No. _____

IN THE

Supreme Court of the United States

In re TED HERRING,

Petitioner.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR EXTRAORDINARY WRIT OF MANDAMUS

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CAPITAL CASE
QUESTION PRESENTED

Under the Antiterrorism and Effective Death Penalty Act of 1996, a petitioner seeking to file a second or successive habeas corpus petition in federal district court must first obtain authorization from a federal court of appeals to ensure that the petition satisfies the requirements of 28 U.S.C. § 2244(b)(2). Pursuant to the plain words of Section 2244(b)(2)(A), a petitioner whose claim is based on a new rule of constitutional law must demonstrate only that the new rule has been made retroactive by this Court to cases on collateral review and that the claim was previously unavailable. Nevertheless, the United States Court of Appeals for the Eleventh Circuit, as well as a minority of other circuits, imposes requirements in addition to those provided in the statute upon petitioners seeking authorization to file federal habeas corpus petitions.

The question presented in this petition for a writ of mandamus is whether the United States Court of Appeals for the Eleventh Circuit abused its discretion when it required the petitioner, who is under a sentence of death and was seeking to raise a federal habeas claim for the first time under *Atkins v. Virginia*, 536 U.S. 304 (2002), to satisfy not only the requirements stated in Section 2244(b)(2)(A) (which his authorization motion and proposed petition undisputedly satisfied), but also demonstrate that "there is a reasonable likelihood that he is in fact mentally retarded" in order to obtain authorization under Section 2244(b)(2) to file in the district court a petition for a writ of habeas corpus.

LIST OF PARTIES AND AFFILIATES

Ted Herring is the Petitioner. The Clerk of the United States Court of Appeals for the Eleventh Circuit would be the Respondent. In addition, the State of Florida, represented by Senior Assistant Attorney General Kenneth S. Nunnelley, opposed Mr. Herring's authorization motion in the United States Court of Appeals for the Eleventh Circuit and would likely be a Respondent.

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The opinion of the United States Court of Appeals for the Eleventh Circuit denying Petitioner Ted Herring's Application for Leave to File a Second or Successive Habeas Petition (the "Authorization Motion"), entered on January 26, 2012, which is unreported, is reprinted in the Appendix to this Petition ("App.") at 1a. The order of the United States Court of Appeals for the Eleventh Circuit denying Herring's Motion for Certification of Question to the Supreme Court of the United States or Entry of Interlocutory Order (the "Certification Motion"), entered on March 29, 2012, which is also unreported, is reprinted at App. 9a.

JURISDICTION

The Eleventh Circuit denied Herring's Authorization Motion on January 26, 2012. App. 1a. It denied the Certification Motion on March 29, 2012. App. 9a. This Petition is timely filed, and the Court's jurisdiction is invoked under 28 U.S.C. § 1651(a) which authorizes this Court to issue all writs necessary or appropriate in aid of its jurisdiction. *See* U.S. Const. art. III, § 2; *Felker v. Turpin*, 518 U.S. 651, 666 (1996) (Stevens, J., concurring).

RELEVANT STATUTORY PROVISIONS

This Petition involves 28 U.S.C. § 1651(a) and 28 U.S.C. § 2244(b), which are reprinted at App. 14a and 10a, respectively.

STATEMENT OF THE CASE

Herring is under a sentence of death in the state of Florida. On October 6, 2011, the Florida Supreme Court reinstated Herring's death sentence, reversing the order of a lower court that had determined that Herring was mentally retarded by clear and convincing evidence and thus exempt from execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). *State v. Herring*, 76 So. 3d 891 (Fla. 2011). The lower court's order came after a two-day evidentiary hearing during which the court heard substantial evidence of mental retardation, including the testimony of three expert witnesses who had examined Herring. Herring moved for rehearing or, in the alternative, clarification, which the Florida Supreme Court denied without opinion on December 20, 2011.

Having already filed a federal habeas petition in 1999 (prior to this Court's *Atkins* decision and not asserting mental retardation as a basis to vacate his death sentence), Herring filed the Authorization Motion on December 26, 2011, pursuant to 28 U.S.C. § 2244, in the United States Court of Appeals for the Eleventh Circuit. In that motion, he sought authorization to file a second or successive habeas petition to raise an *Atkins* claim for the first time in federal court. On January 26, 2012, the Eleventh Circuit denied the Authorization Motion holding that although Herring met the requirements of Section 2244, he could not demonstrate a reasonable likelihood that he is mentally retarded under Florida law, the constitutionality of which Herring sought to challenge with his habeas corpus petition. App. 7a-8a. The Authorization Motion undisputedly satisfied the

express statutory criteria for authorization set forth in 28 U.S.C. § 2244(b)(2)(A), which do not include an evaluation of likelihood of success on the merits. App. 27a-29a.

On March 6, 2012, Herring filed his Certification Motion with the Eleventh Circuit, seeking to certify to this Court the question presented in his Authorization Motion, or, in the alternative, for the entry of an interlocutory order to permit a petition for writ of certiorari to this Court. The Certification Motion raised the issue of whether it is permissible for a federal appeals court to require a petitioner bringing a successive habeas petition raising an *Atkins* claim to demonstrate the merits of his claim at the authorization stage, despite the fact that the plain language of Section 2244(b)(2)(A) requires only that the defendant show that his petition is based on a claim relying on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" (*i.e.*, *Atkins*). On March 29, 2012, the Eleventh Circuit denied Herring's Certification Motion without opinion. App. 9a.

Additionally, on March 19, 2012, Herring filed with this Court a petition for writ of certiorari to review the Florida Supreme Court's decision reinstating his sentence of death. *Herring v. Florida*, No. 11-1158 (filed Mar. 19, 2012). The petition for certiorari and this Petition, however, raise different issues and seek review of the decisions of separate courts. Because of the limitations found in 28 U.S.C. § 2244 prohibiting conventional review by this Court, the only avenue by which Herring can challenge the de-

nial of his Authorization Motion is this petition for a writ of mandamus.

PRELIMINARY STATEMENT

Mandamus is necessary due to the combination of a statute that forbids conventional review by this Court and a standard of review applied by the Eleventh Circuit that violates the plain meaning of that same statute governing access to the courts for persons under sentence of death. And, because there is a direct circuit split on the question presented by this petition, mandamus is the *only* way this Court can resolve a split that could consign similarly-situated persons to life or death depending on only where in this country they were convicted.

Under the plain language of Section 2244(b)(2)(A), a federal court of appeals must authorize the filing of a second or successive petition for a writ of habeas corpus where the petition raises a claim based on a new and retroactive rule of constitutional law not previously available to the petitioner. The statute imposes no other applicable requirements.

Herring filed his Authorization Motion with the United States Court of Appeals for the Eleventh Circuit seeking to raise his *Atkins* claim for the first time in federal court. In denying Herring's Authorization Motion, the Eleventh Circuit acknowledged that Herring's successive petition satisfied the requirements of § 2244(b)(2)(A) – that is, his claim relied upon a new rule of constitutional law made retroactive to cases on collateral review by the Supreme

Court (*Atkins*) and that his *Atkins* claim was previously unavailable. App. 3a, 7a. Based on the plain words of § 2244(b)(2)(A), that required the Eleventh Circuit to grant his motion and permit Herring to file his habeas petition in federal district court. Straying from the plain language of Section 2244(b)(2)(A), however, the court denied Herring's Authorization Motion because, in the majority's view, "Florida did not err in applying its definition of mental retardation or in declining to consider the standard error measurement." App. 7a.

