No. _____

IN THE

Supreme Court of the United States

TED HERRING,

Petitioner,

—v.—

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court pronounced that the Eighth and Fourteenth Amendments to the United States Constitution forbid the execution of mentally retarded persons. A Florida trial court, after hearing extensive evidence and testimony, found the petitioner to be mentally retarded by clear and convincing evidence and accordingly vacated his death sentence. On appeal, the Florida Supreme Court reinstated petitioner's death sentence solely on the ground that his IQ test scores, including scores of 72 and 74, exceeded 70. In so doing, the Florida Supreme Court specifically held that the trial court was not permitted to consider the five-point standard error of measurement that is part of all accepted IQ tests and universally recognized (including by all expert witnesses in the case) to be an essential feature of valid IQ testing and proper mental retardation diagnosis. A majority of state courts permit consideration of the standard error of measurement in the adjudication of *Atkins* claims. A minority (including Florida), however, do not, and consequently permit the execution of persons properly diagnosed with mental retardation under the clinical standards that define the condition and were relied on by this Court when it decided *Atkins*.

The question thus presented is whether the Florida Supreme Court's refusal to permit consideration of the standard error of measurement in its determination of mental retardation in capital cases violates the Eighth and Fourteenth Amendments to the United States Constitution.

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The opinion of the Florida Supreme Court, entered on October 6, 2011 is reported at 76 So. 3d 891 (Fla. 2011), and reprinted in the Appendix to this Petition ("App.") at 1a. The decision of the Circuit Court for the Seventh Judicial Circuit, in and for Volusia County, Florida (the "trial court"), dated November 23, 2009, which is unreported, is reprinted at App. 15a.

JURISDICTION

The Florida Supreme Court entered its judgment on October 6, 2011. App. 1a. It denied a motion for reconsideration on December 20, 2011. App. 51a. This Petition is timely filed, and the Court's jurisdiction is invoked under 28 U.S.C. § 1257(a) because this petition concerns a final judgment or decree rendered by the highest court of the State of Florida and claims a right, privilege, and immunity under the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition involves the Eighth and Fourteenth Amendments to the United States Constitution, as well as Florida Rule of Criminal Procedure 3.203. The pertinent text of these authorities is reprinted at App. 53a-56a.

STATEMENT OF THE CASE

On February 25, 1982, a jury convicted petitioner Ted Herring of armed robbery and murder in the first degree in connection with the fatal shooting of a convenience store clerk during a robbery in Daytona Beach, Florida, on May 29, 1981. *See Herring v. State*, 446 So. 2d 1049 (Fla. 1984). The penalty phase of Herring's trial was held on February 26, 1982, immediately following the conclusion of the guilt phase. The jury returned an advisory recommendation of death by an eight-to-four vote. The trial judge found four aggravating and two mitigating facts and sentenced Herring to death. *See id.* at 1053. The Florida Supreme Court affirmed Herring's conviction and sentence of death on February 2, 1984. *Id.* at 1058. This Court denied certiorari, *Herring v. Florida*, 469 U.S. 989 (1984), and, in the years that followed, Herring sought and was denied post-conviction relief several times. *See Herring v. State*, 501 So. 2d 1279 (Fla. 1986); *Herring v. Dugger*, 528 So. 2d 1176 (Fla. 1988); *Herring v. State*, 580 So. 2d 135 (Fla. 1991); *Teffeteller v. Dugger*, 676 So. 2d 369 (Fla. 1996); *Herring v. State*, 730 So. 2d 1264 (Fla. 1998), *cert. denied*, 527 U.S. 1003 (1999); *Herring v. Crosby*, 862 So. 2d 727 (Fla. 2003), *cert. denied*, 541 U.S. 1042 (2004); *Herring v. Sec'y Dep't of Corr.*, No. 6:99-cv-01413-GKS-DAB (M.D. Fla. Apr. 14, 2003), *aff'd*, 397 F.3d 1338 (11th Cir.), *cert. denied sub nom. Herring v. Crosby*, 546 U.S. 928 (2005).

Following this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), declaring unconstitutional the execution of persons with mental retardation, Herring filed in the trial court a motion to vacate his

death sentence on the ground that he is mentally retarded. On November 2 and 3, 2005, the trial court held an evidentiary hearing on Herring's *Atkins* claim. The trial court heard substantial evidence of Herring's mental retardation, including the testimony of three expert witnesses. On November 23, 2009, the trial court vacated Herring's death sentence, finding by clear and convincing evidence that Herring had satisfied each of the three requirements for mental retardation, namely that (i) he has significantly subaverage intellectual functioning, (ii) he has significant deficits in adaptive functioning and (iii) the onset of his mental retardation occurred before the age of 18. App. 15a.

The State appealed the trial court's order, and the Florida Supreme Court, without permitting oral argument, reversed the trial court's decision vacating Herring's death sentence. *State v. Herring*, 76 So. 2d 891 (Fla. 2011). The Florida Supreme Court did not disturb any of the trial court's factual findings. Rather, the court held that, because Florida applies a bright-line, measured IQ score cutoff of 70 for mental retardation, Herring's measured IQ scores, which included scores of 72 and 74 (App. 31a), did not satisfy the first criterion for mental retardation—significantly subaverage intellectual functioning. *See Herring*, 76 So. 3d at 893, 896. Thus, solely on the basis of its bright-line, measured IQ score cutoff (which is directly contrary to accepted statistical and diagnostic rules, which require, among other things, consideration of the five-point standard error of measurement inherent in IQ testing), the Florida Supreme Court reinstated Herring's death sentence. *Id.* at 895-96. The court also refused to permit Her-

ring a new evidentiary hearing, even though the trial court evidentiary hearing was conducted under a standard for determining mental retardation that was materially different from the standard applied on appeal. *See* App. 22a, 26a (noting that Herring was mentally retarded under the DSM-IV-TR, a universally recognized clinical standard, which both Herring's and the State's experts agreed was functionally identical to the state standard in Fla. R. Crim. P. 3.203(b)). Herring moved for rehearing or, in the alternative, clarification, which the Florida Supreme Court denied without opinion on December 20, 2011. App. 51a.

Herring then filed a motion, pursuant to 28 U.S.C. § 2244, in the United States Court of Appeals for the Eleventh Circuit for authorization to file a second or successive habeas petition to raise his *Atkins* claim for the first time in federal court (the "Authorization Motion"). On January 26, 2012, the Eleventh Circuit denied the Authorization Motion on the ground that (in its view) Herring could not demonstrate a reasonable likelihood that he is mentally retarded under Florida law (despite the fact that the Authorization Motion undisputedly satisfied the express statutory criteria for authorization set forth in 28 U.S.C. § 2244(b)(2)(A), which do not include an evaluation of likelihood of success on the merits). *In re Herring*, No. 11-16095 (11th Cir. Jan. 26, 2012), reprinted at App. 43a.[1] The Eleventh Circuit's deci-

[1] On March 6, 2012, Herring filed with the Eleventh Circuit a motion to certify to this Court the question presented in his Authorization Motion, or, in the alternative, for the entry of an interlocutory order to permit a petition for writ of certiorari to this Court. The motion raises the issue of whether it is permis-

sion expressly found that it is constitutionally permissible for the Florida Supreme Court to enforce a bright-line, measured IQ score cutoff of 70 without regard to the well-established need to consider the standard error of measurement inherent in IQ testing. App. 49a.

Circuit Judge Martin concurred with the Eleventh Circuit panel's opinion denying the Authorization Motion, noting that he was bound by the Eleventh Circuit's precedent in *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011). App. 50a. Judge Martin wrote separately to state that he "would be willing to revisit Mr. Herring's application if the Supreme Court determined our decision in *Hill* was wrongly decided." App. 50a. The unstated premise of Judge Martin's separate opinion appears to be that, if a

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sible for a federal appeals court to require an *Atkins* petitioner bringing a successive habeas petition to make out the merits of his claim at the authorization stage, despite the fact that the plain language of 28 U.S.C. § 2244(b)(2)(A) requires only that the defendant show that his claim is based on a new rule of constitutional law which applies retroactively (i.e., *Atkins*). Presently there is a well-defined split among the circuits on this issue. *See, e.g.*, *Sasser v. Norris*, 553 F.3d 1121, 1126 (8th Cir. 2009) (applying plain meaning of § 2244(b)(2)(A)); *Goldblum v. Klem*, 510 F.3d 204, 219 n.9 (3d Cir. 2007) (same); *Ochoa v. Sirmons*, 485 F.3d 538, 541-42 (10th Cir. 2007) (same); *In re Williams*, 330 F.3d 277, 281-82 (4th Cir. 2003) (same); *Sustache-Rivera v. United States,* 221 F.3d 8, 15 (1st Cir. 2000) (same); *Nevius v. Sumner*, 105 F.3d 453, 462 (9th Cir. 1996) (same). *But see, e.g.*, *In re Hearn*, 418 F.3d 444, 445 (5th Cir. 2005) (requiring a showing of reasonable likelihood of success on the merits); *In re Bowling*, 422 F.3d 434, 436 (6th Cir. 2005) (same); *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003) (same).

person under a sentence of death can be required to demonstrate his mental retardation beyond a reasonable doubt in order to obtain relief under *Atkins*, it was no worse for the Florida Supreme Court to cast aside the standard error of measurement inherent in IQ testing in evaluating Herring's *Atkins* claim.

PRELIMINARY STATEMENT

Herring is under a sentence of death despite the fact that the only court to conduct an evidentiary hearing on his mental condition found him to be mentally retarded by clear and convincing evidence. He is the first—and only—person judicially determined to be mentally retarded to have his death sentence reinstated by the Florida Supreme Court. Like many mentally retarded persons in the United States, Herring obtained scores on standardized IQ tests that were between 65 to 75.[2] Accepted clinical definitions of mental retardation, including those cited with approval by this Court in *Atkins*, state that "[m]ild mental retardation is typically used to describe people with an IQ level of 50-55 to *approximately* 70." *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002) (emphasis added). But those same clinical definitions state equally clearly that a five-point

[2] IQ scores are measured on a "Bell Curve," where the plurality of scores in the population bunch around the mean of 100. The distribution of scores becomes increasingly sparse as scores rise further above 100 or fall further below. Therefore, as a statistical principle, there are more individuals with IQs of 65 to 75 than with IQs of 55 to 65, and so on. *See Sims v. State*, No. W2008-02823-CCA-R3-PD, 2011 WL 334285, at *34 (Tenn. Crim. App. Jan. 28, 2011).

standard error of measurement (the "SEM"), plus or minus, is an inherent and fundamental feature of IQ testing. *See* American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000) ("DSM-IV-TR"), excerpt reprinted at App. 61a. Thus, under well-established clinical rules, persons whose IQ scores fall in the range of 70 to 75 properly may be diagnosed as mentally retarded provided that (as is true in Herring's case) the other diagnostic features of mental retardation are manifest.

Despite the universally recognized applicability of the SEM, in the ten years since this Court's decision in *Atkins*, several states—most notably, Florida—have consciously and explicitly disregarded the role of the SEM in IQ testing. These states refuse to consider the SEM at all in evaluating *Atkins* claims, even where, as in Herring's case, a qualified professional has rendered a diagnosis of mental retardation in conformity with governing clinical standards. The result is that states, like Florida, have redefined mental retardation for *Atkins* purposes in a manner inconsistent with the clinical standards endorsed by this Court for determining mental retardation. Because Florida refuses to consider the SEM, it necessarily permits the execution of persons with mental retardation in direct violation of *Atkins*.

Nothing in *Atkins* empowered the Florida Supreme Court to discard a fundamental and universally accepted feature of mental retardation diagnosis. Its decision to ignore the SEM is no more defensible or constitutional than it would have been to ignore any other core element of mental retardation

diagnosis, such as the requirement of onset before the age of 18. In *Atkins*, this Court did not create or invite the creation of a legal test by judges or legislatures (such as was done in the famous *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843), where a definition for *legal* insanity was established). Rather, *Atkins* declared that it constitutes cruel and unusual punishment for the government to execute persons with a clinical condition that already had a well-settled clinical definition. *See* 536 U.S. at 321. To modify that definition is to violate *Atkins*, and that is precisely what the Florida Supreme Court did when it reinstated Herring's death sentence.

Without a doubt, *Atkins* left it to the states to formulate "appropriate" procedures for implementing its holding. 536 U.S. at 317. But that was not a license for lower courts to redefine the diagnostic criteria for a condition that trained clinicians have been diagnosing and treating for decades in an accepted way. Yet redefining is exactly what the Florida Supreme Court (and a minority of other states) does when it refuses to allow consideration of the SEM. All of the experts in Herring's case testified that the SEM exists and must be considered in properly diagnosing mental retardation (App. 22a, 34a), and the trial court relied on that testimony in vacating Herring's death sentence. App. 27a, 30a. The Florida Supreme Court's reinstatement of Herring's death sentence on the ground that, in substance, trial courts must act as though the SEM does not exist so as to preserve clean and "bright lines" was an impermissible judicial modification of what it means to be mentally retarded. This grievous error persists to this day in Florida and elsewhere. It will lead to the

execution of mentally retarded persons and cannot stand if the rule in *Atkins* is to remain vital.

When courts disregard the SEM, they generally do so because they incorrectly view it as an excuse propounded by prisoners to elevate the IQ score cut-off for mental retardation from 70 to 75. But the function of the SEM in IQ testing is not to make the definition of mental retardation more lenient. Rather, the SEM is a statistical concept necessary to ensure that IQ testing is clinically and statistically reliable and that mental retardation determinations are valid. Therefore, states that purport to adhere to *Atkins* but refuse to apply the SEM will execute defendants whose measured IQ *score* falls just above 70, but whose *actual* IQ is below 70.[3]

After a decade of lethal confusion among the states about the role and importance of the SEM, it is essential that this Court provide the additional guidance necessary to carry out *Atkins*. The Court should grant this petition for a writ of certiorari and resolve the constitutional conflict among lower courts.

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[3] As applied to Herring, this result is especially chilling because even the State's paid expert expressed grave concern about him being mentally retarded. *See* App. 33a (noting that the State's expert "found Herring's case to be 'in that uncertain area where you can be borderline mental functioning or you can be mentally retarded,' 'up for honest debate,' and one where 'reasonable people could differ as to whether Ted was mentally retarded.'" (quoting State's expert's testimony, App. 59a)).

