IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 09-262

DONALD WILLIAM DUFOUR,

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Dufour's motion for postconviction relief seeking a determination of mental retardation brought pursuant to Florida Rules of Criminal Procedure 3.203 and 3.851.

Citations shall be as follows: The record on appeal from Mr. Dufour's trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. The initial postconviction record on appeal shall be referred to as "IPC ROA" followed by the appropriate volume and page numbers. The postconviction mental retardation record on appeal shall be referred to as "ROA" followed by the appropriate volume and page numbers. The postconviction mental retardation supplemental record on appeal will be referred to as "Supp. ROA" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

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Procedural History

Mr. Dufour was indicted on January 20, 1983 for first degree premeditated murder. Mr. Dufour was convicted as charged in May of 1984. The penalty phase concluded in a single day, June 15, 1984, and the jury recommended death by a vote of 12 to 0. The trial court sentenced Mr. Dufour to death on July 3, 1984.

Mr. Dufour filed an initial postconviction motion in 1992, which was amended in October of 2001. An evidentiary hearing was held on November 18-21, 2002. The lower court denied relief on May 30, 2003 and this Court affirmed the denial of relief. Dufour v. State, 905 So.2d 42 (Fla. 2005). While Mr. Dufour's postconviction appeal was still pending before this Court, Mr. Dufour filed a "Successive 3.851 Motion for Postconviction Relief – Motion for Determination of Mental Retardation as a Bar to Execution" in the circuit court on November 24, 2004 pursuant to Florida Rule of Criminal Procedure 3.203(d)(3). ROA Vol. 1, p. 7-33. Mr. Dufour had also filed a motion to relinquish jurisdiction in this Court on November 23, 2004 (Florida Supreme Court Docket, SC03-1326). This Court denied Mr. Dufour's motion without prejudice on April 14, 2005, and directed Mr. Dufour to file a 3.851 motion within sixty (60) days after his postconviction and habeas proceedings became final. (SC03-1326).

Pursuant to this Court's order, Mr. Dufour filed his amended motion on August 9, 2005. ROA Vol. 2, p. 182-208. The lower court held an evidentiary hearing over eight days on August 6-7, 2007, October 10-11, 2007, and February 25-26, 28-29, 2008. Both the State and defense submitted written closing arguments. The postconviction court denied relief on December 19, 2008. Mr. Dufour timely filed a Motion for Rehearing which the court denied on January 14, 2009. Mr. Dufour timely filed his Notice of Appeal. This appeal follows.

STATEMENT OF THE FACTS

Joyce Jones taught Donald seventh grade English. ROA Vol. 14, p. 2331. She described his mental abilities as below average, and she thought that he was "very possibly" mentally retarded. Id. at 2338. Ms. Jones described Donald as "playful" and "immature" and testified that "he was probably one of the most immature students that I've ever had." Id. at 2333. She went on to say that Donald did not act with the same level of maturity as his peers and that he "was like a little kid." Id. She did not remember him having any friends. Id. at 2358.

Ms. Jones described that there were three levels of English classes: advanced, average, and basic. Id. The students in the basic class were low achievers. Id. Donald was in her basic English class. Id. It was Ms. Jones' practice to give a "C" or a "D" to a student with limited ability even though they may not have done "C" or "D" level work. Id. at 2335. Ms. Jones testified that

Donald was below average and that while he was able to make marginal achievements in her basic class, "he certainly would not have been successful in an average class." Id. at 2334.

Ms. Jones testified that at the time Donald attended Lockhart, there were no programs or procedures at Lockhart to identify or help students that were mentally retarded. Id. at 2339. She was familiar with a school called Gateway, but explained that Gateway was a school for "profoundly handicapped" children who had a reputation for acting out physically in class. Id. at 2339-40. Donald was not a student that acted out violently or caused problems in her class. Id. at 2340. A student who was mentally retarded at Lockhart could have been missed. If that happened, they had to work their way through the school, they would be put in basic classes, and would be placed from grade to grade (all three teachers testified that "placed" was the same as social promotion). Id. at 2340-41.

William Cutts was a teacher for over 30 years, and he spent all but two years as a teacher at Lockhart Middle School. Supp. ROA Vol. 1, p. 76. Mr. Cutts did not teach Donald in class, but he did teach his brother Gary and he knew Donald's reputation around school. Id. at 82. Mr. Cutts testified that Donald "would have been placed in the category of children who had a difficult time with any learning environment." Id. Mr. Cutts found Mr. Dufour's school records to be significant because "[n]obody gets failing marks in the first grade. You just don't." Id. at 84.

He explained that he knew that "[Mr. Dufour] had troubles of a mental type" because "when any adult sees a child with failing grades in the first grade, usually lights come on and bells go off." Id. at 103,91.

Mr. Cutts described that he understood the term "placed" to mean "that students were socially promoted, pushed along, given grades, whatever was necessary to move them to where they thought they should be." Id. at 91. At the time Donald went to Lockhart, there were no programs for children with mental retardation. Id. at 77. There was no school psychologist assigned to that school. Id. at 80. In fact, there was only one psychologist for the whole county who would travel around to the schools. Id. Mr. Cutts had students in his regular math classes that were mentally retarded, and said he did what he could to assist them and give them the support they needed. Id. at 104. At the end of the year, the child would be placed into the next grade, and as described by Mr. Cutts, he "littered their records with enough D's so beyond a doubt he would be shipped onto the next grade." Id. at 113.

Nancy Cutts was an elementary school teacher at Lockhart Elementary for approximately thirty years. ROA Vol. 14, p. 2294. She never had Mr. Dufour in class, but testified about the atmosphere and available educational programs at Lockhart Elementary. Mrs. Cutts defined "placed" as it was used at Lockhart Elementary when Mr. Dufour went to school there.

> Well, if a child actually would have failed that grade, but had failed previously and hadn't made a whole lot of progress, and you really didn't think he was ready to go on, but – repeating him was not going to – to do much good, then we would sometimes place the child in the next grade.
>
> ****
>
> So by putting placed on there, that would indicate to the teacher that the child really probably shouldn't have been promoted but there were – there were circumstances that made us feel that it was the best thing for the child.

Id. at 2299-2300. Mrs. Cutts testified about Mr. Dufour's school records, which included his elementary school record. Id. at 2305. Mrs. Cutts described the grades as "very poor" and that they indicated someone with "limited ability." Id. The grades indicate that Mr. Dufour was promoted in first grade, retained in second, and then placed through the remainder of elementary school. Id. at 2307. Mrs. Cutts commented that it was *very* unusual for a child to be placed all the way through elementary school and testified that she had "never seen a report card where someone was placed this often." Id. at 2308.

Mrs. Cutts testified that there were no kinds of special programs or teachers designed to deal with mentally retarded children in the early 1960s. Id. at 2308. In the late 1960s, there was an Educable but Mentally Retarded (EMR) teacher. Id. at 2309. She described the process as to how students were screened or placed into the EMR classes. Teachers would put children who were not performing well, either academically or behaviorally, on a list to be seen by the school psychologist. However she explained that a child's behavior often played a role in a child's

placement on the list. Id. at 2313. For example, if a child's behavior was so outlandish that a teacher could not conduct class, that child had to be tested before he could be removed, so he might get moved up on the list because of behavior, not necessarily academics. Id. at 2313.

Allan Peterson is a librarian specialist at Union Correctional Institution. ROA Vol. 15, p. 2553. Mr. Peterson has a bachelor's degree in history and at the time of the hearing was working on a master's degree in Library Science. Id. at 2554. He is responsible for the delivery of library services, both general library and law library, to the entire 2,200 inmate population, including death row. Id.

Mr. Peterson described the record keeping system as far as how the general library books are requested by death row inmates. First, the inmate sends a written request through institutional mail. Id. at 2556. Mr. Peterson will then get the request and log it into a computer spreadsheet. Id. At that point it is transferred to an inmate clerk, who keeps a handwritten copy of the books he is sending out. Id. at 2557. As far as requests for legal materials, the inmate makes a written request and then it is handwritten in a log at the death row library, because they do not have a computer there. Id. at 2559.

Mr. Peterson testified that he was asked to verify whether or not Mr. Dufour had ever requested any general library books while he has been on death row. Id. at 2560. He testified that he went through the computer and then, over the course

of several afternoons, he went through all of the logbooks by hand. He determined that Mr. Dufour had never requested any books from the general library during the entire time he has been on death row. Id. at 2562. He was also asked to review whether Mr. Dufour had ever requested any materials from the law library. To determine that, he also went through those records by hand and determined that Mr. Dufour never made any written requests for legal assistance or materials since he has been on death row. Id. He testified that he checked the records from 1998 through October of 2007, when he was called to testify. Id. at 2563. He had written a letter to Tammy Manning summarizing the research that he had done, which was introduced into evidence at the hearing. ROA Vol. 36, p. 5917-5919.

Johnny Shane Kormondy, whose cell on death row was immediately next door to Mr. Dufour for a little over one year, testified about Mr. Dufour's behavior. Mr. Kormondy also described the layout of death row and the guard to inmate ratio. Id. at 2571-72. He testified that on each eight hour shift, there are two to three guards for each wing. Each wing contains 80 or more inmates. Id. at 2572-73. Mr. Kormondy described how the inmates clean their cells. He explained that the inmate workers bring a cart with cleaning supplies, hand the supplies out to the inmates, allow them to use the supplies, and then take them back. Id. at 2574. The inmates are not allowed to keep the cleaning supplies in their cell. Id.

Mr. Kormondy also explained how the canteen works. Inmates are allowed to purchase items from the canteen if they have money in their inmate accounts. Id. at 2576. They know if they have money in their accounts because the Department of Corrections gives them receipts to let them know their balance. Id. The inmates do not have to add or subtract or keep track of their balance because the receipts do it for them. Id. Mr. Kormondy would help Mr. Dufour write inmate requests. He could tell Donald needed help because there was a difference in what Donald was telling Mr. Kormondy he wanted and what he had written down on the paper. Id. at 2581. Thomas Overton, whose cell was on the other side of Mr. Dufour, would also help Donald with his writing needs. Id. at 2583.

Mr. Kormondy testified that he did not know Donald to read books and that Donald did not play chess. Id. at 2581. He thought that Donald seemed slow. Id. at 2587. He related a story about the shirt that Donald wore out to run in the yard. Mr. Kormondy saw Donald's yard shirt one day and noticed that it was "really dingy." Id. at 2586. He asked Donald when was the last time he washed it and Donald replied that he washes it every week when he goes to the yard. Id. Donald figured that since he was sweating and throwing water on himself, that meant his shirt was clean. Id. Mr. Kormondy had to explain to him that the shirt needs to be washed with soap in Mr. Dufour's sink or be sent to the laundry. Id.

Officer James Wright is a prison guard at Union Correctional Institution and was a guard on Mr. Dufour's wing for approximately five months. Id. at 2613. There are three guards for 84 inmates on a shift and that they are often short-staffed. Id. at 2607. His duties over an eight hour shift would be varied, including handing out cleaning supplies, feeding, attorney and medical call outs, court call outs, etc. Id. at 2608. In addition to those duties, the officers do two counts per shift where they physically walk by each cell and count the inmates. Id. at 2609.

Officer Wright conceded that at the time of his deposition he did not remember exactly who Mr. Dufour was and needed to see his face to remember him. Id. at 2610. He does not know whether Mr. Dufour reads or what he reads. Id. at 2611. He testified that Mr. Dufour seemed quiet and kept to himself. Id. Officer Wright did tell Dr. McClaren during his interview that Mr. Dufour played chess. Id. Officer Wright had named some other heavy chess players on Mr. Dufour's wing that he thought Mr. Dufour played chess with, including inmates Knight and Chamberlain. Id. at 2614. After being shown the movement logs of those two inmates and the schematic of death row, Officer Wright acknowledged that those two inmates' cells were nowhere near Mr. Dufour. In fact, their cells were on "the other far side in the corner." Id. at 2615. Officer Wright also acknowledged that he could have been mistaken when he said that Mr. Dufour

plays chess.[1] Id. Officer Wright admitted that he had no training in mental illness or mental retardation. Id.

