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

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This Supplemental Initial Brief involves an appeal of the circuit court's denial of Tavares Jerrod Wright's Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203. The record on direct appeal in this case was prepared in three separately paginated parts. The first part, comprising 33 volumes, is cited in the form R[volume number]/[page no]. The second part, comprising three volumes of photos admitted in evidence, evidence lists and the like, is cited where necessary in the form RE[volume number]/[page number]. The third part comprises six volumes and primarily contains sentencing proceedings. It is cited in the form RS[volume number]/[page number]. Citations to the postconviction record on appeal will be cited in the form PC[volume number]/page number]. Citations to the supplemental record on appeal regarding Wright's Renewed Motion for Determination of Intellectual Disability will be cited in the form SR[volume number]/[page number].

REQUEST FOR ORAL ARGUMENT

Given the gravity of the case and the complexity of the issues raised herein, Wright, through counsel, respectfully requests this Court grant oral argument.

STATEMENT OF THE CASE AND OF THE FACTS

Wright's trial counsel filed a Notice of Intent to Rely Upon § 921.137 Florida Statutes, Barring Imposition of the Death Penalty Due to Mental Retardation on June 30, 2005. R5/743-44. The trial court appointed Drs. William G. Kremper and Joel B. Freid to evaluate Wright for mental retardation, R5/745, and both experts testified at a special hearing regarding mental retardation on September 22, 2005. R5/748-832. Neither expert assessed Wright's adaptive behavior. R5/764; R5/783-817. Following that hearing, the trial court found that the five IQ scores which were before the court (76, 75, 77, 82, and 75) did not establish a finding of mental retardation, and that he therefore was not mentally retarded for the purposes of capital sentencing. R5/827-29.

Wright's case is currently pending before this Court on an appeal of the circuit court's denial of his motion for postconviction relief brought pursuant to Fla. R.Crim. P. 3.851. On June 11, 2014, Wright filed a Motion to Relinquish Jurisdiction to the circuit court for the specific purpose of filing a renewed motion for determination of intellectual disability as a bar to execution under Fla. R.Crim.

P. 3.203. On October 7, 2014, this Court issued an order relinquishing jurisdiction to the circuit court for the purpose of filing a renewed motion for determination of intellectual disability as a bar to execution under Fla. R.Crim. P. 3.203. SR4/580. On October 10, 2014, Wright filed Defendant's Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203 [hereinafter "the motion"], in which he sought a renewed determination of intellectual disability as a bar to execution under Fla. R.Crim. P. 3.203 in light of *Hall v. Florida*, 134 S.Ct. 1986, 188 L.Ed. 2d 1007 (2014). SR1-3/1-540; SR4/541-79. After a series of preliminary hearings, an evidentiary hearing was held by the circuit court regarding the motion on January 5-6, 2015 and February 11, 2015. SR4/622-730; SR5-8/731-1459; SR9/1504-1650; SR10/1651-1700. Comprehensive summaries of the testimony presented at the evidentiary hearing, as well as the relevant testimony presented at the penalty phase trial and postconviction evidentiary hearing and a more in-depth discussion of Wright's intellectual disability are included in the written closing arguments filed by Wright following the evidentiary hearing regarding the motion. SR10/1711-1803. Wright would request this Court to refer to that document for a more thorough understanding of the case at hand.

In support of the motion, Wright relied on the testimony of Mary Elizabeth

Kasper, Ph.D., a psychologist who is board certified in psychology and neuropsychology. SR5/881-82. Dr. Kasper testified on behalf of the defense at Wright's evidentiary hearing in October of 2012 (PC11/1885-1940 and PC12/1941-2061), as well as the hearing regarding the instant motion in 2015 (SR5/839-920; SR6/921-995, 1032-1110; SR7/1111-1122; SR9/1604-50; SR10/1651-67). Although she did not conduct any IQ testing on Wright, she reviewed all prior IQ testing of Wright, and she assessed his adaptive functioning. She testified that Wright meets the criteria for mental retardation as defined in Fla. Stat. § 921.137(1). PC12/1994.