ARGUMENT

I. THE SEM IS A NECESSARY, BUT OFTEN DISREGARDED, ELEMENT OF MENTAL RETARDATION DIAGNOSIS THAT MUST BE CONSIDERED IN APPLYING *ATKINS*

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth Amendment to the United States Constitution "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Id.* at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). *Atkins* did not create a freestanding legal definition of mental retardation, but rather endorsed the two leading clinical definitions—those of the American Association on Mental Retardation ("AAMR") and the DSM-IV-TR—used by doctors and psychologists in the real world. *See id.* at 308 n.3. Under both definitions, mental retardation is defined as (1) significantly subaverage intellectual functioning (which generally requires the result of an IQ test), (2) concurrent with significant deficits in adaptive functioning, (3) the onset of which occurs before the age of eighteen. *Id.* Because the Florida Supreme Court reinstated Herring's sentence only on account of his IQ scores (it did not disturb the trial court's findings that he satisfied criteria 2 and 3), this petition is concerned only with the intellectual functioning criterion.[4]

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[4] The trial court found, and the Florida Supreme Court did not question, that the record is "replete with evidence" of Herring's serious deficits in adaptive functioning and that Herring's mental retardation began well before his eighteenth birthday. App. 35a, 41a-42a.

A. The SEM is inherent in all valid IQ testing

Standardized intelligence tests are a measure of intellectual functioning and thus are a central part of mental retardation diagnosis. By their own terms, however, these tests are not completely precise and thus are assigned an SEM. The SEM accounts for this imprecision and helps ensure that IQ test results are interpreted appropriately. The Florida Supreme Court and courts in a minority of states nonetheless reject the SEM on the theory that it interferes with the implementation of their bright-line IQ score cutoffs. This is both incorrect and unconstitutional in an area of law—capital punishment—where misapplication of this Court's holdings should be least tolerated.

It is universally accepted that a five-point SEM (plus or minus) is inherent in and necessary to the valid application of standardized intelligence tests. *See* DSM-IV-TR at 41 (App. 64a). Thus, for example, a person who scores a 72 on a standardized IQ test likely does not have a true IQ of 72; rather, all that can be said is that his true IQ falls within the range of 67-77, with each score within that range reflecting a possible measure of his true intelligence. As a result, a measured IQ score slightly above 70 (like Herring's), absent consideration of adaptive functioning, provides insufficient basis to determine that the defendant's *actual* IQ is above 70. In such cases, the measured IQ score serves only as a gateway to a rigorous investigation of the person's adaptive functioning, which will determine whether a diagnosis of mental retardation is warranted. *See Common-*

wealth v. Miller, 888 A.2d 624, 632-33 (Pa. 2005) (defendant with borderline intellectual functioning "would not automatically be considered 'mentally retarded' under *Atkins* unless he also showed significant deficits in adaptive behavior"); *State v. Dunn*, 41 So. 3d 454, 470 (La. 2010) ("Because of the defendant's borderline IQ scores, his diagnosis is heavily dependent on his adaptive functioning . . . . 'Impairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with Mental Retardation.'") (quoting DSM-IV-TR at 42) (App. 65a)), *cert denied*, 131 S. Ct. 650 (2010).[5]

As the DSM-IV-TR makes clear:

> Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, *it is*

[5] S*ee also* John H. Blume, *et al.*, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J.L. & Pub. Pol'y 689, 704 & n.72 (2009) ("For an individual with an IQ on the border of 70, *Atkins's* first prong serves as a gateway to a consideration of adaptive behavior. The diagnosis is ultimately determined by whether the individual has significant adaptive behavior deficits." (Explaining further that the original purpose of adopting "adaptive behavior" into the definition of "mental retardation" was to check "false positive[]" IQ test results.)).

> *possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior*.

DSM-IV-TR at 41-42 (App. 64a-65a) (emphasis added).

Accordingly, when Florida and states like it impose a bright-line cutoff *measured score* requirement of 70, they do at least two unconstitutional things: *first*, they permit the execution of persons whose true IQS are nearly as likely to be below 70 as above it, and *second*, they impermissibly cleave the adaptive functioning assessment from the determination of mental retardation.

B. Determining mental retardation in a manner outside the bounds of clinical standards violates *Atkins*

Atkins left "to the States the task of developing appropriate ways to enforce the constitutional restriction" on executing the mentally retarded. 534 U.S. at 317 (quoting *Ford*, 477 U.S. at 416); *see, e.g.*, Fla. R. Crim. P. 3.203 (defining mental retardation); Tenn. Code. Ann. § 39-13-203 (same); *Foster v. State*, 848 So. 2d 172, 175 (Miss. 2003) (adopting DSM-IV-TR's definition of mental retardation). Herring does not contest that the states can develop "appropriate" ways to determine mental retardation as contemplated by *Atkins*. But disregarding a central component of intelligence testing (even though Florida courts acknowledge the SEM is an accepted part of that testing) is not "an appropriate way[] to enforce

the constitutional restriction." *Atkins*, 534 U.S. at 317 (citation omitted). It allows the execution of persons with true IQs that fall below 70 and, in Herring's case, the Florida Supreme Court's rigid determination that the trial court improperly considered the SEM overrode science and the clinical judgment of a vastly qualified testifying expert, and upset the trial court's meticulously rendered factual finding of mental retardation.

Importantly, if this Court were to clarify that states are not free to disregard essential aspects of mental retardation diagnosis, such as the SEM, that clarification would not require any state to change its statutory definition of mental retardation. The only change would be that, in cases such as Herring's where the SEM is relevant due to an IQ score close to 70, lower courts would not be permitted to ignore the SEM and other evidence of mental retardation in service of a mechanical and statistically invalid bright-line approach. *See, e.g.*, *Miller*, 888 A.2d at 632-33 (remanding for an evidentiary hearing to determine whether defendant with scores between 70-75 was mentally retarded after consideration of all criteria); *Dunn*, 41 So. 3d at 470, 473 (finding defendant with scores of 69, 75, and 75 not mentally retarded because of lack of deficits in adaptive behavior).

The Florida Supreme Court, and a minority of other state courts, operate under the mistaken belief that applying the SEM would change the IQ cutoff for mental retardation from 70 to 75. But properly understood, the SEM does not change any cutoff; rather, it assures that defendants whose measured

IQ scores are within the SEM of the cutoff of 70 are fully evaluated to determine whether they are mentally retarded as mandated by clinical standards. The vice of what the Florida Supreme Court did in Herring's case was to declare that the trial court's analysis should have stopped in its tracks because of a recorded score that is less than a handful of points above 70.

II. THE FLORIDA SUPREME COURT'S DECISIONS IN THIS AND OTHER CASES DEMONSTRATE THE UNCONSTITUTIONAL NATURE OF HOW IT APPLIES *ATKINS*

In this and other capital cases, the Florida Supreme Court has refused to consider the SEM in deciding *Atkins* claims. As noted, this refusal reflects that court's apparent misunderstanding of how the SEM functions, a point amply demonstrated by the facts of the present case, which, to Herring's knowledge, is the only case where the Florida Supreme Court reversed a trial court's factual finding of mental retardation and reinstated a death sentence.

A. Herring was found to be mentally retarded by clear and convincing evidence, yet the Florida Supreme Court reinstated his death sentence because of its erroneous refusal to consider the SEM

The evidentiary hearing on Herring's *Atkins* claim took place on November 2 and 3, 2005. The trial court heard testimony from three expert witnesses, two of whom appeared for the State. App.

17a-18a. The trial court also had before it a voluminous record concerning Herring's mental retardation, "including psychological evaluation records, records from prior proceedings, and psychology manuals and articles." App. 17a-18a. The expert witnesses based their opinions on "in-person evaluations of Herring, structured interviews of Herring's relatives, psychological and intelligence testing and test results, and Herring's medical, psychological, and scholastic records." App. 18a. After hearing all the evidence, the trial court found that Herring's IQ scores (including scores of 72 and 74) were consistent with mental retardation; that the record was "replete with evidence" of his adaptive deficits; and that his mental retardation clearly began before the age of 18. App. 30a-31a, 35a, 41a-42a. On these bases, the trial court found by clear and convincing evidence that Herring was mentally retarded and thus exempt from execution under *Atkins*. App. 26a.

Under all accepted definitions of mental retardation, the trial court's conclusion was sound. Indeed, even the State's own expert testified that Herring's mental retardation was "'up for honest debate'" and that "'reasonable people could differ as to whether [Herring] was mentally retarded.'" App. 33a (quoting State's expert's testimony, App. 59a). Furthermore, Herring's *and the State's* experts agreed that "persons with IQ scores between 70 and 75 can be diagnosed as mentally retarded" due to the SEM and the presence of severe adaptive deficits. App. 27a-28a.

The State appealed the trial court's order, and, without oral argument, the Florida Supreme Court

reversed and reinstated Herring's death sentence. *Herring*, 76 So. 3d at 897. In so doing, the court rejected Herring's arguments (and all record evidence) concerning the SEM and its universally accepted role in properly determining mental retardation. *See id.* at 893, 896. Notwithstanding these arguments, the Florida Supreme Court persisted in its view that the SEM should be disregarded in favor of a strict and unyielding measured IQ score cutoff of 70, even if that results in the execution of persons whose actual IQs are less than 70. *Id.* at 896.

B. Beyond Herring's case, the Florida Supreme Court persistently has failed to apply the SEM

The Florida Supreme Court steadfastly has refused to consider the SEM in cases like Herring's, where a five-point (plus or minus) statistical variance could mean the difference between execution and prison. For example, in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), the court rejected SEM on the ground that "the statute does not use the word approximate, nor does it reference the SEM." *Id.* at 713. But in *Cherry*, just like in the instant case, "[b]oth [sides' experts] testified that the standard error of measurement (SEM) should be taken into account in every IQ analysis." *Id.* at 711. The trial court in *Cherry* recognized that the SEM should always be considered in the *Atkins* context:

> [T]he +/-5 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 (quoting trial court order). But despite explicitly recognizing that the SEM is a "universally accepted given fact," the trial Court in *Cherry* concluded it was powerless to apply the SEM in view of the Florida Supreme Court's refusal to allow experts and trial courts to do so. *See id.*

Other cases demonstrate the Florida Supreme Court's refusal to adhere to the principles of reliability and validity in IQ testing, as safeguarded by the SEM. *See, e.g.*, *Dufour v. State*, 69 So. 3d 235, 247 (Fla. 2011) (rejecting SEM even though all four experts testified that "a standard error of measurement must be applied to intelligence scores"), *cert. denied*, 132 S. Ct. 1150 (2012); *Franqui v. State*, 59 So. 3d 82, 93 (Fla. 2011) (rejecting SEM even though the court admitted that the *Atkins* court stated that "an IQ between 70 and 75 or lower" is typically recognized as being in the mentally retarded range); *Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009) (severing the analysis at the first prong and refusing to consider adaptive functioning, even though defendant's IQ was in the SEM range of 70-75).

To understand just how far the Florida Supreme Court's approach strays from *Atkins*' command that the mentally retarded not be executed, it is useful to consider that, under Florida's rigid bright line, a recorded score even one point above 70 *per se* disqualifies a petitioner from *Atkins* relief, even in a case where all experts agree that the petitioner is mentally retarded under clinical standards. In no sense

can disregarding the SEM in this way be considered an "appropriate" mechanism to implement the "restriction" pronounced in *Atkins*. *See* 536 U.S. at 317.

C. The Florida Supreme Court ignores Florida's own regulatory framework, which on its face requires all IQ tests in capital cases to be conducted in a reliable manner

Florida Rule of Criminal Procedure 3.203 (Florida's *Atkins* statute)—under which Herring was purportedly adjudged—does not expressly reference SEM, but it requires the use of a "standardized intelligence test," which under the relevant regulation must be "valid and reliable for the purpose of determining intelligence." *See* Fla. Admin. Code § 65G-4.011(1); *see also* Rule 3.203(b) (delegating to the Department of Children and Family Services the role of authorizing IQ tests for use under the Rule). The Florida Supreme Court's reading of this regulation is, at best, highly selective. On the one hand, the court accepts that a measured score of 70 on the WAIS-III (authorized by § 65G-4.011) is two standard deviations from the mean. *Jones v. State*, 966 So. 2d 319, 329 (Fla. 2007). Yet, on the other hand, the court ignores the explicit requirement in the WAIS-III manual that SEM *must* be accounted for. *See* John H. Blume, *et al.*, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J.L. & Pub. Pol'y 689, 698 n.40 (2009) (quoting The Psych. Corp., WAIS-III Technical Manual 53 (1997)) ("'The standard error of measurement is used to calculate the confidence interval, or the band of scores, around the

observed score in which the individual's *true* score is likely to fall . . . . Confidence intervals also serve as a reminder that measurement error *is inherent in all test scores* and that the observed test score is only an estimate of true ability.'") (emphasis added). Without accounting for the SEM, the result of an IQ test is simply not valid and reliable, and is thus impermissible under Florida's own statutory *Atkins* regime.

The notion that statutory bright lines must be applied through scientifically valid and reliable data is not a novel argument, and should have particular force where the question concerns an important constitutional right and is unique to capital cases. For example, Florida law creates a presumption that a defendant is under the influence of alcohol where his blood alcohol level is over .08, and delegates to the Florida Department of Law Enforcement the task of formulating and approving the process for analyzing a person's blood. *See* Fla. Stat. §§ 316.1933(2)(b), 1934(2)(c) (2000). But importantly, "[c]ompliance with the administrative rules is essential because the presumption of impairment is entirely contingent on the integrity of the process." *Dodge v. State*, 805 So. 2d 990, 994 (Fla. Dist. Ct. App. 2002). Likewise, if the Florida Supreme Court wishes to create an "irrebuttable presumption" against mental retardation for IQ scores over 70, *see Nixon*, 2 So. 3d at 142, then it should be required to arrive at that conclusion only through scientifically reliable data that complies with state regulations governing IQ testing in capital cases. *See* Fla. Admin. Code § 65G-4.011(1).

D. In addition to Florida, a minority of other "death penalty" states misunderstand the SEM and refuse to consider it under *Atkins*

Florida unfortunately is not alone in misunderstanding and rejecting the SEM. *See, e.g.*, *Pizzuto v. State*, 202 P.3d 642, 650-51 (Idaho 2008); *Bowling v. Commonwealth*, 163 S.W.3d 361, 375 (Ky. 2005); *see also Smith v. State*, 71 So. 3d 12, 20-21 (Ala. Crim. App. 2008) (citing *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002)).

