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APPENDIX A

Supreme Court of Florida

WEDNESDAY, OCTOBER 27, 2021

CASE NO.: SC20-48
Lower Tribunal No(s).:
371984CF002324AXXXXX

JOE ELTON NIXON vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

A True Copy
Test:

/s/ John A. Tomasino
John A. Tomasino [SEAL]
Clerk, Supreme Court

kc
Served:

MOE KESHAVARZI
ERIC M FREEDMAN
MARIA E. DELIBERATO
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MARIE-LOUISE SAMUELS PARMER
MICHAEL T. KENNETT
HON. GWEN MARSHALL, CLERK
EDDIE D. EVANS
HON. JONATHAN ERIC SJOSTROM, CHIEF JUDGE

APPENDIX B

Supreme Court of Florida

No. SC20-48

JOE ELTON NIXON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

August 26, 2021

PER CURIAM.

Joe Elton Nixon is a prisoner under sentence of death. He appeals a trial court order, entered after a hearing, denying Nixon's claims (1) that he is intellectually disabled and therefore ineligible for the death penalty and (2) entitled to relief under *Hurst v. Florida*, 577 U.S. 92 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). We affirm the order.[1]

I.

A.

Nixon was convicted and sentenced to death in 1985 for the first-degree murder of Jeanne Bickner. We detailed the horrific facts of Nixon's crime in our

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[1] We have jurisdiction. *See* Art. V, § 3(b)(1), Fla. Const.

decision affirming the conviction and sentence on direct appeal. *Nixon v. State*, 572 So. 2d 1336 (Fla. 1990), *cert. denied*, 502 U.S. 854 (1991). Later we affirmed the denial of Nixon's initial postconviction motion. *Nixon v. State*, 932 So. 2d 1009 (Fla. 2006). Later still, we affirmed the denial of Nixon's initial motion claiming that he is intellectually disabled. *Nixon v. State*, 2 So. 3d 137 (Fla. 2009).

Before us now is Nixon's successive motion under Florida Rule of Criminal Procedure 3.203 raising an intellectual disability claim. "[T]o establish intellectual disability as a bar to execution, a defendant must demonstrate (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen." *Haliburton v. State*, 46 Fla. L. Weekly S177, S178 (Fla. June 17, 2021); s*ee also* § 921.137, Fla. Stat. (2019); Fla. R. Crim. P. 3.203. "[S]ignificantly subaverage intellectual functioning" means "performance that is two or more standard deviations from the mean score on a standardized intelligence test." § 921.137(1), Fla. Stat; *see also* Fla. R. Crim. P. 3.203(b). Given that the mean IQ test score is 100 points and the standard deviation is approximately 15 points, this definition translates to an IQ test score of approximately 70 points. *Hall v. Florida*, 572 U.S. 701, 711 (2014).

Nixon filed his successive intellectual disability claim in 2015, after the Supreme Court's decision in *Hall*. *Hall* is a successor case to *Atkins v. Virginia*, 536 U.S. 304 (2002), where the Supreme Court first held that the U.S. Constitution forbids the execution of

persons with intellectual disability. After *Atkins* but before *Hall*, we had held that "failure to present an IQ score of 70 or below precluded a finding of intellectual disability." *Haliburton*, 46 Fla. L. Weekly S178 (citing *Cherry v. State*, 959 So. 2d 702, 712-13 (Fla. 2007)).

We recently explained the holding in *Hall* as follows:

> In *Hall*, the Supreme Court held that Florida's "rigid rule" interpreting section 921.137(1) as establishing a strict IQ test score cutoff of 70 or less in order to present additional evidence of intellectual disability "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." 572 U.S. at 704, 134 S. Ct. 1986. The Court further held that when assessing the intellectual functioning prong of the intellectual disability standard, courts must take into account the standard error of measurement (SEM) of IQ tests. *Id.* at 723. And "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error [±5], the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.*

Haliburton, 46 Fla. L. Weekly S178. We noted in *Haliburton* that, even after *Hall*, "[i]f the defendant fails to prove any one of the three components of the statutory test for intellectual disability, the defendant will not be found to be intellectually disabled." *Id.*

When it first took up Nixon's successive intellectual disability claim, the trial court summarily denied Nixon's motion. Nixon appealed the denial, and while that appeal was pending, this Court held that *Hall* is retroactive to cases where there has already been a finding that the defendant is not intellectually disabled. *See Walls v. State*, 213 So. 3d 340 (Fla. 2016). In Nixon's appeal, we concluded that summary denial of Nixon's successive motion was inconsistent with our cases interpreting *Hall* and we remanded the case to the trial court "to conduct proceedings to determine whether a new evidentiary hearing is necessary." *Nixon v. State*, No. SC 15-2309, 2017 WL 462148, at *2 (Fla. Feb. 3, 2017).

The trial court held an evidentiary hearing on remand and received evidence on all three prongs of the intellectual disability test. Ultimately the court concluded that Nixon had presented clear and convincing evidence of adaptive deficits but that he had failed to establish the other two prongs—significantly subaverage intellectual functioning and manifestation by age 18.

In its order denying Nixon's intellectual disability claim, the trial court explained that the parties had presented a range of IQ test scores for Nixon at the hearing: 88, 80, 73, 72, 68, and 67. Of these, the court found that the test score of 80 was the most credible—a score that, accounting for the standard error of measurement, placed Nixon's IQ somewhere in a range from

75 to 85. Nixon received that score on a WAIS III test[2] administered in 2006 by the state's expert, Dr. Gregory Prichard, a forensic psychologist. Specifically, the court found that "Dr. Prichard's full-scale score of 80 and SEM range of 75-85 is more credible than the scores falling within the *Hall* range [i.e., the scores that, accounting for the standard error of measurement, placed Nixon's IQ at or below 70]."

The trial court determined that Nixon's criticisms of Dr. Prichard's test administration were unpersuasive. The court elaborated:

> First, there is no persuasive evidence that either the administration or scoring by Dr. Prichard was invalid.
> Second, as Dr. Prichard testified, the purpose of cognitive testing is to determine capacity. While many factors other than [intellectual disability] can reduce capacity on a given day—inattention, lack of effort, lack of rapport with the examiner, lack of sleep—no similar factors can increase capacity.

As part of its rationale for finding that Nixon had not established intellectual disability, the trial court reasoned that "*Hall* does not suggest that an IQ range of 75 to 85 . . . should be adjusted by applying deficits in

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[2] WAIS is an acronym for Wechsler Adult Intelligence Scale. Dr. Gregory Prichard testified that the WAIS-III test was the state of the art when he administered it to Nixon in 2006 and that the WAIS-IV test has now replaced it as the current state of the art. Dr. Barry Crown, one of Nixon's experts, administered the WAIS-IV to Nixon in 2017 and scored Nixon's IQ at 67.

adaptive behavior to then further reduce the estimate of intellectual functioning lower than the standard error of measurement."

B.

In this appeal, Nixon argues that the trial court misapplied *Hall* and that the evidence shows that Nixon is intellectually disabled. The State counters Nixon's arguments on the merits. But it also argues at the threshold that Nixon is unentitled to relief because *Hall* is inapplicable in his case, given this Court's recent decision in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020). In *Phillips*, we held that "this Court in *Walls* clearly erred in concluding that *Hall* applies retroactively," and we receded from *Walls*. *Id*. at 1023-24.

We agree with the State that Nixon is not entitled to reconsideration of whether he is intellectually disabled. It is true that—when *Walls* was still good law—this Court instructed the trial court to determine whether an evidentiary hearing was necessary to evaluate Nixon's successive intellectual disability claim in light of *Hall*. But under *Phillips*, the controlling law in our Court *now* is that *Hall* does not apply retroactively. It would be inconsistent with that controlling law for us to entertain Nixon's successive, *Hall*-based challenge to the trial court's order here.

We have not overlooked the law of the case doctrine. That doctrine reflects "the long-established 'principle that the questions of law decided on appeal to a court of ultimate resort must govern the case in the

same court and the trial court, through all subsequent stages of the proceedings.'" *State v. Okafor*, 306 So. 3d 930, 934 (Fla. 2020) (quoting *Delta Prop. Mgmt. v. Profile Invs., Inc.*, 87 So. 3d 765, 770 (Fla. 2012)). But the law of the case doctrine is prudential, and it has exceptions. One "generally accepted occasion for disturbing settled decisions in a case [is] when there has been an intervening change in the law underlying the decision." *Kathrein v. City of Evanston, Ill.*, 752 F.3d 680, 685 (7th Cir. 2014); *see also Wagner v. Baron*, 64 So. 2d 267, 268 (Fla. 1953) (law of the case doctrine "must give way where there has been a change in the fundamental controlling legal principles" (quoting *Imbrici v. Madison Ave. Realty Corp.*, 99 N.Y.S.2d 762, 765 (Sup. Ct. 1950)). This exception to the law of the case doctrine applies here.

Accordingly, we affirm the denial of Nixon's successive intellectual disability claim.

II.

Nixon also appeals the trial court's denial of Nixon's most recent successive motion under Florida Rule of Criminal Procedure 3.851. In that motion, Nixon sought relief "predicated upon *Hurst v. Florida*, 136 S. Ct. 616 (2006) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016)."[3]

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[3] We partially receded from *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) in *State v. Poole*, 297 So. 3d 487 (Fla. 2020).

We have repeatedly held that *Hurst* relief is unavailable to defendants, like Nixon, whose death sentences were final before the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *See, e.g.*, *Wright v. State*, 312 So. 3d 59, 60 (Fla. 2021). Accordingly, we affirm this aspect of the trial court's order as well.

III.

We affirm the trial court's order denying Nixon's successive intellectual disability claim and his *Hurst*-based claim.

It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.
LABARGA, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

LABARGA, J., dissenting.

In *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), I dissented to the majority's holding that *Hall v. Florida*, 572 U.S. 701 (2014), is not to be applied retroactively, and its resultant decision to recede from *Walls v. State*, 213 So. 3d 340 (Fla. 2016). *See Phillips*, 299 So. 3d at 1024-26 (Labarga, J., dissenting).

In addition to my fundamental disagreement with the holding in *Phillips*, I noted the following:

> [B]ecause this Court held *Hall* to be retroactive more than three years ago in *Walls*, some individuals have been granted relief pursuant to *Walls* and received consideration of their intellectual disability claims under the standard required by *Hall*. However, going forward, similarly situated individuals will not be entitled to such consideration. This disparate treatment is patently unfair.

Id. at 1026.

I adhere to my dissent in *Phillips*, and thus, I dissent to the majority's conclusion that Nixon is not entitled to consideration of his successive claim of intellectual disability.

An Appeal from the Circuit Court in and for Leon County,
Jonathan Eric Sjostrom, Judge
Case No. 371984CF002324AXXXXX

Eric M. Freedman of Law Offices of Eric M. Freedman, New York, New York; Maria DeLiberato and Marie-Louise Samuels Parmer of Parmer DeLiberato, P.A., Tampa, Florida; and Moe Keshavarzi, David Poell, and Laura Alexander of Sheppard, Mullin, Richter & Hampton LLP, Los Angeles, California,

for Appellant

Ashley Moody, Attorney General, and Michael T. Kennett, Assistant Attorney General, Tallahassee, Florida,

for Appellee

APPENDIX C

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC20-48

JOE ELTON NIXON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

(Filed Dec. 14, 2020)

[Portions Omitted In Printing]

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[13] **II.**

SUMMARY OF ARGUMENT

A. The Circuit Court Erred in Denying Mr. Nixon's Hall Claims

In 2007, the Circuit Court denied Mr. Nixon's intellectual disability claim on a basis obliterated by the United States Supreme Court in 2014. In 2015, the Circuit Court denied Mr. Nixon's intellectual disability claim on the same basis. This Court reversed in 2017. In 2019, the Circuit Court denied Mr. Nixon's disability claim on the same basis. Mr. Nixon asks this Court to reverse once more.

The legal error below was simple. The Circuit Court conflated "sub-average general intellectual functioning" with "IQ scores." Thus it failed to read the record from the perspective that "Intellectual disability is a condition, not a number." Hall, 572 U.S. at 723.

As Mr. Nixon pointed out in his post-hearing submission below (see Nix. 2019 Post-Hrg. Mem., ROA 9555-9557), the additional live evidence adduced at the hearing before the Circuit Court in 2018 was only a small fraction of the record before it for consideration, all of which was admitted without objection and none of which the State contested factually. That record included, apart from expert submissions: 23 affidavits submitted by eyewitnesses who knew Mr. Nixon literally since birth in a variety of capacities along with dozens of school records, social services reports and psychological test results compiled by independent

[14] professionals dating back to 1972, when Mr. Nixon was 11 years old. (Sections III.A.1-3 below).

Everyone—parent, relative, friend, teacher, social worker—who ever knew Mr. Nixon described him as impaired. There is not a single report to the effect that Mr. Nixon was a typical child. On the contrary, one finds nothing but continuing expressions of concern that he was intellectually challenged, a fact that is as significant clinically as common sense would suggest. See Tr. of Evid. Hrg. Vol. 3 (Fla. 2d Jud. Cir. July 31, 2018), ROA 9477 (testimony of State's expert, Dr. Prichard)).

The Circuit Court, however, repeating the precise legal error that led to reversal in this Court well over three years ago, determined that the evidence was to be disregarded because of the existence of IQ results outside the range of intellectual disability. That is simply not the law. The IQ results in question were specifically noted in this Court's 2017 remand order. See Nixon VI, 2017 WL 462148, at *1 n.2.

The direction contained in that order was that the Circuit Court give Mr. Nixon the "conjunctive and interrelated assessment" mandated by Hall. Nixon VI, 2017 WL 462148, at *2. The Circuit Court quite explicitly refused, writing in the decision now under review that the above-75 IQ scores in the record meant that this was not a case "in which Hall would require resort to the interrelated and conjunctive [15] assessment." (2019 Hall/Hurst Order, at 2, 8, 25-27, ROA 9652, 9658, 9675-9677). (Section III.A.4 below)

In accordance with the suggestion Mr. Nixon made when he was last here (Supplemental Brief of Appellant, No. SC15-2309 (Sept. 26, 2017), ROA 4121) this Court should correct the error by ordering the imposition of a life sentence, just as it did in Hall v. State, 201 So. 3d 628 (Fla. 2016) and Herring v. State, No. SC15-1562, 2017 WL 1192999 (Fla. Mar. 31, 2017). (Section III.A.5 below). That disposition is appropriate because two seeming barriers to relief need not be reached.

First, although Mr. Nixon adheres to his long-standing contention that he may not be required to prove his intellectual disability by "clear and convincing evidence" (Section III.A.6 below), he has in fact done so.

Second, Mr. Nixon's entitlement to relief is unaffected by the decision in Phillips v. State, 299 So. 3d 1013 (Fla. 2020) (announcing that Walls v. State, 213 So. 3d 340 (Fla. 2016) erred in holding Hall v. Florida, 572 U.S. 701 (2014) retroactive under Witt v. State, 387 So. 2d 922 (Fla. 1980)).

[A]pplying Phillips to deny Mr. Nixon Hall relief would violate the United States and Florida Constitutions. (Section III.A.7 below)

[18] **III.**

ARGUMENT

A. The Circuit Court Erred in Denying Mr. Nixon's Hall Claims

1. An Overwhelming and Uncontested Factual Record Demonstrates That Mr. Nixon Manifested Subaverage Intellectual Functioning Prior to the Age of 18

a. Background: Mr. Nixon's Childhood Environment Dramatically Increased the Likelihood That He Would Develop an Intellectual Disability

A doctor seeking to determine whether a patient had malaria or instead some similar-appearing disease would reasonably ask whether the patient had recently travelled to an area where malaria was rampant.

Similarly, clinicians in the field of intellectual disability agree that there are several well-defined risk factors that make it more likely that an individual will develop that condition. See Moore v. Texas, 137 S. Ct. 1039, 1051 (2017) ("Moore I"); 2006 MH Tr. at 37:3-15, ROA 1202; 2017 Greenspan Aff. ¶¶ 11(b), 17-18, ROA 4204, 4207-4208; Supplemental Affidavit of Denis Keyes, Ph.D. (Oct. 23, 2006), Def. Exh. 2 ("Keyes Supp. Aff."), Tab S, ROA 974-977; Power Point, entitled 'Joe Elton Nixon,' presented by Denis William Keyes, Ph.D. (Oct. 23, 2006,) Def. Exh. 3 ("MH Power Point"), at 10-16, ROA 7602-7608. Mr. Nixon was exposed to almost every one of these risk factors.

First, maternal alcohol use and malnutrition, especially in the first trimester of pregnancy, have long been recognized as specific risk factors for mental [19] retardation. 2015 Greenspan Aff. ¶¶ 8-9, ROA 2558-2559. Mr. Nixon's mother, Betty Nixon, by her own well-corroborated admissions, see Betty Nixon Aff. ¶¶ 3-4 (June 4, 2013), ROA 4812-4813, drank excessive amounts of alcohol, including beer and gin, during her pregnancy with Mr. Nixon; she was unable to attain adequate medical care or nutrition while Joe was in utero; the family was living in extreme poverty and access to food was very limited. See 2017 Greenspan Aff. ¶¶ 17, 34, ROA 4207-08, 4215-4216; Virginia Nixon Aff. ¶ 8 (Oct. 6, 1993), ROA 3024 ("We grew up poor. We didn't have money to go to the doctor so we used home remedies to take care of ourselves. We didn't have much food and we were always hungry."), id. ¶ 13, ROA 3025 ("My mother and grandparents all drank a lot of gin. Mom gave up gin, but it wasn't until long after Joe was born."); id. ¶ 3, ROA 3022 ("Food was scarce; there was never enough to go around"); Dee Report at 2, ROA 2975 ("Betty[ ] Nixon admits to ingesting alcohol during her pregnancy with Joe. She was unable to obtain adequate medical care or nutrition while Joe was in utero."); 1993 Keyes Report, Tab 3 at 2, ROA 2959 ("Mrs. Nixon has admitted to drinking alcohol, both beer and gin, during her pregnancy."); 2006 MH Tr. 38:12-39:20, ROA 1203-1204; MH Power Point at 12, ROA 7604.

Second, Mr. Nixon's developing brain was subjected to a variety of additional chemical insults. Notably:

- [20] As a small child, Joe was exposed to nicotine and pesticides in the tobacco fields, both well-documented dangers to developing brains. See 2017 Greenspan Aff. ¶¶ 36-37, ROA 4216-4217.
- From the time he was a small boy he was given alcohol to entertain others, and by the age of 12, was "always drunk." See 2015 Greenspan Aff. ¶ 72, ROA 2582 ("Alcohol consumption by young children affects the developing brain and is a risk factor for ID.").

See Virginia Nixon Aff. ¶ 6 (Oct. 6, 1993), ROA 3023-3024 ("[A]ll of us kids had to pick tobacco. I was not even 10 years old, so Joe had to be younger than 8 years old. I remember plenty of times when airplanes would be flying overhead and spraying something down. . . . [Daddy] told me that the planes were spraying the tobacco to kill bugs."); John Nixon, Jr. Aff. ¶ 3 (Sept. 30, 1993), ROA 3013-3014 ("Joe, who was just a baby, was put on a quilt near the tobacco, and the tobacco was dusted with pesticides. A plane flew over and sprayed the dust down. . . . It blew all over us, including Joe while he lay on the quilt"); id. ¶ 13, ROA 3017 ("I remember people giving Joey liquor even when he was real young – about 7 or 8 years old."); Eddie Ingram Aff. ¶ 11 (Sept. 21, 1993), ROA 3086 ("I know that Joe drank when he was young. He told me about older people giving him alcohol just to watch him act crazy.");

Detention-Adjustment Unit Admission/ Release Form (June 17, 1976), ROA 3631 ("The student [Joe] was huffing anti-perspirant to a condition that he was in an inebriated state unable to communicate with anyone"); 2006 MH Tr. at 40:12- 41:12, ROA 1205-1206; id. at 41:6-7, ROA 1206 ("[Nixon] was huffing chemicals that could have caused brain damage as well."); MH Power Point at 14, ROA 7606.

[21] Third, Mr. Nixon was malnourished throughout his childhood. See Virginia Nixon Aff. ¶ 17 (Oct. 6, 1993), ROA 1069 ("Sometimes, as a punishment, my mother would withhold food from us all day."); see also id. ¶ 8, ROA 1067 ("We didn't have much food and we were always hungry. . . . Getting enough food was always on our minds."); Thomas Earl Nixon Aff. ¶ 5 (Oct. 5, 1993), ROA 32243225 ("I have seen [Joe's mother] deprive Joe and the other children of food for several days, as a punishment. . . . [She] got angry over nothing and would make Joe stay in the bedroom for the entire weekend."); 2006 MH Tr. 39:7-11, ROA 1204 (Testimony of Dr. Keyes: "[M]alnutrition is the number one cause of intellectual disability in the world . . . [I]f it occurs in any situation the brain does not develop properly.").

Fourth, many severe physical injuries to the frail bodies of children put their brains at risk of permanent damage, but some injuries are more threatening than others. "It has long been amply corroborated by the professional literature that children subject to physical abuse, especially severe physical abuse – and particularly when accompanied by psychological neglect

and torment – are likely to suffer from distorted mental development that damages their later ability to function normally." See 2015 Greenspan Aff. ¶ 41, ROA 2570.

Here:

- Mr. Nixon's uncle admits to having sex with him "against his wishes" when he "was very young" until he was in his teens.
- [22] Mr. Nixon was beaten and emotionally traumatized by his older brother, John.
- Mr. Nixon's elementary school principal "used to beat Joe all the time, with a paddle and sometimes with a fan belt. He was very cruel and everyone knew he did it, but no one did anything about it. That's just the way things were."

James Nixon Aff. ¶ 5 (Sept. 3, 1993), ROA 3352-3353 ("I had sex with Joe when he was very young and didn't know what it was about. When Joe was older I continued to have sex with him against his wishes. Joe cried and wanted me to leave him alone, but I continued to have sex with him throughout his childhood."); id. ¶ 7, ROA 3353 ("I know of times that John beat Joe. One time I recall John came to my apartment and started attacking Joe. My apartment was virtually destroyed."); John Nixon, Jr. Aff. ¶ 7 (Sept. 30, 1993), ROA 3015 ("Joe would get beaten at school too, and then when he got home, he'd get beat again there. Mr. Tookes, the principal of the elementary school, used to beat Joe all the time, with a paddle and sometimes

with a fan belt"); id. ¶ 9, ROA 3015-3016 ("Uncle James sexually abused Joe from the time he was a little boy until he was in his teens. Uncle James told me how he did Joe. . . . When Joe was in his late teens, Uncle James used to tell Joe's girlfriends that he had 'had' Joe."); Eddie Ingram Aff. ¶ 12 (Sept. 21, 1993), ROA 3087 ("Uncle James forced him to have sex from the time he was very young until he was in his teen years."); id. ¶ 14, ROA 3087 ("John would lie about Joe to get him in trouble, then laugh at him. . . . John even teased Joe about their Uncle James abusing him, [23] and that really hurt. John got pleasure out of . . . hurting Joe in any way he could, both physically and mentally."); Thomas Earl Nixon Aff. ¶ 8 (Oct. 5, 1993), ROA 3225-3226 ("[Joe's uncle] was a sex fanatic who forced Joe to have sex with him. I saw [Joe's uncle] make Joe get in bed with him when Joe was about ten years old and have sex with him If Joe complained or resisted, [Joe's uncle] would choke him."); 2006 MH Tr. at 39:16-20; 41:13-22, ROA 1204, 1206; MH Power Point at 15, ROA 7607.

Mr. Nixon's father was rarely at home to provide the necessary caretaking, parenting, and stimulation that a child requires, and when he was home he did not know any other way to control Joe besides beating him with "switches, belts, extension cords, ropes, fan belts, whatever was handy." Eddie Ingram Aff. ¶ 13 (Sept. 21, 1993), ROA 3087 ("His father was seldom at home and when he was, he beat Joe for no reason. Joe's father beat Joe with his fist and just about anything else that he could get his hands on."); Thomas Earl Nixon Aff.

¶ 4 (Oct. 5, 1993), ROA 3224 ("Joe's father, John Nixon, was never around."); id. ¶ 6, ROA 3225 ("Joe's mother would get mad at Joe and have her husband beat him. John Nixon would use whatever he could get into his hands. He even used a limb off a tree to beat Joe. But his favorite was an extension cord. He'd swing wild and just keep hitting him all over his body. If Joe didn't cry, his daddy would just get madder and swing harder and harder. I have seen Joe walking around with bruises for days."); Doris Graham [24] Aff. ¶ 6 (Sept. 26, 1993), ROA 3008 ("My parents never had the time to give us any of the attention we needed. That was especially hard on Joe because he had so many problems. . . . [t]he only attention we got were whippings. When our parents whipped us, they would use sticks, belts, electric cords, fanbelts; almost anything they could find. Those beatings left scars."); Virginia Nixon Aff. ¶ 16 (Oct. 6, 1993), ROA 3025-3026 ("Joe got whipped a lot. Whenever he did poorly in school or came home with bad grades, he got beaten."); Paul Nixon Aff. ¶ 15 (Dec. 16, 2016), ROA 6019 ("Joe took a lot of violent beatings as a child, some undeserved"); John Nixon, Jr. Aff. ¶ 7 (Sept. 30, 1993), ROA 3015 ("[Our father] would tie us up with rope and give us a read bad whipping. He would beat us with just about anything and just about anywhere he could hit us. He left bruises and welts on us."); Marvin Carter Aff. ¶ 3 (Oct. 6, 1993), ROA 3091 ("It was common knowledge in the community that Joe's father was mean as a snake and that there were things going on in that house that just weren't right"); 2006 MH Tr. at 39:21-40:11, ROA 1204-1205; MH Power Point at 13, ROA 7605; Doris Graham Aff. ¶ 10

(Sept. 26, 1993), ROA 3009 ("All my parents would do was tell Joe he had no sense, he was crazy and that he would never amount to anything."); Virginia Nixon Aff. ¶ 20 (Oct. 6, 1993), ROA 3026 ("Mom called [Joe] stupid all the time."); Marvin Carter Aff. ¶ 3 (Oct. 6, 1993), ROA 3091 ("[Joe] was neglected and I could tell that his parents weren't doing right by him."); Eddie Ingram Aff. ¶ 12 (Sept. 21, 1993), ROA 3087 ("Joe told his mother [25] about what was done to him [sexual abuse by his uncle], but she never did anything to stop it."); Betty Nixon Aff. ¶¶ 3-4 (June 4, 2013), ROA 4812-4813 (admitting she knew of the sex abuse; that she punished, and allowed her husband to punish, Joe too harshly; and that she withheld food from him)

Fifth, just as parental provision of a nurturing environment promotes healthy brain growth, parental neglect does the opposite and has long been recognized as a causative factor in the development of intellectual disability. See 2015 Greenspan Aff. ¶ 30, ROA 2566.

Mr. Nixon's parents abandoned him when he was a young child. When his parents moved to Tallahassee, Florida, they took six of their eight children with them, leaving Mr. Nixon and his brother Paul with their grandparents in Quincy, Florida. John D. Nixon, Jr. Aff. ¶ 2 (Sept. 30, 1993), ROA 3013. Mr. Nixon experienced the same emotional and physical experience from his grandfather, "Daddy," as he experienced with his own parents. John D. Nixon, Jr. Aff. ¶ 5 (Sept. 30, 1993), ROA 3014 ("Before Joe was school age, Daddy used to put Joe and Paul outside the house at night at lock the door. He wanted to see who cried first. Daddy laughed

at Joe for crying and being scared. . . . Joe hated the dark. It terrified him. . . . Daddy thought it was funny, especially when he got drunk."). He was also sent to live with his aunt, and in various institutions. See Virginia Nixon Aff. ¶ 23 (Oct. 6, 1993), ROA 3027 ("Joe was separated from us often. He lived with my [26] grandparents, my aunt and was sent to several different half-way houses and boys' schools throughout the years."). "From age 10 to 16, Joe Nixon moved 12 times between eight different residences," disrupting not just his instructional environment and ability to form peer relationships, see 2017 Greenspan Aff. ¶ 65, ROA 4229; id. Tab 120, ROA 6192-94; Paul Nixon Aff. ¶ 22 (Dec. 16, 2016), ROA 6021, but also depriving him of sustained behavioral modelling by adults, just at the period of life when this "is most necessary to prevent developmental damage." 2015 Greenspan Aff. ¶ 10, ROA 2559.

