No. 11-1158
IN THE SUPREME COURT OF THE UNITED STATES

Ted Herring,
Petitioner,
vs.
Attorney General, State of Florida and
Secretary, Department of Corrections,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX

PAMELA JO BONDI
ATTORNEY GENERAL OF FLORIDA
Carolyn M. Snurkowski
Associate Deputy Attorney General
Kenneth S. Nunnelley*
Senior Assistant Attorney General
Ken.Nunnelley@myfloridalegal.com
Florida Bar No. 998818
Office of the Attorney General
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118
Telephone number (386)238-4990
Counsel for the State of Florida
* Counsel of Record

CAPITAL CASE

QUESTION PRESENTED

Whether this court should exercise its certiorari jurisdiction when there is no federal question, the claim was not raised in the state courts, and there is no split of authority on this fact-specific claim?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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CITATION TO OPINION BELOW

The decision of the Florida Supreme Court which corrected the trial court's refusal to follow Florida law is reported as *State v. Herring*, 76 So. 3d 891 (Fla. 2011). That decision is attached as Resp. Appx. A-1 – A-17. The trial court's order (which the Florida Supreme Court reversed) is attached as Resp. Appx. A-18 – A-51.

JURISDICTION

Herring says that this Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTATUTIONAL AND STATUTORY PROVISIONS INVOLVED

Herring says that the Eighth and Fourteenth Amendments to the Constitution of the United States are involved in this proceeding. He also says that *Florida Rule of Criminal Procedure* 3.203 is involved. In addition, § 921.137 of the *Florida Statutes* is implicated in this case.[1] Those provisions are attached as Resp. Appx. A-52 – A-60.

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[1] Section 921.137 is the statutory "mental retardation as bar to execution" provision that is effectuated through *Florida Rule of Criminal Procedure* 3.203.

RESPONSE TO "STATEMENT OF THE CASE" AND "PRELIMINARY STATEMENT"[2]

On pages 2-9 of the petition, Herring sets out what he calls a "statement of the case" and a "preliminary statement." Both of those "statements" are histrionic and inaccurate, in addition to being replete with references to Herring's unsuccessful Eleventh Circuit proceeding that is irrelevant to any of the issues contained in the petition. The Respondents rely on the following statement of the case, which is taken from the Florida Supreme Court's decision in this case:

> 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*

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[2] Herring's discussion in his "statement of the facts" about the Eleventh Circuit's denial of his motion for leave to file a successive habeas corpus petition is longer than his discussion about the substantive facts of this case as developed in the State courts. The Eleventh Circuit proceedings are completely irrelevant to this petition. The State Court proceedings, which are supposed to be the focus of the petition, are almost wholly ignored. The discussion in footnote 1 which purports to set out a "split among the circuits" on an issue of **federal habeas corpus procedure** has nothing at all to do with this petition. The "argument" in that footnote is, in the context of this petition, frivolous.

3.851. Because the order concerns postconviction 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. [FN1]

> [FN1] 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).

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. [FN2] Herring's petition for federal habeas relief was also denied by the United States District Court for the Middle District of

Florida. [FN3] This is the first time that the question of Herring's status as a person with mental retardation has been raised in any proceeding.

> [FN2] *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).

[FN3] *See Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338 (11th Cir. 2005) (affirming denial of Herring's federal habeas petition).

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.[3] The scores of all four tests fell at or around the range of 70–75. [FN4] 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

[3] Lest there be any confusion, Herring's expert, VanGorp, **conducted no intelligence testing at all with Herring.**

age eighteen.

> [FN4] 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.

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 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, [FN5] 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.

> [FN5] 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.*
>
> **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).

State v. Herring, 76 So. 3d 891, 892-894 (Fla. 2011). (emphasis added).

THE FLORIDA SUPREME COURT DECISION[4]

[4] On pages 4 and 5 of the petition, Herring implies some impropriety by the Florida Supreme Court in not giving him a "new hearing" based on his claim, which the Florida Supreme Court rejected, that a "different standard for finding mental retardation" was used at the hearing from the standard used on appeal. This claim is spurious. Likewise, Herring's complaint, on page 6 of the petition, that no other defendant found mentally retarded by a trial court has had that finding reversed on appeal ignores the reality of this case -- the lower court was reversed because it flatly refused to follow Florida law.

In its decision reversing the trial court's finding that Herring is mentally retarded and therefore ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002), the Florida Supreme Court found as follows:

> 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. [FN6]
>
> [FN6] Section 921.137(1) provides the 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." 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."

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 (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" [FN7]) 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 definition 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.**

[FN7] Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 41–42 (4th ed. 2000).

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.

State v. Herring, 76 So. 3d 891, 894-897 (Fla. 2011). (emphasis added).

REASONS FOR DENYING THE WRIT

PRELIMINARY MATTERS

In *Atkins,* this Court specifically referred to Florida's definition of mental retardation as "generally conform[ing] to the clinical definitions" discussed elsewhere in that opinion. *Atkins v. Virginia*, 536 U.S. 304, 317 n. 22 (2002). Because that is so, the only possible constitutional part of Herring's claim (which can accurately be called the *Atkins* component) was recognized by the Florida legislature's retardation-as-a-bar-to-execution statute which was in place before *Atkins* was decided. That leaves Herring with a bare complaint about Florida's **implementation** of its admittedly valid *Atkins* rule and definition. That issue was squarely left to the States in *Atkins*, and does not present a federal question because it is not an Eighth Amendment claim.

Rule 10 of the *Rules of the Supreme Court of the United States* sets out the considerations that factor into the decision to exercise this Court's certiorari jurisdiction. Herring satisfies none of them. That Rule (in pertinent part) provides:

> PART III. JURISDICTION ON WRIT OF CERTIORARI

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (b) a state court of last resort has decided an important **federal question** in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of **erroneous factual findings** or the misapplication of a properly stated rule of

law.

(emphasis added). Herring satisfies none of those considerations -- there is no federal question, and there is no conflict.

Florida law is settled that, in order for a capital defendant to be considered "mentally retarded" for *Atkins* purposes, the attained, full-scale IQ score must be 70 or below. *Dufour v. State*, 69 So. 3d 235 (Fla. 2011); *Nixon v. State*, 2 So. 3d 137 (Fla. 2009); *Phillips v. State*, 984 So. 2d 503 (Fla. 2008); *Jones v. State*, 966 So. 2d 319 (Fla. 2007); *Cherry v. State*, 959 So.2d 702 (Fla. 2007); *Zack v. State,* 911 So. 2d 1190 (Fla. 2005). The other two components of a diagnosis of mental retardation (adaptive deficits and pre-18-onset) were discussed in *Atkins* but are not at issue here.

The issue in this petition is Herring's claim that Florida's use of a "brightline" cut-off score is unconstitutional under *Atkins*. This claim is, first of all, not a federal claim, but rather a complaint about a state procedure. And, even if it can somehow be federalized in spite of *Atkins*, the claim raised in the petition was never presented to the Florida courts.

There Is No Federal Question, The Claim Was Not Raised In The State Courts, And There Is No Split Of Authority On This Fact-Specific Claim

On pages 10-28 of the petition, Herring says (in various forms) that Florida's **procedure for implementing *Atkins*** is "unconstitutional." For the reasons set out below, that claim does not even present a federal question and, even if some basis for this Court's jurisdiction could be imagined, there is no fact about this case which makes it worthy of the exercise of this Court's certiorari jurisdiction.

There can be no dispute that this Court expressly left the implementation of *Atkins* to the States:

> Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), with regard to insanity, "**we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.**" *Id.*, at 405, 416–417, 106 S.Ct. 2595. [footnote omitted]

Atkins v. Virginia, 536 U.S. 304, 317 (2002). (emphasis added). Despite the pretensions of Herring's petition, the **procedure** for determining whether he is mentally retarded is a matter of Florida law which was not addressed or decided in *Atkins* because it is not a constitutional claim in the first place. As the Eleventh Circuit Court of Appeals described the same state procedural claim:

> It is undisputed that Georgia's statutory definition of mental retardation is consistent with the clinical definitions cited in Atkins. *Compare* O.C.G.A. § 17–7–131(a)(3), with *Atkins*, 536 U.S. at 308 n. 3, 122 S.Ct. at 2245 n. 3. Thus, contrary to the dissents' contentions, this is not a case about the categorical exclusion of the mildly mentally retarded or any other group from the Atkins prohibition. Instead, **it is about Georgia's procedure for determining who is mentally retarded, which is a matter distinct from the Eighth Amendment issue decided in *Atkins.*** *See Atkins*, 536 U.S. at 317, 122 S.Ct. at 2250; *cf. Walker v. True,* 399 F.3d 315, 319 (4th Cir.2005) ("While Walker's claim ultimately derives from his rights under the Eighth Amendment, **whether he is mentally retarded is governed by Virginia**

> law."). **To argue otherwise is to argue that federal courts, not the states, have the responsibility under *Atkins* for promulgating the procedures that will be used to determine mental retardation.**

Hill v. Humphrey, 662 F.3d 1335, 1352 (11th Cir. 2011). (emphasis added). This Court has left no doubt that *Atkins* meant what it said about the States being the ones to implement the Eighth Amendment issue decided in that case:

> Our opinion [in *Atkins*] did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation "will be so impaired as to fall [within *Atkins'* compass]." **We "le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction."** *Id.*, at 317, 122 S.Ct. 2242 (internal quotation marks omitted).

Bobby v. Bies, 556 U.S. 825, 831, 129 S.Ct. 2145, 2150 (2009). (emphasis added). Despite the gloss Herring has attempted to put on his claim, it is not an Eighth Amendment claim at all -- it is a claim that the federal courts are responsible for writing the procedures that the states must use in implementing *Atkins*. That is a state procedural law claim that does not present a

federal question. Because that is so, it is not appropriate for the exercise of this Court's certiorari jurisdiction.

The second reason that certiorari is unjustified is because the "constitutionalized" claims contained in the petition were not fairly presented to, and were not decided by, the Florida Supreme Court. It is true that Herring's answer brief[5] (since he was the appellee) contained a two-page argument about the "unconstitutionality" of a "brightline cut-off score of 70." However, Herring never explained to the Florida Supreme Court why that State procedural rule was (1) unconstitutional in the first place, and (2) fell outside the *Atkins* "implementation left to the States" exclusion. Those same questions remain unanswered in this Court. This claim, as raised in State court, is not the same claim that now consumes the entire petition, and did not suffice to squarely present the current claims to the Florida Supreme Court (assuming the implementation of *Atkins* could ever be elevated to Eighth Amendment status). Because the putative claim in the petition was not squarely presented to the Florida Supreme Court, certiorari is not appropriate.

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[5] The *Answer Brief* is attached at A-61 – A-133.

In the State trial court proceedings, Herring made a passing argument about the "constitutionality" of a "brightline cut-off" score in a response to a notice of supplemental authority filed by the State.[6] Herring never obtained a ruling on that "argument," and the state trial court devoted itself to re-writing the Florida Supreme Court's clearly-established law and procedure on *Atkins* claims. The Florida courts never decided the "constitutional" claim that Herring has tried to create.

