IN THE SUPREME COURT OF FLORIDA

PAUL ALFRED BROWN,

Appellant,

v. CASE NO. SC05-1018

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

_____

ANSWER BRIEF OF APPELLEE

_____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE NO.

Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

Procedural History:

Mr. Brown was previously convicted of first degree murder and sentenced to death. Mr. Brown appealed and this Court affirmed. Brown v. State, 565 So. 2d 304 (Fla. 1990), cert. den., 498 U.S. 992 (1990). Thereafter, Appellant sought post-conviction relief and after an evidentiary hearing and denial of relief by the circuit court, this Court affirmed the denial of relief. Brown v. State, 755 So. 2d 616 (Fla. 2000).

On or about September 24, 2001, Mr. Brown filed a Successor Motion To Vacate Sentence and To Declare a Provision of Florida Statute 921.137 Unconstitutional (V1, R.17-29). He subsequently filed a Memorandum in Support of the Successor Motion (V1, R.30-177). The State filed a Response to the Successor Motion on October 4, 2002 (V1, R.78-163).

The court conducted an evidentiary hearing on June 27, 2003 and received testimony of Dr. Valerie McClain and Dr. Greg Prichard (V3, R.384-517; see also V6, R.838-971). The defense submitted a Closing Argument on August 29, 2003 (V1, R.169-209) and the State submitted its Final Argument on August 29, 2003 (V3, R.376-383).

Thereafter, the court additionally appointed Dr. Michael Maher and a further evidentiary hearing was conducted on January 7, 2005, at which time Dr. Maher testified (V6, R.972-1041) and on February 18, 2005, at which time Dr. Maher concluded his

testimony and Dr. McClain testified (V7, R.1042-1138). The State filed its Final Argument from the Trifurcated Evidentiary Hearing on Mental Retardation on March 18, 2005 (V3, R.519-533) and the defense filed its Final Closing Arguments (V5, R.717-777).

On April 25, 2005, the lower court entered its Order denying relief (V5, R.778-782). The court credited the testimony of Dr. Prichard and Dr. Maher and rejected that of Dr. McClain:

> Contrary to Dr. McClain's assessment, Drs. Prichard and Maher each tested the Defendant and found that the recent IQ scores suggesting a range of mildly mentally retarded were a result of malingering.[fn1] Dr. Prichard believes Defendant to be in the "high end of the borderline range or at the low end of the average range." (See June 27, 2003 Transcript, p. 104). According to Drs. Prichard and Maher, it is reasonable to believe that a person in Defendant's situation has a strong motivation to perform poorly on the examinations in order to be declared mentally retarded. (See June 27, 2003 Transcript, p. 114, and February 18, 2005 Transcript, pp. 49-50 and 59, attached).
>
> Likewise, the results of the Vineland test administered by Dr. Prichard suggest Defendant is not mentally retarded in terms of adaptive functioning.[fn2] (See June 27, 2003 Transcript pp. 108-109, attached). Dr. Prichard commented on the level of support needed by an individual that scores 29 in adaptive functioning – the value attributed by Dr. McClain in her examination:
>
> > An adaptive functioning of 29 would correspond to a support level of extensive. It would mean the person would need extensive support, which is characterized by individuals requiring extensive or continuous support and supervision. For example, an individual may attain beginning self-care skills, but may need continuous supervision

from someone within the same room or nearby.

(See June 27, 2003 Transcript, p. 113, attached).

Dr. Prichard's examination supports the fact that Defendant is clearly capable of caring for himself and places extreme doubt on the validity of Dr. McClain' s assessment.[fn3] Therefore, the Court finds Dr. Prichard's and Dr. Maher's analysis to be accurate. Based on Dr. Prichard's, Dr. Maher's and the Court's observations of the Defendant and on the doctors' determination that Defendant is not mentally retarded, the Court finds that Defendant is not entitled to the relief requested.

[fn1] Dr. Prichard testified that he did not believe Defendant's IQ score of 68 represented an accurate reporting. Specifically, Dr. Prichard felt that Defendant was purposely hesitating in giving responses. (See June 27, 2003 Transcript, pp. 85-89, attached).

Dr. Maher testified that he believed the testing he performed on Defendant did not accurately reflect Defendant's true intellectual capabilities. (See February 18, 2005 Transcript, pp. 35-36 and 49-54, attached).

[fn2] Dr. Prichard testified that he has administered the Vineland test approximately 300 times. (See June 27, 2003 Transcript, p. 80, attached). Dr. Prichard's results from the administration of the Vineland test was accepted by the trial court in Bottoson v. State, 813 So. 2d 31 (Fla. 2002).

[fn3] Dr. Prichard lists the tasks Defendant has been able to perform and continues to do. (See June 27, 2003 Transcript, pp. 113-114, attached).

(V5, R.780-781).

Mr. Brown now appeals the lower court's Order.[1]

At the evidentiary hearing on June 27, 2003 Dr. Prichard testified that he does almost exclusively forensic work, specializing in mental retardation, sexual offenders and substance abuse (V3, R.461). He has testified approximately fifty percent for the State and fifty percent of the time for the defense (V3, R.462). Dr. Prichard has administered Vineland Adaptive Functioning Test around three hundred times (V3, R.463). He was court-appointed to assess Brown, was furnished records, reports, prior evaluations and transcripts (V3, R.466-67). Dr. Prichard administered the WAIS, 3rd Edition Test and State Exhibit 2 is his report. (Supp. V1, R.16-29). His findings were verbal score of 67, performance IQ score of 73 and full scale IQ of 68. He did not believe that it was an accurate assessment (V3, R.467-68). Dr. Prichard explained he was wary of Mr. Brown's malingering because of his unusual response time to certain questions and the comparison with prior testing results (V3, R.468-70). He noted that in 1993 Dr. Dee had reported a performance IQ score of 93 with a full scale IQ of 83

[1] Appellee would note that the exhibits introduced at the trifurcated evidentiary hearing on June 27, 2003, January 7, 2005 and February 18, 2005 have now been completely added in Supplement Volume 1 of the Record, R.1-173. Appellee would point out that State Exhibit 1 is a one page report of Dr. Valerie McClain dated September 12, 2001 (Supp. V1, R.3). Pages 4 through 15 which follow are excerpts of the report of Dr. Prichard. Dr. Prichard's entire report follows as State Exhibit

on the Wechsler and intelligence scores do not decline twenty points in ten years (V3, R.470). There were peculiarities in his response latency (anxiety when saying numbers), and Mr. Brown's report of delusions which are fixed, false beliefs yet Mr. Brown did not deem it to be a daily situation (and thus not a legitimate description) (V3, R.471). Dr. Prichard noted also that when the defense retained expert Dr. Berland assessed Mr. Brown in 1986 and 1987 he also opined Mr. Brown was malingering, endorsing false symptoms that psychotic individuals don't endorse (V3, R.472). Dr. Dee's report was admitted as State Exhibit 3. (Supp. V1, R.30-41). Dr. Dee did not find Mr. Brown to be mentally retarded (V3, R.473). Dr. Prichard further testified that Dr. Berland performed a WAIS in February 1986 and Mr. Brown received a verbal IQ score of 75, performance IQ of 84, and full scale IQ of 81 and merely characterized Appellant as slow cognitively (V3, R.474). Dr. Berland reported Mr. Brown's efforts to exaggerate and/or fake symptoms (V3, R.475) and that his actions were not guided by delusional thinking (V3, R.475). A report of DOC Classification Progress in December 1976 when Appellant was twenty-six years old recommended and encouraged Appellant to obtain his GED, and it would not be routine to encourage mentally retarded individuals to get a degree or diploma, since such individuals do not go beyond sixth

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2 at pages 16-29 of Supplement Volume 1.

grade level. (V3, R.477; see also State Exhibit 7 at Supp. V1, R.67-70). Another DOC report dated March 7, 1980 indicated that Mr. Brown appeared to have average learning aptitude with less than average educational achievement and recommended supervised vocational training. He received a BETA score of 99 and compared with WAIS BETA typically underestimates true intelligence (V3, R.478-79; see also State Exhibit 8 at Supp. V1, R.72). The witness acknowledged that the Florida Statutes do not list the BETA, but the BETA has been correlated with the Wechsler Scales so you can get an idea what the corresponding scale would be like (V3, R.479-80). A report by the Hillsborough County School system in 1960 when Mr. Brown was ten years old indicated on the WISC-Children a verbal IQ score of 76, performance score of 74 and full scale score of 72, but it was noted that that was an index of current functioning and must be viewed as a completely nonvalid measure of his capacity (he was inattentive, exhibiting bizarre behavior in classroom, not motivated) (V3, R.481-82; see also State Exhibit 9 at Supp. V1, R.76). Dr. Prichard explained that IQ is a static variable – it does not change significantly over the course of one's lifetime. One can increase their score by five to seven points, but it just is not possible to score a 57 at one point and come back and score 80 or better (V3, R.483-84). A number of things can affect one's performance, such as emotional state, motivation,

multi-personality disorder symptoms or behavioral constellation, sleepiness, etc. (V3, R.485). Mr. Brown had been a troubled young man, placed in a boys' home at age thirteen; he had significant problems with tension, irritability, depression. These traits could affect his performance on a test on any given date negatively. It can deflate but not inflate IQ (V3, R.486). On the day Dr. Prichard tested him the witness felt like Mr. Brown was not motivated for whatever reason; he was just responding in a slow manner (V3, R.486). One cannot "fake good," cannot fake smarter than you really are. Dr. Prichard opined that a correct IQ assessment for Mr. Brown would be between approximately 80 and 95 (V3, R.487).