Additionally, Wright relied on the testimony of Dr. Kevin Kindelan and Dr. Joel Freid, who testified in rebuttal at the evidentiary hearing regarding the motion. SR8/1371-1426. Dr. Kindelan administered the WISC-R to Wright in 1991 when Wright was 10 years old. Dr. Freid administered the WAIS-R to Wright in 1997 when Wright was 16 years old, and he administered the WAIS-III to Wright in 2005.

Wright also relied on the testimony of numerous lay witnesses in support of the motion. Wright's aunt, Cynthia Wright McClain, and his cousin, Carlton L. Barnaby testified during Wright's combined penalty phase/*Spencer* hearing. RS2/277-387. Fellow inmates Dennis Day, James Blake, Jerry Hopkins, Dahrol James, and Shenard Dumas testified during Wright's postconviction evidentiary

hearing. PC10/1683-1706, 1733-1810; PC11/1756-85, 1787-1812, 1836-55. Wright's aunt, Marian Barnaby; his cousin, Carlton Barnaby; trial attorneys Byron Hileman and David Carmichael; and jailhouse lawyer Richard Shere testified on behalf of Wright at the evidentiary hearing on the motion. SR4/633-730; SR5/731-807, 841-78. Wright's childhood friend, Toya Long Ford, testified on behalf of the State, but offered extensive testimony regarding deficits in Wright's adaptive functioning prior to age 18. SR7/1196-1221.

At the evidentiary hearing, the State presented psychologist Michael Gamache, Ph.D. (SR8/1309-69; SR9/1512-1602) and ten lay witnesses (SR7/1124-1221, 1252-1300; SR8/1301-08). In addition to administering a WAIS-IV, which he concluded was not valid, Dr. Gamache reviewed Wright's prior IQ testing and conducted a mental status exam and a "structured" clinical interview with Wright regarding adaptive behavior. SR8/1335, SR9/1522-23. With the exception of Toya Long Ford, the State's lay witnesses either barely knew Wright (such as Carlos Coney, who testified that he and Wright did not know each other SR7/1130; Sandrea Allen, who testified that she was only around Wright five to ten times SR7/1153; Aaron Silas, who only saw Wright twice in his life SR7/1140; Darletha Jones, who only saw Wright in groups and never had a one-one-one conversation with him SR7/1170; Detective Bradley Grice, who only met Wright once when he conducted

a sworn interview of Wright SR7/1276; and Shakida Faison, who saw Wright infrequently over the few months she knew him and never really had any conversations with him SR7/1299-1300), or had a bias against him (such as co-defendant Samuel Pitts' sisters Sandrea Allen, Darletha Jones, and Vontrese Allen and their friend, Shakida Faison; co-defendant Aaron Silas; and victims of the Longfellow drive-by shooting Carlos Coney and Bennie Joner).

Following the hearing, counsel submitted written closing arguments and rebuttal closing arguments. RS10/1711-1833; RS11/1834-57. The circuit court issued an order denying relief on March 26, 2015. RS11/1858-70. A timely notice of appeal was filed on April 9, 2015. RS11/1871-72.

SUMMARY OF THE ARGUMENTS

ARGUMENT I: The circuit court erred in denying Wright's Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203. Wright has proven by clear and convincing evidence that he suffers from an intellectual disability.

ARGUMENT II: The requirement that Wright prove his intellectual disability by clear and convincing evidence violates his right to due process. As such, Fla. Stat. §921.137(4) is unconstitutional. Due process under the Fifth, Eighth, and Fourteenth Amendments requires that the standard be a mere preponderance.

ARGUMENT I
THE CIRCUIT COURT ERRED IN FINDING THAT WRIGHT IS NOT INTELLECTUALLY DISABLED.