Despite the unambiguous language of Section 2244(b)(2)(A), the Eleventh Circuit and a minority of courts of appeal have read into the statute this additional, merits-based requirement for authorization to file a second or successive habeas petition raising an *Atkins* claim. In so doing, these courts have transformed their gatekeeper function from a simple prescreening to a merits determination. The effect has been not only to distort the role Congress prescribed, but to deny habeas petitioners like Herring the opportunity to litigate in federal court the denial of fundamental constitutional rights that this Court has identified as worthy of protection. Insulated by Section 2244(b)(3)(E)'s prohibition on appealing such orders through normal appellate channels, the decision of the Eleventh Circuit (and others like it) can only be corrected through an extraordinary writ of mandamus.

REASONS FOR GRANTING THE PETITION

I. THE PLAIN LANGUAGE OF SECTION 2244(b) IMPOSES LIMITED REQUIREMENTS FOR THE FILING OF A SECOND OR SUCCESSIVE HABEAS PETITION RAISING A PREVIOUSLY UNAVAILABLE NEW RULE OF CONSTITUTIONAL LAW

The Antiterrorism and Effective Death Penalty Act of 1996, 104 P.L. 132, 110 Stat. 1214 ("AEDPA"), sets forth in plain and unambiguous language a standard of review that provides for *two* avenues of authorization to file a second or successive habeas petition. It states as follows:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless–
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; *or*
> >
> > (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in the light of the evidence as a whole, would be sufficient

> to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id. § 160(b)(2) (codified at 28 U.S.C. § 2244) (emphasis added).

Under AEDPA, the courts of appeal function as the gatekeepers to screen second or successive petitions to ensure compliance with Section 2244. 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."). Accordingly, "[t]he court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C).

As described in Section 2244, only two categories of claims may be filed in second or successive habeas petitions: (i) "new rule" claims under Section 2244(b)(2)(A); and (ii) "actual innocence" claims under Section 2244(b)(2)(B). The requirements for authorization of "new rule" claims are clear and simple. An application for a second or successive habeas corpus petition shall be granted if it "(i) relies on a new rule of constitutional law, (ii) made retroactive to cases on collateral review by the Supreme Court, (iii) that was previously unavailable." 28 U.S.C.

§ 2244(b)(2)(A). Accordingly, to make a prima facie showing under "this subsection" as required by Section 2244(b)(3)(C), a petitioner need only establish a reasonable likelihood that the "new rule" claim sought to be raised in a second or successive petition meets these three requirements. There are no other requirements contained in Section 2244(b)(2)(A) and the remainder of Section 2244(b) requires nothing further.

The logic behind this "new rule" standard is straightforward. Congress intended that petitioners have an unimpeded opportunity to raise at least one time all available, constitutional claims in a petition for habeas corpus in federal court. For those constitutional rights that are recognized by this Court only after the filing of a first petition, the petitioner is treated like a first time filer. Thus, review in the court of appeals for authorization of second or successive petitions raising "new rule" claims is limited to the questions of whether the claim is based on a new rule and whether that claim was previously unavailable. If these requirements are met, Congress's plain words command that the district courts be opened for the petitioner.

II. THE ELEVENTH CIRCUIT ABUSED ITS DISCRETION WHEN IT DENIED HERRING'S AUTHORIZATION MOTION

A. The Eleventh Circuit's interpretation of Section 2244(b)(3)(C) is contrary to the plain meaning and purpose of the statute

Despite the plain language of Section 2244(b)(2)(A), the Eleventh Circuit (along with the Fifth and Sixth Circuits) has interpreted Section 2244(b)(3)(C) as requiring an *Atkins* petitioner to demonstrate "a *prima facie* case of eligibility." *In re Herring*, App. 3a (citing *In re Holladay,* 331 F.3d 1169, 1173 (11th Cir. 2003)). In practice, this requires an *Atkins* petitioner to demonstrate that there is a "reasonable likelihood that he is in fact mentally retarded," *In re Holladay*, 331 F.3d at 1173, which results in nothing short of a full merits determination at the gatekeeper stage. In fact, the Eleventh Circuit, after acknowledging that Herring satisfied the requirements of Section 2244(b)(2)(A), devoted more than half of its opinion to analyzing his *Atkins* claim under Florida law before denying the Authorization Motion. App. 4a-7a. Nowhere in Section 2244 did Congress authorize the Eleventh Circuit to conduct a merits analysis at this stage.

By engaging in this premature merits review, the Eleventh Circuit has fundamentally misunderstood the purpose of Section 2244. The courts of appeal function as gatekeepers whose role is limited to ensuring that the application, in the first instance, satisfies the requirements of Section 2244(b). In fact,

the court is rarely in a position to consider the merits of an *Atkins* claim because the factual record is not before the court and the government is often not asked to respond. *See Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1358 (11th Cir. 2007) ("Even if we had submissions from both sides, had the whole record before us, and had time to examine it and reach a considered decision on whether the new claim actually can be squeezed within the narrow exceptions of § 2244(b)(2), the statute does not allow us to make that decision at the permission to proceed stage.").

Moreover, the Eleventh Circuit's reading of Section 2244(b)(3)(C)'s "prima facie" language as a license to consider the merits of the *Atkins* claim runs contrary to well-established rules of statutory construction. First, Section 2244(b)(3)(C) requires a prima facie showing that the petition "satisfies the requirements of *this subsection*." (emphasis added). According that statute its plain meaning, a petitioner raising a new rule of constitutional law must satisfy only the requirements of Section 2244(b)(2)(A). *See In re McDonald*, 514 F.3d 539, 543 (6th Cir. 2008) (refusing to consider timeliness of petition at gatekeeper stage because statute of limitations in § 2244(d) was not part of "this subsection"). Had Congress intended for a merits review at this stage, it would have included a provision similar to Section 2244(b)(2)(B)(ii) or cross-referenced Section 2254, the substantive standard for habeas relief.

Second, the Eleventh Circuit's reading of Section 2244(b)(3)(C) renders § 2244(b)(4) superfluous. Under Section 2244(b)(4), "[a] district court shall dismiss any claim presented in a second or successive

application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." Thus, under the Eleventh Circuit's reading, a district court would have to ensure that the petitioner demonstrated that he was mentally retarded. But district courts are already tasked with making this determination when considering the merits of a properly authorized habeas petition. *See McLeod v. Peguese*, 337 F. App'x 316, 324 (4th Cir. 2009) (noting that district court under Section 2244(b)(4) must dismiss an authorized petition "*without reaching the merits*" if it determines the requirements of § 2244(b)(2) were not satisfied) (emphasis added); *Terry v. United States*, 218 F. App'x 950, 951 (11th Cir. 2007) (citing *In re Morris* for proposition that Section 2244(b)(4) requires district court to dismiss a petition before reaching the merits if it determined that Section 2244(b)(2) was not satisfied); *Ochoa v. Sirmons*, 485 F.3d 538, 544 (10th Cir. 2007) (noting that *"Bennett* disassociated [Section 2244(b)(4) review] from the merits of the claim for which authorization is sought").