As to adaptive functioning, Dr. Prichard performed the Scales of Independent Behavior Revised Edition (SIBR) with Mr. Brown and a floor sergeant on death row and the Vineland Adaptive Behavior Scales with Appellant's ex-girlfriend Fannie James with whom he lived for five or six years prior to death row incarceration. SIBR is a new test, revised in 1993 and recommended by the AAMR. He opined it was one of the strongest tests they have for adaptive behavior and is recommended in other professional literature regarding capital cases (V3, R.488). The top three tests are Vineland, SIBR and the Association of Mental Retardation Adaptive Scales (V3, R.489). On the Vineland Test to Fannie James – a respondent for Mr.

Brown – he received a score of 84 in communication, score of 113 on daily living skills and score of 90 on socialization, a composite score of all the skills of 93. This is absolutely not in the category of being mildly mentally retarded (V3, R.491-92). Dr. Prichard performed the SIBR on Mr. Brown and death row floor sergeant Young. Young had been there a long time, knows the individuals well and is very objective. Young indicated a motor skills standard score of 87, communication of 77, personal living of 85 and community living of 81. His broad independent score, a composite of all the adaptive skills, was 80. Mr. Brown gave himself score of 78 on motor skills, 53 in communication, 64 in personal living, 54 in community living and 57 for broad independent support score (V3, R.493-94). The manual for scales on the Behavior Revised Edition generated from the American Association of Mental Retardation for Professionals indicated that someone with an adaptive functioning of 29 [the score that Dr. McClain had obtained] would mean the person needs extensive and continuous support. However, Mr. Brown does just fine on death row, able to feed and take care of himself (V3, R.495-96). He reviewed Dr. McClain's one-page report of September 12, 2001 and she had not performed any adaptive functioning, and a professional may not legitimately make mental retardation diagnosis without performing adaptive functioning tests (V3, R.497-98).

On cross-examination Dr. Prichard explained there was no need to interview teachers because he had enough information and it was unnecessary (V3, R.503).

At the hearing on January 7, 2005, Dr. Michael Maher testified that he was appointed in this case by Judge Barbas and saw Appellant on March 1, 2004 (V6, R.904-905). He agreed that for a mental retardation diagnosis one must satisfy three prongs – low intelligence scoring, adaptive functioning deficits and onset by age eighteen (V6, R.994). Exhibit 1 was his report and received in evidence (V6, R.995; see also Supp. V1, R.159-173). Dr. Maher had reviewed a number of documents including the reports of Dr. McClain and Dr. Prichard (V6, R.997). Dr. Maher testified that Mr. Brown had been tested many times in his life beginning in 1960 to 2003 (V6, R.1002). Dr. Maher did his testing and also averaged previous test scores given (V6, R.1004). Dr. Maher testified that an IQ test is an effort to measure the underlying capacity, to measure and estimate one's best ability and that many things may depress an IQ score (being hung over, being depressed, being psychotic, not trying very hard) (V6, R.1007). Not many things can artificially inflate or raise a score. Thus, one cannot fake smart (V6, R.1008). On Dr. Maher's testing Mr. Brown had full scale IQ of 70, which was close to the average he had previously received (V6, R.1009). In an addendum to his report, Dr. Maher noted an arithmetic

error which would adjust the full scale IQ score from 70 to 68 or 69 (V7, R.1066-1067, 1071). Dr. Maher opined that the IQ scores in total would not support the conclusion that Mr. Brown is mentally retarded (V6, R.1010). As to adaptive functioning, while he did not do specific testing, he reviewed it through his interview with Appellant and through testing done by other individuals. Dr. Maher concluded that there were significant periods of time where Brown's adaptive functioning was at a low level, but there were also significant periods of time (for example, in the several years prior to his arrest for this murder) where his level of adaptive functioning were above a level that would be expected for an individual who was mentally retarded. Dr. Maher opined that Mr. Brown has other psychiatric problems, a mood disorder and a substance abuse disorder which had an effect on his level of adaptive functioning (V6, R.1010-11). Dr. Maher thought that his level of adaptive functioning does not support the conclusion of mental retardation, but rather supports the conclusion that he has a relatively low normal IQ and other psychiatric and substance abuse problems which affect his level of adaptive functioning (V6, R.1012). Dr. Maher felt that Mr. Brown's deficits were caused by something other than mental retardation (Dr. Fleishaker had described Appellant as a psychotic boy, for example) (V6, R.1013).

At the hearing on February 18, 2005, Dr. Maher continued his testimony (V7, R.1042-1103). Dr. Maher indicated that he had averaged the previous IQ scores "as a common sense way to summarize all data and information" (V7, R.1048). He stated that he offered that as a common sense rational consideration of the way of presenting a lot of data (V7, R.1049). The fact that Mr. Brown may have had a variation of twenty-nine points between the BETA and WAIS tests means that he would try to identify why they are significantly different, i.e. try to understand why the BETA IQ might be artificially elevated or the Wechsler might be artificially depressed (V7, R.1052). Dr. Maher opined that Mr. Brown was in the low range for adaptive functioning for significant periods of his life (V7, R.1071). He did not speak with teachers but did rely on information given by Fanny – Appellant's ex-girlfriend (V7, R.1073). Dr. Maher indicated there may be a lack of full effort on Mr. Brown's behalf during testing (V7, R.1076). Dr. Maher did not believe Appellant's testing was a reasonably accurate reflection of his fundamental intelligence because of other compounding factors (V7, R.1077).

Dr. Maher further testified that under the testing he gave, Mr. Brown's scores were 66 on verbal, 80 on performance and 68 to 69 full scale and that Mr. Brown is <u>not</u> mentally retarded (V7, R.1089). Dr. Maher opined that his likely IQ is more in

the range of 75 to 85 (V7, R.1089). He reiterated the belief that Appellant did not give full effort and was aware that performing well was to some extent contrary to his self-interest (V7, R.1090). Mr. Brown gave a lot of quick "I don't know" responses and responded minimally to encouragement (V7, R.1091). Other experts who had examined Mr. Brown also had commented on Appellant's lack of best effort on the testing, including Dr. Prichard and Dr. Berland (V7, R.1092-95). Dr. Maher explained that he was not trying to say that averaging of scores was a recognized psychiatric approach to analyze and review, only a summary process he uses in the context of using common sense to understand his history (V7, R.1096-97). Dr. Maher opined Mr. Brown's low scores were not merely the result of lack of effort but it is more likely serious underlying psychiatric impairments independent and separate from retardation explain the discrepancy (V7, R.1099). He repeated that one cannot fake a high IQ (V7, R.1101). There were periods of time when Mr. Brown was able to function adequately in society – he was able to hold a job for a number of years, had a social relationship with a member of the opposite sex, lived in a stable environment, possessed a car, paid some of his bills and managed his money (V7, R.1102).

At the June 27, 2003 hearing Dr. Valerie McClain testified that she was referred to Mr. Brown by the Capital Collateral

Regional Counsel in May of 2001 (V3, R.395). She interviewed Appellant on July 2, 2001 and assessed him (V3, R.405-06). She estimated full scale IQ at 63, verbal IQ at 61 and performance IQ at 73 (V3, R.407). Subsequently, she assessed his adaptive functioning to meet the criteria for mental retardation but she did not administer an adaptive functioning test to Mr. Brown (V3, R.414). Dr. McClain testified she did two Vineland tests, one to Appellant's step-brother Daniel Jackson in May of 2003 but did not qualify it as being valid and the other to Appellant's brother Jimmy (V3, R.420). She also spoke to his teacher Ms. McDonald (V3, R.421). Dr. McClain did not make any conclusions about the Vineland results with Ms. McDonald since she really couldn't comment on enough of the areas to fill it out (V3, R.422). Dr. McClain opined that Appellant is in the mildly mentally retarded area of functioning. The witness also interviewed the victim's mother to obtain some information (V3, R.423).