Finally, having mentally disturbed family members, particularly among caregivers, significantly increases a child's risk of developing intellectual disability. See 2017 Greenspan Aff. ¶ 26, ROA 4212. Several members of Mr. Nixon's family suffered from serious mental illnesses, including some of those who cared for him in childhood. See, e.g., Virginia Nixon Aff. (Oct. 6, 1993) ¶ 18, ROA 3026 ("Several other brothers were slow too, but Joe was much worse than they were."); id. ¶ 25, ROA 3027-3028 ("Mental illness seems to run in our family; we have several relatives in the family who have been treated for serious mental illnesses. One of our aunts was institutionalized for

years."); Judith Dougherty Aff. ¶ 6 (Oct. 6, 1993), ROA 1095-1096 ("Mr. Nixon's mother, Betty Nixon, had obvious mental disabilities."); Eddie Ingram Aff. ¶ 4 (Sept. 21, 1993), ROA 3084-85 ("[Joe's father] was real slow, just like Joe. He never talked much at all and just couldn't carry on [27] a conversation, . . . He was just real simple-minded."). Mr. Nixon's uncle, James Edward Nixon, was hospitalized multiple times for severe mental illness, including depression, bipolar disorder, schizophrenia, and suicide attempts. See James Edward Nixon Jail Records, ROA 6406-6441. Two of Mr. Nixon's brothers, Paul and Joseph, were enrolled in special education classes in middle school due to their struggles, and Mr. Nixon's cousin, Richard Tony Robertson, suffered severe and persistent mental illness. See Paul Nixon Aff. ¶ 11 (Dec. 16, 2016), ROA 6018; Testimony of James Meyer, forensic psychologist at 1100:3-22 (Jan. 25, 1993), in Florida v. Richard Tony Robertson, No. 91-3093 AF (Fla. 2d Jud. Cir.), ROA 7229.

b. Mr. Nixon Was a Slow Learner and Significantly Behind His Peers in Intellectual Performance as a Child

In accordance with the overwhelming probabilities of the situation, Mr. Nixon's intellectual development was impaired from earliest childhood onwards. This was visible to lay and professional observers alike and has been confirmed by numerous generalized and

specialized tests conducted over the course of many decades.[9]

[28] *i. Mr. Nixon had Significant Communication Issues*

For an individual to be unable to participate in everyday conversations is a key indicator of intellectual disability. See 2006 MH Tr. at 47:15-19, ROA 4866 ("[L]anguage is one of the main indicators of intelligence in this world. If you are not good in language, you're not going to have a good social life. You are not going to have a good ability to interact with others. And it is part of the main hallmarks of mental retardation."); 2017 Greenspan Aff. ¶ 18, ROA 4326-4327 ("Language and the ability to effectively communicate are considered to be the basis of one's interaction and involvement with society. The fact of Mr. Nixon's reduced language skill is very important because verbal

[9] As noted in footnote 8 above, the most recent test in the record addressing Mr. Nixon's condition during the developmental period was administered in conjunction with the evidentiary hearing below. This was a Test of Premorbid Functioning, specifically designed to quantify innate intelligence at birth. Mr. Nixon's predicted IQ was 71. See Tr. of Evid. Hrg. Vol. 1 (Fla. 2d Jud. Cir. July 30, 2018), ROA 92689269. Another recent specialized evaluation, conducted at Dr. Greenspan's request in order to test the impression he formed after reviewing the record of Mr. Nixon's deficits, see 2015 Greenspan Aff. ¶ 110, ROA 2594, confirmed that Mr. Nixon was born with "a severe level of brain dysfunction" resulting from Fetal Alcohol Spectrum Disorder. See Report of Dr. Julian Davies, M.D., at iii 19 (Aug. 10, 2015), ROA 4014-4019.

ability is generally considered to be a stronger indication of intelligence than perceptual organization.").

Mr. Nixon had severe difficulties in communicating beginning in childhood. Those close to him knew he could not even carry on casual conversation:

- Joe "had such a hard time learning anything in school and he couldn't carry on a conversation about anyone. He even had trouble talking about boxing, even though he loved boxing." John Nixon, Jr. Aff. ¶ 12 (Sept. 30, 1993), ROA 3016.
- "Joe didn't know how to put his words together well and he had a hard time putting his thoughts into words. He often said things the wrong way and I had to tell him the right words to use." Virginia Nixon Aff. ¶ 21 (Oct. 6, 1993), ROA 3027.
- [29] "Joe was unable to participate in conversations with other people because he would not understand what the conversations were about. I remember he used to tilt his head from side-to-side, and spend most of the time watching and trying to figure out what people were talking about." Eddie Ingram Aff. ¶ 8 (Sept. 21, 1993), ROA 4740.
- "He couldn't seem to function on a social level. He had difficulty understanding things and communicating his own thoughts or expressing his own feelings. Joe just didn't understand the simplest things." Paul Nixon Aff. ¶ 3 (July 22, 2015), ROA 8385.

- "He had difficulty understanding things and communicating his own thoughts or expressing his own feelings. Joe always struggled to explain himself. Even when we were real little children, I was always better at constructing sentences than Joe. From the earliest years it was always a problem for him." Paul Nixon Aff. ¶ 10 (Dec. 16, 2016), ROA 6018.
- "Even simple things were hard for Joe. He really struggled with communication. I remember when we would come home from school, people would ask the general 'what did you do at school today?' question to all us kids. My siblings and I would make something up so we could move on to other things. Joe was totally unable to answer the question and would get stuck. This was just who he was. He was never on the same page as others intellectually or socially." Paul Nixon Aff. ¶ 4 (June 22, 2017), ROA 8373.

ii. Mr. Nixon Was Unable to Grasp Basic Quantitative Concepts or to Spell the Simplest Words

While growing up, Mr. Nixon was unable to grasp basic quantitative concepts or to spell at the most elementary level, another characteristic symptom of persons with sub-average intellectual functioning See 2006 MH Tr. at 47:24-48:6, ROA 4866-4867 ("Quantitatively, mathematical concepts, Joe had great difficulty in understanding very basic things. . . . And that actually is a common thing for kids who are mentally

retarded. The will get cheated quite a bit when it comes to money. [30] They will think that . . . ten pennies is better than one quarter."); MH Power Point at 26-28, ROA 5472-5474; Virginia Nixon Aff. ¶ 19 (Oct. 6, 1993), ROA 4724 ("Joe didn't know things that children his age should know. I remember that Joe used to think that having two dimes was more money than having one quarter. He thought like that for a long time – even when the kids in his class at school knew better, Joe didn't."); Paul Nixon Aff. ¶ 5 (June 22, 2017), ROA 8373 ("Joe struggled with his comprehension. . . . Counting money or making change were beyond him.").

The Final School Report from the Dozier School for Boys, which was issued when Mr. Nixon was 11, describes his difficulty with spelling and the basic concept of borrowing in division:

> Standardized Test Results Evaluation: In the dictated Spelling Test . . . , Jo[e] has a well[-]established characteristic of having only the initial letter correct and a pattern of the first and last letters correct. Other errors were scattered such as omitting consonants or a different form of the same word. He got as far as 'up.'
>
> Arithmetic Fundamentals on this test is confined to simple whole number problems. . . . When the subtraction involved borrowing, Jo[e] took the smaller from the larger regardless of position. He placed numbers in the answer spaces for some other problems, but they have no relationship to the proper answers.

See Aug. 1972 Dozier School for Boys Records, at Tab 46, ROA 3582.

These test findings are classic markers of intellectual disability. 2015 Greenspan Aff. ¶ 48, ROA 2574; 2006 MH Tr. at 49:11-50:14, ROA 4868-4869 [31] ("[Mr. Nixon] had a well-established characteristic of having only the initial letter correct and the pattern of the first and last letters correct in his spelling tests. This is the kind of thing you see with kids who have moderate [to] mild mental retardation or severe learning disabilities. They hear the first sound and they hear the last sound. And they may guess at the rest, or they may just put those two letters. . . . at the age of ten . . . the most [Mr. Nixon] could spell was 'up.' "), id. at 50:15-51:10, ROA 4869-4870 ("[Mr. Nixon] had difficulty with borrowing, which is not unusual for kids who have learning problems, but the concept of borrowing requires, of course, taking something from the tens and putting it into the ones. When kids with mental retardation and severe learning disabilities have trouble with mathematics, especially subtraction and borrowing, they will take the lower [number] from the higher [number] no matter where that number happens to be.").

iii. Mr. Nixon Was Easily Led and Had Difficulty Learning From His Mistakes

In another manifestation of his intellectual disability, Mr. Nixon was extremely gullible from childhood onwards, and frequently taken advantage of by his siblings and peers. See 2017 Greenspan Aff. ¶ 56. ROA 4225 ("Persons with limited intellectual abilities and/or intellectual disability are gullible, suggestible, and likely to be subject to domination by authority figures."); 2006 MH Tr. at 44:2445:4, ROA 3244-3245 ("People with mental retardation, gullibility is one of their most common problems. They will believe what people say to them and, that [32] actually, in some ways, it's part of the cloak of competence, because if you act like you believe or you understand and you agree, people will accept you for who they think you are. . . . And they may know that he is mentally retarded, and they may know that he is stupid and just use him in that sense."); Virginia Nixon Aff. ¶ 19 (Oct. 6, 1993), ROA 4724 ("[The kids in his class at school . . . would often cheat him and take his money."); Thomas Earl Nixon Aff. ¶ 12 (June 28, 2017), ROA 8390-8391 ("Joe would do anything you told him to do. . . . I was always really scared for Joe because I knew he could be led to do something crazy."); Gail Igles Aff. ¶ 9 (June 23, 2017), ROA 8412 ("[Joe] would follow what other people were doing. He was unable to say no to anyone, especially his brother John and his Uncle Bo. [Joe] was afraid of John. John and [Uncle Bo] made [Joe] do their dirty work for them. ."); Johnnie Pearl Sanders Aff. ¶ 8 (June 23, 2017), ROA 8415-8416 ("[Joe] would do

whatever he was told to do without question. He would never think of the consequences. His brothers Paul and John constantly took advantage of him because they knew he was slow and wouldn't say no to them."); Eddie Sam Ingram Aff. ¶ 10 (June 5, 2017), ROA 8438 ("I can't think of many people who were more of a follower than [Joe]. He would do anything he was told to do. I witnessed this many times over the years.").[10]

[33] Mr. Nixon's difficulties in this regard were compounded, as is commonly the case with intellectually disabled people, by an inability to learn from negative experiences. "The problems caused by a mentally retarded defendant's substantial intellectual deficits are aggravated by intellectual rigidity, which is often demonstrated by an impaired ability to learn from mistakes and a pattern of persisting in behaviors even after they have proven counterproductive or unsuccessful." Supplemental Aff. of Dennis William Keyes, Tab 2-E at p.7 (Oct. 22, 2006), ROA 2765. See May 14, 1974 Letter from [Segred] Belcher [counselor at the Jack and Ruth Eckerd Foundation Camp], ROA 5179-5180 ("[Joe] can explain in words why an action is wrong, but there is little reality in the way he relates cause to effect. . . . [H]e cannot seem to learn from his mistakes . . . ").

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[10] The so-called "armed robbery" that Mr. Nixon was convicted of committing with Mr. Ingram falls squarely into this pattern. See Eddie Ingram Aff. ¶ 17 (Sept. 21, 1993), ROA 4742; Declaration of Eddie Sam Ingram ¶¶ 11-12 (June 5, 2017), ROA 8438-8439 (quoted in n.19 below).

iv. Mr. Nixon was Repeatedly Identified as "Slow" by Those Around Him

Many people who were close to Mr. Nixon during his childhood saw that he was intellectually impaired, a fact that the State's expert readily agreed was of diagnostic significance. See Prichard, Evid. Hrg. Tr. 354:4-21 (July 31, 2018) (testimony of State's expert), ROA 9477.

In his father's words, "Job was always a slow child. He did not do well in school because he had learning problems. I know Job also had mental problems. [34] Something was wrong with his brain or mind. Job was a very weak child that way. He just did not act like other children. It was something that Job just couldn't help or control. I could look at my son and tell that something was wrong with him. He wasn't normal, and he suffered a lot for it." John Nixon, Sr. Aff. ¶ 6 (Oct. 5, 1993), ROA 3080.

The record is replete with first-hand observations to the same effect by people who knew Mr. Nixon well:

- "I recall Joe Nixon as a young child being tormented and teased by other children because he was retarded. The children's favorite terms for Joe were 'dummy' and 'stupid.' Joe took these insults hard; he would turn and walk away looking very dejected." Marvin Carter Aff. ¶ 2 (Oct. 6, 1993), ROA 3091.
- "[Joe] was a simple person. He was often in his own little world. He was slow mentally. He occupied the majority of his time watching

television." Gail Igles Aff. ¶ 2 (June 23, 2017), ROA 8410.

- "Joe always wished that he was smart enough to be able to stay in school, and learn and have a normal life. Joe said he could not learn while he was in school because he could not understand what the teacher was talking about. He couldn't really even learn to read. When Joe told me about not being able to learn, my heart was broken. I always knew Joe was extremely slow and had something wrong with him. He wasn't a bad kid at all; he just couldn't learn, play or think right. He needed help—more help than I could ever have given him." Eddie Ingram Aff. ¶ 5 (Sept. 21, 1993), ROA 4739.

- "I always felt bad for [Joe]. It was obvious he was slow." Mattie Lou Sol Aff. ¶ 2 (June 5, 2017), ROA 8433.

- "Joe has been slow as long as I can remember. I have often wondered whether he is retarded because he had such a hard time learning [35] anything in school. . . ." John Nixon, Jr. Aff. ¶ 12 (Sept. 30, 1993), ROA 3016.

- "Joe was a slow child. He never seemed to reach the level he should have been on in school. He had a lot of trouble learning Joe knew that he was slow because the kids at school used to tease him and laugh at him for being stupid. Several other brothers were slow too, but Joe was much worse than they were." Virginia Nixon Aff. ¶ 18 (Oct. 6, 1993), ROA 3026.

- "I always thought that [Joe] was slow to catch on to things and naïve. It seems like Joe has had a mental problem all of his life." Thomas Earl Nixon Aff. ¶ 2 (Oct. 5, 1993), ROA 3224.
- "He was not like other children his age. Joe was very slow and had a hard time learning in school. . . . Joe always seemed as if he was in another world. I used to think that he wasn't quite right. He just wasn't all there." Doris Graham Aff. ¶ 14 (Sept. 26, 1993), ROA 3010.

c. Mr. Nixon's Educational Records Confirm That His Intellectual Functioning was Far Below Normal

Educational records from the schools and institutions attended by Mr. Nixon during his childhood, including both cognitive testing and behavioral evaluations, demonstrate that Mr. Nixon was several years behind his peers in terms of his intellectual functioning.

By the age of 10, the extreme trauma, childhood depression, and cognitive dysfunction experienced by Mr. Nixon culminated in behavior requiring institutionalization, including several commitments to the notoriously abusive Arthur G. Dozier School for Boys in Marianna, Florida, where he was one of the [36] youngest inmates.[11] See 2017 Greenspan Aff. ¶¶ 64-67,

[11] In order to settle a civil rights action, the State eventually signed a consent decree agreeing that the Dozier School would no longer accept boys as young as Mr. Nixon was when he first

ROA 4228-4230; id. ¶ 69, ROA 4231 ("Childhood institutionalization – especially in a facility guilty of brutality and warehousing – has profound effects on children and teenagers. [T]he effect . . . is akin to growing up in a combat and can induce . . . an inability to function in the everyday world."); Crown, Evid. Hrg. Tr. 78:2-4 (July 30, 2018), ROA 9201 (Mr. Nixon's attendance at the Dozier School for Boys "certainly becomes a risk factor [for an intellectual disability diagnosis] because [students are] not allowed free and open expression, nor are [they] allowed learning and to develop learning skills."). See Paul Nixon Aff. ¶ 20 (Dec. 16, 2016), ROA 6020-6021 ("They hog-tied us with chains that left marks on our wrists and ankles. They continued to beat us if we disobeyed their orders. They brought us to "The Hill," which was a special confinement area. There they forced us to sleep on brick beds. School staff forced us to fight each other in a ring, too. The staff did it for their own entertainment. If a child chose not to fight when told to do so, we were beaten anyways. Joe told me later that he, too, was forced to fight and beaten when he lost"); Bobby M. Litig., Second Amended Complaint ¶¶ 26-102 (N.D. Fla. filed June 2, 1986) (alleging [37] abuses at Dozier including the denial of medical and psychological care, sexual assaults and violence, disciplinary methods that

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arrived there. See Bobby M., et al. v. Martinez, et al., No. TCA 83-7003 MMP ("Bobby M. Litig."), Consent Decree at 15 (N.D. Fla. May 8, 1987), available at Univ. of Mich. L. Sch. Civ. Rts. Litig. Clearinghouse [hereinafter, "Clearinghouse"], https://www.clearinghouse.net/chDocs/public/JI-FL-00020007.pdf (last accessed Dec. 9, 2020).

included hog-tying, lock-up, and physical assault, unsanitary conditions, and the use of tracking dogs), available at Clearinghouse, https://www.clearinghouse.net/chDocs/public/JI-FL-0002-0005.pdf (last visited Dec. 9, 2020).

But even that grossly inadequate institution was able to detect Mr. Nixon's intellectual disability, and he was recommended for and placed in special education classes. See Woods Expert Decl. ¶ 69, ROA 539; Aug. 1972 Dozier School for Boys Records, ROA 3582 ("Individual Prognosis: Jo[e] should be placed in a special education program."); Paul Nixon Aff. ¶ 11 (Dec. 16, 2016), ROA 6018 ("In middle school I was placed in special education classes. . . . My baby brother, Joseph, was also placed in special education classes.").

In 1973, when Joe was in the 5th grade in Volusia County Schools, by which time he had been left behind at least one grade, he received scores on two group-administered tests, identified as TOGA and OTIS. "[T]he results of both tests reflect that Joe was academically and intellectually impaired. Even after repeating a grade, he was functioning at somewhere between the 4th and 11th percentiles of fifth graders, and very possibly even lower." 2017 Greenspan Aff. ¶ 73, ROA 4234.

On August 19, 1974, Jim Walsh, Home parent at Seminole, submitted a transfer summary concerning Joe: "Jo[e] cannot perform academically in the public [38] school system. He needs special remedial classes and his behavior requires a strict contingency to

maintain it in the classroom." Aug. 19, 1974 Transfer Summary, ROA 5182. See 2006 MH Tr. at 54:18-23, ROA 1218 (Dr. Keyes testifying that such a recommendation for special education is "absolutely" consistent with someone who is manifesting traits of mental retardation).

On August 22, 1975, Joe was discharged from Camp E-Ma-Chamee. A family worker, Ms. Nancy Cupit, prepared a Discharge Summary regarding Joe's camp experience. The "most important" recommendations were

> 1) Job should receive vocational training upon his return to the community and not attend the regular program, 2) personal involvement from parents to open the lines of communication with Job . . . 4) he needs remediation in the 3 "R's" but without lot of pressure.

Discharge Summary dated August 1975, ROA 5199. See Declaration of Nancy Cupit ¶¶ 6-7 (June 28, 2017), ROA 8430-8431 ("In the Discharge Summary, I wrote in August, 1975, it was recommended that upon release, Joe should not go back to a regular classroom but to vocational training It was very unusual to recommend that for a 14 year-old unless we knew he could not succeed in school. My note that Joe needs remediation in the three "R's" indicates that he basically could not read or write at all . . . Most of our kids struggled to a degree, so if I took the time to point out that Joe needed help, he would have been especially weak. He

would not have been able to do the routine tasks required to function at our camp.").

[39] On December 4, 1975, prior to Joe's being transferred to the notorious Dozier School for Boys yet again, Robert Newkirk a state youth counselor, prepared a Predisposition Report:

> Jo[e] has not attended the regular school program since being committed during the year of 1972. . . . Attempts were made within the school system to place him in vocational oriented areas. *However, his IQ was such that he did not qualify* and his age disqualified him.

Pre-Disposition Report dated Dec. 4, 1975, ROA 5203-5204, App. 414-417 (emphasis added).

On December 30, 1975, and February 20, 1976, Joe took the California Achievement Test. See Official Transcript of School Record 1975-1976, ROA 5209. The test results, which were expressed as grade equivalents, show that Joe, at the age of 14, was at least 4 years behind his peers in 1975, and 5 years behind in 1976. See 2017 Greenspan Aff. ¶ 89, ROA 8514 ("[T]hese grade equivalents are consistent with the clinical recognition that for adults with ID in the higher-functioning range (which is what we are typically talking about in criminal cases), the intellectual performance of people with ID never advances beyond that of a normally developing 10 or 11 year-old child. Joe's tremendous number of risk factors, however, impair his intellectual functioning to an even younger age level in many areas."); 2006 MH Tr. at 56:12-16,

ROA 1220 ("[Joe] . . . placed grade-wise [40] between the third grade and third grade and six months. . . . He was . . . therefore . . . at least four full years behind.").

2. Mr. Nixon was Unable to Take Care of Himself or Function in Day-to-Day Life

Mr. Nixon from childhood onwards has been unable effectively take care of himself and perform basic daily living activities:

- "When Joe was about eleven, I taught him how to ride a bicycle. Physically, he was very capable. Mentally, he was not mature enough to ride by himself. We were always terrified he would ride his bike into traffic and hurt himself or cause an accident. We would lock Joe's bike up and not let him ride it unless one of us was around." Paul Nixon Aff. ¶ 8 (June 22, 2017), ROA 8374.

- "The boys in the house were responsible for keeping up the yard. We had a lawnmower to cut the grass. You had to fill the lawnmower with gas and oil to operate it and the blades needed to be adjusted. This was too complicated for Joe. My brothers and I would not allow Joe to operate the lawnmower. It was far too dangerous for him Instead, we gave him a rake and he cleaned up the debris." Paul Nixon Aff. ¶ 7 (June 22, 2017), ROA 8373-8374.

- "[Joe] was unable to deal with even simple problems. . . . [His] shortcomings were well

known to our family. We had no expectations of him doing things independently. Even when Joe was sent to the grocery store to pick up some items, he would be sent with a note for the grocer Mr. Robinson." Paul Nixon Aff. ¶ 5 (June 22, 2017), ROA 8373.

- "To get to the grocery store from the place we lived required taking a bus. [Joe] was not able to take the bus to the store himself. He would not have remembered which bus to get on or where to get off. I recall on one occasion JoJo told me he was going to go somewhere on the bus. I encouraged him to do so. [Joe] left the house. When I saw [Joe] later, I asked him how it went. At first he lied to me and said he had gone. He later fessed up and told me he had hadn't gone because he didn't know how to get where he wanted to go and was afraid of getting [41] lost. . . . If he needed to get somewhere, someone would have to go with him." Gail Igles Aff. ¶ 4 (June 23, 2017), ROA 8410-8411.

- "If Joe needed to get somewhere, he was driven in the car by someone else or accompanied on the bus. If paperwork needed to be filled out, my sisters, Doris or Virginia, would do it for him " Paul Nixon Aff. ¶ 6 (June 22, 2017), ROA 8373.

- "Joe was a bad driver. He would just get in the car and slam the pedal down and drive crazy like he couldn't control the car. We just drove him around, especially John." Thomas Earl Nixon ¶ 11 (June 28, 2017), ROA 8390.

- Joe "wasn't just slow, he was totally unable to take care of himself. When he was almost full grown, he still couldn't do the basic things we all take for granted. My mother and I had to do everything for him, from fixing food to making his bed to telling him what to do and how to do it. He was able to hold a job for a[while] but all he could do was monkey work – just carrying bricks. . . . [H]e wasn't lazy, but he wasn't able to do much of anything except use his muscles. Joe couldn't even play cards. Anytime he tried, he would end up with extra cards and be all confused and embarrassed. I'm sure some people thought he was cheating, but he wouldn't have knowingly done that. He suffered in all areas because of how bad his brain is." Eddie Ingram Aff. ¶ 6 (Sept. 21, 1993), ROA 3085.

- "Joe was not good in making decisions and needed help to make even the most basic day-to-day decisions. I had to help Joe make decisions that were simple to me, but nearly impossible for Joe." Eddie Ingram Aff. ¶ 3 (Sept. 21, 1993), ROA 3084.

- "I did [Joe's] laundry for him. He could separate whites from darks but not much more. The water temperature, load size, fabrics, etc. were way over his head." Gail Igles Aff. ¶ 5 (June 23, 2017), ROA 8411.

- "A lot of fairly routine tasks had to be explained to [Joe], usually more than once. Because he had such difficulties, almost everything was done for him My mother,

sisters and I not only cooked and cleaned for him but also washed all of his clothes. Left to his own devices, none of this would have gotten done. He would have been unable to do [42] something as easy as cooking a roast." Mattie Lou Sol Aff. ¶ 5 (June 5, 2017), ROA 8433-8434.

- "Joe was not a planner. He lived day to day. . . . He was never concerned about dressing appropriately for the weather. Whatever he had on at the time the door open was what he was going out in." Gail Igles Aff. ¶ 8 (June 23, 2017), ROA 8412.

- "[Joe] just didn't have the skills required to take care of himself. For as long as I have known him, he has relied on family for survival. There is no way he could have lived on his own." Gail Igles Aff. ¶ 10 (June 23, 2017), ROA 8412.

- "My Uncle Tom was a brick mason. He would bring [Joe] to work with him. . . . [Joe] didn't have the smarts to lay the brick so he was used mainly to carry bricks and other materials around." Johnnie Pearl Sanders Aff. ¶ 4 (June 23, 2017), ROA 8415.

- "I gave [Joe] a job because he was kin. Based upon his skillset and abilities, I would not have hired him otherwise.He was unemployable. . . . [Joe] was poor with directions. I couldn't rely on him to get from one jobsite to another by himself. Similarly, I was unable to send [Joe] to pick up supplies from the construction store for me. There is just no way he

> could have done it." Thomas Igles Aff. ¶¶ 2, 5 (June 23, 2017), ROA 8427-8428.

See also Affidavit of Denis William Keyes, Ph.D. ¶ 17 (June 15, 2006), ROA 4326 ("[Joe's] actual adaptive functioning is roughly estimated to be at the developmental stage expected of a 6-8 year old child."); 2006 MH Tr. at 45:16-46:1, ROA 1210-1211 ("[Joe] was unable to take care of himself. . . . These are all basic adaptive skills. If he couldn't do these things, it's clear that he was not able to adapt to a situation."); Crown, Evid. Hrg. Tr. 74:1-4 (July 30, 2018), ROA 9197 ("[Individuals with intellectual disability have] [d]ifficulty with maintaining hygiene, difficulty in maintaining appropriate dress. Difficulty in following [43] instructions, difficulty in following directions, particularly multiple-part directions. . . .").

As with all of the evidence presented so far, this aspect of the record is undisputed and has been since the Circuit Court's very first hearing on intellectual disability. The State's expert testified at the evidentiary hearing on October 23, 2006, "I'll concede he has adaptive deficits. Okay. He has got adaptive deficits throughout his records." See 2006 MH Tr. at 212:23-24, ROA 1253. The State then explicitly declined to contest the issue. See State v. Nixon, 1984CF2324, Order at 14 (Fla. 2d Jud. Cir. Apr. 26, 2007), ROA 5514.

To the extent that the Court may consider present functioning to be of relevance, but see Initial Brief of Appellant at 39-42, Nixon v. State, No. SC 15-2309 (Fla. Mar. 7, 2016), ROA 4077-4080; Bowles v. Sec'y, Fla.

Dep't of Corr., 935 F.3d 1176, 1181-82 (11th Cir. 2019) (noting "Atkins focuses on the prisoner's culpability at the time of the crime"), the uncontested record below further establishes that even in the restricted environment of the prison, Mr. Nixon is unable to perform such simple daily tasks as selecting menu items or sorting his laundry into categories, much less write a grievance or even read one written for him See Rachel Aaron Investigation Report at 14-17 (Sept. 5, 2017), ROA 8825-28.

3. Additional Data From Recent IQ Testing of Mr. Nixon Confirms His Intellectual Disability

As the Court was well aware in 2017 when it decided Nixon VI, the record [44] contains various IQ scores for Mr. Nixon, see 2017 WL 462148, at *1 n.2, a fact that, as this Court specifically held, did not disqualify him from an intellectual disability diagnosis.

The only change since then is that after remand Mr. Nixon was tested with the WAIS-IV testing instrument—the current "gold standard" IQ test that is statistically more sound that all previous IQ tests—and scored a 67. See Crown, Evid. Hrg. Tr. 31:15-22 (July 30, 2018), ROA 9155 ("In the field of psychology . . . the Wechsler Adult Intelligence Scale – IV . . . is the gold standard. It's the test that's used by most school systems in the United States. It's used by most clinics. It is used by most facilities. It is the test that's most often and most typically used in the diagnosis of an

assortment of psychological and neuropsychological problems."); id. at 34:4-5, ROA 9157 ("[The WAIS-IV] is based on a methodology that is both mathematically and statistically more accurate . . . it derives its score from a factor analysis, which . . . means that it looks at whether the underlying factors in this test . . . allow certain . . . subtests to cluster together."); id. at 40:17-24, ROA 9163 ("[The WAIS-IV developers] relied on the United States census and drew from a diverse population of 2,200 people. . . . unlike the previous Weschler tests, the sample was more diverse in terms of ethnicity, in terms of geography, in terms of race, in terms of education. It included the neurologic population, and as a result, it's more accurate than earlier tests.").

[45] Indeed, the State's expert, Dr. Prichard testified at the evidentiary hearing below:

> Q. You would agree, would you not, that the WAIS-IV and the Stanford-Binet-V are the best and most reliable measures of intellectual functioning today?
>
> A. Yes.

(Prichard, Evid. Hrg. Tr. 350:2-5 (July 31, 2018), ROA 9473.

4. The Circuit Court Committed Legal Error in Denying Relief Under Hall

In light of the foregoing overwhelming uncontested record, the agreement of all the experts that no IQ scores are necessary to support a diagnosis of

sub-average intellectual functioning before age 18 (Prichard, Evid. Hrg. Tr. 351:10-15 (July 31, 2018), ROA 9474), and Hall's grounding in clinical practice, one may well wonder how the Circuit Court reached the result it did.

The answer is simple: the Circuit Court, fixated on IQ scores,[12] remains convinced that the existence of an IQ score, or scores, above 75 disqualifies a defendant from receiving the holistic assessment mandated by Hall.