B. The Eleventh Circuit's "reasonable likelihood" standard rests on a misapplication of *Bennett v. United States*

The Eleventh Circuit's "reasonable likelihood" standard is based on an erroneous application of the Seventh Circuit's decision in *Bennett v. United States*, 119 F.3d 468 (7th Cir. 1997). *See In re Holladay*, 331 F.3d at 1173 (quoting *Bennett*). Unlike *In re Holladay* and Herring's Authorization Motion here, *Bennett* concerned an authorization motion as-

serting claims based on newly discovered evidence – an "actual innocence" claim, *not* a "new rule" claim. *See Bennett*, 119 F.3d at 468-69. Because Bennett was in federal custody, authorization was sought under 28 U.S.C. § 2255(h)(1), which contains language identical to Section 2244(b)(2)(B) and directs an inquiry into the merits of the facts underlying the claim. *Bennett*, 119 F.3d at 469 ("So Bennett has to show, albeit only prima facie, that the newly discovered evidence would have established by clear and convincing evidence that no reasonable factfinder could have failed to find that Bennett had established his insanity by clear and convincing evidence."). The *Bennett* court held that authorization of a successive petition based on newly discovered evidence shall be granted if "it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition." *Id.* at 469-70. Importantly, the *Bennett* court said nothing of authorization motions concerning "new rule" claims.

In *In re Holladay,* the Eleventh Circuit was faced with an applicant seeking to file a second habeas corpus petition raising an *Atkins* claim under Section 2244(b)(2)(A).[1] The *Holladay* court found that

[1] The decision in *Holladay* is in all events inapposite. There, the petitioner filed an eleventh-hour petition for leave to file a second or successive habeas petition and to stay his scheduled execution without first filing and exhausting his *Atkins* claim in state court. 331 F.3d at 1176. Without any record before the court, and given the unique procedural posture of the case, the *Holladay* court apparently found it appropriate to conduct some review of the merits of the petitioner's mental retardation claim. *Id.* at 1173. In contrast, Herring has fully and success-

"the requirements expressly set forth in 28 U.S.C. § 2244(b)(2)(A) are satisfied", however, the court went on to state that there was an additional "reasonable likelihood" standard that applicants raising *Atkins* claims must meet, which was "articulated by the Seventh Circuit" in *Bennett*. *See In re Holladay*, 331 F.3d at 1172-73. However, *Bennett* says nothing about second or successive petitions raising "new rule" claims. According to the Eleventh Circuit in *In re Holladay*, the additional requirement that *Atkins* petitioners make a fact-based showing of mental retardation at the authorization stage is "manifestly obvious," holding that "[w]ere it otherwise, then literally any prisoner under a death sentence could bring an *Atkins* claim in a second or successive petition regardless of his or her intelligence." *Id.* at 1173 & n.1. This "manifestly obvious" requirement was imposed without reference to the requirements of Section 2244 and considered factors best left to the judgment of Congress.[2]

Other authorities relied upon by the Eleventh Circuit in *In re Holladay* in adopting this additional

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fully litigated in a Florida state court the factual issue of his mental retardation, which underlies his *Atkins* claim. Moreover, Herring, unlike Holladay, is not and has never been subject to a death warrant, and his Authorization Motion was filed pursuant to the conventional, statutorily prescribed channels for habeas review. Any concern for abusing the writ is certainly not present in this case.

[2] Elsewhere, the Eleventh Circuit has previously affirmed the straightforward requirements of Section 2244(b). *See Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1359 (11th Cir. 2007) ("We have neither the power nor the inclination to turn back the clock and pretend that the AEDPA was not enacted."); *see also In re Davis*, 565 F.3d 810, 824-25 (11th Cir. 2009).

merits review are equally unsupportive. *See Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001) (applying the *Bennett* "reasonable likelihood" standard to the question of the retroactivity of *Bailey v. United States*, 516 U.S. 137 (1995), and not an evaluation of the applicant's likelihood of success on the merits of that *Bailey* claim); *Bell v. United States*, 296 F.3d 127, 128 (2d Cir. 2002) (describing the *Bennett* standard in the context of an application "based on newly discovered evidence" under Section 2244(b)(2)(B)); *Thompson v. Calderon*, 151 F.3d 918, 925 (9th Cir. 1998) (applying the *Bennett* standard to an "actual innocence" claim under Section 2244(b)(2)(B)). In fact, some of the cases relied upon by the Eleventh Circuit in *In re Holladay* affirmatively disclaim any intention to address the underlying merits of a claim under Section 2244(b)(2)(A). 331 F.3d at 1173-74 (citing *Rodriguez v. Superintendent*, 139 F.3d 270, 273 (1st Cir. 1998) (noting that because petitioner "does not press any fact base claim, we focus on section 2244(b)(2)(A) to the exclusion of 2244(b)(2)(B)", and determining only whether claim was based on new rule made retroactive to cases on collateral review)).

C. The majority of the courts of appeal adhere to the plain language of Section 2244

Excepting the Eleventh, Fifth and Sixth Circuits, every other court of appeals to have considered the standard of review of authorization motions seeking to raise "new rule" claims has adhered to the plain language of Section 2244(b)(3)(C) and Section 2244(b)(2)(A). For example, the Tenth Circuit held

that the language "'*satisfies the requirements of this subsection*'" in Section 2244(b)(3)(C) "does not direct the appellate court to engage in a preliminary merits assessment. Rather, it focuses our inquiry solely on the conditions specified in § 2244(b) that justify raising a new habeas claim . . . . The conditions in § 2244(b)(2)(A), with which we are concerned, look solely to temporal issues relating to the *availability* of the constitutional authority invoked, not to any assessment regarding the strength of the petitioner's case." *Ochoa v. Sirmons*, 485 F.3d at 541-42 (emphasis added). The First, Third, Fourth, Eighth and Ninth Circuits likewise adhere to this reading of Section 2244.[3] *See Sustache-Rivera v. United States*, 221 F.3d 8, 15 (1st Cir. 2000) ("In judging whether to permit the filing of a second petition [raising a claim under § 2244(b)(2)(A)], the court of appeals, as gatekeeper, does not definitively decide these issues." Rather, the "precise question" is whether "'jurists of reason'" could find petitioner's claim is "'based on a new rule of constitutional law.'") (internal citations omitted); *Goldblum v. Klem*, 510 F.3d 204, 219 n.9 (3d Cir. 2007) ("'[S]ufficient showing of possible merit in this context does not refer to the merits of the claims asserted in the petition. Rather, it refers to

[3] The Fifth and Sixth Circuits have adopted the Eleventh Circuit's erroneous interpretation of Section 2244 and have similarly required that applicants seeking to raise *Atkins* claims satisfy the "reasonable likelihood" standard as to the merits of their claims. *See In re Hearn*, 418 F.3d 444, 445 (5th Cir. 2005); *In re Bowling*, 422 F.3d 434, 436 (6th Cir. 2005) (citing *In re Holladay*, 331 F.3d at 1174). The Second, Seventh and District of Columbia Circuit Courts of Appeal have not yet ruled on the appropriate standard required to be applied by AEDPA to claims under § 2244(b)(2)(A).

the merits of a petitioner's showing with respect to the substantive requirements of 28 U.S.C. § 2244(b)(2).") (quoting *Bennett*, 119 F.3d at 469-70); *In re Williams*, 330 F.3d 277, 281-82 (4th Cir. 2003) ("[W]e infer that the 'showing of possible merit' alluded to in *Bennett* relates to the possibility that the claims in a successive application will satisfy 'the stringent requirements for filing of a second or successive petition,' not the possibility that the claims will ultimately warrant a decision in favor of the applicant. . . . [T]he focus of the inquiry must always remain on the § 2244(b)(2) standards.") (quoting *Bennett*, 119 F.3d at 469-70); *Sasser v. Norris*, 553 F.3d 1121, 1125-26 (8th Cir. 2009) (remanding a habeas petition to the district court for an evidentiary hearing on petitioner's *Atkins* claim where district court erroneously dismissed petition because "'*Atkins* created a *previously unavailable* claim based on the unconstitutionality of executing the mentally retarded'" and "meets the requirement of § 2244(b)(2)(A)") (citation omitted); *Nevius v. Sumner*, 105 F.3d 453, 462 (9th Cir. 1996) (finding that applicant had made a prima facie showing under Section 2244(b)(3)(C) "[w]ithout intimating any view concerning the merits" of his claims).