On cross-examination, the State introduced as its exhibit her one-page letter detailing the results of Dr. McClain's findings following the interview and testing with Appellant (V3, R.432). She interviewed Appellant at about the time of the decision in Atkins v. Virginia (V3, R.432). The witness conceded that she did not perform any adaptive functioning tests when she performed the intellectual testing, asserting that she

"was not asked to assess that" (V3, R.434). When she appeared for the scheduled evidentiary hearing in this case in February 2003, she also had not done any adaptive functioning testing at that time (V3, R.436). She had not done the Vineland test at the time of July 2, or by September 12, or by February of 2003 (V3, R.437).

She claimed that the Vineland test on Appellant's brother Jimmy Brown classified Appellant as being in the severely retarded range (V3, R.444). Mr. Brown's score of 29 would be five standard deviations from the mean and three standard deviations from the IQ level he was at (V3, R.444). Dr. McClain was able to speak with Appellant, he was able to drive a car and had a driver's license. Some of the findings indicated Appellant functioned as one or two year old child (V3, R.450-51). Dr. McClain knew that Appellant had a long term relationship with Ms. Fannie James and that he worked from time to time. Dr. McClain opined that Mr. Brown was mildly retarded, although the adaptive functioning puts him in the severely retarded range (V3, R.452). Dr. McClain agreed that Dr. Dee had testified in a prior proceeding that Appellant had an IQ around 80 (V3, R.456-57).

SUMMARY OF THE ARGUMENT

Appellant failed to satisfy his statutory burden below to demonstrate that he is mentally retarded by clear and convincing evidence. Indeed, he did not even show by a preponderance of the evidence that he is mentally retarded. The trial court properly considered and credited the testimony of Dr. Prichard and court-appointed expert Dr. Maher that Mr. Brown did not give a complete and total effort during the administration of their intelligence tests and that Mr. Brown was not sufficiently impaired in his adaptive functioning to merit a conclusion of mental retardation. The lower court properly discredited the testimony of Dr. McClain who opined that in her limited adaptive functioning testing Mr. Brown was severely retarded and functioning at the level of an infant. This Court should maintain its jurisprudence to accept fact-finding by the trial court where it is supported by competent, substantial evidence as in the instant case, since it is in a more advantageous position to determine the credibility of those who appear before it.

ARGUMENT

ISSUE

WHETHER THE LOWER COURT ERRED IN DETERMINING THAT APPELLANT FAILED TO SATISFY HIS BURDEN TO SHOW THAT APPELLANT IS MENTALLY RETARDED.

Standard of Review:

While Appellant recites (Brief, p.7) unawareness at whether this Court has addressed the issue of mental retardation as subject to the substantial and competent evidence standard of review or a mixed question of law requiring de novo review, Appellee has unearthed the precedent of Bottoson v. State, 813 So. 2d 31, 33 (Fla. 2002) wherein this Court stated "we conclude that the trial court's finding of no mental retardation is supported by the record and evidence presented at the evidentiary hearing." Thus, "Since the evidence supports the trial court's findings we find no error and affirm this determination." Id. at 34.

The trial court's determination that Paul Alfred Brown is not mentally retarded is a factual finding. Consequently, the standard of appellate review is whether there is competent substantial evidence to support that factual determination. See Stephens v. State, 748 So. 2d 1028, 1031 (Fla. 1999) ("The State takes the position, and we agree, that the 'competent substantial evidence standard announced in Grossman applies to the trial court's *factual findings*."); Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001); Jones v. State, 709 So. 2d 512, 514-515

(Fla. 1998) ("this Court, as an appellate body, has no authority to substitute its view of the facts for that of the trial judge when competent evidence exists to support the trial judge's conclusion."); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) (as long as the trial court's findings are supported by competent substantial evidence, Supreme Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence).

This has been reconfirmed in Johnston v. State, 2006 Fla. LEXIS 766 (Fla. May 4, 2006) which declared:

> The standard of review utilized by this Court in reviewing a trial court's finding on a defendant's mental retardation claim is whether competent, substantial evidence supports the finding.
>
> > As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the [trial court's decision].
>
> Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981) (footnote omitted), aff'd, 457 U.S. 31 (1982); see also Windom v. State, 886 So. 2d 915, 927 (Fla. 2004) (citing Porter v. State, 788 So. 2d 917, 923 (Fla. 2001)) ("This Court has held that it will not substitute its judgment for that of the trial court on questions of fact, and likewise on the credibility of witnesses and the weight given to the evidence so long as the trial court's findings are supported by competent, substantial evidence.").

Florida Statute and Rule:

Florida Statute 921.137(1) provides in pertinent part:

> As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

Florida Rule of Criminal Procedure 3.203(b) provides:

> As used in this rule, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means 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. The term "adaptive behavior," for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

In Johnston v. State, 2006 Fla. LEXIS 766 (Fla. May 4, 2006)

this Court approved a trial court's finding and held that there was competent, substantial evidence to support the finding that Johnston was not mentally retarded. In that case Dr. Blandino noted that when Johnston was administered a Stanford-Binet test at age seven, he scored a 57 and he took a Wechsler Intelligence Scale for Children test when he was twelve and scored a 65. However, Dr. Blandino discounted these earlier scores because the test administrators placed a caveat in their notes indicating "that this was not an accurate assessment of his functioning because of behavioral and emotional issues, and that he was actually performing or was functioning at a higher level." Dr. Blandino did not assess adaptive functioning because it was moot given his IQ score being as high at it was. Similarly, Dr. Prichard testified that the three prongs that determine mental retardation are not independent elements; rather, they must all be present in order for mental retardation to be present. Dr. Prichard agreed with Dr. Blandino that two early low IQ test scores should be discarded because at the time emotional factors were getting the way of optimal functioning. Dr. Prichard too did not perform adaptive functioning testing because of his determination that Johnston's IQ score was too high. After summarizing the testimony, this Court stated:

> Under this rule, the three prongs of mental retardation consist of: (1) subaverage general intellectual functioning, (2) deficits in adaptive behavior, and (3) manifestation before age 18; these three

> prongs are to be considered in the conjunctive.

The Court rejected Johnston's argument that the lower court erred in its finding since the experts had only considered the first prong of the rule (subaverage general intellectual functioning):

> First, Johnston had to score two standard deviations below the mean score on an IQ test, or 70, in order to satisfy the first prong of rule 3.203(b). While Johnston did score below this number in tests he took early in his life, the test administrators noted that the low scores were probably due to behavioral and emotional problems at the time.
>
> * * *
>
> While Johnston is correct that the experts in his case did not perform adaptive functioning tests under the second prong of rule 3.203, both experts testified that this testing was unnecessary and contrary to standard professional practice because all three prongs of the rule must be met in order for a defendant to be found mentally retarded. Finally, both experts concluded that Johnston is not mentally retarded pursuant to rule 3.203. Therefore, there was competent, substantial evidence to support the trial court's finding that Johnston is not mentally retarded.

For the reasons that follow, the trial court's order in the instant case should similarly be affirmed.

(1) Intelligence scoring:

Dr. Prichard administered the WAIS – 3rd Edition Test and Mr. Brown scored a verbal IQ score of 67, performance IQ score of 73 and full scale IQ score of 68 but did not believe it was

an accurate assessment (V3, R.467-468). Dr. Prichard opined that a correct IQ assessment would be between approximately 80 and 95 (V3, R.487). See also State Exhibit 2 (V2, R.261; Supp. V1, R.16-29). On Dr. Maher's testing Mr. Brown had a full scale IQ of 70 (V7, R.1009) or 68 or 69 (V7, R.1066-1067, 1071) but also opined that the IQ scores in total would not support the conclusion of mental retardation (V6, R.1010). Dr. Maher's report listed records of IQ testing on Paul Brown dating from 1960 through 2003 with results ranging from 57 to 99 (Supp. V1, R.162). Dr. Maher noted a report by Dr. Dee on April 15, 1993 that a Wechsler Intelligence Scale for Children taken in 1960 when Mr. Brown was about ten years old reported a verbal score of 76 and performance score of 74. The Hillsborough County Schools used a WISC in 1961 obtaining a verbal score of 76, performance of 74 and full scale of 72. Department of Corrections testing in 1972, 1973 and 1998 resulted in scores of 94, 97 and 99.

