera, the 1975 JMH report, the medical records from JMH concerning when Defendant was shot, numerous transcripts, the raw data from testing by Dr. Gregory Prichard, the raw data from Dr. Eisenstein's testing and Defendant's corrections records. (PCR2-ST. 496) Dr. Suarez stated that hospitals usually make an assessment of a person's

functioning after the person has been shot in the head. (PCR2-ST. 497-98) The hospital record he reviewed indicated that Defendant recovered remarkably well and contained no indication of retardation. (PCR2-ST. 498)

With regard to the 1975 JHM report, Dr. Suarez had seen the notation about being labeled as borderline mentally retarded. (PCR2-ST. 499) However, he had seen nothing to support this statement. (PCR2-ST. 499) Further, the remainder of the report was inconsistent with this statement, as it indicated that Defendant was functioning normally. (PCR2-ST. 499-500) Dr. Suarez assumed that the evaluator at the time would have considered the issue of retardation as he noted the labeling and found nothing consistent with Defendant being retarded. (PCR2-ST. 500) Dr. Suarez believed that the author of the report was qualified to look for manifestations of retardation even if he did not conduct tests. (PCR2-ST. 500-01)

Based on everything he had reviewed and all the tests and interviews he had conducted, Dr. Suarez opined that Defendant was not retarded. (PCR2-ST. 502-07) Dr. Suarez did not believed that Defendant had significantly subaverage intellectual functioning because Defendant had consistently scored in the borderline range on IQ tests and the collateral information suggested that Defendant was probably actually functioning in

the borderline to low average range. (PCR2-ST. 502-03) Moreover, these tests were administered after Defendant had been shot in the head, and his level of intellectual functioning was probably even higher before the wound. (PCR2-ST. 505-06)

With regard to adaptive functioning, Dr. Suarez stated that nothing in Defendant's present functioning or his history of travels, employment and relationships suggests that Defendant has or had any deficits. (PCR2-ST. 503-05) Further, Defendant's school records do not suggest that he had intellectual functioning deficits as a child. (PCR2-ST. 506) Defendant did not have failing grades until junior high and the failing grades in junior high were accompanied by problems with conduct and truancy. (PCR2-ST. 507)

On cross, Dr. Suarez believed that he had seen confirmation of some of what Defendant told him in other reports. (PCR2-ST. 518) However, he had not spoken to anyone but Defendant concerning these issues. (PCR2-ST. 518-19) Dr. Suarez had noted that there was no indication that Defendant had exhibited confused or disorganized behavior. (PCR2-ST. 520-22) He made this note because retarded people, particularly those who need instructions repeated before they grasp them, do exhibit such behavior. *Id.*

Dr. Suarez stated that Dr. Ansley's report indicated that

she had given all of the required sections of the WAIS. (PCR2-ST. 527) She had obtained a full scale IQ of 73 and had noted that the score was probably invalid because of malingering. (PCR2-ST. 527)

Dr. Suarez agreed that the MMPI would not be appropriate to give to an individual who had been established to be retarded. (PCR2-ST. 545-46) However, it would be appropriate to administer the MMPI when the issue of retardation had not been established. *Id.* Here, the results indicated that Defendant did understand the questions but was exaggerating to such an extent that he had to be malingering. (PCR2-ST. 561-64) Further, since the validity scales indicated that Defendant did not have a problem with comprehension, Defendant had at least a 6th grade reading level. (PCR2-ST. 571)

Dr. Suarez stated that the preferred method of evaluating adaptive functioning was through the administration of an instrument like the ABAS or Vineland. (PCR2-ST. 588) By doing so, one received standardized information. *Id.*

Dr. Suarez agreed that DMS stated that a person who had previously diagnosed as retarded early in life could develop sufficient skills not to be considered retarded later in life. (PCR2-ST. 589-90) Because of this, it was important to test the individual later in life to differentiate developmental delay

from retardation. (PCR2-ST. 590)

