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

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JOE ELTON NIXON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

---

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

---

# APPENDIX

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9. Motion Under Fla. R. Crim. P. 3.203 and 3.851, State v. Joe Elton Nixon, No. 84-2324 (Fla. 2d Jud. Cir. June 19, 2006), Record on Appeal in Fla. Sup. Ct. Case No. SC07-953, Vol. 1, at pp. 1-6 **(App. 86-91)**

10. Transcript of Motion Hearing, State v. Joe Elton Nixon, No. 84-2324 (Fla. 2d Jud. Cir. Oct. 23, 2006), Record on Appeal in Fla. Sup. Ct. Case No. SC07-953, Vol. 8, at pp. 1-199; *ibid.* Vol. 9, at pp. 200-238 **(App. 92-329)**

11. State v. Joe Elton Nixon, No. 84-2324, Order (Fla. 2d Jud. Cir. Apr. 26, 2007), Record on Appeal in Fla. Sup. Ct. Case No. SC07-953, Vol. 7, at pp. 1225-1301 **(App. 330-406)**

12. State v. Joe Elton Nixon, No. 84-2324, Order Denying Defendant's Successive Post-Conviction Motion (Fla. 2d Jud. Cir. Oct. 9, 2015), Record on Appeal in Fla. Sup. Ct. Case No. SC15-2309, Vol. 1, at pp. 6655-6661 **(App. 407-413)**

13. Robert J. Newkirk, Pre-Disposition Report of Joe Elton Nixon (Dec. 4, 1975)[1] **(App. 414-417)**

14. Amended Initial Brief of Appellant, Joe Elton Nixon v. State, No. SC07-953 (Fla. Nov. 14, 2007), Record on Appeal in Fla. Sup. Ct. Case No. SC15-2309, Vol. 1, at pp. 76-165 **(App. 418-507)**

15. Reply Brief In Support of Successive Motion Under Fla. R. Crim. P. 3.203 and 3.851, State v. Joe Elton Nixon, No. 84-2324 (Fla. 2d Jud. Cir. Aug. 13, 2015), Record on Appeal in Fla. Sup. Ct. Case No. SC15-2309, Vol. 1, at pp. 5133-5151 **(App. 508-526)**

[1] This document was included in the Record on Appeal for this case (see ROA 5202-5205), but the copy in the ROA is poor.

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

CASE NO. 84-2324

STATE OF FLORIDA,

vs.

JOE ELTON NIXON,

Defendant.

_____/

V E R D I C T

FILED
Jul 30 9 [illegible] AM '85
PAUL F. [illegible]
CLERK C[illegible]
LEON CO[illegible]

COUNT I

WE, the Jury, find the defendant JOE ELTON NIXON, guilty as charged of Murder in the First Degree.

SO SAY WE ALL this 22nd day of July, A.D., 1985.

Harrison J. Green
FOREMAN

---

WE, the Jury, find the defendant JOE ELTON NIXON, guilty of the lesser included offense of Murder in the Second Degree.

SO SAY WE ALL this ___ day of July, A.D., 1985.

_____
FOREMAN

---

WE, the Jury, find the defendant JOE ELTON NIXON, guilty of the lesser included offense of Murder in the Third Degree.

SO SAY WE ALL this ____ day of July, A.D., 1985.

_____
FOREMAN

---

WE, the Jury, find the defendant JOE ELTON NIXON, guilty of the lesser included offense of Manslaughter.

SO SAY WE ALL this ___ day of July, A.D., 1985.

_____
FOREMAN

---

WE, the Jury, find the defendant JOE ELTON NIXON, not guilty.

SO SAY WE ALL this ___ day of July, A.D., 1985.

_____
FOREMAN

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

CASE NO. 84-2324

FILED
JUL 30 9 AM '85
PAUL F. ...
CLERK CIRCUIT COURT
LEON COUNTY

STATE OF FLORIDA

vs.

JOE ELTON NIXON,

Defendant.

_____/

V E R D I C T S

COUNT II

WE, the Jury, find the defendant JOE ELTON NIXON, guilty as charged of Kidnapping.

SO SAY WE ALL this 22nd day of July, A.D., 1985.

Harrison J. Green
FOREMAN

---

WE, the Jury, find the defendant JOE ELTON NIXON, guilty of the lesser included offense of False Imprisonment.

SO SAY WE ALL this ___ day of July, A.D., 1985.

_____
FOREMAN

---

WE, the Jury, find the defendant JOE ELTON NIXON, not guilty.

SO SAY WE ALL, this ____ day of July, A.D., 1985.

_____
FOREMAN

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

CASE NO. 84-2324

FILED

STATE OF FLORIDA,

vs.

JOE ELTON NIXON,

Defendant.

_____/

ADVISORY VERDICT

J. LEWIS HALL, JR.
CIRCUIT JUDGE

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

CASE NO. 84-2324

STATE OF FLORIDA,

vs.

JOE ELTON NIXON,

Defendant.

_____/

ADVISORY VERDICT

A majority of the jury, by a vote of 10-2, advise and recommend to the court that it impose the death penalty upon JOE ELTON NIXON.

SO SAY WE ALL this 25th day of July, A.D., 1985.

Harrison G. Green
FOREMAN

---

The jury advises and recommends to the court that it impose a sentence of life imprisonment upon JOE ELTON NIXON without possibility of parole for 25 years.

SO SAY WE ALL this ___ day of July, A.D., 1985.

_____
FOREMAN

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☐ PROBATION VIOLATOR
*(Check if Applicable)*

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

DIVISION FELONY

STATE OF FLORIDA

CASE NUMBER 84-2324

—vs—

JOE ELTON NIXON
Defendant

# JUDGMENT

The Defendant, JOE ELTON NIXON, being personally before this Court represented by MICHAEL M. CORIN, his attorney of record, and having:

*(Check Applicable Provision)*

- [X] Been tried and found guilty of the following crime(s)
- [ ] Entered a plea of guilty to the following crime(s)
- [ ] Entered a plea of nolo contendere to the following crime(s)

| COUNT | CRIME | OFFENSE STATUTE NUMBER(S) | DEGREE OF CRIME | CASE NUMBER |
|---|---|---|---|---|
| 1 | MURDER - FIRST DEGREE | 782.04 | Capital | 84-2324 |
| 2 | KIDNAPPING | 787.01 | Fel. 1° | 84-2324 |
| 3 | ROBBERY | 812.13 | Fel. 2° | 84-2324 |
| 4 | ARSON | 806.01 | Fel. 2° | 84-2324 |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

.....

The Defendant is hereby ordered to pay the sum of ten dollars ($10.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of two dollars ($2.00) as a court cost pursuant to F.S. 943.25(4).

- [ ] The Defendant is ordered to pay an additional sum of two dollars ($2.00) pursuant to F.S. 943.25(8).
  (This provision is optional; not applicable unless checked).

*(Check if Applicable)*

- [ ] The Defendant is further ordered to pay a fine in the sum of $_____ pursuant to F.S. 775.0835.
  (This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S. 775.083 are to be recorded on the Sentence page(s)).

- [ ] The Court hereby imposes additional court costs in the sum of $_____.

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1a

Imposition of Sentence Stayed and Withheld *(Check if Applicable)*

☐ The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in separate order.)

Sentence Deferred Until Later Date *(Check if Applicable)*

☐ The Court hereby defers imposition of sentence until _____. (date)

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

JUDGE

FINGERPRINTS OF DEFENDANT

| 1. R. Thumb | 2. R. Index | 3. R. Middle | 4. R. Ring | 5. R. Little |
|---|---|---|---|---|
| | | | | |
| **6. L. Thumb** | **7. L. Index** | **8. L. Middle** | **9. L. Ring** | **10. L. Little** |
| | | | | |

Fingerprints taken by:

Harry Fonte 316 DS
Name and Title

JOE ELTON NIXON

DONE AND ORDERED in Open Court at LEON County, Florida, this 30th day of July A.D., 1985. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, Joe Elton Nixon and that they were placed thereon by said Defendant in my presence in Open Court this date.

JUDGE

Defendant JOE ELTON NIXON

Case Number 84-2324

# SENTENCE

(As to Count 1)

The Defendant, being personally before this Court, accompanied by his attorney, Michael M. Corin _____, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

*(Check either provision if applicable)*

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that:

☐ The Defendant pay a fine of $_____, plus $_____ as the 5% surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to the custody of the Department of Corrections

☐ The Defendant is hereby committed to the custody of the Sheriff* of _____ County, Florida

*(Name of local corrections authority to be inserted at printing, if other than Sheriff)*

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

☒ For a term of Death

☐ For an indeterminate period of 6 months to _____ years.

*If "split" sentence complete either of these two paragraphs*

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

## SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

*Firearm — 3 year mandatory minimum*

☐ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

*Drug Trafficking — mandatory minimum*

☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

*Retention of Jurisdiction*

☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

*Habitual Offender*

☒ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

*Jail Credit*

☒ It is further ordered that the Defendant shall be allowed a total of 349 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

*Consecutive/Concurrent*

It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☐ concurrent with (check one) the sentence set forth in count _____ above.

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Defendant JOE ELTON NIXON

Case Number 84-2324

# SENTENCE

(As to Count 2)

The Defendant, being personally before this Court, accompanied by his attorney, Michael M. Corin _____, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

*(Check either provision if applicable)*

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that:

☐ The Defendant pay a fine of $_____, plus $_____ as the 5% surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to the custody of the Department of Corrections

☐ The Defendant is hereby committed to the custody of the Sheriff of _____ County, Florida

*(Name of local corrections authority to be inserted at printing, if other than Sheriff)*

To be imprisoned (check one; unmarked sections are inapplicable)

☒ For a term of Natural Life

☐ For a term of _____

☐ For an indeterminate period of 6 months to _____ years.

*If "split" sentence complete either of these two paragraphs*

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

## SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

*Firearm — 3 year mandatory minimum*

☐ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

*Drug Trafficking — mandatory minimum*

☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

*Retention of Jurisdiction*

☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

*Habitual Offender*

☒ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

*Jail Credit*

☒ It is further ordered that the Defendant shall be allowed a total of 349 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

*Consecutive/Concurrent*

It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☐ concurrent with (check one) the sentence set forth in count _____ above.

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Defendant JOE ELTON NIXON

Case Number 84-2324

# SENTENCE

(As to Count 3)

The Defendant, being personally before this Court, accompanied by his attorney, Michael M. Corin _____, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

*(Check either provision if applicable)*

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that:

☐ The Defendant pay a fine of $_____, plus $_____ as the 5% surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to the custody of the Department of Corrections

☐ The Defendant is hereby committed to the custody of the Sheriff* of _____ County, Florida

*(Name of local corrections authority to be inserted at printing, if other than Sheriff)*

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

☒ For a term of Fifteen (15) years

☐ For an indeterminate period of 6 months to _____ years.

*If "split" sentence complete either of these two paragraphs*

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

## SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

*Firearm — 3 year mandatory minimum*

☐ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

*Drug Trafficking — mandatory minimum*

☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

*Retention of Jurisdiction*

☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

*Habitual Offender*

☒ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

*Jail Credit*

☒ It is further ordered that the Defendant shall be allowed a total of 349 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

*Consecutive/Concurrent*

It is further ordered that the sentence imposed for this count shall run ☒ consecutive to ☐ concurrent with (check one) the sentence set forth in count 2 above.

216

Defendant JOE ELTON NIXON

Case Number 84-2324

# SENTENCE

(As to Count 4)

The Defendant, being personally before this Court, accompanied by his attorney, Michael M. Corin _____, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown,

*(Check either provision if applicable)*

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein,

IT IS THE SENTENCE OF THE LAW that:

☐ The Defendant pay a fine of $_____, plus $_____ as the 5% surcharge required by F.S. 960.25.

☒ The Defendant is hereby committed to the custody of the Department of Corrections

☐ The Defendant is hereby committed to the custody of the Sheriff* of _____ County, Florida

*(Name of local corrections authority to be inserted at printing, if other than Sheriff)*

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life

☒ For a term of Fifteen (15) Years

☐ For an indeterminate period of 6 months to _____ years.

*If "split" sentence complete either of these two paragraphs*

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

☐ However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

## SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

*Firearm — 3 year mandatory minimum*

☐ It is further ordered that the 3 year minimum provisions of F.S. 775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

*Drug Trafficking — mandatory minimum*

☐ It is further ordered that the _____ year minimum provisions of F.S. 893.135(1)( )( ) are hereby imposed for the sentence specified in this count.

*Retention of Jurisdiction*

☐ The Court pursuant to F.S. 947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the Court are set forth in a separate order or stated on the record in open court.

*Habitual Offender*

☒ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S. 775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

*Jail Credit*

☒ It is further ordered that the Defendant shall be allowed a total of 349 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

*Consecutive/Concurrent*

It is further ordered that the sentence imposed for this count shall run ☒ consecutive to ☐ concurrent with (check one) the sentence set forth in count 2 & 3 above.

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Defendant JOE ELTON NIXON

Case Number 84-2324

*Consecutive/Concurrent (As to other convictions)*

It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run ☒ consecutive to ☐ concurrent with (check one) the following:

☒ Any active sentence being served.

☐ Specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of LEON County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of this Judgment and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

In imposing the above sentence, the Court further recommends _____

DONE AND ORDERED in Open Court at LEON County, Florida, this 30 day of July A.D., 1985.

JUDGE

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

CASE NO. 84-2324

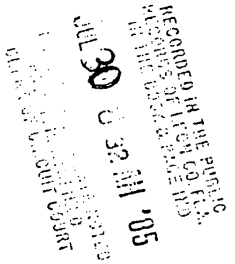
STATE OF FLORIDA, :

vs. :

JOE ELTON NIXON, :

Defendant: :

_____ :



JUDGMENT AND SENTENCE

This cause came on before the Court for trial by jury and after deliberation, a verdict was rendered finding the Defendant, Joe Elton Nixon, guilty of murder in the first degree.

Thereafter, a separate penalty phase proceeding was conducted before the trial jury to determine whether the Defendant should be sentenced to death or life imprisonment as authorized by Sec. 775.082 F.S. The jury duly deliberated and returned its advisory verdict. A majority of the jurors, by vote of 10-2, recommended that the Court impose the death penalty upon Joe Elton Nixon for the murder of Jeanne Bickner.

Pursuant to Sec. 921.141(3) F.S., this Court has considered each aggravating and mitigating circumstance involved herein and evaluated the evidence and testimony received at trial together with that submitted during the penalty phase proceeding. In consequence, the Court makes the following findings:

AGGRAVATING FACTORS

A

Whether the murder of which the Defendant stands convicted was committed by a person under sentence of imprisonment?

FINDING

There is no evidence that the murder for which the Defendant stands convicted was committed while under sentence of imprisonment. The jury was not instructed on this factor.

B

Whether the Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person?

FINDING

Two of the Defendant's prior felony convictions, armed robbery and battery upon a law enforcement officer, involved the use or threat of violence to the person. The Jury was instructed on this factor.

C

Whether the Defendant knowingly created a great risk of death to many persons?

FINDING

There is no evidence that the Defendant knowingly created a great risk of death to many persons in the commission of the murder for which he stands convicted. The Jury was not instructed on this factor.

D

Whether the murder was committed while the Defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb?

FINDING

There was evidence that the murder was committed while the Defendant was engaged in the commission of kidnapping and the Jury convicted the Defendant of that offense in the initial phase of this trial. The Jury was instructed on this factor. Although the evidence supports that the murder was committed while the Defendant was engaged in the commission of robbery and the Jury convicted the Defendant of that offense in the initial phase of this trial, robbery was not included in this aggravating circumstance as it is aggravating circumstance F herein. The Jury was not, therefore, instructed as to robbery under this aggravating circumstance.

E

Whether the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody?

FINDING

Although there was some evidence that the Defendant murdered his victim so that she would not identify him thereby enabling him to avoid or prevent lawful arrest, the Court does not consider that evidence to be legally sufficient to allow consideration thereof as an aggravating circumstance, did not instruct the Jury thereon and does not consider it herein.

F

Whether the murder was committed for pecuniary gain?

FINDING

The Defendant was convicted of robbery by the Jury in the initial phase of this trial. The evidence supports that the Defendant stole the victim's car, rings and money and thereafter pawned the rings and tried to sell the car. The evidence further supports that such actions by him constituted his primary motive for abducting and thereafter murdering his victim. The Jury was instructed on this factor.

G

Whether the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws?

FINDING

There is no evidence that the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. The Jury was not instructed on this factor.

H

Whether the murder was especially heinous, atrocious or cruel?

FINDING

The evidence confirms that Jeanne Bickner was the victim of a vicious, barbaric and savage murder by Joe Elton Nixon.

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.

The Jury was instructed on this factor.

I

Whether the murder was a homicide and committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification?

FINDING

The Jury has found from the evidence presented that the Defendant committed murder in the first degree, inherently finding premeditated intent to effect the death of Jeanne Bickner. The Court finds that verdict supported by the evidence. The Court also finds that there was no pretense of moral or legal justification. The Court has found aggravating circumstance H above to be applicable, however, the question of whether the murder committed by the Defendant was done in a cold and calculated manner is another issue. 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 terorize her, talked with her, ignored her pleas for mercy and methodically incinerated her. Those ac-

tions took place over a span of hours and culminated in her death. There was no evidence that the Defendant's commission of the murder was upon reflection of short duration or the result of sudden impulse.

The Jury was instructed on this factor.

MITIGATING FACTORS

The Defense requested that the Jury not be instructed as to any specific mitigating circumstance. This Court, however, has reviewed and considered each statutory mitigating circumstance and makes its findings below.

A

Whether the Defendant has no significant history of prior criminal activity?

FINDING

The evidence disclosed that the Defendant has an extensive criminal record dating back to age ten. Accordingly, the Jury was not instructed on this factor and the same is rejected by the Court.

B

Whether the murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance?

FINDING

There is no evidence to indicate that the Defendant was under the influence of or suffered from any mental illness, drug abuse or alcohol addiction or was taking drugs or drinking at the time of commission of the murder. Accordingly, the Jury was not instructed on this factor and the Court rejects the same.

C

Whether the victim was a participant in the Defendant's conduct or consented to the act?

FINDING

There is no evidence that the victim in any way consented or participated in the Defendant's actions. Accordingly, the Jury was not instructed on this factor and the Court rejects the same.

D

Whether the Defendant was an accomplice in the murder committed by another person and his participation was relatively minor?

FINDING

There is no evidence that the Defendant was an accomplice in the murder committed by someone else or that his participation was relatively minor. Accordingly, the Jury was not instructed on this factor and the Court rejects the same.

E

Whether the Defendant acted under extreme duress or under the substantial domination of another person?

FINDING

There is no evidence that the Defendant acted under extreme duress or under the substantial domination of another person. Accordingly, the Jury was not instructed on this factor and the Court rejects the same.

F

Whether the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

FINDING

The evidence shows that there were no signs of impairment in the Defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. 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. Accordingly, the Jury was not instructed on this factor and the Court rejects the same.

G

Whether the age of the Defendant at the time of the murder is a mitigating factor?

FINDING

There is no evidence that the age of the Defendant at the time of the murder was a mitigating factor. Accordingly, the

Jury was not instructed on this factor and the Court rejects the same.

H

Whether any aspect of the Defendant's character or record, and any other circumstance of the offense, is a mitigating factor?

FINDING

The Court finds no aspects of the Defendant's character or record that justify the finding of an additional mitigating circumstance.

Evidence was introduced and argument made that the psychological and personality profile of the Defendant was such that his actions were to a degree predictable. In support, Defense argues that the Defendant was brain damaged and of low intelligence, was limited by impaired capacity to reason, subject to sudden and unpredictable swings of temperment and that his ability to function in society has demonstrated steady deterioration over the years without meaningful institutional support. In short, it is argued that the Defendant is not "an intact human being" and thus should not receive the death penalty.

This Court sat as trial judge on all proceedings herein, heard all testimony adduced, was aware of all exhibits introduced and relies on no information not known to the Defendant and his counsel. In so doing, the Court has searched for mitigating factors, statutory and non-statutory, and finds none. The Jury was instructed that the mitigating factors it might consider were unlimited but apparently rejected the existence of any. This Court does likewise.

CONCLUSION

In consequence of the foregoing, and based specifically upon the preceeding findings, the Court has evaluated and considered its sentence. It is the conclusion of this Court that, as a matter of sound and reasoned judgment, as opposed to a cold numerical process, there are sufficient aggravating cir-

cumstances to justify the sentence of death and that there are no mitigating factors that would outweigh the found aggravating circumstances. The Court, therefore, in light of the totality of the evidence and circumstances, concurs with the advisory verdict recommended by the trial jury. It is therefore, upon consideration,

ORDERED AND ADJUDGED as follows:

1. That the Defendant, Joe Elton Nixon, is hereby adjudicated guilty of the offense of murder in the first degree.

2. That the Defendant, Joe Elton Nixon, is hereby sentenced to death for the murder of Jeanne Bickner.

3. That the Defendant, Joe Elton Nixon, shall be taken by proper authority to the Florida State Prison and there be kept under close confinement until the date of his execution be set.

4. That upon the scheduled date of execution of the Defendant, Joe Elton Nixon, he be put to immediate death by having electrical current pass through his body in such amounts and frequency until he is rendered dead.