Dr. Prichard acknowledged that the Beta Test is not listed as one of the tests that the legislature has recognized for the assessment of IQ but "The Beta has been correlated with the WAIS and what has been found is that the Beta is typically an underestimation of true intelligence. For example, one study of Beta scores were approximately 99 and the WAIS scores administered to the same subject were approximately 110." (V3, R.479). Dr. Prichard reiterated that the Beta has "been

correlated with the Wechsler Scales so you can get an idea of the administration of the Beta, what a corresponding Wechsler Scale would likely be." (V3, R.480). Dr. Maher similarly noted that the Beta is a more limited testing instrument sometimes referred to as a screening IQ (V7, R.1049-50) but added that Beta and WAIS "are both legitimate instruments to measure IQ and make a clinical estimate of IQ." (V7, R.1050). Dr. Maher explained that they will give a result in the same range generally. In Dr. Maher's knowledge and experience "It is not a reasonable expectation that a Beta IQ is going to get a result of 120 and a WAIS is going to get a result of 70." (V7, R.1051). Dr. Maher opined the defendant's likely IQ score is "more in the range of 75 to 85." (V7, R.1089-90). Dr. Maher's report additionally noted Dr. Berland's 1987 WAIS scores of verbal 75, performance 84 and full scale 81 and Dr. Dee's 1993 WAIS scores of verbal 77, performance 92 and full scale 83. Dr. Maher also noted Dr. McClain's score in 2001 and Dr. Prichard's results in 2003 (Supp. V1, R.162).

Quite apart from Beta testing, it is clear that all the experts who gave authorized testing pursuant to the recognized WAIS and WISC systems – with the sole exception of Dr. McClain – concluded that Mr. Brown was not mentally retarded. Dr. Dee reported in 1993 that prior testing with the WISC in 1961 when Appellant was about ten years old of verbal score of 76, performance of 74 and full scale of 72. Dr. Berland's testing

on the WAIS in 1987 yielded a verbal IQ of 75, performance of 84 and a full scale IQ of 81. Dr. Dee in 1993 utilized the WAIS to obtain a verbal score of 77, performance of 92 and full scale IQ of 83. Dr. Afield testified at Appellant's penalty phase that Mr. Brown had an IQ of about 80 (FSC Case No. 70,483, R.674).

In addition to the testimony presented below, a review of the State exhibit documents reveals a wide variety of intelligence test scoring. For example, State Exhibit 2, Dr. Prichard's report of April 23, 2003, recited that his recent testing showed a verbal IQ score of 69, performance IQ score of 73 and full scale IQ of 68. (Supp. V1, R.26). Dr. Prichard explained in his testimony why he felt these scores were not valid. State Exhibit 3, the report of Dr. Dee on April 15, 1993, reported Brown in the low average range of general intellectual functioning with a full scale IQ of 83, a verbal IQ of 77 and a performance scale IQ of 92 on the Wechsler (Supp. V1, R.35). State Exhibit 4, a report by Dr. Berland on February 1, 1987, noted Appellant's efforts to exaggerate or fake mental health symptoms (Supp. V1, R.47). State Exhibit 5, the WAIS Record Form of April 13, 1986, revealed a verbal IQ score of 75, performance IQ score of 84, and full scale IQ score of 81 (Supp. V1, R.51). State Exhibit 6, Dr. Berland's report of February 11, 1987, mentioned "the defendant's apparent efforts to exaggerate and/or fake symptoms of mental health disturbance appear to have masked whatever genuine disturbance was present

in a way that prevented separation of what was genuine from what was not." (Supp. V1, R.64). State Exhibit 7, a Department of Offender Rehabilitation Reclassification and Progress Report prepared December, 1976, indicated that Brown had on IQ of 94 and was encouraged to attempt to achieve his GED. (Supp. V1, R.69). State Exhibit 8, a Department of Corrections Educational and Vocational Counselor's Report in March of 1980, listed Brown with an IQ test score of 99 and noted "Inmate appears to have average learning aptitude with less than average educational achievement. Would encourage academic courses, if he is motivated." (Supp. V1, R.72). State Exhibit 9, Hillsborough County Schools case summary dated April 18, 1961, noted that on the WISC test Brown achieved a verbal scale IQ of 76, performance scale IQ of 74 and full scale IQ of 72. The report contained the caveat that "It was noted, however, that findings here are presented as an Index of current functioning and must be viewed as a completely non—valid measure of Innate capacity." (Supp. V1, R.76).

Notably, Appellant did not present at the evidentiary hearing below Dr. Dee or Dr. Berland or Dr. Afield to support the contention that Mr. Brown is mentally retarded.

Appellant also offers a criticism suggesting that the prior test results in years past must be renumbered. On cross-examination of Dr. Maher, the witness acknowledged the general principle that as soon as the test is normed it begins to lose

validity. He did not agree that scores have to be adjusted. There is no agreed upon clinical standards to apply in the first five years or the second five years; it is an area more relevant to academic research than clinical practice. While it may be accurate that a test becomes obsolete for a variety of reasons after it's normed but that is a far cry from it being a law that it has to be modified. (V6, R.1031-32). Dr. Maher's testimony was that the prior tests were valid and useful tests given when they were administered and remain valid and useful in understanding Mr. Brown's current intelligence and ability. He was not asserting they were scored correct and valid but were useful information. (V6, R.1034). He did not presume that all the information was absolutely, categorically, technically perfect; he presumed it fell within the standards of what he's familiar with in reporting this kind of information and the kind of results he typically relies on to reach a conclusion. (V6, R.1036). Dr. Maher did not agree that where there is an outdated test the scores would be off by seven or eight points. Dr. Maher stated that there is research showing that when you look at a group tested with the original WAIS compared to a group of people tested with the Third Edition, there are patterns of difference in the result. The patterns are consistent with the difference in full scale IQs of seven to eight points. He did not agree they are going to be off seven or eight points and would not agree that that means a specific

modification of those results is appropriate. The literature attempts to project into the present day and current test environment a likely result; it does not say the original result was wrong or inaccurate. While of relevance on a research level, it has limited relevance on a clinical level. (V7, R.1061-1062). The standard of care in the community is to give the test that is relevant today; it does not mean that a different version given years ago was wrong. (V7, R.1062-1063).

Appellant contends that earlier testing by mental health experts such as Drs. Afield, Berland and Dee support his claim of mental retardation but the testimony adduced at the hearing below does not support such a claim. First, Appellant did not present any live testimony by Drs. Afield, Berland or Dee. Drs. Afield and Berland testified at Mr. Brown's penalty phase of trial in February of 1987. While Dr. Afield mentioned that "there is brain damage or I think he is kind of retarded." (V4, R.672)(emphasis supplied), he also added that "We have a guy with an IQ of about 80" (V4, R.674) which certainly would not quality an individual for mental retardation status. Dr. Afield's testimony also acknowledged that Mr. Brown was faking some of his responses in testing done by Dr. Berland. (V4, R.676-677).

Dr. Berland testified at the penalty phase that he administered the Wechsler Adult Intelligence Test in 1987, a standardized test; the full scale IQ score was 81, the verbal

was 75 and performance IQ score was 84. (V4, R.635). Dr. Berland added that "there was a substantial element in faking in his MMPI results and in his interview results" (V4, R.648, 658).

Both Dr. Prichard and Dr. Maher alluded in their reports to testing done by Dr. Dee on April 15, 1993 on the WAIS (Wechsler Adult Intelligence Test) – verbal IQ score of 77, performance IQ score of 92 and full scale IQ of 83 (V2, R.259-260; Dr. Maher report at State Exhibit 1, p.3, Supp. V1, R.162). See also Dr. Dee's report of April 15, 1993, V2, R.219-229, State Exhibit 3; Dr. Berland's report of February 1, 1987, State Exhibit 4; V2, R.364-370. Although, the tests given by Dr. Berland and Dr. Dee had newer versions available when the tests were administered, they were still perfectly legitimate and useful instruments. (V7, R.1064). The standard of care in the community is to give the more current procedure but that does not mean that old tests (whether x-rays or intelligence test) are necessarily obsolete. (V7, R.1065).

Dr. McClain opined that Dr. Berland's full scale IQ of 81 on the WAIS should be adjusted to a 70 on the WAIS III and that Dr. Dee's score of 83 should be adjusted to a 72. (V7, R.1109).