Further, on pages 15-23 of the petition, Herring argues a claim that was never raised in the Florida Supreme Court. Specifically, Herring says that it is "unconstitutional" for Florida not to "consider" the "standard error of measure" in connection with attained intelligence test scores. This claim is, at least to some degree, related to the "*Atkins* implementation" claim discussed above. There also seems to be an imperfectly developed "as applied" component to this "claim," but that does not matter. This issue does not

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[6] That notice of supplemental authority directed the trial court's attention to the Florida Supreme Court decision in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), which established, in clear terms, that 70 was the cut-off score. The trial court completely ignored *Cherry*, making no mention of it in the order granting relief that the Florida Supreme Court reversed. *See,* Resp. Appx. A-18 – A-50.

present a federal question because it deals with no more than Florida's implementation of the Eighth Amendment right recognized in *Atkins*, and, in any event, was not raised in the Florida Supreme Court. This Court should decline to issue the writ.

On pages 23-28 of the petition, Herring engages in creative calculations to support his claim that "a majority of states apply the SEM in capital cases," thereby creating a cert-worthy split among jurisdictions. This claim collapses for two reasons. First, *Atkins* left the implementation of the Eighth Amendment protection it established to the States, which is far from a novel concept in this Court's capital jurisprudence. *See Kansas v. Marsh*, 548 U.S. 163, 174, 126 S.Ct. 2516, 2525 (2006) ("So long as a state system satisfies these requirements, our precedents establish that a State enjoys a range of discretion in imposing the death penalty."; *Oregon v. Guzek* 546 U.S. 517, 526, 126 S.Ct. 1226, 1232 (2006) ("[T]he Eighth Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted. Rather, "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'"). The States' implementation of *Atkins* is

constitutionally indistinguishable from the individual States' choice of its method of execution. So long as the procedure (be it *Atkins* or method of execution) is constitutional, the inquiry goes no further. In other words, since Florida has implemented *Atkins* (and had actually done so before that decision), there is no "constitutional" component remaining -- Florida's procedure fully effectuates *Atkins'* Eighth Amendment protection, and, because that is so, it makes no constitutional difference what any other State has chosen to do. *Schriro v. Smith*, 546 U.S. 6, 7, 126 S.Ct. 7, 9 (2005) ("The Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim. *Atkins* stated in clear terms that " 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' " 536 U.S. at 317, 122 S.Ct. 2242 (*quoting Ford v. Wainwright*, 477 U.S. 399, 416-417, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); modifications in original)"; *Moormann v. Schriro*, 672 F.3d 644, 648 (9th Cir. 2012) ("The Supreme Court in *Atkins* did not define mental retardation as a matter of federal law"), *cert. denied, Moormann v.* Ryan, 132 S.Ct. 1656 (2012) (denying stay of execution).

Even if the mechanics of the various State statutes were constitutionally relevant, the

numbers do not help Herring because Florida's statute falls in the majority. In 2005, the Kentucky Supreme Court summarized the state of the law in death penalty jurisdictions as follows:

> Fourteen of the twenty-six **states that presently have statutes** exempting the mentally retarded from the death penalty define the "significantly subaverage intellectual functioning" criterion as either an IQ of 70 or below [FN10] or two or more standard deviations below the mean. [FN11] The two definitions are essentially the same because the mean IQ is 100 and a standard deviation is fifteen on the Wechsler Adult Intelligence Scale (3rd ed.) (WAIS–III) and sixteen on the Stanford–Binet Intelligence Scale (4th ed.), the two norms that are now most frequently used to assess a person's IQ. *Mental Retardation* 59, 61–62 (10th ed. 2002). **In addition, the courts of three states that do not have death penalty exemption statutes have recognized that a person must have an IQ of 70 or below** to qualify for the *Atkins* exemption. *Ex Parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002), *cert. denied Perkins v. Alabama*, 540 U.S. 830, 124 S.Ct. 69, 157 L.Ed.2d 55 (2003); *Murphy v. State*, 54 P.3d 556, 568 (Okla. Crim. App. 2002); *Ex*

Parte Briseno, 135 S.W.3d 1, 14 (Tex. Crim. App. 2004); *cf. Lott*, 779 N.E.2d at 1014 (rebuttable presumption that defendant is not mentally retarded if IQ is above 70).

> [FN10] Del. Code Ann., tit. 11, § 4209(d)(3)(d)(2); Idaho Code § 19–2515A(1)(b); Ky. Rev. Stat. 532.130(2); Md. Code Ann., Crim. Law, § 2–202(b)(1)(i); Neb. Rev. Stat. § 28–105.01(3) (IQ of 70 or below presumptive evidence of mental retardation); N.M. Stat. Ann. § 31–20A–2.1(A) (same); N.C. Gen. Stat. § 15A–2005(a)(1)(c); S.D. Codified Laws § 23A–27A–26.2 (IQ exceeding 70 presumptive evidence of absence of mental retardation); Tenn. Code Ann. § 39–13–203(a)(1); Wash. Rev. Code § 10.95.030(2)(c).
>
> [FN11] Conn. Gen. Stat. § 1–1g(b); Fla. Stat. Ann. § 921.137(1); Kan. Stat. Ann. §§ 21–4623(e) & 76–12b01(i) Va. Code Ann. § 19.2–264.3:1.1(A).

Bowling v. Commonwealth, 163 S.W.3d 361, 373-374 (Ky.), *cert. denied, Bowling v. Kentucky*, 546 U.S. 1017 (2005). Arizona and Arkansas are

properly added to that number. *Hill v. Humphrey*, 662 F.3d 1335, 1352 n. 18 (11th Cir. 2011). What Herring has ignored is that 18 capital punishment states have chosen to implement *Atkins* by requiring a full-scale IQ score of less than 70 as one of the components of a diagnosis of retardation. Connecticut (which the Kentucky court included) and Illinois (which *Hill* counted) no longer have capital punishment statutes, but still represent two (2) additional States that implemented *Atkins* in a similar way. Taking Herring's claim in the petition as accurate, he has identified **no more than** twelve (12) states which,[7] according to him, "consider" the standard error of measure in making the *Atkins* mental retardation determination. That is clearly less than a majority, even without delving into the nuances of the various States' procedures, which are likely not as cut-and-dried

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[7] For example, in the petition, Herring cites *In re Hawthorne*, 105 P.3d 552 (Cal. 2005) as approving the "standard error of measure." The issue in that case was whether, under California's particular statute, the **defendant got a hearing at all**, not whether he was, in fact, mentally retarded. Likewise, *Commonwealth v. Miller*, 888 A.2d 624 (Pa. 2005) was decided at a time when Pennsylvania had no definition of mental retardation in place, a fact which the Court noted. *See Id.,* at 633 n. 11. The State has counted California and Pennsylvania among the 12, even though those states should probably not be included in Herring's total.

as Herring implies, a fact which does no more than emphasize that the states have done what this Court said to do in *Atkins* -- implement the Eighth Amendment prohibition on execution of persons with mental retardation. There is no "split of authority" which would justify the exercise of this Court's certiorari jurisdiction.

Finally, this Court should decline to exercise its certiorari jurisdiction because, in order to examine the specific issue in this case, it would be necessary for this Court to engage in a fact-intensive review. That is inappropriate for certiorari review. The law is well-settled that this Court does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984). This Court is "consistent in not granting the certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties." *Rice v. Sioux City Memorial Park Cemetery, Inc.* 349 U.S. 70 (1955). *See also Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction). Herring's claim is no more than a fact-specific issue of Florida law that contains no federal question, even if Herring is given the benefit of the doubt and proper

presentation of the claim to the Florida Courts is assumed. The petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL OF FLORIDA

_____

Carolyn M. Snurkowski
Associate Deputy Attorney General
Kenneth S. Nunnelley*
Senior Assistant Attorney General
Ken.Nunnelley@myfloridalegal.com
Florida Bar No. 998818
Office of the Attorney General
444 Seabreeze Blvd.., Suite 500
Daytona Beach, Florida 32118
Telephone number (386)238-4990
Counsel for the State of Florida
*Counsel of Record

No. 11-1158
IN THE UNITED STATES SUPREME COURT

Ted Herring,
Petitioner,
vs.
Attorney General, State of Florida and
Secretary, Department of Corrections,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

APPENDIX TO BRIEF IN OPPOSITION BY RESPONDENT STATE OF FLORIDA

PAMELA JO BONDI
ATTORNEY GENERAL OF FLORIDA
Carolyn M. Snurkowski
Associate Deputy Attorney General
Kenneth S. Nunnelley*
Senior Assistant Attorney General
Ken.Nunnelley@myfloridalegal.com
Florida Bar No. 998818
Office of the Attorney General
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118
Telephone number (386)238-4990
Counsel for the State of Florida
* Counsel of Record

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Supreme Court of Florida.

STATE of Florida, Appellant,
v.
Ted HERRING, Appellee.

No. SC09–2200.
Oct. 6, 2011.
Rehearing Denied Dec. 20, 2011.

*892 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 postconviction 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.[FN1]

> FN1. 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).

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.[FN2] Herring's petition*893 for federal habeas relief was also denied by the United States District Court for the Middle District of Florida. [FN3] This is the first time that the question of Herring's status as a person with mental retardation has been raised in any proceeding.

FN2. *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).

FN3. *See Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338 (11th Cir.2005) (affirming denial of Herring's federal habeas petition).

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 scores of all four tests fell at or around the range of 70–75.[FN4] 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.

> FN4. 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.

The State argues that the circuit court's holding that Herring was mentally retarded is wrong as a matter of law because it ***894** ignores this Court's precedent requiring a defendant to demonstrate 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,[FN5] 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.*

> FN5. 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.*

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. FN6

> FN6. Section 921.137(1) provides the 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." 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."

*895 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 (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."); ***896** *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*897 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" [FN7]) 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 definition 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.

> FN7. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 41–42 (4th ed. 2000).

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 Procedure 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.

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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-Or1-18KRS, slip op. (M.D. Fla. Apr. 14, 2003).

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 Psychology, 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 significant 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]

[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

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 observations, and the following additional considerations:

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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 nonadverserial 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.

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 expressl 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 factfinding procedures aspire to a heightened standard of reliability. This especial concern 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 particularly 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

[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.)

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) (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]

[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.

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.)

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).);

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).);

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.);

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 interview 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

[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.)

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 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 conviction 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. Iindeed, 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
Circuit Judge

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

921.137. Imposition of the death sentence upon a defendant with mental retardation prohibited

(1) As used in this section, 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 section, 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. The term "adaptive behavior," for the purpose of this definition, 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. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

(2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation.

(3) A defendant charged with a capital felony who intends to raise mental retardation as a bar to

the death sentence must give notice of such intention in accordance with the rules of court governing notices of intent to offer expert testimony regarding mental health mitigation during the penalty phase of a capital trial.

(4) After a defendant who has given notice of his or her intention to raise mental retardation as a bar to the death sentence is convicted of a capital felony and an advisory jury has returned a recommended sentence of death, the defendant may file a motion to determine whether the defendant has mental retardation. Upon receipt of the motion, the court shall appoint two experts in the field of mental retardation who shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing. Notwithstanding s. 921.141 or s. 921.142, the final sentencing hearing shall be held without a jury. At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has mental retardation. If the court finds, by clear and convincing evidence, that the defendant has mental retardation as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.