The State called Donna Risban Grant, who was Mr. Dufour's stepsister and lived with him for approximately two years prior to Donald turning eighteen. Through Ms. Grant's testimony, the State tried to establish that Mr. Dufour possessed adaptive skills such as cooking, cleaning, and having appropriate social relationships, including a relationship with her "best friend" Sheila Martin. However, Ms. Grant was thoroughly impeached by the testimony of Sheila Martin. Ms Martin, now a teacher with Orange County public schools, testified that she and Ms. Grant were merely acquaintances who hung out for a very short period of time. ROA Vol. 18, p. 3159. She never dated Donald Dufour, she never double dated with Donna, and she did not spend time at the Dufour household. Id. at 3159-3166. Her parents would not let her spend time there because they did not approve of the environment in the Dufour house. Id.

Maxine Valle was the next door neighbor of Mr. Dufour in 1976, when he was about twenty years old. Ms. Valle testified that Mr. Dufour would interact with her children and that he felt very comfortable around them. Supp. ROA Vol. 2, p. 167. Donald would try to read children's books to them, but he had trouble

[1] After reviewing Mr. Dufour's property receipts, Correctional Sentence Specialist Tammy Manning testified that there was no indication that he had ever a chess board or chess pieces in his cell. Supp. ROA Vol. 1, p. 18.

with some of the words so she had to help him. Id. at 168. Ms. Valle's husband had gotten Donald a job putting up drywall because Donald had indicated that he knew how to do the job. Id. at 170. However, after an hour or two on the job, it became obvious that Donald did not know anything about that kind of work. Id. He never worked with her husband again. Id. Ms. Valle knew Mr. Dufour to collect pop bottles for money. She never knew him to cook or follow a recipe. Id. at 171-172. She felt that his intellectual abilities were limited. Id. at 172.

Gary Dufour is Mr. Dufour's brother. He is the second youngest and closest in age to Mr. Dufour. Supp. ROA Vol. 1, p. 133. He characterized Donald as a follower and that "if anybody had something going on, he was ready to go." Id. Gary testified that his alcoholic father hit all of the children and would often hit their mother in front of the children. Id. at 135. There were no rules in the Dufour household and the boys could come and go as they pleased. Id. at 136.

Gary testified to an altercation he had with Donald when Donald was about 12 years old where Gary rammed Donald's head through a glass fish aquarium, causing it to shatter. Id. at 137. Gary also testified to Donald's frequent abuse of drugs and alcohol that started at a very young age. Id. at 143. Donald's arm was scarred and infected from repeated intravenous drug use. Id. He remembers Donald sniffing Toulane and/or glue at the age of 10 or 12. Id. at 147.

Gary testified that Donald enjoyed being around children and "[i]f somebody had kids, Donald was playing with them and acting up." Id. at 139. Donald would play with Gary's daughter Christie, who was about three years old at the time. Id. Gary testified that John, his older brother, was sent to Gateway school, which Gary described as a "retarded school." Id. at 144. John was sent to Gateway because he had mental problems and because he was very violent, hostile, and disruptive in class. Id. at 144, 146. Now, John takes care of himself, has a wife, drives a car, and held a job before injuring his back. Id. at 146.

The State called Stacy Sigler, an accomplice of Mr. Dufour in the instant murder case, who has an immunity agreement that was still in place at the time of her testimony at the evidentiary hearing. Supp. ROA Vol. 2, p. 265. Ms. Sigler knew Mr. Dufour after the age of eighteen, during a time which was monopolized by heavy drug use for both of them. Ms. Sigler gave several inconsistent statements at the hearing. For example, she testified at the hearing that Donald handled their money, paid the rent for their apartment, and dealt with their landlord. Supp. ROA Vol. 2, p. 245; 259-260. However, at the time of the trial, 20 years before mental retardation ever became an issue, she testified that she was the one who paid the rent. Id. at 260-261. Due to the numerous inconsistent statements, the postconviction court gave her testimony little weight. ROA Vol. 9, p. 1460.

Mr. Dufour presented the expert testimony of Dr. Gutman, who had been retained as an expert witness for Mr. Dufour at trial. He is a licensed psychiatrist with a private practice in Orlando. Supp. ROA Vol. 1, p. 117. Dr. Gutman conducted an hour and a half evaluation of Mr. Dufour in 1985. Id. at 119. His evaluation did not include any IQ testing or memory testing. Id. at 120. He stated in his report that he thought Mr. Dufour was of average intelligence. Id. However, he testified that that was only a ballpark estimate, and in the past when he has made ballpark estimates, IQ scores have been lower. Id. at 121. He described the ballpark estimate of Mr. Dufour's IQ to be the "the least reliable of all the mental status exam parameters." Id. at 121-22. He was basing his estimate on the mini-mental status exam, which consists of five to ten questions such as who is the president, what is the capital of the United States, etc. ROA Vol. 16, p. 2757. Dr. Gutman further stated that if there is a question as to someone's IQ, it is proper for a *psychologist* to conduct IQ testing. Supp. ROA Vol. 1, p. 120.

The State called Dr. Berland as an expert witness. Dr. Berland was retained by the defense in the initial 2002 postconviction proceedings. Despite arguing to the contrary at the initial postconviction hearing, the State called Dr. Berland to offer the opinion that Mr. Dufour's IQ score could have been lowered by brain damage that occurred after the age of 18. Supp. ROA Vol. 2, p. 280-290. However, Dr. Berland also acknowledged that Mr. Dufour suffered numerous

accidents, insults, and drug abuse prior to the age of 18. Id. at 307-308. Dr. Berland commented that Mr. Dufour inhaled Toulane before his teenage years. He explained that "there is an international literature which says that exposure to that kind of solvent, volatile hydrocarbons, even one massive exposure, is enough to cause permanent brain injury and psychosis." Id. at 296.

Dr. Valerie McClain was one of the two court appointed experts directed to evaluate Mr. Dufour for mental retardation. Dr. McClain is a board certified forensic neuropsychologist and a board certified forensic examiner. ROA Vol. 14, p. 2362. Beginning as early as 1995, Dr. McClain conducted evaluations for Social Security Disability to determine whether or not individuals were mentally retarded. Id. at 2363. Dr. McClain also performs court ordered evaluations for both mental retardation and competency. Id. She has worked on three capital cases where the issue was determining mental retardation and ten non-capital cases where mental retardation was an issue. Id. at 2364. She is also involved in assessing mental retardation in the school system. Id. Dr. McClain has been qualified as an expert in approximately 500 cases, and qualified as an expert in mental retardation in ten cases. Id. at 2365. She was accepted as an expert by the postconviction court in forensic psychology, forensic neuropsychology, and mental retardation. Id. at 2366.

Dr. McClain testified that she was contacted to do a court ordered evaluation of Mr. Dufour to determine whether or not he was mentally retarded. Id. at 2369. Dr. McClain explained that it is critical when assessing mental retardation to look at background documentation about the person's life prior to age 18. Id. at 2370. Such background information would include birth history, academic records, contacting living family members, and prior medical records. Id. at 2370-71. Dr. McClain reviewed numerous records and spoke to several individuals including George Dufour, John Dufour, Vance Powell, Stacy Sigler, William Cutts, Maxine Valle, Donna Grant, and Sheila Martin. Id. at 2373. She was present in court for the testimony of teachers Nancy Cutts and Joyce Jones, and included their testimony as a basis for her opinion. Id. She also spent four to five hours with Mr. Dufour. Id. at 2374.

In the clinical interview, Dr. McClain learned about his academic history, how he functioned daily, his job history, and the nature and duration of his relationships. Id. at 2376. Mr. Dufour's self report as to his academics was very consistent with the school records she reviewed. Id. at 2377. Dr. McClain found it significant that Donald never had a stable traditional relationship because it shows a deficiency in social adaptation. Id. at 2378.

Dr. McClain reviewed Dr. Merin and Dr. McClaren's IQ testing, and when the standard error of measurement is taken into account, all three experts score Mr.

Dufour in the mentally retarded range. Id. at 2380. She also explained to the postconviction court that the standard error of measurement is generally accepted in the psychological community and cannot be ignored. Id. at 2368.

Dr. McClain's testing revealed Mr. Dufour's Verbal IQ at 68, his Performance IQ at 72, and his full scale IQ was 67, placing him more than two standard deviations below the mean. Id. at 2382. She further testified that Dr. McClaren's testing showed Mr. Dufour to have a Verbal IQ of 65, and a Performance IQ of 65, with a full scale IQ of 62, again placing him more than two standard deviations below the mean. Id. Finally, Dr. McClain testified that she had reviewed Dr. Merin's testing, and discovered some clerical and scoring errors. Id. at 2384.[2]

Dr. McClain explained some of the administration errors made by Dr. Merin. For example, despite the instruction in the manual that requires the examiner to write down the examinee's responses verbatim, Dr. Merin left several of Mr. Dufour's answers blank, yet gave him points for those answers. Id. at 2385-86. When a standardized test is given in a non-standardized manner, its validity is questionable. Id. at 2388. Dr. McClain again emphasized that when you take into

[2] Both Dr. Keyes and Dr. McClaren also testified to Dr. Merin's scoring and administration errors, and the full scale was lowered to at least a 73, and possibly as low as a 70. That will be discussed further below.

account the standard error of measurement, which cannot be ignored, Mr. Dufour scored in the mentally retarded range on Dr. Merin's uncorrected test. Id. at 2389.

Dr. McClain also testified about Mr. Dufour's adaptive functioning. Dr. McClain spoke to Mr. Dufour's brothers, George and Gary, and she also spoke to Vance Powell. George described Donald as primarily a follower, that he had never had a checking account, and that he never did well in school. Id. at 2390-2391. Gary mentioned that Donald had difficulty in school and had a poor attention span. Id. at 2391. Also, Vance Powell described Donald as "a slow kid" who had trouble holding down a job, who partied and used drugs, and who could read but was slow. Id. Nancy Gatewood, who was a parent of a girl that Donald knew before the age of 18, described Donald as "somewhat slow" and that he "had some difficulties." Id. at 2393. Dr. McClain reported consistency across all the informants regarding Donald's adaptive deficits. Id. at 2391-2392.

Dr. McClain also noted the significance of Mr. Dufour's brother John as being mentally retarded. She explained that "it is significant because it can go to the issue of some genetic basis for the mental deficiency." Id. at 2392. Dr. McClain reviewed Dr. Keyes' adaptive functioning data, including his administration of the Adaptive Behavior Assessment System (ABAS) and the Independent Living Scale. Id. at 2398. Based on that data, as well as her own interviews and document

review, Dr. McClain opined that Donald had significant adaptive deficits, satisfying the second prong of the definition of mental retardation. Id.

Dr. McClain testified that she felt Donald was giving his best effort during their testing and that he was not malingering. Id. at 2400,2406. She administered three tests to see if there were any indications of malingering. Id. at 2400-01. One of those tests, the Rey Fifteen Item Memory Test, was within normal limits. Id. at 2401. The other two tests were within limits that could be suggestive of malingering. Id. at 2401. However, as Dr. McClain explained, if a person is suspected of being mentally slower or having organic brain damage, in that population of individuals, there can be a problem with the validity of the malingering tests. Id. Therefore, she explained, "one should consider those results with other criteria." Id. She testified that there are 16 criteria that an evaluator has to consider when determining if an individual is malingering. Id. at 2405. Dr. McClain concluded that based on these criteria and his entire presentation to her, Mr. Dufour's "effort was within normal limits and it was valid testing." Id. at 2406. Dr. McClain also found it significant that the state expert, Dr. Merin, found in 2002 that Donald was not malingering. Id. at 2402. As for Dr. McClaren's scores, Dr. McClain noticed that Donald appeared ill during Dr. McClaren's testing, which could account for a suppression of his scores. However, Dr.