That is what the Circuit Court thought in 2015: "Mr. Nixon's [2006] score of 80 means that Hall does not apply." (2015 Order at 4, App. 410.) We responded in [46] our brief in this Court (see Initial Brief at 30-36, ROA 4068-4074; Reply Brief at 13-14, ROA 4105-4106) by citing numerous post-Hall cases showing that this is simply not the law. See Brumfield v. Cain, 576 U.S. 305, 314-15 (2015); State v. Agee, 358 Ore. 325 (2015); Pruitt v. Neal, 788 F.3d 248, 270 (7th Cir. 2015) (granting federal habeas relief on finding that defendant "demonstrated with clear and convincing evidence that he is intellectually disabled" notwithstanding an attained IQ score of 76); Commonwealth v. Taylor, No. 12-CR-2381, Op. & Order (Jefferson Cir. Ct., Ky. Dec. 1, 2014) (finding after evidentiary hearing conducted under Hall standards that defendant was intellectually

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[12] Thus, the statement of the State's youth counselor, Robert Newkirk, that by age 15 Mr. Nixon's "IQ was such that he did not qualify" even for vocational training is not be found in the opinion below, perhaps because no number appears in the sentence. See Section III.A.I.c. above.

disabled notwithstanding IQ scores of 79 and 91 obtained by Kentucky Correctional Psychiatric Center in 2007 and 2014). We noted that this judicial unanimity was hardly surprising, since Hall himself had achieved an IQ score of 80. Hall, 572 U.S. at 707.

Thus, it was equally unsurprising that this Court, which knew all about the very test scores now relied upon below, reversed in 2017. See Nixon IV, 2017 WL 462148, at *1 n.2.

On remand, the Circuit Court simply failed to understand the law, candidly admitting, "I am uncertain what Hall requires of the trial court under these circumstances." 2019 Order at 25, ROA 9675. It adhered to its 2015 theory and, in flat contradiction to this Court's remand order, held that the above-75 IQ scores in the record meant that this was not a case "in which Hall would require resort to the [47] interrelated and conjunctive assessment." (Id. at 2, 8, 25-27, ROA 9652, 9658, 96759677). But see Nixon VI, 2017 WL 462148, at *2 (reversing because the Circuit Court "should have conducted the more holistic, interrelated assessment for which Nixon's counsel argued at the Huff hearing").

In the 2019 Hall/Hurst Order that is the subject of this appeal, the Circuit Court once again insisted that Hall permits a consideration of adaptive-deficit evidence only when no IQ scores exceed 80.[13] In its view,

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[13] "Hall requires the court to consider the bottom range of the SEM to account for adaptive deficits. Hall does not permit the

"Hall's adaptive behavior analysis must be bounded by the standard error of measurement." 2019 Order at 27, ROA 9677. "Hall does not suggest than an IQ range of 75 to 85 or 83 to 93 should be adjusted by applying deficits in adaptive behavior to then further reduce the estimate of intellectual functioning lower than the standard error of measurement." Id. at 26, ROA 9676. Thus, the fact that "Mr. Nixon's score of 80 exceeded the statutory definition of 'significantly subaverage' – higher than two standard deviations below the mean" was fatal to his Atkins-Hall claim. Id. "Mr. Nixon presented clear and convincing evidence of deficits in adaptive behavior but failed to present clear and convincing evidence that such deficits existed concurrently with subaverage general intellectual functioning." Id. at 30, ROA 9680.

[48] The Circuit Court suggested that it would be absurd to conduct a holistic adaptive-deficit analysis where a defendant had an IQ score of 120. See 2019 Order at 8, ROA 9658. To be sure, if an IQ score of 120 were the only evidence in the record concerning intellectual functioning a court would need to go farther. Zack v. State, 228 So. 3d 41 (Fla. 2017) (dismissing claim of litigant with no qualifying IQ scores).

But that is far from this case.

Indeed, in this case, the most recent test score—which is based on an instrument that the state's expert conceded is state of the art (Prichard, Evid. Hrg Tr. 350

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court to expand the SEM to account for adaptive deficits." 2019 Order at 25, ROA 9676.

(July 31, 2018), ROA 9473)—was 67. But the Circuit Court mentioned that only in passing (2019 Order at 9, 16, 28, ROA 9659, 9666, 9678), instead focusing on the scores it wrongly considered exempted it from conducting a holistic analysis of the record.

The Circuit Court this time did exactly what this Court held was error last time: "because of its ruling as to the subaverage intellectual functioning prong, the court here did not look to all of the record evidence of Nixon's intellectual disability, even disregarding other non-IQ evidence that could have been relevant." Nixon VI, 2017 WL 462148, at *1.

The whole point of Hall's statement that "[i]ntellectual disability is a condition, not a number," Hall, 572 U.S. at 723, is that when clinicians are [49] confronted with a series of IQ scores, some of which are in the qualifying range, no single number is dispositive of the diagnosis.[14] Under those circumstances, professional standards require an evaluation of the whole picture. But the Circuit Court here ruled against Mr. Nixon because it held that once above-75 IQ scores are found Hall does not apply. This legal error led it to simply disregard the massive and uncontradicted record that is canvassed above.

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[14] The underlying reasoning is straightforward. Suppose a high school baseball player faced major league pitching. A reasonable number of plate appearances would demonstrate his actual abilities. If he happened to hit a single home run, one would hardly conclude that this best performance represented his true capacity. But see 2019 Order at 30, ROA 9680.

In a truly remarkable statement, the Circuit Court wrote, "The most basic information regarding Mr. Nixon's functioning [e.g.] whether Mr. Nixon 'had good hygiene, could care for himself, and could drive' is largely absent from the record." 2019 Order at 29, ROA 9679 (internal citation omitted). In truth, as set forth above, the record evidence presented to the Circuit Court and admitted without objection (ROA 9239-40, 9190) could hardly be stronger. But the Circuit Court's legal blinders prevented it from seeing that.

5. This Court Should Order the Imposition of a Life Sentence

The correct outcome here is clear. Whether, as Mr. Nixon contends, he was only required to prove his intellectual disability by a preponderance of the [50] evidence,[15] or instead this Court's clear and convincing standard is correct makes no difference in this case because it is hard to image a more clear and convincing presentation of general subaverage intellectual functioning before age 18. Indeed, a decision to the contrary on this record would be both an unreasonable application of clearly established federal law and an unreasonable determination of the facts in light of the evidence. Hence, the Court should adopt Mr. Nixon's prior suggestion (Supplemental Brief filed Sept. 27, 2016, ROA 4121-56), and—just as it did in Hall v. State, 201 So. 3d 628 (Fla. 2016) and Herring v. State, No.

[15] See § III.A.6, infra.

SC15-1562, 2017 WL 1192999 (Fla. Mar. 31, 2017)—order the imposition of a life sentence.

6. Requiring Mr. Nixon To Prove His Intellectual Disability By "Clear and Convincing" Evidence Is Unconstitutional

Mr. Nixon reiterates what he told this Court in 2007 and it then found unnecessary to address, see Nixon v. State, 2 So. 3d 137, 145 (Fla. 2009), that placing on him the burden of proving intellectual disability by clear and convincing evidence is unconstitutional. Mr. Nixon has maintained that position ever since. See 2019 Mtn. for Rehrg. at 2 n.1, ROA 9683. This Court's repeated invocation of its existing standard, e.g., Wright v. State, 256 So. 3d 766, 771 (Fla. 2018), has not been accompanied by any re-assessment of its validity.

[51] Yet the clear and convincing standard for a determination of intellectual disability as articulated in Fla. Stat. Arm. § 921.137(4) (2020) is an outlier both within Florida's own legal framework and among the remaining states with the death penalty. Only three states—Arizona, North Carolina, and Florida—currently use the clear and convincing standard. Ariz. Rev. Stat. Ann. § 13-753(G) (2011); N.C. Gen. Stat. § 15A-2005(c) (2015). The standard is not used in any other context within Florida criminal law. It creates an unacceptable risk that intellectually disabled persons will be executed in violation of Moore v. Texas, 139 S. Ct. 666 (2019) ("Moore II"); Moore I, 137 S. Ct. 1039; Hall v. Florida, 572 U.S. 701, 701 (2014); and Atkins v.

Virginia, 536 U.S. 304 (2002), because identifying people with mild intellectual disability, the category that covers 80-90% of diagnosed cases, depends on evidence which is frequently less than clear and convincing. The standard thus fails to properly "allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." See Addington v. Texas, 441 U.S. 418, 423 (1979). In Cooper v. Oklahoma, 517 U.S. 348 (1996), the Court determined that the proper burden of proof to place on defendants seeking a determination of incompetence was a preponderance of the evidence. The "standard of proof, as . . . embodied in the Due Process Clause . . . is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions." Id. at 362 (citing Addington). As all but a few [52] isolated States have seen by now, reducing the risk of being wrongly sentenced to death is at least as important to society as reducing the risk of being wrongly brought to trial.

7. Phillips Does Not Apply to Mr. Nixon's Case and Applying It to Deny Him Relief Under Hall Would Be Unconstitutional

Mr. Nixon is of course aware of the decision of this Court's decision in Phillips v. State, 299 So. 3d 1013 (Fla. 2020) (announcing that Walls v. State, 213 So. 3d 340 (2016) erred in holding Hall v. Florida, 572 U.S. 701 (2014) retroactive under Witt v. State, 387 So. 2d 922 (1980)). Although Phillips may at first glance appear similar to this one, it is not. Moreover, applying it to

deny Mr. Nixon the review required by Hall would be unconstitutional.

The conclusion of Phillips that Hall announced a new non-watershed rule of federal Eighth Amendment law for purposes of Teague v. Lane, 489 U.S. 288 (1989) and Witt – was error and violated both Witt and Teague. As this Court stated:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity [57] in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

Witt v. State, 387 So. 2d 922, 925 (Fla. 1980). But this is precisely what this Court did when it abruptly reversed course and opined that Hall announced a new, non-watershed rule of law for Eighth Amendment purposes. The reasoning of this Court's analysis applying the Witt factors to Hall in Walls should not have been disturbed. The Phillips decision raises a grave risk that Florida will execute intellectually disabled capital defendants. This Court's determination that Hall

announced a new non-watershed rule was error. See Bousley v. United States, 523 U.S. 614, 620 (1998).

IV.

CONCLUSION

This Court should reverse the decision below, vacate Mr. Nixon's sentence of death, and reduce his sentence to life imprisonment.

Respectfully submitted,

APPENDIX D

THE SECOND CIRCUIT COURT,
LEON COUNTY, FLORIDA

STATE OF FLORIDA,
vs.
JOE ELTON NIXON,
Defendant.
/

CASE NO.: 1984 CF 2324

Order on Hall and Hurst Motions

(Filed Nov. 21, 2019)

This matter is before the court on a document filed by Mr. Nixon, through counsel, on May 25, 2015 and entitled, "Successive Motion Under Fla. R. Crim. P. 3.203 and 3.851," raising an intellectual disability claim.

This court issued its "Order Denying Defendant's Successive Post-Conviction Motion" on October 9, 2015 without conducting an evidentiary hearing. The Florida Supreme Court issued its opinion on February 3, 2017, reversing. Nixon v. State, SC15-2309 (Fla. Feb. 3, 2017). The opinion found Mr. "Nixon's claim is legally sufficient and not conclusively refuted by the record in this case." The court concluded:

> Because the postconviction court here used the wrong legal standard, under Oats, to address Nixon's claim, Nixon's motion cannot be deemed legally insufficient or positively refuted by the record on that basis and therefore should not have been summarily denied. We remand on this issue alone, and instruct the

> trial court to conduct proceedings to determine Whether a new evidentiary hearing is necessary.

The court conducted an evidentiary hearing on July 30 and 31, 2018. After a delay in completing the transcript, Mr. Nixon submitted written argument through counsel on February 18, 2019. The State filed its written response on March 20, 2019. Mr. Nixon filed his reply, also through counsel, on April 9, 2019.

This order also addresses a document filed by Mr. Nixon, through counsel, on January 9, 2017 and entitled', "Second Successive Motion under Fla. R. Crim. P. 3.851," raising a. Hurst claim. It is resolved summarily at the end of this order.

Introduction

The elements of the intellectual disability death penalty defense are:

(1) significantly low intellectual functioning,

(2) concurrent significant adaptive deficits, and

(3) manifestation before age 18.

The defendant bears the burden of proving the defense by clear and convincing evidence. In a close case, federal constitutional standards require a conjunctive and interrelated assessment of all three elements. I conclude that this assessment requires consideration of a range of intellectual testing bounded by the standard

error of measurement and placement of the estimate of intellectual functioning within that range informed by evidence of adaptive deficits and age of onset.

This order addresses a crime that occurred more than 35 years ago when Mr. Nixon was 23 years old. The cognitive tests completed by Mr. Nixon stretch back over a decade before that. This central temporal fact creates very serious difficulties in resolving the elements of intellectual disability particularly given the prevailing, constitutional legal guidance under Atkins and Hall.

Mr. Nixon was never diagnosed as intellectually disabled before he was incarcerated for the last time in 1984 at the age of 23, although he was tested, screened and committed to juvenile justice facilities multiple times before he turned 18. After the murder, Mr. Nixon was tested multiple times resulting in scoring ranges both inside and outside the standard in which Hall would require resort to the interrelated and conjunctive assessment.

Mr. Nixon presented no direct testimony of adaptive functioning outside of death, row and no persons testified except expert witnesses who saw Mr. Nixon only in connection with performing evaluations. No person testified who knew or tested Mr. Nixon in childhood or during the relatively few years he functioned outside of prison or juvenile justice institutions.

Mr. Nixon was institutionalized in juvenile delinquency facilities for much of his adolescence and imprisoned for much of his adulthood. To explain this history, the prosecution hypothesizes antisocial personality

disorder and the defense hypothesizes intellectual disability. But because Mr. Nixon spent so much of his life institutionalized, resolution of the adaptive deficits element is particularly problematic because institutional functioning is a setting disfavored by psychologists assessing adaptive functioning. And antisocial personality disorder, juvenile conduct disorder and intellectual disability are not mutually exclusive.

But even the evidence of Mr. Nixon's functioning on death row consists exclusively of hearsay through experts. No person testified who observed Mr. Nixon's day-to-day functioning. The evidence is expert opinion that largely served as a conduit for hearsay and hearsay within hearsay, from ambiguous, often decades-old written sources. The persuasive value of much of this evidence is dubious.

For example, some experts accept that Mr. Nixon suffered brain damage from his mother's alcohol consumption during pregnancy and from exposure to pesticides in agriculture. But no person testified who knew what his mother drank, or how much or how frequently. No person testified to any particular pesticide exposure. The experts assume that Mr. Nixon was mistreated in juvenile delinquency facilities, but there is no evidence in the record of any mistreatment.

Mr. Nixon's intellectual functioning was tested or screened at least three times before age 21. None of the scores suggested what was then called mental retardation. The experts now offer various opinions of the

weaknesses of these tests. But this testimony is as speculative as probative.

Mr. Nixon's WISC score of 88 in 1974 – at age 12 – is the subject of meaningful but particularly speculative criticism given the age of the test. The criticism of the WISC is as to the credentials of the administrator, not to the administration itself. Mr. Nixon's Slosson score of 76 in 1981 – at age 19 – is unilluminating because almost no documentation exists regarding this test and the Slosson is only a screening instrument. Mr. Nixon's BETA II score of 83 – at age 20 – was also only a screening test. But the screening tests were presumably administered to screen for something and the result was no further testing and no contemporaneous diagnosis.

Mr. Nixon is thought to have experienced two serious head injuries in prison as an adult, one of which was allegedly inflicted with a pipe and resulted in an extended hospitalization. The record contains nothing about these incidents other than opinion based on decades-old hearsay. No medical records were offered in evidence.

Even assuming the element of the requisite deficient intellectual capacity range now, resolving the age of onset today – when Mr. Nixon is approaching age 60 and spent more than 34 consecutive years imprisoned – creates extremely difficult proof problems.

Abbreviated Factual and Procedural History

This case arises from a criminal episode that occurred August 12, 1984. The detailed facts of the case are recited in the prior opinions of the Florida Supreme Court, cited below. But for purposes of this order, it is sufficient to summarize this criminal episode as the abduction and torture-murder of a stranger. After ineffectual efforts at concealment (including stealing and presumably driving the victim's car) and pawning property stolen from the deceased, Mr. Nixon was arrested a day or so after the murder. Nixon v. State, 572 So. 2d 1336 (Fla. 1990).

Mr. Nixon was convicted by a jury on July 22, 1985 of the offenses of first-degree murder, kidnapping, robbery and arson. The court sentenced Mr. Nixon to death on July 30, 1985. Mr. Nixon's convictions and sentence were affirmed on direct appeal. Id. Mr. Nixon's initial post-conviction motion was denied and such denial affirmed on appeal. Nixon v. State, 857 So. 2d 172 (Fla. 2003); Florida v. Nixon, 543 U.S. 175 (2004); Nixon v. State, 932 So. 2d 1009 (Fla. 2006).

In the same opinion that affirmed denial of Mr. Nixon's initial post-conviction motion, the Florida Supreme Court instructed; "To the,extent that Nixon is eligible to pursue a claim of mental retardation under Florida Rule of Criminal Procedure 3.203, he should do so within sixty days of the release of this opinion." Nixon, 932 So. 2d at 1024. Mr. Nixon filed that motion in June 2006, this court conducted an evidentiary hearing on the mental retardation claim on October 23, 2006 and

denied the motion on April 26, 2007. The Florida Supreme Court affirmed. Nixon v. State, 2 So. 3d 137 (Fla. 2009). Mr. Nixon's initial mental retardation motion relied on the U.S. Supreme Court's opinion of Atkins v. Virginia, 536 U.S. 304 (2002).

Five years later, the U.S. Supreme Court decided Hall v. Florida, 572 U.S. 701 (2014). Mr. Nixon filed a successive post-conviction motion based on Hall a year later, again asserting that he could not be executed because of what is now called intellectual disability (The name of the condition changed from mental retardation to intellectual disability. The substance of the statute did not). Ch. 2013-162, § 38, Laws of Fla.; § 921.137(9), Fla. Stat. (2013). This court summarily denied the motion by order of October 9, 2015.

After the Florida Supreme Court remanded by opinion of February 3, 2017, Mr. Nixon and the State disagreed as to whether another evidentiary hearing was required. This court conducted a series of hearings, considered filings by Mr. Nixon and the State, and ultimately issued a written order June 7, 2017 that ordered a second evidentiary hearing to resolve Mr. Nixon's claim on intellectual disability.

The most recent evidentiary hearing occurred July 30 and 31, 2018 and complete transcripts filed January 7, 2019. The parties filed extensive post-hearing argument, which this court reviewed.

The court is adequately advised.

Legal Analysis

Definitions

The legislature established the definition of intellectual disability in section 921.137(1) of the Florida Statutes. It provides, in pertinent part, and edited for clarity, that intellectually disabled means:

> [1] significantly subaverage general intellectual functioning **existing concurrently with**
> [2] deficits in adaptive behavior
> **and**
> [3] manifested during the period from conception to age 18.

Section 921.137(1) further defines "significantly subaverage general intellectual functioning" to mean:

> [P]erformance 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.

Section 921.137(1) further defines "adaptive behavior" to mean:

[T]he 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.

Burden of Proof

Section 921.137(4) states:

> If the court finds, by clear and convincing evidence, that the defendant has an intellectual disability 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.

Section 921.137 does not, by its terms, apply to Mr. Nixon's case because he was sentenced to death before June 12, 2001. See § 921.137(8), Fla. Stat. However, the same standards apply under Rule 3.203 of the Florida Rules of Criminal Procedure except that Rule 3.203 does not address the burden of proof. But, in any event, case law clarifies that "[t]o demonstrate ID, a defendant must make this showing [of the statutory elements] by clear and convincing evidence." Wright v. State, 256 So. 3d 766, 7.71 (Fla. 2018).

Atkins v. Virginia

The United States Supreme Court considered the application of the death penalty to mentally retarded defendants in Atkins v. Virginia, 536 U.S. 304 (2002). Atkins specifically held that imposing a death sentence on a mentally retarded person violated the prohibitions of the Eighth Amendment against cruel and unusual punishments.

The Court did not establish a definition or process to resolve claims of exclusion from eligibility for a death

sentence because of cognitive deficiency. The Court stated:

> To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. 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, with regard to insanity, "we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences."

Id. at 317 (citations and internal brackets omitted).

The Court, however, observed:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have **diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others**. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that **they often**

> **act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders**. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 318 (emphasis added).

Hall v. Florida

The United States Supreme Court considered Florida's jurisprudence associated with a claim of intellectual disability as a defense to death sentence eligibility in Hall v. Florida, 572 U.S. 701 (2014). The Court criticized Florida's application of the intelligence testing element of the statutory intellectual disability definition. Florida accepted the calculation as defined by the statute two or more standard deviations below the mean is a specific number. The U.S. Supreme Court determined that this element also required application of the standard error of measurement to convert the full-scale score to a range and further evidentiary processes depending on the range so determined.

If the full-scale score is within five points of two standard deviations, the court must also consider adaptive deficits, presumably to place the estimate within the range of the standard error of measurement. if "a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive

deficits." Id. at 723. On the other hand, Hall contains the following sentence:

> It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment.

Id. Presumably, this sentence is not absolute. A person with a 120 IQ score would seem unlikely to have the right to also present evidence of adaptive deficits and age of onset would be a non-sequitur.

Oats v. State

The Florida Supreme Court cited Oats v. State, 181 So. 3d 457 (Fla. 2015) in its remand order. The court in Oats stated; "Based on numerous psychological tests, Mr. Oats's IQ is between 54 and 67, well within the range for an individual who has an intellectual disability." Id. at 459. Mr. Oats was approaching moderately intellectually disabled, having never achieved a full-scale score above two standard deviations below the mean. Indeed, the court noted the State's concession "that there was no doubt that he was in the mildly mentally retarded area." Id. at 460 (internal quotation marks omitted).

By contrast, the lowest full-scale IQ scores ever assigned to Mr. Nixon was the 68 (SEM range of 63-73) assigned by Dr. Keyes in 1993 and the 67 (SEM range of 6272) assigned by Dr. Crown associated with the most recent evidentiary hearing. Mr. Nixon was also scored 80 (SEM range of 75-85) by Dr. Prichard in 2006 (and reaffirmed in the current evidentiary hearing), 72

(SEM range of 67-77) by Dr. Dee in 1993, 73 (SEM range of 68-78) by Dr. Doerman in 1985, and 88 (SEM range of 83-93) in 1974 on the WISC.

Mr. Oats's crime also reflects the impulsivity highlighted by Atkins as a hallmark of intellectual disability. Mr. Oats shot a store clerk in a robbery which seems to me a very different episode than the crimes at issue for Mr. Nixon.

Florida Supreme Court Opinions after Hall

The Florida Supreme Court considered test results within and above the ID range in Wright v. State, 256 So. 3d 766 (Fla. 2018). Mr. Wright was initially sentenced to death before Hall. After Hall, the Wright case was remanded and the trial court conducted a new evidentiary hearing on the issue of ID. On appeal, the court summarized the general intellectual functioning element of the ID defense:

> With regard to the first prong, the statute defines the phrase "significantly subaverage general intellectual functioning" as "performance that is two or more standard deviations from the mean score on a standardized intelligence test." Currently, the mean IQ score of the general population is approximately 100; and each standard deviation represents about 15 points. Accordingly, the medical approximation of significant subaverage intellectual functioning is an IQ score of 70, plus or minus. There is a standard error of measurement (SEM) that affects each IQ

> score, which results in a range approximately 5 points above and below the raw IQ test score. Rather than interpreting IQ scores as a single, fixed number, medical professionals read IQ scores as a range to account for SEM. For this reason, the [U.S.] Supreme Court rejected the use of a strict 70-point ID cutoff in Hall, noting that courts must account for SEM because "an individual with an IQ test score 'between. 70 and 75 or lower,' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." This means that an "IQ test result of 75 is squarely in the range of potential intellectual disability."

Id. at 771 (citations and internal brackets omitted).

Wright's scores "fell into the borderline ID range and the lowest end of the range dipped 1 point beneath 70; therefore, Wright was allowed to offer evidence of adaptive functioning." Id. at 772. The trial court did not simply reject scores within the ID range. The court reasoned that the constitutional standards established by the U.S. Supreme Court do not require, "a significantly subaverage intelligence finding when one of many IQ scores falls into the ID range." Id. The constitutional standard requires consideration of other evidence if clinical experts would do so.

The Florida Supreme Court concluded that the trial court properly resolved the issue of competing IQ scores based on competent substantial evidence.

Adaptive functioning 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 across three broad domains: conceptual, social, and practical. Wright's experts testified that he had no deficits in two of three adaptive functioning domains. The postconviction court and the medical experts appropriately relied on current medical standards. The only meaningful issue for Wright was "an alleged overemphasis on adaptive strengths and improper focus on prison conduct." Id. at 775-76.

The Florida Supreme Court addressed a successive post-conviction motion asserting intellectual disability after Hall in Rodriguez v. State, 219 So. 3d 751 (Fla. 2017).

Rodriguez argued that the trial court, in summarily denying the motion, violated Hall in two ways. First, Rodriguez argued that Hall required postconviction courts "to make all determinations, including credibility findings, in a manner deferential to the standards of the medical community . . . " Id. at 755. The court concluded that because the trial court enunciated bases, supported by record evidence, for rejecting some scores, and considered all three elements of the statutory definition, the trial court did not err. Hall, the court concluded, "does not change the standards for credibility determinations in prior proceedings." Id. at 758.

Second, Rodriguez argued that the trial court Violated Hall by relying on one of the three statutory ID elements instead of analyzing all three. The court noted the record showed "Rodriguez's friends familiar with him before age 18 testified that he had good hygiene, could care for himself, and could drive." Id. The court further noted that the trial court made findings regarding IQ, adaptive functioning deficits and age of onset as the basis for the ultimate conclusion that, Rodriguez "failed to carry his burden of proving the three elements necessary to establish that he is" intellectually disabled. Id. at 759. The Florida Supreme Court concluded such findings adequate; "Summary denial was appropriate because the record reflects that the circuit court made findings as to all three prongs and evaluated them as a whole in denying Rodriguez's claims." Id.

Mr. Nixon's adaptive deficits are uncontested, although the etiology of these deficits is not. The State has never argued that Mr. Nixon's scores should be adjusted toward the top of the SEM range based on Mr. Nixon's adaptive functioning. The issue turns on whether the IQ scores are low enough to establish subaverage intellectual functioning or that the low end of the SEM range establishes the intellectual functioning element.

Summary of Testimony

From the 2006 Evidentiary Hearing

Dr. Keyes

The evidence is weak regarding Mr. Nixon's characteristics and experiences before the offense date in this case. During the original evidentiary hearing in 2006, Mr. Nixon's expert witness, Dr. Keyes testified, "We tried to get school records. The school records that I was supplied with were minimal." Transcript of 2006 Evidentiary Hearing at 139. Dr. Keyes continued:

> Q: All right. And you looked for additional school records?
>
> A: I kept telling them, get me more, you know.
>
> Q: And you were never supplied more?
>
> A: No, I was not.

Id.

Dr. Keyes testified that around the time of the offense, "I don't know exactly what he was doing during that time. I don't know if he had a job or if he was out in the community or if he was living with his sister or what." Id. at 144.

Dr. Keyes testified that with a range of scores from 66 to 80, it does not indicate that any of the particular scores are wrong; "[Y]ou're going to have good days and bad days. You're going to have people who make errors in testing. You're going to have people who give points

to things they shouldn't give points to or don't give points to things they [should] give points to." Id. at 96.

Dr. Keyes adjusted his Stanford-Binet from 65 to 68 to convert to a 100-point scale, relying on Dr. Prichard's estimate. Id. at 126-27.

Dr. Prichard

Dr. Prichard testified that the 1974 WISC should not be rejected because it was performed by an intern under the supervision of a PhD; "But I think it's a huge error to dismiss it simply because it was done by an intern or whatever, because, you know, we are all interns before we are doctors." Id. at 177.

Dr. Prichard administered the Test of Memory Malingering ("TOMM"). The sole purpose of the TOMM is to test for malingering – to rule out a "lower score that artificially lowered the score, primarily because you can't fake smart, and you're testing ceiling and optimal performance." Id. at 190.

Dr. Prichard testified to specific examples of Mr. Nixon's answers demonstrating abstraction and a fund of knowledge that is not consistent with intellectual disability:

> There are always strengths and weaknesses, but it's within certain limitations of the mental retarded population, because, remember you're talking about the bottom 2.2 something percent of the population. These people simply are not very bright. They have strengths, but

the strengths aren't just stellar. Ordinarily you don't get strengths where they are in the average range, even.

So there was one subtest, I think, that was reflective of Mr. Nixon's ability level. And that would be number nine, information. Some of these questions were fairly remarkable when I'm assessing for the presence or absence of mental retardation. I will tell you that in over a thousand assessments, I didn't have a mentally retarded person get these things right. Okay. For example, number eight on information, who wrote Hamlet. And he answered Shakespeare. That's a fairly advanced response from an individual. Ordinarily, a mentally retarded person doesn't know that Shakespeare wrote Hamlet, because he had no exposure to Shakespeare in school or wherever . . .

Another very remarkable one was number 14, whose name is usually associated with the theory of relativity. It's hard to even ask the question, whose name is usually associated with the theory of relativity. And he replied Einstein. Again, that's one of those questions where mentally retarded folks are usually not exposed to that kind of learning.

If you assume that they can learn those kinds of things like Mr. Nixon demonstrated, then you – you're pretty much looking at somebody whose capacity is probably a lot higher than mentally retarded, because the nature of the mentally retarded is, these more complicated

things, they can't comprehend and understand.

We went on with this same test. Never, never did I have a mentally retarded person answer the one about Einstein correctly. Never. Never did I have a mentally retarded person tell me that – where do – in what country did the Olympics originate, which is number 15. He said Greece. What's the main theme of the Book of Genesis. Ordinarily, mentally retarded folks don't know what a theme is. Okay. But he correctly says – or he says, Adam and Eve. I said, well, tell me more. And he said the beginning, understanding what theme is.