A 2008 case from Idaho, *Pizzuto*, 202 P.2d 642, is instructive. There, the Idaho Supreme Court refused to consider the SEM, even though the defendant's scores were on the cusp of 70. *Id.* at 651. The United States District Court for the Southern District of Idaho very recently considered Pizzuto's petition for habeas corpus. *See Pizzuto v. Blades*, No. 1:05-cv-516-BLW, 2012 WL 73236 (S.D. Idaho Jan. 20, 2012). The district court recognized and clearly explained how egregiously the Idaho Supreme Court (and, by extension, Florida and other states) have mistaken the role of the SEM:

> This Court is more troubled by the Idaho Supreme Court's apparent rejection of a standard error of measurement on individual testing instruments.
>
> . . .
>
> Common sense about the nature of human error suggests that no single number on a test can measure intellectual functioning with absolute pinpoint accu-

> racy. This is why professionals in the field agree that scores on IQ tests fall within a small range on either side of the reported numerical score, usually plus or minus three to five points [citing to the DSM-IV-TR]. Pizzuto argues [exactly as Herring did to the Florida Supreme Court] that the Idaho Supreme Court's interpretation creates a risk that an individual with a full scale IQ score between 70 and 75 and significant limitations in adaptive functioning, both manifested before age 18, could be classified as mentally retarded under most clinical and statutory definitions and yet still be eligible for execution under Idaho law. The Idaho Supreme Court could have avoided this problem while remaining faithful to plain language of the statute by interpreting the phrase "IQ score of 70 or below" as allowing for a standard error of measurement. *This is so because a person who receives a full scale IQ score of 72 on a test may have an actual IQ score on that test as low as 67 or as high as 77, and where on this continuum the most likely score lies—above or below 70—is a question of fact to be decided on all of the evidence presented*.

Pizzuto, 2012 WL 73236, at *9 (emphasis added) (citations omitted).

Although the district court in *Pizzuto* ultimately denied habeas relief, the court precisely articulated the flawed understanding prevalent in Florida and other states that refuse to apply the SEM. As the District court recognized in *Pizzuto*, the SEM does not lower or raise states' IQ "bright lines," nor does it alter their existing definitions of mental retardation. In reality its purpose is much less bold: it simply ensures that IQ testing is undertaken in an intellectually honest and scientifically legitimate manner.

III. A MAJORITY OF STATES APPLY THE SEM IN CAPITAL CASES, AND THUS THERE IS A CLEAR SPLIT ON THE ISSUE AMONG THE STATES

The Florida Supreme Court's and other states' rejection of the SEM is in direct conflict with the decisions of the majority of state courts that have addressed the issue, each of which properly considers the SEM as a key element of the testing process. *See, e.g.*, *In re Hawthorne*, 105 P.3d 552, 557-58 (Cal. 2005); *Pruitt v. State*, 903 N.E.2d 899, 914 (Ind. 2009); *State v. Dunn*, 41 So. 3d 454, 461-62, 470 (La. 2010); *Thorson v. State*, 76 So. 3d 667, 676 n.13 (Miss. 2011); *Goodwin v. State*, 191 S.W.3d 20, 31-32 (Mo. 2006); *Ybarra v. State*, 247 P.3d 269, 274 (Nev. 2011); *Smith v. State*, 245 P.3d 1233, 1235, 1237 (Okla. Crim. App. 2010); *Commonwealth v. Miller*, 888 A.2d 624, 632-33 (Pa. 2005); *Coleman v. State*, 341 S.W.3d 221, 230 (Tenn. 2011); *Ex parte Hearn*, 310 S.W.3d 424, 427-28 (Tex. Crim. App.), *cert. denied*, 131 S. Ct. 507 (2010). *See also* Ariz. Rev. Stat. § 13-753(K)(5); Okla. Stat. Ann. § 701.10b; *United States v. Parker*, 65 M.J. 626, 629 (N-M Ct. Crim.

App. 2007); *State v. Waddy*, No. 09-AP-1197, 2011 WL 2536366, at *7 (Ohio Ct. App. June 28, 2011) (citing *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002)).

Importantly, many of the courts cited above explicitly recognize that their "bright line" IQ cutoffs are entirely compatible with applying the SEM in borderline cases. Tennessee presents a particularly telling example. Immediately after this Court's *Atkins* decision, the Tennessee Supreme Court took a hard-line IQ score "cut-off" position similar to Florida's. However, due to recent and vocal protestations from a lower court, the Tennessee Supreme Court last year reversed its position on the SEM, this time recognizing that the SEM is indispensable to complying with *Atkins'* mandate.

Under Tennessee law, "significant subaverage intellectual functioning" is defined as an IQ of "70 or below." Tenn. Code Ann. § 39-13-203. In the wake of *Atkins*, the Tennessee Supreme Court held (like the Florida Supreme Court) that Tennessee's bright-line IQ score cut-off did not permit application of the SEM in borderline cases. *See Howell v. State*, 151 S.W.3d 450, 458 (Tenn. 2004). But because of the Tennessee Supreme Court's strict bright-line rule, the intermediate Tennessee criminal court became vocally concerned that "by refusing to consider ranges of error, it is our view that *some mentally retarded defendants are likely to be executed in Tennessee, particularly in a case . . . where the defendant's IQ is so close to the bright-line cutoff of 70*." *Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454, at *40 (Tenn. Crim. App. July 1, 2009)

(emphasis added); *accord Smith v. State*, No. E2007-00719-CCA-R3-PD, 2010 WL 3638033, at * 40 (Tenn. Crim. App. Sept. 21, 2010).

And recently, in response to the lower court's concern, the Tennessee Supreme Court directly reversed its position on the SEM. In *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011), the court maintained Tennessee's statutory cutoff at 70, but noted that the statute's requirement of a "'functional intelligence quotient of seventy (70) or below'" does not translate into a requirement of a "'functional intelligence quotient *test score* of seventy (70) or below.'" *Id.* at 241 (emphasis in original) (citation omitted). Given the imprecision of IQ testing, the court recognized that a fact-finder must be able to consider any relevant admissible evidence regarding a defendant's intellectual functioning, and that an assessment of intellectual functioning must be based on sound procedures, which includes the SEM. *Id.* at 241, 245.

Similarly, the Supreme Court of California has recognized the imprecision inherent in all IQ testing and that a determination of mental retardation requires a degree of flexibility. *See In re Hawthorne*, 105 P.3d 552, 557-58 (Cal. 2005). The *Hawthorne* court held that the question of mental retardation "is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence." *Id.* at 558. There, because Hawthorne obtained IQ scores mostly between 70-75 and had a history of "impairment in adaptive capacities," the court found that Hawthorne had met the statu-

tory threshold for a full evidentiary hearing on the question of his mental retardation. *Id.* at 558-59.

The Supreme Courts of Pennsylvania and Louisiana are in accord with the courts of Tennessee and California. Decisions of these two courts illustrate precisely the importance of the SEM, and put to rest any misperception that its application is synonymous with altering a state's IQ "cutoff." In *Miller*, the Supreme Court of Pennsylvania remanded to the applicable trial court for a full *Atkins* hearing, noting:

> [T]here is a critical difference between ["borderline retarded" and "mentally retarded"] classifications, since if a defendant is classified as having borderline intellectual functioning, he would not automatically be considered "mentally retarded" under *Atkins* unless he also showed significant deficits in adaptive behavior.

888 A.2d at 632-33.

That court also stated that "consistent with both [the AAMR's and DSM-IV-TR's definitions of mental retardation], we do not adopt a cutoff IQ score for determining mental retardation in Pennsylvania, since it is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation." *Id.* at 631. The court noted further that subaverage intellectual functioning is defined, like in Florida, as two standard deviations below the mean (i.e. 70), but also held that the SEM can and must be taken into consideration be-

fore reaching a conclusion on the defendant's actual IQ. *Id.* at 630. On remand, following a full and procedurally valid *Atkins* hearing, the lower court found the defendant to be mentally retarded—a finding left unchallenged by the State. *See Commonwealth v. Miller*, 951 A.2d 322 (Pa. 2008).

Similarly, in *Dunn*, 41 So. 3d 454, the Supreme Court of Louisiana affirmed that it is possible to diagnose mental retardation in a defendant with an IQ score above 70 if his adaptive functioning is substantially impaired. *Id.* at 470. There, the court noted that two standard deviations on the WAIS amounts to a 70, and that the defendant's IQ scores of 69, 75, and 75 approached the upper limit for a mental retardation finding. *Id.* at 462, 470. The court then turned to a rigorous analysis of Dunn's adaptive functioning, ultimately concluding that although the defendant had borderline intellectual functioning, his relatively strong adaptive functioning warranted a finding that the defendant was not mentally retarded. *See id.* at 471-73.

The differing outcomes in these Pennsylvania and Louisiana cases demonstrate that considering the SEM gives effect to *Atkins*' mandate. As the *Dunn* court noted, when a defendant potentially falls within the mildly mentally retarded range (where 80% of mentally retarded persons are diagnosed) (*see* 41 So. 3d at 469), *Atkins* "may require a fact finder to make exceedingly fine distinctions between those persons who are exempt from capital punishment and those who are not." *Id.* This fact-intensive analysis is more difficult than merely relying on a bare reported IQ score to determine the defendant's

mental retardation. But the only way to ensure that *all* mentally retarded persons are exempt from execution is to afford them a reliable and scientifically valid analysis. For some, like Herring, the totality of the evidence will demonstrate their ineligibility for the death penalty. For others, like the defendant in *Dunn*, it will not. That is the intended result of *Atkins*, and it can be accomplished only through consideration of the SEM.

CONCLUSION

Given the well-defined split among the states and the life-and-death issues it concerns, this Court should grant certiorari on the question of whether the Florida Supreme Court is violating *Atkins* and the Eighth and Fourteenth Amendments by refusing to apply the SEM in determining mental retardation in death penalty cases. The SEM is critical to ensuring that defendants with IQ scores on the cusp of 70 are afforded an honest and clinically legitimate assessment of their mental functioning. Without it, and without a full evaluation of a defendant's adaptive functioning, states like Florida are unconstitutionally sustaining the execution of persons with mental retardation.

For the foregoing reasons, petitioner respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

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March 19, 2012

APPENDIX

SUPREME COURT OF FLORIDA

No. SC09-2200

October 6, 2011

Rehearing Denied December 20, 2011

STATE OF FLORIDA,

Appellant,

—v.—

TED HERRING,

Appellee.

Pamela Jo Bondi, Attorney General, Tallahassee, FL, and Kenneth S. Nunnelley, Assistant Attorney General, Daytona Beach, FL, for Appellant.

John R. Hamilton and Jon M. Wilson of Foley and Lardner, LLP, Orlando, FL; Alan S. Goudiss, Adam S. Hakki, Itzhak Shukrei, and Christopher W. Greer of Shearman and Sterling, LLP, New York, NY; and Leon H. Handley of Rumberger, Kirk and Caldwell, P.A., Orlando, FL, for Appellee.

PER CURIAM.

This case is before the Court on appeal from an order granting Ted Herring's motion to vacate his sentence of death under Florida Rule of Criminal Procedure 3.851. Because the order concerns post-conviction relief from a sentence of death, this Court has jurisdiction under article V, section 3(b)(1) of the Florida Constitution. For reasons outlined below, we reverse the circuit court's order granting Herring's motion to vacate his sentence of death.

I. FACTS AND PROCEDURAL HISTORY

In May 1981, Ted Herring shot and killed a convenience store clerk during a robbery in Daytona Beach, Florida. Herring was subsequently tried and convicted of armed robbery and first-degree murder. By a vote of eight to four, the jury recommended a sentence of death, which the trial judge followed. The trial court found four aggravating factors: Herring had previously been convicted of a violent felony; the murder was committed during the commission of a robbery; the murder was committed to prevent arrest; and the murder was committed in a cold, calculated and premeditated manner (CCP). The trial court also found two mitigating circumstances: Herring had a difficult childhood and suffered from learning disabilities; and Herring was nineteen years old at the time of the crime. *See Herring v. State,* 446 So.2d 1049, 1053 (Fla.1984). On appeal, this

Court affirmed the convictions and the death sentence. *Id.* at 1058.[1]

This Court has also issued a number of opinions addressing various postconviction challenges to Herring's conviction and death sentence. In each instance, we have upheld the death sentence and denied Herring postconviction relief.[2] Herring's petition for federal habeas relief was also denied by the United States District Court for the Middle

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[1] We subsequently struck down the application of the CCP aggravating circumstance. *See Rogers v. State,* 511 So.2d 526, 533 (Fla.1987) (receding from holding in *Herring* that facts were sufficient to show heightened premeditation required for the application of CCP where there was no careful plan or prearranged design). However, we concluded that the elimination of the CCP factor did not "compromise the weighing process of either the judge or jury" and a new sentencing hearing was not required. *Herring v. State,* 580 So.2d 135, 138 (Fla.1991).

[2] *See Herring v. State,* 730 So.2d 1264 (Fla.1998) (affirming denial of postconviction motion alleging that Herring received ineffective assistance of counsel due to a conflict of interest between defense counsel's status as a special deputy sheriff and his responsibilities as Herring's attorney); *Teffeteller v. Dugger,* 676 So.2d 369 (Fla.1996) (remanding several consolidated cases, including Herring's, for an evidentiary hearing on a conflict of interest claim); *Herring v. State,* 580 So.2d 135 (Fla.1991) (remanding for an evidentiary hearing on a conflict of interest issue, but affirming the death sentence despite striking down the CCP aggravator); *Herring v. Dugger,* 528 So.2d 1176 (Fla.1988) (denying writ of habeas corpus on ineffective assistance of appellate counsel claim); *Herring v. State,* 501 So.2d 1279 (Fla.1987) (affirming summary denial of initial postconviction motion).

District of Florida.[3] This is the first time that the question of Herring's status as a person with mental retardation has been raised in any proceeding.

After the United States Supreme Court issued its decision in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), holding that the execution of a person with mental retardation is cruel and unusual punishment in violation of the Eighth Amendment, Herring filed a postconviction motion in June 2003, in which he claimed that he is a person with mental retardation. The circuit court determined that an evidentiary hearing was necessary to make this determination. In November 2005, the circuit court conducted a two-day evidentiary hearing where three mental health experts were called to testify as to Herring's intellectual functioning. The State called Dr. Greg Pritchard and Dr. Harry McClaren, both clinical psychologists in forensic private practice. The defense presented testimony from Dr. Wilfred van Gorp, a professor of clinical psychology at Columbia University and a neuropsychologist. While both State experts opined that Herring did not satisfy the diagnostic criteria for mental retardation, Dr. van Gorp testified that Herring did meet the criteria necessary to classify him as a person with mental retardation.

During the evidentiary hearing, the results of four intelligence quotient (IQ) tests that had been administered to Herring between the ages of eleven and forty-two were submitted as evidence of his general intellectual functioning ability. The

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[3] *See Herring v. Sec'y, Dep't of Corr.,* 397 F.3d 1338 (11th Cir.2005) (affirming denial of Herring's federal habeas petition).

scores of all four tests fell at or around the range of 70–75.[4] The circuit court concluded that this range was consistent with a diagnosis of mental retardation and issued an order vacating Herring's death sentence. The court reasoned that Herring met all three prongs of the standard for mental retardation as articulated in Florida Rule of Criminal Procedure 3.203(b) and the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM–IV–TR). The three prongs include (1) significantly subaverage general intellectual functioning existing concurrently with (2) deficits in adaptive behaviors (3) that are manifested prior to age eighteen.