(5) If a defendant waives his or her right to a recommended sentence by an advisory jury following a plea of guilt or nolo contendere to a capital felony and adjudication of guilt by the court, or following a jury finding of guilt of a capital felony, upon acceptance of the waiver by the court, a defendant who has given notice as required in subsection (3) may file a motion for a determination of mental retardation. Upon granting the motion, the court shall proceed as provided in subsection (4).

(6) If, following a recommendation by an advisory jury that the defendant be sentenced to life imprisonment, the state intends to request the court to order that the defendant be sentenced to death, the state must inform the defendant of such request if the defendant has notified the court of his or her intent to raise mental retardation as a bar to the death sentence. After receipt of the notice from the state, the defendant may file a motion requesting a determination by the court of whether the defendant has mental retardation. Upon granting the motion, the court shall proceed as provided in subsection (4).

(7) The state may appeal, pursuant to s. 924.07, a determination of mental retardation made under subsection (4).

(8) This section does not apply to a defendant who was sentenced to death prior to the effective date of this act.

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 defendant's 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.

(c) Motion for Determination of Mental Retardation as a Bar to Execution: Contents; Procedures.

(1) A defendant who intends to raise mental retardation as a bar to execution shall file a written motion to establish mental retardation as a bar to execution with the court.

(2) The motion shall state that the defendant is mentally retarded and, if the defendant has been tested, evaluated, or examined by one or more experts, the names and addresses of the experts. Copies of reports containing the opinions of any experts named in the motion shall be attached to the motion. The court shall appoint an expert chosen by the state attorney if the state attorney so requests. The expert shall promptly test, evaluate, or examine the defendant and shall submit a written report of any findings to the parties and the court.

(3) If the defendant has not been tested, evaluated, or examined by one or more experts, the motion shall state that fact and the court shall appoint two experts who shall promptly test, evaluate, or examine the defendant and shall submit a written report of any findings to the parties and the court.

(4) Attorneys for the state and defendant may be present at the examinations conducted by court-appointed experts.

(5) If the defendant refuses to be examined or fully cooperate with the court appointed experts

or the state's expert, the court may, in the court's discretion:

(A) order the defense to allow the court-appointed experts to review all mental health reports, tests, and evaluations by the defendant's expert;

(B) prohibit the defense experts from testifying concerning any tests, evaluations, or examinations of the defendant regarding the defendant's mental retardation; or

(C) order such relief as the court determines to be appropriate.

(d) Time for filing Motion for Determination of Mental Retardation as a Bar to Execution. The motion for a determination of mental retardation as a bar to execution shall be filed not later than 90 days prior to trial, or at such time as is ordered by the court.

(e) Hearing on Motion to Determine Mental Retardation. The circuit court shall conduct an evidentiary hearing on the motion for a determination of mental retardation. At the hearing, the court shall consider the findings of the experts and all other evidence on the issue of whether the defendant is mentally retarded. The court shall enter a written order prohibiting the imposition of the death penalty and setting forth

the court's specific findings in support of the court's determination if the court finds that the defendant is mentally retarded as defined in subdivision (b) of this rule. The court shall stay the proceedings for 30 days from the date of rendition of the order prohibiting the death penalty or, if a motion for rehearing is filed, for 30 days following the rendition of the order denying rehearing, to allow the state the opportunity to appeal the order. If the court determines that the defendant has not established mental retardation, the court shall enter a written order setting forth the court's specific findings in support of the court's determination.

(f) Waiver. A claim authorized under this rule is waived if not filed in accord with the time requirements for filing set out in this rule, unless good cause is shown for the failure to comply with the time requirements.

(g) Finding of Mental Retardation; Order to Proceed. If, after the evidence presented, the court is of the opinion that the defendant is mentally retarded, the court shall order the case to proceed without the death penalty as an issue.

(h) Appeal. An appeal may be taken by the state if the court enters an order finding that the defendant is mentally retarded, which will stay further proceedings in the trial court until a

decision on appeal is rendered. Appeals are to proceed according to Florida Rule of Appellate Procedure 9.140(c).

(i) Motion to Establish Mental Retardation as a Bar to Execution; Stay of Execution. The filing of a motion to establish mental retardation as a bar to execution shall not stay further proceedings without a separate order staying execution.

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2200

STATE OF FLORIDA,
Appellant,
v.
TED HERRING,
Appellee.
_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE TED HERRING

Alan S. Goudiss
Adam S. Hakki
Itzhak Shukrie
Christopher W. Greer
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, New York 10022
Telephone: (212) 848-4000
Facsimile: (212) 848-7179

Jon M. Wilson
Florida Bar No. 0139892
John R. Hamilton
Florida Bar No. 0774103

FOLEY & LARDNER LLP
111 N. Orange Ave., Ste. 1800
Post Office Box 2193
Orlando, Florida 32080
Telephone: (407) 423-7656
Facsimile: (407) 648-1743

Leon H. Handley
Florida Bar No. 0033418
Rumberger Kirk & Caldwell, P.A.
300 South Orange Avenue, Suite 1400
Orlando, Florida 32801-3380
Telephone: (407) 872-7300
Facsimile: (407) 649-4941
Attorneys for Appellee Ted Herring

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STATEMENT OF THE CASE

On November 23, 2009, the Circuit Court entered an order vacating appellee Ted Herring's sentence of death on the ground that he is a person with mental retardation and thus exempt from execution under Atkins v. Virginia, 536 U.S. 304 (2002). The circuit court, after conducting an evidentiary hearing, found that Herring satisfied all of the criteria for mental retardation by clear and convincing evidence. This is the State of Florida's appeal from that decision.[1]

The circuit court's order was supported by competent, substantial evidence of mental retardation, including a voluminous record and the testimony of three expert witnesses. The State's appellate brief ("App. Br.") principally asks this Court to re-weigh the evidence and "second-guess" the circuit court's factual findings. That is not permitted. Florida law requires deference to the circuit court's factual findings and that all doubts be resolved in Herring's favor.

The State also argues that the circuit court applied a standard for determining mental

[1] As explained in Herring's accompanying motion to dismiss, the State has no right to appeal the circuit court's decision and thus this Court has no jurisdiction over this appeal. This Answer Brief assumes, arguendo, that the court has jurisdiction.

retardation that was inconsistent with Florida law. The circuit court, in fact, applied the standard for determining mental retardation (the DSM-IV-TR) that the State specifically requested and agreed upon. The State therefore waived any right to appeal the application of that standard.

Even assuming the State were not barred from challenging the standard upon which it agreed, the circuit court's determination of mental retardation fully satisfied Florida law. Moreover, reinstatement of Herring's death sentence would violate the U.S. Constitution and applicable Florida law. This Court should affirm.[2]

STATEMENT OF FACTS

A. The Conviction, Sentencing, And Procedural History

On May 29, 1981, a convenience store clerk in Daytona Beach, Florida was shot and killed during a robbery. On June 12, 1981, Herring (who was 19 years old) was arrested and gave a taped confession to these crimes. Herring v. State, 446 So. 2d 1049 (Fla. 1984). Herring was

[2] The State asserts that this appeal should be decided without oral argument. Herring has requested oral argument. Oral argument clearly is appropriate where, as here, the State asks this Court to set aside the circuit court's evidentiary determination of mental retardation and reinstate a vacated death sentence.

then tried and convicted for armed robbery and first degree murder. The circuit judge sentenced him to death, finding four aggravating and two mitigating circumstances. Id. at 1052-53. This was more than 20 years before the U.S. Supreme Court decided Atkins, and the issue of Herring's mental retardation was not addressed at trial or sentencing.

Herring filed an unsuccessful appeal, as well as a series of ultimately unsuccessful motions and petitions for relief from his sentence.[3] Mental retardation was not litigated in any of these proceedings (all of which commenced pre-Atkins), and no court addressed Herring's mental retardation prior to the decision now on appeal. B. The Circuit Court's Decision Vacating Herring's Death Sentence After Atkins was decided, Herring timely filed a motion to vacate his death sentence pursuant to sections 3.850 and 3.851 of the Florida Code of Criminal

[3] See Herring v. State, 446 So. 2d 1049 (Fla. 1984); 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, 138 (Fla. 1991); Teffeteller v. Dugger, 676 So. 2d. 369 (Fla. 1996); Herring v. State, 730 So. 2d 1264 (1998); Herring v. O'Neal, No. 6:99-cv-1413-Orl-18KRS (M.D. Fla. Apr. 14, 2003), aff'd sub nom. Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338 (11th Cir. 2005), cert. denied, 546 U.S. 928 (2005); Herring v. Crosby, 862 So. 2d 727 (Fla. 2003), cert. denied, 541 U.S. 1042 (2004).

Procedure. The motion argued that Herring's death sentence violated the Eighth and Fourteenth Amendments of the U.S. Constitution under Atkins because Herring has mental retardation. The circuit court held an evidentiary hearing on November 2 and 3, 2005. After the hearing and extensive briefing, the circuit court vacated Herring's death sentence, finding that he had proven mental retardation by clear and convincing evidence. (R. vol. 19 at 2984.) The State's appeal followed.

1. The Evidentiary Hearing

Three witnesses – all experts – were called at the hearing. Various exhibits, including psychological and intelligence testing results, school and medical records, psychological records, records from prior proceedings, and scholarly texts were received into evidence. Herring called Dr. van Gorp, a licensed neurospsychologist and Professor of Clinical Psychology, Columbia University College of Physicians and Surgeons. (R. vol. 19 at 2978.) The State called Drs. Pritchard and McClaren, both clinical psychologists in forensic private practice. The circuit court found all three qualified to opine on mental retardation. (Id.) Neither the State nor Herring challenged the qualification of any of these witnesses to testify as experts or objected to the admissibility of their opinions.

The experts based their opinions on in-person evaluations of Herring, structured interviews of his relatives, intelligence and adaptive functioning testing, and medical, psychological, and scholastic records. (Id.) Dr. van Gorp opined that Herring satisfies the criteria for mental retardation. (Id. (citation omitted).) The State's experts disagreed (id.), but one of them admitted on cross-examination that Herring is "in that uncertain area" where "you can be mentally retarded," and that "reasonable people could differ as to whether Ted [i]s mentally retarded." (R. vol. 19 at 2989; R. vol. 4 at 525.)

2. The Substantive Standard Applied By The Circuit Court

Atkins "categorically prohibits the execution of persons with mental retardation." (R. vol. 19 at 2978); 536 U.S. at 321. Atkins states that the "clinically accepted definition of mental retardation requires 'not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.'" (R. vol. 19 at 2978); 536 U.S. at 318. Atkins relied expressly on the "American Psychiatric Association's definition of mental retardation as set forth in the DSM-IV-TR." (R. vol. 19 at 2979); Atkins, 536 U.S. at 309 n.3, 317 n.22, and Gould v. State, 745

So. 2d 354 (Fla. 4th DCA 1999) (describing DSM-IV-TR as "widely accepted" in the psychological community).

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).

(R. vol. 19 at 2979; R. vol. 10 at 1527.)

The DSM-IV-TR definitions of "significantly subaverage general intellectual functioning" and "significant limitations in adaptive functioning" are, as the circuit court stated, 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.

> 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.

(R. vol. 19 at 2979-80 (emphasis added); R. vol. 10 at 1527-28.)