Number 18 was pretty remarkable. Who painted the Sistine Chapel and he correctly said Michelangelo. So these kinds of things, again, with the internal norms, what are you expecting from a mentally retarded person. You are not expecting these kinds of sophisticated answers. These are answers demonstrative of more average intellectual functioning, certainly not the mentally retarded folks.

Mentally retarded folks by nature are very concrete. They aren't good at learning. These complex things, they aren't exposed to. They are simply kind of getting by each day and not learning these things that are more abstract and academic and kind of book knowledge. . . .

But yeah, I mean, these are sophisticated – these are sophisticated ideas, these are sophisticated pieces of information that he has in his head, which suggests – again, we are

> measuring capacity. Do you have the capacity to learn this kind of stuff. Mentally retarded folks, no. If you're demonstrating you do have the capacity, you're probably a lot brighter than mentally retarded.

Id. at 194-97.

Dr. Prichard concluded:

> [H]e had a lot responses that were – that were`not common, in fact, that were not reflective of mentally retarded folks that I have assessed. And, again, it's been a large number. So the quality of his responses were just superior to that of the mentally retarded folks that I have seen. And that seemed to be pretty consistent across subtests.

Id. at 198.

Dr. Keyes and Dr. Prichard disagreed as to whether Dr. Keyes's 65 and Dr. Prichard's 80 were reconcilable. Dr. Prichard testified that the expert must choose a score that is or is not within the ID range. You cannot say that both a 66 and a subsequent 80 can be valid scores for the same individual:

> No, I would disagree with you wholeheartedly. And this is why. When you construct your confidence interval, what you're trying to do, and you appropriately stated – listen to what you're saying. When you have a full scale IQ score of 80, you're saying, with a 95 percent degree of confidence, your true score falls between 75 and 85. You can't say that and it be true and also say, if you have a full scale IQ

> score of 66, there's a 95 percent confidence that your true IQ score is a between 71 and a 61. Those two things are mutually exclusive. One of those two things is false. You can't have a 95 percent confidence interval that encompasses these ten numbers that is apart from a 95 percent confidence interval that encompasses these ten numbers and those two things be true.

Id. at 221.

From the 2018 Evidentiary Hearing

Dr. Crown

Mr. Nixon presented the testimony of Dr. Barry Crown, a clinical and forensic psychologist. Dr. Crown administered a standard intelligence test and concluded that Mr. Nixon is intellectually disabled. Dr. Crown testified that many factors contribute to the degradation of cognitive function leading toward ID – trauma, neurologic deficits, nutrition and bad exposures of many sorts.

Dr. Crown testified that IQ tests are not a bright line measure and are instead a statement of probability. But for the same individual, test scores should cluster.

Dr. Crown administered the most recent version of the Wechsler IQ test to Mr. Nixon the WAIS-IV.

Dr. Crown testified that he concluded Mr. Nixon's mother consumed alcohol. Transcript of 2018 Evidentiary Hearing at 38.

Dr. Crown testified to the importance of adherence to the testing protocols established in the official scoring manual. Dr. Crown tested Mr. Nixon in an air-conditioned room at the prison.

Dr. Crown testified that his testing yielded an IQ range from 62-72. Dr. Crown testified that his testing was consistent with a cluster of scores reported by Dr. Keys (68 in 2006), and Dr. Whyte (72 in 1993).

Dr. Crown characterized the 1974 88 on the WISC as an outlier. He asserted that the psychologist who supervised the test was not licensed at the time the test was administered.

Dr. Crown characterized Dr. Prichard's 2006 80 as an outlier. Dr. Crown suggested the WAIS-IV is a better test because it is based on a different theory than the WAIS-III Dr. Prichard administered. Dr. Crown did not identify any errors in Dr. Prichard's administration of the WAIS-III. The WAIS-IV was not released until 2008, after Dr. Prichard tested Mr. Nixon.

Dr. Crown testified that Mr. Nixon's deficits occurred in utero as a result of his mother's consumption of alcohol. Dr. Crown also testified that various other negative environmental factors contributed to Mr. Nixon's deficits including working in the fields rather than attending school, pesticide exposure, sex abuse, and commitment to the Dozier School juvenile delinquency facility. Dr. Crown stated that Mr. Nixon's general upbringing was a risk factor.

Dr. Crown concluded that the facts of the offense do not suggest against intellectual disability. He stated:

> [F]irst, I'm not here to discuss the crime in any detail. That's not what we're here about today. But, also, criminality is not a part of the intellectual disability diagnosis. As a consultant to the Sunland Training Centers, the State training centers for intellectually disabled, there was, for example, a recurrent problem of stealing, and attacking other residents. But criminality is not a part of the diagnosis. It's not a part of the disorder.

Id. at 79.

Dr. Crown did not perform an adaptive functioning assessment.

Dr. Crown testified on cross examination that all of Mr. Nixon's tests reached above the statutory intellectual disability threshold at the high end of the standard error of measurement. Dr. Crown testified that Mr. Nixon was beaten in 1981 while incarcerated in Georgia. Dr. Crown testified that in 1982 while incarcerated, Mr. Nixon was beaten in the head with a lead pipe and required a two-week hospitalization. Dr. Crown testified that Mr. Nixon's brother described Mr. Nixon as having severe problems and a changed personality after the lead pipe beating.

Dr. Ouaou

Mr. Nixon presented the testimony of Dr. Robert Ouaou, a neuropsychologist. Dr. Ouaou testified that a

complete assessment of cognitive function is more revealing and important than a single score. Dr. Ouaou testified that the clinical and statutory definitions of intellectual disability are similar.

Dr. Ouaou testified that the first two elements of intellectual disability are interrelated. The testing element measures intelligence and the adaptive element evaluates how deficits manifest in functioning in the real world. The age of onset element establishes that intellectual disability is a neurodevelopmental disorder, although Dr. Ouaou suggests that the brain is not fully developed until the mid-twenties.

Dr. Ouaou reviewed court filings, transcripts, expert reports, declarations, lay witness declarations, academic records, adult criminal records, juvenile delinquency records and evaluations related to Mr. Nixon. Dr. Ouaou administered "a gold standard battery of neuropsychology tests" to Mr. Nixon, "the same one . . . we use with the NFL, for the most part." Id. at 139.

Dr. Ouaou spent six hours with Mr. Nixon at the prison and found. Mr. Nixon cooperative. Dr. Ouaou administered the Test of Premorbid Functioning, the Wechsler Memory Scale-IV, the Delis-Kaplan Executive Function Systems test, the Boston Diagnostic Aphasia Exam and the Boston Naming test, the Complex Ideational Material test and the Wisconsin Card Sorting test, the Rey Complex Color and Memory test and the Test of Memory Malingering.

Dr. Ouaou concluded Mr. Nixon has significantly subaverage intellectual functioning and that it existed

before age 18. Dr. Ouaou tested that his overall estimate correlated to Dr. Crown's WAIS-IV testing results.

Dr. Ouaou criticized the 1974 WISC administration when Mr. Nixon was 12. Dr. Ouaou testified that the person administering the test was inadequately trained and the person who supervised the test was inadequately licensed.

Dr. Ouaou criticized Dr. Prichard's administration and scoring of the WAIS-Ill in 2006. Dr. Ouaou testified that Dr. Prichard over scored some answers resulting in omitting other, easier questions. The test is designed so that if the subject receives full credit for a harder question, the subject is not asked easier questions on the same section. Dr. Ouaou testified that Dr. Prichard gave erroneous full credit resulting in uncertainty as to whether Mr. Nixon would have answered easier questions correctly.

As an example of this criticism, Dr. Ouaou testified that Dr. Prichard erroneously gave partial credit for Mr. Nixon's definition of the word "pout." Mr. Nixon responded, "can't have your way, so have a fit." Id. at 182-83. Dr. Prichard gave partial credit; Dr. Ouaou contends Mr. Nixon should have been given no credit because Mr. Nixon failed to reference a facial expression.

The WAIS-Ill scoring answer distinguishes between zero and one point answers. A one-point answer is defined as "[a] facial expression, to show dissatisfaction, to frown, to show disappointment." A zero answer is "act childish, to cry, to be sad." Id.

Dr. Ouaou criticized Dr. Prichard for making stray marks and handwriting a score scale on Mr. Nixon's score sheet.

Dr. Ouaou testified that his criticisms of Dr. Prichard each would contribute to a higher score and so were suggestive of bias.

Dr. Ouaou testified that many records supported findings of adaptive deficits. For example, a declaration stated that Mr. Nixon was unable to ride a bicycle as a child at some point and was also unable to operate a lawnmower and raked instead. Similarly, at some point, Mr. Nixon was unable to pick-up simple items at the grocery store.

Dr. Ouaou did not personally interview any of the persons who made declarations concerning Mr. Nixon.

Dr. Ouaou testified that his conclusion regarding adaptive deficits is consistent with one of the instruments administered by Dr. Prichard, the Wide Range Achievement Test, 3d edition. Dr. Ouaou testified that Mr. Nixon demonstrates a clear case of adaptive deficits.

Dr. Ouaou testified that Mr. Nixon's deficits were not caused by his head injury. Dr. Ouaou attributed Mr. Nixon's deficits to "risk factors" in the developmental period including fetal alcohol, pesticide exposure and poor prenatal care. Dr. Ouaou also testified that Mr. Nixon's elementary school failure also supported onset of deficits in the developmental period. Dr. Ouaou testified that head trauma would manifest as:

> a different pattern of neuropsychological test findings than the one that I saw. They would be more scattered. There wouldn't be this general suppression of scores. And that's – that is definitely something that would discriminate someone who has traumatic brain injury from someone who has a general deficient, subaverage functioning from birth.

Id. at 219.

Dr. Ouaou testified that a diagnosis of conduct disorder or antisocial personality disorder did not eliminate a diagnosis of intellectual disability. He testified that both diagnoses may exist in the same person.

Dr. Ouaou considered the facts of the offense in making his diagnosis but concluded that the offense did not negate the intellectual disability diagnosis. He testified:

> [I]ntellectually disabled individuals commit crimes, heinous ones. Intellectually disabled individuals, on the other spectrum, work at McDonald's or Publix, which is a grocery store. There's no . . . standard for criminality and intellectual disability. It's not part of making the diagnosis. It's – to me, obviously, the facts, its all very sad, but it doesn't – it doesn't discount all of the data that supports this diagnosis.

Id. at 222.

On cross-examination, Dr. Ouaou testified that Mr. Nixon's ID diagnosis is in the mild spectrum and that he accepted the facts as stated in declarations from

potentially biased persons such as Mr. Nixon's family members. Dr. Ouaou was uncertain whether Mr. Nixon's deficits would be apparent to a lay person in ordinary conversation. Dr. Ouaou acknowledged that Mr. Nixon was never diagnosed in any school or juvenile facility during the developmental period.

Dr. Ouaou testified that reasonable psychologists could disagree on Mr. Nixon's ID diagnosis. Dr. Ouaou testified that he had no independent knowledge of the facts surrounding the administration of the 1974 WISC to Mr. Nixon and the score of 88. Dr. Ouaou acknowledged that two of Mr. Nixon's lawyers were present when Dr. Prichard administered the WAIS-III. Dr. Ouaou never discussed any of his criticisms with Dr. Prichard.

Dr. Ouaou testified that specific aspects of the criminal episode were consistent with the ID diagnosis such as pawning items stolen from the victim. Pawning items demonstrated a failure to anticipate obvious consequences of Mr. Nixon's conduct.

Dr. Ouaou testified that he did not know the exact facts of the 1985 beating Mr. Nixon experienced except that it was very significant. Dr. Ouaou did not feel neuroimaging was necessary because he felt the ID evidence was overwhelming.

Dr. Prichard

The State presented the testimony of Dr. Gregory Prichard. Dr. Prichard testified that he is a forensic

psychologist and administered the WAIS-III to Mr. Nixon in 2006.

Dr. Prichard testified that the marks he made in the margin of Mr. Nixon's scoresheet were for the purpose of maintaining focus throughout the testing and to check his results against what he knew to be the expected results of such testing. He also made some marks the day before the 2018 evidentiary hearing to prepare for his testimony. Some of the marginal notes indicated the time Mr. Nixon took to complete various sections of the test.

Dr. Prichard testified that in addition to his Ph.D. in psychology, he attained a master's degree in assessment diagnostics. Dr. Prichard's psychology work is almost entirely forensic. Like all the other psychologists who testified, Dr. Prichard has evaluated many, many persons for intellectual disability and other diagnoses.

Dr. Prichard testified that he administered to Mr. Nixon the WAIS-III, the Wide Range Achievement Test, 3d Edition ("WRAT-3d"), and the Test of Memory Malingering ("TOMM"). The WAIS-III was state of the art in 2006. The WAIS-III has now replaced it as the current state of the art. The WRAT-3d is an academic screening measure for spelling, arithmetic, reading and writing. Dr. Prichard administered the WRAT-3d to get a screening indication of Mr. Nixon's skills.

Mr. Nixon's WRAT-3d results suggested marginal or borderline functioning but does not directly translate to 10. Mr. Nixon's results suggested "academically he's

functioning low . . . [P]robably around fourth to sixth grades in those three measures." Id. at 306-07.

The TOMM tests effort and faking. Mr. Nixon's TOMM results demonstrated that Mr. Nixon was giving effort and was not faking. The TOMM provides no insight into intellectual disability.

Dr. Prichard reviewed similar background information as the other experts including juvenile delinquency, Department of Corrections, and expert witness reports and information.

Dr. Prichard's administration of the WAIS-III to Mr. Nixon yielded a verbal IQ of 81, a performance IQ of 83 and a full-scale score of 80. Dr. Prichard testified that he continues to have professional confidence in the results of his test administration to Mr. Nixon.

Dr. Prichard disagreed with Dr. Ouaou's general and specific criticism of Dr. Prichard's scoring and administration. Dr. Prichard testified that he followed the manual closely because the manual requires scoring synonyms that show good understanding of the word. Dr. Prichard analogized to the manual's directions regarding the word "penny." The manual gives "a type of coin" as a 2-point answer for "penny." Winter is a type of season like a penny is a type of coin. Id. at 31445.

Dr. Prichard testified that his scoring of Mr. Nixon was based on a plain reading of the scoring manual. The manual is explicit that the listed examples are not the sole basis for scoring. The manual establishes scoring principles that are more important than the precise

examples because many questions can be answered correctly but differently than the examples.

Dr. Prichard disputed Dr. Ouaou's criticism of his scoring of "pout." Mr. Nixon's answer – "can't have your way, so you have a fit" – fits the one-point definition. The manual awards partial credit if "the response is not incorrect, but shows poverty of content." This direction was the basis for Dr. Prichard's score for Mr. Nixon's "pout" response. Id. at 316-18.

Dr. Prichard testified that in reviewing his scoring he identified one specific mistake in his work with Mr. Nixon. Mr. Nixon responded to the word "terminate" with "fire." Dr. Prichard scored this response a zero, but it should have been scored a one. Dr. Prichard suggests this error refutes Dr. Ouaou's suggestion of bias because this mistake reduced Mr. Nixon's score and so made it more likely that Mr. Nixon would be found exempt from the death sentence. Id. at 320-21.

Dr. Prichard testified that the purpose of his marginal notes was to consider how Mr. Nixon's subtest results fell on the spectrum from average through borderline through intellectually disabled. By converting the range for each diagnosis into its corresponding scaled score, Dr. Prichard compared Mr. Nixon's scores to determine whether Mr. Nixon's subtest scores fell within or outside the intellectually disabled range. Mr. Nixon scored six of eleven skills in the average range which is not consistent with intellectual disability and nine of eleven in either average or borderline range.

Dr. Prichard testified that a subject who tests a five on all eleven subtests would receive a full-scale score of 67. Dr. Prichard testified that Mr. Nixon scored five or below on only two of eleven subtests. He scored a five on digit span and a four on the coding subtests.

Dr. Prichard testified that Dr. Crown's scores for Mr. Nixon are not reconcilable with his own scores. Dr. Crown scored Mr. Nixon average on only one of the ten subtests of the WAIS-IV. Where the two instruments overlap, the results of Dr. Crown's scoring of the subtests were dramatically different than Dr. Prichard's scoring of similar subtests on the WAIS-III.

Dr. Prichard testified that he concluded his administration of the WAIS-III was the more accurate measure of Mr. Nixon's capacity. Dr. Prichard repeated his prior testimony that Mr. Nixon's fund of information and knowledge of relatively sophisticated concepts – associating Einstein with the theory of relativity, the Olympics with Greece, the Book of Genesis with Adam and Eve, and the Sistine Chapel with Michelangelo – "doesn't represent [somebody with] intellectual disability." Id. at 332-33.

Dr. Prichard testified that he was confident in his evaluation because "you can't fake smart" but many factors can depress a score including motivation, bad rapport with the examiner, lack of sleep or inattention.

Dr. Prichard testified that Mr. Nixon did not slip through unnoticed by authorities during childhood. He had six commitments from age 10 to 17 and was evaluated. Despite this history, no authority ever

suggested Mr. Nixon was mentally retarded during childhood.

Dr. Prichard does not entirely discount Mr. Nixon's 1974 score of 88 on the WISC. That test represents the only standard test administered before age 18. Dr. Prichard testified that administration by an intern does not invalidate a test nor does a question about the supervising psychologist's licensure status. The 1974 WISC administered to Mr. Nixon was supervised by a Ph.D.

Dr. Prichard testified that Dr. Dee administered the WAIS-R in 1985 and scored four of nine subtests in the average range and five in the intellectually disabled range. Dr. Prichard testified that Dr. Dee's administration likely underestimated Mr. Nixon's intellectual capacity because Dr. Dee scored Mr. Nixon at one on the comprehension subtest which was much lower than any other evaluator. The comprehension subtest is scaled from one to 19 and one is the lowest possible score. Even with this outlier score, Dr. Dee still scored Mr. Nixon at 72.

Dr. Prichard testified that many other factors other than intellectual disability can cause poor adaptive functioning including major mental illness, substance abuse and personality disorder. Dr. Prichard did not perform any formal adaptive function test on Mr. Nixon. Only Dr. Keyes performed a formal adaptive functioning instrument in 1993.

Dr. Prichard testified that Mr. Nixon demonstrated adaptive deficits but concluded that Mr. Nixon's

adaptive deficits "were [primarily] the result of a conduct disorder when he was younger, which is the juvenile equivalent of antisocial personality disorder." Id. at 344. Dr. Prichard testified that Mr. Nixon's multiple juvenile arrests beginning at age ten, six commitments, and repeated criminal episodes were highly suggestive of conduct disorder. As this pattern of criminal conduct, arrests and incarceration continued into adulthood, the diagnosis became antisocial personality disorder.

Dr. Prichard testified "there's no question he has adaptive deficits" but also testified that adaptive deficits are only symptomatic of intellectual disability if the subject's deficits are "tied to intellectual disability." Id. at 346-47. Adaptive deficits from another cause such as antisocial personality disorder do not meet the statutory definition of intellectual disability.

Dr. Prichard testified on cross-examination that it is possible to miss a diagnosis of intellectual disability during the developmental period so that a person is not diagnosed until adulthood, and sometimes schools are reluctant to diagnose because of stigma and perceived disadvantage for the subject. Disadvantaged parents may be more likely to miss signs and symptoms that might otherwise lead to diagnoses. Dr. Prichard testified that the Stanford Binet-V and the WAIS-IV are the best and most reliable present measures of intellectual functioning.

Dr. Prichard testified previously that the 1974 WISC was approved by a licensed psychologist but later

learned that the supervising psychologist was a Ph.D. but not licensed. Dr. Prichard testified that the test administrator of Mr. Nixon's 1974 WISC was an intern with a bachelor's degree and had not yet attained a Ph.D.

Dr. Prichard testified on cross examination that the BETA screening test was not a reliable instrument and could not be validly used to diagnose or discount a diagnosis of intellectual disability. The BETA is not accepted by the scientific community or the Agency for Persons with Disabilities.

Dr. Prichard testified that Mr. Nixon demonstrated many adaptive deficits including poor academics even while in juvenile delinquency commitment facilities. Mr. Nixon also had a deficiencies in social skills, work history and in his ability to maintain safety. Dr. Prichard acknowledged deficiencies in practical, social and academic domains. Dr. Prichard testified that persons with intellectual disability can also have antisocial personality disorder.

Dr. Prichard testified that the ability to assess adaptive functioning in prison and especially death row is low because the repertoire of behavior is limited. Dr. Prichard testified that past criminality does not demonstrate a level of adaptive functioning but, "criminal behavior can create additional adaptive deficits, make it difficult for a person to get a job, make the person lose a job, make a person have a breakdown in their relationships. So it can contribute to some adaptive deficits." Id. at 369.

With respect to Dr. Prichard's assertion of relatively sophisticated knowledge by Mr. Nixon, Dr. Prichard acknowledged that Mr. Nixon also answered that the capitol of Italy is France and the capitol of Brazil is Africa.

Dr. Prichard testified that between childhood and adulthood, variation of five to ten points is typical.

Conjunctive and Interrelated Assessment

Mr. Nixon's test scores cannot be reconciled by adaptive deficits

Mr. Nixon achieved two IQ scores that exceed the statutory threshold at the bottom of the standard error of measurement range. Mr. Nixon also achieved IQ scores squarely within the ambiguous range implicated by Hall. Finally, Mr. Nixon achieved two IQ scores that place him unambiguously in the range of intellectual disability.

I am uncertain what Hall requires of the trial court under these circumstances. But it is crucial, in my view, to recognize that Hall does not purport to provide a sound basis to permit reconciling such scores. A score of 80 – 10 points above the statutory threshold – is irreconcilable with a score of 67. Put another way, Hall requires the court to consider the bottom range of the SEM to account for adaptive deficits. Hall does not permit the court to expand the SEM to account for adaptive deficits.

The 80 and the 88

Mr. Nixon scored 80 on the WAIS III (the state-of-the-art test at the time) administered in 2006 by Dr. Prichard.

Mr. Nixon's score of 80 exceeded the statutory definition of "significantly subaverage" – higher than two standard deviations below the mean. Assuming a plus or minus five-point standard error of measurement, Mr. Nixon's 2006 score supports general intellectual functioning from 75 to 85. The lowest end of Mr. Nixon's 2006 score is five points higher than two standard deviations below the mean and so does not approach the "significantly subaverage" element.

Mr. Nixon's WISC score of 88 as a child converts to a range of 83 to 93 applying a five-point standard error of measurement. The lowest end of Mr. Nixon's WISC score – 83 – is nearly a full standard deviation above the "significantly subaverage" element.

Mr. Nixon's WISC 88 is the subject of various meaningful criticisms – that the test was administered and scored by an unlicensed doctoral candidate is the most serious. But the main problem, both with the test and the criticism, is that the WISC was administered in 1974 when Mr. Nixon was 12 years old. Proof problems associated with a test administered more than forty years ago should be obvious. No testimony suggested any particular error in the administration or scoring of the 1974 WISC, only that the administration of the test was suggestive of the opportunity for mistakes or inadequate supervision.

Hall does not suggest that an IQ range of 75 to 85 or 83 to 93 should be adjusted by applying deficits in adaptive behavior to then further reduce the estimate of intellectual functioning lower than the standard error of measurement. Given the nebulousness of the adaptive behavior element, a *legal* rule requiring resort to adaptive behavior to further reduce such scores lower than the bottom of the standard error of measurement would eliminate the general intellectual functioning element and reverse the burden of proof established by the statute.

Hall's adaptive behavior analysis must be bounded by the standard error of measurement. If the adaptive behavior element doubles or triples the standard error of measurement, cognitive testing approaches meaningless.

Mr. Nixon's 80 and 88 are inconsistent with the timing element of the ID definition. An IQ range from 75 to 85 at age 45 demonstrates that Mr. Nixon was not intellectually disabled before he was 18. The WISC range from 83 to 93 achieved at age 12 is similarly inconsistent with intellectual deficits in the developmental period.

The 73 and 72

Mr. Nixon scored 73 on the WAIS-R in 1985 on a test administered in connection with the murder trial. Mr. Nixon scored 72 on the WAIS-R administered by Dr. Dee in 1993. These full-scale scores exceed the statutory definition and their ranges include, at the top,

scores well above and, at the bottom, just below the statutory two standard deviations below the mean.

If these were the only scores, the principles enunciated in Hall would be plainly and directly applicable, although the scale of the application is not entirely clear to me. The State's expert concedes Mr. Nixon's adaptive deficits but asserts that the deficits are the result of antisocial personality disorder, not ID. However, whether these deficits should result in reducing these scores to the intellectual disability threshold of 69 is a difficult proposition. I am uncertain of how to translate adaptive deficits into a finding of intellectual disability. But if the answer is that a score with an SEM range that extends into the ID threshold plus adaptive deficits (on balance as opposed to adaptive strengths) yields a diagnosis of ID, then Mr. Nixon's 73 and 72 would support a finding of ID.

The 68 and 67

Dr. Keyes, the expert who testified for Mr. Nixon and reviewed the administration of the WAIS-III in 2006, scored Mr. Nixon at 65 on the Stanford-Binet in 1993 which, according to Dr. Keyes, translates to a score of 68 when converted to a 100-point scale. Dr. Crown scored Mr. Nixon at 67 on the WAIS-IV in 2017.

Assuming a standard error of measurement of plus or minus five points, these scores suggest ranges from 63-73 and 62-72. Mr. Nixon's lowest scores are not reconcilable with ranges from 75-85 or 83-93 because the lower scores satisfy the general intellectual

functioning element and on the upper end of the range barely exceed the statutory threshold.

Given the state of Mr. Nixon's adaptive deficits, scores of 68 and 67 would support a conclusion that Mr. Nixon met the subaverage intellectual functioning element. No clinician testified and no evidence suggests that Mr. Nixon's adaptive capacity should be interpreted to adjust Mr. Nixon's cognitive capacity estimate upward.

Age of Onset

If the 80 (SEM range of 75-85) or 88 (SEM range of 83-93) are valid scores, Mr. Nixon failed to carry his burden of proving the age of onset element because the scores refute his claim of significantly subaverage general intellectual functioning.

If the 73 (SEM range of 68-78), 72 (SEM range of 67-77), 68 (SEM range of 63-73) and 67 (SEM range of 62-72) are valid scores, age of onset is exceedingly problematic.

Mr. Nixon was never diagnosed mentally retarded as a child despite multiple arrests, incarcerations, screening instruments and the administration of a full-scale cognitive testing instrument. The lack of a pre-18 diagnosis is, of course, not conclusive. But given Mr. Nixon's extraordinary history of juvenile commitments, it is suggestive of the possibility that he was not diagnosed because he was not intellectually disabled.

Mr. Nixon experienced a severe head injury at least once as an adult while incarcerated. And the evidence

regarding the proposed pre-18 etiology of Mr. Nixon's adaptive deficits is weak and speculative. No person who knew Mr. Nixon testified. Indeed Mr. Nixon presented no testimony of any person except experts who knew Mr. Nixon only within the confines of a psychological examination. The most basic information regarding Mr. Nixon's functioning (deemed probative in Rodriguez) whether Mr. Nixon "had good hygiene, could care for himself, and could drive" – is largely absent from the record. No witness testified to Mr. Nixon's basic grooming, hygiene, and self-care except for what the psychologists saw during examinations.

Credibility Determination

I conclude that Dr. Prichard's score of 80 is credible.

Dr. Prichard's administration was entirely transparent. It is supported by a complete scoring record including the notation of all answers recorded by Dr. Prichard.

Mr. Nixon's expert, Dr. Keyes, sought and was provided access to all scoring information and all of Mr. Nixon's answers. Mr. Nixon's expert and lawyers observed the administration of the test. And Dr. Keyes conceded that this 80 score represented a valid administration and a valid scoring of the test. During the 2006 evidentiary hearing Dr. Keyes offered no criticism of the administration or scoring of the test at all.

Mr. Nixon's expert, Dr. Ouaou, now offers various criticisms of Dr. Prichard's administration, but these

criticisms are unpersuasive. That Dr. Prichard's administration was fully transparent and accepted by the defense expert in 2006 is far more convincing than trying to parse whether Mr. Nixon's definition of the word "winter" as "one of the seasons" deserved one point or two. Dr. Ouaou asserts that the matters on which he criticized Dr. Prichard all redounded to raise Mr. Nixon's score (Dr. Prichard identified one error he made that reduced Mr. Nixon's score). But to the extent that Dr. Prichard answered the criticisms – and he did – Dr. Ouaou's criticisms support an equal and opposite inference of bias.

Dr. Prichard met each of Dr. Ouaou's criticisms by reference to the directions of the scoring manual. Dr. Prichard's explanations were straightforward and consistent with a plain reading of the manual's directions and application of scoring principles.

Dr. Ouaou's criticisms risk scores artificially depressed by treating scoring examples as the only correct answer as opposed to the application of scoring principles that account for vagaries of individual responses as the WAIS-III manual directs. I conclude that Dr. Prichard's testimony regarding application of scoring principles is the more persuasive.

Finally, I conclude that Dr. Prichard's full-scale score of 80 and SEM range of 75-85 is more credible than the scores falling within the Hall range. First there is no persuasive evidence that either the administration or scoring by Dr. Prichard was invalid. Second, as Dr. Prichard testified, the purpose of cognitive testing is to

determine capacity. While many factors other than ID can reduce capacity on a given day – inattention, lack of effort, lack of rapport with the examiner, lack of sleep – no similar factors can increase capacity.

In summary, the evidence presented on behalf of Mr. Nixon is neither clear nor convincing.

Conclusion

Mr. Nixon failed to present clear and convincing evidence of significantly subaverage general intellectual functioning.

Mr. Nixon presented clear and convincing evidence of deficits in adaptive behavior but failed to present clear and convincing evidence that such deficits existed concurrently with subaverage general intellectual functioning.