Executing the intellectually disabled is cruel and unusual punishment in violation of the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed. 2d 335 (2002). 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," intellectually disabled offenders "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 306. The current definitions of intellectual disability in Fla. Stat. § 921.137(1) and mental retardation in Fla. R.Crim. P. 3.203(b) are nearly identical, and require "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18."[1]

Pursuant to Fla. Stat. §921.137(4), Wright must show by clear and convincing evidence that he is intellectually disabled. This Court defined clear and convincing evidence as follows:

This intermediate level of proof entails both a qualitative and

[1] Wright will refer to the three requirements of Fla. Stat. § 921.137(1) and Fla. R.Crim. P. 3.203(b) as Prong One (significantly subaverage general intellectual functioning), Prong Two (existing concurrently with deficits in adaptive behavior) and Prong Three (manifested during the period from conception to age 18).

> 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).

In 2005, the trial court found that Wright did not meet the criteria for mental retardation because none of his IQ scores were 70 or below. R5/825-830. The trial court did not take into account the standard error of measurement, the Flynn Effect, the practice effect, or adaptive behavior. In 2014, the U.S. Supreme Court in *Hall* acknowledged that IQ scores are "best understood as a range." *Hall*, 134 S.Ct. at 1988. The Court rejected the strict IQ score cutoff of 70 required by *Cherry v. State*, 959 So. 2d 702 (Fla. 2007) and held that "when a defendant's IQ score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Hall*, 134 S.Ct. at 2001. Following an evidentiary hearing, the circuit court considered Wright's claim of intellectual disability in light of *Hall* and concluded that Wright did not meet "the criteria to be <u>legally</u> declared intellectually disabled." SR11/1868. Wright seeks review of these findings.

Although in its March 26, 2015 order denying Wright's motion the circuit court found that Wright "has not met the <u>legal</u> standard of being intellectually disabled under Florida Statute 921.137(1) and/or Rule 3.203(b), Fla. R. Crim. P.",

the court expressed great concern about executing an individual such as Wright who is arguably intellectually disabled, and recommended that a renewed proportionality review be conducted by this Court. SR11/1865-68. Wright maintains that he has established by clear and convincing evidence that he suffers from an intellectual disability and that the court's finding that he has not established Prongs I and II by clear and convincing evidence is not supported by competent and substantial evidence. Nevertheless, the circuit court's concerns highlight the constitutional infirmities with the clear and convincing evidence standard as discussed in Argument II below. The court's concerns also lend support to Wright's argument in Argument I of his Initial Brief (*See* p. 58-59) that, but for trial counsel's ineffective assistance in failing to fully investigate and present evidence of Wright's intellectual disability, there is a reasonable probability that even if the trial court did not find that Wright had proven by clear and convincing evidence that he is intellectually disabled, the trial court would have given him a life sentence.

For the following reasons, the circuit court erred in finding that Wright has not proven by clear and convincing evidence that he suffers from an intellectual disability.

A. Prong I: Significantly Subaverage General Intellectual Functioning

The circuit court found that "Wright has been diagnosed, at a minimum, as

being borderline in general intellectual functioning." SR11/1862. The court further found as follows regarding Prong I:

> The Court finds that, while the Defendant's IQ scores do not demonstrate (by clear and convincing evidence) that the Defendant has significant subaverage general intellectual functioning, they do fall within the test's acknowledged and inherent margin of error, and therefore the Defendant is entitled to present, and have considered, evidence concerning the second prong of Florida Statute 921.137(1) and/or Rule 3.203(b), Fla. R. Crim. P., relating to deficits in adaptive behavior.

PC11/1862. While Wright agrees that his IQ scores warrant the circuit court's consideration of adaptive functioning, as the court suggests, Wright seeks review of the circuit court's finding that he has not met his burden regarding Prong I.

Wright has demonstrated by clear and convincing evidence that he suffers from significantly subaverage intellectual functioning. When the standard error of measurement [hereinafter "SEM"] is applied using a 95 percent confidence interval, the range for the 1991 WISC-R administered by Dr. Kindelan is 70-82, and the range for the 1997 WAIS-R administered by Dr. Freid is 69-81, which places Wright in the range of someone who is intellectually disabled. SR6/934, 937; SR8/1386, 1414. Although, as the circuit court points out in its order, Wright's previous IQ scores range from 75 to 82 (SR11/1861), the higher IQ scores that Wright attained are attributable to the practice effect, a well-known effect that is reasonably accepted in

the scientific community by which you take a test multiple times and get a better score. PC11/1940; PC12/1947.