McClaren's scores were still within a standard deviation of Dr. McClain and Dr. Merin's scores. Id. at 2415.

Dr. McClain also stated that she had spoken to Dr. Zimmerman, who had evaluated Donald in 1989 and had concluded that he was mentally retarded. Id. at 2416. Even though the measure that Dr. Zimmerman used, the Slosson, is not an accepted test under the Florida Statutes, Dr. McClain testified that because Dr. Zimmerman is a trained neuropsychologist and the Slosson was individually administered as part of a complete neuropsychological battery, his conclusions are "certainly predictive of Don's actual functioning." Id. at 2417.

Dr. McClain testified that she, along with several of the other experts, administered the Wide Range Achievement Test (WRAT), which tests an individual's achievement in reading, spelling, and arithmetic. Id. at 2407. Donald's scores were at the 3rd and 4th grade level. This was consistent with Drs. McClaren, Merin, and Zimmerman, who all scored Mr. Dufour in the 2nd to 4th grade range. Id. at 2407-08. Dr. McClain went on to explain the significance of Mr. Dufour achieving Ds and Fs and failing the second grade. She testified that grades that poor can show limited intellectual functioning, and well as limited achievement. Id. at 2409. She also listened to the testimony of the teachers, Joyce Jones and Nancy Cutts. Id. at 2410. What was important about Joyce Jones' testimony was that Donald was in a basic English class, and that Ms. Jones

explained that if a student merely "exerted some effort," they would be given a "C" instead of a failing grade. Id. at 2411. In other words, "there was not a specific criteria, you have to pass this particular work, [but] rather exert some effort or motivation." Id. So, if Donald tried in Ms. Jones' class, he got a "C." Id. Dr. McClain also noted that Ms. Jones' description of Donald's immature behaviors in class were consistent with the profile of someone who is mentally retarded. Id. at 2413-14.

Dr. McClain explained to the court that often times adaptive functioning can improve in a highly structured setting. Id. at 2425. However, even if the adaptive functioning improves, Dr. McClain testified that does not mean the person is no longer mentally retarded. Id. at 2426. She offered:

> A: I think that if a person is placed in a structured setting where they have, for instance, what I call set-up, where the person is said, okay, go do this, do your hygiene at this time, all the things they need, the comb, the brush, the soap, the washcloth, the towel, is there, basically it can help a lot in terms of promoting their level of adaptive functioning.
>
> Q: Does that mean that they're no longer mentally retarded?
>
> A: No.

Id. at 2426-27.

Dr. McClain opined that based on Donald's academic performance and the testimony of his teachers, that "there's clear indicators that [the onset of his mental retardation] was early on." Id. at 2505.

Dr. Denis Keyes is an associate professor of special education at the College of Charleston. ROA Vol. 15, p. 2627. He has 34 years of experience working with people with mental retardation in various settings. Id. at 2628. Dr. Keyes' primary focus has been in mental retardation and specifically mental retardation assessment. Id. at 2629. Dr. Keyes is a certified school psychologist, both nationally and in the state of South Carolina. Id. at 2628. Dr. Keyes has been published in several textbooks dealing with mental retardation. Id. at 2630. His works have also been published in various professional journals, one of which was cited by the United Supreme Court in Atkins v. Virginia, 536 U.S. 304,316, 122 S.Ct. 2242,2249, n. 20 (2002). Id. at 2631.

Dr. Keyes has testified in at least 40 capital cases, and has been qualified as an expert in both mental retardation and educational psychology in state and federal courts. Id. at 2633-34. Dr. Keyes has conducted numerous psychoeducational evaluations on inmates involved in the criminal justice system. Id. at 2635. Without objection, Dr. Keyes was accepted by the postconviction court as an expert in mental retardation and educational psychology. Id. at 2640.

Dr. Keyes explained to the court how the definition of mental retardation has evolved over the years. When Mr. Dufour was in school, there was a 15 point spread, between 85 and 70, that was called borderline retardation. ROA Vol. 16, p.

2646. In 1973, the borderline definition was dropped and the intelligence prong for mental retardation became two standard deviations from the mean. Id.

Dr. Keyes also explained the evolution of special education. He testified that in 1972, a Pennsylvania federal district court decided PARC v. Pennsylvania, 343 F.Supp. 279 (D.C.Pa. 1972), which recognized that children with special needs cannot be denied an education. Id. at 2648. Dr. Keyes further explained that in 1975, Public Law 94.142 was enacted in order to fund special education programs. Id. That law still exists today and is called the Individuals with Disabilities Education Act.[3] Id. None of these laws were in place at the time Mr. Dufour withdrew from school in the spring of 1971. Id. at 2649.

Dr. Keyes testified that the Tenth Edition of the Classifications and Systems of Support Manual, published by the American Association on Mental Retardation (AAMR), now known as the AAIDD, is routinely relied on in the psychological community as authoritative on mental retardation. Id. That authoritative treatise describes five assumptions about mental retardation. Id. at 2650. The third assumption, that strengths coexist with weaknesses, is probably the most important. Id. To illustrate this point, Dr. Keyes relayed a story about a Down Syndrome student he had taught who said she was going to vote for independent candidate John Anderson because she knew he needed five percent of the vote to

[3] That Act can be found in Title 20, Chapter 33, of the United States Code.

recover the money he had spent on the election. Dr. Keyes felt this was important because a lot of people think that people with mental retardation are completely incapable of complex or abstract thought. He noted that this was just one example of this common misperception. Id. at 2650-51. Dr. Keyes explained that people with mental retardation have a stigma and that when people think of someone with mental retardation, they only think about people with Down Syndrome. Id. at 2650. Dr. Keyes noted that he often learned things from his mentally retarded students. Id. at 2651.

Dr. Keyes, like Dr. McClain, also testified about the standard error of measurement.

> [T]he standard error of measure is a statistical necessity. Every test, in every test administration, is subject to error. There's no getting around it. And when you develop a test, you have to include the estimated amount of error. That error is called the standard error of measure. And when you report a score, the theoretical true score that may never, ever be found has to be reported within a range of possibilities. So in an IQ, it's typically plus or minus five points. So if you have an IQ that's a 72 or 73 or 74, you can have it go down five points or up five points. This is called your band of confidence. So that if you have a 75, your band of confidence for the actual true score would be between 70 and 80. That's the standard error of measure.

Id. at 2654-55. He explained that any time someone has an IQ below 75, you have to accept the possibility that the person is mentally retarded and proceed to assess adaptive functioning. Id. at 2668.

Dr. Keyes explained that people with mental retardation exhibit certain behaviors and characteristics that are common. For example, more people with mental retardation are male, by an almost two to one margin. Id. at 2656. He also named other characteristics such as: short term memory deficits, lack of ability to retain concentration, poor judgment skills, impulsivity, a tendency to follow along when told to do something, even if it is not in their best interest. Id. at 2656-57. The reasons why a mentally retarded person will go along with something even if it is not in their best interest are twofold. First, the mentally retarded person wants to please the other person, and second, the mentally retarded person wants to fit in. Id. at 2657. They have poor planning and poor coping skills. Id. at 2659. People with mental retardation can lead very successful lives and can be taught to carry out tasks. Id. at 2660. In addition, Dr. Keyes explained there is a common misperception that you can tell whether or not a person is mentally retarded just by looking at them. This is not true or accurate. Id. at 2661.

Dr. Keyes explained the concept of "the cloak of competence," which says "a person with mental retardation would go to incredible lengths to try to make themselves look smart." Id at 2665. Basically, they try to be part of a "normal" group of people. That way, if they appear normal to their peer group, they will be normal to themselves. Id. at 2666. The "cloak of competence" is something that

needs to be taken into account when evaluating and reviewing data in a mental retardation case. Id.

Dr. Keyes testified that prior to going to evaluate Mr. Dufour, he asked to look at school and intelligence data to see if he had any reason to believe Donald might be retarded. Id. at 2672. He reviewed the school records, some testimony from Mr. Dufour's trial and sentencing, and the IQ testing of Drs. McClain, Merin, and McClaren. Based on that information, he felt "there was a reason to be concerned that this person might have mental retardation." Id. at 2672. In addition to reviewing the IQ testing, Dr. Keyes conducted an adaptive examination of Mr. Dufour. He met with him twice, for approximately eight hours total. Id. at 2673.

In addition to meeting with Mr. Dufour, Dr. Keyes testified that he reviewed all of the same materials that Dr. McClain reviewed. Id. at 2673. He also interviewed Nancy Cutts, Joyce Jones, Johnny Shane Kormondy, Thomas Overton, and Nancy and Dynah Gatewood. Id. at 2674. With respect to his interview with Mrs. Cutts, Dr. Keyes learned that the CTBS test that Donald took in the 7th grade when he was fifteen, was actually a 3rd grade level test. Id. at 2675. In addition, Donald's school records were very significant to Dr. Keyes, because in his 30 years in education, he has "not seen any situation where a first grader got Ds or Fs, unless there was something developmental [sic] wrong." Id. at 2679.

Dr. Keyes explained Mr. Dufour's risk factors for mental retardation. Mr. Dufour had traumatic brain injury before the age of 18, malnutrition, an impaired childcare giver (his alcoholic abusive father), lack of adequate stimulation, parental rejection of caretaking and parental abandonment, domestic violence, child abuse, inadequate safety measures, social deprivation, and difficult child behaviors. Id. at 2684-85, ROA Vol. 37, p. 5989-5993.

Dr. Keyes testified about Dr. Merin's IQ testing and highlighted for the postconviction court several administration and scoring errors that Dr. Merin committed during the testing. Id. at 2686. Dr. Merin made errors in the Vocabulary, Digit Symbol, and Similarities subtests. Id. at 2686-88. For example, Dr. Merin gave Mr. Dufour a raw score of 28 on the Similarities subtest, when the addition of Mr. Dufour's test answers for that subtest actually reflects a 13. Id. at 2687. More significant than Dr. Merin's addition errors were his administration errors. He failed to follow the reversal rule on at least three occasions. Id. at 2689. As explained by Dr. Keyes and confirmed by all the other experts, the reversal rule requires the examiner to start on a certain numbered question. If the examinee does not get a perfect score on that question or the next question, the examiner is required to go back and ask the first few questions on the test in reverse order. In other words, the examinee has to get two perfect scores in a row and if he does not, the examiner has to go back, in reverse order, to the beginning until the examinee

gets two perfect scores in a row. Id. at 2689. If he gets two perfect scores in a row on the first two questions, then the examiner automatically gives the examinee the points on the first few questions, without actually asking the questions. Therefore, Dr. Keyes testified, there is no way of knowing whether Mr. Dufour actually achieved the points given to him by Dr. Merin because he was never asked those questions. Id. at 2689. Dr. Keyes acknowledged that if you administer a standardized test in a nonstandardized manner, the test can be invalid. Id. at 2692. After correcting the scoring errors (without taking away points for failure to do reversal rule) Dr. Keyes testified that Dr. Merin's corrected score was a 73 and within the range of mental retardation. Id. at 2693. As noted below by Dr. McClaren, taking away the points given on the reversal rule, Mr. Dufour's score is as low as 70.

Dr. Keyes also administered an adaptive functioning assessment of Mr. Dufour. He concluded, "Mr. Dufour's adaptive behaviors are lower than normal by a significant degree. He does not adapt his behaviors to his same cultural or age group." Id. at 2694. Dr. Keyes testified that he believed his adaptive data was valid because there was a great deal of consistency. Id. at 2695. Dr. Keyes used the Adaptive Behavior Assessment System (ABAS) and the Independent Living Scale to assess adaptive functioning. His informants were Mr. Dufour, Mr. Kormondy, Mr. Overton, and Ms. Gatewood. Id. at 2695. There are three skill

areas the ABAS looks at: conceptual, practical, and social. The ABAS also has a General Adaptive Composite (GAC). Dr. Keyes testified as to the consistency between all four informants and noted that Mr. Dufour estimated his own abilities higher than everyone else, which is consistent with someone with mental retardation. Id. at 2695. In fact, on each of the three areas, as well as his GAC, Mr. Dufour estimated his own abilities anywhere from 6 to 12 points higher than the other three informants. ROA Vol. 37, p. 5992. Mr. Dufour's GAC scores were between a 47 and a 66, all more than two standard deviations below the mean. ROA Vol. 16, p. 2695.