5. That the Defendant, Joe Elton Nixon, is hereby notified that the conviction, judgment and sentence of death under Florida law are subject to automatic review by the Supreme Court of the State of Florida.

DONE AND ORDERED in open court at Tallahassee, Leon County, Florida, this 30th day of July, A. D. 1985.

J. LEWIS HALL, JR.
Circuit Judge

Copies to:

Anthony Guarisco
James Hankinson
Michael Corin
Joe Elton Nixon

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IN THE SUPREME COURT OF FLORIDA

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

CASE NO 84-2324

DOCKET NO. 67,583

RECEIVED
APR 23 1986
DEPT. OF LEGAL AFFAIRS
CRIMINAL DIVISION

Docketed
4-23-86
Florida Attorney
General

JOE ELTON NIXON

APPELLANT

VS

STATE OF FLORIDA

APPELLEE

VOLUME 4
RECORD ON APPEAL

TRIAL JUDGE: HON. J. LEWIS HALL, JR.

HON. MICHAEL ALLEN
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ATTORNEY FOR APPELLEE

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

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JOE ELTON NIXON

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STATE OF FLORIDA

APPELLEE

VOLUME 4

I N D E X

| DATE FILED | I N S T R U M E N T | PAGE NO. |
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| JAN. 29, 1986 | - TRANSCRIPT OF TRIAL, JULY 22, 1985 -- 541 - 709 | |

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

STATE OF FLORIDA, )
)
vs. ) CASE NO. 84-2324-CF
)
JOE ELTON NIXON, )
)
Defendant. )
_____)

FILED
PAUL FIELD
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA
'85 JUL 29 1 22 PM

RE: Trial

BEFORE: Honorable J. Lewis Hall, Jr.

DATE: July 22, 1985

LOCATION: Courtroom No. 1
Leon County Courthouse
Tallahassee, Florida

TIME: Commenced: 9:00 a.m.
Concluded: 6:45 p.m.

REPORTED BY: Lisa G. Eslinger

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Lisa G. Eslinger
Official Court Reporter
Room 303-A
Leon County Courthouse
Tallahassee, Florida 32301
(904) 222-8962

A P P E A R A N C E S

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State Attorney's Office
Tallahassee, Florida

Representing the Defendant:

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Assistant Public Defender
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Tallahassee, Florida

* * * * *

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* * * * *

you.

THE COURT: All right. Members of the jury, I thank you for your attention during the trial. Please pay attention to the instructions that I'm about to give you.

Joe Elton Nixon, the Defendant in this case, has been accused of the crimes of murder in the first degree, kidnapping, robbery, and arson. A separate crime is charged in each count of the indictment and while they've been tried together, each crime and the evidence applicable to it must be considered separately and a separate verdict returned as to each.

A finding of guilty or not guilty as to one crime must not affect your verdict as to the other crimes charge. If you find Joe Elton Nixon guilty, it should be for the highest offense which has been proved beyond and to the exclusion of all reasonable doubt. If you find that no offense has been proved beyond and to the exclusion of all reasonable doubt, then, of course, your verdict must be not guilty.

In considering the evidence, you should consider the possibility that although the evidence may not convince you that the Defendant committed

the main crimes of which he is accused, there may be evidence that he committed other acts that would constitute a lesser-included crime. Therefore, if you decide that the main accusation has not been proved beyond a reasonable doubt, you will next need to decide if the Defendant is guilty of any lesser-included crimes.

Murder in the first degree includes a lesser crimes of murder in the secon degree, murder in the third degree and manslaughter, all of which are unlawful. A killing that is excusable or was committed by the use of justifiable deadly force is lawful.

If you find that Jeanne Bicker was killed by Joe Elton Nixon, you will then consider the circumstances surrounding the killing and deciding if the killing was murder in the first degree or was murder in the second degree or was murder in the third degree or was manslaughter or whether the killing was excusable or resulted from justifiable use of deadly force.

The killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the Defendant or to commit a felony in any

dwelling house in which the Defendant was at the time of the killing.

The killing of a human being is excusable and, therefore, lawful when committed by accident or misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent or by accident or misfortune in the heat of passion, upon any sudden and sufficient provocation or upon a sudden combat without any dangerous weapon being used and not done in a cruel or unusual manner.

I will now instruct you on the circumstances that must be proven before Joe Elton Nixon may be found guilty of murder in the first degree or any lesser-included crime. With respect to the primary offense of murder in the first degree, before you can find the Defendant guilty of first degree, premeditated murder, the State must prove the following three elements beyond a reasonable doubt.

One, Jeanne Bicker is dead. Two, the death was caused by the criminal act or agency of Joe Elton Nixon. And three, there was a premeditated killing of Jeanne Bicker.

Killing with premeditation is killing after

consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing.

The period of time must be long enough to allow reflection by the Defendant. The premeditated intent to kill must be formed before the killing. The question of premeditation is a question of fact to be determined by you from the evidence.

It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing. If a person has a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated.

A criminal act or agency means evidence that tends to show that Jeanne Bickner died, not as a result of natural or accidental causes or by her own hand, but by the hand of another person under such circumstances that the killing would amount to homicide in any of its degrees.

Before you can find the Defendant if guilty of first degree felony murder, the State must prove the following three elements beyond a reasonable doubt. First, Jeanne Bickner is dead. Second, the death occurred as a consequence of and while Joe Elton Nixon was engaged in the commission of kidnapping or robbery. The elements of these offenses will be defined later in these instructions. The death occurred as a consequence of and while Joe Elton Nixon was committing the crimes of kidnapping and robbery. Third, Joe Elton Nixon was the person who actually killed Jeanne Bickner.

In order to convict a first degree felony murder, it's not necessary for the State to prove that the Defendant had a premeditated design or intent to kill.

With respect to the lesser included offense of murder in the second degree, before you can find the Defendant guilty of second degree murder, the State must prove the following three elements beyond a reasonable doubt. First, Jeanne Bickner is dead. Second, the death was caused by the criminal act or agency of Joe Elton Nixon. And third, there was an unlawful killing of Jeanne

Bicker by an act imminently dangerous to another and evincing a depraved mind regardless of human life.

An act is one imminently dangerous to another and evincing a depraved mind regardless of human life if it is an act or series of acts that, one, a person of ordinary judgment would know was reasonably certain to kill or do serious bodily injury another. And two, is done from an ill will, hatred, spite or evil intent. And three, is of such a nature that the act itself indicates an indifference to human life.

In order to convict of second-degree murder, it's not necessary for the State to prove the Defendant had a premeditated intent to cause death.

Criminal act or agency means evidence that tends to show that Jeanne Bicker died not as a result of natural or accidental causes or by her own hand but by the hand of another person under such circumstances that the killing would amount to homicide in any of its degrees.

With respect to the lesser-included offense of murder in the third degree, before you can find the Defendant guilty of third-degree murder, the

State must prove the following three elements beyond a reasonable doubt.

First, Jeanne Bickner is dead. Second, the death occurred as a consequence of and while Joe Elton Nixon was engaged in the commission of grand theft and false imprisonment. The element of these offenses will be defined later in these instructions. Three, Joe Elton Nixon was the person who actually killed Jeanne Bicker.

It's not necessary for the State to prove that the killing was perpetrated with the design to effect death. With respect to the lesser-included offense of manslaughter, before you can find the Defendant guilty of manslaughter, the State must prove the following elements beyond a reasonable doubt.

One, Jeanne Bickner is dead. Two, the death was caused by the act, procurement or culpable negligence of Joe Elton Nixon. I'll now define culpable negligence for you. Each each of us has a duty to act reasonably towards others. If there's a violation of that duty without any conscious intention to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care for others.

For negligence to be called culpable negligence, it must be gross and flagrant. The negligence must be committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following the course of conduct that the Defendant must have known or reasonably should have known was likely to cause death or great bodily harm.

With respect to the primary charge to the offense of kidnapping. Before you can kind the Defendant will guilty of the charge of kidnapping, the State must prove the following three elements beyond a reasonable doubt.

First, Joe Elton Nixon did forcibly, secretly or by threat confine, and conductor imprison Jeanne Bicker. Second, Joe Elton Nixon did so against the will of Jeanne Bicker and without lawful authority. Third, Joe Elton Nixon did so with the intent to commit or facilitate the commission of robbery.

A taking or confinement is alleged to have been done to facilitate the commission of robbery. To be kidnapping, the movement of confinement involved must not be slight, inconsequential or merely incidental to the offense of robbery. It

must have some significance independent of the offense of robbery in that it makes the offense of robbery substantially easier to commit or substantially lessens the risk of detection.

The fact that relatively short distances are involved makes no difference. The offense of kidnapping includes a lesser-included offense of false imprisonment. And with respect to that offense before you can find the Defendant guilty of false imprisonment, the State must prove the following elements beyond a reasonable doubt.

First, Joe Elton Nixon did forcibly, secretly or by threat confine, abduct, imprison or restrain Jeanne Bickner. Second, Joe Elton Nixon do so against the will of Jeanne Bicker and without lawful authority. And third, Joe Elton Nixon did so for any purpose other than those previously defined in the kidnapping instructions.

With respect to the primary charge of the offense of robbery, before you can find the Defendant guilty of robbery, the State must prove the following four elements beyond a reasonable doubt.

First, Joe Elton Nixon took the motor vehicle, jewelry or United States currency from the

person or custody of Jeanne Bickner. Second, the taking was by force, violence or assault or by putting Jeanne Bickner in fear.

Third, the property taken was of some value. Fourth, Joe Elton Nixon took the motor vehicle, jewelry or United States currency from the person or custody of Jeanne Bickner and at the time of the taking Jeanne Bickner of the motor vehicle, jewelry or United States currency.

The taking must be by the use of force or violence or by assault so as to overcome the resistance of the victim or by putting the victim in fear so that she does not resist. The law does not require that the victim of robbery resist to any particular extent or that she offer any actual physical resistance if the circumstances are such that she is placed in fear of death or great bodily harm if she does resist.

But unless prevented by fear, there must be some resistance to make the taking one by force or violence. In order for a taking by force or violence or putting in fear to be robbery, it's not necessary that the taking be from the person of the victim. It's sufficient if the property taken is under the control of the victim so that it cannot



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be taken without the use of force, violence or intimidation directed against the victim.

The offense of robbery includes the lesser offenses of grand theft and petty theft. With respect to those offenses, before you can find the Defendant guilty of theft, the State must prove the following two elements beyond a reasonable doubt.

First, Joe Elton Nixon knowing and unlawfully obtained or used the vehicle, jewelry or United States currency of Jeanne Bickner. And second, he did so with the intent to temporarily or permanently deprive Jeanne Bickner of her right to the property or any benefit from it.

Punishment provided by law for the crime of theft is greater depending upon the property taken. Therefore, if you find the Defendant guilty of theft, you must determine by your verdict whether, (A), the property taken was a motor vehicle or (B), the value of the property was less than a hundred dollars.

Proof of possession of recently stolen property unless satisfactorily explained gives rise to an inference that the person in possession of the property knew or should have known that the property had been stolen.



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Obtains or uses means any manner of taking or exercising control over property, making any unauthorized use, disposition or transfer of property, obtaining property by fraud, any conduct known as stealing, larceny any, embezzlement, conversion, obtaining money by property or false pretenses, fraud, deception or any other conduct similar in nature.

With respect to the primary charge, the offense of arson, before you can find the Defendant guilty of arson, the State must prove the following three elements beyond a reasonable doubt.

First, Joe Elton Nixon damaged a motor vehicle owned by another by fire. Second, the damage was done willfully and unlawfully. Third, the motor vehicle is a structure. A structure means any vehicle.

The offense of arson includes a lesser offense of criminal mischief. And with respect to that offense, before you can find the Defendant guilty of criminal mischief, the State must prove the following three elements beyond a reasonable doubt.

First, Joe Elton Nixon damaged a motor

vehicle. Second, the property damaged belonged to Jeanne Bicker. Third, the injury or damage was done willfully and maliciously.

Willfully means intentionally, knowingly, purposefully. Maliciously means wrongfully, intentionally, without legal justification or excuse and with the knowledge that injury or damage will or may be caused to another person or to the property of another person.

Now, to these charges the Defendant has entered a plea of not guilty. This means that you must presume or believe the Defendant is innocent. The presumption stays with the Defendant as to each material allegation in the indictment through each stage of the trial until it's been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome the Defendant's presumption of innocence, the State has the burden of proving the following two elements beyond a reasonable doubt. First, the crime with which the Defendant is charged was committed. Second, the Defendant is the person who committed the crime. The Defendant is not required the prove anything.

Whenever the words "reasonable doubt" are

used, you must consider the following. A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt.

On the other hand, if after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or if having a conviction, it's one which is not stable but one which wavers and vascillates, then the charge is not prove beyond a reasonable doubt and you must find the Defendant not guilty because the doubt is reasonable.

It to the evidence introduced upon this trial and to it alone that you are to look for a proof. A reasonable doubt as to the guilt of Defendant may arise from the evidence, conflict in the evidence or the lack of evidence. If you have a reasonable doubt, you should find the Defendant not guilty. If you have no reasonable doubt, you should find the Defendant guilty.

It's up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence and which

evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable or less reliable than other evidence.

You should consider how the witnesses acted as well as what they said. Some of the things you should consider are: Did the witness seem to have an opportunity to see and know the things about which the witness testified? Did the witness seem to have an accurate memory?

Was the witness honest and straightforward in answering the attorneys' questions? Did the witness have some interest in how the case should be decided? Does the witness' testimony agree with the other testimony and the other evidence in the case? You may rely upon your own conclusions about the witnesses.

A juror may believe or disbelieve all or any part of the evidence or testimony of any witness specified witnesses are like other witnesses with one exception. The law permits an expert witnesses to give his opinion. An expert's opinion, however, is only reliable when given on a subject about which you believe him to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

A statement claimed to have been made by the Defendant outside of Court has been placed before you. Such a statement should always be considered with caution and weighed with great care to make certain it was freely and voluntarily made.

Therefore, you must determine from the evidence that the Defendant's alleged statement was knowingly and voluntarily and freely made. In making this determination, you should consider the total circumstances, including but not limited to:

One, whether when the Defendant made the statement, he had been threatened in order to get him to make it. Two, whether anyone had promised him anything in order to get him to make it. If you conclude the Defendant's out-of-Court statement was not freely and voluntarily made, you should disregard it.

Circumstantial evidence is legal evidence in a crime, and any fact to be proved may be proved by such evidence. A well-connected chain of circumstances is as conclusive in proving a crime or fact as is positive evidence. Its value is dependent upon its conclusive nature and tendencies.

Circumstantial evidence is governed by the

following rules: One, the circumstances themselves must be proved beyond a reasonable doubt. Two, the circumstances must be consistent with guilt and inconsistent with innocence. Third, the circumstances must be of such a conclusive nature and tendency that you are convinced beyond a reasonable doubt of the Defendant's guilt, the facts to be proved.

If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence. Circumstances which standing alone are insufficient to prove or disprove any fact may be considered by you in weighing direct and positive evidence.

There are some general rules that apply to your discussion, and you must follow these rules in order to return a lawful verdict. First, you must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice.

There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in the matter. Secondly, the case must be decided only upon the

evidence that you heard from the answers of the witnesses and seen in the form of exhibits in evidence and these instructions.

Third, this case must not be decided for or against anyone because you feel sorry or angry at anyone. Fourth, remember, the lawyers are not on trial. Your feelings about them should not influence your decision in the case. Fifth, your duty is to determine if the Defendant is guilty or not guilty in accord with law. My job as judge is to determine what a proper sentence would be if the Defendant is guilty.

Six, whatever verdict you render must be unanimous. That is, each juror must agree to the same verdict. Seven, it's entirely proper for a lawyer to talk to the witness about what testimony the witness would give if called to the courtroom. A witness must not be discredited for talking to a lawyer about testimony.

Feelings of prejudice, bias or sympathy are not legally reasonable doubts and should not be discussed by any of you in any way. Your verdict must be based on your views of the evidence and on the law contain in these instructions.

I will now inform you of the maximum and



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minimum possible penalties for murder in the first degree. The penalty is for the Court to decide. You are not responsible for the penalty in any way because of your verdict.

The possible results of this case will be disregarded as you discuss your verdict. Your duty is to discuss only the question of whether the State has proved the guilt of the Defendant in accordance with these instructions.

The maximum penalty for the crime of murder in the first degree is death in the electric chair. The minimum penalty for the offense shall be life in prison without possibility of parole for 25 years.

Deciding a verdict is exclusively your job. I cannot participate in that decision in any way. Please disregard anything that I may have said or done that made you think I preferred one verdict over another.

Only one verdict may be returned as to each crime charge. The verdict must be unanimous. That is, all of you must agree to the same verdict. The verdict must be in writing. And for your convenience, the necessary forms of verdict have been prepared for you. I will review them with you

at this point.

Count one, the primary charges of murder in the first degree, you are presented with a series of options for your considerations. The first of which is: We, the jury, find the Defendant Joe Elton Nixon guilty as charged of murder in the first degree. If that's your verdict, that is the option your foreperson should date and sign for you.

The next option is: We, the jury, find the Defendant Joe Elton Nixon guilty of the lesser included offense of murder in the second degree. If that's your verdict, then that is the option your foreperson should date and sign for you.

The next option is: We, the jury, find the Defendant Joe Elton Nixon guilty of the lesser included offense of murder in the third degree. If that's your verdict, then that's the option your foreperson should date and sign for you.

The next option is: We, the jury, find the Defendant Joe Elton Nixon guilty of lesser included offense of manslaughter. If that's your verdict, that's the option your foreperson should date and sign for you.

The remaining option is: We, the jury, find

the Defendant Joe Elton Nixon not guilty. If that's your verdict, then that's the option your foreperson should date and sign for you.

There's a special verdict that accompanies that charge. If and only if you reach a verdict of guilty of murder in the first degree, you will then turn your attention to the special verdict. It, likewise, presents you with several options.

If you find the Defendant guilty of murder in the first degree, you need to check one of the following options. The first one is that: We further find that guilt was established by proof of premeditation. If that's your option, then that's the one that should be checked in the blank opposite that phrase.

The next option is: We further find that guilt was established by proof of felony murder by committing a kidnapping. If that was the basis for your verdict, should you reach that verdict, then that's the option that you should check.

The next option is that: We further find that guilt was established by proof of felony murder by committing a robbery. If that is the basis of your verdict, then that's the option that should be checked.

And then the final option is: We further find that guilt was established by proof of premeditation and felony murder. And if that is the option, then that should be checked and your foreperson should date and sign the verdict on your behalf.

With respect to the offense charged in count two, kidnapping, you are presented with three options. The first of which is: We, the jury, find the Defendant Joe Elton Nixon guilty as charged the kidnapping. If that's your verdict, that's the option that should be signed and dated for you.

The second option is: We, the jury, find the Defendant Joe Elton Nixon guilty of the lesser-included offense of false imprisonment. If that's the verdict, that's the option that should be dated and signed.

The remaining option is: We, the jury, find the Defendant Joe Elton Nixon not guilty. If that is your verdict, then that's the option that your foreperson should date and sign for you.

Wrap to the offense charged in the count three if the indicement, robbery, a series of options is presented to you. The first is: We,

the jury, find the Defendant Joe Elton Nixon guilty as charged of robbery. If that is your verdict, that's the option that should be dated and signed for you.

The second option is: We, the jury, find the Defendant Joe Elton Nixon guilty of the lesser included offense of grand theft of a motor vehicle. If that is your verdict, then that's the option that should be signed and dated for you.

The third option is: We, the jury, find the Defendant Joe Elton Nixon guilty of the lesser included offense of petty theft. If that's your verdict, that's the option that should be signed and dated on your behalf.

The remaining option: We, the jury, find the Defendant Joe Elton Nixon not guilty. If that is your verdict, that's the option that should be dated and signed by your foreperson.

With respect to the charged offense in count four of the indictment, arson, you are presented with three options. We, the jury, find the Defendant Joe Elton Nixon guilty as charged of arson. If that's your verdict, then that's the option that should be dated and signed on your behalf.



APP. 000048

The second option is: We, the jury, find the Defendant Joe Elton Nixon guilty of the lesser-included offense of criminal mischief. If that's your verdict, then that's the option that should be dated and signed on your behalf.

The remaining option: We, the jury, find the Defendant Joe Elton Nixon not guilty. If that is your verdict, then that is the verdict that should be signed and dated on your behalf by your foreperson.

In a few moments, you will than taken to the jury room by the Bailiff, and the first thing you should do is to elect a foreperson. A foreperson presides over your deliberations like the chairperson of a meeting. It's the foreperson's job to date and sign the verdict form when all of you have agreed on a verdict in the case.

The foreperson will bring the verdict back to the courtroom when you return. Obviously, either a man or a woman may be the foreperson of a verdict.

Your verdict finding the Defendant either guilty or not guilty must be unanimous. The verdict must be the verdict of each juror as well as the jury as a whole.

In closing, let me remind you that it is



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important that you follow the law spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them.

For two centuries, we have agreed to a Constitution and to live by the law. No one of us has the right to violate if the rules we all share.

All right. If you will remain for just a moment. May I see counsel and Madam Court reporter at the Bench.