That Dr. McClain may have differing views from that presented by Dr. Maher or Dr. Prichard means only that it was for the trial court to resolve the conflicting views and Judge Barbas did so. See Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998) ("It is the province of the trier of fact to determine the

credibility of witnesses and resolve conflicts [citations omitted]. Sitting as the trier of fact in this case, the trial judge had the superior vantage point to see and hear the witnesses and judge their credibility....Secondly this Court will not reweigh the evidence when the record contains sufficient evidence to prove the defendant's guilt beyond a reasonable doubt."); Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984); State v. Spaziano, 692 So. 2d 174, 178 (Fla. 1997)("We give trial courts this responsibility because the trial judge is there and has a superior vantage point to see and hear the witnesses presenting the conflicting testimony. The cold record on appeal does not give appellate judges that type of perspective."); see also Trotter v. State/McDonough, 2006 Fla. LEXIS 940 (Fla. May 25, 2006) ("Second, the circuit court found Dr. Pinkard's testimony unreliable. The determination of the credibility of witnesses also is reserved to the trial court. Windom v. State, 886 So. 2d 915, 927 (Fla. 2004) ('This Court has held that it will not substitute its judgment for that of the trial court on questions of fact, and likewise on the credibility of witnesses and the weight given to the evidence so long as the trial court's findings are supported by competent, substantial evidence.')."); Wainwright v. Witt, 469 U.S. 412, 434, 83 L.Ed.2d 841, 858 (1985)(quoting from an earlier case that "face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate

judges are excluded"). Suffice it to say the fact finder heard and decided which witnesses were credible. See also Creamer v. Bivert, 214 Mo. 473, 113 S.W. 1118, 1120-121 (Mo. 1908):

> We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness, may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify.

(2) Adaptive functioning prong:

The trial court recited in its Order that:

> Dr. McClain testified regarding Defendant's ability to maintain a five year intimate relationship, "I do believe that was after he was 18." (See June 27, 2003 Transcript, p. 64, attached). That Defendant may have been described at an early age as having socialization issues,

does not mean he satisfies the statutory definition of mentally retarded if he is currently able to socialize and adapt at an acceptable level. The mental deficits have to manifest prior to 18 and continue to exist presently, or concurrently with significantly subaverage general intellect. Dr. McClain failed to report on Defendant's current adaptive functioning.

Contrary to Dr. McClain's assessment, Drs. Prichard and Maher each tested the Defendant and found that the recent IQ scores suggesting a range of mildly mentally retarded were a result of malingering.[1] Dr. Prichard believes Defendant to be in the "high end of the borderline range or at the low end of the average range." (See June 27, 2003 Transcript, p. 104). According to Drs. Prichard and Maher, it is reasonable to believe that a person in Defendant's situation has a strong motivation to perform poorly on the examinations in order to be declared mentally retarded. (See June 27, 2003 Transcript, p. 114, and February 18, 2005 Transcript, pp. 49-50 and 59, attached).

Likewise, the results of the Vineland test administered by Dr. Prichard suggest Defendant is not mentally retarded in terms of adaptive functioning.[2] (See June 27, 2003 Transcript pp. 108-109, attached). Dr. Prichard commented on the level of support needed by an individual that scores 29 in adaptive functioning – the value attributed by Dr. McClain in her examination:

> An adaptive functioning of 29 would correspond to a support level of extensive. It would mean the person would need extensive support, which is characterized by individuals requiring extensive or continuous support and supervision. For example, an individual may attain beginning self-care skills, but may need continuous

> supervision from someone within the same room or nearby.
>
> (See June 27, 2003 Transcript, p. 113, attached).
>
> Dr. Prichard's examination supports the fact that Defendant is clearly capable of caring for himself and places extreme doubt on the validity of Dr. McClain' s assessment.[3] Therefore, the Court finds Dr. Prichard's and Dr. Maher's analysis to be accurate. Based on Dr. Prichard's, Dr. Maher's and the Court's observations of the Defendant and on the doctors' determination that Defendant is not mentally retarded, the Court finds that Defendant is not entitled to the relief requested.

(emphasis supplied)(footnotes omitted)(V5, R.780-781)

This is not the first time the courts have credited the testimony of Dr. Prichard. See, e.g., Bottoson v. State, 813 So. 2d 31, 33 (Fla. 2002):

> The court stated: "The court finds Dr. Pritchard's testimony credible and accepts this explanation." n3
>
> n3 The trial court also pointed out that Dr. Henry Dee was the only expert to opine that Bottoson was mentally retarded. The court found Dr. Dee's testimony not credible because Dr. Dee's opinion was "unacceptably vague in light of the objective evidence." We give deference to the trial court's credibility evaluation of Dr. Pritchard's and Dr. Dee's opinions. See Porter v. State, 788 So. 2d 917, 923 (Fla. 2001) (giving deference to the trial court's acceptance of one mental health expert's opinion over another expert's opinion and stating "we recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making

> findings of fact"). See also Stephens v. State, 748 So. 2d 1028, 1034-35 (Fla. 1999).

See also Johnston v. State, *supra*.

There is competent, substantial evidence in the record to support the lower court's conclusion on the adaptive functioning prong. Dr. Prichard's report of March 3, 2003, State's Exhibit 2 (V2, R.261-262) explained:

> The determination of Mental Retardation is a two-pronged process. The person must have significant deficits in both intelligence and adaptive skills. Hence, the, Vineland Adaptive Behavior Scales (Interview Edition) was administered by interviewing Ms. Fannie James, who lived with Mr. Paul Brown for 5-6 years just prior to his incarceration on death row. She appeared to be very familiar with him, and was considered an appropriate and objective respondent. On this administration, Mr. Brown earned a Standard Score of 84 on the Communication Domain, a Standard Score of 113 on the Daily Living Skills Domain, and a score of 90 on the Socialization Domain. This translates into an Adaptive Behavior Composite score of 93. Hence, at the 95% level of confidence, it can be stated that Mr. Paul Brown's true adaptive behavior composite falls between 85-101, suggesting no deficits in adaptive skills.
>
> Sgt. Young, floor Sergeant on death row, was questioned utilizing the Scales of Independent Behavior-Revised Edition. This is a different measure of adaptive skills, and allows the respondent to project how well they BELIEVE the individual could perform specific skills, even if there has been no opportunity to observe the skill in question. Sergeant Young has known Mr. Brown since he arrived on death row in approximately 1987. He appeared to be an

appropriate, objective respondent. Based on Sergeant Young's responses, Mr. Brown earned a Motor Skills Standard Score of 87, a Communication Standard Score of 77, a Personal Living Standard Score of 85, and a Community Living Standard Score of 81. These scores translated into a Broad Independent Support Score of 80, indicating skills that are "limited to age-appropriate".

Mr. Paul Brown was also given the opportunity to respond to questions on the Scales of Independent Behavior-Revised Edition regarding how well he BELIEVES he can perform specific skills. On his assessment of himself, he indicated Motor Skills Standard Score of 78, a Communication Standard Score of 53, a Personal Living Standard Score of 64, and a Community Living Standard Score of 54. These scores translated into a Broad Independent Support Score of 57, indicating skills that are "limited to very limited".

In analyzing the differences obtained in Mr. Brown's self-assessment (Broad Independent Support Score of 57) relative to Sergeant Young's (Broad Independent Support Score of 80), Table 5-6 in the SIB-R manual was consulted. This Table offers a description of Support Score ranges and a description of Support Levels needed for each range. For Mr. Brown's score of 57 (range of 55-69), this Table indicates a Support Level of "Limited". The description of this level of support includes:

> "Individuals require limited but consistent support and supervision. For example, an individual may be independent in some personal care skills, but may require help, support, or supervision with many daily activities and direct and consistent supervision for much of each day in home, school, work, and community

> settings."
>
> For Sergeant Young's score of 80 (range 70-84), this Table indicates a Support Level of "Intermittent". The description of this level of support includes:
>
> > "Individuals require intermittent or periodic support and supervision. For example, an individual may be able to manage most daily activities independently, but may sometimes need periodic (often less than daily) advice, support, assistance, or supervision."
>
> Finally, on the WRAT-3, Mr. Brown earned a Reading score of 66, a Spelling score of 59, with a Arithmetic score of 53. These scores correspond to Grade Equivalent scores of 4, 3, and 2, respectively.

Dr. Prichard additionally testified at the June 27, 2003 evidentiary hearing that he administered adaptive behavior tests in this case. Dr. Prichard performed the Scales of Independent Behavior Revised Edition with Mr. Brown and with a floor Sergeant on death row (Sergeant Young). He also administered a Vineland Adaptive Behavior Scales with Fannie James, Appellant's ex-girlfriend with whom he had lived for a five to six year period just prior to his death row incarceration. The SIBR[2] test is newer than when the statutory rules were handed down in October of 1985, is recommended by the AAMR and other professional literature and "is one of the strongest tests for a measure of adaptive behavior than [sic] we have" (V3, R.488). It is among the top three along with the Vineland and the

Association of Mental Retardation Adaptive Scales (V3, R.499). The Vineland is scored based on the same numerical equivalent as the Wechsler Scale – with a mean of 100 and standard deviation of 15. Thus, two standard deviations would yield a score of 70. In assessing Fannie James as a respondent, Appellant received a score of 84 in communication, 113 on daily living skills and a score of 90 on socialization – a composite score of all the skills of 93. This is "not even a standard deviation below the mean and it's actually very consistent with the other testing" (V3, R.492).