Dr. Keyes commented on Dr. McClaren's use of a prison guard as an informant for the adaptive behavior test. His concern was that the guard/inmate relationship is a master/servant situation, in other words, "one person is ordering the other to do something." Id. at 2701. Dr. Keyes also testified that Ellis and Luckasson published an article in the George Washington Law Review that cautioned against the use of guards and inmates for adaptive functioning. Id. at 2702. The scholarly articles conclude that doing adaptive functioning in a prison setting is not ideal in any case. Id. at 2703. However, Dr. Keyes testified that if there is a requirement to look at current adaptive functioning (as opposed to adaptive functioning prior to 18), in a capital case, the only real choices are guards and inmates. Id. at 2703. If that is the case, Dr. Keyes testified he believes the

inmates would be better informants because they have more frequent contact and will likely know the individual better than the prison guards. Id.

Similar to Dr. McClain, Dr. Keyes explained that when the structure level increases for a person who is mentally retarded, the person will function better. Id. at 2705. Dr. Keyes testified that "Mr. Dufour functions better on death row than he would if he were out in the community." Id. Even still, his current adaptive functioning was also deficient. Dr. Keyes opined that based on all of the data that he reviewed and the testing that he had done, together with his education, training and experience, Mr. Dufour is mentally retarded. Id. at 2705-2706. Based in part on Mr. Dufour's school records, he concluded that the onset was prior to the age of 18. Id. at 2706.

Dr. Merin was called by the State. He is a psychologist specializing in clinical psychology and neuropsychology. ROA Vol. 17, p. 2771. Mental retardation is not his specialty. Id. at 2838. He was tendered and accepted as an expert in clinical psychology and neuropsychology. Id. at 2775. Dr. Merin was retained by the state in 2002 in preparation for the postconviction evidentiary hearing to assess Mr. Dufour's "general mental condition, whether there was any substantial brain damage, and what his present level of intellectual functioning is." Id. At the 2002 hearing, which was judicially noticed by the postconviction court and is part of this record, Dr. Merin testified that Mr. Dufour was not malingering,

that he gave a valid effort, and that his score "placed him at the lower end of the borderline into the mentally retarded range." IPC ROA Vol. III, p. 441, 423-424; ROA Vol.12, p. 1937, 1919-1920.

Dr. Merin testified that he does not use any current objective, adaptive testing instruments in order to determine adaptive functioning. Id. at 2840-41. However, he claimed that part of the WAIS, specifically the Comprehension subtest, has "to do with how to solve social problems" and could be used to determine adaptive functioning. Id. at 2841. He could cite to no authoritative treatise or manual to support this position. Like Drs. McClain and Keyes, Dr. Merin testified about some of the assumptions and common misperceptions about people with mental retardation. Dr. Merin acknowledged that mentally retarded people have strengths and weaknesses: they could have a job and live on their own, they could live with their spouse and children, and they could function reasonably well with proper training. Id. at 2853. Dr. Merin acknowledged that "the closer a person is to 70, the more likely that person is able to function reasonably well and perform tasks that the average person may perform." Id. at 2853-54. People with mental retardation can also be taught carpentry skills, how to fix complex items, work in a stockroom or loading area, and drive an automobile. Id. at 2854.

Dr. Merin acknowledged that both the DSM-IV and the American Association for Mental Retardation state that individuals with an IQ up to 75 can

be diagnosed with mental retardation, provided they also have adaptive deficits. Id. at 2362. He also agreed that IQ scores are not chiseled in marble and can vary by as much as five points on either side. Id. at 2360. Dr. Merin agreed that "[t]he standard error of measure is a critical consideration that must be part of any decision concerning a diagnosis of mental retardation." Id.

On direct examination, Dr. Merin testified that he could not find the scoring errors that were discussed by Drs. McClain and Keyes. Id. at 2785. However on cross examination, he acknowledged that he made some scoring errors and transposed the numbers on some of the subtests. Id. at 2898-2901. He was then asked about the purpose of the reversal rule. He acknowledged that the WAIS Administration and Scoring Manual says, "easier low end items, reversal items have been added to several subtests to lower the floor and increase clinical utility of the WAIS-III." Id. at 2905. In fact, the reversal rule is specifically designed to ensure the reliability of the IQ test when testing people with low intelligence. Id. at 2914. Dr. Merin explained how you are supposed to follow the reversal rule. Using the Similarities subtest as an example, he agreed that on that subtest, the examiner was supposed to start on question number six. If the examinee got a perfect score on question six and question seven, the examiner could automatically give the examinee five points for the first five questions, without actually having to ask him the questions. However, if the examinee failed to achieve a perfect score

on questions six *and* seven, then the examiner must go back and ask questions five through one, until the examinee gets two correct answers in a row. Dr. Merin claimed he followed this rule correctly. Id. at 2906-2907.

However, counsel for Mr. Dufour showed Dr. Merin, off the record, the videotape of his testing with Mr. Dufour. Id. at 2907-2913. Specifically, counsel for Mr. Dufour showed Dr. Merin the Similarities, Information, and Comprehension subtests that he administered to Mr. Dufour. After reviewing the videotape, Dr. Merin conceded that he did not use the reversal rule for the Similarities test, even though Mr. Dufour did not get a perfect score on number six, which meant that the examiner was supposed to go back and ask questions one through five, in reverse order, until Mr. Dufour got two in a row correct. Id. at 2914-2915. Dr. Merin gave Mr. Dufour five points for those answers, but he never asked Mr. Dufour the questions. Id. at 2915. When trying to explain why he did not do the reversal rule, he said that by not asking Mr. Dufour the questions it gave him a lot of information. Id. at 2916. When asked how not asking those questions gave him *more* information, he offered:

> Well, it gives us a lot of information regarding - - by virtue of knowing or seeing or understanding the types of questions he's answering after that and then getting the information from him that would ordinarily be expressed by him - - ordinarily expressed by him if we gave him the benefit of the doubt and gave him scores that were reflected of what he's capable of doing and not what he is not capable of doing.

Id. at 2916-2917. This rambling, nonsensical answer offered no explanation as to why he did not follow the manual. He could cite to no authoritative literature to support his position on not following the reversal rule. Id. at 2919. Dr. Merin also acknowledged that he failed to use the reversal rule on the Information and Comprehension subtests as well, yet he gave Mr. Dufour points on those subtests for questions that he never asked. Id. at 2917,2919.

Dr. Merin agreed that excluding the reversal rule errors and excluding the Digit Symbol Coding error, and only including the error where the numbers were transposed on the Similarities subtests, Mr. Dufour's full scale IQ score would have been a 73. Id. at 2923-24. Dr. Merin also admitted, after failing to answer the question several times, that in his deposition in 2006, he indicated that part of the reason he felt Mr. Dufour was not retarded was because his score on the Similarities test was so high. He testified in deposition that the Similarities and Vocabulary subtests are the two best indicators of intelligence. Id. at 2895-2898. After he corrected just this error, Mr. Dufour's raw score went from a 12 to a 6, and caused his verbal IQ to go down at least six points. Id. at 2898, 2902, 2924. Dr. Merin conceded that a person with a full scale IQ of 73, assuming they had significant adaptive deficits, would be considered mentally retarded. Id. at 2925.

Dr. Harry McClaren has spent nearly his entire career as a psychologist in the criminal justice system, specifically working for the Department of Corrections

in various prison systems and juvenile facilities, and working in and for state hospitals dealing with defendants found not guilty by reason of insanity, those found incompetent to stand trial, and mentally disordered sex offenders. Id. at 2927-28. He also worked for a probation and parole office outside of Milwaukee. Id. at 2928. His private practice that he has had since 1996 deals entirely with forensic psychology and he also serves as an evaluator for Jimmy Ryce. Id. at 2929. He has no formal training in mental retardation. ROA Vol. 18, p. 3070. He has testified in approximately 50 to 100 capital cases and 90% of those have been for the state. Id. at 3071. Dr. McClaren was accepted as an expert in forensic psychology. ROA Vol. 17, p. 2931.

Dr. McClaren relied upon a number of records created by the Florida and Mississippi Department of Corrections in forming his opinion that Mr. Dufour was not retarded. One such document he felt was important was from the Marion Correctional Institute in Lowell, Florida that referred to Donald as "the sorriest, laziest, malingeringest inmate down there." ROA Vol. 18, p. 2988. Other pieces of information he relied on were reports from a probation officer, a police report where Donald called the police because someone had sold him fake drugs, and reports from Stacy Sigler, an accomplice in the crime for which Mr. Dufour was sentenced to death. Id. at 2997, 2999, 3004. Some of the other documents Dr. McClaren relied upon in forming his opinion that Donald was not mentally

retarded were the inmate requests that Mr. Dufour has filled out while on death row requesting medical treatment. He also found it significant that Donald ultimately received his GED. Id. at 3032, 3033.

Dr. McClaren admitted that he did say in his 2006 deposition that he had no reason to believe that Dr. McClain's testing was invalid and that he "had no criticisms or disagreements with her testing procedures, the testing instruments, or the results of the test." Id. at 3081.

Dr. McClaren was the only expert who testified that he felt that Mr. Dufour was not giving his optimum effort. Id. at 3086, 3088. He also acknowledged that Mr. Dufour did appear to be ill during the testing he administered. ROA Vol. 17, p. 2947. He acknowledged that establishing rapport with an examinee is important. ROA Vol. 18, p. 3146. He agreed that studies have shown that "there are significant differences in IQ test performance as a result of the warm versus cold interpersonal relationship between the examiner and the examinee." Id. at 3148. He also agreed that in order to get valid results on the WAIS, "a cooperative relationship between the examinee and the examiner is essential in psychological testing." Id.

When questioned about the sources he relied on in forming his opinion, he agreed that the prison officials writing the reports appeared to have no formal training or any higher education, and it was unclear if they even finished high

school. Id. at 3109. He agreed that it would be inappropriate for a psychologist in a professional setting to categorize a defendant as the "sorriest, laziest, malingeringest inmate down there." Id. at 3126. He conceded that Stacy Sigler had memory problems, abused drugs, had an immunity agreement, and gave several inconsistent statements to the court at the evidentiary hearing. Id. at 3131. In addition, Dr. McClaren failed to speak to any of Mr. Dufour's teachers because he felt "[i]t was so remote." ROA Vol. 19, p. 3205.

Dr. McClaren agreed that the standard error of measurement is a recognized concept in the field of IQ testing. He agreed that the AAMR definition of mental retardation includes individuals with IQ's up to 75. ROA Vol. 18, p. 3143. An IQ of 70 is considered to represent a range of 65 to 75. Id. at 3142. Dr. McClaren agreed that the Florida Supreme Court's decision in Cherry is in conflict with the AAMR and the DSM-IV/TR. Id. at 3145. He also conceded that Dr. Merin's scoring and administration errors on the WAIS lower the IQ score to at least a 72 or 73, but that it could be as low as a 70. Id. at 3081. He agreed that according to the AAMR and the DSM-IV/TR, both Dr. Merin's uncorrected and corrected scores place Donald in the range of mental retardation. Id. at 3146.

SUMMARY OF ARGUMENT

The postconviction court erred in denying relief for the following reasons. First, Mr. Dufour has proven by competent, substantial evidence that he is mentally

retarded. His IQ was tested by the court appointed experts and resulted in scores of 62 and 67. The objective adaptive functioning instruments administered by Dr. Keyes demonstrate that Mr. Dufour has significant adaptive deficits in communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. As for onset before age 18, Mr. Dufour's school records show that he received Ds and Fs in the first grade, he was socially promoted in every grade after first grade, and at least one of his teachers thought he was "very possibly" mentally retarded.