Dr. Suarez explained that the composite scores on the ABAS administrations placed Defendant in the 47 percentile, the 55 percentile and the 70 percentile. (PCR2-ST. 609-10) While Defendant's social skills were the area in which Defendant achieved his lowest scores on all of the rating, his scores in this area were in the borderline and low average ranges, which are too high for Defendant to be considered to have a deficit in adaptive behavior in this area. (PCR2-ST. 610-13) One rater also gave Defendant a below average score in self direction, which again was not low enough to be considered a deficit. (PCR2-ST. 614)

The lower court denied Defendant's motion, finding no credible evidence that Defendant was retarded. (PCR2-SR2. 495-506) It determined that Defendant had not established any of the criteria for retardation. *Id.* In doing so, the lower court detailed Defendant's scores on the various WAIS IQ tests Defendant had been given and did not even mention any other IQ tests. *Id.* This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court did not err in reading the statute and rule in accordance with their plain meaning. Further, the lower court's findings are supported by competent, substantial

evidence. They should be affirmed.

ARGUMENT

I. ADAPTIVE FUNCTIONING.

Defendant first asserts that the lower court abused its discretion in determining the elements that Defendant was required to prove in order to show that he was mentally retarded and in finding that Defendant had not proven the second prong of the test for retardation. However, the lower court was correct in its interpretation of the statute and rule defining the elements of retardation. Further, the lower court's finding that Defendant did not carry his burden of proof is supported by competent, substantial evidence. The denial of the claim should be affirmed.

While Defendant couches his arguments in this issue in terms of abuse of discretion, Defendant does not cite to any authority supporting the use of this standard of review or even explain why he believes that this is the appropriate standard of review. The lack of support or argument is not surprising as abuse of discretion is not the standard of review governing either of the arguments Defendant raises in this issue.

As Defendant acknowledges, his first argument concerns the construction of adaptive functioning element of retardation. Supplemental Initial Brief at 7. As Defendant also admits, the

definition of these elements in contained in Fla. R. Crim. P. 3.203 and §921.137, Fla. Stat., and is the same in both of these sources. Thus, the issue is one of statutory and rule construction. Issues of statutory and rule construction are governed by the same standards and are reviewed de novo. *Kephart v. Hadi*, 932 So. 2d 1086, 1089 (Fla. 2006)(issues of statutory construction are reviewed de novo); *Brown v. State*, 715 So. 2d 241, 243 (Fla. 1998)(standards for statutory construction apply to rules as well).

The second argument Defendant presents concerns the propriety of the lower court's finding that Defendant did not meet the prong. The standard of review governing this issue is whether the lower court's findings are supported by competent, substantial evidence. *Trotter v. State*, 932 So. 2d 1045, 1049 (Fla. 2006); *Johnston v. State*, 930 So. 2d 581, 586 (Fla. 2006).

Applying the appropriate standards of review, Defendant is entitled to no relief. As this Court has acknowledged, the starting point for construing a statute or a rule is its plain law. *Koile v.* State, 31 Fla. L. Weekly S501, S502 (Fla. Jul. 6, 2006). When the plain language of the statute or rule is clear, it controls. *Id.* If the plain language of the statute is not clear, the court then must apply the cannons of statutory construction and explore the legislative history to determine

the intent behind the plain meaning of the statute. *Id.* Further, when the issue involves the meaning of a word undefined in the statute, a court is required to give that word its plain and ordinary meaning and to rely on dictionaries and prior cases defining the word. *Florida Dep't of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So. 2d 954, 960 (Fla. 2005). It is also a basic tenant of statutory construction that a statute or rule should not be construed in such a manner as the make words in the statute superfluous if the statute or rule can be construed in a manner that gives effect to all of the words in the statute or rule. *Koile*, 31 Fla. L. Weekly at S502. Additionally, a statute may not be construed in a manner that would require rearrangement of the words or addition of punctuation. *Wagner v. Botts*, 88 So. 2d 611, 613 (Fla. 1956).

