IN THE SUPREME COURT OF FLORIDA

DONALD DUFOUR,

Appellant,

v. **CASE NO. SC09-262**
L.T. No. 82-5467

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

SCOTT A. BROWNE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0802743
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
scott.browne@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

The State generally accepts the statement of the case presented in appellant's brief, but notes the statement of facts contains argument. The State therefore provides the following:

DIRECT APPEAL

This Court's direct appeal opinion in Dufour v. State, 495 So. 2d 154, 164 (Fla. 1986), recites the following facts [quoted in part]:

> The evidence at trial established the following scenario. State witness Stacey Sigler, appellant's former girlfriend, testified that on the evening of September 4, 1982, the date of the murder, appellant announced his intention to find a homosexual, rob and kill him. He then requested that she drop him off at a nearby bar and await his call. About one hour later, appellant called Sigler and asked her to meet him at his brother's home. Upon her arrival, appellant was going through the trunk of a car she did not recognize, and wearing new jewelry. Both the car and the jewelry belonged to the victim.
>
> Appellant had met the victim in the bar and driven with him to a nearby orange grove. There, appellant robbed the victim and shot him in the head and, from very close range, through the back. Telling Sigler that he had killed a man and left him in an orange grove, he abandoned the victim's car with her help.
>
> According to witness Robert Taylor, a close associate of appellant's, appellant said that he had shot a homosexual from Tennessee in an orange grove with a .25 automatic and taken his car. Taylor, who testified that he had purchased from appellant a piece of the stolen jewelry, helped appellant disassemble a .25 automatic pistol and discard the pieces in a junkyard.
>
> State witness Raymond Ryan, another associate of appellant's, also testified that appellant had told him of the killing, and that appellant had said "anybody hears my voice or sees my face has got to die." Noting appellant's possession of the jewelry, Ryan asked him what he had paid for it. Appellant responded "You

> couldn't afford it. It cost somebody a life." Ryan further testified that he had seen appellant and Taylor dismantle a .25 caliber pistol.
>
> Henry Miller, the final key state's witness, testified as to information acquired from appellant while an inmate in an isolation cell next to appellant's. In return for immunity from several armed robbery charges, Miller testified that appellant had told him of the murder in some detail, and that appellant had attempted to procure through him witness Stacey Sigler's death for $5,000.

Dufour v. State, 495 So. 2d 154, 156-157 (Fla. 1986).[1]

RELEVANT SECOND (ATKINS) POST-CONVICTION HEARING FACTS

A) Mental Health Experts

Dr. Valerie McClain admitted that the majority of her work in capital cases in on behalf of the defense. (V15,2511). Dr. McClain admitted that as rescored, Dr. Merin's 2002 WAIS yielded a 74. She acknowledged that score exceeds the cut-off score of 70 recognized for mental retardation. (V15,2452).

Dr. McClain acknowledged that Dufour's older brother, John, was universally described as the "slowest" and "least intelligent" brother in the family. (V15,2454). Yet, John is married, holds down a job, and is able to function in everyday life. (V15,2454-55). While Vance Powell now describes Dufour as "slow," in a prior deposition, Powell described Dufour as

[1] Given the page limitations, the State omits reference to any general discussion of the facts developed during the first motion for post-conviction relief. Dufour v. State, 905 So. 2d 42 (Fla. 2005). However, some of the relevant evidence developed during that hearing will be discussed in the argument below, *infra*.

"shrewd." (V15,2453) Dr. McClain admitted that since Dufour took the same intelligence test just days after she administered hers, she would expect an increase in Dufour's score on Dr. McClaren's test, "technically" somewhere around five points. However, she testified that Dufour looked ill and took a long time to answer between questions. (V19,2459).

Dr. McClain acknowledged that Dufour sent several requests requesting treatments for Hepatitis and even spelled the word "Interferon" correctly. (V19,2464). DOC records also revealed that Dufour was concerned about his diet, requesting or demanding a special diet in some of his medical requests. (V19,2464). Dufour told Dr. McClain that he was taking 12 pills a day for his medical condition at the time she saw him. (V19,2464-65).

Dr. McClain admitted that she administered two tests to detect malingering. On both of those tests, the indication was "positive" for malingering. (V19,2465). She admitted that both of those tests are designed specifically for the purpose of detecting malingering. (V19,2465-66).

Dr. McClain acknowledged reviewing a WRAT-III taken by Dufour in 1971 in the seventh grade which gives achievement scores for a student's reading, arithmetic and spelling ability. (V19,2468). On spelling skills, 38 percent of children taking

the test fell below the score achieved by Dufour. Similarly, on language skills, Dufour scored above 28 percent of the children taking the test. On arithmetic "over a third of the students" who took the test fell below Dufour in terms of achievement. (V19,2472). Dr. McClain agreed that only between 1 to 4 percent of the general population fall within the category of mentally retarded. (V19,2473).

Dr. McClain did not talk to the English teacher who followed Mrs. Jones who awarded Dufour "C, C, C, C and C in English[.]" (V19,2474). Dr. McClain admitted that two different teachers in two different years gave Dufour average scores in English. (V19,2474-75). However, she discounted the grades, noting that her understanding that in basic class if they were exerting effort, a student would be awarded a C. (V19, 475).

Dr. McClain admitted that the Slosson [administered by Dr. Zimmerman] test is not acceptable to determine retardation because it is not reliable. Dr. Zimmerman is the very first doctor or mental health expert to opine that Dufour was retarded. Dr. McClain acknowledged that this was only after Dufour had been convicted and sentenced to death. (V19,2476). There is no indication that Dr. Zimmerman administered any tests of malingering to Dufour. (V19,2478). Dr. McClain acknowledged that Dufour sought medical or psychological consultation because

he was so depressed over facing a death sentence in Mississippi. (V19,2476).

Dr. McClain learned that Dufour apparently did at one time have a license. (V19,2481). She also has seen documents reflecting the fact Dufour had a vehicle and that his ownership of that vehicle was forfeited. (V19,2482-83). Dufour responded to that request for forfeiture, filed a writ of habeas corpus *ad testificandum*, and asked to be brought back to Orange County for the purpose of testifying at the forfeiture hearing. (V19,2484-85). Dr. McClain acknowledged that the ability to meaningfully participate in legal proceedings is a reflection of adaptive functioning. (V19,2485). Dr. McClain acknowledged that Dufour's brother, Gary, in a deposition described Dufour as "persuasive." (V15,2488).

On cross-examination, Dr. McClain examined letters apparently written by Dufour, one of which was written on the back of a Mississippi court pleading, and was addressed to Stacey Siegler. Dr. McClain noted spelling errors and some run on sentences, but, did agree that the "thoughts" are there. The prosecutor read the following excerpt: "There's still good time to be had by raising a family if you want to, colon, all it takes is a little faith, you once asked me to have faith in you, comma, well, I still do, honey, I guess, don't you have in me

anymore?" (V15, 2493). Dr. McClain criticized that portion of the letter because Dufour apparently used a "colon where you would basically put a period." (V15,2494).

In another letter Dufour refers to the exact date he lost his Oldsmobile and that they gave him a court date four years later. "I think it does show his awareness of the car, the possibility of coming back in four years." (V15,2499). Dr. McClain admitted that the letters she reviewed did look like they were from Dufour himself. (V15,2501). "The content does appear to reflect what's going on for him, yes." (V15, 2501). It would have to be considered, though, whether or not someone helped him to construct those letters, but, as "they're constructed, they do have his emotions there, concerns he has and an indicator of him trying to communicate his thoughts." (V15,2501).

Dufour called Dr. Dennis Keyes to testify. Dr. Keyes admitted he was very much against capital punishment for the mentally retarded and that he has testified in 40 capital cases, each time on behalf of a defendant. (V15,2632-4).

Mental retardation is defined as two standard deviations below the mean, or, 70, but, you have to take into account the "standard error of measure." "So in an IQ, it's typically plus

or minus five points." (V16,2654-55). Additionally, adaptive behavior must be considered.

Dr. Keyes testified that long range planning and abstract thought are "[e]xceedingly rare" in people with mental retardation. "Planning something six months down the road, three months down the road. They're not able to anticipate that." Indeed, Dr. Keyes stated they cannot plan anything, a "party" going on a "vacation." (V16,2716). They lack ability to focus or concentrate, they have poor judgment skills, acquiesce to authority figures, "even if it's not necessarily in their best interests. (V16,2657). The mentally retarded have poor planning and coping skills. (V16,2659-60).

Dr. Keyes admitted that Dufour is right on the "line" for retardation and that this "is a difficult case, yes." (V16,2717). Dr. Keyes agreed that a mental retardation diagnosis depends upon a "valid test" of a person's intelligence (V16,2722).

Dr. Keyes thought that Dufour was a follower but did possess contrary information from Stacey Siegler and Raymond Ryan indicating that Dufour called the "shots" in their social group. (V16,2727). Dufour's brother, Gary, in a deposition, described his brother as someone who could adapt to circumstances and classified his brother as a "leader."

(V16,2751-52). His brother Gary also called Dufour "persuasive" and that he could "work a room." (V16,2753).

Dr. Keyes testified that when he met Dufour he appeared disheveled, smelled, and had unkempt nails. (V16,2735-36). Dufour's appearance surprised him because by history everybody had said Dufour was "very clean and aware of his hygiene." In fact, Dr. Keyes acknowledged that Dufour occasionally made his living by being considered attractive to other people for sexual purposes. Dufour gained access to the gay couple he killed in Orlando and victim Zack Miller, to take him to a place where he could be killed by being considered attractive. (V16,2736-37). And, Dr. Keyes agreed or had been told that Dufour attracted the two victims in Mississippi in the same manner. Dr. Keyes agreed that Dufour's appearance or presentation was a notable change from his past history. (V16,2737).

Dr. Keyes administered no intelligence tests but did rely upon the testing of the other experts. (V19,3295). Dr. Keyes was not aware that another recognized expert had seen Dufour within a year of his examination and evaluated Dufour for mental retardation. (V19,3296). Dr. Keyes agreed that administration of a test within a certain period of time can affect later testing. In fact, Dr. Keyes agreed that if someone was inclined to malinger, any prior association with a particular testing

instrument would give that individual information that they might be able to use in later malingering attempts. (V19,3297).

Dr. Keyes acknowledged that rescoring the WAIS administered by Dr. Merin, he came up with a 73 full scale IQ. (V19,3301). But, on rescoring some optional items on the test, Dr. Keyes testified the full scale was “74, which still puts it within the range of possible mental retardation.” (V19,3305).

Dr. Keyes acknowledged that Dufour’s scores on the test of memory and malingering (TOMM) were very low in the malingering range, for both Dr. McClaren and Dr. McClain. (V16,2742-43). However, when he gave the same test about a year later in 2006, Dufour’s scores were not low, in fact “they were very high.” Dr. Keyes agreed that the inconsistency in results could suggest “malingering.” (V16, 2743).