Dr. Kasper reviewed all prior IQ testing of Wright and found that Wright suffers from significantly subaverage intellectual functioning. SR5/897; SR6/1037. Prior to 2014, Wright was given six full-scale Wechsler IQ tests and two abbreviated Wechsler IQ tests. SR5/907. Drs. Kasper and Gamache agree that it is highly unusual to see a person who has been given versions of the same test eight times. SR5/917; SR8/1348. The following is a list of the IQ tests that were previously administered to Wright:

Date of Test	**Test Form**	**Administrator**	**Full Scale IQ Score**
2/91 (10 years old)	WISC-R	Dr. Kindelan	76
4/4/91 (10 years old)	WISC-R	Evelyn Pierce (Polk County Public Schools, Bartow, FL)	80
9/11/91 (10 years old)	WISC-R	Janet Cook (Williamson Central Schools, Williamson, NY)	81
8/25/97 (16 years 6 months old)	WAIS-R	Dr. Freid	75
2001 (20 years old)	WASI	Dr. Dolente	N/A
2/4/03 (a few days short of 23 years old)	WASI	Dr. Sesta	N/A
7/15/05 (24 years old)	WAIS-III	Dr. Kremper	82
7/25/05 (24 years old)	WAIS-III	Dr. Freid	75

SR5/909-12.

The 1991 WISC-R administered by Dr. Kindelan and the 1997 WAIS-R administered by Dr. Freid are the best indications of Wright's IQ because they would not have been impacted by the practice effect. SR5/913-14, 918-19. In 1991, Wright was given the WISC-R three times in one year, which is contrary to the instructions in the testing manual, as well as established clinical practice. *See* SR5/913; AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) [hereinafter "AAIDD"], at 38 ("[E]stablished clinical practice is to avoid administering the same intelligence test within the same year to the same individual because it will lead to an overestimate of the examinee's true intelligence."). Therefore, the latter two of the three tests (administered by Evelyn Pierce and Janet Cook) should not be considered. The tests given by Dr. Dolente in 2001 and Dr. Sesta in 2004 were not full scale IQ tests, so they should not considered, except to the extent that they contributed to the practice effect. *See Kilgore v. State*, 55 So. 3d 487, 509 (2010) (questioning the reliability of two prorated administrations of the WAIS); *see also*, AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FIFTH ADDITION (American Psychiatric Association 2013) [hereinafter "DSM-V"], at 37 ("Invalid scores may result from the use of brief intelligence screening tests . .

."); SR5/907, 916-17. In 2005, Drs. Kremper and Freid administered the same exact IQ test twice in ten days. Therefore, the second administration of the test by Dr. Freid should not be considered. PC12/2036-37. That leaves three tests for this Court's consideration: the February 1991 test administered by Dr. Kindelan on which Wright scored a 76, the August 25, 1997 test administered by Dr. Freid on which Wright scored a 75, and the July 15, 2005 test administered by Dr. Kremper on which Wright scored an 82. By the time he took the test with Dr. Kremper in 2005, Wright had been already given some form of the Wechsler test six times. The IQ tests were not normed on individuals who had taken the tests multiple times, so the impact of the practice effect cannot be discounted. SR5/918; SR6/928-29. It is not surprising that his IQ score in 2005 was higher than the two scores from the tests he was administered prior to age 18 due to the amount of practice he had had taking these tests. Furthermore, the fact that all of Wright's IQ scores fell within the range predicted by the first IQ test he ever took at the age of ten is strong evidence that the score Wright obtained on the test administered by Dr. Kindelan in 1991 is valid. SR6/928, 935.