The SIBR test is administered the same way as the Vineland – ask someone who is familiar with the individual about specific adaptive skills. The benefit of SIBR is that it gives the opportunity to administer the instrument to the individual himself and provides an opportunity to estimate adaptive skill functioning based on other behaviors when there hasn't been an opportunity to observe the skills. Sgt. Young has been a floor sergeant on death row for a long time, knows the individuals and is objective. Sgt. Young indicated a motor skills standard score of 87, communication of 77, personal living of 85 and community living of 81. The broad independent score, a composite of all the adaptive skills was 80. The SIBR, like the Vineland and WAIS, has a mean of 100 and requires the two standard deviations for someone who is mentally retarded (V3,

[2] The court reporter apparently mistranscribed it as SIDR test.

R.493-494).

Dr. Prichard gave the test to Mr. Brown who gave himself a 78 on motor skills, 53 on communication, 64 on personal living, 54 on community living and a broad independent score of 57 (V3, R.494). Dr. Prichard looked in the SIBR manual at Tables 5-6 listing the levels of support (V3, R.495). Dr. Prichard testified that an adaptive functioning of 29 would be an extensive level of support, i.e. would require almost all total personal care for eating, dressing or bathing; but Mr. Brown does just fine in that context (V3, R.496). In Dr. McClain's report of September 12, 2001 she had not performed any adaptive functioning testing (V3, R.497-498).

Dr. Maher similarly concluded that Appellant Brown did not satisfy the adaptive functioning deficits criteria for a mental retardation diagnosis. While he did not do specific testing, he reviewed that through his interview and testing done by others. Dr. Maher opined that there had been periods of time when Mr. Brown's adaptive functioning was at a low level and other significant periods of time in the several years prior to this arrest for this murder where his level of adaptive functioning was above a level that would be expected for an individual who was mentally retarded. Dr. Maher concluded that his level of adaptive functioning does not support the conclusion that he is mentally retarded (V6, R.1010-1012; see also State Exhibit 1 at Supp. V1, R.169).

In contrast, the testimony of Dr. McClain, which was rejected by the lower court, was that she did not administer any adaptive functioning test at the time of her interview with Mr. Brown (V3, R.414, 434). She performed a Vineland with respondent step-brother Daniel Jackson on May 5, 2003, but she did not qualify it as being a valid Vineland because of the excessive "I don't know" responses (V3, R.420). She interviewed Appellant's brother Jimmy and a former teacher Ms. McDonald. The McDonald interview was inadequate to form a conclusion since she couldn't comment on enough areas. The findings on the interview with Jimmy Brown placed Appellant in the low adaptive level range (V3, R.420-422). The score she achieved when performing the Vineland on Jimmy Brown was a standard score of 29 – within the range of severe retardation (V3, R.444). His score would be five standard deviations from the mean (V3, R.446). Dr. McClain admitted that Mr. Brown had had a four or five year intimate relationship with Fannie James (V3, R.447). She opined that as to interpersonal relationships, Mr. Brown functioned as a one year eleven month old and as to play and leisure he functions as a nine month old infant (V3, R.451).

(3) Onset by age 18 prong:

Dr. Prichard testified that the third element required for a mental retardation diagnosis was that the individual must manifest his deficits prior to the age of eighteen and be presently existing (V3, R.465). See also DSM-IV-TR, p.49. Dr.

Prichard further explained that it was unnecessary to make further inquiry into the onset by age eighteen prong since he had so much data when Mr. Brown was an adult that intellectually he was not below 70 (V3, R.501-502).

Dr. Maher concluded that Mr. Brown's deficits that were apparent prior to age eighteen were caused by other factors, not mental retardation (V6, R.1013-1014).

Appellant's complaint – that the trial court's assertion that the first prong of a mental retardation determination "requires an IQ of 70 or less" is erroneous – is meritless. See Zack v. State, 911 So. 2d 1190, 1201 (Fla. 2005)(finding that in order to be exempt from execution under Atkins, a defendant must meet Florida's standard for mental retardation, which requires he establish that he has an IQ of 70 or below), cited in Hill v. State, 921 So. 2d 579 (Fla. 2006); Rodriguez v. State, 919 So. 2d 1252, n.8 (Fla. 2005)(reciting that "According to the Diagnostic and Statistical Manual of Mental Disorders, mental retardation is 'characterized by significantly subaverage intellectual functioning {an IQ of approximately 70 or below} with onset before age 18 years and concurrent deficits or impairments in adaptive functioning.'"); see also Johnston v. State, *supra*.

Appellant criticizes the trial court for accepting Dr. Prichard's and Dr. Maher's findings on malingering. The lower court alluded in footnotes 1 and 2 of his Order to their

supporting testimony (V5, R.780). Dr. Prichard explained that he became wary when Mr. Brown seemed not to be working as quickly as he could on the performance measures, e.g., Appellant was unusual in taking a long time to respond to four digits stated to him. Typically when someone is trying to perform optimally they tell you right away because that is information one puts in immediate memory. Notably, Mr. Brown's score was not an accurate assessment when comparing results on Dr. Prichard's test to prior testing results. In this regard Dr. Prichard noted testing by Dr. Dee in 1993 indicated a performance IQ of 93 with a full scale IQ of 83 on the Wechsler Scales. As for the twenty point decline in performance and fifteen point decline in full scale IQ score, "Intelligence doesn't change that way." (V3, R.468-470). Mr. Brown's performance was peculiar; while he was anxious, anxiety isn't necessarily going to create a response latency. Moreover, Mr. Brown's responses did not seem honest. When asked about delusions, Appellant indicated that he was afraid someone was contaminating his food and that he skipped approximately one meal per week because he felt it was contaminated or poisoned. This was significant because a delusion is a fixed, false belief – it does not come on Wednesday at lunchtime. It stays with a person and attacks on his daily function. This was not an endorsement or description of delusional ideation. If truly delusional, you would expect him to skip numerous meals.

Furthermore, Dr. Berland's reports in April of 1986 and February of 1987 indicate malingering, i.e., he was endorsing symptoms that were false, that psychotic individuals don't endorse (V3, R.471-472).

Dr. Maher gave similar testimony. When asked by defense counsel whether Mr. Brown made an acceptable effort on the testing, Dr. Maher answered:

> I think that my testing results in a lower score than represents his true intelligence, because he did not make a full effort. That would be my testimony.
> (emphasis supplied)(V7, R.1077)

Dr. Maher expanded on his testimony, noting that Mr. Brown's score was not a reasonably accurate reflection of his fundamental intelligence because of other compounding factors (V7, R.1077). Dr. Maher added:

> A. I do not believe he gave full effort on it. I think he was aware of the circumstances of the testing and aware that performing well on the testing was to some extent contrary to his self-interest. I do not believe that he specifically gave wrong answers when he knew correct answers. Nor do I have any evidence that he refused to give an answer when he had in mind an answer.
> But it is my opinion that he did not give full effort and had he given full effort, he would have performed better.
> Q. That's why you believe it is more accurate that the defendant's IQ is in the 75 to 85 range?
> A. That's correct.
> (V7, R.1090-

1091)

When asked why he felt Mr. Brown did not try his best, the witness answered he gave a lot of very quick "I don't know" responses and responded minimally but somewhat to encouragement which allowed the testing to continue. Dr. Maher noted that Dr. Prichard's assessment was "very similar to my conclusions and opinions. There was a lack of full effort." (V7, R.1092-1094). Dr. Maher agreed that Dr. Berland had expressed the opinion that there was some exaggeration of Mr. Brown's self-report on the severity of his mental health symptoms (V7, R.1095-1096). Dr. Maher said that it is "not only a lack of willingness but a lack of effort" and:

> The intelligence test is a test that requires full effort in order to get the most accurate outcome. So even if a person isn't doing anything to fake or malinger a low score, a lack of full effort will give a less than accurate score, because it's a test which requires a full effort to get the most accurate outcome.
>
> (V7, R.1097)

The trial court's findings thus were not erroneous. Mr. Brown failed to give his best efforts as noted by Drs. Prichard and Maher (and others earlier). Any suggestion that there was insufficient competent evidence to support the trial court's finding, that Mr. Brown is not mentally retarded or that the lower court failed to consider all the evidence presented is without merit. Appellant presented only one live witness Dr.