(WHEREUPON, A BENCH CONFERENCE WAS HELD AND THE FOLLOWING PROCEEDINGS HAD.)

THE COURT: We previously had the charging conference in which all points were made with respect to the charge the Court has given. The law requires that counsel have the opportunity before the jury retires to pose any objections that they might have further or to reaffirm the objections previously made.

MR. CORIN: I would reaffirm my prior objections.

THE COURT: In the event of appeal, let the record show that it's been perfected for that

purpose. The Court is aware of it. The rulings made at that time remain the same. Anything from the State?

MR. HANKINSON: I just noted one duplication. I don't know when it is. It shows here that it's to start -- (indicating to Court)

THE COURT: I don't think it's going to make any difference. It's just a repeat.

Are we ready to dispatch the jury to the juryroom? I have made arrangements for the alternate juror to be placed in a separate room away from the jury and will not participate in the deliberations in this phase. He will remain in a sequestered state until the jury returns its verdict in this case, at which time he will be able to return to the courtroom with them. Is that agreeable to counsel?

MR. HANKINSON: Yes.

MR. CORIN: Yes.

THE COURT: It occurs to me that because I was reading from prepared printed instructions, I did not is instruct the jury with respect to the procedure to be followed in the event they have a question. I think it will be advisable to inform them of that procedure. Is there any objection to

that being done without printed instructions?

MR. CORIN: No problem.

THE COURT: Concur that it should be done?

MR. CORIN: Yes.

(END OF BENCH CONFERENCE.)

THE COURT: Ladies and gentlemen of the jury, it may well be that during the course of your deliberations, you will want to ask a question or pose a question to the Court. If you do so, a pad and pencil will be provided to you for a that purpose.

It is a jury question and not a juror, question. Therefore, each of you will have an opportunity to participate in the formulation of that question. Write it out. Knock on the door. Hand it to the Bailiff. He'll deliver it to me.

I will meet with counsel, the Court Reporter. The question will be considered and appropriate response will be prepared. We'll come back into the courtroom and the question will be read in to the record and the response will be given to you at that time.

If when we're in the courtroom, one of you thinks that that a follow-up question is appropriate, don't ask it. That would be a juror

question and not a jury questions. Simply return back to the juryroom, acquaint your fellow jurors with your concern or your suggestion. Let all of them have an opportunity to participate in it, if that's what you want to do, and then repeat the procedure.

Do not ask the bailiffs questions. They cannot answer it. It would be improper for them even to attempt to do so. It merely places them in a very awkward position.

The tape that was played to you earlier is in evidence. All matters that are in evidence will be taken to the jury room for your examination. Should you desire the tape to be played, a smaller tape recorder is available for that purpose. Simply let us know and it will be provided for at that time.

If none of you can figure out how the tape recorder that you are furnished works to play the tape, simply knock on the door and inform the bailiff. We will have the tape played for you in a different fashion.

All right. Mr. Bailiff. As I informed the jury earlier, I believe we've come to the point where most of us in the courtroom in this phase of the case have concluded your job and you are only

about to start the one you came here for.

The alternate juror will be escorted to a separate room where he will remain sequestered during the course of your deliberation.

(WHEREUPON, THE JURY RETIRED TO DELIBERATE AT 5:45 P.M.)

THE COURT: Gentlemen, we will be at ease then and await word from the jury. Thank you.

(RECESS TO AWAIT VERDICT TAKEN.)

THE COURT: Let me inquire of counsel. The alternate, of course, is in the a separate room sequestered. Do you wish to allow him to come in with the jury for the announcement of the verdict, or would it be your preference that he remain there and then they just collect him up on the way out?

MR. CORIN: I'd just as soon have him in Court.

THE COURT: When you bring the jury in, would you pick up the alternate. He will be seated with them at that time.

(WHEREUPON, THE JURY WAS BROUGHT IN THE COURTROOM.)

THE COURT: Mr. Guess, you are foreperson of the jury.

MR. GUESS: Yes, sir, I am.

THE COURT: Mr. Clerk, would you receive the verdict. Ladies and gentlemen of the jury, harken to your verdict.

With respect to count one, the verdict is: We, the jury, find the Defendant Joe Elton Nixon guilty as charged of murder in the first degree. With respect to the special verdict in conjunction with that, if you find the Defendant guilty of murder in the first degree, you need to check one of the following options.

The option checked by the jury is that: We further find that guilt was established by proof of premeditation and felony murder.

With respect to count two, the verdict of the jury is: We, the jury, find the Defendant Joe Elton Nixon guilty as charged of kidnapping. With respect to count three: We, the jury, find the Defendant Joe Elton Nixon guilty as charged of robbery. With respect to count four, the verdict is: We, the jury, find the Defendant Joe Elton Nixon guilty as charged of arson.

All the verdicts and the special verdict dated July 22, 1985. Signed by Harrison J. Guess as foreman.

Is there a desire to have the jury polled,

Mr. Corin?

MR. CORIN: No, Your Honor.

THE COURT: Ladies and gentlemen of the jury, we're going to recess our proceedings today. It is conventional that in the event that a verdict of murder in the first degree is returned that there be one-day lapse time between that verdict and the commencement of the penalty phase. It gives the lawyers an opportunity to review the evidence and prepare themselves more completely for that.

So, tomorrow, you will not be coming to Court. You will still remain in sequestration, and we will start the penalty phase targeted for the 9:45 Wednesday morning. It's my anticipation that will probably take one day to present that evidence to you, and you should get the case at the end of that day.

That's just my expectation. It could go in to the next day. If so, then that's what we will do. We laid aside, as you well know, during the voir dire two full days. My estimates are guesses, are not sacred. It's just simply my best estimate of the situation.

So, our penalty phase may go for one day. It

may well go for two days. In any event, the same approach will be taken is that you will be given sufficient breaks. Our timing will be such that you will be rested and able to assimilate that information and deliberate it thoroughly.

It's not a race. We are in no hurry. I can assure that that we will see if we can get the air conditioning cranked back up and hope that you will be cooler. It's not meant as a facetious comment.

When you are deliberating a matter of this nature, those are no longer amenities, but something that we wish to have fixed so that your deliberations may be comfortable and not distracted by matters extrinsic to your task.

So, at this point, we will discharge you into the bailiff's care. We will be back here Wednesday morning at 9:45.

(JURY ESCORTED OUT OF COURTROOM.)

THE COURT: If there no objections, I'll continue to retain custody of the file. Any problem with that, Mr. Corin?

MR. CORIN: No, sir.

THE COURT: Do we have anything further that needs to be brought up at this time?

MR. GUARISCO: No.

VOLUME 6

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

JOE ELTON NIXON,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

CASE NO. 84-2324-CF

FILED
MAR 13 2 43 PM '86
PAUL F. HARTSFIELD
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

PROCEEDINGS: Jury Trial
(Continuation of Penalty Phase)

PRESIDING JUDGE: Honorable J. Lewis Hall, Jr.

DATE: Thursday, July 25, 1985

LOCATION: Judge's Chambers and
Courtroom No. 1
Leon County Courthouse
Tallahassee, Florida

REPORTED BY: Betty Kirkland, RPR
Official Court Reporter

- - - - -

APPEARANCES:

For the State of Florida:

MR. TONY GUARISCO
-and-
MR. JAMES HANKINSON,
Assistant State Attorneys
Lewis State Bank Building
Tallahassee, Florida

For the Defendant:

MR. MICHAEL CORIN,
Assistant Public Defender
Barnett Bank Building
Tallahassee, Florida

- - - - -

PENGAD INDY. MUNCIE. IN 47302
SF-FL-10

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don't be hasty, because one vote could decide that point. It's not a unanimous situation.

If you want to recommend death, you'll have to do it seven to five; and if you want to recommend life, you will have to have six of you to do that.

Of course, I'm afraid that that's what you are going to do.

Doctor Doerman, I-- I don't think he tried to tell you yesterday what you should do. I think he was pretty open and honest. And I did ask him, in response to Mr. Guarisco's question about whether he believed in capital punishment-- I don't know what the purpose of that question was. But he said, yes, he did, but only for an intact human being.

And Joe Elton Nixon is not one of those. He's never been one of those. He never will be one of those.

You know, we're not around here all that long. And it's rare when we have the opportunity to give or take life. And you have that opportunity to give life. And I'm going to ask you to do that. Thank you.

THE COURT: Ladies and Gentlemen, it is now your duty to advise the Court as to what punishment should be imposed on the defendant for his crime of murder in the first degree.



PENGAD/INDY. MUNCIE. IN 47302

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law that will now be given to you by the Court, and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether mitigating circumstances exist, and if so, whether the aggravating circumstances, if any, are sufficient to outweigh the mitigating circumstances.

Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence phase of the defendant, and the evidence that has been presented to you in these proceedings.

The aggravating circumstances that you may consider are limited to any of the following, which must be established by the evidence beyond a reasonable doubt:

First: The defendant has been previously convicted of another capital offense, or of a felony, involving the use or threat of violence to some person.

I instruct you that the crime of armed robbery and battery of a law enforcement officer is a felony involving the use or threat of violence to another

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person.

Second: The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of kidnapping.

Third: The crime for which the defendant is to be sentenced was committed for financial gain.

Fourth: The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

Fifth: The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification.

If you find the aggravating circumstances do not justify the death penalty, your advisory verdict should be one of life imprisonment, without possibility of parole for 25 years.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist, and if so, whether the aggravating circumstances are sufficient to outweigh the mitigating circumstances.

The mitigating circumstances which you may consider are unlimited, and you may consider any evidence presented at trial or during the sentencing



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SF-FL-10

proceedings in mitigation of the defendant's sentence.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence, and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous. A decision to impose death may be made by seven or more votes. A decision to impose life imprisonment, without possibility of parole for 25 years, may be made by six or more votes.

The fact that the determination concerning your advisory sentence in this case can be reached by

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a single ballot should not influence you to act hastily or without due regard to the legality of the proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury determine that Joe Elton Nixon should be sentenced to death, your advisory sentence will be:

A majority of the jury advise and recommend to the Court that it impose the death penalty upon Joe Elton Nixon.

On the other hand, if by six or more votes, the jury determines that Joe Elton Nixon should not be sentenced to death, your advisory sentence will be:

The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Joe Elton Nixon, without possibility of parole for 25 years.

You will now retire to consider your recommendation. When six or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreperson and returned to the Court.

Before the jury retires, let me see counsel and Madam Court Reporter at the bench.

PENGAD/INDY. MUNCIE, IN 47302
SF-FL-10

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

STATE OF FLORIDA,

Plaintiff,

vs.

JOE ELTON NIXON,

Defendant.

CASE NO. 84-2324

FILED
OCT 29 9 21 AM
PAUL F. HARTSFIELD
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

HEARING IN RE: DISPOSITION

BEFORE: THE HONORABLE J. LEWIS HALL, JR.
CIRCUIT JUDGE
STATE OF FLORIDA

DATE: JULY 30, 1985

TIME: APPROXIMATELY 8:15 A.M.

LOCATION: IN CHAMBERS
LEON COUNTY COURTHOUSE
TALLAHASSEE, FLORIDA

REPORTED BY: JADA DOLCATER, RPR, CCR
OFFICIAL COURT REPORTER
318-A LEON COUNTY COURTHOUSE
TALLAHASSEE, FLORIDA 32301

FORM OR-325 REPORTERS PAPER & MFG. CO. 800-626-6313

APPEARANCES:

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Tallahassee, Florida

For the Defendant:

MICHAEL CORIN, ESQ.
Assistant Public Defender
Barnett Bank Building
Tallahassee, Florida

*  *  *

FORM OR-325 REPORTERS PAPER & MFG. CO. 800-626-6313

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FORM OR-325 REPORTERS PAPER & MFG. CO. 800-626-6313

P R O C E E D I N G S

THE COURT: Case No. 84-2324, State versus Joe Elton Nixon.

The Defense has filed a motion for new trial. The Court now denies that motion of record.

We have a sentencing hearing at this point. Any comments from the State?

MR. GUARISCO: Yes, sir, Your Honor. Since the jury has returned a recommendation, of course, that the death penalty be imposed, the State would urge the Court to impose the death penalty as to the first-degree murder conviction.

As to the Defendant's conviction for kidnapping, robbery, arson, the State would request the Court to depart from the guideline sentence and sentence the Defendant to the maximum penalties allowable under the law. As to the kidnapping, we request life imprisonment; as to the robbery, we request 15 years; as to the arson, we request 15 years; all sentences to run consecutive to each other and consecutive to the death penalty and consecutive to all other sentences that have been imposed on the Defendant.

The State would ask the Court to consider in departing from the guidelines that the guidelines are not appropriate for a case of this magnitude, that a

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first-degree murder was the end result of the kidnapping and the robbery of Jeanne Bickner, that the sentencing guidelines do not make any allowances to factor this in, that the guideline sentence in this case would be insufficient for retribution, deterrent, or rehabilitation.

Consideration should also be given to the malicious, wanton, cruel treatment of Jeanne Bickner by the Defendant, the physical and psychological trauma suffered by Jeanne Bickner prior to her death. The crime scene photographs tell the whole story, Your Honor, on that part.

Finally, the Court should consider the Defendant's prior history of criminal misconduct which has been made a part of the trial. The Defendant's history shows that he cannot be rehabilitated. The public needs to be protected from further criminal acts by the Defendant.

THE COURT: Mr. Corin?

MR. CORIN: Your Honor, some people have said, I guess rather facetiously, that the sentencing order in this case was perhaps written after the 11 o'clock news on August 13, 1984, and it only remained to pencil in Mr. Nixon's name the following day.

My own view is that perhaps the sentencing order in

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this case was written on August 23rd, 1961, when Joe Elton Nixon was born; and at the very latest, it was written in 1972 upon his first admission to the institutions that have predicted what might have occurred and what did occur. I expressed my thoughts in the matter to the jury last week, and the Court is well aware of my beliefs concerning what the Court ought to do. In my heart I wish the Court to do what I had requested last week when the jury recommended. In my mind, I don't think it will be possible.

THE COURT: All right, with respect to the offense of kidnapping, the Court adjudicates the Defendant guilty of that offense, to be committed to the Department of Corrections for confinement to an institution of its designation for a sentence of life imprisonment, that to run consecutive to any pending sentences presently in force.

With respect to the offense of arson, the Court adjudicates the Defendant guilty of that offense, to be sentenced to an institution to be designated by the Department of Corrections for a period of 15 years to run consecutive to the sentence I have just imposed and other sentences.

With respect to the offense of robbery, adjudicate the Defendant guilty of that offense, to be sentenced to

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the Department of Corrections in an institution of its designation for a period of 15 years, that likewise to run consecutive.

That sequence of sentencing constitutes departure from the sentencing guidelines. I have prepared the Order. File that contemporaneously with these proceedings. Bases of the departure: emotional trauma suffered by the victim in this case. A second point, escalating course of criminal conduct. Third, habitual offender classification previously entered by the Court.

With respect to the offense of first-degree murder, the Court adjudicates the Defendant guilty of that offense, and to be transported to Florida State Prison to there await execution by the electric chair.

The Defendant has automatic and immediate right of appeal to the Supreme Court of the State of Florida.

MR. CORIN: Your Honor, with regard to the departure from the sentencing guidelines. I think if I might state the grounds that the Court had indicated, I would object to those.

Specifically, I think the matter of the emotional trauma was factored in when a jury made their recommendation concerning first-degree murder. The course of conduct of Mr. Nixon is also a matter that was

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factored in pursuant to the aggravating circumstances urged by the State last week. And the matter of Mr. Nixon as an habitual offender, I would just point out that while there is a sentencing Order from Judge Miner entered August 27, 1984, finding Mr.Nixon to be an habitual offender, there is a subsequent Order from this Court on another conviction where it was not urged as a proper disposition.

THE COURT: All right, Madam Clerk, here is the Order departing from the sentencing guidelines, written Order of sentence and judgment in the first-degree murder case.

All right, fingerprint the Defendant.

(WHEREUPON, THE DEFENDANT WAS FINGERPRINTED AND THE HEARING ADJOURNED)

* * *

FORM OR-325 REPORTERS PAPER & MFG. CO. 800-626-6313

CERTIFICATE OF REPORTER

STATE OF FLORIDA )

COUNTY OF LEON )

I, JADA DOLCATER, Registered Professional Reporter; Official Court Reporter in and for the State of Florida; and Certified Court Reporter, State of Georgia:

DO HEREBY CERTIFY that the foregoing proceedings were reported by me at the time and place therein designated; that thereafter my shorthand notes were reduced to typewriting under my personal supervision; and the foregoing pages, numbered 3 through 7, inclusive, are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel.

WITNESS MY HAND AND SEAL THIS, THE 28th DAY OF October, A.D., 1985, IN THE CITY OF TALLAHASSEE, COUNTY OF LEON, STATE OF FLORIDA.

Jada Dolcater

JADA DOLCATER, RPR, CCR
OFFICIAL COURT REPORTER
STATE OF FLORIDA

FORM OR-325 REPORTERS PAPER & MFG. CO. 800-626-6313

95-112161

CORRECTED

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

CRIMINAL DIVISION

RECEIVED & DOCKETED
FLORIDA ATTORNEY GENERAL

NOV 29 1995

CAPITAL COLLATERAL
SECTION - TALLAHASSEE

JOE ELTON NIXON,

Movant,

v.

CASE NO. 84-2324

STATE OF FLORIDA,

Respondent.
_____/

95-112161TCA NIXON, Joe E. (State v.)
(Martell) DEATH 3.850 to Cir. Court
#84-2324, Leon County (10/14/93)

# MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE, AND CONSOLIDATED REQUEST THAT LEAVE TO AMEND BE ALLOWED

JONATHAN LANG
1114 Avenue of the Americas
42nd Floor
New York, NY 10036-7794
(212) 626-4204
Attorney for Defendant,
Joe Elton Nixon

JONATHAN LANG
1114 Avenue of the Americas
42nd Floor
New York, New York 10036-7794

(212) 626-4204

RECEIVED
93 OCT 15 AM 10: 34
WILLIAM [illegible]
STATE ATTORNEY

October 14, 1993

Clerk of the Circuit Court
Leon County
Leon County Courthouse
Tallahassee, FL 32303

Re: Joe Elton Nixon, Movant
v.
State of Florida, Respondent.

Case No. 84-2324.

Dear Sir:

Enclosed is a corrected copy of the Rule 3.850 Motion and the accompanying Appendix. Copies are being served on the State today, as indicated by the certificate of service.

Sincerely,

Jonathan Lang (aff)

Jonathan Lang
Attorney for Joe Elton Nixon

Encl

CLAIM XV

MR. NIXON'S SENTENCE OF DEATH WAS BASED UPON UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTIONS AND THEREFORE VIOLATES HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION.

This claim is evidenced by the following facts:

1. All other allegations and factual matters in this motion and the appendices thereto are fully incorporated herein by specific reference.

2. In Johnson v. Mississippi, 486 U.S. 578 (1988), the Supreme Court held that basing a death sentence in part on evidence of a prior conviction that was reversed because it was unconstitutionally obtained violates the principle that a death sentence may not be "predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" Johnson, 486 U.S. at 585, quoting Zant v. Stephens, 462 U.S. 862, 884-85 (1983). Like a conviction that has actually been reversed, a conviction that was obtained in violation of a defendant's fundamental constitutional rights provides "no legitimate support," Johnson, 486 U.S. at 586, for a death sentence.

3. The trial court based Mr. Nixon's death sentence in part on the aggravating circumstance that he had two prior convictions for violent felonies, a 1980 armed robbery conviction and a 1985 conviction for battery on a law enforcement officer. R. 221. The jury was also instructed to consider the convictions as an aggravating circumstance. R. 1041. As set forth below, these convictions were obtained in violation of Mr. Nixon's Fifth, Sixth and Fourteenth

Amendment rights. Because Mr. Nixon's death sentence is based in part on the 1980 and 1985 convictions, this Court is required to review his claim that those convictions, and thus his death sentence, were unconstitutionally obtained. See Maleng v. Cook, 104 L.Ed.2d 540 (1989) (petitioner in action under 28 U.S.C. § 2254 could challenge prior conviction used to enhance sentence for subsequent conviction). This Court has the duty to review Mr. Nixon's Johnson claim pursuant to Fla.R.Crim.P. 3.850.

A. The 1980 Conviction

4. On July 21, 1980, Joe Nixon pled guilty in the Superior Court of Early County, Georgia, to a single count of armed robbery. Allegedly, Joe's cousin, Eddie Ingram and Joe had tried to rob a Majik Mart convenience store. Eddie had the only "weapon," a butter knife. Before the robbery was completed, the pair were arrested. Both Joe, who is mentally retarded, and Eddie were intoxicated. Id. There is no record of any plea colloquy. In exchange for his guilty plea, Joe was placed on probation for twenty years and banished from South Georgia.

5. Joe Nixon was mentally retarded and mentally ill at the time of the 1980 armed robbery and guilty plea. See Reports of Drs. Dee, Keyes and Whyte, Appendices 2, 3 and 4. Since all of Joe's mental deficits are of a long-standing nature, these findings raise a bona fide doubt concerning his competency to plead guilty in 1980.