Mr. Nixon failed to present clear and convincing evidence of significantly subaverage general intellectual functioning manifested during the period from conception to age 18.

Mr. Nixon's Successive Motion Under Fla. R. Crim. Pr. 3.203 and 3.851 must be and hereby is DENIED.

Mr. Nixon's motion for relief under Hurst must be denied because his death sentence became final before Ring. Mosley v. State, 209 So. 3d 1248 (Fla. 2016).

Mr. Nixon's Second Successive Motion Under Fla. R. Crim. P. 3.851 must be and hereby is DENIED.

It is so ADJUDGED this 21st day of November, 2019 in chambers at Tallahassee, Leon County, Florida.

/s/ Jonathan Sjostrom
Jonathan Sjostrom,
Circuit Judge

Copies: All counsel of Record by Electronic Service

APPENDIX E

2017 WL 462148
Only the Westlaw citation is currently available.
Supreme Court of Florida.

Joe Elton NIXON, Appellant(s)
v.
STATE of Florida, Appellee(s)

CASE NO.: SC15-2309
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FEBRUARY 3, 2017

Lower Tribunal No(s).: 371984CF002324A00100

Opinion

*1 Joe Elton Nixon, a prisoner under sentence of death for the 1984 murder of Jeanne Bickner, appeals the trial court's denial of his third motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. Relief was denied in both of Nixon's previous postconviction proceedings. See Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000); Nixon v. State, 857 So. 2d 172 (Fla. 2003). In his current postconviction appeal, Nixon asserts that the trial court erred in (1) summarily denying Nixon an evidentiary hearing on his intellectual disability claim; (2) dismissing Nixon's motion on the basis that he is not currently intellectually disabled; and (3) rejecting Nixon's intellectual disability claim based upon Nixon's argument as to his total intellectual functioning.

Nixon's first claim is based on his motion being summarily denied in the trial court pursuant to a rule of law that has now been found unconstitutional under Hall v. Florida, 134 S. Ct. 1986 (2014). During the pendency of this case, this Court determined that Hall applies retroactively as a development of fundamental significance. Walls v. State, 41 Fla. L. Weekly S466, S469 (Fla. Oct. 20, 2016).

A postconviction court's decision on whether to grant an evidentiary hearing on a claim is a pure question of law, reviewed de novo. Mann v. State, 112 So. 3d 1158, 1162 (Fla. 2013). A claim may be summarily denied if it is legally insufficient or positively refuted by the record. Id. at 1161. To prevail on a claim of intellectual disability, a defendant must establish three elements: (1) significantly subaverage intellectual functioning (2) existing concurrently with deficits in adaptive behavior and (3) manifesting prior to age 18. Fla. R. Crim. P. 3.203; see also § 921.137(1), Fla. Stat. (2015).

Hall recognizes that intellectual disability "is a condition, not a number." Hall, 134 S. Ct. at 2001. In a recent opinion, this Court found that Hall requires courts to consider all three prongs of intellectual disability in tandem and that no single factor should be dispositive of the outcome. See Oats v. State, 181 So. 3d 457, 459 (Fla. 2015). Thus, an intellectual disability claim may not be legally insufficient or positively refuted by the record even if the defendant's IQ scores are higher than 70.

At the Huff[1] hearing, Nixon presented his full range of scores,[2] which included a 73 from 1985 and a 72 and 68 from 1993. The trial court incorrectly found the significantly subaverage intellectual functioning prong dispositive of Nixon's intellectual disability claim based on Nixon's current score of 80. Although the court did not have the benefit of the Oats decision, it should have conducted the more holistic, interrelated assessment for which Nixon's counsel argued at the Huff hearing. Furthermore, because of its ruling as to the subaverage intellectual functioning prong, the court here did not look to all of the record evidence of Nixon's intellectual disability, even disregarding other non-IQ evidence that could have been relevant.

*2 Therefore, Nixon's claim is legally sufficient and not conclusively refuted by the record in this case. As we noted in Walls, "all three prongs of the intellectual disability test [must] be considered in tandem. . . . [T]he conjunctive and interrelated nature of the test requires no single factor to be considered dispositive." Walls, 41 Fla. L. Weekly at S469 (citing Oats, 181 So. 3d at 459). Because the postconviction court here used the wrong legal standard, under Oats, to address Nixon's claim, Nixon's motion cannot be deemed legally insufficient or positively refuted by the record on that basis and therefore should not have been

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[1] Huff v. State, 622 So. 2d 982 (Fla. 1993).

[2] The record demonstrates six IQ scores for Nixon: a score of 88 in 1974 at 13 years of age, 88 in 1980 at 19 years of age, 73 in 1985 at 24 years of age, 72 and 68 in 1993 at 32 years of age, and 80 in 2006 at 45 years of age.

summarily denied. We remand on this issue alone, and instruct the trial court to conduct proceedings to determine whether a new evidentiary hearing is necessary.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.

CANADY and POLSTON, JJ., dissent.

LAWSON, J., did not participate.

APPENDIX F

SECOND CIRCUIT COURT,
LEON COUNTY, FLORIDA

State Of Florida
v.
Joe Elton Nixon, Defendant. /

CASE NO. 1984-CF-2324
SPN NO. 4

Order Denying Defendant's Successive Post-Conviction Motion

(Filed Oct. 9, 2015)

This matter is before the Court on a document filed by defendant Joe Elton Nixon, through counsel on May 25, 2015 and entitled, "Successive Motion Under Fla. R. Crim. P. 3.203 and 3.851." Mr. Nixon also filed at the same time a brief in support, and Appendix which includes an affidavit of Dr. Stephen Greenspan. The State filed its Response on June 15, 2015.

The Court held a Huff[1]/case management hearing On July 14, 2015.

Mr. Nixon filed a "Reply Brief in Support of Successive Motion Under Fla. R. Crim. P. 3.203 and 3.851," along with an "Amended Expert Affidavit of Stephen Greenspan, Ph.D. in Support of Successive Motion Under Fla. R. Crim. P. 3.203 and 3.851," on August 13, 2015.

[1] See Huff v. State, 622 So. 2d 982 (Fla. 1993).

The State filed its response on August 31, 2015. The State filed a Notice of Supplemental Authority on September 3, 2015.

Mr. Nixon filed a Notice of Filing Supplemental Authority on September 24, 2015.

The Court is adequately advised.

Procedural History

The following history is not exhaustive.

On July 22, 1985, a jury found Defendant guilty of 1) Murder in the First Degree, 2) Kidnapping, 3) Robbery, and 4) Arson. On July 30, 1985, the Court sentenced Defendant to death for Count 1.

The Supreme Court of Florida ultimately affirmed Defendant's conviction and sentences on direct appeal. Nixon v. State, 572 So. 2d 1336 (Fla. 1990) (Nixon I).

Counsel for Defendant filed a motion for postconviction relief on October 7, 1993. The motion was denied by order of October 22, 1997. The Supreme Court of Florida remanded for the trial court to hold an evidentiary hearing. Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000)(Nixon II).

Following an evidentiary hearing, the Court denied Defendant's motion for postconviction relief by order of September 20, 2001. The Supreme Court of Florida reversed the denial and remanded the case for a new trial. Nixon v. State, 857 So. 2d 172 (Fla. 2003) (Nixon III). The Supreme Court of the United States reversed.

Florida v. Nixon, 543 U.S. 175 (2004). The Supreme Court of Florida subsequently affirmed the denial of Defendant's postconviction motion. Nixon v. State, 932 So. 2d 1009 (Fla. 2006) (Nixon IV). Additionally, the Court in Nixon IV instructed, "To the extent that Nixon is eligible to pursue a claim of mental retardation under Florida Rule of Criminal Procedure 3.203, he should do so within sixty days of the release of this opinion." Nixon, 932 So. 2d at 1024.

In June of 2006, counsel for Defendant filed a motion pursuant to Rules 3.203 and 3.851 raising a claim of mental retardation. The court conducted an evidentiary hearing on Mr. Nixon's mental retardation claim on October 23, 2006. Mr. Nixon also filed a motion on April 19, 2007 seeking to declare Florida Statute Section 921.137 unconstitutional. The Court denied the motions by order of April 26, 2007. The Supreme Court of Florida affirmed. Nixon v. State, 2 So. 3d 137 (Fla. 2009)(Nixon V).

Federal Habeas

Mr. Nixon filed a Petition for Writ of Habeas Corpus in the U.S. District Court for the Northern District of Florida in January 2010 (case number 4:10-cv-20-MCR-CAS). The parties represent that the petition, in part, raises a mental retardation claim. As he represents in the instant motion, Mr. Nixon moved to stay those proceedings prior to filing his May 25, 2015 motion in this Court. On August 11, 2015, the U.S. District Court for the Northern District of Florida entered an

Order Staying Proceedings, thereby holding the petition in abeyance during the pendency of the instant motion.

Defendant's Arguments

Defendant asserts that his death sentence violates "the Eighth and Fourteenth Amendments to the United States Constitution as well as Florida constitutional and statutory law because he was intellectually disabled at the time of the offense."

Defendant acknowledges he raised the issue of his intellectual functioning in his 2006 motion. He asserts that Hall v. Florida, 134 S. Ct. 1986 (2014), "overturned the legal rule on which" the denial of his 2006 motion rested. Additionally, Defendant seeks to present evidence of mental illness. He acknowledges that issue, too, was previously raised and denied. He now asserts Hall "shows that denial to have been erroneous. . . ."

For the reasons set-forth below, an additional evidentiary hearing is unnecessary, and Defendant's motion must be denied.

Analysis

The United States Supreme Court, in Hall v. Florida, considered Florida's rule that a defendant's IQ score must be 70 or less to be ineligible for a death sentence because of intellectual disability. Hall v. Florida, 134 S. Ct. 1986, 1990 (2014).

The Hall Court ruled that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." Id. at 2001.

Citing Florida Rule of Criminal Procedure 3.851(d)(2), Defendant asserts that Hall constitutes "new grounds" for relief. Specifically, he asserts Hall corrects "the prior statutory reading of the Florida courts. . . ." Defendant asserts that Hall has been applied retroactively. Defendant further asserts that Henry v. State, 141 So. 3d 557 (Fla. 2014), "authorizes a successive motion."

The facts established in the 2006 evidentiary hearing demonstrate that Mr. Nixon's IQ test score does not "fall[] within the test's acknowledged and inherent margin of error." Mr. Nixon is, therefore, not entitled to "present additional evidence of intellectual disability, including testimony regarding adaptive deficits." Hall at 2001. Because Mr. Nixon's case falls outside of the principles established in Hall, the court need not reach the question of Hall's retroactive application. See., e.g., In re Hill, 777 F.3d 1214 (11th Cir. 2015).

Moreover, in his June 6, 2006 motion, Mr. Nixon argued exhaustively that his death sentence should be vacated because he was intellectually disabled. *Exh. 1-06/19/06 Motion under Fla. R. Crim. P. 3.203 and 3.851(without attachments); Exh. 2-06/09/06 Brief in Support of Motion under Fla. R. Crim. P. 3.203 and 3.851(without attachments).* During the evidentiary hearing, Mr. Nixon

was permitted to and did present evidence and argument regarding each of the criteria that comprise the definition of intellectual disability. *Exh. 2 at pp. 17 – 26.* The Court imposed no restrictions on the presentation of evidence of intellectual disability and Mr. Nixon was not foreclosed from presenting any evidence of intellectual disability at the 2006 evidentiary hearing, including evidence of adaptive deficits. *Exh. 3-07/26/06 Case Management Conference Transcript; Exh. 4-10/17/06 Order; Exh. 5-10/23/06 Motion Hearing Transcript, vol. 1; Exh. 6-10/23/06 Motion Hearing Transcript, vol. 2.*

Dr. Greenspan's affidavits, submitted by Mr. Nixon, assert that "[a]fter comprehensively canvassing the record and evaluating it under current clinical standards through the lens of Hall, Dr. Greenspan concludes to a reasonable scientific certainty that Mr. Nixon was intellectually disabled at the time of the capital offense. . . ." Mr. Nixon argues that the 2006 motion was decided as a matter of law rather than fact.

Dr. Greenspan states, on page 43 of his amended affidavit, that he has "not interviewed or met Joe Nixon." The facts regarding Mr. Nixon contained in Dr. Greenspan's affidavit and amended affidavit come from Dr. Greenspan's review of various background materials and portions of the record. Regarding Defendant's IQ, Dr. Greenspan largely agrees with the conclusions made by Dr. Keyes in 2006 and challenges the conclusions made by Dr. Pritchard in 2006.

The evidentiary hearing in 2006 permitted both the State and Mr. Nixon to present the testimony of experts who actually tested Mr. Nixon reasonably contemporaneously. Both experts testified live and both were subject to cross examination. See, Jones v. State, 966 So.2d 319, 326-27 (Fla. 2007) ("the question is whether a defendant 'is' mentally retarded, not whether he was.").

In the April 26, 2007 order, this court concluded "that Dr. Keyes's testimony is plainly outweighed by Dr. Pritchard's testimony." *Exh. 7-04/26/07 Order, pg. 16 (without attachments).* For reasons set forth in that Order, this court further concluded, "Dr. Keyes's historical cumulative average scoring approach is not persuasive and the persuasive effect of this approach is outweighed by Dr. Pritchard's unrebutted testimony that Mr. Nixon scored 80 on a test validly administered last year." *Id.* This Court also determined, "In the absence of some basis to conclude that Mr. Nixon's 2006 score of 80 was materially invalid, Dr. Pritchard's testimony is dispositive. . . ." *Id. at pg. 15 (without attachments).*

Mr. Nixon does not assert any new testing since Dr. Pritchard administered the Wechsler Adult Intelligence Scale, Third Edition (the WAIS-III) in 2006 and Mr. Nixon earned a valid full scale IQ score of 80. *Exh. 5 at pp. 88, 173 – 174.* The standard error of measurement (SEM) for that test is plus or minus 5 points. *Id at pp. 77 – 78, 185 – 188.*

Hall requires that the court account for the SEM and requires consideration of adaptive functioning ***if the***

achieved score falls within the SEM for intellectual disability. Thus, a valid, current score above 75 on the WAIS-III eliminates the constitutional infirmity established by Hall. Mr. Nixon's score of 80 means that Hall does not apply. Cf. Hall, 134 S.Ct. at 1996-97 citing State v. Roque, 213 Ariz. 193, 227-28 (2006).

For the same reason, Mr. Nixon's assertion that Hall allows him to "introduce evidence showing his total functionality irrespective of the technicalities of whether his dysfunctions meet the legal definition of mental retardation," must also fail.

Regarding mental illness, this Court's 10/17/06 Order *(Exh. 4)* clarifying the issues for the 10/23/06 evidentiary hearing stated:

> As regards the constitutional claim that Rule 3.203 is unconstitutional because it does not permit assertion of a mental illness claim, relitigation of the issue of Mr. Nixon's mental illness apart from retardation is foreclosed by the Florida Supreme Court's decision squarely addressing such issues in Nixon v. State, 932 So. 2d 1009 (Fla. 2006). The evidentiary hearing is limited to the mental retardation issue and will not be expanded beyond the mental retardation issue established in Atkins and its progeny.

Subsequently, regarding mental illness, the Supreme Court of Florida in Nixon V held:

> Lastly, Nixon asserts that the trial court erroneously denied him a hearing on his claim that mental illness bars his execution. We

> rejected this argument in *Lawrence v. State*, 969 So.2d 294 (Fla.2007), and *Connor v. State*, 979 So.2d 852 (Fla.2007). In *Lawrence*, we rejected the defendant's argument that the Equal Protection Clause requires this Court to extend *Atkins* to the mentally ill. *See* 969 So.2d at 300 n. 9. In *Connor*, we noted that "No the extent that Connor is arguing that he cannot be executed because of mental conditions that are not insanity or mental retardation, the issue has been resolved adversely to his position." *Connor*, 979 So.2d at 867 (citing *Diaz v. State*, 945 So.2d 1136, 1151 (Fla.) *cert. denied*, 549 U.S. 1103, 127 S.Ct. 850, 166 L.Ed.2d 679 (2006) (indicating that neither the United States Supreme Court nor this Court has recognized mental illness as a per se bar to execution)). Accordingly, Nixon is not entitled to relief on this claim.

Nixon, 2 So. 3d at 146; accord McCoy v. State, 132 So. 3d 756 (Fla. 2013)(citing Carroll v. State, 114 So. 3d 883 (Fla. 2013)).

Rather than arguing that mental illness should directly bar his execution, Mr. Nixon now asserts that his mental illness might also tend to demonstrate that his overall adaptive functioning amounts to intellectual disability. Hall does not directly address mental illness. But mental illness as degrading adaptive functioning is irrelevant for analysis of intellectual disability for an individual, like Mr. Nixon, who achieved a valid, current IQ score outside of the standard error of measure for intellectual disability.

Mr. Nixon's IQ test score does not "fall[ ] within the test's acknowledged and inherent margin of error." Mr. Nixon is thus not entitled to "present additional evidence of intellectual disability, including testimony regarding adaptive deficits." Hall at 2001 and cf. Brumfield v. Cain, 135 S.Ct. 2269, 2278-79 (2015) (remanding for evidentiary hearing where defendant scored only 75 and expert testified that defendant "may have scored higher on another test"); Conner v. GDCP Warden, 784 F.3d 752, 765 (11th Cir. 2015) (denying federal habeas relief based on evidentiary finding that the defendant's IQ "hovers around 80.").

WHEREFORE IT IS

ORDERED AND ADJUDGED that Defendant's "Successive Motion Under Fla. R. Crim. P. 3.203 and 3.851," filed on 05/25/15, is hereby **DENIED.** Defendant has 30 days from the date of this order in which to file an appeal.

DONE AND ORDERED this 9th day of October, 2015.

/s/ Jonathan Sjostrom
JONATHAN SJOSTROM
CIRCUIT JUDGE

[Certificate Of Service Omitted In Printing]

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JOE ELTON NIXON,
Petitioner,

v.

JULIE L. JONES, Secretary, Florida Department of Corrections, et. al,
Respondents. /

Case No.: 4:10cv20/MCR

ORDER STAYING PROCEEDINGS

(Filed Aug. 11, 2015)

Before the Court is a motion to stay and hold in abeyance filed by Petitioner Nixon (doc. 63). Respondents have filed a response in opposition (doc. 65). In May 2015, Nixon filed a successive motion in state court under Fla. R. Crim. P. 3.203 and 3.851, reasserting a claim of intellectual disability in light of the United States Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014). The Court finds it appropriate to hold the proceedings in this case in abeyance pending the completion of Nixon's state court proceedings. *See Rhines v. Weber*, 544 U.S. 269 (2005).

Accordingly,

1. Nixon's motion to stay and hold in abeyance (doc. 63) is **GRANTED.** The case is **STAYED** pending further Order.

2. Nixon is required to provide the Court with a status report every ninety (90) days, starting on October 1, 2015, setting forth the status of his state court proceedings.

DONE and **ORDERED** this 11th day of August, 2015.

/s/ M. Casey Rodgers
M. CASEY RODGERS
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX H

2 So.3d 137
Supreme Court of Florida.

Joe Elton NIXON, Appellant,
v.
STATE of Florida, Appellee.

No. SC07-953
|
Jan. 22, 2009.

Attorneys and Law Firms

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Bill McCollum, Attorney General, and Carolyn M. Snurkowski, Assistant Attorney General, Tallahassee, FL, for Appellee.

Opinion

PER CURIAM.

Joe Elton Nixon appeals the denial of his motion for postconviction relief filed pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203. Because the order concerns postconviction relief from a sentence of death, we have jurisdiction of the appeal under article V, section 3(b)(1), Florida Constitution. For the reasons expressed below, we affirm both the trial court's denial of postconviction relief and its finding that Nixon is not mentally retarded.

I. FACTS AND PROCEDURAL HISTORY

Joe Elton Nixon was charged, convicted, and sentenced to death for the 1984 murder of a Tallahassee woman. On direct appeal, we affirmed the conviction and sentence. *See Nixon v. State*, 572 So.2d 1336 (Fla.1990) (*Nixon I*).[1] The United States Supreme Court denied Nixon's petition for a writ of certiorari. *See Nixon v. Florida*, 502 U.S. 854, 112 S.Ct. 164, 116 L.Ed.2d 128 (1991). Subsequently, Nixon filed with the

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[1] Nixon raised seven claims in connection with the guilt phase of the trial and eight claims in connection with the penalty phase. *See Nixon v. State*, 572 So.2d 1336, 1338 (Fla.1990) (*Nixon I*). We discussed the following guilt-phase claims: (1) he was denied effective assistance of counsel when his trial counsel, without his record approval, conceded his guilt and sought leniency; (2) during closing argument the prosecutor made an impermissible "Golden Rule" argument when he told the jury " 'we have an obligation to make you feel just a little bit . . . of what [the victim] felt' "; (3) his absence during critical proceedings throughout the trial required a reversal; (4) the admission of an "unnecessarily large number of inflammatory photographs" of the victim in a charred state resulted in a fundamentally unfair proceeding; and (5) the trial court erred when it failed to establish the competency of a juror who was excused from jury service during the penalty phase of the trial due to emotional problems. *See id.* at 1338-43. We discussed the following penalty-phase claims: (1) Nixon's statement after his arrest concerning the removal of victim's underwear was inadmissible because it was given without the full benefit of warnings under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); (2) the trial court erred in failing to instruct the jury on mitigating factors under sections 921.141(6)(b) and (6)(f), Florida Statutes (1985); (3) the trial court impermissibly refused to consider the mitigating evidence presented; and (4) the trial court erred when it refused to give a requested instruction informing the jury of the maximum sentences for kidnapping, robbery, and arson. *See Nixon I*, 572 So.2d at 1343-45.

trial court a motion pursuant to Florida Rule of Criminal Procedure 3.850. The trial court denied the motion without an evidentiary hearing. Nixon appealed the trial court's summary denial to this Court. *See Nixon v. Singletary*, 758 So.2d 618 (Fla.2000) (*Nixon II*).[2] Additionally, Nixon filed with this Court a petition for a writ of habeas corpus. *See id.*[3]

In *Nixon II*, the dispositive issue was whether Nixon was denied effective assistance of counsel when his lawyer conceded guilt without his consent. *See* 758 So.2d at 624. Ultimately, we held that if Nixon could establish that he did not consent to counsel's strategy, then the Court would find counsel to be per se ineffective under the standard espoused in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). *See Nixon II*, 758 So.2d at 624. Accordingly, we remanded the case to the trial court to hold an evidentiary hearing on the issue of whether Nixon consented to trial counsel's strategy. *See id.* On remand, an evidentiary hearing was held. After the hearing, the trial court denied relief and found that Nixon consented to counsel's strategy. *See Nixon v. State*, 857 So.2d 172 (Fla.2003) (*Nixon III*). On appeal, we found Nixon had not consented to counsel's strategy. We then applied the per se ineffective assistance of counsel standard

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[2] Nixon raised seven issues on appeal. *See Nixon v. State*, 932 So.2d 1009, 1014 n. 2 (Fla.2006) (listing issues).

[3] Nixon raised three issues in his habeas petition. We did not address those issues in *Nixon II* because we reversed based on the ineffective assistance of counsel claim.

from *Cronic*, found counsel ineffective, and remanded for a new trial.

The United States Supreme Court granted certiorari review of this Court's decision in *Nixon III* and held that claims of ineffective assistance of counsel based on counsel's concession of guilt to the crime charged, even without the defendant's consent, are to be analyzed under the principles enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004). On remand, we determined all of Nixon's ineffective assistance of counsel claims under the *Strickland* standard and addressed the other issues raised in Nixon's 3.850 appeal and habeas petition. We affirmed the trial court's denial of postconviction relief, and we denied habeas relief. *See Nixon v. State*, 932 So.2d 1009 (Fla.2006).

Pursuant to Florida Rules of Criminal Procedure 3.203(d)(4) and 3.851, Nixon filed a timely motion claiming that his conviction and sentence of death are contrary to the reasoning and holding in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (establishing that the Eighth Amendment prohibits the execution of the mentally retarded). Moreover, Nixon contended that section 921.137, Florida Statutes (2002), as interpreted in *Cherry v. State*, 959 So.2d 702 (Fla.), *cert. denied*, 552 U.S. 993, 128 S.Ct. 490, 169 L.Ed.2d 344 (2007), violates both the United States Constitution and the Florida Constitution.

The Evidentiary Hearing

The trial court conducted a two-day evidentiary hearing on Nixon's mental retardation claim. At the hearing, the defense presented the expert testimony of Dr. Denis Keyes. The State presented the expert testimony and report of Dr. Gregory A. Prichard. In substantial part the evidence indicates that between 1974 and 1992, various doctors administered the Wechsler Intelligence Scale for Children test (WISC) and the Wechsler Adult Intelligence Scale test (WAIS) to Nixon. Nixon's IQ scores based on these tests were 88, 73, and 72.

Dr. Denis Keyes

In 1993, Dr. Denis Keyes, an Associate Professor of Special Education at the College of Charleston in South Carolina, examined Nixon on behalf of the defense. Dr. Keyes tested Nixon's intellectual functioning by utilizing the Stanford-Binet Intelligence Scale test, Fourth Edition. Dr. Keyes determined Nixon's IQ to be 68. At the time Dr. Keyes examined Nixon there was no valid test of malingering. Based on Nixon's test performance, Dr. Keyes opined that he performed at a significantly subaverage intellectual level.

Dr. Keyes further concluded that there were known risks that Nixon was mentally retarded starting in early childhood. These known risks included: Nixon's mother's drinking, diet, and infrequent visits to the doctor during her pregnancy; Nixon's malnourishment and exposure to nicotine and pesticide during

his childhood; Nixon's social and practical deficiencies; and Nixon's psychological, physical, and sexual abuse suffered at the hands of his family.

Dr. Keyes also opined that there was extensive evidence of Nixon's difficulty with adaptive skills. He noted that Nixon had great difficulty in keeping up with others and learning basic information as a child. Dr. Keyes cited Nixon's poor communication skills, difficulty in understanding basic mathematical concepts, poor achievement test results, repetitive behavior of making the same mistakes over and over, and the reports from Nixon's prior teachers stating he should be placed in a special education program as evidence of Nixon's subaverage intellectual functioning as a child. From his testing and observations, Dr. Keyes concluded that the onset of Nixon's low intellectual functioning and adaptive deficits occurred before age eighteen. Therefore, Dr. Keyes concluded that Nixon was mentally retarded at the time of the crime and was currently (in 2006) evidencing adaptive dysfunctioning.

Dr. Gregory A. Prichard

In 2006, Dr. Gregory Prichard, a clinical psychologist, examined Nixon for the State. To determine Nixon's intellectual functioning, Dr. Prichard administered the WAIS III and the Test for Memory Malingering, also known as the WRAT-3 or TOMM. As a result of these tests, Dr. Prichard found Nixon's full scale IQ

to be 80. He found no indication that Nixon was malingering.

After reviewing Nixon's 1974 intelligence test, which was conducted when Nixon was twelve or thirteen years old, Dr. Prichard stated the test indicated an IQ full scale score of 88. Dr. Prichard found that there was no evidence that questioned the validity of the 1974 IQ score. Thus, Dr. Prichard opined that Nixon could not demonstrate onset of mental retardation before eighteen years of age. Based on his evaluations, Dr. Prichard concluded that Nixon is not mentally retarded. He further indicated there was no need to address the adaptive behavior issue as part of his assessment because Nixon's IQ did not fall within the mental retardation range.

After hearing the testimony and reviewing the evidence, the trial court concluded that Nixon did not establish mental retardation under either the clear and convincing or the preponderance of the evidence standard. Nixon appeals that decision, raising the issues discussed below.

II. ANALYSIS

Nixon makes the following arguments applicable to his mental retardation claim: (1) this Court should reconsider its decision in *Cherry v. State*, 959 So.2d 702 (Fla.2007); (2) the trial court's fact-finding, which was infected by legal error, is entitled to no deference; (3) the trial court violated *Atkins* by adding a "culpability" test; (4) the trial court violated *Atkins* by using Nixon's

confession to find him not mentally retarded; (5) he is entitled to a remand for a legally proper hearing because there is ample evidence in the record to support his claim of mental retardation; and (6) this Court must require that the proceedings on remand be freed from several erroneous legal rulings previously made by the trial court.

In 2001, the Florida Legislature enacted section 921.137, Florida Statutes (2001), which barred the imposition of a death sentence on the mentally retarded and established a method for determining which capital defendants are mentally retarded. *See* § 921.137, Fla. Stat. (2001). The following year, the United States Supreme Court issued its opinion in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), holding that execution of mentally retarded offenders constitutes "excessive" punishment under the Eighth Amendment. In response to *Atkins* and section 921.137, we promulgated Florida Rule of Criminal Procedure 3.203, which specifies the procedure for raising mental retardation as a bar to a death sentence. Pursuant to both section 921.137 and rule 3.203, a defendant must prove mental retardation by demonstrating: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. *See* § 921.137(1), Fla. Stat. (2007); Fla. R.Crim. P. 3.203(b).

The trial court concluded that Nixon failed to establish that he is ineligible for the death penalty due to mental retardation. We affirm the trial court's

determination that Nixon is not mentally retarded. When reviewing mental retardation determinations, we must decide whether competent, substantial evidence supports the trial court's findings. *See Cherry*, 959 So.2d at 712 (citing *Johnston v. State*, 960 So.2d 757 (Fla.2006)). We do 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) (citing *Trotter v. State*, 932 So.2d 1045, 1049 (Fla.2006)). However, we review the trial court's legal conclusions de novo. *See Sochor v. State*, 883 So.2d 766, 771-72 (Fla.2004).