As the circuit court stated, "subsequent to the filing of Herring's motion for relief under Atkins., the Supreme Court of Florida adopted Florida Rule of Criminal Procedure 3.203," which defines mental retardation as follows:

> "[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.

(R. vol. 19 at 2980 (emphasis added) (quoting Fla. R. Crim P. 3.203(b)).) The circuit court found that Rule 3.203(b) is "essentially identical to the leading clinical standard; i.e., the standard set forth in the DSM-IV-TR." (Id.) Significantly, the State's "prehearing memorand[um] assert[ed] 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." (R. vol. 19 at 2980-81 (emphasis added) (citing R. vol. 8 at 1093; R. vol. 10 at 1473-74).)

3. The Parties Agreed That The DSM-IV-TR Governs

The State and Herring agreed repeatedly – both during and after the evidentiary hearing – that the DSM-IV-TR definition of mental retardation would govern Herring's motion. In its "Proposed Final Order Denying Defendant's Successor Motion for Capital Post Conviction Relief," submitted to the circuit court after the evidentiary hearing, the State memorialized that agreement in the clearest of words:

> The parties have agreed that the DSM-IV-TR definition of mental retardation is the one that should govern this Court's decision here, and is in fact, the definition of mental retardation that this Court will apply.

(R. vol. 19 at 2857 (emphasis added).) The State's proposed order stated further that the "DSM-IV-TR is generally accepted within the psychological community as authoritative, and the definition of mental retardation therein is functionally identical to the definition of mental retardation contained in Fla. R. Crim. P. 3.203 and in § 921.137 of the Florida Statutes." (R. vol. 19 at 2856-57 (emphasis added).)

The proposed order also memorialized the State's request that the circuit court apply the "plain language of the DSM-IV-TR," and the State's acknowledgment that the DSM-IV-TR "recognizes" that a "reported Full-scale IQ score actually represents a range of plus/minus 5 points." (R. vol. 19 at 2857, 2878 (emphasis added).) That "range," of course, is the 5-point standard measurement error documented in the DSM-IV-TR, acknowledged by all experts in this case, relied on by the circuit court, and which serves as the basis for the DSM-IV-TR's explicit proscription that mental retardation properly can be diagnosed in a person with a measured IQ

score between 70 and 75, where significant deficits in adaptive functioning are also observed.

Similarly, the first thing the State put on the record at the evidentiary hearing was the parties' agreement that the DSM-IV-TR would govern:

> MR. NUNNELLEY [for the State]: . . . . I think we have a couple of things we need to make sure that we are clear on before we begin. There does not seem to be any real disagreement between the parties that we are using the DSM IV TR diagnostic and statistical manual, 4th edition text revision definition of mental retardation If I am incorrect in that understanding, I'm sure counsel will correct me.
>
> . . .
>
> MR. EPSTEIN [for Herring]: Your Honor, I certainly agree with Mr. Nunnelley's first point. We do agree to the DSM-IV as the governing standard and we intend to rely on it.[4]

[4] Attorney Jeremy G. Epstein, of the Shearman & Sterling law firm and a former prosecutor, acted as lead counsel for Herring, pro bono, in his post-conviction proceedings,

(R. vol. 3 at 262-63 (emphasis added).)

Herring relied on the State's agreement in presenting his evidence and arguments to the circuit court. The circuit court relied, too. Yet, the State's appellate brief fails even to acknowledge its agreement that the DSM-IV-TR would govern. It appears the State is trying to renege on its agreement (memorialized in written and oral statements to the circuit court), so that it is free to argue, as it has in its appellate brief, that the circuit court "ignored" controlling precedent on the standard for mental retardation by applying the DSM-IV-TR.

4. The Burden Of Proof Applied By The Circuit Court

The circuit court determined that "Herring bears the burden of proving his mental retardation." (R. vol. 19 at 2981.) Herring contended below that, if he bears the burden, the appropriate standard is proof by a preponderance of the evidence. (Id.) The State contended that the standard is clear and convincing evidence.

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including at the evidentiary hearing and multiple appearances in this Court, for more than 25 years. Mr. Epstein passed away in July 2009, a few months before Herring's death sentence was finally vacated.

(Id.)[5] The circuit court, relying on authority from this Court and other jurisdictions, concluded that a preponderance of the evidence is the proper standard, and that requiring clear and convincing evidence would be unconstitutional. (R. vol. 19 at 2981-84.) The issue was moot, however, because the circuit court determined that Herring proved mental retardation by both a preponderance of the evidence and clear and convincing evidence. (R. vol. 19 at 2984.)

5. The Circuit Court's Finding Of Mental Retardation

The circuit court found that Herring "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." (R. vol. 19 at 2984.) The circuit court based its conclusion "on the totality of the evidentiary record" and found that "Dr. van Gorp's testimony [was] particularly credible and compelling." (R. vol. 19 at 2984.)

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[5] Section 921.137(4), Florida Statutes, requires clear and convincing evidence to establish mental retardation, but by its express terms it does not apply to persons – such as Herring – sentenced after July 12, 2001.

a. Evidence Of Significantly Subaverage Intellectual Functioning

Significantly subaverage general intellectual functioning is the first of three criteria required for a finding of mental retardation. The expert witnesses agreed that "general intellectual functioning is determined through the administration of a standardized, individually administered intelligence test." (R. vol. 19 at 2985; R. vol. 3 at 302-03, 418-19.)

The circuit court stated (quoting the source) that the DSM-IV-TR – which the parties agreed would govern Herring's motion – "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 [as a result] 'it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.'" (R. vol. 19 at 2985 (quoting R. vol. 10 at 1527-28).) Significantly, the circuit court made the factual finding that "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." (R. vol. 19 at 2985 (emphasis added); R. vol. 3 at 325-26; R. vol. 4 at 494.)

Records of four IQ tests administered to Herring were submitted as evidence during the Evidentiary Hearing. (R. vol. 19 at 2985.) The first was a November 23, 1976 administration of the Wechsler Intelligence Scale for Children – Revised ("WISC-R"), which was administered when Herring was fifteen years old. (R. vol. 19 at 2985; R. vol. 10 at 1563.) His score was 72. (R. vol. 19 at 2985.) The second 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. (R. vol. 19 at 2985; R. vol. 10 at 1573-86.) Herring scored a 74. (Id.)

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"); (b) the WISC-R was, when administered to Herring, an improved and very recently re-normed version of Wechsler 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. (R. vol. 19 at 2986 (citations omitted).) As the circuit court noted, Dr. McClaren, testifying for the State, did not

disagree. (R. vol. 19 at 2986) (citing R. vol. 4 at 499, 501-02).)

Two other IQ tests were received into evidence. The first was a June 30, 1972 examination, when Herring was only 10 years old. (R. vol. 19 at 2986; R. vol. 10 at 1552-59.) Herring's score was 83. The second was a January 21, 1974 administration of the same test. Herring's score was 81. (R. vol. 19 at 2986; R. vol. 10 at 1560.) Dr. van Gorp explained in his testimony that both of these scores); were subject to the "Flynn" effect, and thus reflected artificially inflated measurements of Herring's intelligence. (R. vol. 19 at 2986-87; R. vol. 3 at 315-20.) Based on this testimony – and the absence of dissent from the State's experts, both of whom essentially acknowledged the legitimacy of the Flynn effect – the circuit court made the factual finding that these scores were inflated and unreliable:

> 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.

(R. vol. 19 at 2987; R. vol. 3 at 315-17; R. vol. 10 at 1539-51.) The circuit court found that Dr. van Gorp properly "applied the .311 point per year Flynn adjustment to each of the four IQ tests administered to Herring." (R. vol. 19 at 2987.)

The "WISC" exam, on which Herring scored an 83 and 81 in 1972 and 1974, respectively, was published in 1949, and normed against the 1949 population. Herring took the exam almost 25 years after it was published and, after applying the Flynn adjustment, his scores on those exams were found by Dr. van Gorp (and the circuit court) to be approximately 76 and 74 respectively. Herring's score of 72 on the WISC-R in 1976 did not require significant adjustment because it was published approximately two years before he took the test. His score of 74 on the WAIS-III in 2004 required a Flynn-adjustment to approximately 72 because it was published approximately seven years before he took the test. (R. vol. 19 at 2987; R. vol. 3 at 317-24.)

Accordingly, the circuit court made the factual finding that all of Herring's scores, after accounting for the Flynn effect, were "at or around the range of 70-75 and thus consistent with a diagnosis of mental retardation." (R. vol.

19 at 2987.) Significantly, the State's experts acknowledged the existence of the Flynn effect and offered no rebuttal to Dr. van Gorp's application of the Flynn effect to Herring's test scores. (Id.) 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. (R. vol. 19 at 2987-88; R. vol. 3 at 449-50.) Similarly, Dr. McClaren testified that the "Flynn effect exists and that's why tests are periodically renormed." (R. vol. 19 at 2988; R. vol. 4 at 516.)

Thus, applying the DSM-IV-TR, which the State expressly and repeatedly agreed would be the standard governing Herring's motion, and also applying Florida Rule of Criminal Procedure 3.203, which the State repeatedly agreed was "functionally identical" to the DSM-IV-TR, the circuit court found that Herring satisfied the first criterion for mental retardation by clear and convincing evidence.

b. Evidence Of Significant Limitations In Adaptive Functioning

The second criterion for mental retardation is significant limitations in adaptive functioning. 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.'" (R. vol. 19 at 2990; R. vol. 10 at 1528.)

The circuit court found the record to be "replete with evidence that Herring satisfies [the adaptive functioning] criterion." (R. vol. 19 at 2990.) The circuit court filled nearly six pages of its decision documenting the overwhelming evidence that – throughout his life – Herring has had significant limitations in adaptive functioning. (R. vol. 19 at 2990-96.)

The evidence relied on by the circuit court included tests of past and present adaptive functioning administered by the State's experts, extensive citation to the testimony of the experts, the fact that Herring was reading at the 3.7 grade level and doing math at the 5.7 grade level when he was 15 years old (the DSM-IV-TR provides that mentally retarded persons "can acquire academic skills up to approximately the sixth-grade level" by their "late teens"), testimony from Dr. McClaren, the State's expert, that Herring's academic testing results were "consistent" with mental retardation, the fact that Herring's school records said he "could not adjust to the classroom situation," the fact that, at age 12, Herring was found by a psychiatrist to be "undoubtedly functionally retarded," the fact

that 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." (R. vol. 19 at 2992, 2993 (citations omitted) (emphasis added).)

c. Evidence Of Onset Before The Age Of 18

"Onset of the condition prior to the age of 18 is the third and final criterion for a diagnosis of mental retardation." (R. vol. 19 at 2996.) The circuit court concluded that there did "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," and that "a substantial percentage of the evidence in this case concerns Herring's intellectual and adaptive functioning prior to the age of 18." (R. vol. 19 at 2996.) Accordingly, the circuit court concluded that Herring satisfied the third criterion for mental retardation by clear and convincing evidence. (Id.)

SUMMARY OF ARGUMENT

Herring answers the State's appeal with three basic arguments.

First, the circuit court's finding of mental retardation clearly was supported by competent, substantial evidence. The circuit court relied on an extensive documentary record and the

testimony of three expert witnesses. The State is seeking to re-litigate the circuit court's factual findings of mental retardation by asking this Court to re-weigh the evidence and re-assess expert witness opinions and credibility. That is impermissible under Florida law, which gives great deference to the circuit court's factual finding of mental retardation.