Dr. Gamache testified that the practice effect is not an issue in this case because Wright's verbal IQ scores actually went down with the second and third administrations of the WISC-R. SR8/1338-40. However, Dr. Kasper explained the

practice effect is much stronger on performance IQ, which actually went up on the second and third administrations, thereby causing his full scale IQ to increase four to five points. SR5/915; SR6/1063. Furthermore, Dr. Gamache testified that higher IQ scores are more reliable indications of IQ because one can fake bad but cannot fake good, and therefore the best measure of Wright's overall IQ would be the highest IQ score he ever achieved, which is 82. SR8/1335, 1365-66. However, this Court, in a case in which Dr. Gamache testified as an expert for the State, found that where the defendant's IQ scores were 76, 84, 67, 75, 74, and 85, the two highest scores may not be reliable and were probably affected by the practice effect:

> The evidence suggests that the full-scale scores of 84 and 85 may not be reliable. The full-scale score of 84 was achieved through a test administered six months after the first administration of the IQ test. Dr. Ciotola's own report acknowledged that the practice effect was likely an issue. Similarly, Dr. Gamache's May 2006 administration that resulted in a full-scale score of 85 was the sixth administration of the WAIS-III, and thus was probably affected by the practice effect.

Kilgore, 55 So. 3d at 509.

In the case at hand, Wright scored an 82 on the seventh IQ test he was administered. Therefore, the practice effect cannot be discounted, which is evident from this Court's recognition of the practice effect for Kilgore's score of 85 on the sixth administration of the WAIS-III.

Using a 95 percent confidence interval applying the SEM in the same manner

as required by *Hall*, Drs. Kasper, Kindelan, and Freid assessed Wright's IQ scores from February 1991 and 1997. Both tests are within the margin of error for intellectual disability. Incredibly, all of Wright's scores since 1991, with the exception of the 2014 test administered by Dr. Gamache which no one disputes was invalid, fell within the range predicted by the first IQ test Wright was ever administered in 1991, lending validity to that test. Drs. Kasper, Kindelan, and Freid all agreed that Wright suffers from significantly subaverage intellectual functioning. SR5/897; SR8/1386, 1419. The SEMs used by Drs. Kasper, Kindelan, and Freid, and the ranges of scores that they testified about have not been challenged by the State. Thus, Wright has demonstrated by clear and convincing evidence that he has significantly subaverage intellectual functioning.

B. Prong II: Deficits in Adaptive Behavior

Intellectual disability is diagnosed according to severity levels: mild, moderate, and severe. In evaluating the circuit court's order and Wright's claim of intellectual disability, Wright urges this Court not to hold Wright to the incorrect standard of someone who is moderately or severely intellectually disabled. The severity levels can be somewhat misleading, since even a person with a mild intellectual disability is considered to suffer from severe deficits in that he is two standard deviations below the mean or in the bottom two percent of the population

on intellectual testing. SR9/1625. The level of functioning that can be expected of an intellectually disabled individual varies greatly across the three severity levels. The DSM-V outlines the three severity levels and descriptions of what can be expected in each of the three adaptive behavior domains. DSM-V at 34-36; SR10/1801-03. An individual with a severe intellectual disability is extremely impaired to the point where the person's communication is quite limited and he requires supervision at all times. DSM-V at 36; SR10/1803. In contrast, as Dr. Kasper explained:

> [People who are moderately intellectually disabled] are still able to acquire knowledge, learn things, and function to some degree.
>
> A mild level of intellectual disability are individuals who can largely function. Many of them can operate semi-independently, oftentimes with very little assistance in the community. They can work. They can pay taxes. They can hold jobs.

SR9/1620.

