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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC13-1213

TAVARES J. WRIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF TENTH JUDICIAL CIRCUIT FOR POLK COUNTY, STATE OF FLORIDA
Lower Tribunal No. CF00-2727A-XX

REPLY BRIEF OF APPELLANT

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ARGUMENT

The Appellant relies on the arguments presented in his Initial Brief. While he will not reply to every issue and argument raised by the Appellee, he expressly does not abandon the issues and claims not specifically replied to herein.

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. WRIGHT'S CLAIM THAT HE RECEIVED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL WHEN TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE, PREPARE AND PRESENT AVAILABLE MITIGATION.

A. PROCEDURAL BAR

The Appellee asserts that Mr. Wright's mental retardation claim is procedurally barred as his mental retardation claim was fully litigated at the time of his sentencing proceeding. Answer Brief of Appellee at 36-37. Mr. Wright respectfully disagrees with the Appellee's characterization of this claim as procedurally barred. Mr. Wright's claim is based on ineffective assistance of counsel for trial counsel's failure to investigate and present the mental retardation issue at trial. With rare exception, claims of ineffective assistance of counsel are not cognizable on direct appeal. *Smith v. State*, 998 So. 2d 516, 522 (Fla. 2008). Such claims are properly raised in post-conviction motions, as Mr. Wright did in

this case by raising this claim in his Rule 3.851 motion for post-conviction relief. *Smith*, 998 So. 2d at 522. Thus, Mr. Wright is not procedurally barred by his failure to raise this claim on direct appeal.

B. THE FLYNN EFFECT

The Appellee argues that "Florida's bright-line score of 70 is not subject to manipulation and adjustment by the standard error of measurement (SEM) or the Flynn effect." Answer Brief of Appellee at 47. First, as of the writing of this Reply Brief, this Court has yet to determine specifically whether the Flynn effect should be applied to IQ scores in capital cases. Additionally, in the interest of justice and in order to insure compliance with *Atkins* and the Eighth Amendment of the United States Constitution it is imperative that the courts consider the Flynn effect and/or the standard error of measurement when assessing mental retardation claims. Although the Appellee argues that applying the Flynn effect to individual IQ scores is not generally accepted in the scientific community (Answer Brief of Appellee at 47), the Diagnostic and Statistical Manual of Mental Disorders- Fifth Edition (DSM-V) recognizes that "[f]actors that may affect test scores include the practice effects and the 'Flynn effect' (i.e., overly high scores due to out-of date test norms)." Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013). Consequently, the DSM-V recognizes that an

individual with an IQ score above 70 may properly be diagnosed with an intellectual disability (mental retardation) if significant deficits in adaptive functioning also exist, and that clinical judgment is needed in interpreting the results of IQ tests". *Id.* James R. Flynn described the significance of the Flynn effect over the past several decades:

> Setting aside the very real possibility of sampling error, the proportion of Americans eligible to be classified as mentally retarded has fluctuated from something like 1 in 23, circa 1949 (2.27% of White Americans meant 16.90% of Black Americans and 4.32% of all Americans), to 1 in 213, circa 1989 (0.47% of all Americans)[1]. The practice of psychologists in the field would have done much to moderate fluctuations in the numbers actually classified. Nonetheless, it is certain that over the past 50 years, literally millions of Americans evaded the label of mentally retarded designed for them by the test manuals. Whether this was good or bad depends on what one thinks of the label. Some will say millions avoided stigma. Others will say that millions missed out on needed assistance and classroom teachers were left unaided to cope with pupils for whom aid was needed. I leave this balance sheet for those who consider themselves competent bookkeepers.
>
> Even if nothing is done, however, scientists are now empowered. Some states require an IQ score below 70 before they will give a benefit to someone diagnosed as mentally disabled. Psychologists who want their clients to be eligible should pick the most recent test and score it, allowing for obsolescence. On the other hand, psychologists who want pupils to escape the label of mental retardation should pick the oldest test they can get away with. Depending on the tests chosen, there will be no problem in rigging IQ

[1] According to Flynn, on the day an IQ test is normed approximately 2.27% of the biologically normal population will fall at or below two standard deviations below the mean. Flynn 2000 at 192.

scores by at least 10 points.