The State argues that the circuit court's holding that Herring was mentally retarded is wrong as a matter of law because it ignores this Court's precedent requiring a defendant to demonstrate

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[4] Herring scored a full scale score of 83 on the Wechsler Intelligence Scale for Children (WISC) that was administered in 1972. He received a full scale score of 81 on the WISC administered in 1974. A WISC–Revised administered in 1976 resulted in a score of 72. Herring's most recent IQ test, the Wechsler Adult Intelligence Scale–Third Edition, was administered by Dr. McClaren in 2004 and yielded a full scale score of 74. Dr. van Gorp testified that the results of the two WISC tests conducted in 1972 and 1974 should be adjusted to account for the "Flynn effect," which posits that the intelligence of the population increases over time. To obtain an accurate score in light of the Flynn effect, .311 points must be deducted from the measured score for each year between the test's administration and its date of publication in 1949. After accounting for the Flynn effect, Dr. van Gorp testified that Herring's adjusted IQ scores were 76 and 74. We make no judgment as to the efficacy of adjusting for the Flynn effect because it is not relevant in this case. Even when Herring's IQ scores are adjusted, the scores do not fall below 70.

an IQ score of 70 or less in order to meet the criteria of "significantly subaverage general intellectual functioning." The State notes that the circuit court found Herring's IQ to be approximately 75, which means that as a matter of law Herring is not entitled to the relief granted. According to the State, the circuit court erroneously reasoned that *Zack v. State,* 911 So.2d 1190 (Fla.2005), does not impose a bright-line cut off score of 70 for a finding of mental retardation under Florida law and that the circuit court failed to even address recent decisions of this Court which are in direct conflict with the circuit court's finding.

Herring asserts that the trial court's determination that he is a person with mental retardation is a factual finding supported by competent, substantial evidence and that the State has no right to appeal this finding. Herring argues that the State is asking this Court to reweigh the evidence and reassess the credibility and opinions of the expert witnesses. Herring contends that his case is distinguishable from previous cases because the State agreed that the DSM–IV–TR, which does not impose a bright-line IQ score to make a determination that an individual is mentally retarded,[5]

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[5] The American Psychiatric Association's definition provides that "[t]he essential feature of Mental Retardation is significantly subaverage general intellectual functioning . . . that is accompanied by significant limitations in adaptive functioning in at least two . . . skill areas . . . [and] [t]he onset must occur before age 18 years." Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. 2000). The DSM–IV–TR further provides that a score of "about 70 or below" constitutes significantly subaverage intellectual functioning. *Id.*

would govern. He further contends that it is unconstitutional to impose such an IQ cutoff because it permits the execution of mentally retarded persons in violation of *Atkins*.

The only issue presented for our review is whether the facts support the trial court's legal conclusion that Herring has established the first prong of the mental retardation standard, i.e., significantly subaverage general intellectual functioning. Such legal conclusions are subject to de novo review by this Court. *See Cherry v. State,* 959 So.2d 702, 712 (Fla.2007).

II. ANALYSIS

In *Atkins,* the United States Supreme Court held it unconstitutional to execute a mentally retarded person. However, the Supreme Court relegated to the states the task of determining specific rules for who can be classified as mentally retarded. *See Atkins,* 536 U.S. at 317, 122 S.Ct. 2242 ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.") (quoting *Ford v. Wainwright,* 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)). Prior to the Supreme Court's decision in *Atkins,* the Florida Legislature enacted section 921.137, Florida Statutes, in 2001. This statute exempts mentally retarded persons from the death penalty and provides a method for establishing whether a capital defendant is mentally retarded.[6]

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[6] Section 921.137(1) provides the mental retardation means "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive

In accordance with section 921.137 and in response to *Atkins,* this Court adopted Florida Rule of Criminal Procedure 3.203 in 2004. This rule explicitly addresses mental retardation as a bar to the imposition of the death penalty and effectively parallels the language in section 921.137(1). *See Amendments to Fla. Rules of Crim. Pro. & Fla. Rules of App. Pro.,* 875 So.2d 563 (Fla.2004). Florida Rule of Criminal Procedure 3.203(b) essentially mirrors the statutory definition and provides that the term "significantly subaverage general intellectual functioning" means "performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services."

In light of rule 3.203(b) and section 921.137, this Court has consistently held that in order for a defendant to be exempt from the death penalty based upon a claim of mental retardation, he must bear the burden of establishing all three criteria of the three-prong standard. *See Jones v. State,* 966 So.2d 319, 325 (Fla.2007); *Burns v. State,* 944 So.2d 234, 245 (Fla.2006). Further, a defendant must prove each of the three elements by clear and convincing evidence. *See* § 921.137(4), Fla. Stat. (2010); *Franqui v. State,* 59 So.3d 82, 92

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behavior and manifested during the period from conception to age 18." Unlike the DSM–IV–TR, however, the statute does not specify an IQ range for determining the "significantly subaverage general intellectual functioning" prong. Instead, section 921.137(1) specifies that the term means "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."

(Fla.2011) ("A defendant who raises mental retardation as a bar to imposition of a death sentence carries the burden to prove mental retardation by clear and convincing evidence."); *see also Nixon v. State,* 2 So.3d 137, 145 (Fla.2009).

In reviewing determinations of mental retardation, this Court examines the record for whether competent, substantial evidence supports the determination of the trial court. *Nixon,* 2 So.3d at 141; *Cherry,* 959 So.2d at 712; *Johnston v. State,* 960 So.2d 757, 761 (Fla.2006). This Court "does not reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." *Brown v. State,* 959 So.2d 146, 149 (Fla.2007); *see Trotter v. State,* 932 So.2d 1045, 1049 (Fla.2006). However, to the extent that the circuit court decision concerns any questions of law, the Court applies a de novo standard of review. *Cherry,* 959 So.2d at 712.

Despite various challenges to the application of a bright-line IQ cutoff as it relates to the first prong of the mental retardation standard, this Court has consistently and explicitly held that in order to prove exemption from execution under section 921.137 and rule 3.203, a defendant must establish an IQ of 70 or below. *See Zack,* 911 So.2d at 1201 ("Under Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below.") The numerical threshold of an IQ score of 70 or below is in line with the plain language of section 921.137(1) which states that significantly subaverage general intellectual functioning is two or more standard deviations from the mean score on a standardized intelligence test. One standard deviation on the

Wechsler IQ test, which was administered to Herring in the instant case, is fifteen points. Two standard deviations from the mean of 100 is an IQ of 70. *See Dufour v. State,* 69 So.3d 235, 247 (Fla.2011) (stating that the plain meaning of section 921.137 and rule 3.203 provide that an IQ score of 70 or below is required to meet the first criterion of mental retardation); *Phillips v. State,* 984 So.2d 503, 510 (Fla.2008) ("We have consistently interpreted this definition to require a defendant seeking exemption from execution to establish he has an IQ of 70 or below."); *Jones,* 966 So.2d at 329 (interpreting the plain language of the statute to correlate with an IQ of 70 or below).

Herring is not the first defendant to ask this Court to reconsider the constitutionality of the bright-line cutoff of an IQ score of 70 in determining whether one meets the first prong of mental retardation. Recently, the defendant in *Franqui* alleged that the imposition of such a strict cutoff was in violation of the Eighth Amendment and failed to follow the Supreme Court's decision in *Atkins.* Franqui argued that " *Atkins* approved a wider range of IQ results that can meet the test for mental retardation." *Franqui,* 59 So.3d at 92. However, we rejected this argument, emphasizing that in *Atkins* "the Supreme Court did not mandate a specific IQ score or range for a finding of mental retardation in the capital sentencing process." *Id.* We rejected a similar claim from the defendant in *Nixon,* explaining that "[i]n *Atkins,* the Supreme Court recognized that various sources and research differ on who should be classified as mentally retarded" and thus "left to

the states the task of setting specific rules in their statutes." *Nixon,* 2 So.3d at 142.

Moreover, we have specifically rejected Herring's contention that the standard error of measurement must be factored into the IQ score. *See Cherry,* 959 So.2d at 713 (noting that the plain language of section 921.137(1) "does not use the word approximate" in defining significantly subaverage general intellectual functioning as correlating to two standard deviations from the mean, which is an IQ score of 70, and does not "reference the [standard error of measurement]"); *Dufour,* 69 So.3d at 247 (concluding that it was legal error for the circuit court to apply the standard error of measurement to find the range of the defendant's IQ scores above the cut-off score of 70; rejecting defendant's request to recede from Court's previous decisions and factor in the standard error of measurement to benefit the defendant; and stating that "this Court has consistently interpreted the plain language of section 921.137(1) to require the defendant to establish that he or she has an IQ of 70 or below").

In reaching its decision below, the circuit court cited a number of cases from this Court as supporting the proposition that "a growing body of legal cases [is] finding persons with IQ scores between 70 and 75 to be mentally retarded and thus exempt from execution." The cases cited by the circuit court do not stand for this proposition. First, the decisions cited by the circuit court predated the Supreme Court's decision in *Atkins,* which ruled that the mentally retarded are not subject to the death penalty. Second, in those cases where this Court vacated the death sentence

of a defendant whose IQ score exceeded 70, the defendant's low intellectual functioning was either factored into our proportionality review of the death sentence or was found to provide a reasonable basis for the jury's recommendation of a life sentence. *See, e.g., Cooper v. State,* 739 So.2d 82, 85–86 (Fla.1999) (treating defendant's IQ as a significant mitigating factor that weighed against imposition of the death penalty); *Downs v. State,* 574 So.2d 1095, 1099 (Fla.1991) (concluding that jury's recommendation of life sentence was not unreasonable in light of borderline mental retardation and other significant mitigating evidence presented). In none of the cases cited by the circuit court was a defendant's low intellectual functioning that exceeded the 70 IQ score treated as an absolute bar to execution as in *Atkins*.

Finally, Herring argues that the DSM–IV–TR standard for mental retardation (which acknowledges a five-point standard error of measurement and provides that "it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive functioning"[7]) should govern in this case because the State stipulated that this standard would apply in the proceedings below. The State replies that it never stipulated that an IQ score of 75 would be sufficient to establish mental retardation and that it repeatedly cited *Zack* for the principle that an IQ score of 70 or below is required under Florida law. The record shows that the parties stipulated that the DSM–IV–TR defi-

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[7] Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 41–42 (4th ed. 2000).

nition was controlling *and* was the functional equivalent of the Florida statutory and rule definitions. The record also shows that the State never agreed that an IQ score of 75 would be sufficient to establish mental retardation and did in fact cite *Zack* to the circuit court as requiring a score of 70 or below to establish the intellectual functioning prong of mental retardation under Florida law. However, even if the State had stipulated or agreed to a score of 75, the circuit court was obligated to follow this Court's interpretation of section 921.137(1) and rule 3.203(b) in determining whether Herring was mentally retarded. The parties could not agree to create a different legal standard. *Cf. Polk County v. Sofka,* 702 So.2d 1243, 1245 (Fla.1997) (explaining that parties cannot stipulate to subject matter jurisdiction where none exists). In the context of determining whether mental retardation is a bar to imposing the death penalty, "[t]he circuit court's task is to apply the law as set forth in section 921.137, Florida Statutes, which provides for mental retardation proceedings in capital cases; and the circuit court must also follow this Court's precedent." *Franqui,* 59 So.3d at 92; *accord Jones,* 966 So.2d at 327. Here, the circuit court did not follow this Court's clear precedent or the law set forth in section 921.137.

III. CONCLUSION

Based upon the reasons discussed above, we conclude that the circuit court erred as a matter of law in finding that Herring met the definition of mental retardation under Florida law. Accordingly, we vacate the circuit court's order granting Herring's postconviction motion.

It is so ordered.

PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

CANADY, C.J., concurs in result.

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 81-1957-C

Division 40

STATE OF FLORIDA

—v.—

TED HERRING

FINAL ORDER VACATING SENTENCE OF DEATH

The above cause came to be heard on the defendant's Motion for an Order Vacating and Setting Aside Death Sentence. The Court conducted an evidentiary hearing on the motion on November 2 and 3, 2005.

I. *The Motion*

1. These findings of fact and conclusions of law constitute the court's decision on Ted Herring's motion, pursuant to Florida Rules of Civil Proce-

dure 3.850 and 3.851, for an order vacating and setting aside the sentence of death imposed upon him by this court (hereinafter the "Motion"). The Motion asserts that Herring is a person with mental retardation and thus exempt from execution under the United States Constitution and Florida law. An evidentiary hearing was held on the Motion on November 2 and 3, 2005 (hereinafter the "Evidentiary Hearing" or "Hr'g").

2. For the reasons set forth herein, the Motion is granted, and Herring's sentence of death is hereby vacated and set aside.

II. *Herring's Conviction, Sentencing, and Relevant Procedural Background*

3. On May 29, 1981, a man working as a clerk in a 7-Eleven store in Daytona Beach, Florida, was shot and killed during a robbery at the store. In February, 1982, Herring was tried for armed robbery and murder in the first degree arising out of this incident. On February 25, 1982, the jury returned a verdict of guilty on both counts. The sentencing phase of Herring's trial was held on February 26, 1982, immediately following the conclusion of the guilt phase. The jury returned an advisory recommendation of death by an eight-to-four vote. The trial judge found that four aggravating and two mitigating circumstances applied and sentenced Herring to death.

4. Herring's death sentence has been the subject of six decisions by the Supreme Court of Florida, as well as decisions, on a petition for a writ of *habeas corpus* by the United States District Court for the Middle District of Florida and the United

States Court of Appeals for the Eleventh Circuit. None of those proceedings or decisions addressed the question of whether Herring is a person with mental retardation.[1]

5. The Motion and Evidentiary Hearing were prompted by the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which holds that the execution of a person with mental retardation is cruel and unusual punishment in violation of the Eighth Amendment. At the August 8, 2003 preliminary hearing on the Motion, this court determined, over the objection of the State, that an evidentiary hearing on the question of whether Herring is a person with mental retardation was necessary and appropriate under the circumstances.