Here, both the statute and the rule define mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." §921.137(1), Fla. Stat.; Fla. R. Crim. P. 3.203(a). Thus, this is the plain language that must be construed.

Defendant appears to agree that the determination of whether he had significantly subaverage general intellectual functioning was based on intelligence tests administered

presently, as all of the IQ score presented were from tests administered between 1991 and 2005, when Defendant was between the ages of 30 and 44. (PCR2-SR2. 283, 287, PCR2-ST. 184, 186) Further, the rule itself speaks of having a defendant evaluated after he has made a claim of retardation. Fla. R. Crim. P. 3.203(c). Thus, the issue becomes whether the phrase "**existing concurrently** with deficits in adaptive behavior" means that the deficits in adaptive behavior must exist at the same time as the IQ scores or only before Defendant was 18, more than a decade earlier.

This Court has previously defined the word concurrent to "acting in conjunction, agreeing in the same act, contributing to the same event or effect, co-operating, existing or happening at the same time, operating on the same objects." *L'Engle v. Scottish Union & Nat'l Fire Ins. Co.*, 48 Fla. 82, 90 (Fla. 1904)(quoting Webster's International Dictionary). Thus, the plain meaning of the statute and the rule is that the deficits in adaptive behavior must have existed at the same time as the IQ tests. Defendant's contrary construction should be rejected.

The legislative history of §921.137, Fla. Stat. further supports that the deficits in adaptive functioning must exist at the time the evaluation is done. It notes that the definition retardation that the Legislature and later this Court adopted

was intended to mirror the definition of retardation from the DSM. Senate Staff Analysis on CS/SB 238 at 2-3 (Feb. 14, 2001). The DSM notes that the diagnostic for retardation are (1) "significantly subaverage intellectual functioning," (2) "concurrent deficits or impairments in present adaptive functioning" and (3) "onset before age 18 years. AMERICAN PSYCHIATRIC ASSN., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 49 (4th Ed. Text Rev. 2000) (hereinafter DSM-IV-TR). Not only does concurrent still require that the deficits in adaptive behavior exist at the same time as the IQ results but the word "present" means "a moment or period of time perceptible as intermediate between the past and the future; now" AMERICAN HERITAGE DICTIONARY 979 (2d College Ed. 1985). The focus on how a person is presently functioning is in accordance with the DSM's recognition that "Mental Retardation is not necessarily a lifelong disorder. Individuals who had Mild Mental Retardation earlier in their lives manifested by failure in academic learning tasks may, with appropriate training and opportunities, develop good adaptive skills in other domains and may no longer have the level of impairment required for a diagnosis of Mental Retardation." DSM-IV-TR at 47 Thus, the legislative history confirms that the second prong of retardation was intended to refer to a defendant's ability to function at the time of the evaluation.

Defendant's contrary claim should be rejected.

Further, Defendant's construction of the statute and rule would render language in the statute and rule superfluous and require that the language be rewritten. To be consistent with Defendant's interpretation of them, the language of the statute and rule would need to define retardation as significantly subaverage general intellectual functioning, manifested during the period from conception to age 18 and accompanied by deficits in adaptive functioning during the period between conception and age 18. However, this construction renders language in the statute and rule superfluous and requires a rewriting of the language. Since doing so violates the cannon of statutory construction, Defendant's claim should be rejected. ***Koile***, 31 Fla. L. Weekly at S502; ***Wagner***, 88 So. 2d at 613.