Dr. Keyes admitted that prior to Dr. Zimmerman no mental health expert that evaluated or worked with Dufour considered him to be mentally retarded. (V16,2749). Dr. Keyes admitted that Dr. Gutman who had extensive experience working with the Gateway School and setting up the program for referral of children with mental retardation did not consider Dufour mentally retarded. (V16,2749-50).

The State called Dr. Sidney Merin, a board certified diplomat in professional psychology and neuropsychology has

testified as an expert in court some 1300 times in the State of Florida. (V17,2774). Dr. Merin "developed the psychology testing program" for the "McDonald Training Center in Tampa, an active organization which catered to individuals with low IQ levels." (V17,2779). He developed a standardized testing program to assist the placement of people so "that they could function at their top level, whatever the top level may be intellectually." (V17,2780).

In 2002, Dr. Merin assessed Dufour's intelligence using the Weschler Adult Intelligence Scale III, that has 13 subtests. (V17,2783). Over the course of his career, Dr. Merin has administered intelligence testing, including previous versions of the WAIS some 10,000 times. (V17,2783-84). Dufour, obtained a verbal intelligence score of 79 and a performance score of 72, with a full scale IQ of 74. (V17,2784). After being advised of potential scoring errors, Dr. Merin reviewed the test and did find some computational errors in the raw scores, but, as corrected, Dufour's IQ score was "essentially" unchanged. (V17,2784-85). If, as the defense experts testified, such scoring errors dropped Dufour's IQ to a 73, Dr. Merin testified that a "one point difference is statistically not significant at all." (V17,2785).

Dufour's IQ score fell in the borderline range, between 70 and 79. On some individual sub tests Dufour scored in the low average range. He did well on comprehension, which measures the ability to grasp a social problem and solve it verbally. Dufour's score on this aspect of the test was average. (V17,2787). Dufour's processing speed, however, was low. A lengthy history of drug and alcohol abuse may well account for such a slow processing speed (V17,2788-89). Dr. Merin examined Dufour's school records and thought that Dufour probably did have a learning disability in childhood. (V17,2789).

Dr. Merin did not think Dufour malingered on the WAIS he administered, but, did consider that Dufour "just wasn't motivated, which is not necessarily the same as malingering." (V17, 2888). He thought that Dufour's IQ may actually be higher based upon the "absence of motivation for that particular type of tasking." (V17,2889). Dr. Merin explained: "Again, he was malingering on some of the tests that he could get easily or that came to him easily or in which he was interested in, he did very beautifully." (V17,2890).

Dr. Merin did not agree that he made any error in employing the reversal rule. Over the course of his career Dr. Merin has attended workshops and seminars, which describe how to administer the reverse order rule. (V17,2916-18). Dr. Merin

explained that if you take a look at the specific questions, "they are so simple that a person with a lower IQ than does he have (sic) would have been able to answer them." (V17,2918). For example, Dr. Merin explained "I had a pretty good idea that he knew what money was, which is one of the three questions I did not ask him." (V17,2919). Dr. Merin appeared to agree that even assuming he made a mistake on the reverse order rule and the computational errors alleged, Dufour's full scale IQ would drop one point, from 74 to 73. (V17,2924).

After testing and interviewing Dufour, Dr. Merin concluded that he was not mentally retarded. (V17,2789-90). While it was not possible to fake smart on an IQ test, it is possible to malinger, which is of particular concern in the forensic arena. (V17,2790-91). In terms of Dufour's functioning he had both grades and an IQ test from Dufour's school. The grades were low, ranging from F's to C's. (V17,2793-94). The IQ test, administered to Dufour in the 7th grade on which he scored an 80, does not support the notion that Dufour is retarded.[2] (V17,2795).

Dufour's scores on the WAIS run counter to what you would expect from the practice effect. (V17,2798). If Dufour scored a

[2] Dr. Merin admitted that the Lars Thorndike is administered in a group and is not as reliable as an individually administered test. (V17,2864)

74 on the WAIS in 2002 and subsequent scores were lower, including five points lower on tests administered just days apart, Dr. Merin testified it could very well be explained by "a motivational factor." (V17,2797-98). Moreover, if Dufour scored very poorly on the TOMM, a test of memory and malingering, for Dr. McClain, Dr. Merin would have concern about the validity of any intelligence testing results. (V17,2799). If an individual malingers on one test, you must be concerned that he or she will carry on that motivation for another test. (V17,2799-2800). An intelligence test relies upon the good faith effort of the examinee. (V17,2800).

In evaluating Dufour, Dr. Merin said that you also have to account for personality characteristics. "Actually he's very skilled. He's capable of manipulating and can do so very, very skillfully so that you have to be pretty sharp to pick up the fact that he's even doing it because he'll come across as being very honest and capable whereas, in fact, he's exaggerating or he's malingering." (V17,2801). Dr. Merin found Dufour had psychopathic tendencies and such a personality might be expected to malinger when it is in their best interest to do so: "Very much so, yes." (v17,2802). A high score on the MMPI psychopathic deviate scale, coupled with numerous examples of antisocial behaviors, including murders, robberies, and leading

a “parasitic” lifestyle” support the notion that Dufour has an Antisocial Personality Disorder. (V17,2803-04).

Dr. Merin also found evidence in the record to address Dufour’s adaptive behavior. For example, Dr. Merin examined a progress report from the Lantana Correctional Institution in 1978 which reported that Dufour completed a small engine repair course, was assigned as an aide to teach the course, and noted that Dufour has virtually organized and instructed the motorcycle repair course. (V17,2804-05). The report noted that Dufour has done an excellent job and indicated that Dufour had completed his GED. This report indicated Dufour was a capable individual and that he functions well when he wants to. (V17,2805). Moreover, the Lantana team felt that Dufour was “definitely” capable of college level work. (V17,2805-06). This suggests his adaptive functioning is good, he can organize, put things in order, which are all adaptive type processes. (V17,2806). These types of DOC records provide collateral data which are relied upon to show that Dufour was seen as a fairly capable person by observers. (V17,2807).

Dr. Merin reviewed an educational or vocational counselor’s report from the DOC dated September 2nd 1977, which reflected a IQ score of 106 for Dufour. (V17,2810-11). The Beta, however, Dr. Merin acknowledged is a rough intelligence assessment. Dr.

Merin concluded that the DOC documents he reviewed reflect, as he concluded, that Dufour "has got a lot of street smarts." (V17,2811).

A probation report from 1977 noted Dufour's mother called Dufour "a good talker and capable of being a very good salesman." Such family observations, as those made by Dufour's mother, that he is a good talker and would be a good salesman, are inconsistent with them thinking he was slow or dimwitted. (V17,2813). Dr. Merin reviewed a deposition of Gary Dufour from November, 2000 which also shed light on how Dufour functioned. Gary called his brother Donald "street smart." (V17,2816). Donald had good people skills: "Yeah, yeah, people like Donald. He had I guess what you call a gift to gab, you know, he could talk somebody out of anything, you know. He was like a salesman. He could talk somebody out of something or into something, I guess. He was pretty people oriented, you know, you might say." Moreover, when asked if his brother would be called a leader or a follower, Gary testified: "A leader." (V17,2817). When asked to explain, Gary stated: "I don't know. He just–because he was always like the center of attention or wanted to be the center of attention, so to speak." And, Gary admitted that Dufour was "very persuasive." (V17,2818).

According to Dr. Merin, the characterizations of family members give insight into Dufour's adaptive functioning because they are fairly close to that person and their characterizations are similar to those others made, that Dufour was "street smart" and "persuasive." (V17,2819).

Dufour also reviewed the deposition of Stacey Siegler who described Dufour's role in the group: "In general, he was the controller. He was the one who organized things. He was the one who brought about the action." (V17,2814-15). Dufour was seen as a leader, which is a characterization you would not expect of someone who is mentally retarded. (V17,2815).

Dr. Merin reviewed the 2002 post-conviction hearing notes from defense expert Dr. Jonathan Lipman. Dufour explained that when he attended Wymore Tech he did nothing but "deal drugs and stay high." (V17,2821). This behavior might explain Dufour's lack of academic success, at least at Wymore Tech. Also, Dufour told Dr. Lipman that he got the role of Paul in the musical "Hair." He toured with the troupe and was ultimately kicked off because he was not yet 18. The real reason for his dismissal was that the musical director was always trying to get him into bed and Dufour rebuffed his advances. (V17,2822).

Dr. Lipman's report also reflected that Dufour was arrested for possession of pharmaceutical drugs and attempted to bargain

his way out of the consequences. According to Dufour, he told police he could lead them to the dealer but described misleading the police by providing "false leads." (V17,2824). This suggested Dufour was trying to manipulate the police and talk his way out of trouble, something he would not expect from someone who is truly mentally retarded. (V17,2825).

Dufour also admitted to Dr. Lipman that he profited from Stacey Siegler's prostitution, that he looked out for her and protected her. Dufour, however, went on to explain that he was not a pimp, because he would have had many girls working for him. Again, according to Dr. Merin, this behavior was consistent with Dufour's personality and his tendency to profit from other individuals. (V17,2826).

Dufour also related stealing from homosexuals, and, stealing the victim's car, but, dropping it off in the opposite side of town, the "black section of town", and arranging for somebody to pick him up after dumping the car. (V17,2826-27). This showed Dufour was criminally adaptable, committed a crime in one part of town, and dumping the car in the black section of town in an effort to "throw police off." (V17,2827).

Dr. Merin also considered the facts of the Zach Miller murder, wherein Dufour arranged the crime, targeted the victim, lured him to a remote location, and, took steps to cover it up.

He was thinking ahead and planning, showing adaptive functioning in the criminal arena. All of this information, including the intelligence testing, allowed Dr. Merin to come to the conclusion that Dufour is not mentally retarded. (V17,2830).

Dr. Harry McClaren possessed experience determining whether or not a person he had been treating or evaluating was mentally retarded. (V17,2930). He has testified in courts hundreds of times and in capital cases between 50 and 100 times. (V17,2931). Dr. McClaren determined to a reasonable degree of psychological certainty that Dufour was not mentally retarded. (V17,2933).

Dr. McClaren saw Dufour over the course of four days to interview him and conduct tests. (V17,2933). He administered a number of tests, including the TOMM, test of memory of malingering, the WRAIT, and, Weschler Adult Intelligence Scale-III as well as a Scales of Independent Behavior-Revised (SIB-R) with Dufour serving as his own respondent. Given the incarcerative setting, Dr. McClaren thought that malingering, secondary gain, and possible manipulation were obvious concerns. (V17,2934). A forensic examiner must consider the possibility of malingering in the sense of outright fabrication of symptoms or exaggeration of symptoms. (V17,2935). To that end, Dr. McClaren administered the TOMM and Millon, because the Weschler

(WAIS) has no built-in component to assess malingering. (V17,2935-36).