III. A WRIT OF MANDAMUS IS NECESSARY TO CORRECT A CLEAR ABUSE OF DISCRETION BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

In *Felker v. Turpin*, 518 U.S. 651 (1996), three Justices of this Court in a concurring opinion specifically noted that this Court could grant an extraordi-

nary writ pursuant to the All Writs Act, 28 U.S.C. § 1651, to review the decision of the courts of appeal on authorization motions, implying that such review would be especially appropriate "if the courts of appeals adopted divergent interpretations of the gatekeeper standard." *See Felker*, 518 U.S. at 667 (Souter, J., concurring). This suggestion is consistent with the general requirements for issuance of a writ of mandamus:

> Although "we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction,'" we have required that petitioners demonstrate a "clear abuse of discretion," or conduct amounting to "usurpation of [the judicial] power," to be entitled to issuance of the writ. To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they seek, and carry "the burden of showing that [their] right to issuance of the writ is 'clear and indisputable'"

Mallard v. United States Dist. Ct., 490 U.S. 296, 309 (1989) (citations omitted).

A writ of mandamus is available to "'confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Id.* at 308 (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)). This traditional use is not to be constrained

by "an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction.'" *Id.* at 309 (quoting *Kerr v. United States Dist. Ct.*, 426 U.S. 394, 402 (1976)). Herring seeks to invoke precisely this traditional use: he petitions this Court to compel the United States Court of Appeals for the Eleventh Circuit to apply the standard set forth on the face of Section 2244 in reviewing his Authorization Motion.

The exercise of this Court's discretionary power to issue a writ of mandamus is especially appropriate in the circumstances of this case. The Eleventh Circuit and the minority of courts that follow its approach are foreclosing habeas review for an entire class of petitioners. Here, in simplest terms, a mentally retarded prisoner subject to execution has been deprived of all opportunities to have his *Atkins* claim adjudicated in federal court, despite his compliance with all procedural requirements provided for by AEDPA (timeliness, exhaustion, § 2244(b)(2)(A)). Even more troubling is the fact that retroactive new rules of constitutional law are exceedingly rare and are reserved only for the most fundamental of rights. In fact, since AEDPA's passage, *Atkins* remains the only case where this Court announced a new rule of constitutional law specifically made retroactive. *See Ochoa v. Workman*, 669 F.3d 1130, 1142 & n.9 (10th Cir. 2012). So while this Court has deemed it appropriate to afford defendants and prisoners an opportunity to raise a claim asserting those rights, courts like the Eleventh Circuit have closed the door entirely.

It is essential that courts of appeal apply consistent and correct procedures and standards when re-

viewing authorization motions under AEDPA. Yet, the split in the circuit courts of appeal regarding the proper standard to be applied to authorization motions has left petitioners nationwide facing different standards when filing such motions. For instance, a petitioner residing within the Tenth Circuit and seeking to raise an *Atkins* claim will be granted authorization to file a second or successive petition in district court provided the claim was previously unavailable under Section 2244(b)(2)(A). On the other hand, a petitioner – like Herring – residing within the Eleventh Circuit seeking to raise the same constitutional claim will be denied authorization unless that petitioner can also demonstrate that there is a reasonable likelihood that he is in fact mentally retarded.

Furthermore, Section 2244(b)(3)(E) states that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." Justices Stevens and Souter, in their respective concurring opinions in *Felker*, identified three options by which a petitioner whose authorization motion has been denied may seek relief, namely: (1) an original habeas petition; (2) a certification under 28 U.S.C. § 1254(2); and (3) a writ issued under the All Writs Act, 28 U.S.C. § 1651. *Felker*, 518 U.S. at 666 (Stevens, J., concurring); *id.* at 667 (Souter, J., concurring). In the circumstances of this case, an original habeas petition would not result in the appropriate standard of review being applied by the Eleventh Circuit – the relief sought by this petition. Additionally, the Eleventh Circuit summarily denied Her-

ring's motion seeking certification under Section 1254(2).[4] App. 9a. Thus, a writ of mandamus remains the only viable option for this Court to review the Eleventh Circuit's derivation from the plain statutory language of Section 2244(b)(2)(A), but also to harmonize the deep conflict among the circuits that to this point has gone unchallenged.

Finally, as demonstrated above, Herring's right to the writ in this capital case is "clear and indisputable" as the Eleventh Circuit plainly abused its discretion in construing Section 2244(b)(3)(C) in a manner inconsistent with the plain language of the stat-

[4] It is unclear what role, if any, petitioners properly play in moving for certification. Some circuit courts have concluded that certification may be granted only *sua sponte*. *See Kronberg v. Hale*, 181 F.2d 767, 767 (9th Cir. 1950) (denying petition for certification "as being without authority in law or in the rules or practice of the court"); *Andrews v. Nat'l Foundry & Pipe Works, Ltd.*, 77 F. 774, 778 (7th Cir. 1897) (stating certification is available only upon the court's own motion). Other circuit courts have concluded that certification under Section 1254(2) is available only on an interlocutory basis. *See Cella v. Brown*, 144 F. 742, 765 (8th Cir. 1906) ("Questions should not be certified after the case has been decided."); *Andrews*, 77 F. at 778 (stating that certification must be "done before we decide"). Limitations such as these would effectively render certification unavailable in the context of authorization motions, as the circuit court "shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the [authorization] motion." 28 U.S.C. § 2244(b)(3)(D). In fact, certification under Section 1254(2) is granted so rarely that it is effectively unavailable to petitioners in Herring's position. *See* 17 Charles Alan Wright, et al., *Federal Practice & Procedure* § 4038, at 62-63 & n.3 (3d ed. 2007) (noting only three instances in which certification has been granted since 1947).

