

**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 REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References to the State's Supplemental Answer Brief will be in the form [SAB]/[page number].

ARGUMENT

The Appellant relies on the arguments presented in his Supplemental 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.

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

A. Credibility Determinations

The Appellee states that the circuit court made “implicit credibility determinations.” SAB/4. The court did not make any credibility determinations in this case. However, the court’s concern about executing an individual such as Wright who is arguably intellectually disabled, as well as his recommendation that a renewed proportionality review be conducted by this Court, suggests that the circuit court found the testimony of the defense experts to be compelling. SR11/1865-68.

B. Prong I: Significantly Subaverage General Intellectual Functioning

Relying on the testimony of Dr. Gamache, the Appellee argues that because Wright took numerous IQ tests and consistently scored between 75 and 82, “these consistent scores establish a much more accurate indicator of Wright’s true intelligence ‘range’ than utilizing the SEM range.” SAB/6-7. Dr. Gamache

ignored the SEM, averaged seven of Wright's prior IQ scores together to find a "true score", determined the standard deviation of the scores, and determined a range of scores based on the standard deviation. SR8/1337-38, 1354. When questioned about his authority for evaluating IQ scores in this way, Dr. Gamache cited "Online Statistics Evaluation, a Multimedia Course of Study by David Lane", an online "resource for learning and teaching statistics" that has nothing to do with psychology or IQ scores. SR8/1357-58; Online Statistics Evaluation, a Multimedia Course of Study, *available at* <http://onlinestatbook.com>.¹ This practice flies in the face of *Hall*², as well as the standard of practice in the psychological community. Drs. Kasper, Kindelan, and Freid all agreed that it is not the standard of practice to average IQ scores in the manner in which Dr. Gamache did in this case, and in fact it is something that they have never seen before in their many combined years of

¹ Although Dr. Gamache discounts the practice effect in this case despite the fact that Wright has taken more IQ tests than anyone he has ever encountered, the website he relies on for his statistical analysis in this case warns that, "[i]n practice, it is not practical to give a test over and over to the same person and/or assume that there are no practice effects."

² Like Wright, the defendant in *Hall* had multiple IQ scores (nine in total). *Hall v. Florida*, 134 S.Ct. 1986, 1992, 188 L.Ed. 2d 1007 (2014). Under *Hall*, "[e]ven when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a complicated endeavor . . . In addition, because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning." *Id.* at 1993.

practice. SR7/1117; SR8/1382-84, 1419. Looking at IQ scores in this way is also contrary to way in which the APA and the AAIDD, leading authorities on intellectual disability, require psychologists to look at IQ scores when diagnosing intellectual disability. Additionally, averaging together scores from four different versions of the Wechsler test, including one abbreviated test, makes no sense from a statistical perspective, and as Dr. Kindelan explained would be akin to averaging together one's golf scores from different courses. SR8/1384. It is also puzzling that Dr. Gamache included in his average scores (namely the 1991 Dr. Kindelan test and the 1997 Dr. Freid test) that he believes are invalid to produce a "true IQ score".

The Appellee attributes Wright's lower IQ scores to him not putting forth full effort in his intelligence testing. SAB/7. Dr. Gamache expressed concerns that the 1991 test administered by Dr. Kindelan and the 1997 administered by Dr. Freid were invalid because they were not accompanied by a validity test and because the scores were lower than other scores Wright obtained. SR8/1336, 1366. Despite his concerns, Dr. Gamache did not speak with Drs. Kindelan or Freid prior to the hearing. SR8/1368. Drs. Kindelan and Freid testified at the hearing that they believed the scores Wright obtained on these tests were valid, and if they had any concerns about the validity of these tests or the effort Wright was exerting on

the tests, they would have expressed these concerns in their reports. SR8/1382, 1409, 1411.

The Appellee further argues that:

Wright's reliance on *Kilgore v. State*, 55 So. 3d 487 (Fla. 2011), for the proposition that the practice effect probably affected his 82 score on the WAIS-III, is erroneous as the administration of the WAIS-III in 2005 was the first time Wright ever took this specific full-scale test as opposed to the facts in *Kilgore* where the defendant took the same WAIS-III test six times.

SAB/9. As Dr. Kasper explained, although there are different versions of the Wechsler test, they are remarkably similar in the way they are administered, timed, and scored. PC12/1943-46. The same blocks are used in every version of the Wechsler test, and people do better at the block design test by doing it multiple times. PC12/1945-46. Likewise, there is an advantage to knowing which of the tests are timed. PC12/1946. Wright has been administered some version of a Wechsler test a total of eight times. PC12/1942-43. Although the actual questions vary across different versions of the test, the practice effect cannot be discounted.