Valerie McClain and as previously noted the lower court declined to credit her testimony which was contradicted by the State's expert Dr. Prichard and the court-appointed expert Dr. Maher. The court's conclusion was supported by other documentary evidence presented below. For example, State's Exhibit 9, the Hillsborough County School report in 1961 – when Mr. Brown was ten years old – noted that the WISC-C indicated a verbal scale score of 76, performance scale of 74 and full scale of 72 and commented that it was an index of current functioning not as a measure of innate capacity (V2, R.215). Obviously, his innate capacity would not be lesser than his current functioning. State's Exhibit 3, Dr. Dee's report of April 15, 1993, reported Mr. Brown's performance on the Wechsler as full scale IQ of 83, verbal IQ of 77 and a performance scale IQ of 92 (V2, R.226).

Dr. Berland's examination in 1986 on the Wechsler (State Exhibit 5, Supp. V1, R.51) yielded a verbal IQ of 75, performance IQ of 84 and full scale IQ of 81. Additionally, Dr. Berland's report of February 1, 1987 – State's Exhibit 4 – noted consistently with the views of Drs. Prichard and Maher "that his responses were not true and that they represented an effort to either partially or entirely fake symptoms of disturbance." (V2, R.365). See also Dr. Berland's testimony in earlier proceedings as to Mr. Brown's WAIS IQ scores (V4, R.634-635) and Mr. Brown's exaggeration and faking in his MMPI and interview results (V4, R.644-653). Department of Corrections records,

State Exhibits 7 and 8, describe Mr. Brown with average learning aptitude with less than average educational achievement. In the penalty phase of trial Dr. Walter Afield had described Appellant as "a guy with an IQ of about 80" (V4, R.674) and acknowledged that he thought it was accurate that Mr. Brown had faked in a rather primitive kind of way some of his responses in Dr. Berland's test (V4, R.677).

Mr. Brown seems to be critical of Dr. Prichard's use of the Scales of Independent Behavior Test (SIBR) for the adaptive behavior prong, noting that it is not one of the tests specified for use by the Department of Children and Families in Florida. While it is true that Florida Statute 921.137 and Rule 3.203 provide that the Department of Children and Family Service adopt rules to specify "the standard intelligence tests" there is no similar statutory or Rule 3.203 fiat that any particular test must be given to satisfy the adaptive functioning prong of the mental retardation test. Significantly, Appellant does not point to any testimony at the evidentiary hearing to refute or contradict Dr. Prichard's sworn testimony that the revised edition of SIBR came out in 1993, years after the statutory rules were handed down, that "It is one of the strongest tests for a measure of adaptive behavior than [sic] we have. It is recommended by AAMR. It's recommended in other professional literature regarding capital cases. It's statistically very, very strong." (V3, R.488-489). Dr. Prichard added that the top

three are Vineland, SIBR and the Association of Mental Retardation Adaptive Scales (V3, R.489).

Finally, Appellant contends that the experts are in agreement that a person can be diagnosed with mental retardation, mental illness and brain damage. While it may be true that the presence of one does not necessarily exclude the others, that fact avails the Appellant naught, for it is equally true that someone who has a mental illness and/or brain damage may yet still not be retarded – as the testimony of Drs. Prichard and Maher make clear about Appellant Brown.[3] Since the sole inquiry in this proceeding is whether Appellant is mentally retarded and thus his execution proscribed by Atkins v. Virginia, 536 U.S. 304 (2002), it matters not what other problems may exist since he is not mentally retarded.

Appellant claims that Dr. Prichard's report establishes deficits in Mr. Brown's adaptive functioning to support Dr. McClain's diagnosis of mild mental retardation and that he corroborates her diagnosis. Quite the opposite is true. Dr. Prichard administered the Vineland Adaptive Behavior Scales with Mr. Brown's ex-girlfriend with whom Appellant lived for five or six years prior to his incarceration on death row, that the Vineland is scored on the same numerical equivalent as the

[3] As noted in this Court's prior decision Brown v. State, 755 So. 2d 616 (Fla. 2000) affirming the denial of post-conviction relief, a number of experts opined concerning Mr. Brown's alleged organic brain damage and other maladies. Id. at 632-

Wechsler Scale (a mean of 100 and standard deviation of 15; two standard deviations on both IQ score and adaptive behavior scales would correspond to 70) (V3, R.488, 491). In assessing Fannie James as a respondent for Mr. Brown he received a score of 84 in communication, score of 113 on daily living skills and score of 90 on socialization – a behavior composite score of all the skills of 93. (V3, R.491-492). This colloquy followed:

> Q. And that would not put him in the category of being mildly mentally retarded?
> A. No, absolutely not. It's not even a standard deviation below the mean and it's actually very consistent with the other testing, intellectual testing that I referenced.
> (V3, R.492)(emphasis supplied)

Dr. Prichard then explained the SIBR test he gave with death row floor Sergeant Young and with Appellant Brown as a respondent Sergeant Young indicated a motor skills standard score of 87, communication of 77, personal living of 85 and community living of 81. His broad independent score – a composite of all the adaptive skills – was 80. Mr. Brown rated himself a 78 on motor skills, 53 in communication, 64 in personal living, 54 in community living and broad independent score of 57. (V3, R.494). Although counsel for Mr. Brown cross-examined Dr. Prichard, there were no questions propounded as to the numbers and scores he received on his Adaptive Functioning Tests. (V3,

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636.

R.500-512). Since Dr. Prichard's testimony clearly demonstrates his conclusion that Paul Brown is not mentally retarded, it is staggering to suggest that his views corroborate Dr. McClain who opined that Mr. Brown's adaptive functioning score was 29 (V3, R.444), that he functioned as a one-year eleven-month old in interpersonal relationships (although he had lived with Fannie James for five or six years prior to incarceration) and functions as a nine-month old infant. (V3, R.451).

As to Dr. Prichard's written report, Dr. Prichard opined that "Paul's functional independence is limited to age–appropriate; his performance is comparable to that of the average individual at age 15 years 10 months (15-10). This is within the low average range of scores obtained by others at his age level, as shown by his percentile rank (9) and standard score (80)."[4] (V2, R.265).

As to Appellant's assertion that the statutory provision of F.S. 921.137 requiring proof of mental retardation by clear and

[4] Dr. Prichard has far more experience than Dr. McClain. He has been working in the field of mental retardation since 1994, has testified in court approximately 150-200 times, and has administered the Vineland Adaptive Functioning Test around three hundred times. He has testified in ten capital cases at trial, three involving post-sentence relief and eight cases are pending. (V3, R.461-463). Dr. McClain's testimony in death penalty cases has been "approximately two times," she has not previously testified regarding mental retardation in any capital case, had evaluated an individual for mental retardation in capital cases "approximately four times" and has administered the Vineland about twenty times. (V3, R.393-394).

convincing evidence to obtain relief is unconstitutional, Appellee answers that the claim must be rejected. In his motion in the lower court Appellant contended that F.S. 921.137(8) – which provides that the act is inapplicable to a defendant sentenced to death prior to the effective date of the act – violated the equal protection clause and that that section was severable from the remaining sections (V1, R.18-19, 31-32). Mr. Brown did not in his motion or memorandum argue that the clear and convincing burden of proof standard was unconstitutional. Nor did he raise a constitutional challenge to the clear and convincing standard in his first post-hearing memorandum of law (V1, R.169-209). He did not mention such a challenge until his Final Closing Argument in march of 2005 (V5, R.727). His untimely assertion should be deemed procedurally barred.

Additionally, this Court has held that it is unnecessary to address the claim that the clear and convincing evidence standard of F.S. 921.137(4) is unconstitutional where the trial court concludes that a defendant is not mentally retarded either under the clear and convincing standard or the preponderance of the evidence standard. Trotter v. State/McDonough, 2006 Fla. LEXIS 940 (Fla. May 25, 2006). Here, the trial court's total rejection of the opinion testimony of Dr. McClain and acceptance of the views of Drs. Prichard and Maher that Mr. Brown is not retarded satisfies either standard.