B. The 1980 Conviction Was Based on a Guilty Plea That Was not Voluntary and Intelligent, Is not Reflected in the Record, and Resulted from Ineffective Assistance of Counsel

6. A conviction based on a guilty plea that was not "voluntary and intelligent," North Carolina v. Alford, 400 U.S. 25, 31 (1970), violates the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243 (1969). The fact that the waiver of those rights is voluntary, knowing and intelligent must appear on the record. Id. By definition, a defendant who is incompetent is not competent to voluntarily and intelligently waive those rights. Tiller v. Esposito, 911 F.2d 575, 576 (11th Cir. 1990), citing Dusky v. United States, 362 U.S. 402 (1960) (per curiam); Pate v. Robinson, 383 U.S. 375 (1966). Moreover, where the defendant was represented by counsel, he may attack the voluntariness of his plea by showing that his counsel failed to provide effective assistance, including a showing that the defendant was prejudiced by counsel's failures. Hill v. Lockhart, 474 U.S. 52 (1985); Tollett v. Henderson, 411 U.S. 258, 267 (1973). Mr. Nixon was not competent to plead, and his 1980 counsel failed to provide effective assistance to him, with the result that his guilty plea and conviction violated the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution.

7. The fact that Joe Nixon was seriously mentally disturbed in 1980 should have been readily apparent to counsel. Moreover, it was obvious that Joe was very young and that his mental ability and education were extremely limited. Given these facts, it must have been apparent to Mr. Nixon's Georgia counsel that there were serious

questions concerning his client's competence, and that those questions both had to be answered before his client could plead and were also a potentially successful defense. Therefore, Mr. Nixon's counsel had a duty to investigate so that he could make a reasoned decision whether or not to raise his client's competency. See Strickland v. Washington, 466 U.S. 668, 690-91 (1984). Based on the information available to current counsel, it does not appear that any investigation of Mr. Nixon's competency was conducted, or that any hearing on the issue was held.

8. Georgia counsel's failure to pursue the issue of Joe Nixon's competence and sanity was unreasonable. Based on the experts' conclusions regarding Joe's competence and his overall evaluation of Joe, there are serious questions concerning Joe's competence in 1980, questions that should have led trial counsel to move for a competency determination. Based on the apparent lack of any evaluation of Mr. Nixon's competence, Georgia counsel had no way of knowing if Joe was competent to plead guilty and no way of evaluating the information provided to him by Joe.

10. Having failed to take even the most minimal steps to determine whether his client was competent, counsel was in no position to give Mr. Nixon advice on his plea that was "within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771 (1970). This satisfies the deficient assistance prong of Hill, supra. It is also clear that Mr. Nixon was prejudiced by his counsel's deficiencies.

11. Based on the evidence set forth above, it is reasonably likely that, if a competency evaluation had been performed in 1980, Joe Nixon would have been found incompetent to stand trial. If so, he would also have been incompetent to plead guilty, for a guilty plea must be "intelligent and voluntary." Boykin, supra, 395 U.S. at 242. Accordingly, the conviction of Mr. Nixon based on a plea rendered while he was incompetent violates due process. Tiller v. Esposito, supra. Moreover, there is a "reasonable probability" that, but for trial counsel's deficient performance, Mr. Nixon would not have pleaded guilty. Hill, supra, 474 U.S. at 59.

C. Mr. Nixon's 1985 Conviction for Battery on a Law Enforcement Officer Was Obtained in Violation of His Rights Under the Fifth, Sixth and Fourteenth Amendments, Inasmuch as He Was Incompetent at the Time of His Trial, and Counsel Was Ineffective for Failing to Conduct a Proper Investigation of His Competency and to Seek a Competency Hearing

12. The trial on Mr. Nixon's battery charge took place on February 12, 1985. During voir dire, counsel informed the court that Mr. Nixon was not cooperating with him, and asked to have Mr. Nixon "examined." Assault R. 58-59. Counsel did not specifically request a competency determination pursuant to Florida Rule of Criminal Procedure 3.210. The court refused to have Mr. Nixon examined during voir dire, but arranged for an examination during a lunch break. Voir dire therefore continued with no communication or cooperation between counsel and Mr. Nixon.

13. Carolyn Stimel, Ph.D., a psychologist, examined Mr. Nixon during the lunch break. Mr. Nixon refused to return to court after the lunch break. Assault R. 73. Dr. Stimel gave an oral assessment of Mr. Nixon in court. She recounted that she had talked to Mr. Nixon

for forty-five minutes, and that in her opinion Mr. Nixon was not out of touch with reality. Assault R. 74-75. She did not, however, do any psychological testing, and specifically refused to offer any opinion as to Mr. Nixon's competency:

> I would not consider this a full competency evaluation; I would consider this as a screening, and it is obviously based on a clinical interview.
>
> I'm not aware of Mr. Nixon's history, so there may be additional information.

Assault R. 75-76.

14. Another recess was then taken, so that counsel could determine whether Mr. Nixon would attend the proceedings. After the recess, counsel reported that Mr. Nixon did not want to attend the trial, but stated that he was not "satisfied" that Mr. Nixon was "competent to make that decision." Assault R. 80. The court then proceeded to bring the jury in and try Mr. Nixon in his absence. Assault R. 81.

15. The right to attend one's own trial is a fundamental right, derived from the confrontation clause of the sixth amendment and the due process clause of the Fourteenth Amendment. Illinois v. Allen, 397 U.S. 337 (1970). A defendant may waive that right by personally and voluntarily choosing to absent himself from the courtroom. Peede v. State, 474 So. 2d 808, 814 (Fla. 1985), cert. denied, 477 U.S. 909 (1986). In the instant case, there was no personal waiver of that right; counsel merely reported Mr. Nixon's professed desire to be absent to the court. Assault R. 80. Moreover, it is self-evident that for a waiver of the right to be present to be voluntary, the

defendant must be competent. Although counsel stated that he was not satisfied that Mr. Nixon was competent, he made no request for a competency evaluation, and no competency evaluation was performed, only the "screening" performed by Dr. Stimel.

16. As a matter of fundamental due process, see Drope v. Missouri, 420 U.S. 162 (1975), and under the Florida Rules of Criminal Procedure, Rule 3.210, no material stage of the proceedings may be conducted while the defendant is incompetent. The determination to waive the fundamental right to be present at trial is a "material stage" of the proceedings. The trial court was required to determine, sua sponte, whether Mr. Nixon was competent, given the substantial grounds for questioning his competency. Defense counsel was required to take the proper procedural steps to have Mr. Nixon's competency evaluated. Instead, counsel simply accepted the results of Dr. Stimel's "screening" of Mr. Nixon, although she emphasized that she was not in a position to make a formal competency evaluation, and had not done so. Effective counsel would have moved for a competency evaluation, since counsel himself stated in substance that he had "reasonable ground to believe that the defendant [was] not competent to proceed." See Assault Trial Record. Cf. Fla.R.Crim.P. 3.210(b).

17. Failure to protect the defendant's fundamental right to be present is per se prejudicial. See United States v. Cronic, 466 U.S. 648 (1984). In the instant case, Mr. Nixon can show actual prejudice as well. If counsel had moved for a competency evaluation, and if one had been performed pursuant to Rule 3.210, Mr. Nixon would

likely have been found incompetent, precluding further proceedings against him until such time as he was found competent. See Rule 3.212; see Claims I and VI, supra.

18. All of the above was readily ascertainable by counsel, aided by mental health experts who had available to them the results of a reasonable background investigation. Counsel, however, took no action to discover this information, to obtain an actual competency determination, or to present any of this to the court. As a result, a mentally retarded and mentally ill man who was unable to control his behavior during trial or meaningfully consult with his attorney was allowed to waive his very right to be present at trial.

19. Joe Nixon was incompetent to stand trial either on the robbery or the assault charges, and to waive his right to be present at the assault trial, and counsel unreasonably failed to investigate his competency and obtain an evaluation that would have confirmed his incompetency. Had counsel conducted a minimal investigation and obtained a competency evaluation, he would have discovered that his client was unable to assist in his defense. If counsel had obtained this information, there is a reasonable probability that Joe Nixon would have been found incompetent to stand trial.

D. Reliance on the 1980 and 1985 Convictions to Support the Death Sentence Imposed on Mr. Nixon Violated His Rights Under the Eighth and Fourteenth Amendments of the U.S. Constitution.

20. As demonstrated above, because Mr. Nixon was probably not competent to plead in 1980, and because his trial counsel failed to provide him with minimally effective assistance of counsel, his plea was not "voluntary and intelligent." As a result, his conviction

based on that plea violated the Fifth and Sixth Amendments to the United States Constitution. This Court should find that that conviction was unlawfully obtained. Moreover, his battery on a law enforcement officer conviction in 1985 was obtained despite the fact that he was absent from the proceedings and was not competent to stand trial or to waive the right to be present.

21. Mr. Nixon's convictions, like the prior conviction reviewed in Johnson v. Mississippi, supra, "provided no legitimate support for the death sentence imposed on petitioner." Johnson, 478 U.S. at 586. Moreover, as in Mr. Johnson's case, it is "equally apparent that the use of that conviction in the sentencing hearing was prejudicial." Id. The trial court in passing sentence relied on the armed robbery and battery on a law enforcement officer convictions in finding the prior violent felony aggravator. R. 221. Because the trial court, and presumably the jury also, relied on the invalid prior violent felony conviction aggravating factor in imposing the death sentence, it would be impossible to find this error harmless.

22. In all its essentials, this case is in accord with Johnson. Accordingly, the result should be the same. Because Mr. Nixon's death sentence rests in part on evidence of prior convictions that were obtained in violation of his fundamental constitutional rights, the death sentence violates his rights under the Eighth and Fourteenth Amendments of the U.S. Constitution. He is entitled to a new sentencing hearing, at which no evidence of the unconstitutionally-obtained convictions may be introduced.

| | | |
|---|---|---|
| JOE ELTON NIXON,<br><br>Movant,<br><br>v.<br><br>STATE OF FLORIDA,<br><br>Respondent. | : | IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA<br><br>CRIMINAL DIVISION<br><br>CASE NO.: 84-2324 |

FILED
FELONY DIV.
2006 JUN 19 A 10:45
BOB INZER
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

**MOTION UNDER FLA. R. CRIM. P. 3.203 AND 3.851**


| | | |
|---|---|---|
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IN COMPUTER PD

The Florida Supreme Court, in Nixon IV, --- So.2d ----, 2006 WL 1027135 (April 20, 2006), ruled that Mr. Nixon should pursue his claim that he is categorically ineligible for execution through a motion pursuant to Fla. R. Crim. P. 3.203.

Mr. Nixon accordingly requests this Court to find that the infliction of a death upon him would violate the Eighth and Fourteenth Amendments to the United States Constitution as well as Florida Constitutional and statutory law.

More specifically, Mr. Nixon asserts that his conviction and sentence of death are the result of violations of the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution for each of the following reasons: (1) The Supreme Court of the United States has explained that a capital defendant, who was mentally retarded at the time of the offense, cannot be executed because such a person is less culpable, less likely to be deterred, less able to act pursuant to a premeditated plan, face a greater risk of false or coerced confessions, and are more likely to be falsely convicted; (2) Mr. Nixon has made a prima facie showing that at the time of the offense his intellectual functioning was determined to be in the significantly sub-average range on recognized intelligence tests and that concurrent deficits in his adaptive functioning were manifest; (3) Mr. Nixon is entitled to relief under Atkins v. Virginia, 536 U.S. 304 (2002), in which the Supreme Court of the United States held that the execution of the mentally retarded constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution; (4) Mr. Nixon is entitled to relief because under Florida Constitutional and statutory law the execution of the mentally retarded constitutes cruel and unusual punishment; (5) If the Court believes there is any doubt to Mr. Nixon's prima facie showing of his mental retardation at the time of the offense, Mr. Nixon is entitled to an evidentiary hearing where he will produce evidence to establish that he meets the legal criteria of mental retardation as

set forth in Florida Rule of Criminal Procedure 3.203, when read along with the decision of the U.S. Supreme Court of the United States in Atkins; (6) If an evidentiary hearing is held, the state is required to prove that Mr. Nixon is not mentally retarded beyond a reasonable doubt; (7) Any requirement that Mr. Nixon establish his mental retardation by a standard of clear and convincing evidence is contrary to Florida law and is unconstitutional; (8) Rule 3.203 does not provide a constitutionally-adequate procedure (including its failure to provide for a jury trial) for resolving mental retardation claims by persons whose death sentences were final before the Supreme Court of the United States decided Atkins; (9) Rule 3.203 does not provide a constitutionally-adequate procedure for resolving mental illness claims.

The legal and factual support for these claims are explained more fully in Movant's Brief In Support his Motion under Fla. R. Crim. P. 3.203 and 3.851, the June 14, 2006 Affidavit of Denis William Keyes, Ph.D., and the accompanying Appendix, all of which are filed concurrently herewith and are by this reference incorporated as fully completely herein as though set out in full..

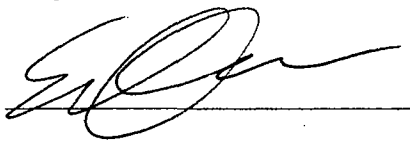
Pursuant to Florida Rule of Criminal Procedure 3.203(c)(2), counsel affirms, that this motion is filed in good faith belief of Mr. Nixon's mental retardation. Mr. Nixon has been tested, evaluated, and/or examined by one or more experts, and the names along with the updated addresses of the experts are as follows:

| | |
|---|---|
| Denis William Keyes, B.S.Ed., M.Ed., M.S., Ed.S., Ph.D., NCSP<br>4 Harrill Ct<br>Charleston, SC 29412-3727 | Alec J. Whyte, M.D.<br>2800 Woodley Rd NW<br>Washington, D.C. 20008 |
| Henry L. Dee, Ph.D., P.A.<br>5131 S Florida Ave Ste 1<br>Lakeland, FL 33813 | Alan Doerman, Psy.D.<br>1619 Cannery Road<br>Owings, MD 20736 |

Copies of reports containing the opinions of these experts are filed concurrently herewith in the Appendix to Motion Under Fla. R. Crim. P. 3.203 and 3.851.

Dated: June 16, 2006

Respectfully submitted,



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**CERTIFICATION PURSUANT TO RULE 3.203(d)(4)(A)**

I hereby certify that this Motion and Brief in Support thereof complies with Florida Rule of Criminal Procedure 3.203(d)(4)(A) because the motion is made in good faith and on reasonable grounds to believe that the Mr. Joe Elton Nixon is mentally retarded.

Dated: June 16, 2006.

Eric O'Connor, Attorney for Joe Elton Nixon

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **MOTION UNDER FLA. R. CRIM. P. 3.203 AND 3.851** has been mailed by first class mail to: (i) Carolyn Snurkowski, Assistant Deputy General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-1050, and (ii) Eddie D. Evans, Assistant State Attorney, Office of the State Attorney, Leon County Courthouse, Room 475, Tallahassee, FL 32301 on June 6, 2006.

Eric O'Connor, Attorney for Joe Elton Nixon

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.
_____/

FILED
11-13-06
Bob Inzer
Clerk, Circuit Court
Leon County, FL

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| PROCEEDINGS: | MOTION HEARING |
| BEFORE: | THE HONORABLE JONATHAN SJOSTROM |
| DATE: | October 23, 2006 |
| TIME: | Commencing at 9:00 a.m.<br>Concluding at 4:30 p.m. |
| LOCATION: | Leon County Courthouse<br>Tallahassee, Florida |
| REPORTED BY: | LINDA CUNNINGHAM<br>Notary Public in and for the<br>State of Florida at Large |

LINDA CUNNINGHAM
Official Court Reporter
Leon County Courthouse, Room 341
Tallahassee, FL 32301

COPY

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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.

THE COURT: Thank you. Thank you for being here. For the State?

MR. EVANS: Eddie Evans for the State, Assistant State Attorney.

THE COURT: Very well.

MS. SNURKOWSKI: Carolyn Snurkowski with the Attorney General's Office.

THE COURT: Good morning. Thank you. All right. Counsel, how do you wish to proceed?

MR. FREEDMAN: Ms. Bhatia will be happy to address, Your Honor, on the matter that you left open respecting burdens of proof, if you would like, Your Honor.

THE COURT: Well, okay. I kind of anticipated that happening at the end, but if you want to proceed with it now, that's fine. Let's go ahead and do that.

MS. BHATIA: Good morning, Your Honor.

THE COURT: Good morning.

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

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

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

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 I take the evidence?

MR. FREEDMAN: That's fine.

MS. BHATIA: That's fine, Your Honor.

THE COURT: Is that acceptable?

MS. BHATIA: That's fine.

THE COURT: Mr. Evans -- rather, Ms. Snurkowski, whoever wants to address the issue, is there any problem that I am creating if I go ahead take the evidence and then address legal issues in writing after the hearing?

MS. SNURKOWSKI: No, Your Honor.

THE COURT: All right.

MS. SNURKOWSKI: I think the evidence is going to come in whatever the standard may be.

THE COURT: All right. So let's go ahead and do that. I appreciate very much -- I've been thinking about this same issue that you've been discussing, but I think we are -- I think it's more sensible to go ahead with the evidence.

MS. BHATIA: Thank you, Your Honor.

THE COURT: Thank you very much, ma'am. Okay.

All right. Mr. Nixon's first witness?

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

THE COURT: Very well. Dr. Keyes. Thank you. Come on up.

MR. EVANS: Your Honor, I guess at this stage, we should -- this will only take a second -- we should renew

all our previous objections about having the hearing we filed.

THE COURT: Of course. Of course. All the previous denials are denied again.

MR. FREEDMAN: On both sides?

THE COURT: On both sides. Okay. Everything is well preserved. Come on up, Dr. Keyes. I will swear you in and we will take your testimony. All right. You can stop right there and raise your right hand.

Whereupon,

DENIS KEYES

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

THE COURT: Very well.

THE WITNESS: Good morning.

THE COURT: Good morning. Come on up and have a seat. When you and the witness are ready.

MR. O'CONNOR: Okay. Thank you. Thank you, Your Honor. I'm just waiting for this slide show to warm up.

DIRECT EXAMINATION

BY MR. O'CONNOR:

Q Good morning. Can you please state your name for the record?

A My name is Denis William Keyes.

Q And where do you currently reside?

A Charleston, South Carolina.

Q And what is your occupation?

A I'm an associate professor of Special Education at the College of Charleston.

Q Okay. Can you please briefly describe your educational background?

A I have a Bachelor's of Science in Education from Ohio University, with a major in special education, primarily mental retardation. I have a Master's in education from Miami University of Oxford, Ohio, in special education. I have a Master's of Science in school psychology from Miami University. I have an Educational Specialist, which is a predoctorate degree, in school psychology from Miami University. And I have a Ph.D. in special education from the University of New Mexico.

Q Okay. And can you tell me, in your field, what is your experience with mental retardation?

A Well, I started working with children with mental retardation about 32 years ago, Your Honor. And I've been in that field since that -- since August of 1974, so 31 years -- no, 32. And I have been a school teacher, teacher's assistant, school psychologist, advocate, adult worker. Short of running a group home, I have done most of the things that you can do in mental retardation as far as working with them.

THE COURT: Thank you.

BY MR. O'CONNOR:

Q Okay. And are you certified by any state or national association as a psychologist?

A I am certified by the State of South Carolina and the National Association of School Psychologists.

Q And how often do you need to be certified as a national psychologist?

A Four years, every four years.

Q Do you have any particular interest or area of expertise in the area of psychology?

A Mental retardation.

Q And what did you write -- do you have papers on them? Articles? Publications?

A I have two major interests in the field. One is mental retardation in the regular classroom, or what we call inclusion, and how it is going to be achieved, if it's ever to be achieved. And the other is mental retardation and the criminal justice system, specifically death penalty.

Q Okay. And one quick question. You mentioned you were a professor at the College of Charleston?

A Correct.

Q What classes do you teach there?

A Oh, I teach classes in assessment of children with special needs, assessment of adolescents with special needs. They are both the same class. I teach a course in

characteristics of mental retardation for people who are going to be special ed teachers, both at the graduate and undergraduate level. I teach classes in classroom management, both the graduate and undergraduate level. I teach Intro to Exceptional Children, which is a survey course in disabilities for future teachers. I teach Procedures in Mental Retardation for the graduate and undergraduate level. I teach Foundations of Education for any -- for all education majors. A couple of other things, small things.

Q Okay. And has your work ever been cited by any court?

A Yes. I've been cited by the United States Supreme -- well, excuse me. I wasn't cited. My work was cited by the United States Supreme Court in Atkins versus Virginia.

Q And have you received any professional honors in your field?

A I'm a Fellow of the American Association of Retardation. I was given an award called The Breaker of Barriers Award by the Hamilton County -- Hamilton -- Charleston County Board of Disabilities and Special Needs. And I was also given a thing called The Advocate of the Year by the Advocacy Coalition for people with mental retardation in Charleston County.

Q And have you conducted psychoeducational evaluations

and examinations for the purpose of providing expert testimony regarding mental retardation?

A Yes, I have.

Q And have you been qualified to render expert testimony regarding mental retardation, in the courts?

A Yes, I have.

Q How many times?

A Roughly 30, 35.

Q And how many of those instances in the State of Florida?

A I think seven.

Q And did any other association in Florida invite you to speak?