The TOMM is a measure of malingering because it is so easy that even persons with severe documented cognitive impairment get high scores. (V17,2938). The results obtained by Dr. McClaren on the TOMM were very low and suggested that Dufour was either malingering or not putting forth his best effort. (V17,2940).

On the WAIS, Dufour did poorly, with a 65 verbal and 65 performance IQ for a 62 full-scale IQ. (V17,2941). If an individual takes the same test close in time you should expect to get a 5 to 7 point higher score on the second test. (V17,2942). Dr. McClain obtained a 68 on the same test a few days earlier. Dr. McClain also administered the TOMM to Dufour and her scores were also in the 20's and therefore were "unexpectedly low." (V17,2942-43). Dr. McClain also administered the M-Fast which is another test of malingering. Dufour scored a 10 on that test and for any score above 6, you begin to suspect malingering. The instruction and scoring book for that test provides: "[e]xaminees who inure six or more M-FAST items are presenting in a manner highly suggestive of malingering." (V17,2944-45). This score reinforced Dr. McClaren's reservations about the reliability of the WAIS that

both he and Dr. McClain administered. (V17,2946). "It made me think there was a significant likelihood that either lack of effort or exaggeration of symptoms was at work on both evaluations." (V17,2946).

Dr. McClaren reviewed the raw data and was present for Dr. Merin's testimony and having rescored it he came up with a 72 or 73. Some subtest scores increased and some decreased. (V17,2950). But, since Dr. Merin, Dr. McCLain and Dr. McClaren all administered the same test, the results ran counter to the Flynn effect,[3] and the practice effect, as well as considering the scores on malingering tests, and, personality testing, led Dr. McClaren to believe his score was somewhere in the 70's, which was consistent with Dr. McClaren knew about his past. (V17,2952-53). And, as a forensic psychologist, Dr. McClaren would not simply rely upon a test to decide everything, he is looking for "convergent validity." (V17,2953). To that end, Dr. McClaren reviewed "over 30 years" of records encompassing medical records, DOC records, depositions, court proceedings, police reports, comments from family DOC personnel, and interviewing his girlfriend. "So, looking at these sources of information, patterns seemed to emerge that made me believe that

[3] The tendency of IQ scores to increase in the population over time unless the test is re-normed. (V17,2952).

his adaptive behavior and intellect was not consistent with the diagnosis of mental retardation." (V17,2954).

Dr. McClaren reviewed the video of Dr. McClain's evaluation of Dufour and noted she told Dufour he was being evaluated for mental retardation and that another doctor, Dr. McClaren, would later be coming to conduct a mental retardation evaluation. (V18,2963,2967). That fact caused Dr. McClaren concerns because Dufour "could understandably be motivated to behave in a manner in the evaluation that would support that contention." (V18,2967-68). Dr. McClaren found evidence in the record to support the notion that Dufour was inclined to malinger. (V18,2979). A statement in a document from a 1977 drug treatment program Dufour was in called The Door, advised Dufour, as a goal, to "refrain from manipulative behavior." (V18,2979). Similarly, a 1979 MMPI from the DOC reflected the "very high" spike on scale 4,[4] and also the notation from a psychologist, Dr. Ferfaili (sic), which showed that Dufour was manipulative. (V18,2986-87). Also, a supplemental team decision at Marion Correctional in Lowell Florida noted that Dufour, among other things, was the most "malingering" inmate there. (V18,2988).

After leaving Florida, Dufour was convicted of two capital murders in Mississippi and was incarcerated in Parchman Prison.

[4] The psychopathic deviate scale. (V17,2948).

(V18,2988). A psychiatric evaluation of Dufour by the Mississippi DOC noted that Dufour was "quite friendly and manipulative" and that his "fund of general information" was "adequate." (V18,2989). Fund of information is a common term used by both psychiatrists and psychologists to reflect that the individual has a decent understanding of the world around him. (V18,2991). Low intellect on the other hand is commonly noted if the psychiatrist had perceived it. (V18, 2991). Another report from Dr. Gutman in 1984 reflected that Dufour showed little signs of a conscience, and, noted that he acted in a "thoroughly perverse and animalistic fashion with no thought or consequences of the moral implications." Dr. Gutman's analysis fits within the psychopathic deviant spike on scale 4 "and what we knew about his behavior." (V18,2992).

Dr. McClaren reviewed documents reflecting Dufour's ability to interact with corrections officers and function on death row, write letters, and communicate. (V18,2994). He gave the SIB-R to correctional officer York who had interacted with Dufour for about two years, five days a week. The result was a Weschler IQ comparable score of 85 with a band of error from 83 to 87. (V18,2995).

A probation report reflected that Dufour had done confidential informant work for the Orlando police and that

"this officer is personally aware of one drug transaction which he aided in setting up." It would be unlikely that a person with mental retardation would participate in such undercover activity. Also, the probation officer's report reflected that Dufour's mother reported that he was "a good talker and capable of being a good salesman" which Dr. McClaren noted "fits with other references to his verbal scales (sic) being able to work the gift of gab and that sort of thing." (V18,2999). Again, "that is consistent with some things we are probably coming to where he's described as having the gift of gab and being able to work a room, being manipulative. So, again, Dr. McClaren explained, "more pieces in the mosaic." (V18,3000).

The records from Lantana reflect that Dufour completed a small engine repair course and showed capabilities which are recognized by those around him. (V18,3001). Dr. McClaren had the opportunity to see and evaluate mentally retarded individuals in the prison system and the types of criminal activity they were accused or convicted of, and, thought it unlikely that a retarded person would engage in the planning behavior Stacey described for Dufour. (V18,3003-04). She described some of the planning involved with Dufour making a phone call to Stinson and Wise, the two gay men who were robbed and killed by Dufour. (V18,3004-05,3010).

Dr. McClaren also testified that he talked to Stacey and she described Dufour arranging a trip to Houston. Dufour had the ticket, the money, and they stayed at the "Houstonian" which is an expensive hotel. (V18,3010). They went to the Montrose district, used cabs, paying for things, so Dr. McClaren testified, "[a]gain, piece of the puzzle." (V18,3011).

Dr. McClaren reviewed the offense report for the two Mississippi murders committed by Taylor and Dufour after fleeing Florida. (V18,3011-12). Taylor was arrested immediately. But, Dufour was able to evade capture for two weeks and was arrested in Jackson, Mississippi. (V18,3013). When he was interviewed, Dufour did not make any statements about the murders to the police, but he said that he rented a room, "cut his hair short" and "dyed it in an attempt to hide his identity." (V18,3014). That indicated a degree of planning and anticipation of what would happen if he came to the attention of the police, again, pieces of the puzzle "about his ability to cope with the world." There was no reference to Dufour having the support of any other person during this period. (V18,3015).

A statement of Raymond Ryan after Dufour's murder of Mr. Miller, reflected Dufour discarding and dismantling the murder weapon. (V18,3015-16). Again, anticipation, and planning exhibited by Dufour. Taylor also described Dufour taking apart

and discarding portions of the murder weapon. (V18,3017). This is an example of adaptive behavior in that situation, "post-armed robbery/homicide." (V18,3018).

Dr. Lipman's notes from 2001 were reviewed and in them Dufour reported being in the musical "Hair", being given the role of Paul, and touring with the troupe. Dufour reported that he was kicked off the troupe for being under the age of 18, but, in reality he said it was because the musical director, who was gay, was trying to get him into bed and he rebuffed or resisted the advances. "It would be unlikely that a person who was mentally retarded would have a role in a musical performance travel troupe." (V18,3022). Dufour also discussed with Dr. Lipman the trip to Houston and the Montrose strip where there was a "carnival" atmosphere, stating that the trip cost $5,500 "he recalled." (V18,3024).

The DOC records from 2000 to 2005 reflecting inmate grievances and requests shed light on Dufour's adaptive behavior. (V18,3032). One such inmate request in which Dufour, beside poor spelling, noted his medical condition, Hepatitis C, and heard about treatment options, specifically mentioning interferon, and asking why he was not receiving treatment for his potentially fatal condition. Dr. McClaren thought it unlikely that someone who was mentally retarded would know about

Interferon and it also reflected that Dufour was concerned about "his health and making requests for proper treatment." (V18,3033). A similar request, from October 16, 2000, in which Dufour stated: "I have Hepatitis C. I am not being given the drug to cure it. I am requesting treatment. Enclosed are two copies of my request. I have the right to treatment like others and want it." (V18,3033-34). He has asserted his rights in this case, just like he asserted his right to silence when he was arrested in Mississippi, showing independence and judgment. (V18,3034). On yet another document, Dufour complained about being overcharged for blood work because he had Hepatitis C, and that he had been wrongly charged $12.00 from his prison account. (V18,3035). On June 27, 2001, another complaint from Dufour: "In month of April I was charged two times-was charged two times for medical copay when I only signed for one sick call. Now I am charged on 5/15/01 for one time medical copay. I have Hep C and they take me down there for blood. That is not to be charged, so two payments are wrong." (V18,3036).

Similar complaints about his condition and his perceived inadequate medical treatment and attention at the jail were made by Dufour, including complaints about the type of foods and his intolerance for fats due to his medical condition. (V18,3036-37). Dufour was not only concerned about his diet, but, he

requested a specialist and a liver biopsy to determine the amount of damage to his liver. (V18,3037-38). Another one, noted his dietary complaints, and the fact he has had to purchase tuna fish off the canteen to fulfill his need for high protein. (V18,3038). Other documents reflect medical issues and having people taken off his visiting list, needing protein, all of which reflect "he is able to express his needs, concerns, trying to take care of his health and his situation." (V18,3040). Dr. McClaren admitted that the requests were generally handwritten and rife with spelling and grammatical errors. (V18,3134). However, Dufour is able to communicate through writing. (V18,3136).

The standard error of measurement is not a criterion for diagnosis, but, a "statistical term." (V18,3138). Dr. McClaren agreed that the AAMR states that mental retardation is best assessed using standardized testing instruments taking into account the standard error of measure. (V18,3139). Dr. McClaren noted that there is ongoing debate regarding the best tools, what the standard of measurement should be, and constructs and these vary over time. (V18,3140-41). Intelligence testing is not necessarily precise and there are "variants in these hypothetical constructs, and to try to make them precise is fruitless." (V18,3141). The AAMR and various states use

different legal criteria and even the AAMR criteria may be different at different times. An IQ score is more accurately understood as a range of measure. (V18, 3142). Dr. McClaren acknowledged that the Florida Supreme Court's decision in Cherry[5] which sets a cutoff of 70, without regard for the standard error of measure, conflicts with the DSM-IV-TR. (V18,3145). While Dufour did receive a cluster of IQ scores in the range of mental retardation or within one standard deviation, you must consider those scores in light of possible exaggeration, malingering, deception. (V18,3146). Dr. McClaren criticized Dr. McClain for specifically telling Dufour that he was being tested for mental retardation and Dr. McClaren testified that "there's no doubt in my mind that Mr. Dufour knows the outcome very well." (V18,3150).