ute. *See Koon v. United* States, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant his petition for a writ of mandamus to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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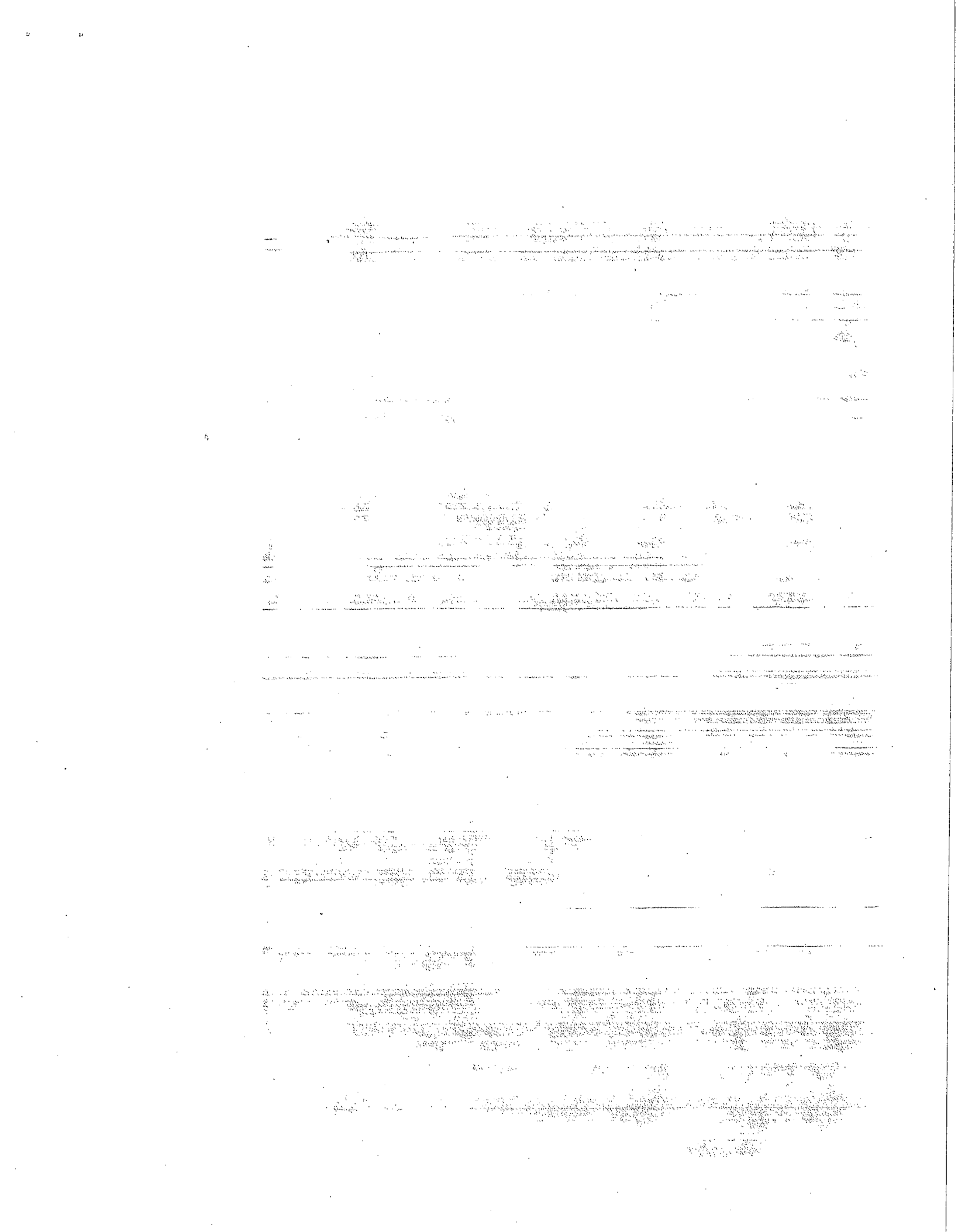
APPENDIX



IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

IN RE: TED HERRING,
Petitioner.

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

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

BY THE PANEL:

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

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

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

I.

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

II.

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

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

> The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18."
>
> The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive func-

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

Id. at 308 n.3, 122 S.Ct. at 2245 n.3 (citation omitted). The Court pointed out that "'[m]ild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70," *id*, and that "an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition," *id.* at 309 n.5, 122 S.Ct. at 2245 n.5.

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

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

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

III.

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

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

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

MARTIN, Circuit Judge, concurring:

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-16095-P
Filed March 29, 2012

IN RE: TED HERRING,
Petitioner.

Middle District of Florida

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

BY THE COURT:

Petitioner's Motion for Certification of Question to the Supreme Court of the United States or Entry of Interlocutory Order is DENIED.

28 U.S.C.A. § 2244

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

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

have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C.A. § 1651

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

No. _____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

In re TED HERRING,
Petitioner.

MOTION FOR AUTHORIZATION TO FILE
SECOND OR SUCCESSIVE PETITION
FOR WRIT OF HABEAS CORPUS

THIS IS A DEATH PENALTY CASE

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PRELIMINARY STATEMENT

Ted Herring ("Herring") is a mentally retarded prisoner on Florida's death row. Following the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), Herring moved the Circuit Court in the Seventh Judicial District, in and for Volusia County, Florida (the "Circuit Court") for an order vacating his sentence of death. After a two-day evidentiary hearing, the Circuit Court granted the motion and vacated Herring's death sentence on November 23, 2009, finding Herring mentally retarded by clear and convincing evidence.[1] The Circuit Court based its determination on a definition of mental retardation stipulated to by the parties and explicitly approved by the Supreme Court of the United States in *Atkins*. The Circuit Court heard evidence of Herring's mental retardation, including the testimony of three expert witnesses, two of whom were called by the State of Florida (the "State"). In clear constitutional and procedural error, the Florida Supreme Court reinstated Herring's death sentence without meaningfully addressing or giving the required deference to the Circuit Court's findings of fact or credibility determinations. *Florida v. Herring*, No. SC09-2200, 2011 WL 4596686 (Fla. Oct. 6, 2011).[2] In so doing, the Florida Supreme Court reinstated a death sentence on a person with mental retar-

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[1] *Herring v. State*, No. 81-1957-C, Final Order Vacating Sentence of Death (Fla. Cir. Ct. Nov. 23, 2009) ("Order") (Tab 1 to Appendix submitted herewith) (Tabs in the Appendix are referenced as "App. ____.")

[2] (App. 2.)

dation, as factually determined by clear and convincing evidence by a court of competent jurisdiction. This blatantly violated *Atkins*' constitutional prohibition against executing the mentally retarded and cannot stand.

Herring has no avenue of redress in the state of Florida beyond its Supreme Court. Accordingly, pursuant to 28 U.S.C. § 2244(b)(3)(A), Herring hereby respectfully requests that this Court grant him leave to file a second or successive habeas petition in the U.S. District Court for the Middle District of Florida to pursue his *Atkins* claim. Herring is a unique petitioner in that (1) the only court to adjudicate his mental retardation found him to be mentally retarded by clear and convincing evidence, and (2) the state's own expert expressed grave doubt as to his own support for the state's position. If ever there were an *Atkins* claim in need of this Court's considered review, it is this one.

FACTUAL AND PROCEDURAL BACKGROUND

On June 12, 1981, Herring, who was then 19 years old, was arrested for possession of a stolen car. *Herring v. State*, 446 So. 2d 1049, 1052-53 (Fla. 1984). After eight hours of interrogation, he confessed to the unintended killing of a 7-Eleven store clerk during a robbery two weeks earlier. Specifically, Herring confessed that he intended only to rob the store but shot the clerk by mistake. On February 25, 1982, Herring was convicted of first-degree murder and armed robbery. *Id.* at

1052. On February 26, 1982, the jury returned an advisory recommendation of death by an eight-to-four vote. *Id.* at 1051, 1053. The trial judge sentenced Herring to death. *Id.* at 1053.

While Herring's sentence has been the subject of numerous decisions by both state and federal courts,[3] the question of Herring's mental retardation was not addressed until the Florida Circuit Court's evidentiary hearing in November 2005 in the wake of the U.S. Supreme Court's proclamation in *Atkins* that the mentally retarded must not be executed. *See* 536 U.S. at 321. In its subsequent order, the Circuit Court found that Herring had established his mental retardation under both the DSM-IV-TR[4] and Florida Rule of Criminal Procedure 3.203, "which the parties agree are functionally identical for purposes of the Motion." (Order ¶ 16.) Specifically, the Circuit Court found that Herring's IQ fell within the range of mental retardation, and detailed numerous examples of Herring's significant limitations in adaptive functioning. (Order ¶¶ 24, 29-34.)