Cherry Decision

Nixon first argues that this Court's interpretation of section 921.137 in *Cherry*, which requires a defendant to have an IQ score of 70 or below, violates *Atkins*.[4] Nixon asserts that because the Supreme Court noted in *Atkins* that the consensus in the scientific community recognizes an IQ between 70 and 75 or lower, states are only permitted to establish procedures to determine whether a capital defendant's IQ is 75 or below on a standardized intelligence test. Nixon's claim

[4] In *Cherry*, we noted that another jurisdiction considering a similar claim found that "fourteen of the twenty-six jurisdictions with mental retardation statutes have a cutoff of seventy or two standard deviations below the mean." 959 So.2d at 713 n. 8 (citing *Bowling v. Commonwealth*, 163 S.W.3d 361, 373-74(Ky.) (upholding use of seventy IQ score cutoff), *cert. denied*, 546 U.S. 1017, 126 S.Ct. 652, 163 L.Ed.2d 528 (2005)).

is without merit.[5] In *Atkins*, the Supreme Court recognized that various sources and research differ on who should be classified as mentally retarded. Accordingly, the Court left to the states the task of setting specific rules in their statutes. *See Atkins*, 536 U.S. at 317, 122 S.Ct. 2242 ("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.' ") (citations omitted). This State in section 921.137(1) defines subaverage general intellectual functioning as "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." We have consistently interpreted this definition to require a defendant seeking exemption from execution to establish he has an IQ of 70 or below. *See*, *e.g.*, *Jones v. State*, 966 So.2d 319, 329 (Fla.2007) ("[U]nder the plain language of the statute, 'significantly subaverage general intellectual functioning' correlates with an IQ of 70 or below."); *Zack v. State*, 911 So.2d 1190, 1201 (Fla.2005) (finding that to be exempt from execution under *Atkins*, a defendant must establish that he has an IQ of 70 or below).

Nixon further asserts that our interpretation of section 921.137 in *Cherry* creates an irrebuttable

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[5] Nixon makes a number of assertions questioning this Court's *Cherry* decision. All of these arguments are versions of his main argument that an IQ of 70 or below should not be the standard and that such a standard is unconstitutional.

presumption that no one with an IQ over 70 is mentally retarded. Nixon claims that we created an irrebuttable presumption because once we concluded that Cherry's IQ score was 72 our inquiry terminated, i.e., we did not consider the two other prongs of the mental retardation determination. *See Cherry*, 959 So.2d at 714. We have consistently interpreted section 921.137(1) as providing that a defendant may establish mental retardation by demonstrating all three of the following factors: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. *See*, *e.g.*, *Jones*, 966 So.2d at 325; *Johnston*, 960 So.2d at 761. Thus, the lack of proof on any one of these components of mental retardation would result in the defendant not being found to suffer from mental retardation.

Nixon further asserts that our interpretation of section 921.137(1) does not provide constitutionally adequate procedures to determine mental retardation. More specifically, Nixon claims that in *Cherry*, we interpreted section 921.137(1) to create fact-finding procedures that preclude a defendant from presenting relevant material. Nothing in *Cherry* or section 921.137 precludes a defendant from presenting any evidence that is germane to the issues involved in a mental retardation claim. Section 921.137(1) and rule 3.203 provide defendants with notice of the type of evidence that is relevant to the issues and that will be considered by a trial court. In addition defendants are given an opportunity to present any relevant evidence

to the court. This procedure was followed in this case. After an evidentiary hearing, the trial court issued a final order that thoroughly explained its decision, finding that Nixon had not established that he should be excluded from the death penalty by reason of mental retardation.

The trial court informed Nixon of his opportunity to present his case, provided an evidentiary hearing, determined Nixon's mental retardation claim on the basis of the examinations performed by two psychiatrists, and provided Nixon with an adequate opportunity to submit expert evidence in response to the report and testimony of the court-appointed expert. We find that Nixon was included in the truth-seeking process and had a full and fair opportunity to present evidence relevant to his mental retardation claim and to challenge the state-appointed psychiatrist's opinions. Because the statute, rule, and caselaw outline adequate procedures for the presentation of mental retardation claims, Nixon is not entitled to relief on this issue.

Nixon further contends that this Court's definition of mental retardation violates both the United States and Florida Constitutions because the definition of mental retardation in section 921.137, as construed in *Cherry*, is inconsistent with the constitutional bar on the execution of mentally retarded persons. In *Jones v. State*, 966 So.2d 319, 326 (Fla.2007), we found that Florida's definition of mental retardation is consistent with the American Psychiatric Association's diagnostic

criteria for mental retardation.[6] Moreover, in *Atkins*, the Supreme Court noted that the statutory definitions of mental retardation throughout the country are not identical to the one outlined in *Atkins* but generally conform to the clinical definitions set forth in the case. *See* 536 U.S. at 317 n. 22, 122 S.Ct. 2242. Florida's statutory definition of mental retardation is not identical but conforms to the one outlined in *Atkins*. *See id.* at 309 n. 3, 122 S.Ct. 2242; § 921.137(1), Fla. Stat. (2007). Nixon's claim involving the definition of mental retardation is also without merit.

Trial Court's Factfinding

Nixon contends that the trial court dismissed Dr. Keyes's testimony based on this Court's holding in

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[6] The American Psychiatric Association's definition provides the following diagnostic criteria for mental retardation:

> A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test (for infants, a clinical judgment of significantly subaverage intellectual functioning).
>
> B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.
>
> C. The onset is before age 18 years.

Jones v. State, 966 So.2d 319, 326-27 (Fla.2007) (quoting American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 49 (4th ed.2000)).

Cherry. Nixon argues that because *Cherry* does not set forth the governing legal standard, the trial court's factual determinations were induced by an erroneous view of the law. This argument is yet another attack on Florida's definition of mental retardation and the trial court's application of this definition to the facts of this case. As we previously stated, the trial court followed the correct procedure in determining Nixon's claim. Section 921.137(1) sets forth the governing legal standard and rule 3.203 outlines the procedural requirements for mental retardation claims. The trial judge followed the statute, rule, and caselaw, then he carefully evaluated the testimony from the two experts. He found the testimony of Dr. Prichard more credible than that of Dr. Keyes and concluded that Nixon was not mentally retarded. Resolving all conflicts in the evidence and all reasonable inferences in favor of the trial court's decision, we find there is competent, substantial evidence to support the trial court's determination that Nixon does not meet the criteria for mental retardation.

Diminished Culpability

Nixon next asserts that the trial court erred in considering his impulsiveness and suggestibility in making a mental retardation determination. In *Atkins*, the Supreme Court addressed both impulsiveness and suggestibility as it relates to findings of mental retardation. The Court said:

> Mentally retarded persons frequently know the difference between right and wrong and

> are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to *control impulses*, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but *there is abundant evidence that they often act on impulse* rather than pursuant to a premeditated plan, and that in group settings *they are followers rather than leaders.* Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

536 U.S. at 318, 122 S.Ct. 2242 (footnotes omitted) (emphasis added). In this case the trial court was not using impulsivity and suggestibility to determine whether Nixon met the diagnostic criteria for mental retardation. Instead, the court was simply addressing why impulsivity or suggestibility was not applicable to this case. The trial court said that "[t]he record in Mr. Nixon's case refutes any inference that impulsivity or suggestibility contributed in any way to Mr. Nixon's crime." The court reasoned that impulsivity or suggestibility was not relevant in this case because the crime was not impulsive but was committed through a series of deceptions, with attempts to destroy any evidence of the crime, and by a lone perpetrator. The trial court did not err in reviewing the role impulsivity or suggestibility played in Nixon's crime.

Confession

Nixon argues the trial court erred by using his confession to find him not mentally retarded. We disagree. The trial court determined that Nixon was not mentally retarded by applying *Atkins*, section 921.137, rule 3.203, and this Court's precedent on mental retardation. In its order, the court simply noted that Nixon's lengthy confession, given very soon after the crimes, also indicated a total absence of impulsivity and suggestibility.

Trial Court's Conclusion

Nixon next argues that the record contains ample evidence in which a fact-finder could determine that he is mentally retarded. Thus, he argues that the trial court erred by not finding him mentally retarded. As stated earlier, we review mental retardation issues to determine whether competent, substantial evidence supports the trial court's determination. *See Cherry*, 959 So.2d at 712 (citing *Johnston*, 960 So.2d 757). We have reserved to the trial court the determination of the credibility of witnesses. *See Trotter*, 932 So.2d at 1050 (citing *Windom v. State*, 886 So.2d 915, 927 (Fla.2004)). The trial court found "Dr. Keyes' historical cumulative average scoring approach is not persuasive and the persuasive effect of this approach is outweighed by Dr. Pritchard's unrebutted testimony that Mr. Nixon scored 80 on a test validly administered last year." The trial court further found that Dr. Keyes' score could have resulted from Nixon's malingering, that Nixon's historical scores were consistent with Dr.

Prichard's measurement of an IQ of 80, and that Dr. Keyes' approach of rescoring and averaging the current and historical scores was inappropriate and inconsistent with both the plain language of section 921.137 and this Court's precedent. Thus, the trial court determined that Nixon did not meet the first prong of the mental retardation determination. We affirm the trial court's determination that Nixon does not satisfy the criteria for mental retardation.

Burden of Proof

Nixon argues that the trial court erred by requiring him to prove his mental retardation. Nixon opines that the State is required to prove that he is not mentally retarded beyond a reasonable doubt. Contrary to this assertion, we have consistently held that it is the defendant who must establish the three prongs for mental retardation. *See*, *e.g.*, *Cherry*, 959 So.2d at 711; Fla. R.Crim. P. 3.203(e). Moreover, Nixon argues that if he bears the burden of showing his mental retardation, the appropriate standard is preponderance of the evidence. However, section 921.137(4) specifically states:

> 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.

(Emphasis added.) We need not address this claim because the circuit court held that Nixon could not establish his mental retardation under either the clear and convincing evidence standard or the preponderance of the evidence standard. *See Jones*, 966 So.2d at 329-30 (noting that we did not need to address the claim because the trial court found that "Jones did not present evidence sufficient to meet even the lesser standard of preponderance of the evidence") (citing *Trotter*, 932 So.2d at 1049 n. 5).

Nixon also claims that under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), due process requires that a jury find beyond a reasonable doubt any facts that would make a defendant eligible for the death penalty. We have rejected this argument and held that a defendant "has no right under *Ring* and *Atkins* to a jury determination of whether he is mentally retarded." *Arbelaez v. State*, 898 So.2d 25, 43 (Fla.2005); *see also Rodriguez v. State*, 919 So.2d 1252, 1267 (Fla.2005); *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002).

The defendant contends the trial court erroneously rejected his argument that rule 3.203 does not provide a constitutionally adequate procedure for resolving mental retardation claims by persons whose death sentences were final before the Supreme Court decided *Atkins*. More specifically, Nixon argues that

rule 3.203 extends due process and other constitutional guarantees only to those who have not yet been sentenced to death. The claim is meritless. Florida Rule of Criminal Procedure 3.203 adopts the statutory definition of mental retardation and recognizes that *Atkins* applies to any defendant currently on death row. *See* Fla. R.Crim. Pro. 3.203(d); *Brown*, 959 So.2d at 147 n. 1 (citing *Phillips v. State*, 894 So.2d 28, 39-40 (Fla.2004)).

Lastly, Nixon asserts that the trial court erroneously denied him a hearing on his claim that mental illness bars his execution. We rejected this argument in *Lawrence v. State*, 969 So.2d 294 (Fla.2007), and *Connor v. State*, 979 So.2d 852 (Fla.2007). In *Lawrence*, we rejected the defendant's argument that the Equal Protection Clause requires this Court to extend *Atkins* to the mentally ill. *See* 969 So.2d at 300 n. 9. In *Connor*, we noted that "[t]o the extent that Connor is arguing that he cannot be executed because of mental conditions that are not insanity or mental retardation, the issue has been resolved adversely to his position." *Connor*, 979 So.2d at 867 (citing *Diaz v. State*, 945 So.2d 1136, 1151 (Fla.) *cert. denied*, 549 U.S. 1103, 127 S.Ct. 850, 166 L.Ed.2d 679 (2006) (indicating that neither the United States Supreme Court nor this Court has recognized mental illness as a per se bar to execution)). Accordingly, Nixon is not entitled to relief on this claim.

III. CONCLUSION

For the reasons discussed above, we affirm the trial court's denial of Nixon's postconviction motion and the trial court's determination that Nixon is not mentally retarded.

It is so ordered.

QUINCE, C.J., WELLS, PARIENTE, and LEWIS, JJ., and ANSTEAD, Senior Justice, concur.

CANADY and POLSTON, JJ., did not participate.

APPENDIX I

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-953

JOE ELTON NIXON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

(Filed Nov. 14, 2007)

[Portions Omitted In Printing]

[1] **I.**
SUMMARY OF ARGUMENT

This appeal from a determination by the Circuit Court that the defendant in a capital case was not mentally retarded turns primarily on a single question of law: should this Court adhere to its ruling in Cherry v. State, 959 So. 2d 702 (Fla. 2007), that the Florida statutory definition of mental retardation imposes a rigid IQ ceiling of 70?

If indeed Cherry controls, the decision below should be affirmed since Mr. Nixon's own contention was that his true IQ score was 73. But if, as we argue below, the ruling in Cherry cannot be reconciled with the Constitution, then there should be a reversal so that the Circuit Court may conduct further proceedings in which it views the facts through the correct legal lens.

III.
ARGUMENT

POINT I: This Court Should Re-Consider Its Decision In *Cherry*

As indicated, the Court below rejected the evidence of mental retardation proffered by Mr. Nixon, who asserted that his IQ was 73,[1] because this Court held in Cherry that Florida Statute Section 921.137(1) imposes a rigid IQ ceiling of 70.

Unless it agrees with Mr. Nixon that the State has waived this argument,[2] or concludes that Cherry does

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[1] See Nixon Post-Hearing Brief, pp. 24-25, at SR5.1180-81 ("the most accurate single-number estimate . . . [of his IQ score is] 73, which is within the range of scores of individuals classified as mentally retarded.").

[2] Mr. Nixon argued below that the Florida statutory scheme does not contain an absolute IQ cutoff score of 70 in order for a defendant to be found mentally retarded. (Rule 3.203 Brief, pp. 19-21 & n. 16-19, at SR5. 603-5.). The State, which had explicitly agreed with that view in other cases before this Court (Rule 3.203 Brief, n. 19, at SR5. 605.), did not dispute this position. Indeed, at the evidentiary hearing in this case, the State's expert specifically agreed that the Florida statute has no bright-line cutoff score of 70, and that mental retardation could appropriately be diagnosed

not apply to this case,[3] this Court should revisit Cherry [8] since the effect of that ruling is to write a definition of mental retardation that is inconsistent with federal constitutional law.

A. The *Cherry* Definition Violates *Atkins*

Florida Statute Section 921.137(1) defines "significantly subaverage general intellectual functioning" to mean "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services." See FLA. STAT. ANN. § 921.137(1) (2006).[4] In Cherry, this Court interpreted

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in a person with an obtained IQ score as high as 75. (MH Tr. at 187:20-188:12, 215:4-216:7.). Under these circumstances, if the Court does not hold that the State has waived any argument that the Florida statute has an absolute cutoff score of 70, Mr. Nixon contends that the Cherry interpretation of the statute – applied to him without warning after the close of the evidentiary proceedings – so far exceeds a fair reading of it as to constitute a denial of due process under Bouie v. City of Columbia, 378 U.S. 347 (1964).

[3] Florida Statute Section 921.137, which Cherry construed, is not applicable to Mr. Nixon. See FLA. STAT. § 921.137(8) (2006). Fla. R. Cr. Pro. 3.203, under which Mr. Nixon proceeded, uses similar language, but need not be construed the same way – and, in light of the considerations urged herein, should not be.

[4] The staff analysis preceding Florida Statute Section 921.137 states: "The Department of Children and Family Services does not currently have a rule. Instead the department has established criteria favoring the nationally recognized Stanford-Binet and Wechsler Series tests. In practice, two or more standard deviations from these test mean that the person has an IQ of 70 or less, although it can be extended up to 75."

Section 921.137(1) to require a defendant to prove that his IQ score meets a strict cut-off score of 70 or below. See Cherry, 959 So. 2d at 711-14. This Court then held that "Cherry does [9] not meet the first prong of the mental retardation determination [under Section 921.137 because] Cherry's IQ score of 72 does not fall within the statutory range for mental retardation." Id. at 714.

The Cherry Court asserted that its interpretation of the Florida statute was permissible because in Atkins, 536 U.S. 304 (holding that the Eighth Amendment prohibits the execution of a mentally retarded person), the United States Supreme Court "left to the states the task of setting specific rules in their determination statutes." See Cherry, 959 So. 2d at 713 (citing Atkins, 536 U.S. at 317).

However, in Atkins, the Supreme Court defined mental retardation in accord with the consensus in the scientific community. See Atkins, 536 U.S. at 309 n.3 (quoting the definition of the AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) ("AAMR") and the APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000) ("DSM")). And, as found by the Court in Atkins, the consensus in the scientific community recognizes that an "IQ score between 70 and 75 or lower" is "typically considered the cutoff score for the intellectual function prong." Atkins, 536 U.S. at 309 n.5

(quoting 2 B. SADOCK & V. SADOCK, COMPREHENSIVE TEXT BOOK OF PSYCHIATRY 2952 (7th ed. 2000)).[5]

[5] As noted, the State's expert readily agreed with that proposition. When he was read the statement from the current edition of the DSM, "it is possible to diagnose mental retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for mental retardation," he responded, "Correct. I would agree with that, yes." (MH Tr. at 216:15-22.). Indeed, the government relied on this same witness in the Cherry case, in which he testified that mental retardation could not be ruled out based on the obtained IQ score of 72. (MH Tr. at 216:23-217:25; Psychological Evaluation by Dr. Prichard, presented Oct. 23, 2006, Def. Exh. 8, at SR5. Vol. 10.).

[10] Thus, the statement of the Supreme Court of the United States that states are permitted to "develop[] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences," Atkins, 536 U.S. at 317, means, in the context of this prong of the mental retardation definition, no more than that the states are permitted to establish procedures to determine whether a capital defendant's IQ score is 75 or below on a standardized intelligence test.

Accordingly, this Court's requirement in Cherry that a defendant prove that his IQ score meets a strict cut-off score of 70 or below violates the clear dictates of Atkins and is unconstitutional under the Eighth Amendment and Section 17 of Article I of the Florida Constitution.

[75] IV.
Conclusion

The decision below should be reversed and the cause remanded for a hearing comporting with constitutional standards.

Dated: November 13, 2007

APPENDIX J

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA
vs.
JOE ELTON NIXON,
Defendant. /

Case No. 1984CF2324
SPN No. 4
Felony Division "C" - Sjostrom

ORDER

(Filed Apr. 26, 2007)

This matter is before the court on Mr. Nixon's Criminal Procedure Rule 3.203(d)(4) motion to determine whether execution of Mr. Nixon's death sentence is prohibited because of mental retardation. The procedural posture of the matter is: (1) Mr. Nixon is a prisoner under sentence of death; (2) Mr. Nixon's conviction and death sentence were affirmed on direct appeal;[1] and (3) all of Mr. Nixon's other post-conviction motions have been denied in the trial court and those denials were ultimately affirmed on appeal to the Florida Supreme Court.[2]

The Florida Supreme Court most recently considered Mr. Nixon's case in Nixon v. State, 932 So.2d 1009

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[1] Nixon v. State, 572 So.2d 1336, 1338 (Fla. 1990).

[2] Nixon v. Singletary, 758 So.2d 618 (Fla. 2000); Nixon v. State, 857 So.2d 172 (Fla. 2003); Florida v. Nixon, 543 U.S. 175 (2004); Nixon v. State, 932 So.2d 1009 (Fla. 2006).

(Fla. 2006). The Florida Supreme Court in that case denied all of Mr. Nixon's then pending post-conviction motions but declined to address Mr. Nixon's potential remedy under the United States Supreme Court's decision of Atkins v. Virginia and Rule 3.203 of the Florida Rules of Criminal Procedure. The court stated, "The record before this Court does not demonstrate that the defendant is mentally retarded. To the extent that Nixon is eligible to pursue a claim of mental retardation under Florida Rule of Criminal Procedure 3.203, he should do so within sixty days of the release of this opinion." Id. at 1024.

Mr. Nixon filed his 3.203 motion on June 19, 2006, together with a supporting memorandum of law. The State responded in writing on July 11, 2006. Mr. Nixon filed a reply brief on July 18, 2006. This court conducted a case management conference on July 25, 2006 and set a final evidentiary hearing on October 23, 2006. Because of various procedural disputes, this court entered a procedural order on October 17, 2006 establishing that the hearing was governed by Rule 3.203 of the Florida Rules of Criminal Procedure; that the purpose of the hearing was solely to address the issue of mental retardation and not to relitigate the issue of mental illness or competency to stand trial; and that the parties would be permitted to make arguments concerning the appropriate burden of proof during the hearing. This court declined the parties' suggestion to dispense with the evidentiary hearing and rule based on the extant record.

During the evidentiary hearing, the State presented the testimony and report of Dr. Gregory A. Prichard. Mr. Nixon presented the testimony of Dr. Dennis Keyes.

Development of the Mental Retardation Death Penalty Exclusion

Atkins v. Virginia

The United States Supreme Court's decision Atkins v. Virginia, 536 U.S. 304 (2002) established that the Eighth Amendment prohibits the execution of the mentally retarded. Mr. Atkins was convicted of abduction, armed robbery and capital murder. Atkins and his codefendant both testified and both asserted that the other fired the fatal shots. The defense argued in mitigation that Mr. Atkins should not be executed because of mental retardation and offered the testimony of a forensic psychologist to the effect that Mr. Atkins was "mildly mentally retarded" with "a full scale IQ[3] of 59." Id. at 307-309.

The jury rejected Mr. Atkins's mitigation testimony and sentenced him to death. The Virginia Supreme Court reversed the sentence and remanded for resentencing. The defense forensic psychologist again testified that Atkins was retarded. A prosecution expert disputed this testimony, concluding that Atkins was of "average intelligence, at least." The jury again

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[3] Dr. Nelson administered the Wechsler Adult Intelligence Scale III (the "WAIS-III").

rejected the mitigation evidence and Atkins was again sentenced to death. Id. at 309. The Virginia Supreme Court rejected the argument that Atkins's mental retardation excluded him from eligibility for a death sentence and the U.S. Supreme Court granted certiorari to address the issue.

The U.S. Supreme Court concluded that execution of the mentally retarded violated the protections of the United States Constitution. The Court did not explicitly define the constitutional limits of "mental retardation" prohibiting the imposition of the death penalty. However, Florida's statutory definition, discussed below, is at least consistent with various statements in Atkins. See Atkins, at 308 & fn. 3 (discussing the AAMR definition); at 316 (noting that "with regard to the mentally retarded, only five [states] have executed offenders possessing a known IQ less than 70 since [the Court] decided Penry."). The Court concluded that "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." Id. at 317.

Although the Court stated, "we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences," it described characteristics of the mentally retarded that promoted the mental retardation exclusion from eligibility for the death penalty:

> Because of their impairments, however, by definition [the mentally retarded] have diminished

> capacities to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders."

Id. at 318. Impulsivity and suggestibility seem, then, to be recognized by the Court as indicators of constitutionally significant cognitive deficits.

The Court did not conclude whether Mr. Atkins was retarded or otherwise ineligible for a death sentence. It remanded "for further proceedings not inconsistent with this opinion."

Section 921.137 of the Florida Statutes

The Florida Legislature enacted section 921.137 of the Florida Statutes in 2001. By its terms, the statute does not apply to Mr. Nixon's case since Mr. Nixon "was sentenced to death prior to the effective date" of the statute. Fla. Stat. 921.137(8). However, the statute sheds considerable light on subsequent decisions of the Florida Supreme Court responding to Atkins. That statute provides:

> **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 guilty 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.

(Emphasis added).

Florida Rule of Criminal Procedure 3.203

The Florida Supreme Court issued its opinion adopting Rule of Criminal Procedure 3.203, "Defendant's Mental Retardation as a Bar to Imposition of the Death Penalty," on May 20, 2004. In re: Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure 895 So.2d 563 (Fla. 2004). The Florida Supreme Court's opinion makes clear that the purpose of Rule 3.203 is to comply with the mandates of Atkins and section 921.137 in both original

trial and post-conviction proceedings. The rule is divided into three temporal categories of death penalty cases. The third encompasses Mr. Nixon's case – "all trials in which a prisoner had been convicted of first – degree murder and sentenced to death and where the conviction and sentence had been affirmed on direct appeal on or before the effective date of the rule – final cases."

Rule 3.203(b) is entitled "Definition of Mental Retardation." The definition of mental retardation under rule 3.203(b) is the same as the definition in section 921.137(1) of the Florida Statutes.

Justice Pariente issued a separate concurrence "to explain why, from my perspective, this Court has omitted a burden of proof from" Rule 3.203. In summary, Justice Pariente expressed doubts regarding the constitutionality of imposing a burden on the defendant to prove retardation by clear and convincing evidence. Justice Pariente reasoned that the U.S. Supreme Court had already held unconstitutional a state statute imposing on a defendant a burden of proving mental incompetence by clear and convincing evidence. Justice Pariente stated, "Our omission of a burden of proof from the rule we adopt today leaves the trial courts obligated to either apply the clear and convincing evidence standard of section 921.137(4), or find that standard unconstitutional in a particular case."[4]

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[4] Mr. Nixon asserts, essentially, that the absence of mental retardation is an element of the crime of death-eligible murder such that the State bears the burden of proving the absence of

The Florida Supreme Court's Mental Retardation Death Penalty Decisions

Cherry v. State

The Florida Supreme Court's most recent death penalty decision is Cherry v. State, ___ So.2d ___ (Fla. April 12, 2007). Cherry v. State is also by far the most instructive of the Court's opinions for resolving the issues raised here.

Mr. Cherry was convicted of two murders that occurred in 1988 and sentenced to death. His convictions were both affirmed on direct appeal. Cherry v. State, 659 So.2d 1069, 1074 (Fla. 1995). Mr. Cherry's first round of post-conviction litigation was ultimately denied after an evidentiary hearing and the denials were upheld by the Florida Supreme Court. Cherry v. State, 781 So.2d 1040 (Fla. 2000). Cherry filed a new post-conviction motion and was eventually granted another evidentiary hearing. The trial court denied the second post-conviction motion and Cherry appealed. During the pendency of the second post-conviction appeal, Cherry filed a motion alleging that he was excluded from the death penalty because of mental retardation. The Florid Supreme Court relinquished jurisdiction

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mental retardation beyond a reasonable doubt. This argument is irreconcilable with controlling authority. Trotter v. State, n.5 (May 25, 2006) ("To establish mental retardation, a defendant must demonstrate all three of the" retardation criteria); Foster v. State, (March 23, 2006); Rodgers v. State, (Fla. Oct. 26, 2006) ("defendant has no right . . . to a jury determination of whether he is mentally retarded."). This court is, of course, bound to submit to the authority of the Florida Supreme Court.

and the trial court conducted an evidentiary hearing to address the retardation allegation.

The trial court appointed defense and prosecution experts to assess Mr. Cherry's mental capacity. The defense expert administered the Wechsler Adult Intelligence Scale, Third Edition ("WAIS-III") and assigned a full scale IQ of 72. Given this finding, the prosecution expert declined to test Mr. Cherry since the prosecution concluded that the plain language of the statute established 70 as the score required to support a finding of mental retardation.

Particularly relevant to Mr. Nixon's arguments, Mr. Cherry argued that the score of 72 did not refute his claim of mental retardation. Mr. Cherry asserted that the standard error of measure meant that a score of 72 only established Mr. Cherry's intelligence somewhere within a band from 67 to 77. In essence, Mr. Cherry argued that because of the standard error of measure inherent in intelligence testing, 75 is the lowest score that permits imposition of the death penalty in Florida under the statutory and rule standard.

The trial court rejected Mr. Cherry's argument:

> The Legislature had mental retardation definitions from various states before it, some of which unequivocally provided that certain IQ scores created a mere presumption either for or against mental retardation; language the Legislature did not include in the Florida law. Neither did they set the cutoff at 75. This Court declines to perform a blanket change of the clearly stated IQ criteria,

> however, 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."

Cherry 2007 at 21.

The Florida Supreme Court affirmed. "Because the circuit court applied the plain meaning of the statute, it did not err in its conclusion that Cherry failed to meet this prong" of the statutory mental retardation standard. Concisely, "The Legislature set the IQ cutoff score at two standard deviations from the mean, and this Court has enforced this cutoff . . . " Id. at 22. The Florida Supreme Court squarely held, "Cherry's IQ score of 72 does not fall within the statutory range for mental retardation, and thus the circuit court's determination that Cherry is not mentally retarded should be affirmed." Id. at 23.

Trotter v. State

The Florida Supreme Court addressed defendant Trotter's allegation that he was ineligible for execution because of mental retardation in Trotter v. State, 932 So.2d 1045 (Fla. 2006). Mr. Trotter was convicted of a murder that occurred in 1986 and sentenced to death. Trotter's murder conviction was affirmed on appeal, but the Florida Supreme Court vacated the death sentence and remanded for resentencing.[5] Trotter was

[5] Trotter v. State, 576 So.2d 691, 692 (Fla. 1990).

again sentenced to death and the Florida Supreme Court affirmed.[6] Trotter filed a motion for post-conviction relief contending that he was ineligible for the death penalty because of mental retardation.

The Florida Supreme Court applied the mental retardation standard found in Rule 3.203(b) and upheld the trial court's conclusion that the evidence did not support Trotter's claim. The court observed that none of the six experts who testified or reported concerning Trotter's IQ found an IQ score below 72. The one expert who testified that Trotter was retarded could not point to any IQ test consistent with that opinion.