Dr. McClaren admitted that the Beta administered to Dufour by the DOC is a screening instrument, a group test, and not suitable to diagnose mental retardation. (V18,3076). Dr. McClaren admitted that Dufour was admitted a Slosson in 1989 who diagnosed Dufour as retarded, prior to Atkins[6], but, for the purpose of clemency proceedings in Mississippi. (V18,3077). The Slosson is a screening test to assess non-verbal intelligence and not suitable for diagnosing mental retardation. (V18, 3077).

[5] Cherry v. State, 959 So. 2d 702 (Fla. 2007).
[6] Atkins v. Virginia, 530 U.S. 304, 122 S. Ct. 2242 (2002).

Dr. Merin's test was the most valid, and, even if you reversed or took away points on the reversal rule and given all zeros "and I don't think that that would have been the case" it would not go below 70. And, Dr. McClaren's best estimate after rescoring the test was that Dufour scored a 72 or 73. (V18,3083). The recent WAIS tests were not within the standard error of measurement, but were within one standard deviation of each other, which is within 15 points. (V18,3085). Dr. McClaren thought that Dufour is someone with a lower or borderline IQ, but that the scores on the intelligence tests do not reflect his optimum effort. (V18,3086).

Another expert who examined Dufour, Dr. Gutman, thought that Dufour had average intellect. (V18,3087). Dr. McClaren admitted that Dr. Gutman, like most psychiatrists, made his assessment of intelligence from the clinical interview, not from intelligence testing. However, Dr. McClaren thought that his assessment was of value, stating:

> No, but they routinely make judgments about the intellect of people they are examining, and I believe that most experienced psychiatrists, especially those that work in schools with exceptional students as Dr. Gutman did in his career, can make observations that are useful in regard to estimates of intellectual ability.

(V18,3128-29).

The DOC documents supported his assessment of Dufour's intellectual and adaptive functioning, and provided "divergent sources" to obtain "convergent validity" (V18,3040-41). Dr. McClaren also reviewed Dufour's school records and noted the test (administered in a group) reflected Dufour's score of 80. (V18,3041).

In the Lantana prison, they thought Dufour had average learning ability with somewhat limited formal education and recommended that he obtain a GED, "which, of course, we all know that he late did achieve." (V18,3046-47). He completed the GED program at Lantana, and, completed vocational training, a small engine repair course. (V18,3047-48). On a progress report, it was reported that Dufour was an excellent worker and that he virtually organized and constructed a motorcycle repair course, satisfactory hygiene. (V18,3048).

While at Lantana, Dufour received a disciplinary report when a guard asked for a paper Dufour was typing. Dufour refused, claiming he was working "on treatment papers and no one was permitted–that no one was permitted to read." The guard told Dufour it was a "direct order" to which Dufour replied "he would destroy the paper." "He then removed the paper from the typewriter and began tearing it up." What Dr. McClaren thought significant about the report was that Dufour had learned to type

to a degree "and also was knowledgeable of the idea of confidentiality." (V18,3050). That was not something he would expect from an individual in the mentally retarded range; "it is a data point that adds to the big picture." (V18,3051).

Dufour attempted to procure a change in venue through inmate Miller based upon pretrial publicity. (V18,3054-55). Also, Dufour mentioned to this same witness that he was worried about Stacey Siegler testifying and that he could end up in the "electric chair." (V18,3055-56). Dufour stated that he could come up with the money to kill Stacey and asked how much it would cost. (V18,3056-57). Such testimony reflected, again, that Dufour could look to the future and recognize a "damaging witness, if eliminated, could help his case." (V18,3057).

In another document, requesting an administrative remedy, Dufour complained about the Department of Corrections stopping some of his "books, like, meditation, yoga, philosophy, enlightenment, religions, health, Buddism." Dr. McClaren thought that such a request for administrative remedy and specifically the content mentioned was unlikely for someone who is mentally retarded.[7] (V18,3059). Similarly, a letter Dufour

[7] Another document, from 1981, a progress review from Marion, dated November 4′ 1980 noted that Dufour spent the "bulk" of his time reading and lifting weights. (V18,3051). Another document from that time period reflected that among the items in his cell were a dictionary and US News. (V18,3052).

sent to Stacey Siegler in which Dufour wrote that it is “raining cats and dogs and horses and cows and well, shit, maybe some say blades will come down.” (V18,3059). This comment, taken in conjunction with Siegler’s sworn testimony that Dufour wanted her to put saw blades into cigars to give to his lawyer to be brought to the jail, suggested the idea of wanting saw blades to make an attempt to escape. (V18,3059-60). Indeed, Dufour made a statement that he thought it would be easier to for him to “escape” if he was in a “psychiatric ward.” (V19,3247). Another example of Dufour using his judgment to “further his perceived best interest, cunning for short.” (V19,3247).

As for self-interest, if an inmate signs a sworn motion alleging mental retardation as a grounds for prohibiting his execution by reason of mental retardation, and, if a psychologist then tells this inmate a test is being administered to assess mental retardation, Dr. McClaren thought there is a “high likelihood” that a death row inmate, realizing that retardation is a bar to execution, “would be motivated to generate test results in support of that intention.” (V19,3249-50).

While Dufour generally lived with other people, after the homicides in Mississippi, Dufour on his own procured a room in a boarding house, obtain and wear nice clothes, and, changed his

appearance in an effort to evade capture. (V19,3251). Another report confirmed that Dufour rented a room under an alias, disguised his identity, and, secured false identification. This suggested that Dufour had the capability to live on his own, rather than be parasitic. (V19,3256). This information, including the list of clothing [jacket, khaki pants] found in Dufour's room, suggested that what Officer York told Dr. McClaren about his selecting or ability to select clothes was true. (V19,3256-57). This also coincided with Siegler's recollection that Dufour had the ability to and did pick out his own clothes.[8] (V19,3257).

Dr. McClaren had a list of the psychiatrists and experts who had seen Dufour over the years, which included two psychiatrists, four, perhaps five psychologists, and, those individuals did not find Dufour mentally retarded. The three which have, included Dr. Zimmerman for the purpose of clemency review in Mississippi, and Dr. Keyes, and, Dr. McClain. (V19,3263). Dr. Zimmerman diagnosed retardation using a

[8] Similarly, Officer York's answer on the SIB-R wherein he thought Dufour could do well presenting a sales presentation was supported by several other people. Notably, Dufour's own family members who talked about his gift of "gab" that his mother characterized him as a good talker and would make a good salesman. Dufour was known to talk "people into things." (V19,3258).

Slosson, which is not a proper test for diagnosing mental retardation. (V19,3265).

When asked about any other expert asked to assess Dufour for mental retardation on re-cross, Dr. McClaren thought that this was a "delicate" matter. Dr. McClaren explained that he reviewed DOC documents which indicated another mental health expert, "probably the best-known psychologist in the area of mental retardation examined Mr. Dufour on February 4, 2004, according to DOC records, and his name is not on the witness list or testified in this case." He did not know what the interaction was, but, he knew what it looked "like." (V19,3266).

In sum, Dr. McClaren explained:

> There is no indication, despite doing poorly in school, repeatedly coming to the attention of authorities, having contact with police, that prior to the age of 18 he was ever suspected of being mentally retarded.
>
> Second, past 18, much of his criminal behavior, writing, conduct, scheming, planning to me show a higher level of behavior than I would expect from someone who is mentally retarded. I believe that some of the behavior that happened to him, as far as substance abuse, head injuries, had the potential to detract from his level of intellectual functioning, and I think all things considered, that he has a very clear history of being manipulative, exploitive, deceptive person going back many years as described by numerous data points that we have gone through today.

(V18,3065-66).

And, on surrebuttal, using all the scoring errors mentioned by Dr. Keyes, and, rescoring it, including an increase in

performance score, including the optional tests administered by Dr. Merin, Dr. McClaren testified that Dufour's full scale IQ was "75." The "90 percent confidence level" of such a score, according to Dr. McClaren is a "72 to 79" range. (V19,3310).

The defense called Dr. Michael Gutman who testified that he was a "double-boarded" forensic psychiatrist, of whom there are "only 150" in the country out of 50,000 psychiatrists. (SV-1,117-18). Dr. Gutman also had experience dealing with mental retardation and was involved in conducting examinations for the Gateway School, as part of the Orange County guidance clinic. The Gateway School accepted referrals from the regular school system. Dr. Gutman testified that the school was established when he got to the area in 1966, so a few years before he arrived. (SV-1,124).

By 1984, when he evaluated Dufour, Dr. Gutman thought he had probably evaluated over a hundred and fifty individuals for mental retardation. (SV-1,126-27). Dr. Gutman concluded Dufour was of average intelligence based upon the question and answer period and his face to face evaluation.[9] Dufour appeared to have verbal skills, to "be able to communicate to me that he-he had a

[9] Dr. Gutman thought that Dufour was a sexual predator, an antisocial behavior and mind, which he would classify now as an "antisocial personality." (SV-1,130). Dr. Gutman acknowledged that he most often is called to testify by the defense. (SV-1,131).

grasp and understanding of many events in his life and he could communicate them. And it is that type of questioning." In addition, he had Dufour perform certain calculations and so he would estimate a range based upon that interaction. (SV-1,128). The range was from retarded, borderline, low average, average, above average to superior. Dr. Gutman makes the estimate from what he "felt about the person." (SV-1,128). But he thought his estimate of intelligence was "subjective" and probably the least reliable of his mental status exam parameters. (SV-1,122).

The court took judicial notice of the pleadings and entire post-conviction record. (SV-2,317-18).

LAY WITNESSES

Teachers from Dufour's elementary school, Lockhart, Nancy and Cutts, testified that although they did not have Dufour in any classes, his low grades suggested that something was wrong, that he had "limited ability probably." (V14,2305). Nancy Cutts testified that she did not remember having any contact with Dufour at all.[10] (V14,2296).

Joyce Jones testified that Dufour was in her basic English class at Lockhart Elementary. (V14,2332). Dufour was a below

[10] William Cutts did not have any classes with Dufour. (SV-1,82). He reviewed Dufour's school records and thought that they reflected either limited ability to function in an academic environment or someone with underlying psychological problems. (SV-1,84).

average student, but, in the basic class "he was able to achieve above some of the other students." (V14,2334). On English, at first Dufour achieved an E which was equivalent to an F, but, "he pulled up to a C in the last two grading periods." (V14,2336). A "C" in a basic class for Dufour meant that he was doing "average" work of the 36 or so students in the class. (V14,2347). Dufour continued on the next year in eighth grade with another teacher to make C's in English. (V14,2351-52). As for Dufour's appearance, Jones testified: "I don't remember him being a shabbily dressed child." (V14,2354). She did not know if Dufour was mentally retarded. (V14,2345).