While Defendant contends that ***Atkins v. Virginia***, 536 U.S. 304 (2002), requires that the statute and rule be construed in this manner, this is not true. ***Atkins*** expressly left the task of defining retardation to the States. ***Id.*** at 317. Further, the Court relied heavily on the state statutes that had outlawed the execution of the retarded to support its holding and specifically noted these statutes conformed to the clinical definitions from the DSM and AAMR. ***Id.*** at 313-16, 317 n.22. As previously noted, the DSM definition also requires that the

deficits in adaptive functioning exist at the present time. The same is true of the AAMR definition. *Id.* at n.3 ("'Mental Retardation refers to substantial limitations in **present** functioning.'")(quoting MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5 (9th ed. 1992))(emphasis added). In fact, the Court noted in *Atkins* itself that the diagnosis of retardation in that case had been made based on interviews with "deputies at the jail where [Atkins] had been incarcerated for the preceding 18 months." *Id.* at 408 n.4. Thus, nothing in *Atkins* compel Defendant's reading of the statute and rule.

Moreover, the United States Supreme Court has recently driven home the point that it did leave the issue to the States. In *Schriro v. Smith*, 126 S. Ct. 7 (2005), the Court summarily reversed a decision of the Ninth Circuit that told Arizona how it was to resolve the issue of whether a defendant was retarded expressly because the Court had left this decision to the States.

Even Defendant's own reading of *Atkins* does not support his construction of the statute and rule. Defendant contends that the statute must be read as meaning adaptive functioning before the age of 18 because it mentioned the lesser culpability of retarded individuals for their crimes and must refer to the time of the crime. However, Defendant was not less than 18 at the

time of the crime; he was 29. Thus, even Defendant's reasoning does not support his construction.

While Defendant complains that being incarcerated limits his abilities to engage in certain adaptive behaviors, it does not eliminate his ability to do so. Even incarcerated individuals have the opportunity to communicate with others, both in person and in writing, and the opportunity to care for their own personal hygiene and the cleanliness of their environments. Inmates still have health care concerns and concerns for their personal safety. While they may not have the ability to go to a repair shop or hold a bank account, they must use the resources available to them to get things repaired and have canteen accounts. They are permitted leisure activities. As such, the mere fact that Defendant has been incarcerated for years may complicate the determination of his ability to function adaptively does not require that the plain language of the statute and rule be ignored.

Defendant also insists that he is somehow denied due process and equal protection because if he had been evaluated at the time of trial, his family would have been the only source of information available. However, this is simply not true in this

case.[2] Defendant had been released from his most recent imprisonment only a couple weeks before he committed this crime. (DAR. 468) At the evidentiary hearing, it was freely admitted that Defendant had spent more than half his life incarcerated. (PCR2-ST. 292, 373) Further, Defendant spent years in pretrial detention before he was even convicted. Thus, corrections officials would have had a better opportunity to observe how Defendant was functioning even at the time of trial.

Since there was no reason for the lower court to have departed from the plain language of the statute and rule, it did not err in refusing to do so. Its decision should be affirmed.

Applying the plain language of the statute and rule and the appropriate standard of review, the lower court properly found that Defendant did not meet this prong. In rejecting this claim, the lower court found:

> There is no credible evidence to suggest that [Defendant] is mentally retarded. . . . Even if [Defendant's] IQ were not determinative of a finding of mental retardation, [Defendant] does not meet the other two prongs. [Defendant] clearly does not suffer from deficiencies in his adaptive functioning. He keep his cell clean, takes his own medication and is aware of which medications he takes and in which dosages. He has fashioned a way to exercise in his cell. Most tellingly, the grievance letters [Defendant] wrote

[2] A Justice Department report shows that 64% of all death row inmates have prior convictions and 40% were actively involved in the criminal justice system at the time they committed their crimes. U.S. Dep't of Justice, Capital Punishment, 2004 at 8. Thus, Defendant's case is not an aberration.

> show that he has ample communication skills and is sophisticated enough in his though process to understand how wire transfers are made from Europe to his prison account.

(PCR2-SR2. 505-06) These findings are supported by competent, substantial evidence and should be affirmed.