A Yeah. I've spoken to the Capital Commission last summer in Orlando and I have spoken to the Florida Association of Prosecuting Attorneys. And I have also spoken for a couple of defense organizations in Florida.

Q Okay. And what -- do you have a list of cases that you have --

THE COURT: Let me just break in. Is there going to be any objection to Mr. Keyes' qualifications?

MR. EVANS: We are going to wish to voir dire him on some of the other --

THE COURT: All right. Go ahead. Proceed, Counsel.

MR. O'CONNOR: Ma'am, could you please mark this for

identification?

THE COURT: We do it with the clerk in Florida, Counsel. Sorry.

MR. O'CONNOR: Sorry about that.

THE COURT: That's all right. If you could hand it to me before you hand it back to them. All right.

So we have marked for identification -- do you know what's been marked? It's been marked Defendant's Exhibit 1. It's the CV that -- is this the same CV that's attached to Dr. Williams' (sic) affidavit?

MR. O'CONNOR: Slightly updated, Your Honor.

THE COURT: Slightly updated affidavit. All right. So I will -- so, Mr. Nixon, 1, is updated CV. Is it going to be offered into evidence?

MR. O'CONNOR: Yes.

THE COURT: Any objection?

MR. O'CONNOR: I was going to show it to him to be sure it is a true and correct copy. Is that necessary?

MR. EVANS: No objection.

THE COURT: All right. Defense Exhibit 1 is admitted. Hang on just a second. I will give this to you, Dr. Keyes.

(Defendant's Exhibit No. 1 received in evidence.)

MR. O'CONNOR: Okay, Your Honor. At this point, I would like to offer Dr. Keyes as an expert in the issue

of mental retardation.

THE COURT: Very well. Voir dire?

MR. EVANS: Yes, Your Honor.

THE COURT: Whenever you are ready. Thank you.

VOIR DIRE EXAMINATION

BY MR. EVANS:

Q Dr. Keyes, are you licensed to practice in the State of Florida?

A No, sir, I'm not.

Q And are you appearing under any special waiver of the license in the State of Florida?

A I have not worked in Florida for 15 days, which I understand is one of the rules.

Q Okay. What are the other rules that you feel qualified to testify that --

A That I'm not doing counseling. I'm not a counseling psychologist. I'm an educational psychologist.

Q Okay. So moving on to -- you don't currently counsel people who are mentally retarded or do any other psychological counseling?

A I don't do any psychological counseling, no. I guess you'd have to say I can be an advisor for people who are mentally retarded. Sometimes I do advise people that I've known -- for example, I'm on the Human Rights Committee for the Florida Disabilities and Special Needs in Charleston. And

by doing that, sometimes we get issues that come before us that we have to make some recommendations. And so I suppose in that sense you could say I'm an advisor. But I'm not a counselor.

Q Okay. Now how much mental retardation testing do you currently do?

A I maybe do five or six cases a year, maybe more.

Q And what type of cases are those?

A Typically death penalty cases. I'm very much against executing people who are mentally retarded.

Q And what type of training have you had recently to administer mental retardation testimony?

A Recently?

Q Yes, sir.

A Well, I keep up with the literature. I do attend professional meetings and I go to specific presentations for training purposes. I haven't taken a course for about five years, six years, probably, may be a little more.

Q All right. In this particular case, you did the testing on the Stanford-Binet, Fourth Edition?

A That's correct.

Q And is that the edition that's currently in use?

A No. The fifth edition is out.

Q Okay. And when did it come out?

A 2003.

Q Okay. And in 1990 -- was it 1993 that you'd do this testing?

A Yes.

Q And at that time, how many testings a year were you doing?

A Not many more. Maybe 10, 15 maybe.

Q And what type cases were you doing those?

A Again, almost entirely death penalty MR cases.

Q Okay. So for the last 13 years the type testing you've done, ranging from ten to five on six a year, and have all been on people who are on death row, seeking to have them released as being mentally retarded?

A Released? No. Taken off death row.

Q Well, that's released from death row as well.

A Right.

THE COURT: Excluded from the death penalty I think is probably the more -- less ambiguous way of saying it.

BY MR. EVANS:

Q I guess now that would be the way to say it, but before Atkins, it was seeking a new sentencing proceeding?

A Mitigating. But I'm not a lawyer.

Q When was the last time you read the Florida Statute?

A That I read the Florida Statute?

Q Yes.

A Day before yesterday, I believe.

Q Okay. And the current rule?
A Yes.
Q Same way?
A Yes.
MR. EVANS: Okay. No further questions.
THE COURT: So any objection now to his testifying as an expert in this case?
MR. EVANS: Yes, Your Honor. Based upon the testimony we have, I don't believe that he has laid a sufficient basis to provide an opinion in this case. He is not licensed to practice in the State of Florida. He does limited mental retardation testing. And it's all been limited to death row inmates. It hasn't been in a wider field in the past 13 years.
THE COURT: Very well. The objection is overruled. You may proceed.
MR. O'CONNOR: Thank you, Your Honor.

CONTINUED DIRECT EXAMINATION

BY MR. O'CONNOR:
Q Dr. Keyes, have you previously submitted an affidavit on June 15th, 2006, in this case which contains your opinions and conclusions?
A Yes, sir, I have.
Q And in that affidavit, did you cite to and rely upon scientific literature, some of which were cited therein and

attached as exhibits?

A Yes.

Q Is this the scientific literature relied upon in your affidavit, the type psychologists would normally rely upon in forming opinions?

A They are.

Q And did you, in fact, rely upon those opinions? Those --

A Yes.

Q Sorry.

A Yes, I did.

Q Dr. Keyes, along with your affidavit, did you cite to and rely upon a factual record that you obtained and then submitted in an appendix with your June 15, 2006, affidavit?

A Yes, sir, I did.

Q Is this the fact -- is this the type of factual record of a type reasonably relied upon by experts in your field in forming opinions or inferences upon the determination of mental retardation?

A Yes, they are.

Q And did you, in fact, rely upon those facts?

A I did.

MR. O'CONNOR: Your Honor, I do not plan to offer those into evidence, as they were already attached as exhibits and in the record, but I didn't know if you

wanted a courtesy copy. Have you got one?

THE COURT: This and the affidavit?

MR. O'CONNOR: Perfect.

THE COURT: I've got them. However you wish to proceed, Counselor.

BY MR. O'CONNOR:

Q Okay. Dr. Keyes, subsequent to the submission of your June 15th, 2006, affidavit, have you reviewed additional scientific literature that you will be relying upon in forming your opinions and conclusions today?

A Yes.

Q Have you collected some of those for the convenience of the Court?

A Yes, I did. I brought them with me.

MR. O'CONNOR: I would like to mark this as Defense Exhibit 2.

THE COURT: All right. Very well.

MR. O'CONNOR: This is the October 22nd, 2006, affidavit of Denis William Keyes, Ph.D.

THE COURT: The affidavit of Defense 2 would be supplemental affidavit --

MR. O'CONNOR: Yes.

THE COURT: -- executed on the 22nd, Exhibits Q through W.

All right. It's been marked.

MR. O'CONNOR: Thank you, Your Honor.

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.

MR. O'CONNOR: Your Honor, I would also like to move this into evidence as Defense Exhibit 3.

THE COURT: You want to move 3, not 2; is that right?

MR. O'CONNOR: Both, Your Honor. I apologize. I forgot.

THE COURT: All right. So let's take up 2. Two is the supplemental affidavit with the additional -- looks like you have got some, -- mostly articles. All articles. And then 3 is the slide show. Any objection to 2?

MR. EVANS: No objection.

THE COURT: Two is admitted. Any objection to 3? Take your time.

MR. EVANS: No objection, Your Honor.

THE COURT: All right. So we will admit Defendant's 2 and Defendant's 3 --

MR. O'CONNOR: Thank you, Your Honor.

THE COURT: -- for purposes of the hearing today. Whenever you are ready.

(Defense's Exhibits No. 2 AND 3 received in evidence.)

MR. O'CONNOR: Thanks.

BY MR. O'CONNOR:

Q Dr. Keyes, what is mental retardation?

A Well, I prepared a slide for this. If you --

Q Just go through it. The first is just overview. It is just for the convenience.

A This is --

Q And what -- continue. Sorry.

A This is the American Association of Mental

Retardation's definition of mental retardation from the 2002 10th edition of the standards book.

Q Okay.

A Mental retardation is a serious disability that manifests from deficits in adaptive behavior and significant limitations in intellectual functioning and is diagnosed prior to age 18.

Q And are you familiar with the diagnostic standards regarding whether a particular individual has mental retardation?

A Yes, sir, I am.

Q And is it okay if I refer to mental retardation as MR, for convenience?

A That's fine with me.

Q Are these standards contained in any textbooks or authoritative treatises?

A I beg your pardon?

Q Are these standards, those diagnostic standards that you just referred to, are they contained in any textbooks?

A Yes.

Q And what would those be?

A Well, the American Association on Mental Retardation's Diagnosis Classification and Systems of Support Manual, which is in its 10th edition, published in 2002, and the Diagnostic and Statistical Manual, Fourth Edition,

Textbook Revision, from 2000, from the American Psychiatric Association, both of which fundamentally use the same definition. APA, American Psychiatric, has in the past deferred to the American Association on Mental Retardation as the experts in the field.

Q Okay. 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 Would it be a trustworthy psychoeducational assessment to rely upon just a brief self-report by an individual claiming mental retardation?

A I don't believe it would be a good idea, no.

Q And why that would be?

A Because people with mental retardation have a

notorious habit of forgetting a lot of things about themselves, and it's because they don't have good memories. They often will overlook important things they don't want to report, things that don't put them in a good light.

Q Okay. And is this theory referred to in the field as anything, any particular term?

A I would say that the "cloak of competence" is probably a good example of why people with mental retardation shouldn't be allowed to make just self-reports. I do think you should interview them, but I don't think you should take their word for everything.

Q And you just mentioned the mentioned the cloak of competence. What is that?

A A professor at the University of California, Riverside, by the name of Robert, E-D-G-E-R-T-O-N -- I forgot to write that down. Dr. Edgerton wrote a book back in 1967 that was called Stigma in the Lives of the Mentally Retarded, The Cloak of Competence.

And then 20 years later, in 1984, he revisited that same idea. And in it what he says is that people with mental retardation don't want people to know that they are mentally retarded. And by virtue of that, they hide their mental retardation in the best way they know how, by acting like they understand what's going on and understanding more than they really do. It's a really common ruse.

Q Okay. And can you give me an everyday example of that?

A Well, suppose you're having a conversation with somebody who is mentally retarded and you -- that person with mental retardation is just watching you and talking to you and listening to you. And a person who doesn't understand what's going on and what you're talking about is more likely to just nod their head and agree and follow along and just, you know, think about what they are going to have for dinner.

Q Okay. And are there any other theories in the field that you would call into question a self-report by an individual when you're trying to assess their self-report?

A Anytime your talking about a self-report situation, you have to consider how much they understand, how much they know about themselves, and how willing they are to disclose.

Q Okay. So, Dr. Keyes, let me just go by this. Now that you have collected this data, what would a clinician do with the data you collected?

A Once you have got -- once you have all the information you need to decide whether or not you're going to take the case -- for example, in my work, if there is not enough evidence that there is something wrong and that mental retardation may, in fact, exist, I won't take the case. I turn down more cases than I take, in fact. But the -- when the evidence supports the possibility of the existence of

mental retardation, I will then look into whether or not it is important to do any testing.

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.

Q Okay. And did you prepare a slide?

A Yes, I did.

Q Okay. And what does this say, briefly?

A It simply says that when you have the right amount of data, when you have got enough information, you make the decision clinically whether or not the person should be tested and whether or not that person, on the basis of that testing and the results, is mentally retarded.

Q Okay. And has the AAMR defined components of sound clinical judgment?

A Yes. I think there is a -- there we go.

Q Okay.

A All of these things are components of clinical judgment that are expounded upon in the treatise from the AAMR. Clearly, one of the most important is that people who are working in the field of diagnosing mental retardation, especially psychologists and psychiatrists, should have some

experience and understanding specific to mental retardation.

There are a lot of ways that people with mental retardation, as I've said before in the cloak of competence, can hide that fact, that they, in fact, are mentally retarded. And direct experiences is extremely important when you're a diagnostician. If you don't know the nuances of mental retardation, the strange characteristics that pop up in mental retardation, you may overlook what's the obvious.

Q Okay. And has the scientific literature discussed what would be termed a lack of clinical judgment?

A Yes, it has.

Q And did you also prepare a slide on that?

A Yes, I think I did.

Q Okay. And just briefly, what are some of these?

A Well, some of the problems associated with quick evaluations, justification for abbreviated evaluations, clinical judgment if you have got a vast amount of background in working with people with disabilities, it doesn't allow you to say, well, I know that he is retarded or I know he is not retarded, ergo stop. It is a vehicle -- clinical judgment is not a vehicle for stereotyping. And that's one of the problems that comes up whenever you are worried about malingering. A substitute for insufficient or -- questions. And, finally, an excuse for incompetent or missing data.

Q Okay. So now tell me in general, in the population,

what -- how do you classify -- you okay?

A Yeah, I just banged my knee. I'm sorry.

Q Tell me about the different classifications of persons with MR.

A Well, that's actually changed somewhat. In the American Association on Mental Retardation, the association was trying to get away from the aspect of labeling individuals who are mentally retarded because of the stigma associated with it. So they have gone instead to labeling the support services necessary for people with mental retardation to live their lives. On the other hand, the American Psychiatric Association has still embraced the concept of mild, moderate, severe, and profound. And I believe we have some kind of --

Q Briefly, just before that, about what percent of the population are considered MR?

A Theoretically, 2.27 percent of the population, but in reality, in the schools, it's closer to about 1.3 percent.

MR. O'CONNOR: Okay. Your Honor, I would like to mark this next chart as, I think it's Defense Exhibit 3 -- 4.

THE COURT: Should be on 4, I think.

MR. O'CONNOR: Yeah.

THE COURT: Yeah.

MR. O'CONNOR: And can I approach the witness?

THE COURT: Yes. All right. Defendant's 4 is a

classic bell curve.

BY MR. O'CONNOR:

Q Okay. Mr. Keys -- Dr. Keyes, sorry, can you identify what this document is?

A It's okay.

Q I'm sorry about that.

THE COURT: All right. Do you have 4 in front of you?

THE WITNESS: Yeah.

THE COURT: Whenever you are ready.

THE WITNESS: Your Honor, if you look at the entirety, you're looking at a symbolic representation of the entire population. When you look down just below the 1 and the 1-4, that roughly coincides with an IQ of 75. The mean IQ is 100.

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.

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.

Q And that's what this chart is designed to show?

A Well, part of it stops at the -- actually, it would stop roughly about the IQ of 40.

MR. O'CONNOR: Okay. Your Honor, I would like to offer Defense Exhibit 4 into evidence.

THE COURT: Any objection to Defense 4?

MR. EVANS: I am going to object. We have a copy of, I guess it's page 37 of the --

MS. SNURKOWSKI: Slide show.

MR. EVANS: -- of the slides that's already been

entered into evidence and --

THE COURT: So this ends up being redundant, you think?

MR. EVANS: I would believe so. The only difference I see is someone has drawn in a bell curve at the two percent mark that's not in the -- apparently not in the slide show.

THE COURT: All right. I'm going to overrule the objection, because you've demonstrated the difference, and I think that he has established the basis for admissibility, along with his testimony. So objection to 4 is overruled. Defense Exhibit 4 is admitted.

(Defense Exhibit No. 4 received in evidence.)

MR. O'CONNOR: Thank you, Your Honor.

THE COURT: Very well. Thank you.

BY MR. O'CONNOR:

Q And, Dr. Keyes, we just spoke about mild mental retardation. Do you have a definition of mild MR?

A It essentially is the same definition as the definition of mental retardation, only it's the upper level of the severe disability.

Q Okay. Let's just explore that real quickly. Did you prepare a slide on this issue?

A I believe I did, yes.

Q Okay. So what is this -- how does this describe

mild mental retardation?

A This is the description of the higher level of supports necessary, the intermediate level of supports needed, the people who are in the mild range, according to the APA, but are people who need mild or intermittent support services, by the American Association of Mental Retardation from the 2002 -- oh, no. Oh, sorry. This is from DSM. Sorry. This is the DSM IV. And this still does look at the mild mental retardation range. I'm sorry. And it looks specifically at the description of the kinds of things that people with mild mental retardation can do.

Q And, again, just to clarify, when you say mild mental retardation, are you comparing them to other people with mental retardation?

A Yes.

Q Okay. And please describe to me some more characteristics of individuals with mild MR.

A I believe there are some more slides that go over this.

Q Okay. And just briefly, what are a few of these?

A Again, most -- most people with mental retardation, almost 2 to 1, are male. They have reduced short-term memories. They do not remember things or recall things, especially short term. Sometimes they can remember things for over the long term when it's information that they have again

and again and again. But short-term memory is usually not very good.

They have poor ability to use abstract thought. They don't plan things in the future. They are very rigid and concrete in the way that they think. They have a tendency to repeat their behaviors. They -- this is called -- in the field it's called perseveration. They will do the same thing again and again and again. One of the hardest things for teaching a student with mental retardation is once they have learned a skill incorrectly, taking them back and turning them around and making them learn the skill correctly is exceedingly difficult. So you have to go back and literally reteach the entire task.

Q Okay. And now let's transition. Why did you agree to work on Joe Nixon's case?

A I received from Jenny Greenberg and Anne Jacobs many years ago, 1992 or '3, a packet of information about Mr. Nixon. And I felt that there was a good bit of information in there that suggested that he had more than just behavioral issues.

Q Okay. And have you conducted a full clinical and valid evaluation, as you have described?

A I believe I did, yes.

Q Okay. And since 1993 what have you done on this case?

A Well, for a long time, nothing. I think it was about 1995 or '6 that the Volunteer Attorneys Association here in Tallahassee closed, and I lost track of all of those folks. And then about 2002, I got a phone call from a man who was named Jonathan Lang, who I believe has passed away, essentially, and Jonathan asked me if I was able to take a look at the case again. This would have been about nine years later.

Q Okay.

A And I said, Sure, I would. And I reviewed the information that was sent to me. And he asked me if I would consider writing an affidavit about my earlier experiences with the case for the, I believe it was for the, one of the appeals. And I said yes. And I did. And then I didn't hear anything for a long time. And then last spring, I heard from you.

Q Okay. And what did I contact you about?

A You also were asking me to do an affidavit regarding my experience in the case and my diagnosis.

Q Okay. And you mentioned the AAMR as the authoritative text on mental retardation; correct?

A Correct.

Q Do they describe risk factors of MR?

A Causation risk factors, yes, they do.

Q And have you prepared a slide?

A I did.
Q Okay. Thanks.
A These are lists of -- a listing of the risk factors specific to individuals who could develop mental retardation but not necessarily will develop mental retardation. If you'll look, they are broken up into biomedical, social, behavioral and educational areas. And it talks also as now, everything in the association for the last 15 years or so has been pushing towards causation during the prenatal, perinatal, and postnatal as being important to when and how the mental retardation has occurred.
Q So these descriptors they have in these little boxes, they are -- make it more likely that an individual would be at risk of manifesting mental retardation?
A That is correct.
Q And have you prepared a slide in this case, according to the information you obtained and reviewed, which describes the risk factors present in Joe Nixon?
A I did. They are in the red.
Q So the previous slide and these are the potential risks --
A Correct.
Q -- and then these as the risk factors present?
A These are the known risk factors for Joe.
Q Okay. And when you say "known", what do you mean by

that?

A From the record, from all the background information that was -- that I have reviewed and received, and we are talking two large boxes of stuff, and based on all of this information, these were the factors that I determined were known risk factors for Joe.

Q Okay. So let's first look at Mr. Nixon's early childhood. Again, did you review affidavits and other interviews submitted into evidence by Mr. Nixon's friends and relatives?

A I did.

Q And let me first ask you about Mr. Nixon's mother. Is there anything that you reviewed concerning his mother that suggested Joe would be at risk for developing MR?

A I am sad to say yes. I did do a slide on this.

Q Okay. If you could highlight some of these factors for the Court, please.

A These were all quotes and basic information that came out of the records that I reviewed, Your Honor, specifically some affidavits that the family members and other people who knew Joe mentioned. Mrs. Nixon drank during her pregnancy, both beer and alcohol -- hard liquor, and potentially exposed her son to fetal alcohol problems.

Q Okay.

A She was unable to go to the doctor during her

pregnancy, which, of course, could have caused problems for Joe in utero. She also did not eat appropriately, from what I was able to discern from the affidavits.

During Joe's childhood, he was malnourished. And she would withhold food from him as a form of punishment, which --

Q What is the significance of malnutrition?

A Well, malnutrition is the number one cause of mental retardation in the world. It is the number one cause. And if it occurs in any situation the brain does not develop properly.

Q Okay.

A And, finally, she -- both her husband and she would abuse Joe psychologically and/or physically. And they called him stupid. She called him stupid a good bit of the time.

Q And now, just quickly, the physical abuse, how could that -- what is the significance of that relative to your diagnosis of MR?

A Physical abuse and psychological abuse, both, can lead to trauma, and trauma can lead to mental retardation.