6. Three witnesses—all expert witnesses—were called at the Evidentiary Hearing and provided testimony upon direct examination and cross-examination. Various exhibits including psychological and intelligence testing data and results, school records, medical records, psychological evaluation records, records from prior proceedings, and psychology manuals and articles were received as evidence. Herring called as an expert witness Dr. Wilfred van Gorp, a licensed neurospsychologist and Professor of Clinical Psy-

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[1] *Herring v. State*, 730 So. 2d 1264 (Fla. 1998); *Teffeteller v. Dugger*, 676 So. 2d 369 (Fla. 1996); *Herring v. State,* 580 So. 2d 135 (Fla. 1991); *Herring v. Dugger,* 528 So. 2d 1176 (Fla. 1988); *Herring v. State,* 501 So. 2d 1279 (Fla. 1987); *Herring v. State*, 446 So. 2d 1049 (Fla. 1984); *Herring v. Sec'y*, 397 F.3d 1338 (11th Cir. 2005); *Herring v. O'Neil*, No. 6:99-cv-1413-Orl-18KRS, slip op. (M.D. Fla. Apr. 14, 2003).

chology, Columbia University College of Physicians and Surgeons. The State called Dr. Greg Pritchard and Dr. Harry McClaren, both of whom are licensed clinical psychologists in forensic private practice. The court finds all three witnesses to be qualified to opine on whether Ted Herring has mental retardation. These witnesses based their opinions on their in-person evaluations of Herring, structured interviews of Herring's relatives, psychological and intelligence testing and test results, and Herring's medical, psychological, and scholastic records. In addition to his testimony, Dr. van Gorp provided a written report of his opinions and findings. [Hr'g Ex. 2 (June 16, 2003 Letter from Dr. Wilfred G. van Gorp to Jeremy Epstein, Esq)]. Dr. van Gorp opined that Herring satisfies the diagnostic criteria for mental retardation. The State's expert witnesses opined that Herring does not satisfy the criteria. The State's expert witnesses did not prepare any written reports of their findings.

III. *The Substantive Standard for Determining Mental Retardation*

7. The United States Supreme Court's decision in *Atkins* categorically prohibits the execution of persons with mental retardation. In *Atkins*, the Supreme Court did not mandate a bright-line test for retardation but rather left to the states "'the task of developing appropriate ways to enforce the constitutional restriction"' against the execution of persons with mental retardation. *Atkins*, 536 U.S. at 317 (citations omitted). The Court did note, however, that the clinically accepted definition of mental retardation requires "not only subaverage intellectual functioning, but also sig-

nificant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id.* at 318. The court cited as sources for these requirements (i) the American Psychiatric Association's definition of mental retardation as set forth in the DSM-IV-TR (which is widely regarded as the "Bible" for diagnosis of mental disorders); and (ii) the American Association of Mental Retardation's definition. *Id.* at 309 n.3; *Gould v. State*, 745 So. 2d 354, 356 (Fla. 4th DCA 1999) (describing DSM-IV-TR as "widely accepted" in the psychological community). The court also pointed out that these definitions are very similar and that the statutory definitions employed by the various states "generally conform to the clinical definitions." *Atkins,* 536 U.S. at 317 n.22.

8. The DSM-IV-TR diagnostic criteria for mental retardation are as follows:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

[Hr'g Ex. 3 (Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000) (the "DSM-IV-TR") at 41].

9. The DSM-IV-TR goes on to define significantly subaverage general intellectual functioning and significant limitations in adaptive functioning as follows:

> *General intellectual functioning* is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children, 3rd Edition; Stanford-Binet, 4th Edition; Kaufman Assessment Battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of *about* 70 or below (*approximately* 2 standard deviations below the mean). It should be noted that there is a measurement error of *approximately* 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). *Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior*. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning.
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> *Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the

> standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.

(*Id.* at 41-42) (emphasis added).

10. The DSM-IV-TR divides cases of mental retardation into four levels of severity: mild (IQ of 50-55 to approximately 70); moderate (IQ of 35-40 to 50-55); severe (IQ of 20-25 to 35-40); and profound (IQ below 20 or 25). *(Id.* at 42-43.) The Supreme Court's flat prohibition of the execution of persons with mental retardation applies to all four levels of severity.

11. Subsequent to the filing of the Motion, the Supreme Court of Florida adopted Florida Rule of Criminal Procedure 3.203. *See Amendments to Fla. R. Crim. P. & Fla. R. App. P.*, 875 So. 2d 563 (Fla. 2004). The rule provides the following definition of mental retardation:

> "[M]ental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test . . . . The term "adaptive behavior," for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility

> expected of his or her age, cultural group, and community.

Fla. R. Crim. P. 3.203(b). Consistent with *Atkins*, this standard is essentially identical to leading clinical standard; i.e., the standard set forth in the DSM-IV-TR. Indeed, both Herring's and the State's pre-hearing memoranda assert that the DSM-IV-TR definition of mental retardation and the standard set forth in Fla. R. Crim. Proc. 3.203(b) are functionally identical. (Pre-Hearing Brief of Movant Ted Herring, dated Oct. 14, 2005, at 5; State's Pre-Hearing Memorandum, dated Oct. 14, 2005, at 1-3.)

IV. *Burden and Standard of Proof*

12. Herring bears the burden of proving his mental retardation. Herring contends that the appropriate standard is proof by a preponderance of the evidence. The State contends that the standard is clear and convincing evidence.

13. The Supreme Court of Florida has already expressed deep skepticism toward a clear and convincing evidence standard for *Atkins* claims. In adopting Florida Rule of Criminal Procedure 3.203 in 2004, the court declined to include a clear and convincing standard in the rule despite a proposal that it do so. In a concurring opinion, Justice Pariente explained that the omission of a clear and convincing evidence standard stemmed from "concerns about the constitutionality of the 'clear and convincing' standard" under *Atkins* and *Cooper*. *Amendments to Fla. R. Crim. Proc.*, 875 So. 2d at 566 (Pariente, J., concurring, joined by Anstead,

C.J.). Significantly, none of the Justices endorsed the clear and convincing standard.[2]

14. Section 921.137, by its terms, does not apply to persons, such as Herring, who were sentenced prior to July 12, 2001. Because Section 921.137 does not apply to Herring, this Court need not formally declare the clear and convincing standard unconstitutional in order to apply the preponderance of the evidence standard (although if Section 921.137 did apply, the Court would find it unconstitutional). Rather, the Court may adopt the standard of proof it deems appropriate in light of *Atkins*. The Court adopts the preponderance of the evidence standard of proof for purposes of the Motion in light of the Supreme Court of Florida's refusal to endorse the use of the clear and convincing evidence standard, Justice Pariente's

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[2] Justice Pariente explained further that in cases under Section 921.137(4), Florida Statutes—which requires clear and convincing evidence of mental retardation but was enacted *before Atkins* was decided—"trial courts [are] obligated to either apply the clear and convincing standard of evidence of Section 921.137(4), or find that standard unconstitutional in a particular case." *Id.* at 567. According to Justice Pariente, that approach will allow the issue to come before the Supreme Court of Florida "in the form of an actual case or controversy rather than a nonadversarial rules proceeding." *Id*. Justice Pariente also suggested that "the Legislature amend the [clear and convincing evidence] burden of proof set forth in Section 921.137" (which, again, was enacted before *Atkins*) in light of *Atkins* and *Cooper* and in light of the "clear majority" of states requiring that a defendant only show mental retardation by a preponderance of the evidence. *Id*. The execution of persons with mental retardation had not yet been declared unconstitutional as of July 12, 2001, when Section 921.137 was enacted.

observations, and the following additional considerations:

a. The overwhelming majority of states that have death penalty statutes permit the defendant to establish his or her mental retardation by the preponderance of the evidence. Presently, only five states apply a stricter standard, whereas 24 states apply preponderance of the evidence.

b. In *Cooper v. Oklahoma*, 517 U.S. 348 (1996), the United States Supreme Court held that it is unconstitutional to require a defendant to prove his incompetence to stand trial by anything more than a preponderance of the evidence. The express underpinning of the *Cooper* holding was that the right to be tried only when competent is a fundamental constitutional right, and that applying a clear and convincing standard of proof impermissibly limits that right. *Id*. at 353-54. The court also relied on the fact that the overwhelming majority of states required only a preponderance of the evidence to establish incompetence. *Id*. at 348, 359-62. The same rationale does--and indeed must--apply to mental retardation. The Supreme Court held in *Atkins* that it is unconstitutional to impose a death sentence upon a mentally retarded person. Requiring persons such as Herring to prove their mental retardation by clear and convincing evidence would have precisely the effect that was ruled unconstitutional in *Cooper*. There is simply nothing in *Atkins*

or *Cooper* suggesting that mental retardation and incompetence should be treated differently from each other. As with the constitutional precept of trying only competent defendants, the *Atkins* prohibition of death sentences for the mentally retarded is intended, in part, to account for the difficulties impaired defendants have in protecting their interests at trial.

c. In *Pruitt v. State*, 834 N.E.2d 90, 101 (Ind. 2005), for example, the Supreme Court of Indiana rejected a clear and convincing evidence standard for determining mental retardation, finding that "[t]he reasoning of *Cooper* in finding a clear and convincing standard unconstitutional as to incompetency is directly applicable to the issue of mental retardation." See also *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky.) (applying preponderance of evidence standard to claim of mental retardation in capital case and citing *Cooper* as authority), *cert. denied*, 126 S. Ct. 652 (2005).

d. The arguments against applying a clear and convincing standard for proving mental retardation in capital cases are far stronger than the arguments accepted in *Cooper* with respect to competency. The United States Supreme Court has already held in *Ford v. Wainwright*, 477 U.S. 399 (1986), that in "capital proceedings generally, this Court has demanded that fact-finding procedures aspire to a heightened standard of reliability. This especial con-

> cern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Id.* at 411 (citation omitted). In obvious contrast, an erroneous finding of competency is not "irremediable." Moreover, in *Cooper*, the court found that the State's interests in avoiding erroneous findings of incompetence—which findings can exempt a defendant from being tried at all—were modest. 517 U.S. at 364-65. Applying the *Cooper* reasoning here, the State's interest in avoiding an erroneous finding of mental retardation is even more modest because such defendants can still be sentenced to life in prison.

15. Even if clear and convincing evidence were the appropriate standard of proof, for all of the reasons explained herein, Herring has in any event proved that he is a person with mental retardation by both a preponderance of the evidence and by the clear and convincing evidence.

V. *Herring Has Established That He is a Person With Mental Retardation*

16. Herring established at the Evidentiary Hearing that he meets the criteria for a diagnosis of mental retardation under both the DSM-IV-TR and Florida Rule of Criminal Procedure 3.203, which the parties agree are functionally identical for purposes of the Motion. While this conclusion is based on the totality of the evidentiary record, the court finds Dr. van Gorp's testimony particu-

larly credible and compelling. Dr. van Gorp has extensive credentials and accomplishments in the field of psychology. Among other things, he is board certified in clinical neuropsychology, the editor of a prestigious psychology journal, a fellow of the American Psychological Association, and a past president of the American Academy of Neuropsychology. (Hr'g Tr. 30-39.)

A. *Significantly Subaverage General Intellectual Functioning*

17. Significantly subaverage general intellectual functioning is the first of three criteria required for a finding of mental retardation. As explained previously, and as testified to by both Herring's and the State's expert witnesses, general intellectual functioning is determined through the administration of a standardized, individually administered intelligence test. (Hr'g Ex. 3 (DSM-IV-TR) at 41, 49); Fla. R. Crim. P. 3.203(b); (Hr'g Tr. 46-47 (van Gorp testimony), 160-61 (Pritchard testimony)).

18. The DSM-IV-TR provides that an IQ score of "about 70 or below" constitutes significantly subaverage general intellectual functioning, but also states clearly that "there is a measurement error of approximately 5 points in assessing IQ" and that "it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior." (Hr'g Ex. 3 (DSM-IV-TR) at 41-42.) Herring's and the State's expert witnesses agreed that, consistent with the DSM-IV-TR, persons with IQ scores between 70 and 75 can be diagnosed as mentally

retarded. (Hr'g Tr. 67-68 (van Gorp testimony), 236 (McClaren testimony).)

19. Records of four IQ tests administered to Herring were received as evidence during the Evidentiary Hearing. Two of those tests yielded scores between 70 and 75. The first was a November 23, 1976, administration of the Wechsler Intelligence Scale for Children—Revised ("WISC-R"), which was administered to Herring when he was fifteen years old. (Hr'g Ex. 8.) Herring's full-scale score on this test was 72. The subcomponents of the score were a Verbal IQ score of 82 and a Performance IQ score of 67. The second IQ test where Herring scored below 75 was Dr. McClaren's April 7, 2004 administration of the Wechsler Adult Intelligence Scale–Third Edition ("WAIS-III"), which was administered when Herring was 42 years old. (Hr'g Ex. 9.) Herring's full-scale score on this test was 74. The subcomponents of the score were a Verbal IQ score of 82 and a Performance IQ score of 69.

20. Dr. van Gorp testified that Herring's score of 72 on the WISC-R in 1972 is especially reliable because (a) it was administered under ideal testing conditions (among other things, the testing data states that Herring worked "beautifully" with the examiner and that his "motivation to achieve was commendable") *(see* Hr'g Ex. 8 at VA 310); (b) the WISC-R was, when administered to Herring, an improved and very recently re-normed version of Weschler Intelligence Scale for Children *(see* discussion of "Flynn" effect, *infra*); and (c) the subcomponents of Herring's score on the WISC-R are nearly identical to the subcomponents Dr. McClaren found on the WAIS-III approximately 30

years later (Hr'g Tr. 62-67). Dr. McClaren, testifying for the State, did not disagree. Indeed, he agreed that when Herring was administered the WISC-R in 1976 it had recently been "re-normed and changed in some ways to better allow comparison of a person's performance on this test with other people of the same age." (Hr'g Tr. 241.) Dr. McClaren also acknowledged that he had "absolutely no basis to dispute" the characterization of Herring's level of effort on the 1976 test set forth in the testing data, and that such levels of effort "increase[ ] the validity [and] reliability of a test." (Hr'g Tr. 243-44.)

21. Two other IQ tests were introduced into evidence during the evidentiary hearing. The first was a June 30, 1972, Wechsler Intelligence Scale for Children ("WISC"), which was administered when Herring was almost 11 years old. (Hr'g Ex. 6.) Herring received a full-scale score of 83 on the test. The second was a January 21, 1974 administration to Herring of the same test (the WISC) less than two years later. Herring received a full-scale score of 81 on the test. (Hr'g Ex. 7.) Dr. van Gorp explained in his testimony that both of these scores were subject to the "Flynn" effect, thus reflecting inflated measurements of Herring's intelligence.

22. The "Flynn" effect results from the fact that the intelligence of the population increases over time. As a result, the average IQ increases by .311 points per year. Because IQ tests are normed against the population at a particular point in time, one must deduct .311 points from measured scores on an IQ test for each year that passes after that test's date of publication in order to obtain an

accurate score. (Hr'g Tr. 57-59, 241; *see also* Hr'g Ex. 5 (*The Flynn Effect and U.S. Policies: The Impact of Rising IQ Scores on American Society Via Mental Retardation Diagnosis*, 58 Am. Psychologist 778 (Oct. 2003)).)