The only evidence that Defendant presented at the evidentiary hearing to support his claim was the testimony of Dr. Eisenstein. However, Dr. Eisenstein admitted he had made no attempt to determine Defendant's adaptive functioning at any time other than before Defendant was 18. (PCR2-ST. 334-35) As such, Defendant presented no credible evidence of this prong. Dr. Eisenstein and Ms. Wiley both testified that Defendant keeps his cell clean. (PCR2-ST. 338, 253) All of the witnesses testified about Defendant and his use of medications. (PCR2-ST. 343, 264, 429-33) Dr. Eisenstein testified about Defendant's exercise routine. (PCR2-ST. 338-39) Not only do the grievance forms demonstrate Defendant's ability to communicate and ability to understand his finances but Ms. Wiley and Dr. Suarez agreed that Defendant was perfectly capable of communicating. (PCR2-SR2. 277-81, PCR2-ST. 256, 261, 422) Even Dr. Eisenstein agreed that Defendant could communicate in writing and understood his finances. (PCR2-ST. 338, 340) Since there is competent substantial evidence to support the order, it should be affirmed.

In his discussion of this issue, Defendant appears to complain that the lower court accepted Dr. Suarez's opinion over Dr. Eisenstein's. However, such choices about the credibility and weight of the evidence presented are reserved to the lower court and do not provide grounds to overturn a factual finding. *Trotter*, 932 So. 2d at 1050. Thus, Defendant's complain should be rejected.

Moreover, the record amply supports the credibility choice. After the last evidentiary hearing, the lower court rejected the testimony of Dr. Eisenstein, Pamela Mill and Carl Leon Miller on credibility grounds. (PCR1. 386-88) The lower specifically found that the claim that "Defendant was a poor student, was contradicted by the school records, Laura Long's trial testimony and the testimony of Defendant's teacher." (PCR1. 387) This Court affirmed these findings. *Jones v. State*, 855 So. 2d 611 (Fla. 2003). Defendant acknowledged that relying on this same information in support of the present motion would cause it not to meet the "laugh test." (PCR2-ST. 8) Despite this acknowledgement, Defendant then supported his motion with only the testimony of Dr. Eisenstein. Other than reinterviewing Defendant, Pamela Mills and Carl Leon Miller, the only new information upon which Dr. Eisenstein relied was interviews with Frank Mills and Shirley Anthony and two recent WAIS scores of 72

and 75. (PCR2-ST. 497) According to Dr. Eisenstein, Frank Mills had never had any real contact with Defendant and Ms. Anthony "hard time recalling her relationship with Defendant". (PCR2-ST. 208-12) She was even incorrect about Defendant's age at the time. (PCR2-ST. 210-12, 373-74) Dr. Eisenstein's testimony shows that he relied largely on the interviews conduct prior to the 2000 evidentiary hearing and the new interviews of the witnesses who were found incredible. (PCR2-ST. 292-94) Additionally, Dr. Eisenstein explained his change of opinion regarding whether Defendant was retarded by claiming that the language of the DSM had changed in 2000. (PCR2-ST. 298) However, a comparison of the DSM-IV applicable before 2000 to the DSM-IV-TR applicable after 2000 shows that there was no change in language. *Compare* AMERICAN PSYCHIATRIC ASSN., DIAGNOSIS AND STATISTICAL MANUAL OF MENTAL DISORDERS 39-40 (4th Ed. 1994) *with* DSM-IV-TR at 41-42. As such, the lower court's determination that Dr. Eisenstein's testimony resulted in the presentation of no credible evidence is amply supported by the record. It should be affirmed.

While Defendant attempts to make it seem as if Dr. Suarez's ABAS scores support a finding of present deficits in adaptive functioning, this is not true. While Defendant asserts that scores that rated at the 45th, 55th and 70th percentile are not consistent with being called average, such an assertion makes no

sense when one considers that percentile means "a number that corresponds to one of 100 equal divisions of a range of a statistic in a given sample" and the average of such a division would be 50. AMERICAN HERITAGE DICTIONARY 979 (2d College Ed. 1985). Further, the borderline and low average ranges are the ranges above the level needed to be considered deficits. (PCR2-ST. 610-13) *See also Johnston v. State*, 930 So. 2d 581, 586 (Fla. 2006). Thus, Dr. Suarez's ABAS results do not support a finding of deficits in adaptive functioning. The lower court should be affirmed.