C. Prong II: Deficits in Adaptive Behavior

The Appellee relies largely on the testimony of Dr. Gamache, and discusses the basis for his opinion regarding adaptive behavior. SAB/11-16. In contrast to Dr. Kasper, Dr. Gamache offered an opinion regarding Wright's adaptive behavior

without speaking with a single collateral source or using any standardized measure of adaptive functioning. SR9/1594. He did not attempt to apply the extensive lay witness testimony regarding Wright's adaptive behavior to the three categories of adaptive functioning. He did not review Wright's school records, which were introduced at the 2012 evidentiary hearing. SR9/1594. Instead, he relied almost entirely on one interview with Wright and an internet blog that was written by another inmate and only copied by Wright. SR9/1532-33, 1578, 1600-01.

Dr. Gamache's heavy reliance on his interview with Wright renders his findings unreliable at best. The AAIDD "caution[s] against relying heavily only on the information obtained from the individual himself or herself when assessing adaptive behavior for the purpose of establishing a diagnosis of ID." AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) [hereinafter "AAIDD"], at 52. For one, "mental retardation had been a particularly stigmatizing and pejorative label that leads most individuals with this label to fight hard not to be identified as 'MR'." *Id.* Additionally, it notes that "persons with ID typically have a strong acquiescence bias or a bias to please that might lead to erroneous patterns of responding." *Id.*

Dr. Kasper testified that Wright, like many people with intellectual

disabilities, is not a reliable source, and that he tends to either inflate or overestimate his abilities. SR6/948, SR9/1606. She personally observed an acquiescence bias with Wright, such that he tended to agree with Dr. Gamache and seemed to be trying to impress him. SR9/1613-14. In fact, some of Dr. Gamache's findings based on his interview with Wright were contradicted by witness testimony. For example, under the conceptual and practical skills categories, Dr. Gamache cited Wright's self-report that he manages his own canteen account at the prison as evidence that he has managed his own funds and that he is able to get what needs on a day-to-day basis in his current institutional setting. SR9/1540, 1573. However, fellow death row inmate Richard Shere testified that he and other inmates help Wright with his canteen account. SR5/858, 876. Likewise, regarding Wright's use of community resources under the social skills category Dr. Gamache cited Wright's self-report that he knows how to file requests and grievances and has filed grievances about five times, and that he knows how to use resources such as the law library. SR9/1566-70. Once again, Dr. Gamache ignored the testimony of Shere that he and other inmates help Wright with requests, grievances, and use of the law library. SR5/852-53, 859. Regarding Wright's request for a kosher diet, he did not write the request himself, but copied a boiler plate request form that the inmates passed up and down the

hallway. SR5/860. Also under the social skills category, Dr. Gamache relied on Wright's denial that he has been exploited or taken advantage of, and testified that he could not find any examples either from things Wright told him or in the records that suggested that he was being exploited by others. SR9/1860. The record is rich with examples of Wright being taken advantage of by others, and the circuit court correctly found that Wright has been "manipulated, bullied, and taken advantage of throughout his life." SR11/1863-64. The children in school took things from him and tried to get him to do things for them, other children made up lies about someone saying something about his mother to get a reaction out of him, and other inmates at the jail got him to steal pizza from the guard, steal bread from the food cart and give it to them, or hide razors in his cell without getting anything in return. Despite being present for this testimony and having received the lay witness testimony from the evidentiary hearing in October of 2012, Dr. Gamache did not even attempt to address these contradictions and instead chose to rely on Wright's overestimation of his own abilities. Furthermore, Dr. Gamache's willingness to rely on Wright's answers during the interview section of his evaluation when he found that Wright was malingering during the testing portion of the evaluation suggests a bias. Specifically, Dr. Gamache relies on information that supports a finding that Wright is not intellectually disabled and accepts it without question,

while rejecting or ignoring data that supports a diagnosis of intellectual disability.

Additionally, the Appellee cites Dr. Gamache's extensive testimony regarding Wright's correspondence with a woman on the Between the Bars blog, which he relied on regarding his findings in the conceptual and social categories. SAB/12, 14. Wright, however, told Dr. Gamache that he received help from other inmates who wrote the drafts for Wright based on what Wright wanted to say to the pen pals, and Wright would rewrite them in his own handwriting. SR9/1532-33, 1600-01. The letters in question included words such as "genes and chromosomes" and "thoughts and missives"- words that even someone with borderline intellectual functioning would not normally use. SR9/1600. Furthermore, Richard Shere testified that he and other inmates on death row help Wright write things, and Wright merely copies their drafts in his own handwriting. SR5/848-49, 857, 860, 874. The weight of the evidence strongly suggests that someone else wrote these blogs, and Wright merely copied them in his own handwriting. Whether any part of these writings is in Wright's own words is highly debatable, and Dr. Gamache's reliance on the content of the writings as evidence of Wright's adaptive behavior is misplaced.