The Florida Supreme Court's reinstatement of Herring's death sentence was contrary to all

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[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 (Fla. 1991); *Teffeteller v. Dugger*, 676 So. 2d 369 (Fla. 1996); *Herring v. State*, 730 So. 2d 1264 (Fla. 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); *Herring v. Crosby*, 862 So. 2d 727 (Fla. 2003).

[4] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000).

notions of fundamental fairness and a facially unreasonable application of *Atkins*. Never before has the Florida Supreme Court reinstated a death sentence in the face of a factual finding of mental retardation by the trial court below. Indeed, the Florida Supreme Court's decision here was particularly disturbing. First, it continued to apply an unconstitutional bright-line IQ score cutoff, despite the fact that applying such a cutoff, by definition, permits the execution of mentally retarded offenders. Second, it refused to acknowledge the Circuit Court's application of the standard error measure ("SE_M")—an important statistical concept universally incorporated into clinical standards (and expressly accepted by all expert witnesses in the case)[5]—when assessing Herring's IQ test results. *Herring*, 2011 WL 4596686, at *5. Third, it ignored the testimony of the State's own expert, Dr. McClaren, that a person can (as plainly spelled out in the governing literature) be mentally retarded despite having a measured IQ score over 70, and Herring was a close case "'up for honest debate'" and one where "'reasonable people could differ as to whether [he] was mentally retarded.'" (Order ¶ 27; Hr'g Tr. 267 (App. 24).) Finally, to avoid addressing the substantial evidence of mental retardation and elide the court below's factual findings, the Florida Supreme Court actually supplanted the standard for determining mental retardation that the Circuit Court applied and that parties explicitly had agreed upon without even remanding the case, resulting in a flagrant due process violation.

[5] (Hr'g Tr. 47, 234-35 (App. 14, 19).)

Accordingly, Herring should be afforded the opportunity to present his *Atkins* claim in a second or successive habeas petition.

STANDARD OF REVIEW

Pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a federal Circuit Court of Appeals acts as a gatekeeper to screen out a second or successive petition for a writ of habeas corpus that does not comply with certain statutory criteria. *See* 28 U.S.C. § 2244(b)(3)(A); *In re Davis*, 565 F.3d 810, 825 (11th Cir. 2009) (noting its own "gatekeeper" role). Specifically, § 2244(b)(2)(A) provides that:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. . . .

Herring's *Atkins* claim amply satisfies these requirements. First, Herring did not, and could not, have presented his claim in his first habeas petition filed in 1988 (and refiled in 1999) because *Atkins* had yet to be decided. Second, his claim is based solely on the new rule announced by the Supreme Court in *Atkins* "that the mentally retarded should be categorically excluded from execution." 536 U.S. at 318. Finally, this Court

has recognized that "there is no question" that the rule announced in *Atkins* "is a new rule . . . made retroactive to cases on collateral review by the Supreme Court that was previously unavailable." *In re Holladay*, 331 F.3d 1169, 1172 (11th Cir. 2003). Having satisfied the plain language of § 2244(b)(2)(A), this Court should (and indeed, must) authorize Herring to raise his *Atkins* claim in a second or successive habeas petition in the United States District Court for the Middle District of Florida.

To the extent that the State may argue that this Court should engage in a merits determination of Herring's mental retardation, that argument is foreclosed by the plain language of 28 U.S.C. § 2244(b)(2)(A) as set out above, which leaves to the district court (after review is authorized) the task of reviewing Herring's second or successive petition.[6] *See Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (noting that, at this stage, the court's role is limited to a *prima facie* determination that the statute's express requirements are met, leaving to the district court

[6] This Court has previously affirmed the straightforward requirements of § 2244(b). *See Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1359 (11th Cir. 2007) ("We have neither the power nor the inclination to turn back the clock and pretend that the AEDPA was not enacted."); *see also In re Davis*, 565 F.3d 810, 824-25 (11th Cir. 2009). This Court has also acknowledged that § 2244's restrictions encompass the evolving body of equitable principles intended to place a restraint on abuse of the writ. *In re Davis*, 565 F.3d at 824-25 (citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996)). Thus, any concerns about frivolous claims, including *Atkins* claims, are appropriately addressed by the express provisions of § 2244.

the tasks of making factual determinations, hearing from the government, and reviewing the entire record). In any event, given that the Circuit Court has already determined that Herring is mentally retarded, and given that the State's own expert confirmed that "'reasonable people could differ as to whether [he] was mentally retarded'" (Order ¶ 27; Hr'g Tr. 267 (App. 24)), Herring plainly meets any "gatekeeping" standard that this Court could apply. *See, e.g.*, *In re Holladay*, 331 F.3d at 1176 (authorizing the filing of a second or successive petition merely because there was a "reasonable likelihood" that the prisoner was mentally retarded).

ARGUMENT

I. The Florida Supreme Court's decision reinstating Herring's death sentence violated *Atkins*.

Not only does Herring's *Atkins* claim satisfy the requirements of § 2244, but his claim, once properly before the district court, will warrant full habeas relief under § 2254(d)(1) because the Florida Supreme Court unreasonably applied *Atkins*' clear mandate "that the mentally retarded should be categorically excluded from execution." 536 U.S. at 318.

Pursuant to 28 U.S.C. § 2254(d)(1), an application for a writ of habeas corpus shall not be granted unless the state court's adjudication of the merits "resulted in a decision that . . . involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court

of the United States." In *Atkins*, the Supreme Court established that the execution of mentally retarded individuals violates the Eighth Amendment to the United States Constitution. 536 U.S. at 321. The Court left it to the states to "develop[] appropriate ways to enforce the constitutional restriction," but explicitly forbade the execution of all "mentally retarded offenders about whom there is a national consensus." *Id.* at 317. Furthermore, in rendering its opinion, the Supreme Court endorsed and relied heavily upon clinical standards that are universally accepted among psychologists. *Id.* at 308 n.3, 318 & n.22. Thus, *Atkins* clearly prohibits Florida from using a method for determining mental retardation that ultimately results in the execution of a person who is mentally retarded under nationally accepted standards.

The Florida Supreme Court's unreasonable application of *Atkins* is twofold. *First*, the court continues to apply a bright-line cutoff for IQ scores. *Second*, the court refuses to recognize the built-in standard error measure that is required to render testing valid and reliable and is built into all accepted standardized IQ tests. Taken together, the Florida Supreme Court is permitting the execution of an entire class of individuals, like Herring, who are mentally retarded under all clinical definitions approved by the Court in *Atkins*.

A. There is substantial evidence that Herring is mentally retarded.

Herring's case is unique in that a state trial court, after a full and fair hearing, and in accordance with the procedures established by the

State of Florida, found Herring mentally retarded on clear and convincing evidence and thus exempt from execution under *Atkins*.

To establish mental retardation, a person must show (1) significantly subaverage general intellectual functioning and (2) significant limitations in adaptive functioning that (3) manifest before the age of 18. *See* Fla. R. Crim. P. 3.203(b); *see also Atkins*, 536 U.S. at 308 n.3. The Circuit Court's determination was based on the testimony of three expert witnesses (including two called by the state) and a comprehensive record consisting of "psychological and intelligence testing data and results, school records, medical records, psychological evaluation records, records from prior proceedings, and psychology manuals and articles." (Order ¶ 6.) As to all three criteria for establishing mental retardation, substantial evidence exists to support Herring's *Atkins* claim.