II. OTHER ISSUES.

Defendant next asserts claims that the lower court erred in "other finding." Defendant appears to be complaining that the lower court allegedly erred in finding that he did not have significantly subaverage intellectual functioning and that he had not shown onset of the condition before he was 18. He complains about the IQ test that Dr. Suarez administered. He also vaguely discusses the standard of proof. However, the lower court's rejection of the intellectual functioning and onset prongs is supported by competent, substantial evidence. Moreover, the lower court was correct in applying the clear and convincing standard of proof.

With regard to the finding that Defendant did not show that

he had significantly subaverage intellectual functioning, Defendant appears to complain that the lower court should not have required him to show that he had an IQ of 70 or below to meet this prong and should have accepted Dr. Eisenstein's testimony that he did so. However, the plain language of both the statute and rule define this term as "performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65B-4.032 of the Florida Administrative Code." §921.137(1), Fla. Stat.; Fla. R. Crim. P. 3.203(b). No one has ever disputed that the WAIS tests are listed in administrative code, that its mean is 100 or that its standard deviation is 15. Thus, to meet the plain language of the statute and rule, Defendant had to show that he had an IQ of 70 or lower on the WAIS to meet this prong. In apparent recognition of this plain language, this Court has twice required that a defendant must show that his IQ is 70 or below to be considered retarded. *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006); *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005).[3] Moreover, for the same reasons that *Atkins* did not compel a reading of the adaptive functioning prong in any manner other

[3] Other states with similar statutes have also found that the statutes require what they say. *Bowling v. Commonwealth*, 163 S.W.3d 361, 375-76 (Ky. 2005); *Howell v. State*, 151 S.W.3d 450, 457-59 (Tenn. 2004).

than its plain meaning, it does not compel a reading of the intellectual functioning prong other than its plain meaning. The lower court properly defined the intellectual functioning prong.

Further, competent, substantial evidence supports the finding that Defendant did not meet this prong. The lower court had before it evidence that Defendant had achieved a full scale IQ of 72 on the WAIS-R in 1991, of 70 on the WAIS-R in 1993, of 67 on the WAIS-III in March 1999, of 73 on a WAIS-III in June 1999 of 72 on the WAIS-III in 2003 of 75 on the WAIS-III in 2005, of 76 on a BETA in 1988 and of 76 on a TONI in 2005. (PCR2. 176, 179, 190, 195; PCR2-SR2. 287; PCR2-ST. 408) Even Dr. Eisenstein admitted that all of these scores were consistent. (PCR2-ST. 186) As a review of these scores show and Dr. Suarez testified, the scores are consistently too high. (PCR-ST. 414-15, 591-92) Further, the BETA and June 1999 WAIS were accompanied by notations from the evaluators that the scores did not reflect optimal effort. (PCR2. 179-82, 190-91) The validity testing administered with the 2005 WAIS-III and the TONI indicated that Defendant was malingering. (PCR2-ST. 416-19) As such, there is competent, substantial evidence to support the lower court's finding that Defendant did not meet this prong. It should be affirmed.