Furthermore, Dr. Gamache's focus on very basic things that Wright is able to do is misleading and suggests that in order to be diagnosed with an intellectual

disability one has to function at the level of someone who is severely, or even profoundly, intellectually disabled. For example, when he was considering Wright's communication skills under the conceptual category, Dr. Gamache noted that Wright asked for a bathroom break twice, asked about an echo from the recording in the adjoining room that was interfering with the examination, asked to speak with his attorneys during a break, and requested a Mountain Dew when Dr. Gamache asked him if he wanted a drink. SR9/1536. He also relied on Wright's self-report that he asks the correctional staff at the prison for toilet paper when he runs out. SR9/1557. One would not expect an individual with a mild intellectual disability not to be able to get food, follow basic directions, get his needs met, remember things, provide information, or request a Mountain Dew. SR9/1621-23. In fact, Dr. Kasper testified that she would expect even someone with a severe intellectual disability to be able to ask for a Mountain Dew or ask to go to the bathroom. SR9/1622.

Also under the conceptual skills category, Dr. Gamache considered self-direction and Wright's ability to formulate objectives or goals. Dr. Gamache relied heavily on what Wright told him about his relationship with his attorneys, including that he is able to identify his attorneys by name and that he told Dr. Gamache how long they have been working on his case. SR9/1543. First, one

would expect these behaviors from a mildly intellectually disabled individual, and any suggestion that this is proof that Wright does not suffer from an intellectual disability because he can provide this very basic information is misleading. Additionally, this section of Dr. Gamache's testimony resembles a competency evaluation, seems to have little to do with self-direction or Wright's ability to formulate goals and objectives, and provides minimal information about Wright's adaptive behavior. If it were the case that mildly intellectually disabled individuals were not able to provide this type of information, then no intellectually disabled individual would ever be competent to stand trial. Furthermore, if Dr. Gamache would have probed deeper into Wright's understanding of the legal proceedings at hand, he would have found that it is actually very limited. When Dr. Kasper spoke with Wright on the phone following his interview with Dr. Gamache, she asked him what the upcoming hearing was about. SR10/1653. He mentioned the word "Flynnedom" and seemed to think it had something to do with getting found innocent. SR10/1653-54. Apparently, he does not realize that these proceedings have to do with a determination of whether he is intellectually disabled.

Regarding the social skills category, the Appellee cites Dr. Gamache's testimony about Wright's "history of heterosexual relationships and, when Wright was 18-19, he spent regular time with his girlfriend and took her to the movies, out

to eat, and to the beach.” SAB/14. In his interview with Dr. Gamache, which was introduced by the State at the hearing, the only girlfriend Wright spoke about was Vontrese Anderson, who testified at the hearing on January 6, 2015. Despite being present for Anderson’s testimony, when questioned at the hearing on February 11, 2015 about whether Vontrese Anderson was the girlfriend Wright reported buying roses for and going on dates with, Dr. Gamache responded that his “notes don’t reflect a name.” SR9/1591. In fact, Anderson’s testimony contradicted what Wright told Dr. Gamache in their interview. According to Anderson, she and Wright only dated for two to three weeks, she really did not know him, he only stayed over once, and they went out to eat once and to the movies once. SR7/1181-82, 1191-92. Dr. Gamache ignored these contradictions that did not support his conclusions, and despite there being more than a month between Anderson’s testimony and Dr. Gamache’s testimony in February of 2015, he did not bother to check the tape of his interview with Wright to determine whether the girlfriend Wright was talking about was Anderson.

Furthermore, it is important to remember that in order to be diagnosed with an intellectual disability, an individual need only have significant deficits in one of the three categories of adaptive behavior (conceptual, social, and practical). AAIDD at 43. The deficits suffered by individuals such as Wright who are mildly

intellectually disabled are often subtle, and these individuals do not typically display deficits in all three categories:

Comparatively, the limitations in individuals with ID at the upper end of the spectrum are more subtle, more difficult to detect, and often context-specific. Most individuals with ID at the upper end of the spectrum do not experience problems in the practical skills measured by adaptive behavior scales, such as dressing oneself or using the telephone. However, they typically display significant deficits in adaptive skills in the social and conceptual domains.