23. Dr. van Gorp applied the .311 point per year "Flynn" adjustment to each of the four IQ tests administered to Herring. The WISC, on which Herring scored an 83 and 81 in 1972 and 1974, respectively, was published in 1949, and thus normed against the population of that time period. Herring took the exam almost 25 years after it was published and, after applying a .311 point per year adjustment, his scores on those exams are revealed to be approximately 76 and 74 respectively. In contrast, Herring's score of 72 on the WISC-R does not require significant downward adjustment because it was published approximately two years before Herring took the test. Herring's score of 74 on the WAIS-III requires Flynn-adjustment to approximately 72 because it was published approximately seven years before Herring took the test. (Hr'g Tr. 59-66.)

24. Accordingly, all of Herring's scores, after accounting for the Flynn effect, are at or around the range of 70-75 and thus consistent with a diagnosis of mental retardation. Significantly, the State's experts acknowledged the Flynn effect and did not offer any specific rebuttal to Dr. van Gorp's application of the Flynn effect to Herring's test scores. Dr. Pritchard testified that the Flynn-effect was "not a hypothetical phenomenon" but rather a "measured phenomenon" that could elevate scores if the "test is 20 years old" when administered, as was the case with Herring's

scores of 83 and 81 on the WISC. (Hr'g Tr. 191-92). Similarly, Dr. McClaren testified that the "Flynn effect exists and that's why tests are periodically renormed." (Hr'g Tr. 258.)

25. Based on the evidence presented at the hearing, the court finds that Herring satisfies the first criterion for mental retardation—significantly subaverage general intellectual functioning given his IQ scores of 72 and 74. The State has not provided any legitimate basis to question the validity of these scores or show that Herring's scores of 81 and 83 on earlier tests are more valid. To the contrary, it is essentially undisputed that, after allowing for the Flynn effect, those scores are more reflective of scores of approximately 75.[3]

26. This determination is also supported by a growing body of legal cases finding persons with IQ scores between 70 and 75 to be mentally retarded and thus exempt from execution. *See Bottoson v. State*, 813 So. 2d 31, 33-34 (Fla. 2002)

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[3] At the evidentiary hearing, the State's expert witnesses mentioned a fifth IQ test but did not offer it into evidence. Neither of the State's experts had seen the test scores, much less the test data. Instead, they made reference to a "deposition" (at which no counsel for Herring was present) from over twenty years ago where a psychologist testified that he administered an IQ test to Herring in 1980 on which Herring scored an 82. (H. Tr. 254-59.) Given that none of the expert witnesses reviewed the test scores or data or knows anything about the testing conditions, the court gives no weight to this "fifth" IQ test. To the extent it is given any weight, it is not inconsistent with a diagnosis of mental retardation. Indeed, the State's expert, Dr. McClaren, conceded that the test score likely would have been subject to a Flynn adjustment of 8 points, yielding an adjusted score of 74. (*Id.*)

(trial court permitted evidentiary hearing where defendant's IQ tests "consistently indicated that he was not mentally retarded" and still considered whether defendant had adaptive deficits); *Crook v. State*, 813 So. 2d 68, 76-78 (Fla. 2002) (vacating death sentence where there was evidence of brain damage and defendant suffered only "borderline" (as opposed to "mild") mental retardation); *Cooper v. State,* 739 So. 2d. 82,85-86, 88-89 (Fla. 1999) (vacating death sentence where there was evidence of mental retardation and brain damage notwithstanding IQ test scores of 77 and 82); *Downs v.* State, 574 So. 2d 1095, 1099 (Fla. 1991) (vacating death sentence where defendant's IQ was 71); *Morris v. State*, 557 So. 2d 27, 30 (Fla. 1990) (vacating death sentence where defendant had IQ of approximately 75); *In re Hawthorne*, 105 P.2d 552, 557 (Cal. 2005) (rejecting "IQ of 70 as the upper limit" for mental retardation); *State v. Lorraine*, No. 2003-T-0159, 2005 WL 1208119, at *3 (Ohio Ct. App. May 20, 2005) (IQ of 73 "not dispositive of the issue of mental retardation for *Atkins* purposes"); *Ex parte Briseno,* 135 S.W.3d 1, 7 n.24 (Tex. Crim. App. 2004) ("[S]ometimes a person whose IQ has tested above 70 may be diagnosed as mentally retarded. . . ."); *Foster v. State*, 848 So. 2d 172, 174-75 (Miss. 2003) (petitioner's IQ scores—ranging between 62 and 80—did not prevent a finding of mental retardation.); *Moore v. Dretke,* No. 603CV224, 2005 U.S. WL 1606437, at *4-5 (E.D. Tex. July 1, 2005) (holding that petitioner with IQ scores of 74, 76 and 66 had "satisfie[d] the AAMR criterion of subaverage intellectual functioning"); *United States v. Johnson*, No. 02 C 6998, 2003 WL 1193257, at *11

(N.D. Ill. Mar. 12, 2003) (holding that petitioner with full-scale IQ of 76 "may be able to state a colorable Eighth Amendment claim based on mental retardation"); *Brownlee v. Haley,* 306 F.3d 1043, 1073 (11th Cir. 2002) ("[I]t is abundantly clear that an individual 'right on the edge' of mental retardation suffers some of the same limitations of reasoning, understanding, and impulse control as those described by the Supreme Court in *Atkins*.").

27. These decisions reflect appropriate caution on the part of courts in dealing with the question of whether to permit the execution of a human being on the basis of tests with standard error measurements of five points or more. Indeed, the State's own expert witness, Dr. McClaren, found Herring's case to be "in that uncertain area where you can be borderline mental functioning or you can be mentally retarded," "up for honest debate," and one where "reasonable people could differ as to whether Ted was mentally retarded." (Hr'g Tr. 267.) The United States Court of Appeals for the Eleventh Circuit—which ultimately would hear and decide any federal petition for a writ of habeas corpus related to the issues presented by the motion—finds it "abundantly clear that an individual 'right on the edge' of mental retardation suffers some of the same limitations of reasoning, understanding, and impulse control as those described by the Supreme Court in *Atkins*." *Brownlee*, 306 F.3d at 1073. One of the State's expert witnesses effectively has *conceded* that Herring is "right on the edge," which itself is enough under *Brownlee* to trigger *Atkins* protection. Moreover, for all of the reasons explained

herein, Herring has sufficiently proven that he *is* mentally retarded.[4]

B. *Significant Limitations in Adaptive Functioning*

28. The second of the three criteria for a diagnosis of mental retardation is the requirement of significant limitations in adaptive functioning. (Hr'g Ex. 3 (DSM-IV-TR) at 41-43, 49)); Fla. R. Crim. P. 3.203(b). According to the DSM-IV-TR, these limitations must manifest themselves in "at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." (Hr'g Ex. 3 (DSM-IV-TR) at 49.) According to the DSM-IV-TR, *"[a]daptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." (*Id*. at 42.)

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[4] The State's reliance on *Zack v. State*, 2005 Fla. LEXIS 1456 (Fla. 2005) (published at 911 So. 2d 1190), is entirely misplaced. Contrary to the State's arguments, *Zack* does not impose a bright-line cutoff of 70 or below for a finding of mental retardation. In *Zack*, the defendant's IQ score was 79, and there was no mention of any scores below 75. Thus, the case simply does not address the implications of IQ scores between 70 and 75 or the five-point standard error of measurement that the DSM-IV-TR and all of the expert witnesses in this case say is in inherent in intelligence testing. The State's own expert witnesses agree that a person with IQ scores between 70 and 75 appropriately can be diagnosed as mentally retarded.

29. The evidentiary hearing record is replete with evidence that Herring satisfies this criterion. While it is impracticable to set forth even a substantial portion of that evidence here, it can be found in the hearing transcript at pages 68 through 113, in hearing exhibits 8 and 10 through 22, and in Dr. van Gorp's expert report.

30. A few of many examples from the record concerning Herring's "functional academic skills" are as follows:

> a. Herring was forced to repeat the first grade and struggled academically in grades one through four, earning mostly grades of "D" and "F." (Hr'g Tr. 70-71; Hr'g Ex. 10 (Elementary Record—Archdiocese of New York).);
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> b. At age 14, Herring's math scores were at a 4.2 grade level, and his reading scores were at a 4.7 grade level. (Hr'g Ex. 12 (Educational Evaluation, Dec. 2, 1975) at VA 217).);
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> c. When Herring was almost 15 years old, on a different set of tests, his reading scores were at a 3.7 grade level, and his math scores were at a 5.7 grade level. (Hr'g Ex. 13 (May 12 & 14, 1976 Testing Data) at VA 319.);
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> d. When Herring was 15 years, 4 months old, on a different set of tests, his reading scores were at a 4.8 grade level, and his math scores were at a 3.4 grade level. (Hr'g Ex. 8; Hr'g Tr. 262-63.);

31. Herring's performance on standardized academic tests is entirely consistent with the profile of a person with mild mental retardation. The DSM-IV-TR provides that "[b]y their late teens"

such persons "can acquire academic skills up to approximately the sixth-grade level." (Hr'g Ex. 3 (DSM-IV-TR) at 43.) Herring was and is not close to that level. Dr. McClaren, one of the State's experts, agreed that these tests results were "consistent" with a diagnosis of mental retardation. (Hr'g Tr. 263.)

32. In addition, there are numerous examples in the record of Herring's significant limitations in adaptive functioning in various other areas, to wit:

a. School records indicate that Herring "could not adjust to the classroom situation." (Hr'g Ex. 11 (Nov. 11, 1975 Wiltwyck School Record) at VA 295);

b. At age 12, Herring was found by a psychiatrist to be "undoubtedly functionally retarded." (Hr'g Ex. 14 (Nov. 28, 1973 Psychiatric Evaluation) at VA 241).);

c. When Herring was approximately 13 years old, although he was already in a special school, it was recommended that he be placed in a "600 school, which is designated for children who have educational handicaps *complimented [sic] by minor mental retardation*." (Hr'g Ex. 11 at 295 (emphasis added); Hr'g Tr. 74.)

d. At age 14, Herring "experienced difficulties grasping concepts, organizing his thoughts and relating them in a logical, organized manner." (Hr'g Ex. 12 (Dec. 2, 1975 Educational Evaluation) at VA 216);

e. At age 15, Herring "did not know the sequence of the seasons . . . or what makes a sailboat move." (Hr'g Ex. 13 (May 12 & 14, 1976 Examination Report).);

f. At age 15, Herring was found by psychologist to be "very dependent upon outside help for a child of his age." (Hr'g Ex. 8 at VA 311.)

g. Herring never developed age-appropriate peer relationships, choosing instead to spend time with older persons who would take care of him, and did not seek normal personal independence. (Hr'g Tr. 86-87.);

h. Herring could not sustain employment of any kind and failed at multiple jobs. (Hr'g Tr. 88.);

i. Based on her experience raising him, Herring's mother did not think Herring was capable in his late teens of changing buses on his own on a trip from New York to Florida. (Hr'g Tr. 87);

j. Herring never supported himself financially, never paid rent, and never had a credit card or bank account. (Hr'g Tr. 88-89); and

k. Even at his current age, Herring was unable to provide an answer when asked what he would do if lost in an airport with only a dollar in his pocket. (Hr'g Tr. 89-90).

33. Tests performed by the State's expert witnesses further confirm that Herring has had—and continues to have—significant deficiencies in adaptive functioning. Dr. Pritchard administered the "Vineland" test, which is a structured inter-

view of someone who knows the person in question well, to a relative who lived with Herring while Herring was in his late teens. (Hr'g Ex. 15; Hr'g Tr. 92-96.) The test resulted in an adaptive functioning score of 68--a score that, like an IQ score of 68, is more than two standard deviations below the mean and strongly supportive of a diagnosis of mental retardation. (*Id.*)[5] Dr. McClaren administered the SIB-R test, another test of adaptive functioning, to Herring. Herring received a score of 49, which is a result several standard deviations below the mean. (Hr'g Tr. 269-70.) While it may be that this score was affected by the fact that some of the questions are inapplicable to a person living on death row (*see id.*), the score nonetheless is supportive of the conclusion that Herring has significant limitations in adaptive functioning.

34. Finally, the record of Herring's conduct during his trial also suggests significant limitations in adaptive functioning. Dr. van Gorp addressed the psychological implications of that conduct in detail during his testimony. (*See* Hr'g Tr. 105-12 and related exhibits).

35. The Court finds that Herring's behavior during his trial and sentencing, as reflected in the

---

[5] Dr. Pritchard testified at the Evidentiary Hearing that Herring's composite score of 68 on the Vineland test is "misleading" because it is the subcomponents of the score that are most important. (Hr'g Tr. 181-82.) This testimony is inconsistent with the DSM-IV-TR, which provides that in applying the Vineland test and other tests of adaptive functioning, the "composite" score "provide[s] a clinical cutoff" in assessing adaptive functioning. Herring falls below the cutoff score of 70. (Hr'g Ex. 3 at 41-42.)

record of those proceedings, was consistent with the very concerns that the Supreme Court articulated in *Atkins*. In *Atkins*, the Supreme Court explained that one reason for excluding persons with mental retardation from execution is because "[t]he risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty' is enhanced" in the case of such persons. *Atkins*, 536 U.S. at 320 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). Specifically, the Court cited the increased risk of false confessions, the limited ability of persons with mental retardation to assist counsel effectively, and the fact that the demeanor of such persons "may create an unwarranted impression of lack of remorse." *Id*. at 321. These risks became realities at Herring's trial.

36. Furthermore, Herring's inability to adapt to and properly perceive his circumstances manifested itself in other ways. Despite providing a taped confession to the killing, Herring testified at his trial that while he went to the store with the intent to commit a robbery, a stranger followed him into the store, robbed the clerk, and killed him. Herring's trial counsel later conceded under oath (during post-conviction proceedings) that this defense was "incredible." (Hr'g Ex. C (Nov. 26, 1006 Hr'g Tr., *State v. Herring*, No. 81-1957 (Fla. Cir. Ct.)), at 400-01.) Worse still, the trial judge stated that Herring's testimony about the second gunman "doomed" Herring to receive a death sentence: "[M]ost damaging of all [Herring] told the jury the preposterous story of how a second robber 'beat him to the punch' [the trial judge's words, not Herring's] . . . . Frankly, this preposterous story doomed the Defendant not only as to a con-

viction *but as to sentence as well*." (Hr'g Ex. 22 (Order, *State v. Herring*, No. 81-1957, slip. op. (Fla. Cir. Ct. July 24, 1985)) at 5-6 (emphasis added).) Herring's trial counsel also testified that "it was clear," based on discussions with the trial judge and the State, that Herring would have received a life sentence had he pleaded guilty. (Hr'g Ex. A (Dep. of James ("Peyton") Quarles, taken Dec. 12, 1991), *State v. Herring*, No. 81-1957 (Fla. Cir. Ct.)), at 19-20.) Herring refused to do so, despite the advice of his counsel, and instead proceeded to verdict—notwithstanding his taped confession—on the absurd theory that a second, unrelated gunman killed the clerk. Herring's performance during a trial where his life was at stake validates the concern expressed by the United States Supreme Court in *Atkins*. Indeed, it is the clearest possible demonstration of a failure of adaptive functioning.