Rodgers v. State

The Florida Supreme Court addressed defendant Trotter's allegation that he was ineligible for execution because of mental retardation in Rodgers v. State, 948 So.2d 655 (Fla. 2006). Mr. Rodgers was convicted of a murder that occurred in 1991. The trial court issued a single sentencing order that addressed the issue of mental retardation death eligibility and imposed sentence. Thus, Rodgers raised the issue of mental retardation on direct appeal.

Rodgers asserted that the trial court should have excluded old IQ scores from Rodgers's Department of Corrections records during the penalty phase proceeding. The trial court concluded that the objection went to the weight not admissibility of the records.

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[6] Trotter v. State, 690 So.2d 1234 (Fla. 1996).

Specifically, Rodgers argued against admission of the records because of, "the absence of information about actual testing conditions. He also argued that one of the scores resulted from a 'beta' test, a test Rodgers admits has been used for decades, but which he claims is used for 'screening,' not ascertaining an individual's IQ for mental retardation purposes." The Florida Supreme Court held that the trial court did not err by admitting evidence of the old IQ scores.

The trial court concluded that the evidence did not support Rogers's assertion of mental retardation. The trial court considered the testimony or reports of three experts as to Rodgers's IQ. Only one measured Rodgers's IQ below 70 – at 69. Two measured Rodgers's IQ at 74 and 75. The trial court concluded that Rodgers was mildly mentally retarded as measured by his intelligence scores, but failed to satisfy the adaptive functioning and onset before age 18 criteria. The Supreme Court affirmed the trial court's conclusion that Rodgers was eligible for the death penalty.

Burns v. State

The Florida Supreme Court addressed defendant Burns's allegation that he was ineligible for execution because of mental retardation in Burns v. State, 944 So.2d 31 (Fla. 2006). Mr. Burns was convicted of a murder that occurred in 1987 and sentenced to death. On direct appeal the Florida Supreme Court affirmed Burns's conviction but vacated the death sentence and remanded for resentencing. Burns v. State, 609So.2d

600 (Fla. 1992). Burns was again sentenced to death and the Florida Supreme Court then affirmed the sentence. Burns v. State, 699 So.2d 646 (Fla. 1997). Burns filed a postconviction motion alleging ineffective assistance. During the pendency of Burns appeal from the trial court's denial of his postconviction motion, the United States Supreme Court released its opinion in Atkins and Burns raised the issue in supplemental filings. The Florida Supreme Court remanded for an evidentiary hearing on the mental retardation issue. The trial court took evidence including expert testimony and concluded that Burns was not retarded and so was eligible to be executed.

The trial court heard the testimony of a defense expert who scored Burns at 69 on the Wechsler Adult Intelligence Scale, Third Edition (WAIS III). The prosecution's expert scored Burns at 74 on the WAIS III although he scored below 70 on two subtests. The prosecution expert concluded that the low subtest scores indicated that Burns had a significant cognitive or neuropsychological deficit but was not mentally retarded within the Rule's standard. The prosecution expert also noted that, among other adaptive characteristics, Burns adapted reasonably to the institutional setting. The Florida Supreme Court affirmed. The Court stated, "even if we concluded that Burns demonstrated that his intellectual functioning was significantly subaverage, he still must meet the other two prongs of the mental retardation standard in rule 3.203."

Foster v. State

The Florida Supreme Court addressed defendant Foster's allegation that he was ineligible for execution because of mental retardation in Foster v. State, 929 So.2d 524 (March 23, 2006). Mr. Foster was convicted of a murder that occurred in 1993 and sentenced to death. On direct appeal the Florida Supreme Court affirmed Burns's conviction and death sentence. Foster v. State, 679 So.2d 747 (Fla. 1996). Foster filed a postconviction motion and the trial court conducted an evidentiary hearing. Following the evidentiary hearing, the United States Supreme Court issued its opinion in Atkins. The trial court considered testimony that Foster's IQ was 75, that the defendant "was supporting himself and functioning on his own, albeit, by illegal drug sales," that he communicated adequately, that Foster was not placed in special education classes, and that his teachers did not identify him as mentally retarded. The trial court rejected Mr. Foster's assertion of mental retardation and concluded that he was eligible for the death penalty. The Florida Supreme Court affirmed.

Arbelaez v. State

The Florida Supreme Court addressed defendant Arbelaez's allegation that he was ineligible for execution because of mental retardation in Arbelaez v. State, 898 So.2d 25 (Fla. 2005). Mr. Arblaez was convicted of a murder that occurred in 1988 and sentenced to death. On direct appeal the Florida Supreme Court affirmed Arbelaez's conviction and death sentence.

Arbelaez v. State, 626 So.2d 169 (Fla. 1993). Arbelaez raised the Atkins mental retardation issue in a supplemental postconviction 3.850 motion. Although an expert testified that Arbelaez's had a full scale IQ of 67, the expert's testimony was contradicted by all other experts and did not consider age of onset or adaptive functioning. The court rejected Arbelaez's assertion that Atkins required a jury to determine the absence of mental retardation beyond a reasonable doubt to establish death eligibility. The Florida Supreme Court ultimately did not resolve Arbelaez's mental retardation claim under Atkins.

The Defendant's Burden of Proof

For the reasons discussed below, I conclude that Mr. Nixon can carry neither a burden of proof by a preponderance of the evidence or by clear and convincing evidence as to mental retardation. Therefore it is unnecessary to resolve the constitutional issue described by Justice Pariente in her concurrence to the Florida Supreme Court's opinion adopting Rule 3.203.

Testimony and Evidence Regarding Mr. Nixon's Intellectual Capacity

The State's expert psychologist, Dr. Gregory Prichard, prepared a written report addressing Mr. Nixon' cognitive abilities. Dr. Prichard examined Mr. Nixon on Death Row at Union Correctional on September 15, 2006. Dr. Prichard administered standard intelligence testing as well as the "Test of Memory Malingering" to

consider whether Mr. Nixon was putting forth full effort. In summary, Dr. Prichard assessed Mr. Nixon's intelligence score on the Wechsler Adult Intelligence Scale – Third Edition ("WAIS III") at a full scale score of 80.

For purposes of the standards established in 921.137 of the Florida Statutes and Rule 3.203, Dr. Prichard's report stated:

> The diagnosis of mental retardation requires three criteria. The first criterion is significantly sub-average intellectual functioning, which is defined as two standard deviations below the mean on accepted IQ measures. In practical language, this equates to a score of less than approximately 70 or two standard deviations (one standard deviation is 15 points) below the mean score of 100. The second criterion is concurrent deficits in adaptive skills and the third criterion is onset prior to the age of 18. It is notable that the absence of any one of these three criteria precludes a diagnosis of mental retardation in a legitimate way.
>
> Hence, the present IQ testing result alone contraindicates a legitimate diagnosis of mental retardation with Mr. Joe Nixon. His Verbal score of 81, Performance score of 83, and Full Scale IQ score of 80 on the most widely accepted measure of adult intelligence (the WAIS – III) refutes any possible argument for the presence of retardation in this man. Testing conducted prior to the age of 18 does not support the presence of mental retardation either. Given these facts, there was simply no reason to address the adaptive behavior issue (the second criterion of retardation) as part of this

> assessment. As mentioned above, the absence of any one of the three criteria necessary for a legitimate diagnosis of mental retardation precludes its existence. Hence, the obtained IQ score during this evaluation is enough to answer the referral question without hesitation.

Transcript of Evidentiary Hearing at 88.

In summary, then, Dr. Prichard concluded that because present testing established an intelligence score well above the statutory and rule threshold, it was unnecessary to consider the two additional criterion the defendant must establish to sustain a finding of death penalty exclusion because of mental retardation.

Mr. Nixon presented the testimony of Dr. Dennis Keyes, an expert psychologist. Dr. Keyes is the only expert ever to test Mr. Nixon's intelligence below the threshold established by the statute and rule. Dr. Keyes administered the Stanford Binet, Fourth Edition to Mr. Nixon in 1993 and did not retest him for the present motion. Dr. Keyes scored Mr. Nixon at 68.[7]

Dr. Keyes disputes neither the validity of Dr. Pritchard's administration of the WAIS – III or Dr. Prichard's scoring of Mr. Nixon's test at a full scale IQ of 80. In the absence of some basis to conclude that Mr.

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[7] Dr. Keyes's 68 is equivocal. Dr. Keyes opined that based on the entire history of Mr. Nixon's testing, Dr. Keyes estimated Nixon's full scale IQ to be "72, 73." Transcript of Evidentiary Hearing at 128. Dr. Keyes originally scored Mr. Nixon at 65 but adjusted the score to 68 in recognition that the Stanford Binet uses a different scale than the WAIS III. Transcript of Evidentiary Hearing at 82-83.

Nixon's 2006 score of 80 was materially invalid, Dr. Prichard's testimony is dispositive, although I will address Dr. Keyes's testimony that Mr. Nixon should be ineligible for the death penalty nonetheless.

Dr. Keyes's testimony takes two main thrusts. First, Dr. Keyes combines the Rule and statutory mental retardation standards with his own implicit and explicit definition of "mental retardation" and concludes that Mr. Nixon meets Dr. Keyes's definition of mental retardation. More specifically, Dr. Keyes's opinion is, essentially, that Mr. Nixon's adaptive behavior and upbringing were so disastrous that Mr. Nixon must be considered mentally retarded, regardless of his measured intellectual functioning. Transcript of Hearing at 28-29, 130-131. This is simply not the law. The law is that the evidence must demonstrate significant impairment in both spheres (IQ and adaptive function) "concurrently" to support a mental retardation death penalty exclusion. Additionally, as Dr. Keyes acknowledged, no standard test scoring methodology supports subtracting points from a validly administered intelligence test to reflect poor adapative functioning. Transcript of Evidentiary Hearing at 130.

Dr. Keyes's second approach is to rely on the statistical and practical uncertainty associated with intelligence testing[8] to rescore both Dr. Pritchard's testing

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[8] This uncertainty takes two acknowledged forms, the "Standard Error of Measure," and the norming inflation effect. "Norming inflation effect" is my own term for what Dr. Keyes calls the "Flynn Effect," named for the researcher who first described it. Modern intelligence tests are "normed" by measuring the responses of

and historical testing of Mr. Nixon. Dr. Keyes then averaged these lowered scores with his own 1993 testing and calculated a reduced average score that is still above the mental retardation threshold. See, e.g., Transcript of Evidentiary Hearing at 98-100, 127-130. Finally, Dr. Keyes then subtracts the standard error of measure from the average to conclude that Mr. Nixon is mentally retarded. Essentially, Dr. Keyes's testimony is that the standard error of measure means that 75 is the lower limit of eligibility for the death penalty – the same testimony rejected by the Florida Supreme Court in Cherry.

I conclude that Dr. Keyes's testimony is plainly outweighed by Dr. Pritchard's testimony. Dr. Keyes's historical cumulative average scoring approach is not persuasive and the persuasive effect of this approach is outweighed by Dr. Pritchard's unrebutted testimony that Mr. Nixon scored 80 on a test validly administered last year.

First, Dr. Prichard hypothesized that Dr. Keyes's score could have been the result of malingering by Mr. Nixon. Dr. Prichard administered a test specifically

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a more or less representative population at a point in time. Over time, successive generations of test takers seem to consistently improve on aging normed tests. Although the cause of this inflation is not entirely clear, Dr. Keyes testified that there is enough data to predict from this norming inflation effect that 1/3 of a point should be subtracted from a test score for every year after the test was normed. See Transcript of Evidentiary Hearinig at 67 and Dr. Keyes Affidavit at Tab K (Flynn, James R., Tethering the Elephant: Capital Cases, IQ and the Flynn Effect, Psychology, Public Policy and the Law, Vol. 12, No. 2 (2006)).

designed to ensure against malingering for his present testing. That test revealed that Mr. Nixon was in fact giving a valid effort and was not malingering on Dr. Pritchard's present test. Dr. Keyes testified that no valid test of malingering was available at the time that he tested Mr. Nixon in 1993 and he did not administer any test to address the possibility of malingering.

Second, Dr. Prichard's measurement of an IQ score of 80 is consistent with Mr. Nixon's historical scores. In 1974, Nixon scored a full scale 88 on the Wechsler Intelligence Scale for Children. Transcript of Evidentiary Hearing at 65. In 1980 or 1981, Mr. Nixon was scored 88 on a "Revised Beta" screening test. Transcript of Evidentiary Hearing at 146-147, 158-59. In 1985, (after Mr. Nixon was arrested for the instant murder) Nixon scored a full scale 73 on the Wechsler Adult Intelligence Scale – Revised Edition. Transcript of Evidentiary Hearing at 79. In 1993, Nixon scored a full scale 72 on the WAIS-R. Transcript of Evidentiary Hearing at 87.

Dr. Keyes scored Nixon at 68 on the Stanford Binet, Fourth Edition administered to Mr. Nixon in 1993 – the only IQ test ever administered to Mr. Nixon that yielded a score below 70. Transcript of Evidentiary Hearing at 130. Dr. Keyes criticizes some of the older scores in various ways,[9] but he did not testify to any

[9] Dr. Keyes especially criticizes the WISC administered in 1974 and were it the only score, some of his opinions would be cause for concern. The WISC was 49 years old when it was administered to Mr. Nixon. However, the subsequent tests consistently place Mr. Nixon above the statutory threshold. Dr. Keyes's

criticism of Dr. Prichard's administration of the test last year or Dr. Prichard's interpretation of the results. Given a current, valid IQ score of 80, Dr. Keyes's criticism of the historic tests is unpersuasive.

Dr. Keyes's rescoring and averaging of the current and historical scores is inappropriate and inconsistent with both the plain language of the statute and the Florida Supreme Court's authority.[10] Additionally, as an evidentiary matter, I conclude that Dr. Keyes's approach is unpersuasive. First, Dr. Keyes asserts that the scores should each be reduced by the "standard error of measure." The standard error is a statistical expression of the necessary imprecision of intelligence testing. The assigned score is the best estimate based on the professional skill of the examiner within a 95% degree of confidence. Simply subtracting the standard error from the IQ score ignores a precisely equal standard error above the assigned score. Transcript of Evidentiary Hearing at 118. It is no more valid to subtract the standard error than it is to add it to the IQ score. If the standard error is subtracted from the full scale score, all that is accomplished is to reduce the probability that the score is accurate. Transcript of Evidentiary Hearing at 185-186.

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criticizes the 1974 WISC only to the extent that the criticism operates to reduce Mr. Nixon's score. Transcript of Evidentiary Hearing at 110-115, 179-180.

[10] As Dr. Keyes acknowledged, and consistent with Cherry 2007, the statute establishes a mental retardation of 70, not 70 plus or minus. Transcript of Evidentiary Hearing at 119.

Put another way, Dr. Keyes's proposal to subtract the standard error of measure from the achieved score misapprehends the burden of proof. While the standard error demonstrates the obvious – that there is uncertainty inherent in every score – it establishes the achieved score within a high degree of confidence. Subtracting the standard error of measure would allow the defendant to carry his burden of proof even though there is very little possibility and essentially no probability that his score falls within the range of death penalty exclusion. Dr. Keyes's testimony in effect attempts to raise only a doubt as to Mr. Nixon's score. Raising a doubt is irrelevant to the legal issue presented.

Averaging the historical scores is likewise unpersuasive. Dr. Prichard's present score of 80 is irreconcilable with Dr. Keys's score of 68. To include the two scores in an average is simply to assign a score to Mr. Nixon that is unsupported by any testing. The twelve point disparity in the two scores alone represents a substantial portion of the two standard deviations that is the difference between an *average* IQ and a mentally retarded IQ – a range greater even than the standard error of measure. Averaging the scores provides no meaningful information. Transcript of Evidentiary Hearing at 189-190, 220-223.

Dr. Keyes in essence asserts that intelligence testing itself is wildly inaccurate. According to Dr. Keyes, the norming inflation effect, standard error of measure and general uncertainty of intelligence testing mean that Dr. Prichard's actual obtained results

could support an actual intellectual capacity anywhere from 82 to 62 . Transcript of Evidentiary Hearing at 96.

Dr. Keyes's testified:

> It is not uncommon to have a wide array of – when you're taking a distribution, any kind of distribution, even testing, a large differences is not necessarily normal, but it's not completely unusual. It happens.
>
> Anytime you're looking at something as changeable as – difficult to measure as intelligence, you're going to have good days and bad days. You're going to have people who make errors in testing. You're going to have people who give points to things they should give points to or don't give points to things they shouldn't give points to. And as I said before, every test has an inherent amount of error, so you have to consider what all of the possible options are.

Transcript of Evidentiary Hearing at 96.

The Legislature established intelligence testing as a basis to establish the floor of moral culpability of death eligible defendants. It is of no evidentiary value at all to disagree with the standard the Legislature established.

It is unnecessary to resolve whether the appropriate response to the norming inflation effect is to simply reduce the scores by 1/3 of a point for each year between a given test's norming and its application. None of the test's scoring manuals direct a 1/3 point reduction

for each year that passes after the test was normed. Transcript of Evidentiary Hearing at 182-183. Moreover, even subtracting for the norming inflation effect and an additional five points for the Standard Error of Measure would not reduce the score Mr. Nixon achieved on the test administered by Dr. Prichard last year below the statutory standard. Reducing even the 35 year old WISC[11] by 1/3 of a point per year from the date of norming to date of administration and subtracting an additional 5 points for the standard error of measure would still result only in a score of 75. Transcript of Evidentiary Hearing at 185-186.

Dr. Keyes's testimony regarding the proposed treatment of Dr. Prichard's scoring of Mr. Nixon and the other historical scores is essentially an argument for the law to be something other than what it is. Dr. Keyes's testimony that Mr. Nixon scored 68 on the Standford Binet in 1993 is some evidence of mental retardation. However, that evidence is far less convincing than Dr. Prichard's present score and the other historical scores Mr. Nixon achieved all above the statutory threshold. The evidence is insufficient to carry Mr. Nixon's burden of proving even by a preponderance of the evidence that Mr. Nixon is entitled to be excluded from the death penalty.

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[11] The WISC was normed in 1949 and administered to Mr. Nixon in 1974. Transcript of Evidentiary Hearing at 60.

The Record Refutes Any Inference of Impulsivity or Suggestibility

As discussed above, the United States Supreme Court stated that impulsivity and suggestibility are hallmarks of the diminished culpability that renders execution of the mentally retarded cruel and unusual in violation of the Eighth Amendment. As the Court there stated, the mentally retarded "often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." Atkins v. Virginia, 536 U.S. 304, 318 (2002). The record in Mr. Nixon's case refutes any inference that impulsivity or suggestibility contributed in any way to Mr. Nixon's crime.

In summary, Mr. Nixon committed a torture murder. As stated in the Final Judgment:

> The Defendant abducted his victim in the parking lot of the Governor's Square Mall, stuffed her into the trunk of her small MG convertible sports car and drove her to an isolated area of Leon County. There he tied her to a tree and suspended one arm to another tree, using battery jumper cables for binding. He then robbed her, beat her, choked her, removed her undergarments to 'scare' her and put a sack over her head. The Defendant started a fire nearby and burned some of her belongings while Jeanne Bickner pled and begged for mercy. Defendant then took a part of the convertible top cover burning in the fire and used it to ignite his victim. Photographs of the grisly scene corroborate that most of the body was thus burned. Jeanne Bickner endured torturous knowledge of her

> impending death and experienced excruciating pain while Joe Elton Nixon Cooked her alive.[12]

Final Judgment at 4 (July 30, 1985).

The court concluded in the final judgment that Mr. Nixon's crimes were not impulsive. "The evidence presented by the prosecution depicts a deliberate, thoroughly conceived scenario of execution by the Defendant. He abducted his victim, took her to a remote area, tied her up, built a fire, took time to rob and terrorize her, talked with her, ignored her pleas for mercy and methodically incinerated her." Final Judgment at 4. The crime "took place over a span of hours and culminated in her death." Id. at 4-5. The Final Judgment specifically concluded, "There was no evidence that the Defendant's commission of the murder was upon reflection of short duration or the result of sudden impulse." Id. at 5.

Likewise, there is no evidence that this crime was the suggestion of anyone other than Mr. Nixon. "There is no evidence that the Defendant was an accomplice in the murder committed by someone else or that his participation was relatively minor." Final Judgment at 6. Likewise, "There is no evidence that the Defendant acted . . . under the substantial domination of another person." Id. Mr. Nixon was well aware

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[12] Mr. Nixon stated in his confession that he choked Ms. Bickner to death before setting her on fire. Transcript of Confession at 20-21. On its review of the record, the United States Supreme Court concluded that the record supported that Ms. Bickner was still alive when set on fire and her death was caused by fire. Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551 (2004).

of the criminality of his own conduct. "He told his brother, girlfriend and uncle what he had done and that he was in trouble. The Defendant even told his girlfriend that he would go to the electric chair for murder." Id.

Mr. Nixon's lengthy confession, given very soon after the crimes, indicates a complete absence of impulsivity and suggestibility. Mr. Nixon was not talked into this crime. Indeed, he perpetrated the abduction by talking Ms. Bickner into accompanying him through a series of deceits.[13] As Ms. Bickner drove the car ostensibly to take Mr. Nixon home, Mr. Nixon grabbed the steering wheel and hit Ms. Bickner in the head. She "hollered," "don't kill me" and started bleeding "all over her face," according to Mr. Nixon. Mr. Nixon then pulled the car over to the side of the road and forced Ms. Bickner into the trunk. Mr. Nixon stated that Ms. Bickner remained conscious and continued talking to Mr. Nixon. At this point she begged him not to kill her and offered Mr. Nixon money in exchange for her life. Mr. Nixon stated that Ms. Bickner told Mr. Nixon that if he would take her to a phone booth, Ms. Bickner would call someone to bring money.[14]

After forcing Ms. Bickner into the trunk, Mr. Nixon drove her to a secluded, wooded area. Mr. Nixon was unmoved by Ms. Bickner's pleas for mercy because, he

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[13] Mr. Nixon stated that he was acquainted with Ms. Bickner prior to the abduction. Transcript of Confession at 7. A copy of the confession transcript is attached. Mr. Nixon stated that he convinced Ms. Bickner to give him a ride home. Id. at 9-11.

[14] Transcript of Confession at 12-13.

stated, he "gave three years to society for nothing I didn't do."[15] As Mr. Nixon tied her to a tree with jumper cables, Ms. Bickner continued to ask him why he was doing it and calling his name.[16] After Mr. Nixon set fire to Ms. Bickner's belongings and the car cover, he "sat there and talked to her." She continued to try to convince him to do no further harm to her, offered him her car and begged him for her life.[17] The last thing Mr. Nixon remembered Ms. Bickner say was, "you're hurting me."[18] Mr. Nixon killed her because, "she know me," "she know my name. . . ."[19]

After the murder, Mr. Nixon burned the car attempting to destroy evidence. Mr. Nixon was worried that his handprints would be found on the car.[20] Mr. Nixon decided to burn the car when he read in the newspaper that Ms. Bickner's burned body had been found.[21] He also threw Ms. Bickner's car keys in a trash can for the same purpose.[22] When Mr. Nixon burned Ms. Bickner's car, Mr. Nixon also burned the clothes he wore during the murder because they were bloody.[23]

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[15] Transcript of Confession at 14.

[16] Transcript of Confession at 18.

[17] Transcript of Confession at 21.

[18] Transcript of Confession at 23-24.

[19] Transcript of Confession at 46.

[20] Transcript of Confession at 29.

[21] Transcript of Confession at 35.

[22] Transcript of Confession at 33.

[23] Transcript of Confession at 40-41.

The appellate decisions addressing the record in this case similarly concluded that Mr. Nixon's murder was not the product of impulsivity or suggestibility. On direct appeal, the Florida Supreme Court summarized Mr. Nixon's taped confession, noting that Mr. Nixon described: meeting "Ms. Bickner at the mall and asked her to take him to his uncle's house because he was having car trouble;" the forcible abduction; that "the two talked about their lives;" and finally that "Ms. Bickner offered to give Nixon money, to sign her car over to him, begging him not to kill her." Nixon v. State, 572 So.2d 1336, 1338 (Fla. 1990). The Florida Supreme Court affirmed the conviction and imposition of the death penalty.

The United States Supreme Court's opinion is likewise replete with conclusions refuting any suggestion that Mr. Nixon's conducted indicated suggestibility or impulsivity. Florida v. Nixon, 543 U.S. 175 (2004). The Court noted Mr. Nixon's confession including that Mr. Nixon resisted Ms. Bickner's pleas for mercy and offers of compensation. The Court likewise noted that Mr. Nixon confessed that he determined to kill Ms. Bickner to avoid prosecution for the abduction. Finally, the Court concluded that, "The State gathered overwhelming evidence establishing that Nixon had committed the murder in the manner he described." Id. at 179-80.

Mr. Nixon's crime suggests neither impulsivity nor suggestibility consistent with diminished moral culpability. As Mr. Nixon stated, he was not persuaded by her pleas for mercy nor her offers of payment of money

in exchange for her life. Mr. Nixon was unswayed by Ms. Bickner's agony. He resisted her suggestions because he determined that he had to kill her to try to avoid getting caught for the robbery and abduction. Additionally, he methodically destroyed evidence in the case in an effort to avoid responsibility for these crimes.

There is no evidence other than that Mr. Nixon planned and committed this murder by himself. No other person suggested the murder or encouraged him to commit it in any way. Likewise, the murder took far too long to be consistent with any inference that Mr. Nixon acted on impulse. In addition to the length of time that Mr. Nixon beat and tortured Ms. Bickner, Mr. Nixon was presented with multiple opportunities to restrain himself. Mr. Nixon admitted that Ms. Bickner suggested multiple alternatives to murder and indeed begged for her life. Yet Mr. Nixon could not be persuaded.

The record in Mr. Nixon's case overwhelmingly refutes any suggestion of diminished culpability as envisioned by the Supreme Court in Atkinson.

For all of these reasons, the court concludes that Mr. Nixon failed to establish by a preponderance of the evidence that he should be excluded from eligibility for the death penalty by reason of mental retardation.

Defendant's Motion to Declare Section 921.137 Unconstitutional is Denied

On April 18, 2007 Mr. Nixon filed a motion to declare section 921.137 of the Florida Statutes unconstitutional. The motion apparently recognizes that the principles set out in Cherry v. State are dispositive of the issues raised in Mr. Nixon's mental retardation motion. This court is without authority to reconsider the precedents of the Florida Supreme Court. Therefore, the motion to declare section 921.137 of the Florida Statutes unconstitutional is likewise hereby denied.

Defendant must file notice of appeal within 30 days of the date of this order to preserve appellate rights.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida this 26th day of April, 2007.

/s/ Jonathan Sjostrom
JONATHAN SJOSTROM
CIRCUIT JUDGE

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APPENDIX K

----------	x	**IN THE CIRCUIT**
STATE OF FLORIDA,	:	**COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA**
v.	:	
JOE ELTON NIXON,	:	**CRIMINAL DIVISION**
Defendant.	:	**CASE NO.: 1984CF2324**
----------	x	**SPN 4**

DEFENDANT JOE ELTON NIXON'S MOTION TO DECLARE FLORIDA STATUTE SECTION 921.137 UNCONSTITUTIONAL

(Filed Apr. 24, 2007)

[Portions Omitted In Printing]

COMES NOW the Defendant, **JOE ELTON NIXON**, by and through his undersigned counsel, and respectfully requests that this Court enter an Order that Florida Statute § 921.137, as interpreted by the Florida Supreme Court in Cherry v. State of Florida, ___ So.2d ___, 2007 WL 1074931, at *7-10 (Fla., April 12, 2007), violates the Constitution of the United States and the corresponding provisions of the Florida Constitution.

I.

AS CONSTRUED BY THE FLORIDA SUPREME COURT, FLORIDA STATUTE SECTION 921.137 VIOLATES *ATKINS*

Florida Statute Section 921.137(1) defines the term "significantly subaverage general intellectual functioning" to mean "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services." See FLA. STAT. ANN. § 921.137(1) (West 2001).[1] In Cherry v. State of Florida, the Florida Supreme Court interpreted Section 921.137(1) to require a defendant to prove that his IQ score meets a strict cut-off score of 70

[1] The staff analysis preceding Florida Statute Section 921.137 states: "The Department of Children and Family Services does not currently have a rule. Instead the department has established criteria favoring the nationally recognized Stanford-Binet and Wechsler Series tests. In practice, two or more standard deviations from these test mean that the person has an IQ of 70 or less, although it can be extended up to 75."

or below. See Cherry v. State of Florida, ___ So.2d ___, 2007 WL 1074931, at *7-10 (Fla., April 12, 2007).[2] The Court then held that "Cherry does not meet the first prong of the mental retardation determination [under Florida Statute § 921.137 because] Cherry's IQ score of 72 does not fall within the statutory range for metal retardation." Id. at *10.[3]

The Florida Supreme Court asserted that its interpretation of the Florida statute was permissible because in Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the Eighth Amendment prohibits the execution of

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[2] Mr. Nixon has previously argued in this case that the Florida statutory scheme does not contain an absolute IQ cutoff score of 70 in order for a defendant to be found mentally retarded. See Mr. Nixon's Brief In Support Of Motion Under Fla. R. Crim. P. 3.203 and 3.851, dated June 16, 2006, pp. 19-21 & n.16-19. For its part, the State of Florida also recognized in prior briefing that an IQ score above 70 can establish sub-average intellectual functioning. See id. p. 21 n.19. Indeed, at the evidentiary hearing in this case, the State's expert specifically agreed that the Florida statute has no bright-line cutoff score of 70, but instead contains a comparative definition: a score of two standard deviations below the mean. See October 23, 2006 Motion Hearing Transcript at 187:20-188:12, 215:4-216:7. Under these circumstances, if the Court does not hold that the State has waived any argument that the Florida statute has an absolute cutoff score of 70 it should rule that the Cherry interpretation of the statute so far exceeds a fair reading of it as to constitute a denial of due process under Bouie v. City of Columbia, 378 U.S. 347 (1964).