As to the first criterion, the Circuit Court noted that the standard set forth in the DSM-IV-TR "provides that an IQ score of 'about 70 or below' constitutes significantly subaverage general intellectual functioning" and that "'there is a measurement error of approximately 5 points in assessing IQ.'" (Order ¶ 18; Hr'g Ex. 3 (App. 4).) After considering all the evidence, including the results of four intelligence tests (Hr'g Tr. 57-67, 191-92, 241-44, 258; Hr'g Exs. 5-9 (App. 5-9, 15, 18, 21-22)), the Circuit Court found that Herring's IQ fell within the range of 70-75, which is consistent with a diagnosis of mental retardation. (Order ¶¶ 19, 20, 23.) The Florida Supreme Court did not question this factual determination.

As to the second criterion, the Circuit Court found the record "replete with evidence that Herring satisfies th[e] criterion" for limitations in adaptive functioning. (Order ¶ 29.) Specifically, Herring consistently struggled academically (Order ¶ 30; Hr'g Tr. 70-71; Hr'g Ex. 10 (App. 10, 17)), never progressed past the 5th grade level in math and reading (Order ¶ 30; Hr'g Exs. 8, 12, 13 (App. 8, 12-13)), was unable to adjust to classroom situations (Order ¶ 32 Hr'g Ex. 11 (App. 11)), had difficulty grasping concepts and organizing his thoughts (Order ¶ 32; Hr'g Ex. 12 (App. 12)), and was almost totally dependent upon others' help. (Order ¶ 32; Hr'g Ex. 8 (App. 8).) The state's expert testified that Herring's school test results were "consistent" with a diagnosis of mental retardation. (Order ¶ 31; Hr'g Tr. 263 (App. 23).) The Florida Supreme Court ignored all of this evidence.

As to the third and final criterion, both parties agree that if Herring is mentally retarded, onset of the condition occurred prior to age 18. (Order ¶ 40.)

Finally, the Circuit Court noted that courts should take "appropriate caution . . . 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." (Order ¶ 27.) In the instant case, the importance of taking care in making this critical determination is further illustrated by the state's own expert's characterization of this case as "borderline" and "'up for honest debate.'" (Order ¶ 27; Hr'g Tr. 267 (App. 23).)

B. The Florida Supreme Court's "bright-line" IQ cutoff permits the execution of mentally retarded offenders in violation of *Atkins*.

There is no basis in *Atkins* for a bright-line cutoff for IQ scores. The Florida Supreme Court reads *Atkins* to permit a cutoff because "the Supreme Court did not mandate a specific IQ score or range for a finding of mental retardation." *Herring*, 2011 WL 4596686, at *4 (quoting *Franqui v. State*, 59 So. 3d 82, 92 (Fla. 2011)). While true, this reasoning misses the point entirely—*Atkins* does not impose a specific IQ cutoff because IQ testing is inherently imprecise. The clinical standards endorsed by *Atkins* express the IQ level for mental retardation in terms of approximate numbers (*see* 536 U.S. at 308 n.3, 317 n.22), and the *Atkins* court specifically noted that "[i]t is estimated that between 1 and 3 percent of the population has an *IQ between 70 and 75 or lower*, which is typically considered the cutoff IQ score for the intellectual function prong." *Id.* at 309 n.5 (emphasis added). Thus, in direct conflict with the Florida Supreme Court, the *Atkins* court properly expressed the IQ cutoff for mental retardation in terms of an *approximate* set of numbers or a *range*, and even stressed that millions of mentally retarded individuals, like Herring, will in fact have an IQ between 70 and 75.

Herring does not argue that states are restricted from formulating their own procedures for enforcing *Atkins'* restrictions on executing the mentally retarded. *Atkins* plainly grants the State that authority ("'we leave to the State[s] the task of

developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences'"). *Id.* at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416-17 (1986)). However, by imposing a bright-line IQ cutoff of 70 – directly within the range of IQ scores encompassing mental retardation – the Florida Supreme Court perseveres in executing mentally retarded persons, in plain defiance of *Atkins*.[7]

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[7] As the Circuit Court noted, since *Atkins*, many jurisdictions have refused to define mental retardation with a bright line cutoff of 70. (*See* Order ¶ 26 ("[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*.") (citing *Brownlee v. Haley*, 306 F.3d 1043, 1073 (11th Cir. 2002))); *Carroll v. Crosby*, No. 605-cv-875-ORL-31KRS, 2008 WL 2557555, at *15 (M.D. Fla. June 20, 2008) (noting that state trial court used 75 as IQ cutoff score); *Moore v. Dretke*, No. 603CV224, 2005 WL 1606437, at *4-5 (E.D. Tex. July 1, 2005) (holding that petition 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 petition with full-scale IQ of 76 "may be able to state a colorable Eighth Amendment claim based on mental retardation); *In re Hawthorne*, 105 P.3d 552, 557 (Cal. 2005) (rejecting "IQ of 70 as the upper limit" for mental retardation); *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); *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").

C. The Florida Supreme Court's failure to recognize the standard error measure results in the continuing execution of the mentally retarded.

At the core of the Florida Supreme Court's error in applying a bright-line IQ cutoff is its refusal to recognize the standard error measure built into all standardized IQ tests. The SE_M is a statistical concept that adjusts for the fact that no IQ score is precise: IQ scores are not properly expressed as single-point figures and must account for the SE_M in order to be valid and reliable. *See* American Association of Intellectual and Developmental Disabilities ("AAIDD"), *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition* (updated Jan. 2008).[8] As a person's IQ score moves into the higher end of the range, a diagnosis of mental retardation remains appropriate when the person has significant adaptive deficits. (Order ¶ 18; Hr'g Tr. 236; Hr'g Ex. 3 (App. 4, 20).) In this case, the Circuit Court found, and the Florida Supreme Court did not question, that the "record is replete with evidence that Herring satisfies [the adaptive deficit] criterion." (Order ¶ 29.)

For at least the below reasons, the Florida Supreme Court's refusal to recognize the SE_M when considering IQ scores constitutes an unreasonable application of *Atkins*.

First, all accepted clinical definitions of mental retardation incorporate SE_M as an integral fea-

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[8] *See* http://www.aamr.org/media/PDFs/AAIDDFAQonID.pdf (last visited Dec. 16, 2011) (App. 25). Prior to 2007, the AAIDD was known as the American Association of Mental Retardation ("AAMR").

ture. The leading definition in the DSM-IV-TR – endorsed by the *Atkins* court, stipulated to by the parties below and relied upon by the Circuit Court – stresses the necessity of considering SE_M in prominent, unambiguous language. *See Atkins*, 536 U.S. at 308 n.3, 317 n.22; (Order ¶ 9; Hr'g Ex. 3 (App. 4).) Specifically, the DSM-IV-TR defines "significantly subaverage general intellectual functioning" (*i.e.*, the IQ prong of mental retardation) 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.*

(Hr'g Ex. 3 (App. 4) (quoted in Order ¶ 9) (emphasis added).) And importantly, Rule 3.203(b) is plainly crafted to track the definition of mental retardation in DSM-IV-TR: in the words of the Circuit Court, the two definitions are "essentially

identical"; in the words of the state, they are "functionally identical." (Order ¶ 11; State's Pre-Hr'g Memo at 1-3 (App. 3).) Accordingly, given the role of SE_M, both parties' experts agreed that persons like Herring with IQ scores between 70 and 75 can be diagnosed as mentally retarded. (Order ¶ 18; Hr'g Tr. 67-68, 236 (App. 16, 20).)