Dufour called death row inmate Shane Kormondy, who testified he had 17 felony convictions, who generally testified that Dufour was his neighbor on death row for about a year and a half. (V15,2579). Kormondy agreed that Dufour was or looked physically fit. (V15, 580). When an inmate is in a cell "[y]ou can't see them, you can talk to them or hear them or whatever." (V15,2578). He could hear Dufour working out in his cell sometimes, but, could not hear the TV or see what he was doing. (V15,2593-93). Kormondy testified that he used to help Dufour with inmate requests and could tell Dufour's spelling and grammar were not good. (V15,2581-82).

Maxine Valle, a former neighbor of Dufour's, testified that in social conversations Dufour appeared to take a meaningful part in the discussions. (SV-2,180). Valle testified that no one in the group thought that Dufour was intellectually limited. (SV-2,182).

Attorney Jay Cohen testified that he defended Dufour during his murder trial in 1984 and that he primarily handled the penalty phase. (SV-2,214-15). In that capacity he had frequent contact with Dufour. Cohen felt Dufour understood the issues, the discovery and the proof. He found Dufour a friendly and engaging person and did not have the sense he did not understand "what we were going over with him." (SV-2,221). Dufour became socially engaged with one of the firm's secretary's and was aware that this secretary had attempted to provide "inappropriate" photographs to Dufour. (SV-2,225).

Stacey Siegler was called by the State and testified that she first met Dufour when she was 17 or 18 years old.[11] They developed a romantic relationship and as a result she had the opportunity to spend a lot of time with him. (SV-2,235). Dufour picked out his own clothes, was concerned about his appearance, and was well groomed. (SV-2,237-38). Dufour drove a car when she was with him, either her own car or another car. (SV-2,238).

[11] Stacey admitted that she helped support Dufour as a dancer and prostitute. (SV-2,251).

During her time with Dufour she observed no indication that he was mentally slow. (SV-2,243). Dufour planned, arranged, and paid for a trip they took to Houston. (SV-2,242).

Donna Risban Grant was called by the State and testified that after her mother died, her father, Ralph Risban, married Beverly Dufour. Donald was four or five years older than her, so, he was about 17. (SV-1,40).

Donna did not observe any limitations to suggest that Dufour was not a smart or a bright person. (SV-1,45). Donald could read and appeared to understand what he read. (SV-1,45-46). Donald was able to drive and understand traffic signals and informational signs. (SV-1,47). She observed Dufour in social settings even after he left the house, at Gary's, in social settings, and Dufour would fit in with everyone else.[12] (SV-1, 48).

[12] Donna admitted that she left home and was homeless at the age of 14 because Dufour raped her. (SV-1,64). She left the home not only because she was raped by Dufour, but, because his mother "did not believe it." (SV-1,64). Donna's father believed her at first, but, ultimately, "they both were convinced it did not happen." (SV-1,64). Dufour never paid any consequences for what he did to her at the age of 14. (SV-1,65).

SUMMARY OF THE ARGUMENT

ISSUE I—-Competent, substantial evidence supported the trial court's finding that Dufour was not mentally retarded. Dufour showed abilities, both intellectually and adaptively, well above those necessary to be considered mentally retarded.

ISSUE II—-Florida's standard for the burden of proof for the determination of mental retardation is constitutional. Moreover, as found by the trial court below, Dufour did not even meet the lesser preponderance of the evidence standard in this case.

ISSUE III—-Appellant has not established the trial court abused its discretion in making various evidentiary rulings during the hearing below.

ARGUMENT

ISSUE I

WHETHER COMPETENT, SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT DUFOUR IS NOT MENTALLY RETARDED?

Dufour challenges the trial court's determination below after an evidentiary hearing that Dufour is not mentally retarded. The State maintains that ample, indeed, overwhelming evidence supports the determination of the trial court below.

A. Standard of Review

This Court reviews the circuit court's mental retardation determination on appeal to "determine whether it is supported by competent substantial evidence." Phillips v. State, 984 So. 2d 503, 509-513 (Fla. 2008)(citing Cherry v. State, 959 So.2d 702, 712 (Fla.2007)("In reviewing mental retardation determinations in previous cases, we have employed the standard of whether competent, substantial evidence supported the circuit court's determination.")

B. Petitioner Did Not Establish Significantly Subaverage Intellectual Functioning

With respect to the IQ testing presented below, the trial court provided an extensive analysis before finding "there is no clear and convincing evidence that Mr. Dufour's IQ score establishes significantly subaverage general intellectual functioning." (V9,1454).

The record contains abundant evidence to support the trial court's conclusion in this case. First, while the trial court noted that Dr. Merin seemed somewhat cavalier about any scoring errors on his test administered in 2002, even the defense experts who extensively analyzed and rescored the test, indicated it dropped a single point, to 73 from the 74 obtained by Dr. Merin.[13] (V16,2693; V15,2452). Moreover, when optional items are included, and, adding in some underscoring, Dr. Keyes ultimately testified that Dufour's IQ on that 2002 WAIS was 74, the same IQ score obtained by Dr. Merin. (V19,3305). On surrebuttal, Dr. McClaren testified that Dufour's full scale IQ actually increased, accounting for all the scoring errors mentioned by Dr. Keyes, and, rescoring it, including an increase in performance score, and inclusion of the optional tests administered by Dr. Merin. Dr. McClaren testified that Dufour's full scale IQ on the 2002 test rose to "75." (V19,3310). The

[13] Interestingly enough, Dr. McClain, accounting for scoring errors on Dr. Merin's administration of the test, came up with the same overall IQ score as Dr. Merin, 74. (V15,2452). And, on rebuttal, when making the same calculations, adding some points and scoring optional items, Dr. Keyes admitted he calculated Dufour's full scale IQ at "74." (V19,3305). Thus, for all the criticism leveled at Dr. Merin and the extensive review and rescoring of the test he administered by both Dr. Keyes and Dr. McClain, it appears that Dr. Merin ultimately obtained the correct full scale IQ score. But, again, as Dr. Merin noted, while he did not conclude Dufour was consciously malingering during his administration of the test, he was not sure he received Dufour's full, or motivated effort, on many of the subtests. (V17,2890).

"90 percent confidence level" of such a score, according to Dr. McClaren, is a "72 to 79" range. (V19,3310).

Appellant takes issue with the failure to generally include the standard of error in the generally recognized cut-off for mental retardation in Florida. However, the requirements a defendant must establish to be considered mentally retarded, including an IQ of 70 or below, are now well established as a matter of Florida law. Cherry v. State, 959 So. 2d 702, 711 (Fla. 2007); see also Nixon v. State, 2 So. 3d 137, 142 (Fla. 2009); Phillips v. State, 984 So. 2d 503 (Fla. 2008); Jones v. State, 966 So. 2d 319, 325 (Fla. 2007); Johnston v. State, 960 So. 2d 757, 761 (Fla. 2006); Brown v. State, 959 So. 2d 146, 148-49 (Fla. 2007); Burns v. State, 944 So. 2d 234, 245 (Fla. 2006); Rodgers v. State, 948 So. 2d 655, 666-67 (Fla. 2006); Trotter v. State, 932 So. 2d 1045, 1049 (Fla. 2006). See Fla. Statute § 921.137(4); Fla. R. Crim. P. 3.203. Dufour has offered no compelling reasons to depart from this precedent.

While Dr. McClaren, as did the other experts below, agreed that mental health professionals recognize the standard error of measurement, the standard error of measurement is not a criterion for diagnosis, but, a "statistical term." (V18,3138). Dr. McClaren agreed that the AAMR states that mental retardation is best assessed using standardized testing instruments taking

into account the standard error of measure. (V18,3139). But, Dr. McClaren noted that there is ongoing debate regarding the best tools, what the standard of measurement should be, and constructs and these vary over time. (V18,2140-41). The legislature and this Court were certainly entitled to place a score, generally accepted as two deviations below the mean, as the cut-off for determining mental retardation in Florida. In any case, it is clear that Dufour's intellectual functioning, as well as adaptive functioning, do not fall within the range of mental retardation.

Dufour simply has no qualifying IQ score from a valid test which can meet the intellectual functioning prong. The lower WAIS scores obtained by Dr. McClaren and Dr. McClain on subsequent tests were simply unreliable. Dufour's obvious interest in putting less than optimum effort, or, even outright malingering was not only a distinct possibility, it was borne out by tests specifically designed to detect malingering.[14] Both

[14] Dr. McClain inexplicably told Dufour he was being evaluated for mental retardation and that another doctor would be coming later in the week to make the same determination. As Dr. McClaren testified: "As for self-interest, if an inmate signs a sworn motion alleging mental retardation as a grounds for prohibiting his execution by reason of mental retardation, and, if a psychologist then tells this inmate a test is being administered to assess mental retardation, Dr. McClaren thought there is a "high likelihood" that a death row inmate, realizing that retardation is a bar to execution, "would be motivated to

Dr. McClaren and Dr. McClain administered the test of memory and malingering (TOMM) to Dufour. In each case, Dufour's scores were so low that they were indicative of malingering. (V19,2465). Dr. McClain admitted that she obtained scores on the TOMM that were in the 20's and therefore were "unexpectedly low." (V17, 2942-43). Dr. McClain also administered the M-Fast which is another test of malingering. Dufour scored a 10 on that test and the instruction and scoring book provides: "[e]xaminees who inure six or more M-FAST items are presenting in a manner **highly suggestive of malingering**." (V17,2944-45). This score on the MFAST reinforced Dr. McClaren's reservations about the reliability of the WAIS that both he and Dr. McClain administered just days apart. (V17,2946). "It made me think there was a significant likelihood that either lack of effort or exaggeration of symptoms was at work on both evaluations." (V17,2946).

Contrary to Dufour's argument, the trial court did not find Dr. McClain's scores were the most reliable. Rather, the trial court expressed concern that Dr. McClain seemed to discount her own tests which indicated Dufour was malingering. Dr. McClain admitted that both the TOMM and MFAST were specifically designed and utilized to detect malingering. (V19,2465-66). Dr. McClain

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generate test results in support of that intention." (V19,3249-50).

did attempt to discount the significance of the TOMM she and Dr. McClaren administered by suggesting it was not normed or formulated for the mentally retarded population. The problem with this post ad hoc rationalization, is that Dr. Keyes administered the very same test to Dufour in "2006" and Dufour did well, scoring "very high", i.e., not in the malingering range. (V16,2743). Thus, aside from the fact Dr. McClain chose to administer the TOMM to Dufour and therefore obviously thought it was of some forensic value in this case, the fact that Dufour scored well on the same test of malingering for Dr. Keyes established that his performance was a matter of motivation, i.e., malingering, and not any lack of ability. See Brown v. State, 959 So. 2d 146, 149-50 (Fla. 2007)(discounting Dr. McClain's testimony and crediting state experts who found Brown's low IQ was the result of "malingering and mental disorders."). Dr. McClaren cited numerous examples in the record where other individuals evaluating Dufour over the years had observed a tendency to manipulate others and malinger.