Second, the requirement that Mr. Dufour prove his mental retardation by clear and convincing evidence violates due process. As such, Florida Statute 921.137(4) is unconstitutional. The concerns addressed in Atkins against sentencing a mentally retarded defendant to death are more analogous to the concerns against trying an incompetent defendant as addressed in Cooper v. Oklahoma, 517 U.S 348(1996). As such, due process under the Fifth, Eighth and Fourteenth Amendments requires the standard be a mere preponderance.

Finally, the postconviction court erred in several evidentiary rulings throughout the course of the hearing. The court erred in admitting letters purportedly written by Mr. Dufour that were not properly authenticated. The court also erred in allowing Dr. Berland, a prior defense expert, to testify for the State in violation of the attorney client privilege. The court also erred in the admission of

hearsay documents during Dr. McClaren's testimony and allowing them to become the focus of the State's case. Dr. McClaren relied on this documents in reaching his opinion and read extensively from them during his six hour direct examination.

STANDARD OF REVIEW

While the standard of review of a trial court's finding regarding a defendant's mental retardation is whether competent, substantial evidence supports the finding, Johnston v. State, 960 So.2d 757 (Fla. 2006), when there are mixed questions of law and fact, as is the case here, the standard of review should be *de novo*, with the lower court's legal rulings reviewed *de novo* and deference given to factual findings supported by competent and substantial evidence. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 2000); Sochor v. State, 883 So.2d 766, 772 (Fla. 2004).

ARGUMENT I

THE LOWER COURT'S FINDING THAT MR. DUFOUR IS NOT MENTALLY RETARDED IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE, VIOLATES ATKINS, AND VIOLATES THE 5TH AND 8TH AMENDMENTS.

Mr. Dufour has proven by clear and convincing evidence that he is mentally retarded.[4] With IQ scores below 70, significant limitations in adaptive functioning, and substantial evidence of onset before age 18, Mr. Dufour has demonstrated that

[4] Mr. Dufour argues below in Argument II that this burden is unconstitutional, and should be a mere preponderance of the evidence. Mr. Dufour maintains that he meets either standard.

he is mentally retarded as set out in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002). In Atkins, the Supreme Court held that evolving standards of decency dictate, and there is a nationwide consensus that, "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses," mentally retarded offenders "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." Id. at 306, 2244. Moreover, the Court relied on clinical definitions of mental retardation as used by the AAMR and the American Psychiatric Association (APA). Id. at 308, 2254. The Court also cited Kaplan and Sadock's Comprehensive Textbook of Psychiatry to explain that an "IQ between *70 and 75* or lower… is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." Id. at 309,2245, n. 5(emphasis added). Finally, the Atkins court left it to the states to develop appropriate mechanisms to enforce the constitutional prohibition against executing the mentally retarded. Id. at 317,2250 (citing Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986)).

In response to Atkins, the Florida Legislature created Florida Statute 921.137. This statute defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." Fl. Stat. 921.137(1). The statute further defines "significantly subaverage general

intellectual functioning" as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." Id. There is no numerical cutoff score listed in the statute. Similarly, in Florida Rule of Criminal Procedure 3.203, enacted to govern the process by which claims of mental retardation are presented and adjudicated, there is no numerical cutoff score. See Fl. R. Crim. Pro. 3.203 (2004).

In March of 2006, this Court acknowledged the 70 to 75 cutoff as indicated in Atkins. Foster v. State, 929 So. 2d 524 (Fla. 2006). The Foster court accepted that Mr. Foster's IQ score of 75 was considered evidence of mental retardation. Id. at 532. However, the court held that Mr. Foster failed to meet the second prong – significant limitations in adaptive functioning. Id. See Johnston v. State, 960 So.2d 757,760 (Fla. 2006)(recognizing testimony about the 95% confidence interval in IQ testing and accepting an IQ score as a range). See also Webb v. Florida Department of Children and Family Services, 939 So.2d. 1182, 1184 (Fla. 4th DCA 2006)(a noncapital case recognizing the standard error of measurement exists and that three to five points above 70 should be considered).

Then, in April of 2007, this Court decided Cherry v. State, and found Mr. Cherry not to be mentally retarded because all of his IQ scores were above 70. 959 So.2d 702 (Fla. 2007). In addition, the Cherry court established 70 as the cutoff score for mental retardation, and in doing so, claimed it was deferring to the plain

meaning of the statute. Id. at 713. However, the Cherry court did acknowledge that the trial court, in its order, had placed some importance on the testimony that the "standard of error is a universally accepted given fact and, as such, should logically be considered, among other evidence, in regard to the factual finding of whether an individual is mentally retarded." Id. at 712.

Florida Statute 921.137 sets the burden of proof at clear and convincing evidence. This Court has defined clear and convincing evidence as follows:

> This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

In Re Davey, 645 So.2d 398,404 (Fla. 1994). Moreover, this Court defined clear and convincing evidence as "evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue. Standard Jury Instructions – Criminal Cases (99-2), 777 So.2d 366, 373(Fla. 2000).

As noted above, there are three prongs in the definition of mental retardation: 1) an IQ score two or more standard deviations below the mean, 2) adaptive deficits and 3) onset before age 18. Each prong will be addressed below.

Intelligence Testing

Mr. Dufour's IQ was tested in conjunction with the instant mental retardation claim by Drs. McClain and Dr. McClaren, both of whom were appointed by the postconviction court. Dr. McClain's testing of Donald revealed a Verbal IQ of 68 and a Performance IQ of 72, for a full scale of IQ of 67. Dr. McClaren's testing of Mr. Dufour revealed a Verbal IQ of 65, a performance IQ of 65, for a full scale IQ of 62.

In addition to the above testing, Dr. Merin had also tested Mr. Dufour's IQ in 2002 at the request of the State. The State used Dr. Merin as their witness in Mr. Dufour's 3.850 postconviction proceedings. Dr. Merin's original, uncorrected score had Mr. Dufour's Verbal IQ at an 85 and his Performance IQ at a 64, for a full scale IQ of 74. However, it was undisputed that Dr. Merin made several scoring and administration errors that rendered his full scale IQ score unreliable. The corrected score is at most 73, and as low as 70.

Dr. Merin's scoring error on the Similarities test was significant. Dr. Merin testified under oath in his 2006 deposition that part of the reason he felt that Mr. Dufour was not mentally retarded was because of his scaled score of 12 on the Similarities test. ROA Vol. 17, p. 2897. He testified that the Similarities subtest and the Vocabulary subtest were the two best indicators of intelligence. Id. A scaled score of 12 would put Mr. Dufour more than one standard deviation *above* the mean, which would mean Mr. Dufour had above average verbal abilities.

However, as indicated in the rebuttal testimony of Dr. Keyes, once that error was corrected, and the Similarities score was a 6 instead of a 12, all of Donald's scaled subtest scores were at or near two standard deviations *below* the mean, which showed that Mr. Dufour's verbal abilities were within the mentally retarded range. ROA Vol. 19, p. 3288-89;ROA Vol. 37,p.6104-6105.

In addition, as explained above, because Dr. Merin failed to follow the reversal rule on three of the subtests, it is impossible to know what Mr. Dufour would have scored on those questions. Instead, Dr. Merin gave Dufour points for questions he was never asked. It is undisputed that the failure to use the reversal rule is an administration error prohibited by the WAIS manual, which renders Dr. Merin's IQ test results unreliable. In part because of the gross scoring and administration errors, the postconviction court found that Dr. Merin's "testimony, diagnosis, and opinion carry little weight with respect to the actual IQ test result." ROA Vol. 9, p. 1452.

Despite finding Dr. Merin's score to be not credible and finding that "Dr. McClain and Dr. Keyes provided the strongest testimony and evidence in support of a finding of mental retardation," the postconviction court concluded that Mr. Dufour did not prove the subaverage intellectual functioning prong by clear and convincing evidence. Id. at 1453. This conclusion is not supported by competent, substantial evidence because Dr. Merin's uncorrected score was the *only* score

above 70. Dr. McClain and Dr. McClaren both scored Mr. Dufour at two or more standard deviations below the mean, at 67 and 62, respectively. Dr. McClain expressed confidence in her score and felt Mr. Dufour was giving a valid, consistent effort and was not malingering. Dr. McClaren testified that he could offer no criticisms of her testing or her data. While Dr. McClaren expressed some concern that Mr. Dufour may not have been giving his best effort during Dr. McClaren's testing, either because of illness or lack of motivation, Dr. McClaren's score is still consistent with Dr. McClain's score. The postconviction court's finding that Dr. McClain discounted her own testing is inaccurate and not supported by the record. ROA Vol. 9, p. 1453-1454.

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

The postconviction court accepted Dr. McClain's unchallenged score of 67 as the most reliable. However, the postconviction court then applied the standard

error of measure to the score, adding 5 points to the score. The postconviction court then found that the upper level of the range, 72, is above the Cherry cutoff. ROA Vol. 9, p. 1454. Mr. Dufour argued in his Motion for Rehearing that by doing so, the postconviction court misapplied Cherry. Mr. Dufour also respectfully argues that this Court's decision in Cherry violates Atkins.

As noted above, all of Cherry's IQ scores were above 70. The defense in Cherry argued that the standard error of measure, or band of confidence, lowered his IQ scores to below 70, thus making it necessary to go onto the second prong, adaptive functioning. The Cherry court rejected this argument, and rejected the concept of the standard error of measure. By adding 5 points to Dr. McClain's score under the guise of the band of confidence, the postconviction court has done precisely what Cherry disallows. The postconviction court cannot have it both ways. If Cherry is the law and Cherry rejects the standard of measure, then this Court cannot accept the postconviction court's addition of 5 points to Dr. McClain's score. Allowing courts to add 5 points under the standard error of measurement to take the score above 70, and use that as a basis for a finding that a defendant is not mentally retarded, is an arbitrary application of law and is a direct violation of Atkins.

While not conceding that Cherry does not violate Atkins, Mr. Dufour argues that the Cherry cutoff does not apply to his case. Unlike Mr. Cherry, whose scores

were *all* above 70, Mr. Dufour has two scores that are below 70, three if Dr. Zimmerman's Slosson is included. The only score above 70 was Dr. Merin's score, which has been discredited by all of the experts in this case and discounted by the postconviction court.

The requirement in Cherry of a strict cutoff score of 70 violates the dictates of Atkins and is unconstitutional under the Fifth and Eighth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution. Further, it violates the Equal Protection Clause of the United States Constitution because similarly situated defendants who are mentally retarded will be protected from execution in one state, but will not be protected in Florida. As noted by the United States Supreme Court, "[b]oth equal protection and due process emphasize the central aim of our entire judicial system-all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court." Griffin v. Illinois, 351 U.S. 12,17, 76 S.Ct. 585,590(1956)(internal quotations omitted)(citing Chambers v. Florida, 309 U.S. 227,241, 60 S.Ct. 472,479(1940).

In rejecting the standard error of measurement and imposing a strict cutoff score of 70, this Court is at odds with accepted science. Other jurisdictions recognize the standard error of measurement, and in so doing, recognize that an IQ

is not a precise measurement. Scores between 70 and 75 are evidence of mental retardation sufficient to satisfy the first prong.[5]

Moreover, in Thomas v. Allen, the United States District Court for Alabama, recognized that "the adjustments to raw IQ scores mandated by the 'standard error of measurement' and the 'Flynn effect' are well-supported by the accumulation of empirical data over many years." Thomas v. Allen, 614 F.Supp. 2d 1257, 1280-1281(N.D. Ala. 2009). There the Court found the defendant to be mentally retarded, noting "a court should not look at a raw IQ score as a *precise* measurement of intellectual functioning" but must consider the "standard error of measurement in determining whether a petitioner's score falls within a *range* containing scores that are less than 70." Id. (emphasis in original).