Second, in addition to ignoring the plain language of *Atkins*, the clinical definitions of mental retardation and the agreement of the parties' experts, the Florida Supreme Court also ignored Rule 3.203(b) itself, as implemented through its regulation.[9] The regulation authorizes two IQ tests under Rule 3.203(b), each of which explicitly integrates SE_M as a fundamental element of the testing and the test results. *See, e.g.*, WAIS-III *Technical Manual* at 53 ("confidence intervals . . . serve as a reminder that *measurement error is inherent in all test scores* and that the observed test score is *only an estimate of true ability*") (App. 26).) Pursuant to the regulation, all testing under Rule 3.203(b) must be "valid and reliable for the purpose of determining intelligence" and must be administered "in conformance with instructions provided by the producer of the tests or evaluation materials." As noted, no IQ result is valid and reliable expressed as an exact number, and IQ tests' instructions invariably caution that SE_M must be accounted for. *See, e.g.*, WAIS-III *Technical Manual* at 53; App. 26.

Third, the legislative history of Fla. Stat. § 921.137, the pre-*Atkins* equivalent of Rule 3.203(b), demonstrates that the Florida legislature

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[9] Fla. Admin. Code r. 65G-4.011.

believed that generally accepted practice requires the consideration of SE_M. The Florida Senate analysis noted that "[a]lthough the [Department of Children and Family Services] does not currently have a rule specifying the intelligence test, it is anticipated that the department will adopt the *nationally recognized tests*," and that "[t]wo standard deviations from these tests is *approximately* a 70 IQ, although it *can be extended up to 75*." Senate Staff Analysis and Economic Impact Statement, Senate Bill 238, S.B. 238, 2/14/2001 at 8 (emphasis added). The Florida legislature's clear understanding further shows that IQ scores not expressed in terms of a range flies in the face of accepted practice and thus violates *Atkins*.

Finally, many U.S. courts, including this Court and even the Florida Supreme Court, have concluded that it is proper to consider SE_M when interpreting substantially similar *Atkins* statutes. *See, e.g.*, *Thomas v. Allen*, 607 F.3d 749, 753, 758 (11th Cir. 2010) ("When considering an individual's intellectual functioning test score, the evaluator may consider the [SE_M] .... In sum, the district court exercised its discretion to consider the [SE_M], as it did with the Flynn effect, and we cannot say that this was clear error"); *Foster v. State*, 929 So. 2d 524, 532 (Fla. 2006) (interpreting *Atkins* to require that, "to be considered mentally retarded, a defendant should be able to show ... a significantly subaverage intellectual function and that typically between 70 and 75 or lower is the cutoff IQ score"); *United States v. Davis*, 611 F. Supp. 2d 472, 489 (D. Md. 2009) ("All that remains is to determine whether his scores place him at least two standard deviations below the mean.

Taking into account the standard error of measurement, this would require an IQ score at or below 75."); *Chase v. State*, 873 So. 2d 1013, 1027 (Miss. 2004) ("As previously stated, the cutoff score for the intellectual functioning prong of the test is 75 .... Thus, defendants with an IQ of 76 or above do not qualify for Eighth Amendment *Atkins* protection."); *In re Hawthorne*, 105 P.3d 552, 557 (Cal. 2005) ("Attorney General urges the court to adopt an IQ of 70 as the upper limit for making a prima facie showing. We decline to do so for several reasons: First, unlike some states, the California Legislature [like the Florida legislature] has chosen not to include a numerical IQ score as part of the definition of mentally retarded .... Second, a fixed cutoff is inconsistent with established clinical definitions .... Finally, IQ test scores are insufficiently precise to utilize a fixed cutoff in this context [referring to DSM-IV-TR at 41, accounting for SE_M].").

In summary, the SE_M cannot be ignored when interpreting or applying IQ results. This is particularly true in the context of capital cases. *Atkins* recognizes this, as do virtually all other sources of authority on the issue, including all accepted clinical definitions, Rule 3.203(b) via its implementing regulations, the Florida legislature, and a critical mass of well-reasoned judicial decisions. Even the state's expert in this case agreed that persons like Herring with IQ scores of between 70 and 75 can be diagnosed as mentally retarded, given the function of the SE_M. (Order ¶ 10; Hr'g Tr. 236 (App. 20).) But despite the weight of the authority and the evidence presented to the Circuit Court, the Florida Supreme

Court has refused to recognize SE_M and has refused to provide protection to Herring, though he is mentally retarded (or, in the words of the state's expert, "borderline" mentally retarded or "right on the edge"). (Order ¶ 27; Hr'g Tr. 267 (App. 24).) Thus, in condemning Herring to death, the Florida Supreme Court has abused any discretion afforded to it (*see Atkins*, 536 U.S. at 317), resulting in an unreasonable application of *Atkins*.

II. The Florida Supreme Court continues to find ways to avoid the holding of *Atkins* and keep mentally retarded offenders on death row.

This case typifies the Florida Supreme Court's disregard for *Atkins*' mandate and the level of heightened scrutiny that should be used when analyzing an *Atkins* claim. It also demonstrates the lengths the Florida Supreme Court will go to keep a mentally retarded individual on death row.[10] Unlike the cases that came before it, this case presents a well-supported factual finding of mental retardation based on clear and convincing evidence, handed down after extensive briefing and a full hearing on the issue. Faced with substantial evidence of mental retardation, and its own recognition that it could not re-weigh the evidence or second guess the Circuit Court's factual findings, the Florida Supreme Court simply changed the standard.

During Herring's *Atkins* hearing, the State stipulated that the DSM-IV-TR standard was equiv-

[10] Since *Atkins*, the Florida Supreme Court has never found a death row inmate to be mentally retarded.

alent to the state standard for mental retardation, then argued the opposite to the Florida Supreme Court despite clear law that "a party may not challenge as error a ruling or other trial proceeding invited by that party." *United States v. Ross*, 131 F.3d 970, 988 (11th Cir. 1997); *see also Calloway v. State*, 37 So. 3d 891, 893 (Fla. 1st Dist. Ct. App. 2010) (invited error cannot result in a reversal). The Florida Supreme Court ignored both the stipulation and the invited error doctrine, and proceeded to apply a standard on appeal (*i.e.*, a bright-line IQ cutoff of 70) that the Circuit Court and Herring did not believe governed during the hearing. This created a fundamental unfairness for Herring in this case, and should give this Court significant pause.

CONCLUSION

For the reasons stated above, Herring has satisfied the statutory requirements of 28 U.S.C. § 2244. He has not previously presented his *Atkins* claim in a federal habeas petition, and his *Atkins* claim relies on the new rule of constitutional law that has been made retroactive to cases on collateral review by the U.S. Supreme Court. Moreover, should this Court engage in a determination of whether there is a reasonable likelihood that Herring is mentally retarded, the factual findings of the Circuit Court, left undisturbed by the Florida Supreme Court, demonstrate that Herring has met the requirements for proving mental retardation. Finally, this case presents the unique circumstance where a lower court has actually made a finding of mental retardation. The Florida

Supreme Court's reinstatement of Herring's death sentence is an unreasonable application of *Atkins* warranting federal habeas relief. Accordingly, this Court should grant Herring's motion for authorization to file a second or successive habeas petition.

Dated: December 26, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Adam S. Hakki, hereby certify that on this 26th day of December, 2011, I caused to be delivered by third-party carrier for overnight delivery a copy of this Motion and all attachments to the Attorney General of the State of Florida at the following address:

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