[3] In this case, Mr. Nixon asserts that "the most accurate single-number estimate . . . [of his IQ score is] 73, which is within the range of scores of individuals classified as mentally retarded." See Mr. Nixon's Post-Hearing Brief In Support Of His Motion Under Fla. R. Crim. P. 3.203 and 3.851, dated January 5, 2007, pp. at 24-25.

a mentally retarded person) the Supreme Court of the United States "left to the states the task of setting specific rules in their determination statutes." See Cherry, ___ So.2d ___, 2007 WL 1074931, at *9 (citing Atkins, 536 U.S. at 317).

However, in Atkins the Supreme Court of the United States defined mental retardation in accord with the consensus in the scientific community. See Atkins, 536 U.S. at 309, n.3 (quoting the definition of the AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) and the definition of the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000)). And, as found by the Court in Atkins, the consensus in the scientific community recognizes that an "IQ score between 70 and 75 or lower" is "typically considered the cutoff score for the intellectual function prong." See Atkins, 536 U.S. at 309, n.5 (quoting 2 B. SADOCK & V. SADOCK, COMPREHENSIVE TEXT BOOK OF PSYCHIATRY 2952 (7th ed. 2000)). Thus, the statement of the Supreme Court of the United States that states are permitted to "develop[] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences" (Atkins, 536 U.S. at 317), means in this context no more than that the states are permitted to establish procedures to determine whether a capital defendant's IQ score is 75 or below on a standardized intelligence test.

Accordingly, the Florida Supreme Court's requirement in Cherry that a defendant prove that his IQ score meets a strict cut-off score of 70 or below violates

the clear dictates of Atkins and is unconstitutional under the Eighth Amendment its Florida constitutional analogue.

CONCLUSION

For all of the foregoing reasons, Mr. Nixon requests that this Court enter an Order that Florida Statute Section 921.137, as interpreted by the Florida Supreme Court in Cherry v. State of Florida, ___ So.2d ___, 2007 WL 1074931, at *7-10 (Fla., April 12, 2007), violates the Constitution of the United States and the corresponding provisions of the Florida Constitution.

Dated: April 18, 2007

Respectfully submitted,

_____

APPENDIX L

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

CASE NO.: 1984CF2324

STATE OF FLORIDA

vs.

JOE E. NIXON,

Defendant. /

PROCEEDINGS:	MOTION HEARING
BEFORE:	THE HONORABLE JONATHAN SJOSTROM
DATE:	October 23, 2006
TIME:	Commencing at 9:00 a.m. Concluding at 4:30 p.m.
LOCATION:	Leon County Courthouse Tallahassee, Florida

[Portions Omitted In Printing]

[4] PROCEEDINGS

THE COURT: All right. We are here in the case of State of Florida versus Joe Elton Nixon, 1984-2324. Mr. Nixon is present. We are here for an evidentiary hearing.

I entered an order last week. The purpose of the hearing today is to resolve the issues raised pursuant to criminal Procedure Rule 3.203. And I entered a procedural order establishing the burden of proof with Mr. Nixon, I believe, and various other issues for argument related to the specific burden of proof and establishing the limited purpose of the hearing. I'll take appearances for Mr. Nixon.

MR. FREEDMAN: Good morning, Your Honor. Eric Freedman for Mr. Nixon, with my co-counsel Eric O'Connor and Karen Bhatia.

MS. BHATIA: Addressing the order of October 17th regarding the burden of proof issues, specifically, one that we want to address, whether the burden of proof is established by statute or common law constitutional standards. Our position that the Court has rejected relies on Ring whereby we state that the State has to prove beyond a reasonable doubt whether there is absence of mental retardation in order to make a defendant eligible for the death penalty. As the Court has rejected this, we presume that the Court does not want argument on this matter.

We will proceed by discussing what does establish the burden of proof. The burden of proof is not established by a statute. According to Florida Statutes Section 921.137, part 4, clear and convincing evidence must be shown. However, similarly, Section 8 indicates that this particular section, 912.137, does not apply if [6] the defendant was sent to death prior to the effective date of the act. As Mr. Nixon was sentenced to death on July 1985, this statute does not apply to him. Similarly, the Florida Rule of criminal Procedure 3.203, where defendant's mental retardation is a bar to the death penalty, does not set a burden establishing what the defendant has to prove in order to establish mental retardation.

As we indicated in our brief, Justice Pariente, in adopting the rule, indicated his (sic) concern for the clear and convincing burden. The burden of proof is governed by Florida and the united states constitution, as well as common law. As of today, 24 out of 30 states that have decided the burden issue regarding mental retardation in the death penalty has accepted the preponderance of the rule – of the burden.

New Jersey, in addition, is one state that has established that the state must prove beyond a reasonable doubt that the defendant has an absence of mental retardation. This was established in the Jimenez case in 2005.

The rationale for the preponderance standard was discussed by Justice Brennan in In re Winship, the Supreme Court case, in 1970. In that case, Justice

Brennan indicates that we must weigh the interest of the [7] defendant as well as the State. The interest of the defendant in this particular case, In re Winship, was that of liberty. Justice Brennan indicated that there was a strong due process interest here, which was of immense importance. Given that, the Constitution, federal, as well as the Florida Constitution, as well as common law tradition, indicate that we give – afford great protection to such interests.

In the case of Mr. Nixon, the interest is even more immense, that of life. Coinciding with this interest in life is the policy for the preponderance standard that no erroneous executions will be made. Under Atkins, fundamental decency necessitates no executions of those with mental retardation.

We protect – preponderance protects mental retardation by reducing erroneous executions of those with mental retardation. This coincides also with the Supreme Court ruling in Cooper v. Oklahoma, where the Supreme Court provided further support for this interest.

The Oklahoma statute there had a burden of incompetence to stand trial – excuse me. The Oklahoma statute required clear and convincing evidence in order to establish incompetence to stand trial. The Supreme Court found that this violated due process. The rationale behind this decision was that there is a [8] history of protecting incompetent people, and the history of our cases, English, as well current common law,

indicate that we must use the standard of more likely than not.

Our common law tradition indicates that heightened standards offends a principle of justice so deeply rooted in tradition and conscience of our people. Mental retarded people – mentally retarded people and incompetent people have historically been treated similarly. Therefore, similarly to the ruling in Cooper, the mental retardation statute requiring clear and convincing evidence, if that is the burden to be found, is adverse to our history of common law as well as the Florida and the Federal Constitution.

THE COURT: Let me stop you and ask you a question.

MS. BHATIA: Sure.

THE COURT: I assume you all are going to present the same evidence regardless of what the burden is.

MS. BHATIA: Yes.

THE COURT: And it doesn't seem to me that legal issue – is there any necessity for me to give you a ruling today before taking the evidence in the case, as opposed to if you all want to brief the issue after take the evidence?

MR. FREEDMAN: That's fine.

[9] MS. BHATIA: That's fine, Your Honor.

MR. O'CONNOR: Your Honor, Mr. Nixon would like to call Dr. Denis Keyes.

DENIS KEYES

was called as a witness, having been first duly sworn, was examined and testified as follows:

BY MR. O'CONNOR:

Q And, Dr. Keyes, did you prepare some slides in preparation for your testimony today?

A Yes, I did.

Q Are these the type of materials and documents cited in these slides the type that psychologists would normally rely upon in forming the opinions, and did you, in fact, rely upon the materials in forming your opinions?

A Yes, I used them in developing the slide show.

Q And do these slides summarize the evidence and scientific bases for your opinions?

A They do.

MR. O'CONNOR: Your Honor, I want this marked Defense Exhibit 3.

THE COURT: Very well. All right. This is – this is the slide show itself in hard copy form?

MR. O'CONNOR: Yes, Your Honor.

THE COURT: All right. Very well.

Q How would you – how do you begin a reliable psychoeducational assessment for the purposes of diagnosing MR?

A No matter what the situation, you always look at what the records show. You get as much data as you can prior to any kind of testing. In a school situation, when a teacher says, I want to you look at this kid, you have to look at all the information about the child long before you ever meet with the kid.

And in a situation in adulthood, before you do any kind of testing or any kind of meeting with that individual, you look to see what's available in writing from the past, school records, medical records, psychiatric records, psychological records, et cetera.

Q Okay. And when you have this initial material, what would a clinician do to take the next step? What would he have to apply to go forward?

A Clinical judgment. You decide based upon – whether or not the preponderance of the evidence suggests that it's important to proceed. And that's a clinical decision.

THE COURT: Whenever you are ready.

THE WITNESS: In order for the definition of mental retardation to be satisfied roughly two standard deviations below the mean is a score of 70. And the standard error of measure requires that you consider plus or minus five points. So, roughly, where that 1 is, a little bit to the left of that, actually, begins the area that could be clinically considered mentally

retarded intelligence. And it goes from that 75 down to the 55. Those IQs, between 75 and 55, would be considered within the range of mild mental retardation intellectually.

[32] Q Okay.

A And that's roughly 83 to 90 percent of the population of the people with mental retardation.

Q Now, could you explain that just a little bit more? when you say 83 to 93 – 85 to 93 percent of the population of mentally retarded people are mildly mentally retarded, what do you mean by that?

A The vast majority of people who are mentally retarded are within the mild range. It obviously goes down further as you continue down the curve. From 55 to 40, which is considered moderately retarded, then you're looking at obviously less than .1 of the population. And then even smaller, from 40 to 25, which is considered severely retarded. And then 25 and below is considered profoundly retarded. Again, we are just talking about intelligence.

CONTINUED DIRECT EXAMINATION

BY MR. O'CONNOR:

[77] Q Now, much earlier you had mentioned the standard Error of Measure.

A The Standard Error of Measure.

Q Could you please explain what that is?

A The Standard Error of Measure is a statistical device that is estimating the amount of error in every test. And subtest has its own standard Error of Measure. It's the score variation between the obtained score and the true score. It's the basis of true score theory, that somewhere in that normal curve, if you have, say, 100 as your IQ, that your IQ actually falls somewhere between 95 and 105.

Q Okay. And have you prepared any slides on the Standard Error of Measure?

A Yes, I have.

Q Let us go through them real quickly.

A Okay.

Q And what is this?

A This is from the MR text again, specifically to the Definitions, Classifications, Systems, and Support. The assessment of intellectual functioning through the primary reliance on intelligence test is fraught with the potential for misuse if consideration is not given to possible errors. Every test has error. There is no question about it. No [78] getting around it. Whatever the obtained score is has to be seen in light of a plus or minus x number of points.

Q Okay. Let's go to the next one.

A This is again from DSM, the other side of the coin. It calls for consideration of measurement error of approximately five points for IQ measurement.

Q Okay. And then this last one.

A And, again, in Atkins, the Supreme Court of the U.S. clearly indicated that IQs between 70 and 75 or lower were within the range that could be considered to complete the intellectual prong of the definition.

Q Great. So, now, looking at this range of scores, you have a range of scores, actually, from 66 to 80?

A Correct.

Q Do some of these have to be wrong?

A Not necessarily.

Q Why?

A It is not uncommon to have a wide array of – when you're taking a distribution, any kind of distribution, even testing, a large difference is not necessarily normal, but it's not completely unusual. It happens.

Anytime you're looking at something as changeable as – difficult to measure as intelligence, you're going to have good days and bad days. You're going to have people who make errors in testing. You're going to have people who give points to things they shouldn't give points to or don't give points to things they shouldn't give points to. And as I said before, every test has an inherent amount of error, so you have to consider what all of the possible options are.

Q So you're just weighing two different reasonings [97] that could explain this range?

A First and foremost, the Standard Error of Measure, okay? You look specifically at how wide that is. If you take the Standard Error of Measure from the lowest to the highest, it can be, really, not very statistically different at all.

Q Okay. So let's – so as you've just described, so taking into account the standard Error of Measure and then you also explained the scatter you get over multiple testings –

A Distributions, right.

Q – what affect does this have on Joe Nixon's test scores?

A Well, again, any specific testing can have, the research suggests, six to eight points difference. A large amount of difference is, it's not common, but it's not that unusual.

Q Thank you. So looking at all of this statistical data that you have described and these test scores that Joe Nixon received, what do you make of it all?

A Well, if you look – if you look at the totality, which, in any type of diagnostics, you really need to look at totality. You don't want to take one test in particular and say, well, that's it, you know. This is my diagnosis, boom.

Q And you actually said, like "the totality of the information". Is there a term for that in the scientific literature?

A The distribution, the total distribution.

Q Okay. Let me go to your next slide.

A Okay.

Q And what is this?

[100] A This is looking at, as I said, the regression to the mean. In all of those scores, when put together accounted for Flynn, for – the research suggested six to eight points possible differences, and the Standard Error of Measure you're looking at a regression to the mean, which would be approximately 73.

Q Okay. So if – let me give you an example. If we had an neutral administrator that gives Joe Nixon an IQ test with the current version and an obtained score of a 73, as you have up there, what would your opinion be regarding Joe Nixon's subaverage intellectual functioning?

A That it would require further investigation, because a 73 is within the range of intellectually retarded.

Q Is a score of 73 consistent with a finding of mental retardation?

A It could be, yes.

[109] Q Okay. So, in this case here, at the time of the alleged offense, did Joe, in your opinion, did Joe Nixon have subaverage intellectual functioning?

A Yes, I think he did.

Q And, in your opinion, at the time of the alleged offense, did Joe Nixon have deficits in adaptive behavior?

A Unquestionably.

Q And was the onset of both of these prior to the age 18?

A I think if you look at the record, you have to admit that something was going on all of his life. Yes, I believe it was prior to the age of 18.

Q And is it your expert opinion, to a reasonable degree of psychological certainty, that Joe Nixon was mentally retarded at the time of the offense?

A Yes, I believe he was.

Q Okay. Does Joe Nixon, today, manifest significantly subaverage intellectual functioning?

A I believe so, yes, sir.

Q And today, are Joe Nixon's conceptual, social, and practical adaptive skills significantly impaired?

A They are.

[110] Q And was the onset of both of these conditions prior to the age of 18?

A Absolutely.

Q And is it your expert opinion, to a reasonable degree of psychological certainty, that Joe Nixon is mentally retarded today?

A I believe he is, yes.

DIRECT EXAMINATION

BY MR. EVANS:

Q State your name for the record please, sir.

A My name is Dr. Greg Prichard. Last name is P-R-I-C-H-A-R-D.

Q And what is your profession?

A I'm a licensed clinical psychologist in the state of Florida.

Q Now, you were referred at – you were appointed as an expert for the state to do a mental retardation [evaluation] of Mr. Nixon; is that correct?

A Yes, I was.

Q And then did you do a face-to-face evaluation with Mr. Nixon?

A I did.

Q And what particular – and did you – what particular testing instrument did you use?

A I used the WAIS-III, the Wechsler Adult Intelligence scale, Third Edition, which is the most recent edition of the adult version of the Wechsler scales. I also administered the Test of Memory Malingering. The acronym for that is TOMM, T-O-M-M, and I also administered a wide Range Achievement Test, Third Edition. And the acronym for that is WRAT-3.

Q And what were your results?

A On the Wechsler scale, the result was a verbal IQ score of 81, a performance IQ score of 83, with a full scale [174] IQ score of 80. On the test or memory Malingering, essentially what I'm utilizing that instrument for is to assess for malingering, whether or not a person appears to be putting forth maximum effort in the testing occasion. And on that instrument, there was no indication that Mr. Nixon was malingering. He performed well, suggesting good motivation on my testing occasion.

On the WRAT-3, which is basically an academic screening measure, his scores were, reading was a 70, spelling was a 68, and the arithmetic was 75.

Q Now, based upon your testing and your training and experience, did you reach a conclusion as to whether there needed to be any further testing as to adaptive functioning or a determination of onset before age 18?

A Yes, I did.

Q And what was that?

A Well, the conclusion is, because of the results of my testing with the full scale IQ score of 80, this means that Mr. Nixon is not mentally retarded, okay? So, again, three prongs are required for diagnosis of mental retardation. If any one prong is not, then retardation does not legitimately exist.

So because the result of my assessment said a full scale IQ score of 80, a valid testing occasion, it was – the referral question was at that point answered. There was no [175] need to go any further in terms of

assessing for adaptive behavior. I tell you the reason why. It wouldn't matter what his adaptive behavior was at that point. With a full scale IQ score of 80, a full scale IQ score of 80 means the same thing as a full scale IQ score of 100, or 130 for that matter, in terms of adaptive behavior.

In other words, if you get a score that high on IQ, adaptive behavior scores are absolutely moot. They are pointless to account for because it doesn't matter if they are deficient. With an IQ of 80, he is not mentally retarded. And that's the question that I had to answer.

THE COURT: Can I stop you for a second?

THE WITNESS: Sure.

THE COURT: And I'm going to – something you said earlier I want to just follow up on a little bit. You said that 74, because of the Standard Error of Measure, still yields a possibility within the 95 percent -- [188]

THE WITNESS: Confidence.

THE COURT: So if you yield – if you yield your full scale score of 74, then you go to the second prong? Is that what you're telling me?

THE WITNESS: That is what I would do personally, yes. If I had the maximum score of a 74, and there is some room for considering that the person's IQ --

THE COURT: Then you go to adaptive functioning?

THE WITNESS: Then to adaptive functioning, which is prong two, correct.

CROSS EXAMINATION

BY MR. FREEDMAN:

Q Now, in this case when you did your assessment, you decided there was no reason to address the adaptive behavior issue?

A Correct.

Q Because, as we have discussed, you found that the IQ test that you gave and the ones that you reviewed meant that there was no significantly subaverage intellectual functioning, so there was no need to address that adaptive behavior issue?

A That's correct.

Q So you haven't assessed that?

A Correct.

Q Now, if you had found his IQ to be around 74 or below, then you would have proceeded to an adaptive behavior assessment?

A Probably, yes.

Q That's because if, hypothetically, an individual obtains an IQ score of 73, what an competent examiner does is to construct a confidence interval around that obtained score [216] and conclude that the likelihood is 95 that the true intelligence score must be between 68 and 78?

A Correct.

Q And that's how one takes account of Standard Error of Measure?

A That is Standard Error of Measurement. And that's the correct way to communicate it.

Q Okay. And on your direct, you recognized as the authoritative standard for doing these assessments the DSM-IV-TR?

A Yes.

Q And so I take it, then, you agree with the statement on page 48 that says: ["]As discussed earlier, an IQ score may involve a measurement error of approximately five points depending on the testing instrument. Thus, it is possible to diagnose mental retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for mental retardation. Differentiating mild mental retardation from borderline intellectual functioning requires careful consideration of all available information.["]

A Correct. I would agree with that, yes.

Q And, in fact, last year you did a mental retardation assessment on a capital defendant named Roger cherry; correct?

A Yes.

[217] Q And he had a full scale IQ of 72, and you wrote in your report that because this meant that with

a 95 percent competence interval, the true IQ was between 67 and 77, it would be imperative that the professional conduct adaptive behavior testing?

BY MR. FREEDMAN:

Q Could you identify that document for me, Doctor?

A Yes. It looks like an evaluation report that I conducted and completed on July 17th of 2005 on an individual named Roger Cherry.

MR. FREEDMAN: I'll offer that into evidence, Your Honor.

THE COURT: Any objection to Defense 8?

MR. EVANS: None.

EXHIBIT 3

Joe Elton Nixon

DENIS WILLIAM KEYES, Ph.D.

[SELECTED SLIDES]

Standard Error Measure (SEm)

"The assessment of intellectual functioning through the primary reliance on intelligence tests is **fraught with the potential for misuse if consideration is not given to possible errors in measurement**. An obtained IQ standard score must always be considered in terms of the accuracy of its measurement. . . ."

MENTAL RETARDATION, Definition, Classification and Systems of Support, 10th Ed., (2002) AAMR, p. 57, attached as Exh. H to June 15, 2006 Keyes Affidavit.

SEm Continued . . .

The DSM-IV-TR calls for consideration of "a measurement error of **approximately 5 points** in assessing IQ . . . a Wechsler IQ of 70 is considered to represent a range of 65-75)."

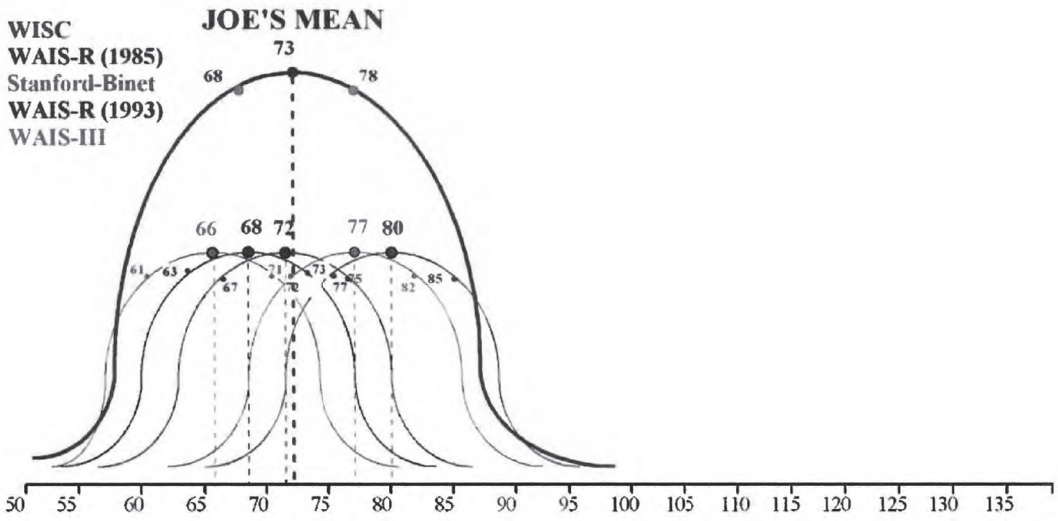
DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS – TEXT REVISION, 4th ed. (2000) (APA) at 41, attached as Exh. G to June 15, 2006 Keyes Affidavit.

SEm Continued . . .

Indeed, in Atkins the Supreme Court of the United States specifically recognized that an **"IQ score between 70 and 75 or lower"** is "typically considered the cutoff score for the intellectual function prong."

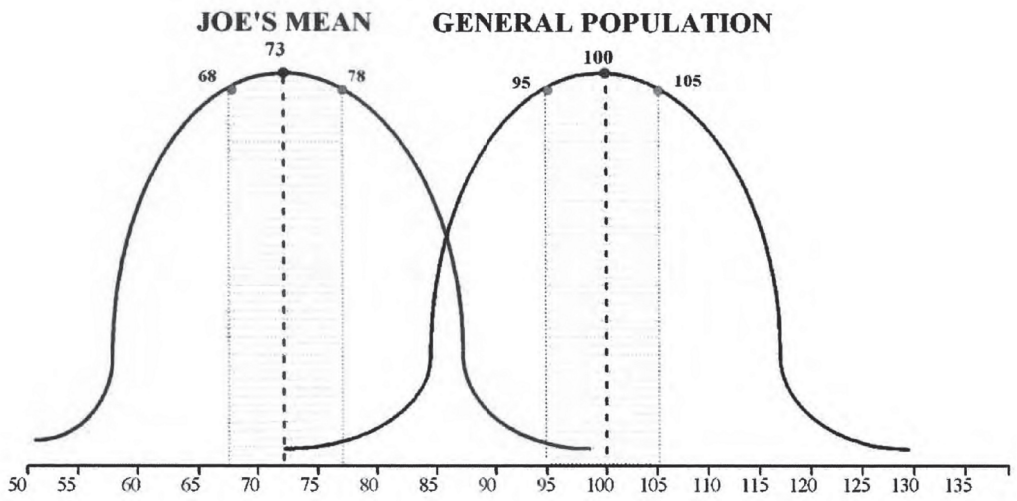
> Atkins v. Virginia, 536 U.S. 304, 309, n.5 (2002) (quoting 2 B. Sadock & V. Sadock, *Comprehensive Text Book of Psychiatry* 2952 (7th ed. 2000)).

JOE'S MEAN OF 5 IQ TESTS



A203

JOE'S MEAN VS. GENERAL POPULATION STANDARD ERROR



A204

EXHIBIT 8

[Portions Omitted In Printing]

GREGORY A. PRICHARD, Psy.D.

Name:	Roger Cherry
Date of Report	7/17/05

Referral & Information:

Mr. Roger Cherry was referred to me for a Mental Retardation Assessment by the Honorable Julianne Piggotte, Circuit Court Judge in the Seventh Judicial Circuit, in and for Volusia County. Mr. Cherry is currently on Death Row at Union Correctional Institution, having been sentenced to death following a murder conviction in 1987. The issue as to whether Mr. Cherry meets the statutory definition of mental retardation has been raised by his attorney, and I was asked to address this issue through my evaluation.

Discussion[ ] and Conclusions:

It is important to note that an obtained IQ score is not absolute. That is, an obtained IQ Score is actually an approximat[ion]. To represent that score in a valid manner, professionals must build a confidence interval around the obtained score and state that it is within this confidence interval that a person[']s true IQ actually falls. Most professionals use a 95% confidence interval. Given Dr. Barnard's obtained result of 72, the appropriate confidence interval would be between 67 and 77. That is, it can be stated with 95% confidence that Mr. Cherry's true IQ falls within the range of 67 to 77.

Hence, Dr. Barnard's statement that a 72 does not represent retardation is not necessarily true. A[n] obtained score of 72 can actually represent a true IQ score of below 70, qualifying for a diagnosis of retardation.

In any event, Dr. Bursten also obtained a Full Scale IQ Score of 72 utilizing the most recent version of the Wechsler Scales, the WAIS-III. For the same reason discussed above, an obtained score of 72 can and often does equate to a score consistent with mental retardation. It becomes imperative with a score on the cusp between mental retardation and borderline that the professional conduct adaptive behavior testing.

Given these results, it would be my opinion that Mr. Roger Cherry likely does meet the statutory criteria for a diagnosis of mental retardation classified in the mild range.

Respectfully,

Gregory A. Prichard, Psy.D.
Licensed Psychologist

APPENDIX M

Table of States' Burdens of Proof on Intellectual Disability

State	Burden of Proof	Statute or Case
Alabama	Preponderance of the evidence.	*Smith v. State*, 112 So.3d 1108, 1125 (Ala. Crim. App. 2012); Ala. R. Crim. P. 32.3.
Arizona	Clear and convincing evidence (pretrial). Preponderance of the evidence (sentencing).	*State v. Escalante-Orozco*, 386 P.3d 798, 830-34 (Ariz. 2017), *abrogated on other grounds by State v. Escalante*, 425 P.3d 1078 (Ariz. 2018); Ariz. Rev. Stat. Ann. § 13-753.
Arkansas	Preponderance of the evidence.	Ark. Code Ann. § 5-4-618 (2019).
California	Preponderance of the evidence.	Cal. Pen. Code. § 1376(B)(3).
Florida	Clear and convincing evidence.	Fla. Stat. § 921.137 (2013); *Wright v. State*, 256 So. 3d 766, 771 (Fla. 2018).
Georgia	Beyond a reasonable doubt.	Ga. Code Ann. § 17-7-131 (2017).
Idaho	Preponderance of the evidence.	Idaho Code § 19-2515A (2006).

Indiana	Preponderance of the evidence.	*Pruitt v. State*, 834 N.E.2d 90, 103 (Ind. 2005) (preponderance constitutionally required); Ind. Code § 35-36-9-4.
Kansas	None specified.	
Kentucky	Preponderance of the evidence.	*Woodall v. Commonwealth*, 563 S.W.3d 1, 6 n.29 (Ky. 2018); Ky. Rev. Stat. § 532.130.
Louisiana	Preponderance of the evidence.	La. Code Crim. Proc. art. 905.5.1 (2014).
Mississippi	Preponderance of the evidence.	*Chase v. State*, 873 So. 2d 1013, 1029 (Miss. 2004).
Missouri	Preponderance of the evidence.	Mo. Rev. Stat. § 565.030(4)(1) (2016).
Montana	None specified.	
Nebraska	Preponderance of the evidence.	Neb. Rev. Stat. § 28-105.01(4) (2013).
Nevada	Preponderance of the evidence.	Nev. Rev. Stat. Ann. § 174.098.
North Carolina	Clear and convincing evidence (pretrial). Preponderance of the evidence (sentencing).	N.C. Gen. Stat. § 15A-2005 (2015).
Ohio	Preponderance of the evidence.	*State v. Ford*, 140 N.E. 616 655-56 (Ohio 2019).

Oklahoma	Clear and convincing evidence (pretrial). Preponderance of the evidence (sentencing).	Okla. Stat. tit. 21, § 701.10b (2019).
Oregon	Preponderance of the evidence.	*State v. Agee*, 364 P.3d 971, 983 (Or. 2015) (en banc).
Pennsylvania	Preponderance of the evidence.	*Commonwealth v. Sanchez*, 36 A. 3d 24, 63 (Pa. 2011)
South Carolina	Preponderance of the evidence.	*State v. Laney*, 627 S.E.2d 726, 730 (S.C. 2006).
South Dakota	Preponderance of the evidence.	S.D. Codified Laws § 23A-27A26.3 (2018).
Tennessee	Preponderance of the evidence.	Tenn. Code § 39-13-203 (2021).
Texas	Preponderance of the evidence.	*Ex parte* Van Alstyne, 239 S.W. 3d 815, 823 (Tex. Crim. App. (2007)).
Utah	Preponderance of the evidence.	Utah Code § 77-15a-104 (2018).
Wyoming	None specified.	