Mild intellectual disability is typically used to describe a person with an IQ of approximately 50 or 55 to approximately 70. SR10/165; *See also*, *Hall*, 134 S.Ct. at 1998. Wright suffers from a mild intellectual disability. In determining whether Wright is intellectually disabled under Fla. Stat. § 921.137 or Fla. R.Crim. P. 3.203, it is important to understand the level of functioning that one can expect from an individual who is mildly intellectually disabled. Both AAIDD and DSM-V divide

adaptive deficits into three "domains" or categories: conceptual, social, and practical. AAIDD at 44; DSM-V at 37. An individual with a mild intellectual disability would be expected to learn to read up to a sixth grade level, and would function at or around the level at or around that of a 12 ½ year old in their deficit areas. SR9/1622-25. An individual with adaptive functioning in one or more of the three categories of adaptive behavior at or below those expected of approximately a 12 ½ year old child meets Prong Two of the definition, as this is a "severe deficit". SR9/1622-25. In order to be diagnosed with an intellectual disability, one must have significant deficits in only one or more of the categories of adaptive behavior, and not necessarily all three. AAIDD at 43; DSM-V at 37-38. Additionally, intellectually disabled people commonly exhibit strengths as well as weaknesses, and a strength in one area does not negate a weakness in another area. AAIDD at 47. Therefore, one could still function at a level above that of a 12 ½ year old in one or two of the categories and still be considered intellectually disabled. In low socioeconomic communities, individuals with mild intellectual disabilities are often seen as having slow learning problems. SR9/1620. Although a mild intellectual disability affects a person, it does not affect him to the point where he cannot function, learn, or benefit from assistance. SR9/1621.

Regarding Prong II, the circuit court found that, although Wright "has failed

to establish, by clear and convincing evidence, that he suffers from deficits in adaptive behavior which would rise to the level of declaring him, legally, as intellectually disabled." SR11/1864. The court also found, however, that Wright was "a slow learner in school and never did well academically", and that "[h]e has been manipulated, bullied, and taken advantage of throughout his life." SR11/1863-64. The court's description of Wright's adaptive behavior sounds like that of an individual with a mild intellectual disability, and the court's reluctance to find that Wright has established by clear and convincing evidence that he suffers from deficits in adaptive behavior seems to stem from a misunderstanding of what would be expected of an individual with a mild intellectual disability, as opposed to Wright not meeting his burden regarding this prong.

The circuit court also noted that it read and considered Wright's trial testimony, which it found "very telling and compelling in gauging the Defendant's intellectual functioning and adaptive behavior." SR11/1863. Such a reliance, however, on this one example of Wright's functioning is not appropriate in assessing adaptive behavior, as adaptive behavior focuses on a person's typical performance, as opposed to his maximum performance. SR6/937; SR9/1616; AAIDD at 47. Furthermore, it is unclear how Wright prepared for his testimony, and adaptive behavior is what a person can do on his own, as opposed to what he can do with

assistance, which is considered coached behavior. SR9/1616.

Wright has proven by clear and convincing evidence that he suffers from deficits in adaptive behavior. Dr. Kasper conducted a comprehensive assessment of Wright's adaptive functioning as prescribed by the AAIDD[2], which included the Adaptive Behavior Assessment Scales II, multiple interviews with Wright, numerous witness interviews, and a review of school records and psychological reports SR6/945, 947; SR9/1606; PC12/1985. In contrast, despite the AAIDD's caution about "relying heavily only on the information obtained from the individual himself or herself when assessing adaptive behavior for establishing a diagnosis of ID," Dr. Gamache relied mainly on what Wright told him and his observations of Wright during a single interview on November 17, 2014. AAIDD at 52; SR9/1578. Dr. Kasper found that Wright suffers from deficits in adaptive behavior across multiple environments under Fla. R.Crim. P. 3.203, Fla. Stat. § 921.137, and the DSM-V and AAIDD definitions of intellectual disability. SR6/949, 985. She also

[2] "A comprehensive assessment of adaptive behavior will likely include *a systematic review of the family history, medical history, school records, employment records (if an adult), other relevant records and information, as well as clinical interviews with a person or persons who know the individual well.*" AAIDD at 45 (emphasis added). "Obtaining information from multiple sources (e.g. school records, employment history, previous evaluations) is essential to providing corroborating information that provides a comprehensive picture of the individual's functioning." AAIDD at 47.

found that he suffered from significant deficits in the conceptual skills category at age 16 ½ and present and the social skills category at age 16 ½ and present, as well as the general adaptive composite at age 16 ½ and present. SR6/959-64.