AAIDD at 26. Individuals with mild intellectual disabilities “can participate in their communities in ways that far exceed public expectations,” and they are able to master independent living skills such as using public transportation. *Id.* at 27. Regarding the practical skills category, the Appellee cites Dr. Gamache’s testimony that Wright “engaged in activities of daily living.” SAB/15. No one, including Dr. Kasper, has opined that Wright suffers from significant deficits in the practical skills category. Therefore, any testimony that Wright was able to engage in activities that fall within the category of practical skills, such as grooming himself or using the city bus, does not negate his deficits in the other two categories.

The Appellee also cites Wright’s employment as a “selector” at Albertson’s warehouse, as well as Wright informing Dr. Gamache that he was a drug dealer who used a pager or a beeper to conduct drug transactions. SAB/15-16. The only

witness at the evidentiary hearing with any knowledge of Wright being a drug dealer was Sandra Allen, who testified that Wright sold cocaine, and that she once saw Wright deal drugs to an undercover police officer. SR7/1156-57. The collateral sources Dr. Kasper spoke with told her that they did not believe Wright to be a successful drug dealer, and that he was someone who would have been exploited and manipulated by the higher-ups because of his inability to count and suggestibility. PC11/1914. One person told her that he would have been given the drug-dealing task of an 11-year-old, who would be easily led and manipulated as to how much money he would be passing. PC11/1915, SR9/1611-12. Therefore, while Wright may have sold drugs at some point, the evidence suggests that he was not a very successful drug dealer.

Regarding Wright's job at the Albertson's warehouse, Wright's cousin Carlton testified that when he and Wright were 16 or 17 years old, they worked there together for less than six months. SR4/668. They worked as selectors, which consisted of remaining stationary, putting stickers on boxes they grabbed from nearby, and placing them on a belt, where the boxes would go to another section of the warehouse and another set of workers. SR4/672-73. They always worked the same shift, and Carlton helped Wright with virtually every aspect of the job, such as filling out the application, picking him up every day for work and making sure

he was there on time, making sure he knew how to punch the time clock, making sure he knew where to stand, making sure he was doing his job right, and cashing his paychecks. SR4/668-75; SR6/954-55. As Dr. Kasper explained, 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. Carlton testified that Wright could not have done this job without someone helping him, at least at first. SR4/674. Carlton provided support for Wright that was virtually identical to what a job coach would do. SR6/954-55.

The Appellee further relies on the facts of Wright's crimes in refuting deficits in adaptive behavior. SAB/19-21. Evidence of one's past criminal behavior, however, is not indicative of adaptive behavior:

Other sources of information frequently presented in *Atkins* hearings are the **facts of the specific crime or the defendant's past criminal behavior**. Schalock et al. (2010, 2012) have taken the clear position that past criminal behavior is not an indicator of one's level of adaptive functioning and that "the diagnosis of ID is not based on the person's 'street smarts,' behavior in jail or prison, or 'criminal adaptive functioning'" (2012, p. 20). This position is supported by the definition of adaptive functioning that requires examination of typical behavior in one's community. As noted earlier, isolated examples of relative strengths are expected. It is difficult to prove that specific examples of criminal behavior are typical or representative of one's overall adaptive functioning. Further, Schalock and colleagues (2010, 2012) have noted that research shows that *maladaptive behavior* (e.g. criminal behavior) is not the same as *impaired adaptive behavior*.

AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, THE DEATH PENALTY AND INTELLECTUAL DISABILITY (Edward A. Polloway ed., 2015), at 194-95.

None of the experts who testified at the hearing related this past criminal behavior to Wright's adaptive deficits, or to a lack of adaptive deficits. Furthermore, his cases involved multiple co-defendants, including Samuel Pitts, the leader of the gang whose domination and control Wright was under. Therefore, this Court should not rely on this evidence in considering Wright's adaptive behavior.

Finally, the Appellee is critical of Dr. Kasper's use of the ABAS-II, and argues that she "relied extensively" on these test scores. SAB/17. First, Dr. Kasper's opinion is based on much more than just the results of the ABAS-II, including hours of interviews with both lay witnesses and experts, documentary evidence, and multiple interviews with Wright. Additionally, the AAIDD requires the use of a standardized measure of adaptive behavior, such as the ABAS-II, in diagnosing intellectual disability. AAIDD at 43. Dr. Kasper used the ABAS-II; Dr. Gamache did not use any standardized measure of adaptive behavior. Dr. Kasper acknowledged the difficulties with the ABAS-II. SR9/1635-36. She agreed that it would not be proper to rely solely on the results of the ABAS-II, and she did not do so in this case. SR9/1636. This Court should find that the circuit court erred in determining that Wright is not intellectually disabled.

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 September 24, 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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