Second, to the extent the State claims that the circuit court's application of the DSM-IV-TR violated Florida law, the State is barred from making that argument. The State agreed on the record and in writing that the DSM-IV-TR would govern Herring's motion to vacate his death sentence. Where, as here, a party agrees upon a standard of decision, it waives any right to challenge that standard on appeal.

Third, even if the circuit court's decision were not supported by competent, substantial evidence, and even if the State were not barred from appealing the standard applied by the circuit court, reinstating Herring's death sentence would violate the U.S. Constitution and Florida law.

ARGUMENT

I.

THE CIRCUIT COURT'S DETERMINATION OF MENTAL RETARDATION WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE

For the reasons set forth in Herring's accompanying motion to dismiss this appeal, the State has no right to appeal the circuit court's order vacating his death sentence. This brief assumes, arguendo, that this Court has jurisdiction over the appeal. The standard of review governing "a determination of mental retardation [is] . . . whether competent, substantial evidence supports the circuit court's determination." Burns v. State, 944 So. 2d 234, 247 (Fla. 2006) (rejecting de novo standard) (citing Trotter v. State, 932 So. 2d 1045, 1049 (Fla. 2006)); Nixon v. State, 2 So. 3d 137, 141 (Fla. 2009) ("When reviewing mental retardation determinations, we must decide whether competent, substantial evidence supports the trial court's findings.") (citing Cherry v. State, 959 So. 2d 702, 712 (Fla. 2007)).

Accordingly, the circuit court's determination that Herring has mental retardation need only have been supported by competent, substantial evidence. This Court does "not 'reweigh the evidence or second-guess the

circuit court's findings as to the credibility of witnesses.'" Nixon, 2 So. 3d at 141 (quoting Brown v. State, 959 So. 2d 146, 149 (Fla. 2007)). Nor does this Court "substitute [its] judgment" for that of the circuit court in assessing the evidence of mental retardation. Cherry, 959 So. 2d at 705. Furthermore, "all conflicts in the evidence and all reasonable inferences therefrom [must be] resolved in favor of the [decision] on appeal." Brown, 959 So. 2d at 149.

A. The Circuit Court's Determination Of Mental Retardation Was Based On Competent, Substantial Evidence

The circuit court set forth its determination of mental retardation in a detailed decision painstakingly supported by the record. (R. vol. 19 at 2976-97.) Pages 10 through 16 of the Statement of Facts, supra, discuss in detail the evidentiary bases for the circuit court's findings on the three criteria for mental retardation.

B. The State Impermissibly Asks This Court To Re-weigh The Evidence And Second-Guess The Circuit Court's Evaluation Of Testimony And Credibility

The State did not challenge the competency of any evidence in the circuit court. It attacked the weight of the evidence and what conclusions

should be drawn from the voluminous record and detailed expert testimony. In the end, the State's own expert, Dr. McClaren, testified that in his view the question of whether Herring is mentally retarded is in an "uncertain area," "up for honest debate," and that "reasonable people could differ as to whether Ted [is] mentally retarded." (R. vol. 4 at 525.)

The circuit court resolved this "debate" in Herring's favor, finding that he had demonstrated mental retardation by clear and convincing evidence. The State has not identified a single case where this Court has reversed a trial court's factual finding of mental retardation. Where, as here, the circuit court's determination of mental retardation was grounded in an extensive record and in a comprehensive evaluation of evidence, the Court does not re-weigh the evidence or reassess the credibility of witnesses. See Phillips v. State, 984 So. 2d 503, 510 (Fla. 2008) ("[W]e give deference to the court's evaluation of the expert opinions.").

1. The State's Arguments Regarding Witness Credibility Should Be Disregarded

The State offers various arguments concerning expert witness credibility. As noted, however, the law is clear that credibility determinations are left to the sound judgment of the circuit court. For example, the State

complains that Dr. van Gorp, Herring's expert witness, evaluated Herring in a way that differed from "how he would conduct an evaluation for mental retardation in his private practice." (App. Br. at 5.) The State argues that this "should diminish the reliability and weight given to Dr. van Gorp's ultimate conclusions in this case." (Id.) Similarly, the State argues that some of Dr. van Gorp's testimony "strongly suggests" (at least to the State) that his evaluation of Herring "was not a neutral and objective one." (Id. at 6 n.4.) But these were credibility determinations for the circuit court to make.[6] Likewise, the State's argument that its experts' testimony was more reliable than Dr. van Gorp's because the State's experts may have conducted more mental retardation assessments during their careers (see, e.g., App. Br. at 29) is yet another credibility argument that the State cannot re-litigate on appeal.[7]

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[6] In point of fact, the circuit court found that Dr. van Gorp's "testimony [was] particularly credible and compelling," and that Dr. van Gorp has "extensive credentials and accomplishments in the field of psychology." (R. vol. 19 at 2984.)

[7] The State argues that Dr. van Gorp's opinions may be of questionable "reliability" purportedly because "significant intelligence testing results were withheld" from him. (App. Br. at 30.) This is an evidentiary weight and credibility argument. It is also inaccurate, as the circuit court held. The circuit court made a factual finding that the supposedly omitted testing data (the actual results of

2. The State's Request For A Re-Weighing Of The Evidence Is Impermissible

a. The Intellectual Functioning Evidence Should Not Be Re- Weighed

The State's brief notes that Herring, as a child, was "truant a great deal," and that his supposed lack of scholastic motivation artificially depressed his performance on IQ tests. (App. Br. at 5.) This is a classic attempt to re-litigate the weight of a particular item of evidence. Even worse, the State fails to acknowledge that its own expert admitted that he had "'absolutely no basis to dispute'" Herring's effort level on the 1976 IQ test where Herring scored a 72, and that the high level of effort noted in writing by the professional who administered the test actually "increase[d] the validity [and] reliability of a test." (R. vol. 19 at 2986; R. vol. 4 at 502.) The fact that the State's arguments and citations to the record are contradicted by other parts of the record is a good example of why the determination of mental retardation, so long as it appears to be based on competent, substantial evidence, is left to the sound judgment of the circuit court. See Burns v.

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which the State did not offer into evidence and no party or expert witness had even seen) deserve "no weight," and that "[t]o the extent [they are] given any weight, [they are] not inconsistent with a diagnosis of mental retardation." (R. vol. 19 at 2988.)

State, 944 So. 2d 234, 247 (Fla. 2006) (circuit court has "'superior vantage point in assessing the credibility of witnesses and in making findings of fact'") (citation omitted).

The State argues throughout its brief that the circuit court gave too little weight to the State's experts' testimony concerning the "split" between Herring's verbal and performance scale scores on his IQ tests. (App. Br. at 4-5, 6-11, 31-32.) This argument plainly goes to the weight of the evidence and the circuit court's evaluation of expert opinions. See Jones v. State, 966 So. 2d 319, 327 (Fla. 2007) ("With regard to expert opinion, however, the court has discretion to accept or reject such testimony."). The argument is also inconsistent with Florida law and the DSM-IV-TR, both of which determine intellectual functioning based on a full scale score, not its sub-components.

Next, the State criticizes the circuit court for giving too much weight to Dr. van Gorp's testimony concerning the "Flynn effect" in assessing Herring's various scores on IQ tests. (App. Br. at 33.) This, too, is an impermissible attack on the circuit court's evaluation of expert testimony. The Flynn effect, as previously discussed, artificially inflates IQ scores when a person takes a version of an IQ test that was normed based on people's intelligence many years earlier. (See supra at 13.) The undisputed

evidence was that on both IQ tests where Herring scored above the low seventies, the versions of the tests he took were several decades old, giving rise to the maximum inflationary effect. In any event, both parties made a variety of arguments and evidentiary submissions asserting that Herring's measured IQ scores were not reflective of his true intelligence. Herring cited the Flynn effect as inflating his scores. The State cited the "splits" in the components of Herring's scores as evidence that his full-scale scores were misleadingly high. It was a classic "battle of the experts," and after weighing the evidence and appraising the experts' opinions, the court found mental retardation. The State is not entitled to repeat that process in this Court. Merck v. State, 975 So. 2d 1054, 1065 (Fla. 2007) ("When experts disagree, the trier of fact is entitled to resolve the resulting factual issue").

There are additional problems with the State's arguments concerning the Flynn effect. First, the State never sought to exclude evidence of the Flynn effect on the ground that it is not generally accepted.[8] Second the State's own experts acknowledged the legitimacy of the Flynn effect and agreed that it artificially inflates IQ scores. Dr. Pritchard testified that the Flynn

[8] According to the State's appellate brief, "this Court need not address the general acceptance of the Flynn effect in this case." (App. Br. 34.)

effect was "'not a hypothetical phenomenon'" but rather a "'measured phenomenon'" that could elevate test scores if the "'test is 20 years old'" when administered, which was the case with at least two of Herring's IQ scores. (R. vol. 19 at 2987-88.) Similarly, Dr. McClaren testified that the "'Flynn effect exists and that's why tests are periodically renormed.'" (R. vol. 19 at 2988; R. vol. 4 at 516); see also Thomas v. Allen, 607 F.3d 749, 757-58 (11th Cir. 2010) (rejecting State of Alabama's challenge to the application of Flynn effect in appeal from lower court finding of mental retardation and finding that "all the experts acknowledged that the Flynn effect is a statistically-proven phenomenon" and that "we cannot say that the district court clearly erred in applying it" where the lower court "considered the Flynn effect just as it considered the other evidence in the record").

Third, as the circuit court noted, the State's experts "did not offer any specific rebuttal to Dr. van Gorp's application of the Flynn effect to Herring's test scores." (R. vol. 19 at 2987.) There simply is no evidentiary basis to challenge the circuit court's factual findings concerning the impact of the Flynn effect on Herring's IQ scores, and, even if there were contrary evidence, the circuit court's finding would be entitled to deference. See Jones, 966 So. 2d at 327 (in deciding mental retardation, circuit court can apply its discretion to determine which expert's

testimony to accept concerning diagnostic standards).

b. The Adaptive Functioning Evidence Should Not Be Re- Weighed

The State does not genuinely dispute the validity of the circuit court's findings concerning the second criterion for mental retardation – significant limitations in adaptive functioning. Nor could it. As noted, 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.'" (R. vol. 19 at 2990 (quoting Hr'g Ex. 3 at 49).) The circuit court made extensive findings as to Herring's adaptive deficits, citing myriad sources in the record. (R. vol. 19 at 2990-96.)

Nevertheless, the State claims the circuit court erred by "refus[ing] to recognize that the rule and statute require that the adaptive deficits exist concurrently with the IQ deficiency." (App. Br. at 36.) The State relies principally on this court's decisions in Phillips v. State, 984 So. 2d 503 (Fla. 2008), and Jones v. State, 966 So. 2d 319 (Fla. 2007), in support of this argument.[9] In Jones, the court held that significant deficits in

[9] Both decisions were issued after the evidentiary hearing.

adaptive functioning must begin before the age of 18, exist "concurrently" (i.e., at the same time), and persist through the present. 966 So. 2d at 326.