Dr. Kasper's findings are supported by extensive and remarkably consistent lay witness testimony. The AAIDD emphasizes the importance of obtaining information about adaptive behavior from knowledgeable informants who are "very familiar with the person and have known him/her for some time and have had the opportunity to observe the person function across community settings and times." AAIDD at 47. State witness Toya Long Ford, as well as the lay witnesses called by Wright at the October 2012 evidentiary hearing, the hearing regarding intellectual disability, and his penalty phase/*Spencer* hearing were all very familiar with Wright, and were able to offer in depth insight into his adaptive behavior. As these witnesses, who knew Wright at different points throughout his life, demonstrate, Wright's adaptive behavior deficits are lifelong, across multiple settings, and therefore exist concurrently with any of the IQ scores Wright has achieved. As a child, he was seen by others as "slow" and a follower. RS2/285; PC10/1740-43; PC11/1762-63; SR4/637. He had problems with his speech and started walking later than the other children. SR4/639, 645. He had difficulty with his schoolwork, as well as with reading and writing, and he was in SLD and ESE classes at school. RS2/285, 289-

90; SR4/637-40, 663-64; SR7/1204. Toya Long Ford testified that she had difficulty communicating with Wright when they were children, and she would often have to use simple words, repeat herself, and explain things so that Wright could understand. SR7/1214-15. Ford testified that Wright could not complete his homework because he did not understand how, and when she tried to help him with his homework, she would often end up doing it herself. SR7/1204, 1212. Ford further described how the other children manipulated him, took things from him, and picked on him because he was an easy target. SR7/1210. Wright's cousin Carlton testified about how he looked out for Wright and provided much-needed supports, helping Wright with his schoolwork and hygiene, driving him around, and assuming the role of a job coach when they worked together at the Albertson's warehouse for a short time. SR4/654-702. Several inmate witnesses testified about Wright's adaptive behavior in jail after he was arrested for the murders. PC10/1683-1706, 1733-1810; PC11/1756-85, 1787-1812, 1836-55. They described him as someone who was slow, immature, a follower, and easily manipulated. He had difficulty understanding spiritual concepts such as forgiveness and prayer. He had difficulty following the rules, and made the same mistakes over and over again without seeming to learn. Wright's trial attorneys offered testimony about the challenges they faced in communicating with Wright, as well as his lack of understanding. SR4/704-109;

SR5/731-807. Finally, Richard Shere, a death row inmate who has known Wright for the past several years confirmed that Wright continues to suffer from significant deficits, especially in terms of reading, writing, and conceptual skills, and that he and several other inmates on death row have assisted Wright in these areas. SR5/841-78.

C. Prong III: Manifestation During the Period from Conception to Age 18

Wright has shown by clear and convincing evidence that his intellectual disability manifested during the period from conception to age 18. The circuit court found "by clear and convincing evidence that the Defendant's intellectual condition (whatever it is classified) has existed his entire life and therefore precedes his 18th birthday." SR11/1865. This finding is supported by competent and substantial evidence. Dr. Kasper testified that Wright's problems began in utero, when his mother drank heavily. SR/987. Wright has been diagnosed with fetal alcohol syndrome, which is known to cause defects in intellectual capacity. SR/986-87. He has microcephaly, as well as other physical characteristics of fetal alcohol syndrome. SR6/987; PC12/1996-97. Environmental factors during early childhood such as inadequate nutrition and lack of stimulation may have also contributed to Wright's difficulties. SR6/987-88. Two IQ scores administered when Wright was younger than 18 years of age indicate significantly subaverage general intellectual