Q Okay. Let's move on to Joe's father. Is there any evidence that you observed or read that would suggest that Joe's father would add to the risk factors of Joe Nixon becoming mentally retarded?

A Yes. I did a slide, I think. One of the

interesting ones, most interesting ones that I saw here, there was a lot of information regarding Joe's father being abusive. But I think probably the most interesting that I remember reading was a woman who wrote that -- I think it was from the Eckerd Foundation, and I think I mentioned it later on, but I want to mention it here because it's importance. The people at the Eckerd Foundation found that Joe's father didn't know how to control his children in any other way but to beat them, that this was the way that he disciplined them. And by virtue of that, he clearly was a simple-minded man. He didn't understand how to make a child behave.

Q Okay. And are you aware of any events in Joe's childhood that would impede the development of his brain?

A Several. In addition to the malnutrition, I do think that there is a slide, if I'm not mistaken, when he was a child, his mother worked in the fields, the tobacco fields, and nicotine and pesticides, both, were chemicals that he was exposed to while he was the fields with his mother. Even as I remember reading an affidavit that said that he would be an infant, he was infant, laying on a blanket in the tobacco fields while the plane was flying overhead spraying pesticides. Even if there was a plane spraying pesticides, you know, within the not-too-terribly-distant area, that's still not something you want an infant exposed to, needless to say.

He was apparently given alcohol at a young age for entertainment purposes, which I don't understand. And one of the more important ones, as a toddler, his sister remembered him falling into a vat of hot water and he was scalded that way. And as such, that could have added to the trauma. And, finally, he huffed, which means he was huffing chemicals that could have caused brain damage as well.

Q And these facts that could cause brain damage, how does that relate to your opinion regarding the development of mental retardation?

A All of these factors could cause a drop in intelligence functioning.

Q Okay. And was Joe abused as a child?

A Physically, yes. Emotionally, yes.

Q And any other?

A He had an uncle who sexually abused him, as this shows. Joe was not willing. And so his uncle forced him, which essentially is a rape. His uncle even admitted to this in an affidavit that I read.

And he was beaten up by his brother John regularly. And Joe even said that he remembered his brother being pretty cruel to him when he was young.

Q Okay. Thank you. So now I want to just bring this back to the definition of mental retardation.

A Okay.

Q Are you aware of whether -- oh, I guess quickly, refresh our memory on the definition by the AAMR?

A Yes.

Q And are you aware of whether Florida has adopted a definition of MR in its rules?

A Yes, they have. Specific to --

Q Okay. And let's look at it. Right here. Okay.

And in reaching your evaluation of Joe Nixon's mental retardation status in this case, is this the definition of mental retardation that you have applied?

A It has to be, yes.

Q Okay. Thank you. Does the AAMR Manual organize the type of deficits and adaptive behavior that must be assessed?

A Yes, it does.

Q And, again, what is -- regarding the definition, adaptive behavior is one of three prongs, as you've testified before?

A Yeah. There are three prongs to the definition, the intelligence, the adaptive behavior, and the age of onset. Specifically, adaptive behavior, as AAMR has listed this, conceptually, socially, and practically. They looked at the individual's abilities in each one of these areas. And if there is evidence that this person is not able to function in the same way or in the same quality as his same age peers, same cultural group peers or community group peers, then he

could have deficit adaptive behavior severe enough to be considered mentally retarded.

Q And an individual with mental retardation, do they need to have deficits in every single one of these area?

A No, they do not. It doesn't necessarily -- it is not required to have deficits in all areas. People with mental retardation have strengths as well as deficits.

Q Okay. And in review of the records and affidavits concerning Joe Nixon, did you find any evidence of deficits in adaptive behavior?

A Yes, I did.

Q Okay. Let's first go to discuss the social deficits.

A Okay.

Q In that regard, what did you find?

A When you're talking about social deficits in mental retardation, you're talking about interpersonal difficulties, particularly, getting along with other people. In there, there were myriad examples of Joe's inabilities. He was emotionally withdrawn. He did not get along with family. He was belligerent. He fought quite a bit. He was consistently abused emotionally by his family and his neighbors, his friends, who referred to him as dummy and stupid primarily.

He liked to -- he couldn't understand games and did not play well with others. And at the -- in school he was

noted to be in need of special ed constantly. I mean, were two perfect examples of teachers who said, this child needs special education. And he was apparently not given it, so.

Q And you just mentioned that he had a few friends, people who would call him slow, dummy, stupid, et cetera. In your opinion, in this case, how do these factors relate to the development of MR?

A They certainly could exacerbate his emotions and his adaptive skills would -- from withdrawing -- from withdrawing from people from being hurt constantly, he would not know how to behave from observing others, which is social learning is one of the ways that we learn.

Q Okay. And we go to the next type of social deficits. What did you find regarding his self-esteem?

A Joe had self-esteem problems to the extent that even at a young age, he tried to kill himself. He took Tylenol, which indicates that he wasn't really sure of how to kill himself. And then he tried to hang himself. And I believe it was his cousin Eddie, yeah, who stopped him from doing it.

Q Okay. And did you find any other social deficits in adaptive behavior during your assessment of Joe Nixon?

A Yes, I did.

Q Okay.

A People with mental retardation, gullibility is one of their most common problems. They will believe what people

say to them and, that 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, okay? And they may know that he is mentally retarded, and they may know that he is stupid and just use him in that sense.

Q Okay.

A Then you've got -- he would get cheated out of his money, which I think there is an example of that later on that is really a good one.

Q Okay.

A Okay. Finally, he also was incredibly naive.

Q Okay. The next type is practical deficits. Did you find any type of practical deficits in your review of the record?

A There were. In the activities of daily living. He was unable to take care of himself. He did not take -- his mother had to do things for him, such as cooking, when she did. And he needed help with most of his decisions in day-to-day activities.

Q And when you're saying he is unable to take care of himself, cook, make his bed, how does this reflect on adaptive skills?

A 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.

Q Okay. Now, before we go into the educational, school and records, I would like to turn to the second prong, the subaverage intellectual prong of MR. Apart from your review of those educational records, did you find any evidence of subaverage intellectual functioning when Joe was a child?

A The examples are replete. So I believe if we have a slide for it.

Q Yes.

A Okay.

Q And what are these --

A I think it's real important to look at the fact that people thought he couldn't learn. People with mental retardation can learn. They just learn slower. They learn in a different way than most people do. And as such, he was slow, he didn't keep up, and because he wasn't getting the kind of special help that he had really needed, he became more and more frustrated. The frustration level gets worse and worse and eventually it acts -- acting out in aggressive behavior is one of the things that pops out of it.

He didn't understand what teachers were talking about. These were affidavits from his brother and his sister and his cousin. And all of these things clearly indicate that he had great difficulty in keeping up with others and learning basic information.

Q Okay. And let's continue to -- could you find any further evidence of subaverage intellectual functioning while Joe was a child?

A Again, the inability to learn. He didn't have good language skills. He couldn't communicate well. His sister said he could not carry on a conversation. He often said things the wrong way and -- even though he was exposed to his family, which was a large family, he had, I think, six or seven siblings and they -- and even with all of that exposure to communication constantly, he did not learn to communicate well with his family.

Q Okay. And in your experience with the mental retardation field, what is the significance of being unable to speak or carry on a conversation?

A Well, language 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.

Q Okay. And did you find any other evidence of subaverage intellectual functioning?

A Yes, I believe I did.

Q I think this is what you were referring to before.

A Yes. Quantitatively, mathematic concepts, Joe had great difficulty in understanding very basic things. He could

not grasp the idea that two dimes were not as good as one quarter. And that actually is a common thing for kids who are mentally retarded. They will get cheated quite a bit when it comes to money. They will think that, for example, that ten -- ten pennies is better than one quarter, you know, and that's just not the way it is.

Q So at this point, in addition to the data regarding the deficits in adaptive behavior that you have just described and the subaverage intellectual functioning that we just went over, is there any other records that your investigation discovered in those two areas?

A Yes, there are.

Q Okay.

A Okay. The educational records turned up --

THE COURT: Let me stop you. Let me stop you here while we go ahead and take a 15-minute break.

MR. O'CONNOR: Thank you, Your Honor.

(Break taken.)

THE COURT: All right. Counsel, whenever you are ready to proceed. Take your time.

MR. O'CONNOR: Thank you, Your Honor.

BY MR. O'CONNOR:

Q Okay, Dr. Keyes, so at this point, as I just mentioned, in addition to the data that we just reviewed regarding the deficits in adaptive behavior and adaptive

skills and subaverage intellectual functioning that you've just described, is there any other records that your investigation discovered in this case?

A Yes.

Q Okay. Let's go through those. Okay. You started describing these. Can you please explain what this record is?

A All right. Remember when you were a kid and you took all the Iowa Test of Basic Skills or the California Achievement Test or Metropolitan Achievement Test. Those are the ones you do all the little dots.

Okay. Joe was administered several tests when he was at the Dozier School for Boys. And the last one of those standardize test results, he 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 -- 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 of it, or they may just put those two letters. It was not at all uncommon for some of my kids when I was teaching to do that and I had 18-, 19-, and 20-year-old kids who were a little lower functioning.

Q Could you just give us an example of a word that they would get, and they dictated at the spelling test?

A If the word was something like tree, they'd put T-E-E, okay, because they'd remembered the sound and they would forget the R. If the word was longer than that, they would put the first sound and the last sound and then just maybe superfluously add in some letters that they thought were in there or that they might remember were in there. They tend to remember the last part that they hear, which is why they remember to put the sound at the end on, and then they will remember the beginning of the word, too.

In this one, I think it's important to note that at the age of ten, the final report stated that he got as far as "up". And I believe, actually, when he did that, I thought he was older than ten, but I might be wrong. I think he might have been 12. But the most that he could spell was "up".

Arithmetic fundamentals, he 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 from the higher no matter where that number happens to be. I think I have an example of that.

Q Yeah. So, explain what this is real quick.

A Very easy. Twenty-three minus 16, obviously, since

he doesn't know the borrowing concept, he can't take the six from the three, so he takes the three from the six, puts the three, and then takes the one from the two and puts the one. So the answer is clearly erroneous. Forty-six minus 29, he takes the six from the nine and he gets a three, and he takes the two from the four and get a two.

Q Okay. And this is what they mean when he didn't understand the concepts of borrowing?

A That's correct. He would just take the lower from the higher number.

Q Okay. And the next paragraph, what is the significance of that paragraph?

A I think this is very telling. His teacher at this point says Joe should be placed in a special education program. He needs encouragement and understanding with a lot of help in the area of reading. And, again, nothing was done to that effect.

Q So how would that sentence you just described reflect on your opinion regarding Joe's intellect, subaverage intellectual functioning at this time?

A It certainly supports it. It certainly does support it. I think one of the things that is also important to note is at the time he would -- this would have been 1974 about on '73, and this would have been prior to the enactment of PL 94-142, which is the Education of All Handicapped Children's

Act that Ford signed.

THE COURT: You have got to slow down with that for the court reporter.

THE WITNESS: I am so sorry. PL 94-142, the Education of All Handicapped Children's Act, which came into being in November of 1975.

BY MR. O'CONNOR:

Q Okay. And just for the record, do you remember approximately when Joe Nixon was born?

A He was born in 1961, I believe.

Q So at this time, it would be around what year?

A It would have been about 1973, '74.

Q Okay. And this last sentence, the last -- I guess that is its own paragraph -- what is the significance? If you can -- can you read that?

A Oh. Yeah. It's important to note that when he was doing work that was on his level, he did a good job, that he could continually work and he tried hard. And as long as he was doing things that he could do and not get frustrated, he would stick with it.

Q Okay. So, overall, how does this report in general affect your opinion concerning Joe Nixon's mental retardation status?

A Well, it certainly doesn't refute it and it does support it.

Q Are you aware of any other evidence regarding Joe's subaverage intellectual functioning during his elementary school years?

A Yes. I have another slide.

Q Okay.

A Not that one.

Q No. We just did that one.

A There you go. Okay.

During this time, between the ages of 12 and 13, he apparently was held back in school. And here is where that quote is about his father, that he didn't know how to handle his children except to whip them.

The Carnegie -- the Carnegie -- the Eckerd Foundation woman that wrote this report simply says, he cannot seem to learn from his mistakes. That is a very common factor. Eckerd is E-C-K-E-R-D. It's a very common factor for people who are mentally retarded to continually make the same mistakes again and again. And it's part of perseveration, P-E-R-S-E-V-E-R-A-T-I-O-N.

Q And what do you mean by "perseveration"?

A The repetitive behaviors that they do again and again despite the fact that they are not successful.

Q So what would be an example?

A Borrowing from the -- in the math example, he knew that that was not correct but he kept doing it.

Q Okay.

A He couldn't get the concept of borrowing. That's a good example.

Q And then he would just keep on repeating it.

A Yeah. And like I said, when somebody has learned something incorrectly, as a teacher, you have to go back and retrain the entire process so that they -- and then you have to make sure that they go through it again and again. And there are various different strategies that you could use to do that.

Q Okay. Let's see. And what about this next paragraph on the Seminole Group?

A Yeah. He was transferred to the Seminole Group Treatment Home. And this was a report from them. He needs special remedial classes, which suggests to me that another teacher noticed that he needed some kind of special education help but did not get.

Q Okay. And as we saw in the previous slide that recommended special education because he couldn't read, in general, does a recommendation for special education, is that consistent with someone who is manifesting traits of mental retardation?

A Absolutely. One thing more I want to point out, see at the bottom of the last paragraph, it says, Before applying a point system to his misbehavior, he terrorized the

classroom. Now, keep in mind at this time he is about -- actually, I think he is closer to 14 at this time, 13 or 14.

A point system in the classroom is referred to as a token economy system. And a token economy system is the kind of thing that you see very often just to get kids to behave in a way that is not disruptive, that they stay on task and that they complete their work. It's a pretty common thing you see in second, third, fourth grades. But this time he is probably seventh or eighth grade age level, and they started a token economy system to get him to behave. That's -- you don't see token economies in middle school and junior high school, typically.

Q So what's significance of someone who should be in eighth grade finally behaving when they are receiving a treatment applied to normally third or fourth graders?

A It clearly indicates that he is learning on a much lower level and that he is behaving on a much lower level.

Q Okay. Continuing on, at age 14, does Joe take any achievement tests?

A Yes. He took the California Achievement Test, which I think is there. It was administered when he was in the seventh grade. His chronological age at the time was 14 years, six months, which would have put him about two years behind, because, typically, people will turn 14 in the eighth grade, and he was already six months into it, which suggests

that he probably was a full two years behind where he should have been academically.

The test that he ended up taking -- we contacted the folks at the -- I can't even remember who publishes it now. Cap Tech (phonetic), I think it is. We contacted them and they actually stated that the test that he took were -- was the test that was ordinarily given to second to fourth graders. And at this time he is in the seventh grade and he is already behind, okay? So he was taking a test that ordinarily would have been given to children very much younger than he.

At that point, he still placed grade-wise between the third grade and the third grade and six months, which would have been halfway through the third grade, on the total battery, that is. He was -- and therefore was at least four full years behind. And had he actually taken the test that was meant for a seventh grader or an eighth grader, he would have been even further behind than that, I suspect.

Q And why would he have been further behind if he actually got a test directed to his age level?

A Because the information on that test would have been so high, he would have gotten significantly fewer questions correct.

Q Okay. And, Dr. Keyes, in relation to the submission of your June 15th, 2006, affidavit and the accompanying brief,

the State submitted a response. And on page 25 and 26 of that response, it states that, quote, There is no evidence that Joe Nixon has deficient adaptive functioning and that Joe Nixon did not manifest subaverage intellectual functioning. What do you think of those statements?

MR. EVANS: Objection. That calls form.

THE WITNESS: Well, I think they are erroneous.

THE COURT: Well, the objection is as to the form of the questioning. I think the -- why don't you go ahead and rephrase the question.

BY MR. O'CONNOR:

Q In your opinion, in your professional opinion in the field, do you agree with those statements?

A No, I don't. I think that the record is replete with examples of Joe's difficulty with adaptive skills.

Q Okay. So never mind. At this point, after you've gathered all of this data, you have reviewed the educational records, what is the role of standardized intelligence tests to determine the subaverage intellectual functioning prong?

A Once you get the information you need, then you, first of all, have to get permission, which, in those days, I'm not sure they did. Get permission, determine what test is the best test to use under the circumstances, and go in and test him. And the results of that test will decide how to proceed as far as his education is concerned.

Q Okay. So you have the evidence before that you review and then you test second. Okay. So, has Mr. Nixon been given any standardize intelligence tests during his lifetime?

A Numerous. Yes, he has.

Q Okay. Let's actually go through them and start in chronological order. What was the first standardized intelligence test administered to Mr. Nixon?

A The first standardized test he was given was called the Wechsler Intelligence Scale for Children.

Q And what is the Wechsler Intelligence Scale for Children?

A Well, the Wechsler was a groundbreaking test. It was an extremely important concept. The founder of the test, the writer of test, was a man by the name of David Wechsler, who was a doctor at the Bellevue Hospital in New York City. And he developed the Wechsler Bellevue Scale, which was used with adults, primarily to look at people with both mental disabilities and mental illness, but it was to test to see the individual's intellectual level.

And the idea came from -- the idea of IQ tests has been evolving since the early part of the 20th century, when Binet was asked to -- a guy by the name of Alfred Binet, in Paris, was asked to develop a test that would discriminate against kids with disabilities to get them out of the regular

school system, which he did. And the idea that he came up with was to develop questions that would be worth so much -- so many months developmentally. And by virtue of the fact that he had these -- all of these questions, the questions that you answered, you got credit for. The questions that you didn't answer, you didn't get credit for.

And in the end, when you have missed ten questions, he would stop the testing, he would count up all the months' credit you had, and that would be your mental age. And then they would take that mental age, number of months, and they would check out to see how chronologically old you were, and they would divide the mental age by chronological age. And then he would multiply that by 100 and that's how you got an IQ in the old days, in the old days.

And, in fact, that's an interesting point that most people don't realize. That is, in fact, an intelligence quotient, because the quotient is an answer in a division problem; right? Okay.

David Wechsler comes along in the 1940s and he says, wait a minute, that's not the way to handle this. And he develops a test in advance, and then he takes a sampling of individuals, a sample of people, and he administers that test to these people. And he tries to get a group of people that is somewhat representative of the population. Now, this is 1949. No African-Americans, no Hispanic-Americans, no Chinese

or Oriental-Americans. People who were disabled were not included in the sampling. It was all Caucasian and almost entirely middle class.

Q And when you are talking about these cultural and racial groups, what do you mean "all"? How are -- let me rephrase that question. What is the significance of the demographics of your sample population to the validity of the test results that will eventually be obtained when you test an individual?

A It's very important, because if you don't have a demographically correct stratified sample of the population, then the people who are not included in that sampling are not represented and therefore should not be considered for testing with that instrument.

Q So, is it your opinion that this 1949 Wechsler Intelligence Scale for Children is invalid for testing an individual that is African-American, for example?

A They weren't included in the sample. It's not valid testing and it certainly isn't the way standards are today.

Q Okay. So you mentioned that this test was published in 1949.

A That's correct.

Q Do you know when it was administered to Joe Nixon?

A 1974.

Q Do you have any concern regarding the use of a test

that's 25 years old?

A I have a lot of concerns about using 25-year-old testing, yeah.

Q Okay.

A Primarily -- I'm sorry. Primarily, because by today's standards, IQ tests are republished and rewritten and renormed approximately every ten years.

Q Okay. And you just mentioned one example of the norming. So norming was done back in 1949. It could be a different demographic sample in 1974?

A Not to mention the fact that the items on the test were sometimes archaic at that point.

Q Could you give us an example, if you remember?

A Sure. As you may or may not know, human beings are getting taller. And one of the questions on the old list was what is the average height of an American male. And the answer that they gave is five-seven to five-ten. And, in fact, the average American male is taller than that now.

And they use words like, what's a belfry. Belfries, you know, haven't existed very much for a long, long time. Shilling, what's a shilling, you know? At that point, I think even the British had stopped using shillings. So these are words that many kids 25 years after the fact would not have known.

Q Okay. So this 1949 version, when was it updated?

A 1974, about the same time that Joe was administered the old test.

Q Okay. And so the administration of this test on Joe Nixon, do you remember where it was administered?

A Yeah. It was at Apalachee Mental Health Center, I think it is was, or -- I think that's right.

Q Okay. And do you remember who was the person who administered the test to Joe Nixon?

A It was -- her name was Miles, Wendy Miles, and she was described as a psychological assistant.

Q Okay. Does the report specify if she was a licensed psychologist?

A No, it does not.

Q Do you know if -- recall if there is any other records confirming that she was a licensed psychologist?

A I have never seen any, no. And I think that this was investigated, and it was never found that she was ever certified.

Q And what is the significance or the importance of being a licensed psychologist in administering an IQ test?

A When a psychologist learns to give these tests, you take a minimum of two courses, one typically for administration and one for interpretation. And you can't really understand the nuances of the test unless you've had considerable experience with them. When I was in my training,

we were required to do 20 to 25 testings on tape or being observed by your professor --

Q Okay.

A -- which is, you know, really, a good way, because the professor very often would stop and say, you need to do this or you need to do that, and show us the various different things.