James R. Flynn, *Individual Differences: Implications for Educational Policy: The Hidden History of IQ and Special Education: Can the Problems be Solved?*, 6 PSYCHOL. PUB. POL'L & L. 191, 197 (MARCH 2000) [hereinafter Flynn 2000]

In other words, if the Flynn effect is not applied to IQ scores, whether one is eligible for the death penalty under *Atkins* and under Florida law is left either to chance or manipulative design regarding what version of an IQ test is administered and in what year. A savvy practitioner could manipulate scores by administering an older or more recent IQ test. In order for the law to be fairly and evenly applied in capital cases, it is essential that the Flynn effect be taken into consideration.

The Appellee asserts even after Mr. Wright's IQ scores are adjusted for the Flynn Effect he does not meet Florida's statutory definition of mental retardation because all but one of his scores (70, 74, 75, 69, 77, and 70) are still above 70. Answer Brief of Appellee at 49. The State's assertion is based on the incorrect premise that in order to be considered mentally retarded an individual's IQ must be more than two standard deviations below 100. As Mr. Wright explained in his Initial Brief, Fla. Stat. § 921.137(1) defines "significantly subaverage general intellectual functioning" as "performance that is two or more standard deviations from the mean." Assuming that the mean score is 100, as this Court did in *Cherry*, the cut-off score mental retardation is 70 or below, as opposed to below 70, as the

Appellee suggests. Initial Brief of Appellant at 59. When Mr. Wright's IQ scores are corrected for the Flynn Effect, he has not one but three scores that are 70 or below, two of which were attained before the age of eighteen.[2]

Additionally, the Appellee is incorrect in their assertion that Dr. Kasper erred in her testimony regarding the years that the WAIS-R and WISC-R were normed. In Footnote 26 of their Answer Brief, the Appellee argues:

> Dr. Kasper adjusted Wright's WAIS-R test (75) with the Flynn effect and testified that the WAIS-R was normed in 1978 and Wright took it in 1997 (19 years * 0.3 = 6), and thus, taking away the six points gave Wright a Flynn-adjusted score of 69. The State would note, however, that in *Thomas v. Allen*, 614 F. Supp. 2d 1257, 1265, 1299 (N.D. Ala. 2009), *aff'd*, 607 F.3d 749 (11th Cir. 2010), cited by Appellant, the district court noted that the WAIS-R was normed in 1981, not 1978. Similarly, the district court stated that the WISC-R was normed in 1974 while Dr. Kasper claimed it was 1972. *Id.* at 1276.

[2] The Appellee cited *Jones v. State*, where this Court found that a defendant's IQ scores of 72, 70, 67, 72, and 75 did not indicate "significantly subaverage general intellectual functioning." Answer Brief of Appellee at 47. *Jones* is distinguishable from this case, as each of these tests was administered after Jones was shot in the head when he murdered the victims, and experts opined that the defendant's intelligence was probably higher before the head injury. *Jones v. State*, 966 So. 2d 319, 329 (Fla. 2007).

Likewise, *Phillips v. State*, which is also cited by the Appellee is distinguishable from this case. Answer Brief of Appellee at 47. In *Phillips*, where the defendant scored 75, 74, and 70 on the WAIS, this Court deferred to the lower court's finding that the defendant was malingering on IQ tests. *Phillips v. State*, 984 So. 2d 503, 510 (Fla. 2008). There is no evidence in the record at hand that Mr. Wright ever malingered on any test, and Dr. Kasper testified that she did not find any indication that Mr. Wright was purposely performing poorly on any of the IQ tests. PC12/1984.

Answer Brief of Appellee at 45.

The confusion seems to stem from the district court's incorrect assumption that the WAIS-R and the WISC-R were normed in the same year they were published. As James R. Flynn (the namesake of the Flynn effect) explained, the relevant date when adjusting IQ scores for the Flynn effect is the date the test was normed, not the date the test was published. James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and he Flynn Effect*, 12 PSYCHOL. PUB. POL'L & L. 170, 173-74 (May 2006) [hereinafter Flynn 2006]. The WISC-R was normed in 1972, but it was not published until 1974. *See Id*. at 173-74, 185; Flynn 2000 at 192; David Wechsler, WECHSLER INTELLIGENCE SCALE FOR CHILDREN- REVISED: MANUAL (Psychological Corporation) (1974). Similarly, the WAIS-R was normed in 1978, but it was not published until 1981. *See* Flynn 2006 at 173-74; David Wechsler, WECHSLER ADULT INTELLIGENCE SCALE- REVISED: MANUAL (Psychological Corporation) (1981). Furthermore, the State did not offer any expert at the postconviction evidentiary hearing to refute Dr. Kasper's testimony, including her adjustment of Mr. Wright's IQ scores for the Flynn effect.