There is also competent, substantial evidence to support

the finding that Defendant did not show that his alleged condition had an onset before the age of 18. The lower court found no evidence to support this prong. (PCR2-SR2. 506) Defendant presented no IQ test results from before he was 18. Instead, Dr. Eisenstein relied entirely on Defendant's allegedly failing grades as a child, his family's claim that he was slow and in need of special education and a single line in the JMH report that stated that Defendant had been "labeled as borderline mentally retarded." However, the lower court expressly rejected the claim that Defendant was a poor student on credibility grounds in connection with the initial motion for post conviction relief. (PCR1. 387) This Court affirmed these findings. *Jones v. State*, 855 So. 2d 611 (Fla. 2003). Further, Defendant's school records show that he was not a poor student and was not in special education. (PCR1. 197-206) Vera Edwards, Defendant's third grade teacher, stated that Defendant had no academic difficulties and was an above average student with above average intelligence. (PCR1. 1161-62, 1166, 1168, 1173) The JMH report did not diagnose Defendant as retarded, it cited no source for the information that Defendant had been labeled as borderline mentally retarded and it found Defendant to be of average intelligence. Moreover, as Dr. Suarez testified and this Court has found, the borderline level of functioning is above

the level necessary to diagnose an individual as retarded. (PCR2-ST. 410); *Johnston*, 930 So. 2d at 586. As argued in the previous issue, Dr. Eisenstein's testimony regarding Defendant's adaptive functioning deficits was not credible. As such, competent, substantial evidence supports the lower court's rejection of this claim. It should be affirmed.

Defendant next complains extensively that Dr. Suarez administered the TONI. However, Defendant ignores that Fla. Admin. Code 65B-4.032 expressly permits a lower court to rely on tests other than the WAIS and Stanford-Binet. While Defendant complains that peer review and study data was not provided, the Code does not require such information. It only requires published validity and reliability data. The published validity and reliability data was provided. (PCR2-SR2. 397-444) Moreover, Dr. Suarez testified that he did not believe that it was even necessary to test Defendant's intelligence again, given that Defendant's intelligence had been repeatedly tested. (PCR2-ST. 402-03) Even Dr. Eisenstein agreed that the results of the TONI were consistent with the other IQ results that Defendant had achieved. (PCR2-ST. 227-29) Thus, the lower court did not abuse its discretion in allowing the TONI results into evidence.[4]

Further, Defendant completely ignores that the lower court

[4] The admission of evidence is governed by an abuse of discretion standard. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000).

did not even mention Dr. Suarez's TONI results in its order. (PCR2-SR2. 495-507) It is well settled in Florida law that when a judge sits as a trier of fact, he is presumed to have ignored any inadmissible evidence to which he might have been exposed unless he expressly relies on that evidence. *See Guzman v. State*, 868 So. 2d 498, 510-11 (Fla. 2003); *State v. Arroyo*, 422 So. 2d 50, 51 (Fla. 3d DCA 1982). Since the lower court did not rely on the TONI results, any error in Dr. Suarez's administration of the TONI would not be grounds for relief.

Defendant also complains that Dr. Suarez administered the MMPI because it is not a test of intelligence or adaptive functioning. However, Dr. Suarez expressly stated that he was giving the MMPI as a test of validity and to determine whether Defendant had some other mental condition was interfering was Defendant's ability to perform optimally on the IQ tests. (PCR2-ST. 467) The determination of whether the IQ tests are accurate is an important part of determining whether a defendant is retarded. *See Centeno v. Superior Ct.*, 117 Cal. App. 4th 30, 45 (Cal. Ct. App. 2004).[5] Even Dr. Eisenstein admitted that the information obtained from the MMPI was "certainly relevant" to determining whether Defendant was retarded. (PCR2-ST. 189)

[5] Mississippi requires that the MMPI be given to determine if a defendant is malingering on the IQ tests. *Jordon v. State*, 918 So. 2d 636, 660 (Miss. 2005).

Further, Dr. Suarez explained that the difficulty with giving the MMPI to retarded individuals is that they may not have the ability to read and comprehend the test. (PCR2-ST. 546-47) However, the MMPI has a scale to measure whether this is a problem with a particular administration, and Defendant's score on that scale indicated that he could understand the information. (PCR2-ST. 571) Thus, the giving of the MMPI was appropriate.