37. During the evidentiary hearing, the state made much of the DSM-IV-TR's use of the phrase "present adaptive functioning," arguing that there is insufficient evidence of present limitations in Herring's adaptive functioning. The court finds the state's arguments unavailing. First, as shown above, there is substantial evidence, including Dr. van Gorp's findings and the results of the SIB-R test administered by Dr. McClaren, on Herring's present functioning level. Second, Dr. van Gorp testified that his assessment includes Herring's present adaptive functioning. (Hr'g Tr. 114.) Third, the DSM-IV was obviously intended for general application to clinical patients, not persons who have resided on death row for twenty-five years. The structured environment of

incarceration by definition does not allow for the sort of independent living where limitations in adaptive functioning are likely to reveal themselves—e.g., finding suitable housing, managing independent finances, paying taxes, preparing meals, managing a household, obtaining and maintaining employment, developing family relationships, and the like. Fourth, the modifier "present" does not appear in Florida Rule of Criminal Procedure 3.203(b)'s definition of mental retardation. As a matter of law, this rule governs, and the DSM-IV-TR can be used in this proceeding only to the extent consistent with the law. Furthermore, the state should not be heard to argue that the DSM-IV-TR requires *more than* Florida law for a finding of mental retardation after having submitted a pre-hearing memorandum asserting that the two standards are "functionally identical."

38. Accordingly, the court finds that Herring has satisfied the second criterion for a diagnosis of mental retardation. There is ample evidence in the record that, throughout his life, Herring has suffered from significant limitations in adaptive functioning in multiple areas.

C. *Onset Before Age 18*

39. Onset of the condition prior to the age of 18 is the third and final criterion for a diagnosis of mental retardation. (Hr'g Ex. 3 at 49); Fla R. Crim. P. 3.203(b).

40. There does not appear to be any dispute among the parties that, whatever Herring's condition may be, it began well before he turned 18

years old. Indeed, a substantial percentage of the evidence in this case concerns Herring's intellectual and adaptive functioning prior to the age of 18. Accordingly, Herring has satisfied the third and final criterion for a diagnosis of mental retardation.

UPON THE FOREGOING findings of fact and conclusions of law, the Motion is granted and Herring's sentence of death is hereby vacated and set aside.

DONE AND ORDERED in Daytona Beach, Volusia County, Florida, this 23rd day of November, 2009.

/s/ JOSEPH G. WILL
Joseph G. Will
Circuit Judge

Copies to:
Kenneth Nunnelley, Assistant Attorney General
Rosemary Calhoun, Assistant State Attorney
Jeremy Epstein, Esquire
Leon Handley, Esquire
Jon Wilson, Esquire

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-16095-P
Filed January 26, 2012

IN RE: TED HERRING,
Petitioner.

Application for Leave to File a Second or
Successive Habeas Corpus Petition,
28 U.S.C. § 2244(b)

Before: DUBINA, Chief Judge,
MARCUS and MARTIN, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. § 2244(b)(3)(A), Ted Herring has filed an application seeking an order authorizing the district court to consider a second or successive petition for a writ of habeas corpus. Such authorization may be granted only if:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *Id*. § 2244(b)(3)(C).

I.

Herring, who was convicted of first-degree murder and armed robbery and sentenced to death, indicates that he wishes to raise one claim in a second or successive § 2254 petition. He wishes to argue that the Florida Supreme Court erroneously reinstated his death sentence in violation of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

II.

To overcome the restrictions on filing a second or successive habeas petition, Herring must show: (1) that his "claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"; and (2) a *prima facie* case showing that he is eligible to file a successive habeas petition. *In re Holladay*, 331 F.3d 1169, 1172 (11th Cir. 2003) (quotation omitted). We have held *Atkins* to be "a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court." *Id*. Where a new rule of constitutional law was decided while a petitioner's habeas petition was pending, we have considered whether amending that petition to assert the new claim was feasible. *In re Hill*, 113 F.3d 181, 183 (11th Cir. 1997) ("The pragmatic approach we have adopted properly recognizes that the liberal amendment policy applicable to habeas petitions may make claims based upon new rules of constitutional law 'available' to the petitioner during a prior habeas action, even when the claim would not have been available at the inception of that prior action."); *cf. In re Turner*, 637 F.3d 1200, 1203 n.4 (11th Cir. 2011) (holding that *Atkins* was previously unavailable where the petitioner's prior habeas petition was denied only six days after *Atkins* was decided). Finally, to establish a *prima facie* case of eligibility, Herring "must demonstrate that there is a reasonable likelihood that he is in fact mentally retarded." *Holladay*, 331 F.3d at 1173.

In *Atkins*, the Supreme Court held that executing a mentally retarded offender constitutes excessive punishment and, therefore, violates the Eighth Amendment's prohibition on cruel and unusual punishment. 536 U.S. at 321, 122 S.Ct. at 2252. The Supreme Court discussed definitions of mental retardation, but delegated to the state legislatures the task of formulating precise standards for determining whether an individual is mentally retarded. *Id.* at 317, 122 S.Ct. at 2250. The Court did, however, list definitions of mental retardation as formulated by the American Association on Mental Retardation and American Psychiatric Association:

> The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related 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. Mental retardation manifests before age 18."
>
> The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive func-

> tioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C)."

Id. at 308 n.3, 122 S.Ct. at 2245 n.3 (citation omitted). The Court pointed out that "'[m]ild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70," *id*, and that "an lQ 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 n.5, 122 S.Ct. at 2245 n.5.

In Florida, "mental retardation" is defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." Fla.R.Crim.P. 3.203(b). "Significantly subaverage general intellectual functioning" is defined as "performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services." *Id.* Florida courts have interpreted this language to mean that a prisoner must have an IQ of 70 or below to establish that his intellectual functioning is significantly subaverage. *See, e.g., Zack*, 911 So.2d at 1201 (noting that the Supreme Court in *Atkins* prohibited the execution of mentally retarded individuals, but left it "to the states to determine who is 'mentally

retarded'"). In *Turner*, this Court denied a Florida prisoner's application to file a successive habeas petition based on an *Atkins* claim because the prisoner's IQ of 72 was above 70 and thus did not meet the subaverage intellectual functioning prong in Rule 3.203. 637 F.3d at 1205-06. In rejecting that application, this Court noted that, under *Atkins*, the states have the authority to determine how to enforce the prohibition against executing mentally retarded prisoners. *Id.* at 1206. Moreover, Rule 3.203 was "substantially identical to . . . the clinical definitions in *Atkins*," and "Florida's 70-IQ cutoff [was] within the IQ range for mental retardation cited by the Supreme Court in *Atkins*." *Id.* at 1205, 1206 n.7; *see also Powell v. Allen*, 602 F.3d 1263, 1272 (11th Cir. 2010), *cert. denied*, 131 S.Ct. 1002 (2011) (noting that an IQ of 70 or below was required to show mental retardation in Alabama, and where the petitioner failed to allege an IQ below this threshold in his habeas petition, he had "failed to plead facts on which an *Atkins* claim [could] be based").

The Florida Supreme Court has rejected the use of a standard error measurement or the use of a range of IQ scores because the plain language of Rule 3.203 "does not use the word approximate, nor does it reference the [standard error measurement]." *Cherry*, 959 So. 2d at 713. The court noted that when the language of a statute was unambiguous, it was not to consider legislative intent or apply rules of statutory construction. *Id.*

III.

We deny Herring's application because he cannot "demonstrate that there is a reasonable likelihood that he is in fact mentally retarded." *Holladay*, 331 F.3d at 1173; *see also* 28 U.S.C. § 2244(b)(3)(C). That is, the Florida Supreme Court did not err in determining that he had not shown significantly subaverage intellectual functioning because his IQ was above 70. Nor did the court err in declining to utilize a standard error measurement. Under *Atkins*, Florida has the authority to formulate standards for determining whether an individual is mentally retarded. *See* 536 U.S. at 317, 122 S.Ct. at 2250. Thus, although the Court listed definitions of mental retardation that included specific IQ ranges in *Atkins*, Florida is not required to utilize those definitions. Nevertheless, Florida's use of a cutoff of an IQ of 70 is consistent with the definitions of mental retardation set forth in *Atkins*. The Supreme Court explained that "an IQ of between 70 and 75 or lower [was] typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Id.*, at 309 n.5, 122 S.Ct. at 2245 n.5. Florida's cutoff IQ of 70 falls within the range of 70 to 75 "or lower" that the Court referenced. *Id.*; *see also Turner*, 631 F.3d at 1205-06, 1206 n.7. Based on the above, Florida did not err in applying its definition of mental retardation or in declining to consider the standard error measurement, and we deny Herring's application.

Accordingly, because Herring has failed to make a prima facie showing that the application satis-

fies the requirements set forth in § 2244(b)(2), his application for leave to file a second or successive petition is hereby DENIED.

MARTIN, Circuit Judge, concurring:

Our Circuit's binding precedent requires me to concur in the denial of Mr. Herring's application for leave to file a second or successive habeas corpus petition pursuant to 28 U.S.C. § 2244(b). *See Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011). Suffice to say, if it is not unreasonable for a state to adopt a beyond a reasonable doubt standard of proof for an *Atkins* claim, it is not unreasonable for a state to disregard the five-point standard error of measure for determining if a defendant is mentally retarded. For myself, I would be willing to revisit Mr. Herring's application if the Supreme Court determined our decision in *Hill* was wrongly decided.

SUPREME COURT OF FLORIDA

Tuesday, December 20, 2011

Case No.: SC09-2200

Lower Tribunal No(2).: 81-1957-CFA

STATE OF FLORIDA,

Appellant

—vs.—

TED HERRING,

Appellee

Appellee's Motion for Rehearing and Alternative Motion for Clarification is hereby denied.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

A True Copy
Test:

/s/ THOMAS D. HALL [SEAL]
Thomas D. Hall
Clerk, Supreme Court

th
Served:

Rosemary Calhoun
Kenneth Sloan Nunnelley
Leon H. Handley
Itzhak Shukrie
Alan S. Goudiss
Adam S. Hakki
John Richard Hamilton
Jon M. Wilson
Christopher Greer
Hon. Joseph G. Will, Judge
Hon. Diane M. Matousek, Clerk

UNITED STATES CONSTITUTION

AMENDMENT VIII—EXCESSIVE BAIL, FINES, PUNISHMENTS

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

UNITED STATES CONSTITUTION

AMENDMENT XIV—CITIZENSHIP RIGHTS

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President

and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

FLORIDA RULES OF CRIMINAL PROCEDURE

Rule 3.203. Defendant's Mental Retardation as a Bar to Imposition of the Death Penalty

(a) Scope. This rule applies in all first-degree murder cases in which the state attorney has not waived the death penalty on the record and the defendants mental retardation becomes an issue.

(b) Definition of Mental Retardation. As used in this rule, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65G-4.011 of the Florida Administrative Code. The term "adaptive behavior," for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA
CASE NO. 81-1957-C

VOLUME I

STATE OF FLORIDA,

Plaintiff,

vs.

TED HERRING,

Defendant.

EVIDENTIARY HEARING BEFORE
THE HONORABLE JOSEPH G. WILL
CIRCUIT COURT JUDGE

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: NOVEMBER 2 AND 3, 2005

PLACE: JUSTICE CENTER
COURTROOM FOUR
251 NORTH RIDGEWOOD AVENUE
DAYTONA BEACH, FLORIDA 32114

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CERTIFIED REALTIME REPORTER
AND NOTARY PUBLIC

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386-255-2150

[267] help you. Do you know whether that happened?

A No, I have no idea.

Q And, you know, if Ted said he liked to read Tom Clancy, you really don't have a basis to say whether he actually understood what he was reading, do you?

A No. Like I said, I didn't question him about the plot. Dr. Prichard did.

Q You didn't ask him about the plot?

A I wish I had. But Dr. Prichard did.

Q And we might read a book on astrophysics and understand nothing?

A High probability.

Q You told me at your deposition that reasonable people could differ as to whether Ted was mentally retarded. Do you remember that?

A Yes.

Q You also told me that he was in that uncertain area where you can be borderline mental functioning or you can be mentally retarded, correct?

A Yes.

Q And you said it was up for honest debate, didn't you?

A Yes.

Q You also said that a somewhat compelling case **[268]** for mitigation could have been made for Ted Herring. Do you remember that?

A Yes.

Q And have you reviewed the trial record?

MR. NUNNELLEY: Your Honor, I object. This is outside the scope of this hearing. This goes to matters other than mental retardation. Yesterday morning Mr. Epstein agreed that we were not going down the ineffective assistance of counsel road. That's squarely where this line of questioning takes us.

THE COURT: I'm not able to sense that yet because there haven't been enough questions asked for me to have the same feel that you do. So let me just observe the line of questioning and we'll see.

Q Really, my only question is based upon this composite of all these problems we see from Ted Herring's youth. You testified at your deposition that you agree that a compelling case probably could have been made for Ted as to mitigation?

MR. NUNNELLEY: And, Your Honor, that's outside the scope of this hearing. It's irrelevant to this hearing. I object to it. That claim is essentially a 3.851 claim and has no

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS

FOURTH EDITION

TEXT REVISION

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[*41*] Mental Retardation

Diagnostic Features

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children, 3rd Edition; Stanford-Binet, 4th Edition; Kaufman Assessment Battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in **[*42*]** individuals with IQs between 70 and 75 who exhibit significant

deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. The choice of testing instruments and interpretation of results should take into account factors that may limit test performance (e.g., the individual's socio-cultural background, native language, and associated communicative, motor, and sensory handicaps). When there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading.

Impairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with Mental Retardation. *Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities and the mental disorders and general medical conditions that may coexist with Mental Retardation. Problems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute.

It is useful to gather evidence for deficits in adaptive functioning from one or more reliable independent sources (e.g., teacher evaluation and educational, developmental, and medical history). Several scales have also been designed to measure adaptive functioning or behavior (e.g., the Vineland Adaptive Behavior Scales and the American Association on Mental Retardation Adaptive Behavior Scale). These scales generally provide a clinical cutoff score that is a composite of performance in a number of adaptive skill domains. It should be noted that scores for certain individual domains are not included in some of these instruments and that individual domain scores may vary considerably in reliability. As in the assessment of intellectual functioning, consideration should be given to the suitability of the instrument to the person's socio-cultural background, education, associated handicaps, motivation, and cooperation. For instance, the presence of significant handicaps invalidates many adaptive scale norms. In addition, behaviors that would normally be considered maladaptive (e.g., dependency, passivity) may be evidence of good adaptation in the context of a particular individual's life (e.g., in some institutional settings).