ARGUMENT V

THE CIRCUIT COURT ERRED IN DENYING MR. WRIGHT'S CLAIM THAT DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S IMPROPER ARGUMENT REGARDING MR. WRIGHT'S PROPENSITY TO COMMIT VIOLENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

The Appellee argues that Mr. Wright cannot establish prejudice under *Strickland* because this Court found on direct appeal that the prosecutor's comments did not constitute fundamental error. Answer Brief of Appellee at 84. Justice Pariente, in her dissenting opinion in *Hodges v. State*, explains why a finding of no fundamental error on direct appeal does not preclude relief on an ineffective assistance of counsel claim in postconviction where trial counsel failed to object to the prosecutor's improper closing arguments. *Hodges v. State*, 885 So. 2d 338, 366-70 (Fla. 2003) (Pariente, J., dissenting).

> Because Hodges' trial counsel did not object, appellate counsel was forced to argue that these comments were fundamental error that constituted improper victim impact evidence in violation of *Booth v. Maryland*, 482 U.S. 496, 96 L.Ed. 2d 440, 107 S.Ct. 2529 (1987). *See Hodges*, 695 So. 2d at 933. This Court rejected Hodges' claim of fundamental error. *See id.*

Hodges, 885 So. 2d at 367.

> Finally, in my view the majority's reliance on this Court's previous rejection of this claim of error on direct appeal to support the denial of relief on the ineffectiveness claim is now misplaced. The majority fails to distinguish between Hodges' current claim of ineffectiveness for failing to object at trial and his claim on direct appeal based on the substantive error. By concluding that Hodges is not prejudiced because we denied relief on the substantive claim on direct appeal, the majority ignores the fact that we denied relief primarily because Hodges' counsel *failed to object*. Indeed, it was the failure to object to the improper closing argument, and thus preserve the issue, that prompted this Court to analogize *Hodges* to *Jackson* and *Hudson*, and analyze the claim for fundamental error.
>
> I further disagree with the majority's conclusion that relief is foreclosed because the Court previously found the error "harmless." *See* majority op. at 31-32. Notwithstanding the fact that this Court used the term "harmless" to describe the impact of the error, the fact remains that Hodges did not object at trial. Thus, the issue was not preserved for appeal and this Court could not have performed a conventional harmless error analysis in which the *heavy burden would have been on the State* to prove beyond a reasonable doubt that the closing argument error did not contribute to the verdict. *See State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986). The absence of an objection results in a fundamental error approach, *which imposes a heavy burden on the defendant* to establish that the error undermined the fairness of the judicial process. *See Maddox v. State*, 760 So. 2d 89, 94 (Fla. 2000).

Id. at 368.

As in Hodge's case, Mr. Wright's trial counsel rendered deficient performance by failing to object to clearly improper prosecutorial arguments. As a result, the issue was not properly preserved for appellate review, and this Court was only able to consider whether the arguments constituted fundamental error. The instant claim of ineffective assistance of counsel for failure to object is

separate and distinguishable from the claim raised on direct appeal, and it is not precluded by this Court's previous ruling that the prosecutor's comments did not constitute fundamental error. If trial counsel had objected to the prosecutor's improper arguments, the claim would have been preserved for appellate review, and this Court would have performed a harmless error analysis, which probably would have resulted in a reversal of Mr. Wright's conviction and sentence.

CONCLUSION

Based on the foregoing Reply Brief and the Initial Brief of Appellant, the circuit court improperly denied Mr. Wright relief on his 3.851 motion. Mr. Wright respectfully requests that this Honorable Court reverse the circuit court's order denying relief, vacate his conviction and sentence of death, and grant him a new trial; or grant such other relief that this Honorable Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished electronically to Stephen Ake, Esq. at cappapp@myfloridalegal.com and Stephen.Ake@myfloridalegal.com and to the Defendant by US Mail on April 28, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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