Every single expert in this case, including both state experts, agreed that the standard error of measurement is something that cannot be ignored and that an IQ between 70 and 75 indicates evidence of mental retardation. Dr. McClaren, the state's own expert, conceded that the Cherry decision is in conflict with accepted psychological definitions and established science. As noted above, both court appointed experts scored Mr. Dufour's intellectual functioning two or more standard deviations below the mean - Dr. McClain at a 67 and Dr. McClaren at a

[5] See State v. Burke, WL 3557641, p.13-14(Ohio App. 10 Dist.)(2005); State v. Lynch, 951 So.2d 549, 557 (Miss 2007); In Re Hawthorne, 105 P.3d 552, (Ca. 2007); Commonwealth v. Miller, 888 A.2d 630,631; US v. Davis, 611 F.Supp 2d 472 (D. Md. 2009).

62. In addition, once Dr. Merin's scoring and administration errors were brought to light and corrected by experts by both the state and defense, Dr. Merin's score was as low as a 70. Therefore, credible, precise, and explicit evidence places Mr. Dufour in the range of mental retardation.

To the extent that the post conviction court found that Mr. Dufour's IQ scores of 67 and 62 did not establish mental retardation, such a finding is inconsistent with the United States Supreme Court's holding in Atkins. Further, a finding that Mr. Dufour did not establish this prong is not supported by competent, substantial evidence, especially when the postconviction court's order lacks specific supporting facts or reasoning to support this assertion. The postconviction court merely concludes, "The Court finds there is no clear and convincing evidence that Mr. Dufour's IQ score establishes 'significantly subaverage general intellectual functioning.'" ROA Vol. 9, p. 1454. However, it then becomes unclear whether the postconviction court ultimately conceded that Mr. Dufour satisfies prong one because in the Order Denying Motion for Rehearing, the court states,

> Assuming, without finding, that this court mis-applied *Cherry* and should accept the IQ score of 67 obtained by Dr. McClain, that does not change the ruling that Mr. Dufour is not mentally retarded. Contrary to his argument in the instant Motion, the Court finds that Mr. Dufour's adaptive functioning more than compensates for any intellectual limitations he may have, and that all of the evidence presented to this Court weighs against a finding that he suffers from mental retardation.

ROA Vol. 9, p. 1479.

As such, the post conviction court's order as to prong one fails to rely on competent, substantial evidence, and, to the extent that the postconviction court's Order rejects this claim, it "fails to point to any evidence from the [postconviction proceedings] that actually controverts [Mr. Dufour's claims.]" Coday v. State, 946 So.2d 988, 1020 (Fla. 2006) (Bell, J., *concurring*). This Court should substitute its own findings of fact and weigh the credibility of the witnesses for this claim. Sochor v. Florida, 883 So.2d 766, 781 (Fla. 2004). Dr. McClain's score was uncontradicted, and at a 67, demonstrates clear and convincing evidence that he satisfies the subaverage intellectual functioning prong.

Adaptive Functioning

Mr. Dufour has demonstrated by clear and convincing evidence that he has significant adaptive deficits. The postconviction court's finding to the contrary is not supported by competent, substantial evidence and violates Atkins.

The United States Supreme Court in Atkins recognized the definition as used by the AAMR as "limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." Atkins at 308,2245, n. 3.

The term "adaptive behavior" as described in the Florida Statutes, "means the effectiveness of degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." Fl. Stat. 921.137(1). The definition in Florida Statute 921.137 as well as Florida Rule of Criminal Procedure 3.203 states that the subaverage intellectual functioning must exist "concurrently" with adaptive deficits in order to satisfy the second prong of the definition. This Court has interpreted this to mean that subaverage intellectual functioning must exist at the same time as the adaptive deficits. Jones v. State, 966 So.2d 319, 326. (Fla. 2007). In Jones, the Court rejected the argument that the adaptive deficits must exist before age 18, and instead held that there must be current adaptive deficits. Id. Mr. Dufour has demonstrated by clear and convincing evidence that he does currently have adaptive deficits, and he has also presented significant evidence that these deficits existed prior to the age of 18.

As Dr. Keyes explained, to assess adaptive functioning, one must look at conceptual, social, and practical skills. ROA Vol. 16, p. 2646. He stressed the importance of using objective adaptive testing instruments. Id. at 2666. Both Dr. Keyes and Dr. McClaren conducted formal adaptive functioning tests on Mr. Dufour. However, Dr. McClaren only administered formal testing (the SIB-R) to one guard and to Mr. Dufour. Dr. Keyes, on the other hand, interviewed Mr.

Dufour, two inmates on death row whose cells were next to Mr. Dufour, and two individuals who knew him from the community prior to the age of 18. He then conducted formal testing on Mr. Dufour, two inmates, and one of the members from the community who knew Mr. Dufour prior to the age of 18.

It is improper and unreliable to assess adaptive functioning in prison. All of the experts testified to the practical limitations in assessing adaptive functioning in prison, especially in a restrictive setting such as death row. This issue was not addressed in the Jones case, but Mr. Dufour argued it to the postconviction court and raises the issue here. During his testimony, Dr. Keyes cited scholarly research that cautions against the use of prison guards in evaluating adaptive functioning.[6]

In a scholarly article forthcoming in Cornell Law School's Legal Studies Research Paper Series, John Blume addresses the limitations of assessing adaptive functioning in prison. The article explains:

> Members of the scientific community note that conducting adaptive assessments in prison makes it impossible to assess adaptive behavior within the context of community environments as required by the 2002 AAMR standards….prison assessments are suspect because many real-world adaptive behaviors (e.g., transportation skills) are not possible in this setting and therefore cannot be measured; certain adaptive behaviors (e.g., grooming) may appear better due to the structure; and some adaptive behavior deficits (e.g., inability to read) can be masked by the appearance of reading (i.e. looking at reading

[6] See also Stanley L. Brodsky & Virginia A Galloway, *Ethical and Professional Demands for Forensic Mental Health Professionals in the Post-Atkins Era,* 13(1) Ethics and Behavior (2003).

> material such as a newspaper but instead of actually reading merely looking at the pictures or sports scores).

John Blume, Sherri Lynn Johnson, & Christopher Seeds, *Of Atkins and Men: Deviations From Clinical Definitions of Mental Retardation in Death Penalty Cases*, (forthcoming in Cornell Journal of Law and Public Policy 2009) (manuscript at p.24-25), *at* http://ssrn.com/abstract=1327303.

Other scholarly articles accepted in the psychological community explain the difficulty in choosing suitable informants for adaptive functioning in prison. Informants should generally have "(a) contact almost every day with the individual; (b) contacts of several hours each contact; (c) contact during the past 1 to 2 months, and (d) opportunities to observe the variety of behaviors measured by the ABAS-II." Kay B. Stevens & J. Randall Price, *Adaptive Behavior, Mental Retardation, and the Death Penalty*, 6(3) Journal of Forensic Psychology Practice p. 10(2006).

In the instant case, prison guards do not satisfy the first two requirements. As testified by Officer Wright, the guards are often short staffed, and are responsible for 84 inmates on any given 8 hour shift. Assuming the guards ignored all of their other duties and just spent time with the inmates, they would be able to have no more than 5 minutes of contact with each inmate per 8 hour shift. To the contrary, the inmates are in contact with one another 24 hours a day, 7 days a

week. While they cannot see into each other's cells, they talk, pass items, and interact face to face on the yard and in the showers.

Guards also "may be biased regarding the death penalty, inhibited by institutional policies or peer pressure, and/or poorly informed." Id. at p. 16. Arguably, using inmates as informants could result in a bias in favor of the defendant. However, both Dr. Keyes and Dr. McClain explained that if given the choice between the two, the biases would cancel out and when you look at frequency of contact, the inmates will always have more knowledge of the individual and would therefore be the better informants.

Dr. McClaren's adaptive functioning assessment was inadequate and insufficient to overcome Dr. McClain and Dr. Keyes' extensive interviewing and testing. Dr. McClaren administered only one objective adaptive functioning instrument to Officer York, who was a guard on Mr. Dufour's wing for a couple of years. Dr. McClaren testified that Officer York was a "pretty bright guy" with the implication being that he was therefore a reliable informant. ROA Vol. 19, p. 3209. Officer York did not graduate high school but had obtained a GED. After he left employment at Death Row in September of 2006, he joined the military, where he went AWOL and then attempted suicide. ROA Vol. 5, p. 831, ROA Vol. 19, p. 3210-12. Further, Officer York told Dr. McClaren that Mr. Dufour went to the law library to request cases. ROA Vol. 19, p. 3233. As noted above, Allan

Peterson presented uncontradicted testimony that Mr. Dufour has never made a request for legal materials or gone to the law library in all the time he has been on death row. See Thomas v. Allen, 614 F.Supp. 2d 1257, 1320-1321(N.D. Ala. 2009)(Rejecting Dr. McClaren's opinion as not credible and rejecting his administration of the SIB-R to a prison guard whose assessment of the defendant was "grossly inconsistent with the descriptions provided by all other third-party informants."). Despite relying repeatedly on records from Department of Corrections when they supported his opinion, Dr. McClaren tried to qualify his answer about the library records, saying, "Assuming the records are correct." Id. at 3240. Yet, the State offered no evidence to prove that the records were unreliable. Further, Officer York told Dr. McClaren that Donald "dresses neatly and selects clothes that go together with regard to color and pattern." Id. at 3238. Of course, as Dr. McClaren acknowledged, inmates do not get to select the color or pattern of the clothes they wear on death row. Id. In addition, Dr. McClaren testified that when he interviewed him, Mr. Dufour was wearing a shirt that was ripped, torn and filthy. Id. at 3238. Dr. Keyes testified similarly that Mr. Dufour's hygiene was very poor when he interviewed him. Id. at 3209-10.

On the other hand, the objective adaptive functioning measures done by Dr. Keyes were taken from a wide range of informants, encompassing different areas of Mr. Dufour's life. As noted above, all four informants (including Mr. Dufour)

were consistent in their reporting. His data was valid and convergent. Instead of relying on a single prison guard, Dr. Keyes relied on two inmates who had daily and constant contact with Mr. Dufour for a year or more. He also used an objective person, Ms. Gatewood, who knew Mr. Dufour in the community prior to the age of 18. Dr. Keyes explained that the scores on the ABAS are based on the normal curve, with a mean of 100 and a standard deviation of 15. ROA Vol. 16, p. 2696. On ABAS, Mr. Dufour's scores were all more than two standard deviations below the mean, and were consistent with his IQ scores. Id. at 2695.

In Burns v. State, this Court held in part that Mr. Burns was not mentally retarded even though he had IQ scores ranging from 69 to 74 because he did not have sufficient adaptive deficits. Burns v. State, 944 So. 2d 237 (Fla. 2006). The Court placed much emphasis on the fact that Mr. Burns always supported himself, he co-owned a watermelon hauling company, he worked as a cab driver, he graduated high school, he provided financial support to his family, and he stressed the importance of an education to his brothers and sisters. Id. at 248.

Similarly, in Rodgers v. State, this Court cited Mr. Rodgers' responsible job history as evidence that he did not have sufficient adaptive deficits to be found mentally retarded. Rodgers v. State, 948 So.2d 655 (Fla. 2006). This Court noted that Mr. Rodgers rose from dishwasher to a supervisory position at Morrison's Cafeteria. Id. at 667. This Court also placed significance on the fact that he ran a

lawn irrigation business which "required him to bid on projects, determine the necessary supplies and costs, plan and execute the work without direction from others, drive his truck to job sites, and deal with customers." Id. Mr. Rodgers also "kept appointments and maintained normal relationships with people, from customers to friends to family members. Id.