With regard to the burden of proof, Defendant has waived this issue because he has not properly brief it. This Court has made clear that the "purpose of an appellate brief is to present arguments in support of the points on appeal." *Duest v. State*, 555 So. 2d 849, 852 (Fla. 1990). Thus, this Court has required defendants to present arguments that explain why the lower court erred in its rulings and to do so in more than a conclusory fashion. *See Shere v. State*, 742 So. 2d 215, 217 n.6 (Fla. 1999); *Bryant v. State*, 901 So. 2d 810, 827-28 (Fla. 2005);. When an issue is not sufficiently briefed, it is considered waived. *Bryant*, 901 So. 2d at 827-28; *Duest*, 555 So. 2d at 852.

Here, Defendant's entire discussion of the issue of the proper burden of proof is an assertion that the issue was subject to comment when this Court adopted Fla. R. Crim. P. 3.203, an assertion that the standard the Legislature

established places Florida in the minority of jurisdictions and an assertion that the prejudice in applying the legislative standard to him is clear. Supplemental Brief of Appellant at 29. He does not even distinctly claim that the lower court erred in applying the clear and convincing standard of proof and as such make no attempt to explain how any of his assertions show that the lower court erred or how he was allegedly prejudiced. Thus, Defendant has not sufficiently brief any issue regarding the burden of proof and any issue is waived.

Even if the issue had been properly briefed, Defendant would be entitled to no relief. In enacting §921.137, Fla. Stat., the Legislature set the standard of proof at clear and convincing evidence. The United States Supreme Court recently addressed what is necessary to show that an assignment of a burden of proof is unconstitutional. In *Clark v. Arizona*, 126 S. Ct. 2709, 2719 (2006), the Court required a showing that adopting a burden of proof "offends [a] priniciple of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." However, as *Atkins* itself shows that determination that the retarded should not be executed is a matter of recent origin and not a deeply rooted principle. The Court also stated that State's were free to assign burdens of proof in the manner they chose to issues allowing a defendant to

avoid "customary criminal responsibility." *Clark*, 126 S. Ct. at 2731. As Defendant acknowledges, *Atkins* concerned the measure of criminal responsibility as defendant should bear. Further, in *Atkins*, the Court recognized that the legislative judgment of the various states was the best indicator of what the evolving standards of decency were. 536 U.S. at 312. Here, the legislature has made a judgment and determined that only those defendants who show they are retarded by clear and convincing evidence should be exempt from the death penalty. As legislative judgment underpins the entire basis for the exemption, it should be followed.

Cooper v. Oklahoma, 517 U.S. 348 (1996), does not compel a different result. In *Cooper*, the Court was faced with a principle deeply root in the concept of justice. The right not to be tried while incompetent is of venerable origin. The right not to be executed because of retardation is not. Further, the Court expressly relied on the fact that the State's burden for an incorrect determination of competency was simply delay and not exclusion for just punishment. *Id*. at 365. This is not true of a decision exempting a defendant from the death penalty because he is retarded. Instead, this decision exempts a defendant from customary punishment. Further, such an exemption is exactly like the exemption for the insane. In *Clark*, the

Court just reaffirmed that the states could require a defendant to carry the clear and convincing burden of proof. As such, requiring Defendant to prove by clear and convincing evidence that he is retarded is not unconstitutional. The lower court should be affirmed.

Even if the lower court was incorrect to accept the terms of the statute, Defendant would still be entitled to no relief. The lower court found that Defendant presented no credible evidence that he was retarded. Because there was no credible evidence presented to show that Defendant was retarded, it did not matter whether the burden of proof was clear and convincing or a mere preponderance. As such, any claim about the level of the burden of proof is irrelevant. *Trotter*, 932 So. 2d at 1049 n.5. The lower court should be affirmed.

CONCLUSION

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

Respectfully submitted,

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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 **William Hennis,** CCRC-South, 101 NE 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this ___ day of August 2006.

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

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