Appellee would respectfully submit that the standard of clear and convincing evidence is proper and does not suffer any constitutional infirmity. Florida Statute 921.137(4) requires the defendant to prove his claim of retardation by clear and convincing evidence. This standard is consistent with that required for other mental health issues which may be presented in a criminal action. See Fla.R.Crim.P. 3.812(e) (competency to be executed); § 775.027(2), Fla. Stat. (insanity as affirmative defense); see also §§ 394.467(1), 394.917 (1), 916.13, Fla. Stat. (civil commitment proceedings). Rule 3.203 did not adopt a standard of proof because of concerns that this was a substantive rather than a procedural issue and the concerns of some Justices and Rules Committee members that under Cooper v. Oklahoma, 517 U.S. 348 (1996), a defendant could constitutionally be required to prove his competence to stand trial by a preponderance of evidence but not by the higher burden of clear and convincing evidence. See, Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure, 875 So. 2d 563 (Fla. 2004) (Pariente, J., concurring).

Cooper ruled that requiring a defendant to prove his incompetence to stand trial by clear and convincing evidence could force a defendant to go to trial even when he could be shown more likely than not to be incompetent. Drawing on a

lengthy history of jurisprudence and an overwhelming consensus of State statutory and procedural law opposing this position, the Supreme Court found this to violate due process.

For many reasons, the State feels that Cooper is distinguishable from the instant proceeding and that the clear and convincing burden is both appropriate and constitutional. State criminal procedures are not subject to proscription by the Due Process Clause unless they offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Patterson v. New York, 432 U.S. 197 (1977). Historical practice is the Court's "primary guide" in determining whether a principal in question is fundamental. Montana v. Egelhoff, 518 U.S. 37 (1996). Unlike the historical perspective required by due process analysis, the Eighth Amendment reasoning employed by the Atkins Court relied on a newly emerging consensus among state legislatures and state courts that mentally retarded defendants should not be subject to the death penalty. Clearly, there was no issue that this practice was deeply rooted in our jurisprudence, since only fifteen years earlier, the Court had reached the opposite conclusion in Penry v. Lynaugh, 492 U.S. 302 (1989).

Recognizing that the same States that constituted this emerging consensus disagreed on how retardation should be defined and on the standard of proof required to establish it,

the Atkins majority determined that "as was our approach in Ford v. Wainwright, 477 U.S. 399 (1986) with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" Since Atkins was decided two additional States have enacted legislation requiring that a defendant prove retardation by clear and convincing evidence. See, Ariz. Rev. Stat. § 13-703.02(G) (2003); N.C. Gen Stat. § 15A-2005(c) (2003).[5]

Georgia, which was the first state to outlaw execution of the mentally retarded, requires that the defendant prove retardation by the even higher standard of proof beyond a reasonable doubt. Recognizing that Atkins did not mandate a standard of proof, Georgia Courts have consistently upheld their statute against due process challenges under Cooper. Head v. Hill, 587 S.E.2d 613 (Ga. 2003); Mosher v. State, 491 S.E.2d 348 (Ga. 1997). Finding that a mental retardation claim is similar to a claim of insanity at the time of the crime "in that both relieve a guilty person of at least some of the statutory

[5]Appellee acknowledges that some other states have chosen to attribute to a defendant the burden to establish mental retardation by a preponderance of the evidence. See, e.g., Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004). Along with Florida, the states that have set the burden at clear and convincing evidence include Arizona, Colorado, Delaware, and Indiana. See Ariz. Rev. Stat. § 13-703.02 (2003); Colo. Rev. Stat. § 18-1.3-1102 (2003); Del. Code Ann. Tit. 11, § 4209

penalty to which he would otherwise be subject," the Georgia court was guided by Leland v. Oregon, 343 U.S. 790 (1952) which approved the application of the reasonable doubt standard to a defendant's proof of an insanity defense. Id. Accord, People v. Vasquez, 84 P.3d 1019 (Colo. 2004) (upholding 1993 statute requiring proof of retardation by clear and convincing evidence); State v. Grell, 66 P.3d 1234 (Ariz. 2003) (en banc) (approving clear and convincing standard without discussion. Cf. Medina v. State, 690 So. 2d 1241 (Fla. 1997) (upholding requirement of clear and convincing proof that defendant is not competent to be executed). But see Pruitt v. State, 834 N.E.2d 90 (Ind. 2005) (holding clear and convincing standard unconstitutional). See Montana v. Egelhoff, 518 U.S. 37, 51 (1996) ("In sum, not every widespread experiment with a procedural rule favorable to criminal defendants establishes a fundamental principle of justice. Although the rule allowing a jury to consider evidence of a defendant's voluntary intoxication where relevant to *mens rea* has gained considerable acceptance, it is of too recent vintage, and has not received sufficiently uniform and permanent allegiance, to qualify as fundamental, especially since it displaces a lengthy commonlaw tradition which remains supported by valid justifications today.").

(2003); Ind. Code § 35-36-9-4 (2003).

Recently, in Ferrell v. Head, 398 F. Supp. 2d 1273, 1295 (USDC, N.D. Ga. November 18, 2005) the court opined:

> The Petitioner contends that the United States Supreme Court's decision in Atkins, requires this Court to hold the Georgia statute unconstitutional, as the Georgia procedure requires the criminal defendant to bear the burden of proving that he is mentally retarded. In Atkins, the Supreme Court established a federal constitutional prohibition on the execution of the mentally retarded. Atkins, 536 U.S. at 321. The Court, however, specifically stated that it would "leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon the execution of its sentences." Id. at 317 (quoting Ford v. Wainwright, 477 U.S. 399, 416-17, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986)). Included in this mandate is the procedure for determination of a defendant's mental retardation. Id. at 317; see also Morrison v. State, 276 Ga. 829, 834-35, 583 S.E.2d 873 (2003). The Petitioner correctly notes that the burden on a criminal defendant to prove mental retardation is more onerous in Georgia than in many other states. n7 However, the Court in Atkins makes it abundantly clear that each state is permitted to design its own system for determining mental retardation, insofar as such system does not wholly erode the constitutional prohibition against execution of the mentally retarded. The Petitioner fails to persuade this Court that Georgia's statute so erodes this prohibition.
>
> > n7 Of the eighteen states that banned execution of the mentally retarded before Atkins, nine required the criminal defendant to prove mental retardation by a preponderance of the evidence. See Ark. Code Ann. § 5-4-618; Conn. Gen. Stat. § 53a-46a; Md. Code Ann., art. 27 § 412; Mo. Rev.

> Stat. § 565.030; Neb. Rev. Stat. Ann. § 28-105.01; N.M. Stat. Ann. § 31-20A-2.1; N.Y. Crim. Proc. Law § 400.27; Tenn. Code Ann. § 39-13-203; Wash. Rev. Code Ann. § 10.95.030. Five states required clear and convincing proof. See Ariz. Rev. Stat. § 13-703.02; Colo. Rev. Stat. § 16-9-402(2); Fla. Stat. Ann. § 921.137; Ind. Code Ann. § 35-36-9-4; N.C. Gen. Stat. § 15A-2005. In the other three states and in cases before the federal government, the requisite burden upon the criminal defendant is unclear. See 18 U.S.C. § 3596(c); Kan. Crim. Code Ann. § 21-4623; Ky. Rev. Stat. Ann. §§ 532.140, 532.130, 532.135; S.D. Codified Laws § 23A-27A-26.1. The Georgia provisions barring execution of the mentally retarded, the first of their kind, are expressly mentioned and discussed by the Court in Atkins. Atkins, 536 U.S. at 313-14. The Court's discussion of the Georgia statute without criticism of the burdens it imposes upon the parties also suggests tacit approval of the state's procedure.

In Medina v. State, 690 So. 2d 1241 (Fla. 1997) this Court rejected a similar argument that Cooper v. Oklahoma, 517 U.S. 348 (1996) rendered unconstitutional the requirement in Rule 3.812 that there be clear and convincing evidence that a prisoner is insane to be executed. As the Supreme Court acknowledged in Ford v. Wainwright, 477 U.S. 399 (1986) the State has a legitimate and substantial interest in taking petitioner's life as punishment for a crime and the heightened procedural requirements in capital trials and sentencing procedures do not apply (in contrast to competency to stand

trial determinations where the defendant's interest is substantial and the state's interest modest).

Significantly, the issue presented here is in a context of a collateral, postconviction challenge to Appellant's judgment and sentence, as his direct appeal became final years ago. See Brown v. State, 565 So. 2d 304 (Fla. 1990), cert. den., 498 U.S. 992 (1990). The reduced demands of due process recognized by concurring Justices Powell and O'Connor in Ford, *supra*, should be noted and obviously it is not necessary or appropriate in the instant case to determine whether the standard might be different in a case presenting a challenge to F.S. 921.137 on direct appeal of a judgment and sentence. That is simply a case for another day.

The lower court's order should be affirmed.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Carol C. Rodriguez, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this 26th day of June, 2006.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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