In Holladay v. Allen, 533 F. 3d 1346 (2009), the Eleventh Circuit, in finding the defendant had significant adaptive deficits, relied on his school records showing that he repeated the first and second grades, earned mostly "F's", and was socially promoted. Id. at 1359. The court also relied on the testimony of teachers that "he did not have the ability to learn on the level of an average child." Id. At least one teacher felt that he was mentally retarded. Id. Further evidence to support a finding of adaptive deficits included a sparse work history consisting solely of jobs requiring unskilled labor and that he obtained all of his jobs through the assistance of friends and family. Id.

Unlike in Burns and Rodgers, the testimony at Mr. Dufour's evidentiary hearing revealed that Mr. Dufour never lived alone and always relied on others for help and support. He was not in charge of paying bills, he never held a job for more than a few months, and he never had a checking account. The jobs he did have were menial. He worked as a prison janitor at one point. ROA Vol. 18, p. 3108. He was easily led around and influenced by others, and he was always more

comfortable playing with children. Even the State's expert, Dr. McClaren, agreed that Mr. Dufour's history of academic failure and menial jobs, along with his "really poor" relationships could be a justification for the diagnosis of mental retardation. ROA Vol. 19, p. 3197-3201.

The evidence presented by Mr. Dufour through Gary Dufour, Maxine Valle, William Cutts, and Joyce Jones, as well as the objective adaptive functioning measures done by Dr. Keyes, demonstrate that Mr. Dufour has significant limitations in communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mr. Dufour's hygiene was described by Dr. Keyes, Dr. McClaren and Mr. Kormondy as very poor. Mr. Kormondy explained that Mr. Dufour did not understand that his yard shirt needed to be washed with soap in order to get clean. Similar to the defendant in Holladay, when he was working, Donald relied on friends and family to help him get jobs. For example, Maxine Valle described how her husband tried to get Donald a job hanging drywall. As part of the cloak of competence, Donald told her and her husband that he knew how to hang drywall. After less than two hours on the job, it became obvious that Donald had no idea what he was doing. His brother Gary also testified that he would hire Donald to work on jobs with him, but that Donald would not show up and was unreliable.

In finding that Mr. Dufour did not satisfy this prong, the postconviction court addressed the testimony of the lay witnesses presented by the State and Mr. Dufour. The court found that the testimony of all the State's witnesses, including Stacy Sigler, Donna Grant, Officer Rex Straw, attorney Jay Cohen, and prosecutor Dorothy Sedgewick carried little weight. ROA Vol. 9, p. 1459-1461. Donna Grant and Stacy Sigler were the only witnesses to testify that Mr. Dufour possessed normal adaptive skills. The postconviction court specifically found that due to Stacy Sigler's "inherent bias from the immunity agreement, as well as the inconsistencies, her testimony carries little weight." Id. at 1460. Similarly, the court found that the testimony of state witness Donna Grant was directly refuted by defense witness Sheila Martin. Id.

The postconviction court found the testimony of Gary Dufour and Maxine Valle to carry moderate weight because "their personal knowledge and observations are much more lengthy and substantive." Id. at 1459. Inexplicably, the court only gave the testimony of the teachers little weight, but did not offer a reason why. The teachers were not impeached in any way, and in fact, Bill Cutts was located and listed by the State as its witness, although Mr. Dufour ultimately called him as his witness. This finding is inconsistent with this Court's precedents which emphasize the importance of looking at school records and evaluating the testimony of teachers. Jones, supra.

The postconviction court lists the following findings of fact with respect to Mr. Dufour's adaptive behavior:

> Mr. Dufour does not read or write much, if at all. He does not play chess in the Department of Corrections. He does not have good hygiene habits. In the past, he drove a car and possessed a driver's license. He participated in a small engine repair class while in prison in the 1970's. He could be good with children. He was capable of interacting in social situations, and could be friendly and engaging. He appeared to understand discussions with trial counsel.

ROA Vol. 9, p. 1462. However, none of these findings preclude a finding of mental retardation, and most of them in fact support such a finding.

The court's factual findings highlight common misperceptions of people with mental retardation. For example, the State's own expert, Dr. Merin, testified that people with mental retardation can drive. ROA Vol. 17, p. 2854. Dr. Merin also explained that people with mental retardation can be taught carpentry skills and taught to fix complex items. Id. In addition, as Dr. Keyes explained, people with mental retardation often seek to be the center of attention. ROA Vol. 19, p. 3274. People with mental retardation can have street smarts. Id. at 3277. People with mental retardation could learn and participate in a small engine repair course. Id. People with mental retardation have career goals. Id. at 3276. Dr. Keyes testified that he had a mentally retarded student who wanted to be a nurse and is currently a nurse's assistant at the University of Cincinnati Medical Center. Id. Dr. Keyes also testified that people with mental retardation are able to get their

needs met. He noted that "a person who has an IQ somewhere between 75 and 55, and who has some adaptive skills, but clearly has deficits, will certainly be able to show that they have needs and they will do what they can do to have them fulfilled." Id. at 3278. Dr. Keyes also agreed that when reviewing Mr. Dufour's inmate requests, it appeared that Mr. Dufour was asking for things that were not actually available to him or the requests demonstrated that he was not using the proper channels to get his needs met. Id. at 3279. There was also unrebutted testimony presented at the hearing that Mr. Dufour required extensive help with writing requests and with his legal work.

It is undisputed that there are limitations in assessing adaptive functioning in a restrictive setting such as death row. But all the experts testified that the more information you can gather about an individual, the stronger the diagnosis and the opinion supporting the diagnosis. Drs. Keyes and McClain spoke to a wide range of individuals, including Mr. Dufour's teachers, and reviewed Mr. Dufour's school records. Dr. McClaren chose not to speak to the teachers because "it was so remote." Dr. McClaren relied almost exclusively on documents created by the Department of Corrections and other law enforcement agencies. Dr. Keyes testified that Mr. Dufour's adaptive behaviors are lower than normal by a significant degree and he does not adapt his behaviors to his same cultural or age group. Because of the limited scope of Dr. McClaren's adaptive functioning (and

his reliance almost exclusively on records from and interviews with law enforcement), the conclusions of Drs. Keyes and McClain with respect to adaptive functioning are more reliable. The postconviction court's finding to the contrary is not supported by competent, substantial evidence and is inconsistent with the dictates of Atkins.

The postconviction court wholly fails to address any of the objective functioning measures administered by Dr. Keyes. Under its discussion on adaptive functioning, the postconviction court makes a blanket assertion that "the evidence does not even meet the more lenient preponderance of the evidence standard." ROA Vol. 9, p. 1461. However, the court fails to identify what the preponderance standard is and how the evidence fails to meet it. Such a sweeping conclusion unaccompanied by any reasoning or legal analysis, wholly deprives this Court of meaningful appellate review. As such, the post conviction court's order as to the second prong fails to rely on competent, substantial evidence, and, to the extent that the postconviction court's order rejects this claim, it "fails to point to any evidence from the trial or [postconviction proceedings] that actually controverts [Mr. Dufour's claims.]" Coday v. State, 946 So.2d 988, 1020 (Fla. 2006) (Bell, J., *concurring*). This Court should substitute its own findings of fact and weigh the credibility of the witnesses for this claim. Sochor v. Florida, 883 So.2d 766, 781

(Fla. 2004). Mr. Dufour has shown by clear and convincing evidence that he has adaptive deficits in two or more areas, thus satisfying prong two of the definition.

Onset Before 18

Mr. Dufour has shown through clear and convincing evidence that the onset of his mental retardation occurred prior to age 18. The testimony from Joyce Jones, William Cutts, and Nancy Cutts establishes the significance of Mr. Dufour's school records. He received Ds and Fs in the first and second grades. He failed the second grade, and he was placed or socially promoted every year thereafter. Nancy Cutts testified that in all her years of teaching, she had never seen a report card in which a child was placed so many times. William Cutts testified that "lights come on and bells go off" when a student compiles a school record like Mr. Dufour. Dr. Keyes testified that in his 30 years of experience, he has not seen a situation where a first grader got Ds or Fs unless there was something developmentally wrong.

It is undisputed that school records and reports from teachers are invaluable in determining whether a capital defendant has mental retardation. This Court in Jones emphasized the significance of school records and reports of teachers. Jones at 322. Unlike Mr. Jones, Mr. Dufour has demonstrated that his intellectual abilities were limited from a very young age. All four of the witnesses with extensive experience in education, the teachers and Dr. Keyes, repeatedly stressed

the significance of a child achieving Ds and Fs in first and second grades and being placed through the remainder of his academic career. Ms. Jones, whose memory of Mr. Dufour was clear and without confusion, testified that Donald was the most immature student she ever had and that he was very possibly mentally retarded. She indicated that she gave him a "C" because he exerted some effort, not because he actually earned a "C." The fact that Mr. Dufour was not formally diagnosed as mentally retarded or placed in a special program is not dispositive. Every teacher who testified said there were no special programs for mentally retarded children at the time Donald went to Lockhart Elementary and Middle School. Mrs. Cutts said there was not even an EMR teacher at the elementary school until the late 1960s. By that time, Donald was already at the end of his elementary years and heading to middle school. Children could easily slip through the cracks. Mr. Cutts would often have students in his class that were mentally retarded and he would do what he could to encourage them and push them along. Students with behavior problems who disrupted class were given priority. Donald was never a disturbance in class and was not violent or hostile. His brother John, on the other hand, had violent outbursts in class that were so disruptive that he ultimately was kicked out of Lockhart and sent to Gateway. The school records and the testimony of the teachers are clear and convincing evidence that the onset of Mr. Dufour's mental retardation was prior to age 18.

In addition, there was undisputed testimony that Mr. Dufour began abusing drugs and alcohol in his late childhood and throughout his teens. There was testimony that he inhaled Toulane as early as age 10. In addition, Mr. Dufour suffered numerous head injuries and insults prior to age 18, including a motorcycle accident and having his head pushed through a glass aquarium.

The postconviction court's denial of prong three is a mere two sentences. ROA Vol. 9, p. 1463. The court wholly failed to address the precise, explicit, and extensive testimony detailed above that Mr. Dufour presented about the onset of his mental retardation prior to age 18. As such, the post conviction court's order as to the third prong fails to rely on competent, substantial evidence, and, to the extent that the postconviction court's order rejects this claim, it "fails to point to any evidence from the [postconviction proceedings] that actually controverts [Mr. Dufour's claims.]" Coday v. State, 946 So.2d 988, 1020 (Fla. 2006) (Bell, J., *concurring*. This Court should substitute its own findings of fact and weigh the credibility of the witnesses for this claim. Sochor v. Florida, 883 So.2d 766, 781 (Fla. 2004). As such, Mr. Dufour has proven the third and final prong of the definition of mental retardation by clear and convincing evidence.

ARGUMENT II

FLORIDA STATUTE 921.134(4) IS UNCONSTITUTIONAL AND VIOLATES MR. DUFOUR'S DUE PROCESS RIGHTS AS PROTECTED BY THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION.

Florida Statute 921.137(4) requires Mr. Dufour to prove by clear and convincing evidence that he is mentally retarded. This requirement violates Mr. Dufour's Due Process Rights under both the Florida and Federal constitutions.

In Cooper v. Oklahoma, the United States Supreme Court held that an Oklahoma statute which required a criminal defendant to prove by clear and convincing evidence that he was incompetent to stand trial was unconstitutional and violated the defendant's Due Process rights. The Court found that "Oklahoma's practice of requiring the defendant to prove incompetence by clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is competent." Cooper v. Oklahoma, 517 U.S 348,363 (1996). The Court further reasoned that the clear and convincing standard of proof requirement affects a class of cases where the defendant has already demonstrated that he is more likely than not incompetent and the "consequences of an erroneous determination are dire." Id. at 364. Finally, the Court noted that a majority of jurisdictions, in accord with common law, required the defendant to prove incompetence by a mere preponderance of the evidence. As such, the Court found the Oklahoma statute unconstitutional.