The State does not dispute that Herring had the requisite significant deficits in adaptive functioning prior to the age of 18. The circuit court found the record "replete" with such evidence. This evidence is summarized at pages 15 through 16, supra.

In addition, there can be no dispute that, consistent with Jones the circuit court relied on competent, substantial evidence that Herring's adaptive deficits continued into adulthood and through the present. For example, the circuit court cited Dr. van Gorp's expert testimony that, when interviewed 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," and has never supported himself financially, paid rent, or maintained a credit card or bank account. (R. vol. 19 at 2993; R. vol. 3 at 347-48.) Moreover, Dr. McClaren, the State's expert, administered the SIB-R test of adaptive functioning to Herring shortly before the evidentiary hearing. The result of the test was a score of 49, a result several standard

deviations below the mean.[10] (R. vol. 19 at 2993; R. vol. 4 at 527-31.)

Thus, the State's insistence that the circuit court "refused" to address present adaptive functioning (App. Br. at 36) is simply incorrect. The circuit court expressly addressed the State's argument and found that "there is substantial evidence, including Dr. van Gorp's findings and the results of the SIB-R test administered by Dr. McClaren, [of] Herring's present functioning." (R. vol. 19 at 2995.)[11]

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[10] Unable to dispute that the SIB-R was a test of present adaptive functioning, the State argues that the score is too low to be relied upon. But the circuit court addressed this factual assertion and rejected it: "[w]hile 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 . . . the score nonetheless is supportive of the conclusion that Herring has significant limitations in adaptive functioning." (R. vol. 19 at 2993.) Nor did Dr. McClaren state that Herring was malingering or otherwise trying to do poorly on the test.

[11] The circuit court did observe that a prisoner on death row has less ordinary life responsibilities than a person living outside of prison, and that the use of the word "present" in diagnostic manuals (which was adopted essentially verbatim by the applicable statutes and rules) appears to contemplate an ordinary life setting, not prison. (R. vol. 19 at 2995-96.) As noted, however, the circuit court found present and substantial adaptive deficits based on multiple sources of record evidence in any event.

In addition, consistent with Jones, the circuit court clearly found that Herring's adaptive deficits existed concurrently with his significantly subaverage intellectual functioning. Jones found that "concurrent" means "'operating or occurring at the same time.'" 966 So. 2d at 326 (quoting Merriam-Webster's Collegiate Dictionary 239 (10th ed. 2001)). With respect to intellectual functioning, the circuit court expressly relied upon IQ tests administered to Herring from the 1970s through the present in finding significantly subaverage intellectual functioning. (R. vol. 19 at 2985-90.) The circuit court found significant deficits in Herring's adaptive functioning that were "concurrent" with his significantly subaverage intellectual functioning: the record evidence of Herring's adaptive deficits spanned from his childhood through the present. (See supra at 15-16.)

The circuit court in Jones appears to have found no significant deficits in present adaptive functioning. To the contrary, it found that Mr. Jones understood his medical problems and medication, "self-administer[ed]" his medication on a schedule, suggested to his doctors "changes in [his] diet or medication," successfully "manage[d] the finances of his inmate account," followed up on money transfers, had "strong" "intellectual skills," "traveled alone" as a young adult, and "supported himself through various jobs." 966 So. 2d at 328 (emphasis added).

Furthermore, Jones' school record included evidence that he was a "good student," who was in "regular classes and earned good grades." Id.

The facts here are essentially the opposite of those in Jones. As noted, the circuit court's determination of significant deficits in adaptive functioning included Herring's dreadful academic record and inability to function anywhere near his class level, his placement in special schools and a recommendation that he be transferred to a school for the mentally retarded, his history of never maintaining personal finances or prolonged employment, his failure to live independently, and his inability to successfully transfer buses en route to Florida. (See supra at 15-16; see also R. vol. 19 at 2990-96.)

In Phillips, the defense expert did not consider present adaptive functioning and instead relied exclusively on a retrospective analysis. 984 So. 2d at 511. The circuit court's finding of no mental retardation in Phillips was supported by "substantial evidence that Phillips [did] not suffer from deficiencies in adaptive functioning" at all. Id. Phillips was able to support himself financially, worked as a short-order cook, an "unusually high level" job for someone with mental retardation, paid the bills for his entire household, and purchased a new car for his mother. See id. As with Jones, the evidentiary record on adaptive functioning in

Phillips is essentially the opposite of Herring's record.

This Court also cited in Phillips the defendant's careful planning of his crime and sophisticated efforts to evade conviction as evidence of his lack of retardation. The Court observed that Phillips studied the patterns of his victim, carefully hid evidence, declined to be interviewed by the police when apprehended, and attempted to silence witnesses. 984 So. 2d at 512. This Court found that Phillips' acts of "self-preservation indicate that he has the ability to adapt to his surroundings." Id.

Herring behaved in the opposite fashion. He gave a taped confession of his crime, and then (despite the tape being played for the jury) took the stand and told the ludicrous story that, while he was committing the robbery in question, a second person coincidentally came in to rob the store and shot the clerk. (R. vol. 19 at 2994-95.) To say the least, it is difficult to see how a non-mentally retarded person would have expected the jury to believe that story. And the consequences of Herring's mental retardation were dire: Herring's original trial judge stated at sentencing that Herring's decision to tell this "preposterous story" "doomed the Defendant not

only as to conviction but as to sentence as well." (Id. (emphasis in original).)[12]

Making matters worse, as the circuit court noted in vacating Herring's death sentence, his trial counsel eventually testified that, based on discussions with the State and trial judge, Herring actually would have received a life sentence had he pleaded guilty, but that Herring ignored the advice of his counsel and proceeded to trial despite insurmountable evidence of guilt. (R. vol. 19 at 2995.) Consistent with Phillips, the circuit court (and Herring's expert) examined Herring's post-arrest behavior and found it to be further evidence of his mental retardation. (Id.) This also was consistent with Atkins itself, where the U.S. Supreme Court stated that one reason for excluding persons with mental retardation from execution is the enhanced "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" 536 U.S. at 320 (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

[12] Giving false testimony, of course, is not an aggravating circumstance for purposes of capital sentencing under Florida law. The trial judge's acknowledgement that false testimony earned Herring a death sentence, coupled with the fact that Herring's mental retardation caused him to provide that testimony, reflect just how far out of bounds Herring's death sentence was.

c. The Age Of Onset Evidence Should Not Be Re-Weighed

The State argues that Herring failed to satisfy the "onset before age 18" requirement for mental retardation because, according to the State, Herring was never formally diagnosed with mental retardation before he turned 18. (App. Br. at 38.) This argument misstates the facts and law.

The State's argument appears to be that mental retardation must actually have been diagnosed before the defendant turned 18 in order for him to be protected under Atkins. That is not the law, and the State cites no case supporting this purported requirement. As discussed previously, the circuit court relied on IQ test scores and detailed evidence of adaptive deficits from Herring's childhood through the present. (See supra at 10-16.) In fact, the circuit court found that a "substantial percentage of the evidence in this case concerns Herring's intellectual and adaptive functioning prior to the age of 18" and that "[t]here 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." (R. vol. 19 at 2996.) The State also ignores the fact that, as a child, Herring was diagnosed as "undoubtedly functionally retarded," and recommended for

transfer to a school for the "mildly mentally retarded." (See supra at 15-16.)

d. There Are No Judicial Findings That Herring Does Not Have Mental Retardation

The State argues that "Herring has never before claimed that he suffers from mental retardation," and that "this court and the federal courts have explicitly found to the contrary in the context of ineffectiveness of counsel claims." (App. Br. at 1.) It is correct that Herring first challenged his sentence on the ground of mental retardation after the Supreme Court decided Atkins. That challenge, which was timely and successful, is the subject of this appeal.

It is thus unclear why the State suggests that there are prior judicial findings that Herring is not mentally retarded. None of the purported prior "findings" are quoted or even cited in the State's brief. Nevertheless, at page 29 of its brief, the State asserts, without citation, that the "sentencing Court found, in mitigation, not that Herring was mentally retarded, but that he had a learning disability." The State fails to point out that Herring's sentencing decision, rendered decades before Atkins was decided, did not address and makes no mention of mental retardation, and that no experts or mental health professionals testified or submitted reports at the sentencing. Similarly, the State's suggestion

(again without citation) at page 29 of its brief that this Court and the U.S. Court of Appeals for the Eleventh Circuit made "prior rulings" that Herring is not mentally retarded is incorrect. There are no such factual findings. There was no litigation of mental retardation in any of Herring's appeals. Indeed, Herring never even retained an expert until the present motion was filed.[13]

II.

THE CIRCUIT COURT APPLIED THE PROPER STANDARD FOR DETERMINING MENTAL RETARDATION

The State argues that the circuit court "completely failed to follow this Court's precedent which requires an IQ score of less than 70 before a defendant is considered mentally retarded for Atkins purposes." (App. Br. at 14.) The State is incorrect. First, there can be no dispute that the circuit court applied the standard for determining mental retardation that the parties agreed would govern: the DSM-IV-TR. (See supra at 7-9.) As such, the State is barred from arguing

[13] The State's one-sentence suggestion, without citation to any legal authority, that mental retardation "appears to be an issue that is collaterally estopped" (App. Br. at 29) is thus baseless. Nor does collateral estoppel appear to be an argument the State is actually pursuing on appeal.

on appeal that the circuit court erred by applying the DSM-IV-TR. Second the circuit court, in any event, applied a standard for determining mental retardation that is consistent with Florida Rule of Criminal Procedure 3.203 and not inconsistent with this Court's precedent.

A. The Circuit Court Applied The Standard The Parties Agreed To, And The State Is Barred From Challenging It

1. The State Agreed That The DSM-IV-TR Governs

Section B.3 of this brief, which appears at pages 7 through 9, sets forth the State's express agreement that the DSM-IV-TR standard for determining mental retardation would govern Herring's motion.

In summary, the State began the evidentiary hearing by stating to the circuit court – on the record – that "we need to make sure we are clear" that "we are using the DSM-IV TR diagnostic and statistical manual, 4th edition text revision definition of mental retardation." (R. vol. 3 at 262 (emphasis added).) Immediately thereafter, and also on the record, Herring's counsel confirmed that "[w]e do agree to the DSM-IV as the governing standard and we intend to rely on it." (Id. at 263 (emphasis added).) The parties then proceeded with the

hearing with the DSM-IV-TR serving as the governing standard. After the evidentiary hearing, and after the experts on both sides extensively relied on and discussed all relevant aspects of the DSM-IV-TR, the State submitted a proposed final order denying Herring's motion. The State's order again confirmed that the "parties have agreed that the DSM-IV-TR definition of mental retardation is the one that should govern this Court's decision here, and is in fact, the definition of mental retardation that this Court will apply." (R. vol. 19 at 2857 (emphasis added).)

2. The Circuit Court Properly Applied The DSM-IV-TR

As noted, the DSM-IV-TR states that the first criterion and "'essential feature of Mental Retardation is significantly subaverage general intellectual functioning.'" (R. vol. 19 at 2979; R. vol. 10 at 1527.) The DSM-IV-TR goes on to explain that "[g]eneral intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent)," and that "[s]ignificantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean)." (R. vol. 19 at 2979; R. vol. 10 at 1527 (second emphasis added).) Importantly, the DSM-IV-TR also states that:

> It should be noted that there is a measurement error of approximately 5 points in assessing IQ . . . . Thus, it is possible to diagnose Mental Retardation in individuals with IQ's between 70 and 75 who exhibit significant deficits in adaptive behavior.