Similar to Dr. McClaren, Dr. Merin noted that Dufour's scores on the TOMM, taken at the time of the administration of Dr. McClain's and Dr. McClaren's intelligence tests, gave him considerable doubt about the resulting scores. (V17,2799). If an individual malingers on one test, you must be concerned that

he or she will carry on that motivation for another test. (V17,2799-2800). This is particularly a concern with the WAIS-III because that test has no built in validity scale or test. (V17,2800). An intelligence test relies upon the good faith effort of the examinee. (V17,2800). Further, Dr. Merin, like Dr. McClaren, thought that Dufour's personality characteristics made malingering an even stronger possibility in this case.

In evaluating Dufour, Dr. Merin said that you have to account for personality characteristics. "Actually he's very skilled. He's capable of manipulating and can do so very, very skillfully so that you have to be pretty sharp to pick up the fact that he's even doing it because he'll come across as being very honest and capable whereas, in fact, he's exaggerating or he's malingering." (V17,2801). Dr. Merin found Dufour had psychopathic tendencies and such a personality might be expected to malinger when it is in their best interest to do so: "Very much so, yes." (V17,2802). A high score on the MMPI psychopathic deviate scale, coupled with numerous examples of antisocial behaviors, including murders, robberies, and leading a "parasitic" lifestyle" support the conclusion that Dufour has an Antisocial Personality Disorder. (V17,2803-04).

In addition to test scores on the TOMM and MFAST which strongly suggest malingering, Dr. Merin explained that the

course of Dufour's scores run counter to what you would expect. If Dufour scored a 74 on the WAIS in 2002 and subsequent scores were lower, including five points lower on a test administered just days apart, Dr. Merin testified these could very well be explained by "a motivational factor." (V17,2797-98). In other words, the course of Dufour's scores run counter to what you would expect from the practice effect. (V17,2798).

Another reason to doubt the validity of Dufour's latest scores, is that during Dr. McClaren's testimony it was revealed that a noted expert on retardation examined Dufour during the course of an entire day in 2004. Dr. McClaren knew "what it looked like" and assumed that this expert tested Dufour. However, collateral counsel, despite opening the door to this line of inquiry on cross-examination, objected to any questioning relating to this testing on the grounds of relevance and "attorney client" privilege. (V19,3266-67). Yet, such an inquiry was clearly relevant as even defense expert Dr. Keyes acknowledged that exposure to the same test, if someone was inclined to malinger, would provide that individual information they may be able to use in later attempts to malinger on the same instrument. (V19,3297). The results of any such testing were clearly relevant and should have been disclosed by the

defense to the State, the testifying experts, and, to the trial court.[15]

The State filed a motion in the trial court below at the conclusion of the hearing alleging, among other things, the failure to disclose the evaluation and test results implicated serious ethical concerns about the conduct of defense counsel in this case. (V7,1073-75). In her response, collateral counsel invoked the right to consult with a non-testifying expert whose "identity is protected from disclosure by the work product and attorney client privileges." (V9,1439). However, the Rules of Criminal Procedure clearly require disclosure of whether or not a defendant has previously been evaluated or tested for mental retardation and the names and addresses of any such experts. Fla. R. Crim. Proc. 3.203(c)(2). Attorney client privilege is a shield, not a sword in which a defense attorney can expose a

[15] Two likely possibilities exist for such testing results and the rather conspicuous failure of the defense to disclose this expert and the result of such testing. First, the expert obtained IQ test results above the cut off required to meet the intellectual prong of mental retardation. The second, equally likely possibility, is that the expert concluded that Dufour was malingering and discounted any resulting IQ score. In either scenario, the fact Dufour was tested alone is relevant to any subsequent evaluation and should have been disclosed. Indeed, below, the State alleged it may very well have been a violation of the rules of professional conduct, requiring attorneys to display candor before the court. (V7,1073-74). Although the State ultimately prevailed below, it remains concerned about the undisclosed expert [through DOC records, Dr. Greg Pritchard], the undisclosed test results, and the violation of Florida Rule of Criminal Procedure 3.220.

defendant to an evaluation and testing material which can possibly alter or materially affect subsequent testing and conceal that fact from opposing counsel and the court.

Aside from the fact that the record establishes that Dufour has the ability to score above the cut-off for the intellectual functioning prong for mental retardation, earlier intelligence testing also suggested that Dufour's intellectual functioning was not in the retarded range. While collateral counsel heavily relies upon Dufour's admittedly poor performance in school as reflected on his early report cards, counsel ignores or discounts the actual IQ testing conducted by the school system in which Dufour scored an 80 on the Lorge Thorndike IQ test.[16] (V15,2519; V17,2793). Similarly, the DOC administered a BETA IQ test on which Dufour scored a 106.[17] While the State recognizes that neither of these tests is ideal or recognized as a valid instrument to discern mental retardation, they do provide data

[16] Both the testimony of Cutts and of Dr. Gutman established that while Dufour was attending the Orange County schools, there was a system for determining mental retardation in the school system, and that an institution to educate mentally retarded children existed during the time that Dufour was in middle school. Nothing in Dufour's school records suggested that anyone ever thought that Dufour should be tested for mental retardation. Indeed, although Dufour's grades were poor, both the IQ group testing he received and his performance test scores on the WRAT were above those expected of a mentally retarded individual.

[17] In 1977, while in prison, Dufour was given a Beta IQ test on which he scored 106. (State Exhibit 26).

to suggest Dufour's intellectual functioning, at least when not facing the death penalty, is clearly above the mentally retarded range.

Finally, Dufour has repeatedly been seen and evaluated by a myriad of mental health professionals over the years, none of whom concluded, or, even apparently suspected that Dufour was retarded, prior to his being placed on death row for two Mississippi murders.[18] (V19,3263; V16,2749). See Jones, 966 So. 2d at 329 ("none of the many doctors who examined Jones at trial and during prior post-conviction proceedings...considered Jones to be mentally retarded."). Of particular note, is Dufour's evaluation by Dr. Michael Gutman, a "double boarded" forensic psychiatrist, who, at the time he evaluated Dufour, had extensive experience evaluating individuals for mental retardation. He engaged Dufour in conversation, administered a mini mental status examination, and concluded that Dufour was of average intelligence. (SV-1,120-30). Dr. Gutman agreed that it was possible his estimate of Dufour's IQ was mistaken, but he routinely assesses intelligence and places a person in a range from retarded, borderline, low average, average, average to above average and superior. (SV-1,128). It is possible but

[18] Dr. Keyes admitted that the Slosson, administered by Dr. Zimmerman prior to clemency proceedings in Mississippi, is not a valid instrument for determining mental retardation.

unlikely that Dr. Gutman would be that far off on his estimate of Dufour's intelligence.

For all of the foregoing reasons, the trial court correctly concluded that Dufour did not meet the intellectual functioning prong of mentally retardation. The lower scores on the WAIS are inherently suspect and not worthy of any weight. The 2002 WAIS administered by Dr. Merin was the most accurate test result and establishes that Dufour's intellectual ability exceeds the cut-off required to be considered mentally retarded. Moreover, as found by the trial court below, Dufour did not meet the adaptive functioning prong to be considered retarded.

C. Dufour Did Not Establish Any Deficit In Adaptive Functioning

With regard to adaptive functioning, the trial court extensively analyzed the testimony and evidence addressing adaptive functioning and found that Dufour did not display the necessary deficits to be considered retarded. The trial court ultimately concluded:

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

(V9,1461).

Dr. McClaren's testimony alone provides competent, substantial evidence to support the trial court's finding on appeal. Dr. McClaren summarized his findings below:

> There is no indication, despite doing poorly in school, repeatedly coming to the attention of authorities, having contact with police, that prior to the age of 18 he was ever suspected of being mentally retarded.
>
> Second, past 18, much of his criminal behavior, writing, conduct, scheming, planning to me show a higher level of behavior than I would expect from someone who is mentally retarded. I believe that some of the behavior that happened to him, as far as substance abuse, head injuries, had the potential to detract from his level of intellectual functioning, and I think all things considered, that he has a very clear history of being manipulative, exploitive, deceptive person going back many years as described by numerous data points that we have gone through today.

(V18,3065-66).

Dufour's criminal behavior displayed the ability to plan criminal activity and attempt to cover it up. The circumstances of Zack Miller's murder and the circumstances of Dufour's other murders and crimes, and numerous additional data points in Dufour's history, all preclude a finding that Dufour has deficits in adaptive behavior.

First, the circumstances of the crime for which he stands convicted would preclude a finding that Dufour has deficits in adaptive behavior. The trial court found that Dufour murdered Zack Miller in an especially cold, calculated, and premeditated manner (CCP). This Court affirmed that finding in Dufour's

direct appeal of his conviction. Dufour v. State, 495 So. 2d 154, 164 (Fla. 1986). Such a finding in and of itself demonstrates that Dufour could not suffer from the deficits in adaptive behavior functioning required for a finding that he is a mentally retarded offender:

> A CCP killing demonstrates "that the defendant had a careful plan or prearranged design to commit murder before the fatal incident . . .; that the defendant exhibited heightened premeditation." Id. The actions required to satisfy the CCP aggravator are not indicative of mental retardation. See *Atkins*, 536 U.S. at 319—20, 122 S.Ct. 2242 ("Exempting the mentally retarded from [the death penalty] will not affect the 'cold calculus that precedes the decision' of other potential murderers. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders.")

Phillips v. State, 984 So. 2d 503 (Fla. 2008).

Significantly, while incarcerated, Dufour attempted to procure through the assistance of another inmate a change in venue and actually sought to arrange the murder of one of the State's primary witnesses, Stacey Siegler. This was clearly an example of relatively long-range planning, i.e, conduct inconsistent with mental retardation. Defense expert Dr. Keyes stated that it is very rare for a mentally retarded individual to engage in long-range planning. (V16,2716). The record demonstrates Dufour clearly possesses such ability.

Dufour planned and executed robberies and murders of individuals by gaining their trust and isolating them so that he

could commit the crimes and escape undetected. His conduct displayed the ability to plan both before and after the murders. For the Sinson and Wise murders, Dufour showed the ability to set up and commit robbery and murders for financial gain. As Dr. McClaren explained below, the planning of such a crime made it unlikely to be carried out or perpetrated by someone who is mentally retarded. (V18,3028). Dufour admitted that after one of his crimes he stole the victim's car and dumped the car in the opposite side or "black" area of town arranging for someone else to pick him up in an effort to impede the police investigation. (V17,2826-27). Again, evidence of planning and deceit in the criminal context.

Dufour told defense expert Dr. Lipman about planning the Stinson and Wise robbery/murders. Dufour told Lipman that he set up the homosexual victims and arranged the robbery. (V32,5256). Dr. McClaren testified that he found reference to this same double murder in Stacey Siegler's pre-trial deposition. In the deposition Siegler had described being with Dufour when he made the phone call to the victims, asking what they were doing for the Fourth of July. This matched Dufour's description to Lipman of being the main actor in setting up the men to be robbed and murdered.