Q Okay. And does the AAMR text give any commentary on what qualifications an administrator of an IQ test needs?

A Yes, they do. I did a slide for that, I believe. This is from the AAMR Definitions, Classifications, and Systems of Support. It very clearly indicates that the assessment of intellectual functioning should be done by someone who is qualified in terms of professional and state regulations, most particularly somebody who has been trained. And that would require schooling, education.

Q Okay. And do we have what's called the scored protocols of this test?

A No, we don't.

Q And what is a scored protocol?

A A protocol is a record form that has been used in the process of testing an individual. And it's done for several reasons. One is to prove that the individual's testing was done correctly, standardized, which means that the test is given the exact same way every time. Therefore, it

can always be compared with everyone else who is taking the test. And it also indicates that the person gave the test appropriately, wrote down the answers appropriately, and made the correct decisions regarding the numbers, particularly the raw score and the IQ.

Q And you mentioned raw score and IQ, but did she also report any of the subtest data?

A Not in that report, no.

Q And what would be the significance of subtest data?

A Well, I mean, at the time he took this, he was a school-aged child, and any information that is given from the testing or any information you get from the test can help the teachers to understand how to teach the child and -- or how to help the child. And none of that information was given, not to mention the fact that certain subtests are better indicators of intelligence than other subtests are. And it would be important to see how he did on the high indicators, the high loaders, those being in the verbal scale, information, similarities, comprehension, and vocabulary. And in the performance scale, at that time there was only one, which was called block design.

Q Okay. So overall verbal/language skills, are better indicators of subaverage intellectual functioning than the other tests, which are the quantitative or conceptual aspects of the test?

A That's correct.
Q Okay. Did -- do you recall whether Ms. Miles reported how Joe performed on the tests?
A I believe, as I recall, she said he cooperated, that he cooperative and that he worked hard.
Q And do you recall actually what IQ score she reported?
A I believe the full scale score that she recorded was an 88.
Q And do you remember the verbal and the performance?
A I think I have a -- I wrote it down, I thought. Yeah. The verbal was 79 and the performance was 100.
Q And I want you to just explain. Does anything concern you about the difference in the scores between this verbal of 79 and the performance of 100?
A When you see a large discrepancy between the verbal and the performance scores, it's very indicative of brain damage.
Q And why would that be?
A Because part of the brain has developed more highly than the other.
Q So here his verbally abilities would -- would this data you've just described suggest that his verbal abilities were not functioning as well as his performance?
A Far below. Statistically, the significance level is

15 points. Anything more than 15 points would be considered statistically significant.

Q Okay. Are there any other -- so you just discussed basically, the problems with this obtained score of an 88. Are there any adjustments that have to be made to more closely determine true IQ score?

A Well, that's a good point. Whenever you're looking at a score, an IQ, for example, you have to consider two possible adjustments. In fact, you have to consider them as real adjustments. One is called the standard error of measure. And the standard error of measure is an estimation of the amount of error that is inherent in a test, every test.

Q Okay. And what is the other one? You mentioned there was two.

A Yes. The other one is a phenomenon for an IQ test that's called the Flynn Effect.

MR. EVANS: Your Honor, I'm going to object. I don't believe the Flynn test has been Frye tested, at least not here in the State of Florida.

THE COURT: You don't think the Flynn test has been Frye tested?

MR. EVANS: Correct.

THE COURT: So -- all right. Counsel, you want to respond to that? Novel scientific evidence is the objection.

MR. O'CONNOR: Your Honor, I believe if Dr. Keyes explains it, you will be able to make a determination.

THE COURT: All right. So they are going to try to lay a foundation, and then I will rule on the objection. Whenever you are ready.

MR. O'CONNOR: Thank you, Your Honor.

BY MR. O'CONNOR:

Q Okay, Dr. Keyes, what is the Flynn Effect?

A The Flynn Effect is a phenomenon that occurs in intelligence testing. It -- as a test gets older, from the time it's published every year, the IQ of the -- the actual IQ ranges tend to go up. And by virtue of fact that the test is getting older, by virtue of the fact that the information gets out, however it happens, we don't know, but it does tend to go up about a third of a point each year so that when you're talking three years down the road --

THE COURT: In the population? Not with regard to an individual; right?

THE WITNESS: That's correct, right. But, of course, it affects the individual as well. When you are looking at that over, for example, --

THE COURT: The Flynn Effect, though, is about norming; right?

MR. O'CONNOR: That is correct. And, in fact, Jim Flynn recently has been noting that the numbers in the

most recent IQ tests are off by about two and quarter, so -- 2.34 for the mean.

BY MR. O'CONNOR:

Q Okay. So given that this test was published 25 years before the administration of the test on Joe Nixon, how would the Flynn Effect --

THE COURT: We forget our task. We are on laying foundation for the Frye objection.

MR. O'CONNOR: Right.

THE COURT: So we need to discuss, we need to discuss what the foundation is for novel scientific evidence, assuming that Frye applies to the Flynn Effect.

MR. O'CONNOR: Thank you.

BY MR. O'CONNOR:

Q Dr. Keyes, did you prepare a slide on the Flynn Effect?

A I did. And I also attached articles to my affidavit.

Q Okay. And has your slide show --

A Very clearly, it is a phenomenon that about three points every ten years, the test needs to be renormed for that very purpose. In fact, it was one of the things that was considered when which tests were being renormed --

MR. EVANS: Your Honor, I'm going to object. It's not a question. The Frye test isn't what the Flynn

Effect is in the sense that what it would do in this particular case but whether or not it is novel in the field.

MR. O'CONNOR: Your Honor, I'm getting to that in one second.

THE COURT: All right. You can go ahead and proceed. I think you've -- here is the bottom line of the whole thing. You've very clearly made the objection. I'm going to let counsel lay the foundation that he thinks is appropriate. And then whenever he gets to the end of his discussion of the Flynn Effect, I will entertain the objection and a motion to strike, if that's where we are. Go ahead, sir.

BY MR. O'CONNOR:

Q Okay. So, Dr. Keyes, in the real world, in the testing community, is it standard practice in the educational testing community for psychologists to adjust obtained IQ score for the Flynn Effect?

A It's often done, yes.

Q Is there scholarly support for this practice?

A There is. It's been accepted in many courtrooms. It's been accepted in the literature. The literature is replete with examples of the use of the Flynn Effect.

Q And is that described in these articles that you cited there?

A It is.

Q Okay. And has the Flynn Effect been specifically verified regarding individuals with MR?

A Individuals with mental retardation are included in the sampling of any test; ergo, it has to be true for them too.

Q Is there any scientific support for the proposition that the Flynn Effect has been evaluated regarding individuals with MR?

A I believe that there is some information in the "Tethering the Elephant" article that supports it.

MR. O'CONNOR: Your Honor, I would like to mark this as Exhibit -- Defendant's Exhibit 5, I believe we are on.

THE COURT: Is this "Tethering the Elephant"?

MR. O'CONNOR: No, it's an additional one, Your Honor.

THE COURT: Okay. All right. Go ahead. That's fine. We are on 5; is that right, Ms. Boles?

THE CLERK: Yes, sir.

MR. O'CONNOR: Your Honor, can I approach and provide Dr. Keyes with a copy?

THE COURT: Very well.

BY MR. O'CONNOR:

Q Now, Dr. Keyes, I just asked you whether the Flynn Effect has been verified regarding individuals with MR. Does

this article, is this the one you are referring to in support of that proposition?

A Yes. I only saw this article recently. It does mention the use of the Flynn Effect in mental retardation cases. It says that it needs to be studied more and that it doesn't necessarily refute it.

Q Okay. Could you turn to page -- it's page 784. It's going to be the concluding paragraph of Hypothesis 1.

A Off of what?

Q So it's page 784.

A Right.

Q It's on the left-hand column.

A Uh-huh.

Q And could you please read the sentence, the end of the paragraph that's coming over on the side. It's right above Hypothesis 2. Can you read that last sentence, starting with the word "so"?

A In the first paragraph or the second paragraph?

Q It would be that paragraph that is just right there at the top.

THE COURT: You want him to read it out loud?

MR. O'CONNOR: Sorry.

THE WITNESS: Oh. I see it.

BY MR. O'CONNOR:

Q Would that refresh your recollection as to whether

this article --

A Yes. So our best estimate is that the Flynn Effect falls between five and six IQ points in the mild MR and borderline ranges, almost exactly the same magnitude that the Flynn Effect -- or Flynn found in the middle of the IQ distribution.

Q Thank you.

MS. SNURKOWSKI: What page is that?

THE COURT: Page 784.

MR. O'CONNOR: Your Honor, I offer this article, it has as been marked as Defense Exhibit 5 into evidence.

THE COURT: Any objection?

MR. EVANS: No objection to it being admitted.

THE COURT: All right. As to the article itself. So 5 is admitted.

(Defense's Exhibit No. 5 received in evidence.)

BY MR. O'CONNOR:

Q So, Dr. Keyes, considering your practice in the area, your experience in these articles that you have cited and reviewed, is the Flynn Effect a standard tool psychologists in the field use to adjust obtained score to get a more accurate true score?

A Yes, it is.

THE COURT: All right. Anything else with regard to the Frye objection on the Flynn Effect or a motion to

strike?

MR. EVANS: Yes, Your Honor. May I ask a couple of questions?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. EVANS:

Q Dr. Keyes, is the Flynn Effect recognized in the scoring manual of any of the WAIS-R or the Stanford-Binet?

A Not -- I have not seen it in even the Stanford-Binet, Fifth Edition.

Q Okay. So it is not in the Stanford-Binet, Fifth Edition. It is not in the WAIS-III either, is it?

A No, it is not.

Q So the scoring manuals of these particular items do not recognize the Flynn Effect?

A That is correct.

Q And when was the Stanford-Binet originated, the latest, the Fifth?

A In 2003 it was published.

Q 2003.

A Uh-huh.

Q So that was after the -- Flynn had published his article?

A He started publishing articles on this in '84.

Q Okay. And it was also about the same time that --

'83 was the same time of this, I guess, Defense Exhibit No. 5, which was done in '03?

THE COURT: I didn't follow the question, Mr. Evans. I'm sorry.

MR. EVANS: Pardon me. All right. 2003 -- Defendant's Exhibit, I believe it's No. 5; is that correct?

THE COURT: Yes, sir.

BY MR. EVANS:

Q Was published in 2003?

A Yes, this article is from 2003.

Q So it would have also been 2003 has been, you believe the Stanford-Binet Five came out?

A Yeah, I know that it came out in 2003.

Q Okay. And since that time, has -- it's 2006 -- have they revised the Stanford-Binet Five to incorporate the Flynn Effect in the scoring manual?

A Not to my knowledge.

Q And I think you also -- did I hear you correctly? You indicated that the this article, Defendant's Exhibit No. 5, indicated that when it relates to people with mental retardation, that it indicated that the Flynn Effect needed to be studied more? And I think you also indicated that it doesn't necessarily refute the Flynn Effect?

A It doesn't necessary refute it, but it doesn't, it

doesn't -- it does not, not support it. It definitely states very clearly in that sentence that I read that it says that the magnitude is about the same as it is in the middle of the distribution.

Q Okay. But you just indicated that it doesn't not support the Flynn Effect?

A It says it needed to be studied more. And I think that that's true for, I mean, anybody that is doing research always says that it needs to be studied more.

MR. EVANS: No further questions.

THE COURT: All right. Now, so what's your objection?

MR. EVANS: My objection is that it is not -- it's not been shown that it's been generally accepted in the field. One, it's not in the scoring manuals that has been going on up and to including the Stanford-Binet Five. Nothing has changed there. The WAIS-III has been out for a while. The WAIS-R was certainly out for a while. And there has been no indications that the Flynn Effect is somehow used in the scoring manuals for those particular items.

If it were to be recognized in the community that the scoring manuals would take that into effect, that based upon the testimony of Dr. Keyes that said specifically when the Flynn Effect relates to mental

retardation, it indicated that it needed to be studied more. So if something needs to be studied more and it doesn't necessarily refute it, it doesn't necessary mean that it has been accepted in the scientific community.

THE COURT: All right. I think it goes to weight and not admissibility. I'm going to overrule it. There is -- the term "Flynn Effect" is so broad, I mean, I think it's inherent in the fact that these tests are renormed is sort of the point of it, if I'm following correctly.

But the -- what it means and whether you apply the Flynn Effect by subtracting, doing the calculation and subtracting from the IQ score, I think it's almost a legal question more than a factual question. But I don't think you have a good Frye objection to Flynn, so I'll -- to the overall concept of the Flynn Effect. So I will overrule the objection. You can proceed, Counsel.

MR. O'CONNOR: Thank you, Your Honor.

CONTINUED DIRECT EXAMINATION

BY MR. O'CONNOR:

Q Now we get to the question that I mistakenly asked too early. Given the fact that the -- this test was published in 1949 and was administered in 1974. It was 25 years old, how many points would that affect the IQ score of 88?

A According to Flynn Effect, about eight points.

Q Thank you. Okay. And, now, much earlier you had mentioned a second adjustment to an obtained score. Could you please explain? And you mentioned, actually, 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

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 Okay. So let's continue --

THE COURT: Hang on a second. I think Dr. Keyes needs to take five minutes. We will take a brief five minute break.

(Break taken.)

THE COURT: Counsel, whenever you are ready.

MR. O'CONNOR: Thank you, Your Honor.

BY MR. O'CONNOR:

Q Okay, Dr. Keyes. So, now continuing chronologically, what was the next standardized intelligence test administered to Joe Nixon?

A I believe there is a -- there we go. The next one was the WAIS-R 1985. This was done by Dr. Doerman, I believe. That was after the commission of the crime.

Q And what was his results?
A The results, the obtained score was a 73, with a verbal 74, performance 72 split.
Q And this -- you said it's the WAIS-R?
A The Wechsler Adult Intelligence Scale Revised.
Q And do you know when that was published?
A 1981, I believe it was.
Q And Joe took -- was administered this test in 1985?
A Correct.
Q So the full-scale obtained score of 73 should be adjusted to what score for purposes of the Flynn Effect?
A For -- when the Flynn Effect is considered, it would be a point difference, 72.
Q So one point?
A Correct.
Q Does Dr. Doerman report any other findings in his report?
A I think specifically he states that he is borderline intelligence. Or does he state mentally -- I think he says mental retardation, in effect.
Q But -- according to the test results, does he mention anything about scatter or subtests?
A That's true. He noted that there was -- thank you for reminding me. I apologize. He noted that there was a large amount of subtest scatter. That means that the subtest

scores were specifically high and low. And he -- that also could mean that the answers that the individual gave in the test showed differences as far as missing easier questions and then getting harder questions correct and vice versa. It means that there are huge spaces between.

Q Could you just explain this a little bit more. What is -- so how would a person who doesn't have mental retardation, how would their subtest scores look?

A Let's look at it from a point of view of looking at subtests. A subtest starts easy and gets harder. It's just like every other test. And the idea is that you are going to get X number correct, start missing a few, and then get enough wrong and stop, okay? When you hit the ceiling, which, depending on the subtest, can be as many as three to six in a row incorrect, at that point, on the Wechsler, for example, you would stop testing. The Binet is a little different. You have to have three of the four incorrect in any order.

So when you're looking at a person who is normal functioning, you're going to see them get several in a row correct. Very rarely will they miss a considerable amount in the easier questions. Then you're going to get about, you know, an interim area where they will miss some and get some right. And then you are going to see them miss a number in a row. That will stop the testing. And occasionally you will see them pop up with a correct answer.

But you very rarely see a profile in a test that has people missing easy ones, then getting easy ones right, and then missing more, and then getting them right, and then missing more, and getting them right. That's not the kind of thing that you see in a normal profile.

Q And that latter description that you just described, is that what you mean when you refer to subtest scatter?

A Yes, subtest scatter. And we actually have a little term for it that we have coined called Aces and Spaces. And it's something that my friend Jim Patton and another psychologist and I are working on an article.

Q Okay. And this pattern of subtest scatter, is it -- what is it indicative of related to an opinion of someone's mental retardation status?

A It's the kind of thing you see in people who are mentally retarded, specifically adults with mental retardation. And it's based upon years of experience that they have remembered certain things and mental retardation whereby they have forgotten many things.

Q Okay. So did Dr. Doreman's results that you just described support a finding of mental retardation?

A Yes, they do. They certainly -- that his IQ functions are within the range.

Q And do we have any information regarding Joe's participation in the test that was administered by

Dr. Doerman?

A Dr. Doerman felt that he was cooperative and that he worked hard.

Q Okay. So let's move along to the next test. And what was the next test administered to Joe Nixon?

A The Stanford-Binet, Fourth Edition, which was published in 1986, and it was administered by myself, in 1993.

Q And what were the results?

A The full scale result was a 65 -- or a 68. Excuse me. I can't read it. A 68, The verbal, 70. Abstract visual reasoning was 75. Quantitive, 72. And short-term memory, 61.

Q Okay. Let me take a step back and ask you a question. You showed us before the normal curve distribution; right?

A Correct.

Q And it had 100 as the center and it showed various distributions.

A Correct. Oh, that's --

Q On the Stanford-Binet, is there any difference in --

A Yeah. Yeah. The actual score that was achieved was a 65. Now, the reason that is 68 is to adjust for the differences between the two tests. The Wechsler has a standard deviation of 15 points. The old Binet had a standard deviation of 16 points. Ergo, when you adjust for the difference between the 65 on the 16 standard deviation, it

would go to a 68 on a test with a 15 standard deviation. So it actually -- if you compared them to the rest of those tests, then it would actually be a 68. Okay?

Q All right. So just for comparison purposes with the other Wechsler tests --

A Right. The actual composite score that was achieved was a 65.

Q Thank you.

A You're welcome.

Q And how did Mr. Nixon test on his verbal ability?

A Right at 70, which would have been within the range of mental retardation.

Q And what about short-term memory?

A Short-term memory is considerably impaired, much more impaired. Down as far -- as low as 61.

Q Okay. If you look at the scores, abstract visual, 75, quantitive, 72, short term, 61. Which of those subtests are more reflective of someone's intellectual functioning?

A Verbal is the number one.

Q Verbal is number one? Okay. When was this Stanford-Binet, Fourth, published?

A '86, 1986, Riverside Publishing.

Q And then you administered the test in 1993?

A Correct.

Q So for comparison purposes again, the full scale 68

score should be adjusted to what score for purposes of the Flynn Effect?

A Given the Flynn Effect, it would be only about two points. So 66.

Q Okay. And are you aware that the State has an expert in this case?

A Oh, yes.

Q Are you aware that -- if he was deposed in this case?

A Yes, I am.

Q Did you have an opportunity to review his deposition?

A I did.

Q Do you recall whether he had any comments concerning your administration of the Stanford-Binet Fourth Test to Joe Nixon?

A Yeah. Greg Prichard, who is the State's expert, who is a friend as well, he was concerned that Joe may have been malingering during this administration of the test.

Q And during your administration in 1983, what instruments existed to guard against the possibility of malingering?

A Only one that I know of at the time.

Q Okay.

A It was called the Minnesota Multiphasic Personality

Inventory, MMPI.

Q And why wouldn't you have not used that in 1993 (sic)?

A Because it's inappropriate for people with mental disabilities.

Q Okay. So what steps would you take to confirm, then, that Joe was not malingering on the test?

A Well, there are three things that you watch out for for malingerers. One is they tend to fatigue easily. They fatigue because it's difficult to keep up the ruse. Testing is very stressful for the person being tested, so keeping up that ruse is difficult.

The latency period is the second area that you would look to see how long it took the person to respond. Specifically, latencies in more of the verbal areas than others --

Q Okay.

A -- because what they have to do is they have to develop a response that is plausible but not correct. And then the third area is that people tend to exaggerate. They tend to overcompensate. If you are trying to make someone believe you are retarded, unless you have some significant experience with mental retardation, you will tend to miss more items than you get correct --

Q Okay. And --

A -- or all of the items.

Q And in your practice and experience, how do you know about this topic of malingering?

A I did my dissertation on malingering in mental retardation.

Q Okay. And in your review of the records, in this case, the testing results and his educational tests, educational records too, has Joe evidenced a history of not putting forth good effort on tests?

A On virtually every one of those evaluations, no one ever said he did not put forth a good effort.

Q Okay. And you mentioned that at this time there was no test for malingering. Was a test later developed?

A Yes. In 1996, a guy in Canada came out with a test called the Test of Memory Malingering.

Q Okay. And we will get to that. And I should -- actually, let's just proceed. Before we go to the next IQ test, was there any other, chronologically, any other testing performed on Joe Nixon?

A Yes. There was a psychiatrist that went to see him by the name of Dr. Alec Whyte, W-H-Y-T-E.

Q And do you recall what his finding was?

A He felt that he was -- his adaptive behavior was so severely impaired that Joe would be considered to function within the moderate range of mental retardation, which I

disagree with.

Q And let's just continue to the next administration of an IQ test. Will you tell me who administered the next IQ test?

A The next one was done in 1983 by Dr. Henry Dee, D-E-E.

Q And what results did he get?

A He achieved a 72 in the WAIS-R, with a verbal performance split of 73, 78, respectively.

Q Okay. And so this is his fourth test. How does the score on this WAIS-R prepare to, for example, Dr. Doreman's test in 1985?

A Very similar.