(R. vol. 10 at 1523.) This is the standard the State agreed to and the standard the circuit court applied.

There is no dispute between the parties that, because of the standard measurement error of five points inherent in all accepted IQ tests, the DSM-IV-TR permits a finding of mental retardation in persons with measured IQ scores between 70 and 75 where, as here, significant deficits in adaptive functioning have been found. The State acknowledged this in its proposed final order, stating that the DSM-IV-TR "recognizes" that a "reported Full-scale IQ score actually represents a range of plus/minus 5 points." (R. vol. 19 at 2879.) The State's expert witness, Dr. McClaren, similarly acknowledged that the DSM-IV-TR permits a mental retardation finding in persons with measured IQ scores between 70 and 75. (R. vol. 4 at 494.)

The circuit court made the factual finding that Herring's IQ scores "are at or around the

range of 70-75 and thus consistent with a diagnosis of mental retardation." (R. vol. 19 at 2987.) More specifically, the circuit court made a factual finding that:

> Based on the evidence presented at the hearing, the Court finds that Herring satisfies the first criterion for mental retardation . . . . 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 [two other] 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 [of 81 and 83] are more reflecting of scores of approximately 75.[14]

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[14] In multiple instances, the State's brief asserts that "the lower court found that Herring's IQ was 'approximately 75.'" (App. Br. at 2.) As the quotations above make clear, the State is mistaken. The circuit court found that Herring's measured IQ scores were "at or around the range of 70-75." (R. vol. 19 at 2987.) The words "approximately 75" refer to Herring's two scores that the circuit court determined were inflated by the Flynn effect, once adjusted. The State does not cite any legal authority for the proposition that all IQ scores must be equally low to permit a diagnosis of mental retardation. See Thomas, 607 F.3d at 757 (rejecting proposition that a score of 77 "automatically defeat[ed] an Atkins claim when the

(R. vol. 19 at 2988.)

In the end, the State's proposed final order urged the circuit court to apply the "plain language of the DSM-IV-TR." (R. vol. 19 at 2857.) That is precisely what the circuit court did, including the DSM-IV-TR's plain words that "it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior." Drawing all inferences in favor of affirmance as required, the circuit court's findings were amply supported by competent, substantial evidence. [15]

3. The State Waived Any Argument That The Circuit Court Applied A Standard For Determining Mental Retardation That Violated Florida Law

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totality of the evidence (scores) indicate[d] that a capital offender suffer[ed] subaverage intellectual functioning").

[15] To the extent the State's proposed order, where it stated its agreement that the DSM-IV-TR "should govern" and "will apply," includes contentions that may have been inconsistent with certain aspects of the DSM-IV-TR, those contentions should be disregarded on appeal. The State agreed to the application of the DSM-IV-TR without equivocation or conditions. It cannot self-servingly excise out selected portions of the DSM-IV-TR that support the circuit court's finding of mental retardation.

Having agreed that the DSM-IV-TR would govern Herring's motion, the State cannot argue on appeal that the circuit court violated Florida law by applying the DSM-IV-TR. It is well settled that a party that submits to the court a proposed standard of decision "'may not be heard to urge, on appeal'" that it was "error" to apply that standard. See, e.g., Diamond Regal Dev., Inc. v. Matinnaz Constr., Inc., 1 So. 3d 1104, 1106 n.1 (Fla. 1st DCA 2009) (citation omitted); see also Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990) ("Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal."); Norton v. State, 709 So. 2d 87, 94 (Fla. 1997) ("[A] party may not invite error during the trial and then attempt to raise that error on appeal."); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983) (applying invited error doctrine in appeal in capital case). "It is 'a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party.'" U.S. v. Ross, 131 F.3d 970, 988 (11th Cir. 1997); see also Calloway v. State, 37 So. 3d 891, 893 (Fla. 1st DCA 2010) (where a party "[o]n two separate occasions" "acquiesced and agreed to the use" of an allegedly erroneous legal standard, "the error was invited and cannot result in reversal").

The State did far more than just "acquiesce" in the circuit court's application of the DSM-IV-TR. Rather, the State stipulated on the

record that the DSM-IV-TR would govern. Likewise, in its proposed final order, the State affirmatively urged that the DSM-IV-TR "should govern" and "will apply." (See supra at 7-9.) This Court has squarely held that where, as here, a party enters into a "stipulation" or agreement, it must live with that agreement and is deemed to have "waived any claim of error" arising therefrom. Terry v. State, 668 So. 2d 954, 963 (Fla. 1996); see also Myrick v. Gillard Grove Serv., 577 So. 2d 655, 656 (1st DCA 1991) (stipulated matters cannot be undone on appeal).[16]

By agreeing to the application of the DSM-IV-TR, the State waived the right to argue on appeal that the circuit court erred by applying that standard. This, of course, includes the State's waiver of any objection to the court applying the DSM-IV-TR's express language that "it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who

[16] Although the doctrine of invited error and the authorities cited above are the most applicable, the State's attempted "U-turn" with respect to the DSM-IV-TR is also barred by principles of estoppel. See Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061, 1066 (Fla. 2001); see also Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278, 281 n.1 (5th Cir. 1999) (stating that judicial estoppel applies to hold a party to its prior stipulation).

exhibit significant deficits in adaptive behavior."[17]

B. The Standard For Mental Retardation Applied By The Circuit Court Is Consistent With Florida Law.

The Court need not reach the State's argument that the substantive standard for determining mental retardation applied by the circuit court violated Florida law. As explained in the preceding section, the circuit court undisputedly applied a standard agreed upon by the State, and the State is thus precluded from challenging that standard on appeal. But even if

[17] Courts have consistently held that where, as here, the government on appeal challenges a standard it agreed to on the ground that the standard set a higher bar for the government than the law actually required, the government has been held to the standard to which it agreed. See U.S. v. Taylor, 933 F.2d 307, 310 (5th Cir. 1991) (requiring government to prove element not required by applicable law where government had consented to the inclusion of that element in jury instructions); see also U.S. v. Torres-Villalobos, 487 F.3d 607, 611 n.1 (8th Cir. 2007) (requiring government to prove two elements in conjunction with each other that were actually disjunctive under the applicable statute where the government failed to object to jury instruction that required conjunctive proof). Similarly, the State should be bound to its agreement to apply the DSM-IV-TR even if the Court finds that the DSM-IV-TR is more favorable to Herring's position than the otherwise applicable Florida law.

the State's arguments were not precluded, its arguments fail because the circuit court applied a standard consistent with Florida law.

First, the State itself asserted repeatedly that the standard applied by the circuit court – the DSM-IV-TR – is "functionally identical" to the standards provided under Florida law. The State's proposed final order stated:

> The DSM-IV-TR is generally accepted within the psychological community as authoritative, and the definition of mental retardation therein is functionally identical to the definition of mental retardation contained in Fla. R. Crim. P. 3.203 and in § 921.137 of the Florida Statutes.

(R. vol. 19 at 2856-57 (emphasis added).) The State made the same statement in its pre-hearing memorandum in connection with the evidentiary hearing. (R. vol. 10 at 1473.) The circuit court relied on these representations and included them in its decision. (R. vol. 19 at 2980-81.) Obviously, applying the DSM-IV-TR cannot violate Florida law if the DSM-IV-TR is "functionally identical" to Florida law. To the extent the State now claims otherwise, the argument was waived when it agreed below that the tests were functionally identical. Norton, 709

So. 2d at 94; Pope, 441 So. 2d at 1076; *Terry v. State,* 668 So. 2d at 962.

Second, even if the State did not waive the argument that applying the DSM-IV-TR violated Florida law, its arguments are without merit. The definitions of mental retardation in the DSM-IV-TR and Florida Rule of Criminal Procedure 3.203(b) are effectively the same. The DSM-IV-TR speaks of an IQ score "approximately 2 standard deviations below the mean" on a "standardized, individually administered intelligence test[]." (R. vol. 19 at 2979; R. vol. 10 at 1527.) Rule 3.203(b) requires "performance that is two or more standard deviations from the mean score on a standardized intelligence test." (R. vol. 19 at 2980); Fla. R. Crim. P. 3.203(b).

The DSM-IV-TR mentions the 5-point standard error of measurement (and the consequent possibility that someone who scores between 70 and 75 is mentally retarded). (R. vol. 10 at 1527-28.) Rule 3.203(b) does not make that explicit, but it did not need to do so. Rule 3.203(b) does not use the number "70." It references standard deviations from the mean (which is a statistical concept) on a "standardized intelligence test." There is no dispute – and the experts below agreed – that the tests administered to Herring include a standard error of measurement (also a statistical concept) of 5 points, plus or minus. (R. vol. 19 at 2985; R. vol. 3

at 325-26; R. vol. 4 at 494.) The standard error of measurement is an inherent and essential feature of the tests, as recognized in a decision quoted with approval by this Court. See Cherry v. State, 959 So. 2d 702, 712 (Fla. 2007) ("[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.") (citing unpublished lower court opinion) (emphasis added).

For example, if the Florida State University men's basketball team adopted a rule that its varsity players must be able to make 7 out of 10 free throws on a "standardized basketball court" to join the team, it would not be necessary for the rule to specify that this means shooting from a line 15 feet from the basket. The 5-point standard of error is an inherent part of a standardized intelligence test, just as a 15-foot free-throw line is an inherent part of a regulation basketball court. Herring is not asking the Court to read unwritten words into Rule 3.203. Herring is merely asking the Court to give the words "standardized intelligence test" their ordinary meaning by including the standard error of measurement. Cherry, 959 So. 2d at 713 (the "statute's plain and ordinary meaning must control") (quoting Daniels v. Fla. Dep't of Health, 898 So. 2d 61, 64-65 (Fla. 2005) (emphasis added)); see also Thomas, 607 F.3d at 753 ("[T]he

SEM [standard error of measurement] is a statistical measure that allows the evaluator to know the amount of error that could be present in any test.") (emphasis added).

Thus, the circuit court determined correctly, with the assistance of experts (as well as in reliance on the State's admission that the standards are "functionally identical"), that Florida Rule of Criminal Procedure 3.203 and the DSM-IV-TR are "essentially identical." (R. vol. 19 at 2980-81.) Accordingly, the standard applied by the circuit court did not violate Florida law. Third, the State's reliance on this Court's decisions in Cherry v. State, 959 So. 2d 702 (Fla. 2007); Nixon v. State, 2 So. 3d 137 (Fla. 2009); Phillips v. State, 984 So. 2d 503 (Fla. 2008); Zack v. State, 911 So. 2d 1190 (2005), and Jones v. State, 966 So. 2d 319 (Fla. 2007), is misplaced. The most obvious distinguishing feature of Herring's case is the State's agreement that the DSM-IV-TR would govern. That agreement renders moot the State's reliance on these cases, and the "bright-line" cutoff of 70 they supposedly require.