The statements of Raymond Ryan and Robert Taylor after Dufour's murder of Mr. Miller, reflected Dufour discarding and dismantling the murder weapon. (V18,3015-16; 3017). Again, this was an example of Dufour anticipating, planning, and exhibiting adaptive behavior in that situation, "post-armed robbery/homicide." (V18,3018).

Dr. McClaren reviewed the offense report for the two Mississippi murders committed by Taylor and Dufour after fleeing Florida. (V18,3011-12). Taylor was arrested immediately. But, Dufour was able to evade capture for two weeks and was arrested in Jackson, Mississippi. (V18,3013). When he was interviewed, Dufour did not make any statements about the murders to the police, but admitted he rented a room, "cut his hair short" and "dyed it in an attempt to hide his identity." (V18,3014). This kind of behavior, dying and cutting his hair, wearing a suit so he wouldn't stand out, indicated a degree of planning and anticipation of what would happen and shed light on Dufour's "ability to cope with the world." (V18,3015). Dufour also exhibited the ability to clothe himself, obtain a room, and conceal his identity after the Mississippi murders.

The available records, including the reports of family members do not suggest Dufour possessed limited adaptive functioning. See Rodgers v. State, 948 So. 2d 655, 667 (Fla.

2006)(Court rejected claim that defendant was deficient in adaptive functioning, noting that "none of the witnesses, even family and friends of Rodgers, testified that they had ever considered Rodgers to be mentally retarded".) To the contrary, the record clearly establishes that Dufour was verbally gifted, persuasive, and, often seen as a leader. This is in contrast to Dufour's older brother John, who was seen as slow, and the least intelligent brother by family members. Indeed, it is significant that John, not Donald, was identified as retarded and attended the Gateway School.[19] (V15,2454).

In an interview with a probation officer, Dufour's mother stated that Dufour was a "good talker and capable of being a good salesman." (V18,2999). Dufour's brother, Gary, in a sworn deposition, called his brother "street smart" and said that Dufour had people skills. "He had I guess what you call a gift to gab, you know, he could talk somebody out of something or into something, I guess. He was pretty people oriented you know, you might say."[20] (V17,2817). Gary admitted that his brother was "very persuasive." (V17,2818). Dr. Merin noted that

[19] Despite his obvious limitations, John married, drove a car, and, until he hurt his back, was gainfully employed, and able to function in everyday life. (V15,2454).

[20] During the first post-conviction hearing, George Dufour testified that Don *a very social person who had to be the life of the party and the center of attention. (*PCR Vol. 7, 187*).* According to George, the Defendant was an "instigator" with respect to activities like grave robbing. (PCR Vol. 7, 212-213).

family member assessments of Dufour coincided with those of others that Dufour was "street smart" and "persuasive." (V17,2818). Vance Powell, described Dufour in a deposition as someone who is "shrewd." (V15,2453).

Dufour was also considered a leader in his social and criminal group. When asked if he would classify his brother as a leader or a follower, Gary testified: "A leader." (V17,2817). Stacey Siegler in a deposition described Dufour's role in the group: "In general, he was the controller. He was the one who organized things. He was the one who brought about the action." (V17,2815). Similarly, Raymond Ryan, a friend of Dufour's stated that in their social group, Dufour called the "shots." (V16,2727). Defense expert Dr. Berland, acknowledged during Dufour's initial post-conviction hearing that Dufour was viewed as a leader in his social group. (V11,1851-52).

Dr. Keyes acknowledged that traveling and planning a trip to Houston as Dufour reportedly did was unlikely for someone who is retarded. Yet, Siegler testified that Dufour arranged, planned, and paid for the trip by air where they stayed at an expensive Houston hotel. Defense expert Dr. Lipman's notes reflected Dufour's trip to Houston:

> He [Dufour] discussed the trip they made to Houston, where they stayed first at the Houstonian and then later at a hotel on 'the Montrose strip' where there was a more carnival atmosphere. The trip cost five

> thousand five hundred dollars, he recalled. (V32,5256).

This statement is interesting in that it not only provides corroboration for Siegler's testimony regarding the Houston trip, but, it also reflects that Dufour had good recall in 2001 of an event which had occurred years earlier. Contrast that with Dufour claiming not to know what year it was, or, how old he was in his taped interview with Dr. McClain. (V34,5544). This suggests that Dufour was overacting or malingering during his interview with Dr. McClain.[21]

While true, Dufour had a poor work history, this was not due to any intellectual deficit, but motivational and psychological factors. Dufour was a full-blown psychopath or at the very least, possessed antisocial traits, and was a chronic drug and alcohol abuser. Dufour described a job he had at Orlando Armature, but stated he was dissatisfied: "I couldn't get the kind of job that let me live the kind of life I like living, end quote." (V17,2823). That type of statement is not something he would expect from someone who is truly mentally retarded. Dr. Merin explained that the mentally retarded are usually happy simply to have a job. (V17,2824). Apparently, however, Dufour was dissatisfied with low wages. (V17,2824).

[21] Of course, Dr. McClain told Dufour he was being evaluated for mental retardation.

Aside from Dufour's ability to plan, execute, and attempt to conceal his participation in numerous crimes, abundant evidence of adaptive functioning exists from the voluminous DOC records reviewed by Dr. McClaren and Dr. Merin. For example, Dr. Merin noted a document he examined from the Lantana Correctional Institution in 1978 reported that Dufour completed a small engine repair course, was assigned as an aide to teach the course, and noted that Dufour had virtually organized and instructed the motorcycle repair course. (V17,2804-05). The report noted that he had done an excellent job and that Dufour had completed his GED. This report indicated Dufour was a capable individual and that he functions well when he wants to. (V17,2805). Moreover, the Lantana team felt that Dufour was "definitely" capable of college level work. (V17,2805-06). This shows that Dufour can organize, put things in order, which are all adaptive type processes. (V17,2806).

Dr. McClaren reviewed numerous documents, inmate requests, medical call outs, and letters written by Dufour which suggest he has good adaptive functioning in the prison environment and is easily capable of looking after his health and needs in that restricted setting. Dr. McClaren noted that the prison records reflect that Dufour was concerned and protective regarding his health and his diet. He specifically requested treatment for

his hepatitis, requested a biopsy, and even asked for Interferon. (V17,2949; V18,3033). See Jones, 966 So. 2d at 325 ("Jones recognized when he had medical problems and requested help.").

While appellant asserts that it is undisputed that Dufour had assistance writing or making inmate requests, he produced only one witness, fellow death row inmate, Kormondy, with his 17 felony convictions, to support this proposition. Kormondy was in a cell next to Dufour a relatively short period of time and the history of documents authored by Dufour go back decades.[22] Defense expert Dr. McClain admitted that after being confronted with numerous items purportedly authored by Dufour, they appeared to have been authored by Dufour [with consistent grammatical and spelling errors] and that the content did appear to "reflect what's going on with him." (V15,2501).

Also significant is the fact Dufour had the ability to fight the forfeiture of his Oldsmobile, request a delay in the forfeiture hearing, and otherwise, look to protect his interest in the car from prison in Mississippi, among other interesting items. Dr. McClaren also noted a letter from Dufour to Stacey Siegler in which Dufour described filing documents to prevent

[22] Kormondy acknowledged that he could not see Dufour in his cell and his only face to face interaction with Dufour was in the prison exercise yard.

the forfeiture of the Oldsmobile. Defense expert Dr. McClain admitted that the ability to meaningfully participate in legal proceedings is an example of adaptive functioning. (V19,2485).

While appellant places much stock in the fact Dufour apparently never ordered books from the law library, the record makes it clear that Dufour can and does read, and is able to obtain reading material outside of the small prison library. For example, in one document, in which Dufour requests an administrative remedy, Dufour complained about the Department of Corrections stopping some of his "books, like, meditation, yoga, philosophy, enlightenment, religions, health, Buhddism." Dr. McClaren felt such a request for administrative remedy and specifically the content mentioned was unlikely for someone who is mentally retarded. (V18,3059). Similarly, another DOC document reflected that Dufour spent most of his time in corrections lifting weights and reading. (V18,3051).

Dufour also had the ability to communicate and express himself in personal letters. For example, in a letter Dufour sent to Stacey Siegler, he wrote that it is "raining cats and dogs and horses and cows and well, shit, maybe some say blades will come down." (V18,3059).

The lay witness testimony did not establish any significant deficits in adaptive functioning. While death row inmate

Kormondy attempted to establish Dufour lacked proper hygiene skills, Deputy Wright noted that Dufour was not known by the guards as one of the inmates with any hygiene problem. Dufour was physically fit and exercised. (V15, 2620). Further, Dr. Keyes admitted that the records he reviewed indicated that Dufour was "very clean and aware of his hygiene." (V16,2736). Indeed, Dufour took pride in his appearance and in the past he had taken advantage of his appearance to his financial benefit. Dufour lured victims to isolated or private areas so that they could be robbed and killed. (V16,2736-37). Thus, the record clearly contradicts any notion that Dufour has any deficit in his ability to take care of his hygiene or health.

In sum, Dufour has failed to prove any of the elements of mental retardation by clear and convincing evidence, or, for that matter, even a preponderance of the evidence. The State presented competent and substantial evidence to support the trial court's ruling below. Consequently, the instant appeal should be denied.

ISSUE II

WHETHER FLORIDA STATUTE 921.137 IS UNCONSTITUTIONAL?

Although a minority of the Florida Supreme Court has expressed concerns that Cooper v. Oklahoma, 517 U.S. 348, 116 S.

Ct. 1373 (1996) may result in the invalidation of the burden of proof set out in Florida Statute 921.137 (4), at least two states with schemes for determining mental retardation *vis-à-vis* eligibility for capital sentencing, and which impose burdens of proof equal to or higher than the clear and convincing standard provided in F.S. 921.137(4), have found that imposing such a burden passes constitutional muster. See People v. Vasquez, 84 P.3d 1019 (Colo. 2004)("[i]mposing upon the defendant the burden of proving his retardation by clear and convincing evidence for that purpose offends no constitutional mandate."); Head v. Hill, 277 Ga. 255, 587 S.E.2d 613 (2003)(Georgia's statutory scheme of placing the burden on the defendant to prove mental retardation beyond a reasonable doubt was constitutional because mental retardation is more akin to the affirmative defense of insanity than the issue of competency (citing Leland v. Oregon, 343 U.S. 790, 72 s. Ct. 1002 (1952)). Petitioner has not cited any authority to establish Florida's standard for determining mental retardation is unconstitutional.