This Court cited Cooper when it expressed a concern with the constitutionality of the legislature's use of this standard. Writing separately, Justice Pariente explained that "[b]ecause of concerns about whether the burden of

proof is a substantial or procedural requirement and further concerns over whether a preponderance of evidence burden may be constitutionally required under Atkins and Cooper, it is preferable to omit the burden enunciated by the legislature from our rule of procedure regarding mental retardation." Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure, 875 So.2d 563(Fla. 2004). She further opined that omitting a standard will allow the issue to come before the Court "in the form of an actual case or controversy rather than a nonadversarial rules proceeding." Id. This Court has never squarely addressed whether the clear and convincing standard is unconstitutional, and instead disposed of the cases that raised this issue on other grounds.[7]

The postconviction court denied this claim below based on its interpretation of this Court's decisions in Provenzano v. State, 750 So.2d 597 (Fla. 1999) and Medina v. State, 690 So.2d 1241 (Fla. 1997). ROA Vol. 9, p. 1476. However, the postconviction court's reliance on these cases is misplaced.

This Court should look to the Cooper standard for guidance in assessing the proper burden the defense is required to establish to prohibit the execution of the mentally retarded. This is so, because a sanity to be executed claim, as in Medina and Provenzano, is a very different proceeding, with different constitutional

[7]See Phillips v. State, 984 So.2d 503(Fla. 2008); Jones v. State, 966 So.2d 319 (Fla. 2007); Burns v. State, 944 So.2d 234 (Fla.2006); Trotter v. State, 932 So.2d 1045(Fla. 2006); Nixon v. State, 2 So.3d 137 (Fla. 2009).

concerns. A review of the circumstances surrounding the adoption of Rule 3.811 and 3.812 is necessary to provide adequate context for this argument.

Florida Rule of Criminal Procedure 3.811 was enacted as a direct response to the United States Supreme Court decision in Ford v. Wainwright, 477 US 399, 106 S.Ct. 2595 (1986). See In re Emergency Amendment to the Florida Rules of Criminal Procedure (Rule 3.811, Competency to be Executed), 497 So. 2d 643 (Fla. 1986). Ford held that it was unconstitutional to execute someone who was insane *at the time of their execution*. Ford did not specifically set out a burden of proof, but instead left the task of providing adequate procedures and safeguards up to the states. This Court has interpreted Ford (and 3.811) to mean that a defendant must prove his incompetence to be executed by clear and convincing evidence.

In Medina v. State, 690 So.2d 1241 (Fla. 1997) this Court explained the difference in Cooper and Ford by stating that in a competence to stand trial posture, the defendant's interest was substantial and the State's interest was modest, but in a competency to be executed posture, the State's interest was substantial and the defendant's interest was modest. Medina at 1247. This Court then cited with approval Justice Powell's concurrence in Ford, which explained, "the only question raised [by the competency to be executed claim] is not *whether*, but *when*, his execution may take place. Id. (emphasis in original).

In finding that it is unconstitutional to execute someone who is insane, the United States Supreme Court stated,

> [T]his Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim to be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.

Ford v. Wainwright, 477 U.S. 399, 409-410 (1986). The rationale behind the prohibition is focused more on a human decency argument and lack of meaningful retribution than on the diminished culpability of the defendant or the inherent risks of due process violations because of the mental status of the defendant.

Atkins, on the other hand, prohibits the execution of the mentally retarded in part because "society views mentally retarded offenders as categorically less culpable than the average criminal." Atkins at 316. Moreover, because of the reduced capacity of mentally retarded offenders, there is a "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" Id. at 321 (citing Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). These risks include the fact that defendants who are mentally retarded "may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." Id. at 321.

Similarly, in Cooper, the United States Supreme Court explained the constitutional importance ensuring that a defendant is competent to stand trial.

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

Cooper at 1376 (citing Drope v. Missouri, 420 U.S. 162, 171-172, 95 S.Ct. 896, 903-904, 43 L.Ed.2d 103 (1975)).

It follows then, that the concerns against sentencing a mentally retarded defendant to death are more analogous to the concerns against trying an incompetent defendant. Trying the incompetent defendant and the mentally retarded defendant encompass the same risks – limited ability to consult with counsel, capacity to testify relevantly, and ability to fully understand the proceedings. Also, unlike in Ford, the question about the mentally retarded and the death penalty *is in fact* "*whether*, [not] *when* the execution will take place." Ford at 425, 2610. Because the interests of the defendant are more substantial and the interests of the State more modest when dealing with *eligibility* for the death penalty, imposing a standard of clear and convincing evidence violates due process. Additionally, "requiring the defendant to prove [mental retardation] by clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is [not mentally retarded]." Cooper at 363. Mr.

Dufour urges this Court to address this issue on the merits, reject the clear and convincing standard imposed by the trial court, and institute a preponderance of the evidence standard.

ARGUMENT III

THE LOWER COURT ERRONEOUSLY ADMITTED EVIDENCE IN VIOLATION OF MR. DUFOUR'S RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS OF THE U.S. CONSTITUTION AND THE CORRESPONDING PROVISIONS UNDER THE FLORIDA CONSTITUTION.

During the evidentiary hearing, the postconviction court made several erroneous evidentiary rulings. Each error will be addressed in turn.

Unauthenticated letters

A document is authenticated if there is sufficient evidence to support a finding that the document in question is in fact what its proponent claims. Coday v. State, 946 So.2d 988, 1000 (Fla.2006)(citing § 90.901, Fla. Stat. (1997). Sepcifically, "A writing may be identified by a non-expert witness who testifies that the handwriting in question is that of a particular person." *Florida Evidence*, Charles Ehrhardt 901.4, citing McCormick Evidence, ' 221 (4th ed. 1992). See also Pittman v. State, 51 Fla. 94, 41 So. 385,393 (Fla. 1906).

At the evidentiary hearing, over defense objection, the postconviction court admitted a letter purportedly written by Mr. Dufour and addressed to his former lawyer, Jay Cohen. Mr. Dufour objected and asserted the attorney client privilege

as well as improper authentication. Supp. ROA Vol. 2, p. 227. There was no testimony as to whether Mr. Cohen had sufficient knowledge about Mr. Dufour's handwriting to be able to authenticate the letter. Id. Mr. Cohen was never asked whether he recognized Mr. Dufour's handwriting. In addition, Mr. Dufour showed the postconviction court the front of the envelope to show the notification on the front that said "legal mail." Id. at 230. The postconviction court began reading the letter and Mr. Dufour objected. Id. As is apparent from the transcript, the postconviction judge then admitted the letter into evidence in frustration after a contentious exchange with defense counsel. Supp. ROA Vol. 2, p. 230-31. Mr. Dufour was prejudiced by the letter because the State argued that it contained romantic overtones to one of Mr. Cohen's assistants and that it showed Mr. Dufour had adaptive abilities regarding personal relationships.

Also introduced during the hearing, during the defense's case-in-chief, were letters purportedly written by Mr. Dufour to Stacy Sigler, his girlfriend and co-conspirator. The State moved to admit these letters during the cross-examination of Dr. McClain, who had reviewed the letters as part of her evaluation of Mr. Dufour. Mr. Dufour objected to improper authentication, hearsay, and lack of predicate that Dr. McClain actually relied on these letters in forming her opinion.

Dr. McClain never identified Mr. Dufour as the one who wrote the letters. She repeatedly qualified her testimony by saying "assuming the letters were in fact

written by him" and stated, "if in fact, someone did help him construct the letters in terms of phraseology, in terms of what he was trying to say, if anybody wrote things out for him, that all has to be considered." ROA Vol. 15, p. 2500.

There was uncontradicted testimony that Mr. Dufour needed and obtained assistance from other inmates with his writing. The State had the opportunity to properly authenticate these letters at an earlier setting of the evidentiary hearing through the testimony of the recipient of the letters, Stacy Sigler. They chose not to do so. The letters were never properly authenticated and were improperly admitted. Mr. Dufour was prejudiced by the letters because the State used these letters to argue that Mr. Dufour possessed sufficient adaptive skills and therefore was not mentally retarded.

Dr. Berland's Testimony

Dr. Berland testified on behalf of Mr. Dufour at the postconviction proceedings in November of 2002. As a defense expert, he was privy to confidential communications, documents, and strategy about Mr. Dufour's case. He testified in 2002 that Mr. Dufour suffered from brain damage, a finding which the state vigorously challenged. During the mental retardation postconviction proceedings, the State retained Dr. Berland to "offer a possible alternative explanation for low intelligence." Supp. ROA Vol. 2, p. 301. Prior to Dr. Berland

testifying, Mr. Dufour objected and raised attorney client privilege. Supp. ROA Vol. 2, p. 268-274.

This Court has held that it is error to allow a previously retained defense expert, who has had access to confidential defense materials, to subsequently testify for the State when the defense has not waived attorney client privilege. Sanders v. State, 707 So.2d 664 (Fla. 1998). Dr. Berland testified that Mr. Dufour's numerous head injuries and drug use after the age of 18 caused brain damage that could result in a lower IQ at the time of the 2005 testing. Thus, Dr. Berland's testimony allowed the State to argue an alternative explanation for the low IQ scores. Such testimony prejudiced Mr. Dufour and it was error for the postconviction court to admit the testimony when Mr. Dufour had not waived the attorney-client privilege.

Hearsay documents relied on by Dr. McClaren

Dr. McClaren based his opinion on whether Mr. Dufour was mentally retarded almost exclusively on records from the Florida and Mississippi Department of Corrections, as well as other reports, letters or documents generated by third parties. Numerous documents were placed on a large projector screen and introduced by the State over repeated defense objections during Dr. McClaren's testimony under the guise of the hearsay exception for expert testimony. ROA Vol. 18, p. 2980,2981,2985.

In its order denying relief, the postconviction court claims in a footnote that "[t]he documents themselves are part of the record of the case, but have not formed the basis of the Court's ruling." ROA Vol. 9, p. 1456. However, in finding that Mr. Dufour did not have adaptive deficits, the postconviction court relied on the testimony of Dr. McClaren, who in turn relied on the documents as "pieces of a mosaic" that were important in reaching his conclusion that Mr. Dufour was not mentally retarded. Dr. McClaren spent the bulk of his *six hour* direct examination reading from and/or relying on documents from the Department of Corrections that all were rank hearsay. To say that the documents have not formed the basis of the court's ruling defies logic. The documents were the focus of and the primary evidence of adaptive functioning put forth by the State at the hearing.

This Court has recognized that an expert's testimony "may not merely be used as a conduit for the introduction of the otherwise inadmissible evidence." Linn v. Fossum**,** 946 So.2d 1032, 1037-38 (Fla. 2006). In Linn, this Court noted that "allowing the presentation of otherwise inadmissible evidence merely because an expert relied on it in forming an opinion undermines the rules of evidence that would have precluded its admission. Id. at 1038.

What happened in Mr. Dufour's case is precisely what Linn disallows. Dr. McClaren could have simply testified that he relied on various reports and documents from the Department of Corrections or other third parties in forming his

opinion. It was error for the State to publish them to the Court on a projector screen and have Dr. McClaren repeatedly refer to them and read from them during his lengthy testimony. The State used the documents in its attempt to rebut Mr. Dufour's proof that he had adaptive deficits. As noted above, Dr. McClaren did objective testing on adaptive functioning with only one corrections officer. He did not talk to Mr. Dufour's teachers or other people in the community who knew him prior to the age of 18. The other witnesses he talked to were either not credible or their testimony was given little weight. His conclusion on Mr. Dufour's adaptive functioning was based almost exclusively on these inadmissible records. The postconviction court erred in admitting these documents.

CONCLUSION AND RELIEF SOUGHT

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Initial Brief of Appellant has been furnished by Fed Ex and by U.S. Mail to all counsel of record on this ____ day of September 2009.

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CERTIFICATE OF COMPLIANCE

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

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