The other fundamental difference is that the cases on which the State relies involved a lower court's factual finding that the appellant did not have mental retardation. Fundamentally, the appellate decisions were not about the legal standard. The central focus was whether the

appellants' IQ scores and other evidence were sufficiently compelling to warrant reversal of the trial courts' factual findings as to mental retardation. And, while it is true that this Court has, at times, pointed to an IQ score of 70 as a "cutoff" of sorts, it generally has done so in rejecting challenges to a factual finding that the appellant was not mentally retarded. Here, the circuit court made a factual finding that Herring has mental retardation based on the totality of the evidence. As such, the accepted rule (which benefits the State's position in most appeals), of drawing all inferences in the lower court's favor and requiring only competent, substantial evidence, should lead to an affirmance of the circuit court's order.

The circuit court's analysis in this case was consistent with the language cited in Cherry that "the +/-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." 959 So. 2d 702 at 712 (citation omitted). Contrary to the implication of the State's arguments, the circuit court did not reach any sweeping legal conclusion that persons with IQ's between 70 and 75 are exempt from the death penalty. It merely "logically considered" the standard error of measurement as one of many factors supporting a finding of mental retardation.

The circuit court's decision relied on, among other things, prior findings that Herring was "undoubtedly functionally retarded" and belonged in a school for the mentally retarded, the fact that Herring scored below 70 on all tests of adaptive functioning, the dramatic manifestation of Herring's mental retardation during his trial, which, in the words of the sentencing court, "doomed" him to a death sentence, and the testimony of Dr. McClaren, the State's expert, that Herring's mental retardation was "up for debate" and in an "uncertain area" where he could be mentally retarded. (See supra at 4.) This constellation of factors, and the circuit court's consequent finding of mental retardation, clearly distinguish this case from the cases relied on by the State.

The circuit court did not "ignore" the law. It made a multi-layered factual finding of mental retardation based on competent, substantial evidence finding is entitled to deference and every supporting inference. It should be affirmed.[18]

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[18] The State asserts that "Herring's death sentence should be reinstated." (App. Br. at 39.) As is crystal clear from the record, the parties and the circuit court proceeded with the evidentiary hearing on the agreement and understanding that DSM-IV-TR governed. If, as the State contends, the circuit court erred in applying the DSM-IV-TR, and if the State did not waive that purported error by agreeing to the

III.

THE STATE'S ARGUMENTS, IF ACCEPTED, WOULD VIOLATE HERRING'S CONSTITUTIONAL RIGHTS

The State's arguments, if accepted, would violate Herring's rights under the U.S. Constitution, including, but not limited to the Fifth, Eighth, and Fourteenth Amendments, and their equivalents under Florida's Constitution. For all of the reasons stated herein, the Court need not reach these constitutional issues to affirm the circuit court's order.

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application of the DSM-IV-TR, the appropriate remedy would not be reinstatement of Herring's death sentence. The appropriate remedy would be remand, so that the circuit court could hold an evidentiary hearing under the standard this court dictates. See Smith v. State, 866 So. 2d 51, 67 (Fla. 2004) (reversing and remanding for trial court to re-sentence defendant where trial court had applied the wrong standard to impose the death sentence). Particularly in a capital case involving the testimony of experts, there is no basis for the State's demand that this Court engage in an independent fact-finding exercise to determine that Herring is not mentally retarded. In any event, none of this should happen given that the circuit court applied the standard the State agreed upon and relied on competent, substantial evidence to vacate Herring's death sentence.

A. Bright-Line IQ Score Cutoff Of 70 Is Unconstitutional

Applying a bright-line cutoff of 70 for a determination of mental retardation would violate Herring's rights under the Eighth, Fifth, and Fourteenth Amendments of the U.S. Constitution and their equivalents under the Florida Constitution. To the extent Sections 916.106 and 921.937, Florida Statutes, Florida Rule of Criminal Procedure 3.203, or this Court's precedent require an IQ score of 70 or below (or are interpreted to so require for a finding of mental retardation), they are unconstitutional.

In Atkins, the U.S. Supreme Court held that executing persons with mental retardation violates the Eighth Amendment. 536 U.S. at 321. Atkins directed the states to adopt standards for determining mental retardation that "generally conform[] to the clinical definitions." Id. at 317 n.22. The clinical definitions Atkins recognized were the DSM-IV-TR and the American Association of Mental Retardation's publication, Mental Retardation: Definition, Classification and Systems Supports (10th ed. 2002). Id.

A strict IQ score cutoff of 70 violates and is not consistent with these clinical standards because it ignores, among other things, (1) the standard error of measurement inherent in IQ tests, (2) the fact that an IQ score constitutes

only a range of intelligence, (3) the DSM-IV-TR's directive that persons with an IQ score of 70 to 75 properly can be diagnosed with mental retardation, (4) the approximate nature of IQ scores, (5) the "Flynn" effect, (6) the "practice effect," (7) testing error, and other clinically accepted factors affecting IQ scores. Put simply, a bright-line cutoff of 70 unconstitutionally permits the execution of persons with mental retardation and this violates Atkins.[19]

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[19] See generally Foster v. State, 929 So. 2d 524, 532 (Fla. 2006) (accepting IQ score above 70 as evidence of mental retardation); Johnston v. State, 960 So. 2d 757, 760 (Fla. 2006) (recognizing IQ score as a range); Webb v. Florida Dep't of Children & Family Servs., 939 So. 2d 1182, 1184 (Fla. 4th DCA 2006) (recognizing standard error of measurement); Thomas v. Allen, 607 F.3d 749, 757-58 (11th Cir. 2010) (recognizing standard error of measurement and Flynn effect); Lynch v. State, 951 So. 2d 549, 557 (Miss. 2007) (scores between 70 and 75 can be sufficient for mental retardation); U.S. v. Davis, 611 F. Supp. 2d 472 (D. Md. 2009) (same); In re Hawthorne, 105 P.3d 552 (Cal. 2005) (rejecting "IQ of 70 as upper limit"); Ex parte Briseno, 135 S.W.3d 1, 7 n.24 (Tex. Crim. App. 2004) (same); Cooper v. State, 739 So. 2d 82, 88-89 (Fla. 1999) (vacating death sentence where there was evidence of mental retardation notwithstanding IQ test scores of 77 and 82); People v. Super. Ct., 155 P.3d 259 (Cal. 2007) (rejecting bright-line IQ cutoff); Chase v. State, 873 So. 2d 1013, 1028 (Miss. 2004) (recognizing possibility of mental retardation in persons with IQ scores "of up to 75"); see also Ford v. Wainwright, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability.")

Furthermore, the diverging interpretations of Atkins by different courts in different states, including in the interpretation of substantively identical statutes, evidences both an Eighth Amendment violation (Florida's strict cutoff of 70 is "unusual" and not clinically accepted) and an Equal Protection constitutional violation. Cf. Kennedy v. Louisiana, 128 S. Ct. 2641, 2665 (2008) ("arbitrary and capricious application" of death penalty is not permissible).

B. Requirement Of Present Adaptive Deficits In A Person Incarcerated Is Unconstitutional

The State argues that the circuit court erred in finding mental retardation because Herring failed to demonstrate that he presently suffers from significant deficits in adaptive functioning. (App. Br. at 36-38.) The State relies on Jones, where the Court held that significant deficits in adaptive functioning must persist through the date of examination by the experts in the case. 966 So. 2d at 326. As explained previously, Herring satisfies Jones because there was competent, substantial evidence of both past and present adaptive deficits.

Herring respectfully submits that the requirement of present adaptive deficits. as applied to incarcerated persons violates the Fifth, Eighth, and Fourteenth Amendments because, as

the circuit court observed, "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." (R. vol. 19 at 2995.) Insofar as the State's arguments and/or the Jones decision erect a standard for proving adaptive deficits that would be unduly burdensome or even impossible for an incarcerated person to satisfy, they violate Atkins and are unconstitutional. Retrospective examinations of a defendant's history of adaptive functioning should be sufficient grounds to establish mental retardation.

C. Requiring Proof Of Mental Retardation By Clear And Convincing Evidence Is Unconstitutional

The State argues that Herring was required to prove mental retardation by clear and convincing evidence. The circuit court found this standard of proof to be unconstitutional, but also found that Herring had proven mental retardation by clear and convincing evidence in any event. (R. vol. 19 at 2981-84.) Thus, the Court need not reach this issue.

Requiring clear and convincing evidence of mental retardation is, in fact, unconstitutional. See Cooper v. Oklahoma, 517 U.S. 348, 363 (1996) (requiring proof of incompetence by clear

and convincing evidence is unconstitutional); see also Pruitt v. State, 834 N.E.2d 90, 101 (Ind. 2005) (rejecting clear and convincing evidence standard for determining mental retardation).

CONCLUSION

For the foregoing reasons, the circuit court's order should be affirmed.

Respectfully submitted,

/s/

Alan S. Goudiss
Adam S. Hakki
Itzhak Shukrie
Christopher W. Greer
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, New York 10022
Telephone: (212) 848-4000
Facsimile: (212) 848-7179

Jon M. Wilson
Florida Bar No. 1039892
John R. Hamilton
Florida Bar No. 0774103
FOLEY & LARDNER LLP
111 N. Orange Ave., Ste. 1800
Post Office Box 2193
Orlando, Florida 32080
Telephone: (407) 423-7656

Facsimile: (407) 648-1743

Leon H. Handley
Florida Bar No. 0033418
Rumberger Kirk & Caldwell, P.A.
300 South Orange Avenue, Suite 1400
Orlando, Florida 32801-3380
Telephone: (407) 872-7300
Facsimile: (407) 649-4941

Attorneys for Appellee Ted Herring

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail this 12th day of October, 2010, to: Kenneth S. Nunnelley, Esq., Senior Assistant Attorney, counsel for the appellant, at 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118.

/s/

Alan S. Goudiss
Adam S. Hakki
Itzhak Shukrie
Christopher W. Greer
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, New York 10022
Telephone: (212) 848-4000

Facsimile: (212) 848-7179

Leon H. Handley
Florida Bar No. 0033418
Rumberger Kirk & Caldwell, P.A.
300 South Orange Avenue, Suite 1400
Orlando, Florida 32801-3380
Telephone: (407) 872-7300
Facsimile: (407) 649-4941

Jon M. Wilson
Florida Bar No. 1039892
John R. Hamilton
Florida Bar No. 0774103
FOLEY & LARDNER LLP
111 N. Orange Ave., Ste. 1800
Post Office Box 2193
Orlando, Florida 32080
Telephone: (407) 423-7656
Facsimile: (407) 648-1743

Attorneys for Appellee Ted Herring

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in 14-point Times New Roman font.

/s/
Alan S. Goudiss
Adam S. Hakki
Itzhak Shukrie

Christopher W. Greer
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, New York 10022
Telephone: (212) 848-4000
Facsimile: (212) 848-7179

Leon H. Handley
Florida Bar No. 033418
Rumberger Kirk & Caldwell, P.A.
300 South Orange Avenue, Suite 1400
Orlando, Florida 32801-3380
Telephone: (407) 872-7300
Facsimile: (407) 649-4941

Jon M. Wilson
Florida Bar No. 1039892
John R. Hamilton
Florida Bar No. 0774103
FOLEY & LARDNER LLP
111 N. Orange Ave., Ste. 1800
Post Office Box 2193
Orlando, Florida 32080
Telephone: (407) 423-7656
Facsimile: (407) 648-1743

Attorneys for Appellee Ted Herring