Cooper v. Oklahoma, 517 U.S. 348, 116 S. Ct. 1373 (1996), does not suggest Florida's standard is unconstitutional. In Cooper, the Court was faced with a principle deeply rooted 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 v. Arizona, 548 U.S. 735, 768-75, 126 S. Ct. 2709 (2006), 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 Supreme Court has held "it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends 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, 201-02, 97 S. Ct. 2319 (1977)(quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)); see also Clark v. Arizona, 548 U.S. 735, 748-49 (2006).

In any case, since the trial court also determined that Dufour has not met even the lesser preponderance of the evidence standard, this Court need not even address the issue in this case. Nixon v. State, 2 So. 3d 137, 145 (Fla. 2009)("We need not address this claim because the circuit court held that Nixon could not establish his mental retardation under either the clear and convincing evidence standard or the preponderance of the evidence standard.")(quotations omitted)

ISSUE III

THE TRIAL COURT'S EVIDENTIARY RULINGS

Dufour next takes issue with various evidentiary rulings of the trial court below. However, Dufour has not established an abuse of discretion or accompanying prejudice which would warrant remand for a second evidentiary hearing on mental retardation.

Standard of Review

A trial court's rulings on evidentiary matters are subject to an abuse of discretion standard. McCoy v. State, 853 So. 2d 396, 406 (Fla. 2003); Jorgenson v. State, 714 So. 2d 423 (Fla. 1998)(trial court's evidentiary ruling is reviewed for an abuse of discretion). "Discretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable

[person] would take the view adopted by the trial court.'" Spann v. State, 857 So. 2d 845, 854 (Fla. 2003)(citation omitted).

Letters

Dufour first challenges an unauthenticated letter utilized by the State during its direct examination of defense counsel Jay Cohen. However, that letter was sent by Cohen to the court file after Judge Cohen received it, after he was finished representing Dufour. Cohen acknowledged, without objection, that Dufour and a member of his staff had developed a relationship. (SV-2,223). Over objection, Cohen generally testified about an incident in which he received a letter marked legal mail which was sent by Dufour to a secretary in his law partner's office. Cohen seemed to recall that this secretary and Dufour had some type of romantic relationship. (SV-2,220-25). But, once again, without objection, Cohen testified that he was aware that a secretary had tried to give some "not appropriate" pictures to Dufour and that he and his partner, Ray, when informed by the jail, were not "happy with that conduct of one of the members of our staff." (SV-2,225).

The State moved to introduce the letter only after the conclusion of its direct examination, noting that the letter was "in our court file in this case." (SV-2,226). While conceding

the letter had been placed in the court file, collateral counsel objected to its introduction, claiming that it was placed there without Dufour's consent and that it violated attorney client privilege. (SV-2,227).

On voir dire, defense counsel did not question Judge Cohen about the authenticity of the letter, rather, on attorney client privilege. (SV-2,229). The letter was addressed to Chief Judge Cohen and Judge Cohen thought he had received the letter in the last two years. (SV-2,230). The letter, when read by Judge Cohen, did not contain any information relating to his representation of Dufour but was a letter with "romantic" overtones. (SV-2,232).

The focus of the objection below was attorney client privilege, not authentication. The defense never seriously challenged authentication of the letter which was already in the official court file in this case. The letter was not mentioned nor relied upon the judge in deciding this case. The admissible testimony from Judge Cohen indicated that Dufour carried on or had a romantic interest in a secretary from Judge Cohen's former law firm, an interest which at one time, at least was reciprocated. The letter was insignificant in light of the wealth of evidence establishing that Dufour is not retarded. No reversible error has been established by Dufour.

As for Dr. McClain, Dufour claims that he objected to using letters from Dufour on cross-examination, citing hearsay and authentication objections. However, it was clearly proper to test Dr. McClain's opinion on retardation with the letters. The letters themselves need not be admissible for use in cross-examination. See Carroll v. State, 636 So. 2d 1316, 1318-19 (Fla. 1994)(where defense psychiatrist admitted her reviewed defendant's medical records it was proper for state to cross-examine the doctor on portions of those records that were inconsistent with his diagnosis).

With regard to authentication of the letters, the letters generally reflected Dufour's name, address, and were sent from locations where he was known to be housed and addressed issues and people of known interest to Dufour [Stacey Siegler]. Further, as noted by Dr. McClain, the letters appeared to express Dufour's thoughts and feelings. (V15,2501).

With regard to authentication, the First District has stated the following:

> The requirements of the evidence code are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. *See* § 90.901, Fla. Stat. (2007). The use of circumstantial evidence to authenticate is permissible. Charles W. Ehrhardt, Florida Evidence, § 901.5 (2007 ed.). Authentication occurs in a situation where the offered item, considered in light of the circumstances, logically indicates the personal connection sought to be proved. *Id.*

Sunbelt Health Care v. Galva, 7 So. 3d 556, 559 (Fla. 1st DCA 2009). "Once a prima facie case of authenticity has been established, the document is authenticated, and the trier of fact must resolve any disputes regarding the genuineness of the exhibit." Id. (citing Pace v. State, 854 So. 2d 167 (Fla. 2003)).

Assuming for a moment that the State even has to authenticate letters or records used on cross-examination of a defense expert, the record supports use of the letters for this purpose. Dr. McClain admitted that the letters she reviewed did look like they were from Dufour himself. (V15,2501). "The content does appear to reflect what's going on for him, yes." (V15,2501). It would have to be considered, though, whether or not someone helped him to construct those letters, but, as "they're constructed, they do have his emotions there, concerns he has and an indicator of him trying to communicate his thoughts." (V15,2501). Moreover, as Dufour candidly admits, Dr. McClain stated that she reviewed those letters as part of her evaluation of Dufour. (Appellant's Brief at 71).

The letters were clearly relevant, purportedly authored by Dufour, contained and referenced items of interest to him, and, were therefore sufficiently authenticated for use during cross-examination. As for hearsay, they were properly admitted as

material which the expert admitted she relied upon in evaluating the question of retardation in this case. In fact, defense expert Dr. McClain admitted that these "letters" are the "normal sort of background information" that an expert uses to try to determine what is going on in a person's life and how they are able to express themselves. (V15,2500). "I think as collateral information it's important to consider indicators of their abilities, yes." (V15,2500). Finally, it can certainly be argued that since the letters reflect Dufour's ability to communicate in a logical and coherent manner, which is clearly relevant to the issue of retardation, the letters themselves constitute an admission of a party opponent and were therefore admissible as substantive evidence. See Dade County v. Yearby, 580 So. 2d 186, 189 (Fla. 3d DCA,), rev. denied 589 So. 2d 291 (1991)(finding admission of defendant's statement in a police report was proper, noting that an admission by a party opponent may be in "writing" as well as orally.).

Dufour has not demonstrated any error in admission of such documents as matters normally relied upon by experts making a retardation assessment. Moreover, the trial court in its order specifically noted that, while the court generally overruled objections to documents used by experts, the court did not rely on those documents in rendering its opinion, stating: "The

documents themselves are part of the record of the case, but have not formed the basis of the Court's ruling." (V9,1456). Thus, admission of the documents themselves, if error, was clearly harmless in this case. Schwarz v. State, 695 So. 2d 452, 456 (Fla.4th DCA 1997)(finding hearsay error harmless in connection with expert's testimony because "[i]n this nonjury trial, however, the trial judge was well aware of the weight to be given this testimony.").

Dr. Berland's Testimony

Dufour's objection to Dr. Berland's testimony during the hearing below is patently without merit. Dr. Berland testified during the initial post-conviction hearing on behalf of Dufour. He was not a confidential defense expert, his testimony and opinion were a matter of record. The trial court took judicial notice of the 2002 post-conviction record without objection from the defense. Consequently, Dufour's reliance upon Sanders v. State, 707 So. 2d 664 (Fla. 1998), is misplaced. In Sanders this Court held that "where an expert is hired solely to assist the defense and will not be called as a witness, the State may not depose the expert or call him as a witness." (citing Pouncy v. State, 353 So. 2d 640 (Fla. 3d DCA 1977); Lovette v. State, 636 So. 2d 1304, 1308 (Fla. 1994).

Dr. Berland did not reveal a single confidential communication which could arguably be considered privileged.[23] Dr. Berland's testimony during the successive post-conviction hearing differed little, if at all, from his testimony during the first post-conviction hearing. (V8,480-540). Furthermore, the trial court gave his limited testimony little weight. Consequently, assuming *arguendo,* some error can be discerned from the fact the State called him to testify below, admission of such testimony was clearly harmless.

Dr. McClaren

Dr. McClaren could certainly rely upon documents from the DOC, records, and other material routinely utilized by mental health experts in assessing the intellectual and adaptive functioning of a defendant. The ability of Dufour to meet, care for, and communicate his needs behind bars was clearly relevant. So, too, were the observations of others which shed light upon Dufour's adaptive functioning outside of the restrictive prison environment. The material was properly introduced for the purpose of explaining the basis for Dr. McClaren's opinion in this case. The material is of the nature and type routinely

[23] This situation is little different from the typical post-conviction capital case where the defendant alleges either the defense attorney failed to obtain, or, the mental health expert failed to conduct, an adequate examination. The State is forced to call the trial defense expert during the post-conviction hearing to refute the allegation.

relied upon by mental health experts. See generally Jones, 966 So. 2d at 328; Masters v. State, 958 So. 2d 973, 975 (Fla. 5th DCA 2007); Bender v. State, 472 So. 2d 1370 (Fla. 3d DCA 1985).

Dufour's reliance upon Linn v. Fossum, 946 So. 2d 1032, 1039 (Fla. 2006) is misplaced. In Linn this Court addressed "opinion testimony by consensus" and the danger that one testifying expert will attempt to bolster his or her opinion by claiming consultation with a non-testifying expert. "The opposing party is unable to cross-examine the nontestifying experts who participated in the consultation."

Dr. McClaren, unlike the subject expert in Linn, did not attempt to bolster his own testimony by consulting with other experts outside of court. Further, most of these documents were gathered and introduced during the prior post-conviction hearing in 2002. Judicial notice of the post-conviction record, as noted by the trial court, was made at the beginning of the evidentiary hearing. (V18,2981). No abuse of the trial court's broad discretion has been shown.

Finally, as noted above, the trial court specifically stated that it did not rely upon these documents in making its determination. Consequently, any resulting error must be considered harmless.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court AFFIRM the denial of Dufour's successive motion for post-conviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE has been furnished by U.S. mail to Marie-Louise Samuels Parmer, Assistant CCRC-M, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136; Gretchen S. Sween, Esquire, Dechert, LLP, 300 W. 6th Street, Suite 1850, Austin, Texas 78701-3956; and Dick Jucknath, Assistant State Attorney, Orange County State Attorney's Office, 415 N. Orange Avenue, Orlando, Florida 32801, this 9th day of November, 2009.

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,

BILL McCOLLUM
ATTORNEY GENERAL

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SCOTT A. BROWNE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0802743
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
scott.browne@myfloridalegal.com

COUNSEL FOR APPELLEE