Degrees of Severity of Mental Retardation

Four degrees of severity can be specified, reflecting the level of intellectual impairment: Mild, Moderate, Severe, and Profound.

317	**Mild Mental Retardation:**	IQ level 50-55 to approximately 70
318.0	**Moderate Retardation:**	IQ level 35-40 to 50-55
318.1	**Severe Mental Retardation:**	IQ level 20-25 to 35-40
318.2	**Profound Mental Retardation:**	IQ level below 20 or 25

[*43*]

319 Mental Retardation, Severity Unspecified, can be used when there is a strong presumption of Mental Retardation but the person's intelligence is untestable by standard tests (e.g., with individuals too impaired or uncooperative, or with infants).

317 Mild Mental Retardation

Mild Mental Retardation is roughly equivalent to what used to be referred to as the educational category of "educable." This group constitutes the largest segment (about 85%) of those with the disorder. As a group, people with this level of Mental Retardation typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level. During their adult years, they usually achieve social and vocational skills adequate for

minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.

318.0 Moderate Mental Retardation

Moderate Mental Retardation is roughly equivalent to what used to be referred to as the educational category of "trainable." This outdated term should not be used because it wrongly implies that people with Moderate Mental Retardation cannot benefit from educational programs. This group constitutes about 10% of the entire population of people with Mental Retardation. Most of the individuals with this level of Mental Retardation acquire communication skills during early childhood years. They profit from vocational training and, with moderate supervision, can attend to their personal care. They can also benefit from training in social and occupational skills but are unlikely to progress beyond the second-grade level in academic subjects. They may learn to travel independently in familiar places. During adolescence, their difficulties in recognizing social conventions may interfere with peer relationships. In their adult years, the majority are able to perform unskilled or semiskilled work under supervision in sheltered workshops or in the general workforce. They adapt well to life in the community, usually in supervised settings.

318.1 Severe Mental Retardation

The group with Severe Mental Retardation constitutes 3%-4% of individuals with Mental Retardation. During the early childhood years, they acquire little or no communicative speech. During the school-age period, they may learn to talk and can be trained in elementary self-care skills. They profit to only a limited extent from instruction in pre-academic subjects, such as familiarity with the alphabet and simple counting, but can master skills such as learning sight reading of some "survival" words. In their adult years, they may be able to perform simple tasks in closely supervised set-**[*44*]**tings. Most adapt well to life in the community, in group homes or with their families, unless they have an associated handicap that requires specialized nursing or other care.

318.2 Profound Mental Retardation

The group with Profound Mental Retardation constitutes approximately 1%-2% of people with Mental Retardation. Most individuals with this diagnosis have an identified neurological condition that accounts for their Mental Retardation. During the early childhood years, they display considerable impairments in sensorimotor functioning. Optimal development may occur in highly structured environment with constant aid and supervision and an individualized relationship with a caregiver. Motor development and self-care and communication skills may improve if appropriate training is provided. Some can perform simple tasks in closely supervised and sheltered settings.

319 Mental Retardation, Severity Unspecified

The diagnosis of Mental Retardation, Severity Unspecified, should be used when there is a strong presumption of Mental Retardation but the person cannot be successfully tested by standardized intelligence tests. This may be the case when children, adolescents, or adults are too impaired or uncooperative to be tested or, with infants, when there is a clinical judgment of significantly subaverage intellectual functioning, but the available tests (e.g., the Bayley Scales of Infant Development, Cattell Infant Intelligence Scales, and others) do not yield IQ values. In general, the younger the age, the more difficult it is to assess for the presence of Mental Retardation except in those with profound impairment.

Recording Procedures

The specific diagnostic code for Mental Retardation is selected based on the level of severity as indicated above and is coded on Axis II. If Mental Retardation is associated with another mental disorder (e.g., Autistic Disorder), the additional mental disorder is coded on Axis I. If Mental Retardation is associated with a general medical condition (e.g., Down syndrome), the general medical condition is coded on Axis III.

Associated Features and Disorders

Associated descriptive features and mental disorders. No specific personality and behavioral features are uniquely associated with Mental

Retardation. Some individuals with Mental Retardation are passive, placid, and dependent, whereas others can be aggressive and impulsive. Lack of communication skills may predispose to disruptive and aggressive behaviors that substitute for communicative language. Some general medical conditions associated with Mental Retardation are characterized by certain behavioral symptoms (e.g., the intractable self-injurious behavior associated with Lesch-Nyhan syndrome). Individuals with Mental Retardation may be **[*45*]** vulnerable to exploitation by others (e.g., being physically and sexually abused) or being denied rights and opportunities.

Individuals with Mental Retardation have a prevalence of comorbid mental disorders that is estimated to be three to four times greater than in the general population. In some cases, this may result from a shared etiology that is common to Mental Retardation and the associated mental disorder (e.g., head trauma may result in Mental Retardation and in Personality Change Due to Head Trauma). All types of mental disorders may be seen, and there is no evidence that the nature of a given mental disorder is different in individuals who have Mental Retardation. The diagnosis of comorbid mental disorders is, however, often complicated by the fact that the clinical presentation may be modified by the severity of the Mental Retardation and associated handicaps. Deficits in communication skills may result in an inability to provide an adequate history (e.g., the diagnosis of Major Depressive Disorder in a nonverbal adult with Mental Retardation is often based primarily on manifestations such as depressed mood, irri-

tability, anorexia, or insomnia that are observed by others). More often than is the case in individuals without Mental Retardation, it may be difficult to choose a specific diagnosis and in such cases the appropriate Not Otherwise Specified category can be used (e.g., Depressive Disorder Not Otherwise Specified). The most common associated mental disorders are Attention-Deficit/Hyperactivity Disorder, Mood Disorders, Pervasive Developmental Disorders, Stereotypic Movement Disorder, and Mental Disorders Due to a General Medical Condition (e.g., Dementia Due to Head Trauma). Individuals who have Mental Retardation due to Down syndrome may be at higher risk for developing Dementia of the Alzheimer's Type. Pathological changes in the brain associated with this disorder usually develop by the time these individuals are in their early 40s, although the clinical symptoms of dementia are not evident until later.

Associations have been reported between specific etiological factors and certain comorbid symptoms and mental disorders. For example, fragile X syndrome appears to increase the risk for Attention-Deficit/Hyperactivity Disorder and Social Phobia; individuals with Prader-Willi syndrome may exhibit hyperphagia and compulsivity, and those with William's syndrome may have an increased risk of Anxiety Disorders and Attention-Deficit/Hyperactivity Disorder.

Predisposing factors. Etiological factors may be primarily biological or primarily psychosocial, or some combination of both. In approximately 30%-40% of individuals seen in clinical settings, no

clear etiology for the Mental Retardation can be determined despite extensive evaluation efforts. Specific etiologies are more likely to be identified in individuals with Severe or Profound Mental Retardation. The major predisposing factors include:

Heredity: These factors include inborn errors of metabolism inherited mostly through autosomal recessive mechanisms (e.g., Tay-Sachs disease), other single-gene abnormalities with Mendelian inheritance and variable expression (e.g., tuberous sclerosis), and chromosomal aberrations (e.g., translocation Down syndrome, fragile X syndrome). Advances in genetics will likely increase the identification of heritable forms of Mental Retardation.

Early alterations of embryonic development: These factors include chromosomal changes (e.g., Down syndrome due to trisomy) or prenatal damage due to toxins (e.g., maternal alcohol consumption, infections).

[*46*] *Environmental influences:* These factors include deprivation of nurturance and of social, linguistic, and other stimulation.

Mental disorders: These factors include Autistic Disorder and other Pervasive Developmental Disorders.

Pregnancy and perinatal problems: These factors include fetal malnutrition, prematurity, hypoxia, viral and other infections, and trauma.

General medical conditions acquired in infancy or childhood: These factors include infections, traumas, and poisoning (e.g., due to lead).

Associated laboratory findings. Other than the results of psychological and adaptive behavior tests that are necessary for the diagnosis of Mental Retardation, there are no laboratory findings that are uniquely associated with Mental Retardation. Diagnostic laboratory findings may be associated with a specific accompanying general medical condition (e.g., chromosomal findings in various genetic conditions, high blood phenylalanine in phenylketonuria, or abnormalities on central nervous system imaging).

Associated physical examination findings and general medical conditions. There are no specific physical features associated with Mental Retardation. When Mental Retardation is part of a specific syndrome, the clinical features of that syndrome will be present (e.g., the physical features of Down syndrome). The more severe the Mental Retardation (especially if it is severe or profound), the greater the likelihood of neurological (e.g., seizures), neuromuscular, visual, auditory, cardiovascular, and other conditions.

Specific Culture, Age, and Gender Features

Care should be taken to ensure that intellectual testing procedures reflect adequate attention to the individual's ethnic, cultural or linguistic background. This is usually accomplished by using tests in which the individual's relevant characteristics are represented in the standardization sample of the test or by employing an examiner who is familiar with aspects of the individual's ethnic or cultural background. Individualized testing is always required to make the diagnosis of Mental Retardation. The prevalence of Mental

Retardation due to known biological factors is similar among children of upper and lower socioeconomic classes, except that certain etiological factors are linked to lower socioeconomic status (e.g., lead poisoning and premature births). In cases in which no specific biological causation can be identified, the Mental Retardation is usually milder (although all degrees of severity are represented) and individuals from lower socioeconomic classes are overrepresented. Developmental considerations should be taken into account in evaluating impairment in adaptive skills because certain of the skill areas are less relevant at different ages (e.g., use of community resources or employment in school-age children). Mental Retardation is more common among males, with a male-to-female ratio of approximately 1.5:1.

Prevalence

The prevalence rate of Mental Retardation has been estimated at approximately 1%. However, different studies have reported different rates depending on definitions used, methods of ascertainment and population studied.

[*47*]

Course

The diagnosis of Mental Retardation requires that the onset of the disorder be before age 18 years. The age and mode of onset depend on the etiology and severity of the Mental Retardation. More severe retardation, especially when associated with a syndrome with a characteristic phenotype, tends to be recognized early (e.g., Down syndrome is usually diagnosed at birth). In contrast, Mild

Retardation of unknown origin is generally noticed later. In more severe retardation resulting from an acquired cause, the intellectual impairment will develop more abruptly (e.g., retardation following an encephalitis). The course of Mental Retardation is influenced by the course of underlying general medical conditions and by environmental factors (e.g., educational and other opportunities, environmental stimulation, and appropriateness of management). If an underlying general medical condition is static, the course is more likely to be variable and to depend on environmental factors. Mental Retardation is not necessarily a lifelong disorder. Individuals who had Mild Mental Retardation earlier in their lives manifested by failure in academic learning tasks may, with appropriate training and opportunities, develop good adaptive skills in other domains and may no longer have the level of impairment required for a diagnosis of Mental Retardation.

Familial Pattern

Because of its heterogeneous etiology, no familial pattern is applicable to Mental Retardation as a general category. The heritability of Mental Retardation is discussed under "Predisposing Factors" (see p. 45).

Differential Diagnosis

The diagnostic criteria for Mental Retardation do not include an exclusion criterion; therefore, the diagnosis should be made whenever the diagnostic criteria are met, regardless of and in addition to the presence of another disorder. In **Learning**

Disorders or **Communication Disorders** (unassociated with Mental Retardation), the development in a specific area (e.g., reading, expressive language) is impaired but there is no generalized impairment in intellectual development and adaptive functioning. A Learning Disorder or Communication Disorder can be diagnosed in an individual with Mental Retardation if the specific deficit is out of proportion to the severity of the Mental Retardation. In **Pervasive Developmental Disorders**, there is qualitative impairment in the development of reciprocal social interaction and in the development of verbal and nonverbal social communication skills. Mental Retardation often accompanies Pervasive Developmental Disorders.

Some cases of Mental Retardation have their onset after a period of normal functioning and may qualify for the additional diagnosis of **dementia**. A diagnosis of dementia requires that the memory impairment and other cognitive deficits represent a significant decline from a previously higher level of functioning. Because it may be difficult to determine the previous level of functioning in very young children, the diagnosis of dementia may not be appropriate until the child is between ages 4 and 6 years. In general, for individuals under age 18 years, the diagnosis of dementia is **[*48*]** made only when the condition is not characterized satisfactorily by the diagnosis of Mental Retardation alone.

Borderline Intellectual Functioning (see p. 740) describes an IQ range that is higher than that for Mental Retardation (generally 71-84). As discussed earlier, an IQ score may involve a mea-

surement error of approximately 5 points, depending on the testing instrument. Thus, it is possible to diagnose Mental Retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for Mental Retardation. Differentiating Mild Mental Retardation from Borderline Intellectual Functioning requires careful consideration of all available information.

Relationship to Other Classifications of Mental Retardation

The classification system of the American Association on Mental Retardation (AAMR) includes the same three criteria (i.e., significantly subaverage intellectual functioning, limitations in adaptive skills, and onset prior to age 18 years). In the AAMR classification, the criterion of significantly subaverage intellectual functioning refers to a standard score of approximately 70-75 or below (which takes into account the potential measurement error of plus or minus 5 points in IQ testing). Furthermore, DSM-IV specifies levels of severity, whereas the AAMR 1992 classification system specifies "Patterns and Intensity of Supports Needed" (i.e., "Intermittent, Limited, Extensive, and Pervasive"), which are not directly comparable with the degrees of severity in DSM-IV. The definition of developmental disabilities in Public Law 95-602 (1978) is not limited to Mental Retardation and is based on functional criteria. This law defines *developmental disability* as a disability attributable to a mental or physical impairment, manifested before age 22 years, likely to continue indefinitely, resulting in substantial lim-

itation in three or more specified areas of functioning, and requiring specific and lifelong or extended care.

[*49*]

Diagnostic criteria for Mental Retardation

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test (for infants, a clinical judgment of significantly subaverage intellectual functioning).

B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

C. The onset is before age 18 years.

Code based on degree of severity reflecting level of intellectual impairment:

317	**Mild Mental Retardation:**	IQ level 50-55 to approximately 70
318.0	**Moderate Mental Retardation:**	IQ level 35-40 to 50-55
318.1	**Severe Mental Retardation:**	IQ level 20-25 to 35-40

318.2	**Profound Mental Retardation:**	IQ level below 20 or 25

319 **Mental Retardation Severity Unspecified:** when there is strong presumption of Mental Retardation but the person's intelligence is untestable by standard tests