functioning: the February 1991 WISC-R administered by Dr. Kindelan when Wright was ten years old and the August 25, 1997 WAIS-R administered by Dr. Freid when Wright was 16 years 6 months old. Lay witnesses who knew Wright as a child, including Toya Long Ford, James Blake, Jerry Hopkins, Carlton Barnaby, and Cynthia McClain, described a child who had difficulty following the rules, was picked on by the other children because of his disability, and was easily manipulated. Wright was classified as emotionally handicapped and specific learning disabled in school, was exempt from taking standardized tests, and earned a special diploma. PC11/1911, 1923-24. As Dr. Kasper explained, the reason why he was not diagnosed as mentally retarded when he was in school was because his IQ scores were above the strict 70 cutoff that was the law of the land in Florida at the time. SR6/988-89. Wright's school records indicated that he had deficits in functional academic skills, as well as problems interacting and communicating with others and controlling his environment. PC11/1929. His mother received social security benefits for Wright when he was a child. PC12/1998-99. For these reasons, Dr. Kasper opined that Wright's intellectual disability manifested during the developmental period. SR6/986. Although Dr. Gamache testified that Wright does not meet the criteria for Prongs One and Two, the State offered no testimony from Dr. Gamache or any other witness to suggest that Wright's difficulties did not

manifest during the period from conception to age 18.

ARGUMENT II

FLA. STAT. § 921.137(4) IS UNCONSTITUTIONAL AND VIOLATES WRIGHT'S DUE PROCESS RIGHTS AS PROTECTED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Fla. Stat. § 921.137(4) requires Wright to prove by clear and convincing evidence that he is intellectually disabled. Wright argued below that requiring proof of intellectual disability by clear and convincing evidence violates his due process rights under the Florida and Federal Constitutions because it "imposes a significant risk of an erroneous determination" that Wright is not intellectually disabled, the "consequences of an erroneous determination . . . are dire," and the majority of jurisdictions require proof only by a preponderance of the evidence. *See Cooper v. Oklahoma*, 517 U.S. 348, 359-64, 116 S.Ct. 1373, 134 L.Ed. 2d 498 (1996). The circuit court denied relief, citing *Herring*, in which this Court stated that "a defendant must prove each of the three elements by clear and convincing evidence." *Herring v. State*, 76 So. 3d 891, 895 (Fla. 2011). Wright seeks review of this finding.

Despite this precise issue being raised in several cases, this Court has never squarely addressed whether the clear and convincing standard is unconstitutional, and instead disposed of the cases on other grounds. *See, e.g.*, *Dufour v. Sate*, 69 So.

3d 235 (Fla. 2011); *Snelgrove v. State*, 107 So. 3d 242 (Fla. 2012). In *Cooper*, the Supreme Court held that the "clear and convincing evidence" standard of proof with regard to competency to stand trial violated a defendant's due process rights. *Cooper*, 517 U.S. at 359-64. Wright urges this Court to look to the *Cooper* standard for guidance in assessing the proper burden the defense is required to establish to prohibit the execution of the intellectually disabled. Because of the reduced capacity of intellectually disabled offenders, there is a "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Atkins*, 536 U.S. 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 intellectually disabled "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 Supreme Court explained the constitutional importance of 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 to doing so.

Cooper, 517 U.S. at 1376.

Executing an intellectually disabled defendant and trying an incompetent defendant encompass the same risks: limited ability to consult with counsel, capacity to testify relevantly, and ability to fully understand the proceedings. 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 [intellectual disability] by clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is [not intellectually disabled]." *Cooper*, 517 U.S. at 363. Wright urges this Court to address this issue on the merits, reject the clear and convincing evidence standard imposed by the circuit court, and institute a preponderance of the evidence standard.

CONCLUSION

Based on the foregoing, the circuit court improperly denied Defendant's Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203. Wright respectfully requests that the Court vacate his sentences of death and that life sentences be imposed, or any other such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing SUPPLEMENTAL INITIAL BRIEF OF APPELLANT has been emailed to Stephen D. Ake, Assistant Attorney General, at capapp@myfloridalegal.com and Stephen.Ake@myfloridalegal.com and mailed via United States Postal Service to Tavares J. Wright, DOC # H10118, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026 on this 15th day of May, 2015.

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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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