Q Would they be statistically different?

A Nope. One point difference is not statistically significant. And if you adjust for Flynn, you're talking four points difference, and that's not statistically significant either. The research suggests that six to eight points difference in any administrations of the test is not unusual.

Q Okay. And, lastly, so we can move on, how did Dr. Dee's results compare to your results earlier?

A Well, again, we are looking at different tests, looking at the Stanford-Binet versus the Wechsler. But when you adjust for Flynn, they were within two points of each other.

Q Okay. And is Dr. Dee's scores consistent with the finding of mental retardation?

A Yes, they are.

Q Okay. And did Dr. Dee report any of the subtest information?

A Yes, he did. He also pointed out that Joe did have wide subtest scatter. And he also pointed out that Joe was cooperative.

Q Okay. And just to be clear, this WAIS-R you had mentioned before, because it was the same test, actually, Dr. Doerman administered, it was published in 1981. So adjusting for purposes of the Flynn Effect, the obtained score of 72 should be?

A Four points down, 68.

Q Okay. And so after the submission of your affidavit in --

A 2002?

Q -- June 2006, Joe Nixon was actually tested again?

A Correct.

Q And who tested him?

A Greg Prichard, Psy.D.

Q And what were his results?

A Dr. Prichard got an obtained score on the WAIS-III, which was published in 1997, of 80, with a verbal/performance split of 81 and 83.

Q Okay. So the full score 80. What should that be adjusted to for purposes of the Flynn Effect?

A Considering Flynn about three points down, 77.

MR. O'CONNOR: Okay. Your Honor, I would like to make this document --

THE COURT: We are on 6, I think.

MR. O'CONNOR: Thank you. Defense Exhibit 6 for purposes of identification.

Can I approach him?

THE COURT: Very well.

BY MR. O'CONNOR:

Q So, Dr. Keyes, I'm handing you a document that we have marked as Defense Exhibit 6. Can you identify this?

A This is the protocol that Dr. Prichard administered to Joe Nixon on the 15th November -- 15th of September.

Q And have you seen this before?

A I have.

Q And how did --

A He was kind enough to send me a copy.

MR. O'CONNOR: Your Honor, I would like to offer Defense Exhibit No. 6 into evidence.

THE COURT: Any objection to Defense 6?

MR. EVANS: None.

THE COURT: Defense 6 will be admitted.

(Defense Exhibit No. 6 received in evidence.)

BY MR. O'CONNOR:

Q Okay. Dr. Keyes, you okay?

A Yeah, I'm fine. Thank you.

Q What is the relevance of these scored protocols, in your opinion, to this case?

A Well, this particular protocol I think quite clearly addresses my concern about the subtest scatter. When I talked to earlier about Aces and Spaces, I mentioned that several times you will see people who are normal will get the first part of the test correct, miss things in the middle part, and then get the end part incorrect. And I think that this is a good example of what I was talking about there, Your Honor.

If you look at the picture of completion, he gets the first part correct and then misses several, gets a few correct, gets -- misses a few more, and goes all the way to the end and never ceilings. It's C-E-I-L-I-N-G-S.

And then in vocabulary, very familiar. And this, again, this is a verbal test, which is what I was mentioning earlier. If you look, you will see that he gets the first part correct with twos then he gets one wrong -- one point off. Because the highest score you could get on this particular test is a two. And then he misses one and then he gets another two and then one, one, one, one, two and it goes all the way, almost to the end. If you will notice, he does ceiling. The ceiling item is No. 27 and he finishes with No.

32, okay? But he gets a good number of them correct with only partial credit and a good number of them incorrect in between.

Jumping ahead to similarities, I believe, is the next one that I wanted to mention. Yeah. Similarities is on two pages ahead. He gets the first four correct. And he misses one point in the next two, from 10 and 11. Misses 12 completely, gets a full score for 13. Misses 14 and 15, and gets another partial score for 16, and then gets the three in a row correct.

Skipping ahead to arithmetic, same thing. Skipping ahead to information, same thing. And then finally skipping to comprehension, a very good example of the same thing.

Q And this subtest scatter that you're describing, is it reflective of any organic problem?

A It is reflective of people who have a wide array of experience and a poor memory.

Q And is the subtest scatter consistent with the finding of mental retardation?

A It certainly is, yes.

Q And have you done any research on this issue?

A As I said before, I'm in the process with Dr. Patton in Florida -- Texas, rather, and we are just starting a study to look at some data that we have regarding this phenomenon.

Q Okay. So referring back to Dr. Prichard's deposition, do you recall if he had issues with Joe's

performance on the administration of the WAIS-III?

A Yeah, the only part I remember him mentioning, he was concerned about the latency of his responses in digit span, which is a test where I -- where he asks the examinee to -- I'm going to say some numbers. Repeat them back to me. And then you say them in a very specific fashion.

You have to put no -- very little inflection only at the end, and in between, you give a full second between each number. And he was concerned, in his report, that there was -- or in his deposition, rather, that there seemed to be some latency problems, and he noted it on his protocol, Long time to respond, I believe is what it says. And that was one part.

And then he was also concerned about digit symbol, which is a little earlier. I think he said that the digit symbol, which is on page 2 -- no, excuse me, page 3, you could see that the idea in digit symbol is that you learn the symbol, and you have to match the symbol to the number. And his concern here was that he said that Joe seemed to spend a lot of time going over the symbols again and again. Several times he did that. And, in fact, if you look at some of them, you can tell that they have been traced a couple of times, which would indicate, you know, that he was wasting time, perhaps.

But the other possible explanation of that is what I

was talking about earlier when I was talked about perseveration. People with mental retardation will perseverate, do the same thing again and again and again, before they move on. It's very common. It does happen.

Q Okay. Let me just close out an issue. You had mentioned earlier that one possible way a person can malinger is to have a latency in response. And you just mentioned that Dr. Prichard indicated that Joe, on the -- you said the digit span?

A Uh-huh.

Q He had latency.

A Yes.

Q Regarding the subtest of digit span, is latency a problem regarding malingering?

A If a person were trying to malinger digit span, they wouldn't do it by spending a long time to respond. Latency in digit span is not uncommon for people with brain damage. And one of the reasons is because people who are low intelligence tend to remember the last thing they heard. And since you have to put in the correct order -- and that's like I said earlier when we were talking about spelling and writing, since you have to put them in the right order, he had to think about what was the last thing he heard and then what was the first thing he heard and what was the order.

And digit span is usually, not always, but usually

one of the tests that people with mental retardation don't do very well on. And as you can see in Dr. Prichard's testing, a raw score of 9 is not very good.

Q Okay. And do you recall in Dr. Prichard's deposition whether these two issues he raised with the latency and the retracing, whether that, in his opinion, was evidence of malingering?

A No, I believe he said that he felt that other than those -- that those two points were the ones that he had concern about, but he never said malingering nor did he say that he did not give an effort.

Q Okay. And did, actually, Dr. Prichard do any tests concerning whether Joe was malingering?

A Yes. He administered the Test of Memory Malingering.

Q And do you recall how Joe Nixon performed on the Test of Memory Malingering?

A He performed very well. He missed, I believe, one on the first trial and none on the second.

Q Okay. And how many total questions are there?

A Fifty in each trial.

Q So he got 99 out of 100 correct?

A Correct. Now, please understand, though, this is a real basic skill. This is not an intelligence test.

Q Right. So now I've just -- did you prepare any

slides concerning the comparison of these IQ test scores?

A Yes, I did.

Q Okay. Let's just go through this.

A I would like to point them out. This was the -- this is looking at the normal curve. The score that was achieved in the WISC from the 1974 administration, which, at that time, like I said, was 25 years old, adjusted for Flynn, looks at an IQ of 80 and a Standard Error of Measure of 75 to 85, okay? And so we are looking at specifically what that individual testing looks like in consideration of the Standard Error of Measure.

Q Okay.

A And Flynn.

Q Thank you. And then the next administration?

A This would have been Dr. Dora -- excuse me, Dr. Doreman's in 1985, the 72, adjusted for Flynn, which was a 73 to begin with, with a range between 67 and 77 for the Standard Error of Measure.

Q Okay. And the next one?

A This would have been my Stanford-Binet in 1993, adjusted for Flynn and adjusted for the standard deviation difference between the Binet and the Wechsler, 66, with a range at the 95th -- 95 percent band of confidence, 61 to 71.

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

A The next one is in 1983 Dr. Henry Dee administration

of the WAIS-R, which had the IQ of 68 when adjusted for Flynn. And that would go as low as 63 or as high as 73.

Q Okay. And the next one, last one?

A This would has been Dr. Prichard's WAIS-III last month, in September. Adjusted for Flynn 77 and high would have been 82. Low would have been 62.

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

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. We -- I was looking at some research not too long ago that suggested that people can have as much as -- I believe it was out of 107 people in an inn, there were 36 people who had two to three points difference -- one to three points difference, rather, and there were other people who, you know, had 13 and 14 point differences. That's a lot of difference, but they were -- there was no reason for them to not get -- you know, to malinger and get very different scores, scores that were as high as 15 points apart. So it's not unheard of to have a wide distribution of scores.

Q Okay. And as you see here, we have that score of

80. With the Standard Error of Measure, it would be as low as what?

A With the Standard Error of Measure, the score of 80 could be as low as 75.

Q And then we have on the other side, a score of 66. And on the high end of the Standard Error of Measure, it would be a what?

A A 71.

Q So is it statistically significant, a score of 71 and 75?

A No, because eight points -- six to eight points is not unusual in the research. It says that it's not that unusual for a six to eight points to be in a multiple testings. In test, retest reliability, for example, you are going to see that people will vary very often between six and eight points. I added articles, two articles to my affidavit to that affect.

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. A good example of that is, for example, I won't do an IQ test

on a small child for mental retardation, for mild mental retardation specifically.

I mean, if the child is Down Syndrome or, you know, clearly has some kind of genetic problem, it -- then it's pretty safe to give the test and see where the child is functioning. But I won't do an IQ test on a small child until they are about in second or third grade for the purposes of determining mental retardation, because so many kids very often are delayed.

But if you look at this overall, you want to look at the totality of the evidence and you see what would be -- what we call the regression to the mean. You want to actually look to see how the average of all of these comes out. Excuse me.

Q And you referenced a couple of times in there, totality of the --

A Distribution.

Q Distribution?

A Yes.

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?

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.

Q Let me actually transition again.

Now I want to look at the second prong that we talked about, the deficits and adaptive behavior.

A Uh-huh.

Q Is there any psychological instruments to confirm evidence of deficits in adaptive behavior that we discussed at length earlier?

A Yes, there are.

Q And have any of those instruments been used

concerning Joe Nixon?

A Yes, they have.

Q And who administered those tests?

A I did.

Q And what test did you use?

A I used the Vineland Adaptive Behavior Scale.

Q And could you just briefly describe to us what the Vineland is?

A The Vineland is a checklist, basically, a rating scale and checklist that looks at specific behaviors in three domains, daily living skills, communication, and socialization. And it looks at different areas of each of those.

For example, in daily living skills, it includes, can he cook? Can he clean? Does he take care of himself? Does he keep clean? Does he change his sheets? Does he answer -- no, that's not the same one.

And then you have got communication. Does he communicate appropriately with people? Does he interact appropriately? Is he able to have, you know, reading, writing skills, et cetera?

And then the last one which is the socialization, does he have friends? Does he go out with people? Does he interact appropriately with them? Does he play games with others, etcetera, etcetera.

And what you do is you administer this to other people in the hopes that you will get accurate information regarding that person's behavior. And by use of that information, you try to put them together in what's called convergent validation with the rest of your evidence. And by using convergent validation, you can find out if there is -- there is obviously going to be some error, but you can determine, given the totality of the evidence.

Q And you just mentioned convergent validation. Can you explain what that means, in layman's terms?

A I think the first place I read it was a book from the '40s, 1949, a guy named Gordon Allport, A-L-L-P-O-R-T. And what he said was that by putting together multiple pieces of information, such as those IQ tests, you get a better, well-rounded view of the individual than you do out of one score so that if you are trying to do something like trying to diagnose someone, you look at a multitude of data rather than look at one or two small points. And by virtue of that, you can get test information, you can get anecdotal information, you can get all sorts of information on the individual. And you use clinical judgment to determine whether or not that person actually falls within the range of mental retardation.

Q Okay. And is this convergent validation, is that standard practice, to use that theory in order to diagnose individuals with mental retardation?

A Certainly in the adaptive skills and more so in the intellectual functioning, yes.

Q Okay. Let's just get back to where we were. Did you obtain any score on your administration of the Vineland test that you just described?

A Yes, I did.

Q And what was that score, if you recall?

A The scores that I have were pretty low. They were -- I actually administered it to his sister. Virginia, I believe it was. And in the scoring that I got, the overall score, I believe, was a 48, which would place Joe in the severe range of adaptive deficits.

Q Okay. So to make this -- understand this a little bit better, does that score that you obtained on the Vineland, can that be expressed in an age equivalence?

A Yes, it could.

Q And so the score you obtained on this Vineland, do you recall what it would be in age equivalent?

A I believe it was seven years, eight months.

Q Okay. And so is it your testimony that by the administration of this test, that Joe Nixon functions at the level of a seven year old?

A No. No. Actually, I'd say intellectually and adaptively, he functions probably closer to about 10 or 11.

Q Okay. And why would you believe that he functions

like someone who is 10 or 11?

A Based upon the totality of the evidence that I've reviewed. Also, his overall IQ score. Roughly, ten years old is a 70.

Q Okay. And what about any adaptive skill information? Does that --

A Well, the adaptive skill information came from many sources, not the least of which was all the records. And his adaptive skills were clearly impaired from a very youthful age.

Q But -- so the facts that we've discussed earlier, do -- and we went through in detail the different types, do those -- does that information reflect upon your opinion that Joe functions at the level of a 10- or 11-year-old?

A Absolutely.

Q And you also mentioned taking all the information, you had mentioned the holistic approach, convergent validation. Is there any support in the scientific literature for using this type of approach?

A Yes.

Q Okay. And let me show you -- oh, this is just from before apparently. Okay.

Can you -- where does this slide that you've made come from?

A Well, it's actually -- it says page 57 down there.

I have got to tell you, it's also on page 1 of the American Association on Mental Retardation's Definitions, Classifications and Systems of Support. It is -- these are the five assumptions that are necessary to be understood when looking at a possible diagnosis of mental retardation.

First, we look at the community environments and how that person interacts with his same age, same culture peers. Second, we look at the language and communication diversity as being an important point to avoid over-representation of people of color and people of different ethnicity. Third is what I consider to be the most important assumption, and, in fact, I had many conversations with my mentor and my teacher, who is the editor of the American Association on Mental Retardation's Classification Manual. Her name is Ruth Luckasson.

And Ruth and I talked about this quite a bit, because one of the things that most people don't understand about mental retardation is that though they have significant deficits in many areas, they also exhibit strengths. Now, sometimes those strengths don't even come up to the normal level, not even up to average for any other normal functioning individual, but sometimes those strengths appear to be higher because of the fact that their general functioning is much lower. We are talking about people who function in the lowest two percent of the population.

So that when those two people have even minor strengths, they seem remarkable, particularly for those of us who teach them. You take advantage of those strengths. You work on those strengths, especially in the classroom, to make people work better and perform better in those areas.

Q Okay.

A One last thing before I finish --

Q Oh, yeah. Continue.

A Regarding strengths, this is how I said earlier, it's one of the best ways to trip up malingerers, because they think people with mental retardation can't do anything.

Q So, for example, could someone with mental retardation hold a job?

A Absolutely. Often do. In fact, many of my ex-students do.

Q Could someone with mental retardation have a conversation with you?

A I've had many conversations with many people with mental retardation. They can hold a job. They can have a family. They can have relationships. They can drive a car, which seems scary, but, believe it or not, the ones that I knew weren't too bad. They are capable of doing many things in the community.

Sometimes those that hold a job, they may end up just in the service industry, you know, busboy, dishwasher,

things that are considered to be menial tasks by most of us, but people with mental retardation can do these things and do. And I've known people that have held jobs, with mental retardation, for years.

Q So when we discussed the adaptive behaviors before, we had the practical, social, and --

A Conceptual.

Q Conceptual. Thank you.

A You're welcome.

Q And it listed all sorts of different examples. So could someone have strengths in certain of those areas and weaknesses in another and still be considered mental retardation?

A Absolutely, they do.

Q Okay. And did Joe Nixon have deficits in adaptive behavior?

A Serious ones, yes.

Q And when you were doing your diagnosis of mental retardation, and specifically assessing adaptive skills, would it be appropriate to assess those skills in an artificially-structured environment?

A No. You'd want to adapt -- you want to check adaptive skills in the community because that's where they count.

Q Okay. So in this case, currently, where is Joe

Nixon?

A Death row, Union Correctional Institute in Raiford.

Q And would you consider this an artificially-structured environment?

A Prison is the highest structured environment on the planet. You can't get more structured than that.

Q So would it be appropriate, then, to assess any adaptive behavior, skills in death row?

A No, because people with mental retardation respond really well to structure and routine. They love it. They seek it out. The best teachers I know are people who have a structured environment in their classroom. The students know what's coming, when it's coming, how it's coming. And even though you have to change the way you teach things, because otherwise they won't generalize it to their regular life, you have to also keep a high level of structure in your classroom so that they don't -- I mean, you have heard people talk about when they have -- whenever they get a substitute teacher, the kids are off the walls? That's because it changes the environment, okay?

My kids, I kept a highly structured environment for them, and they responded extremely well to it. And the same thing goes for people what are mentally retarded in homes that are in disarray or turmoil or violence. These things really do make a difference in how people adapt to their lives.

Q Okay. And those last factors that you've described, were those present in Joe Nixon's upbringing?

A Oh, absolutely.

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.

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.

MR. O'CONNOR: Okay. One second, Your Honor.

THE COURT: Very well.

MR. O'CONNOR: Thank you, Your Honor. No further questions.

THE COURT: All right. It's about five minutes to twelve. I would suggest we go ahead and take our lunch break. We will be back here and start again at one o'clock.

(Break taken.)

THE COURT: We are back on the record in State of Florida versus Nixon, 1984-2324. We are ready to proceed with the cross examination.

THE WITNESS: Your Honor, did I leave some things here?

THE COURT: Did you leave some what where?

THE WITNESS: I thought I left my bags here. Maybe I didn't. It doesn't matter.

THE COURT: Is there something you are looking for?

THE WITNESS: Well, I thought I left my things here, but that's okay.

THE COURT: I don't remember.

Did you pick something off of his --

THE BAILIFF: No. He just had his glass of water.

THE WITNESS: Then I must have taken it with me. I'm sorry.

THE COURT: That's all right.

Mr. Evans, whenever you are ready to proceed with your cross examination.

CROSS EXAMINATION

BY MR. EVANS:

Q Dr. Keyes, the result in '74 was an 88; is that correct?

A That's correct. On the WISC, the old WISC.

Q Excuse me?

A On the old WISC.

Q On the old WISC. And that particular item, the -- did the coding manual ever take into consideration the Flynn Effect on the old WISC?

A No.

Q And, in fact, the year that it was given, the Flynn Effect hadn't even been postulated at that stage, had it?

A That's correct.

Q Now, you had discussed the fact that there were no

minorities that were included whenever -- I guess, as the base sample for the WISC; is that correct?

A That's correct.

Q Now, is it not that the literature has indicated that --

THE COURT: Would you spell WISC just so the court reporter knows. It is Wechsler Intelligence Scale for Children. So that would be W-I-S-C; is that correct?

MR. EVANS: That's correct.

THE COURT: Go ahead. Trying to help out.

BY MR. EVANS:

Q That the literature has indicated that it, in fact, scored minorities falsely low; is that correct?

A That is correct.

Q In particular, African-American males?

A That's correct.

Q So, the 88 result, if we take Mr. Nixon as part of the group encompassing African-American males, which he is, given the test at that time, we would believe that the score of 88 would actually be lower than what his actual IQ is?

A Not 25 years later.

Q Not 25 years later?

A No. Twenty-five years later, it would have been lower.

Q So what changed in the time that the test was -- had

came about and the fact that it was given 25 years later that would make Mr. -- that would result Mr. Nixon's score actually being lower?

A Flynn.

Q All right. Without the Flynn Effect.

A Without the Flynn Effect? Again, we have no evidence. We have no protocols. We have no description of the test administration. We have no evidence --

Q You're going back about this particular test.

A -- that this completely correct.

Q What I'm asking you about is the WISC.

A Generally?

Q Generally. African --

A Generally, the WISC scored African-Americans lower.

Q Right. And Mr. Nixon is an African-American male?

A That is correct.

Q And so the 88, we would think, since it scored African-Americans lower, that Mr. Nixon's score could, in fact, be higher based been the fact that it artificially lowered African-American males' scores?

A I would disagree with that. I think that given what I've known about Joe Nixon, that an 88 is a score he could never have achieved.

Q Okay. But assuming he achieved the score, and, you know, because at this stage you're -- to undermine the score,

in 88, it's based upon your current observations of Mr. Nixon; is that correct?

A The score in '74, you mean?

Q Yeah, in '74 of 88.

A Yeah, I understand what you're saying. I disagree that it's a correct score. But, generally, African-American men did score lower on the old WISC.

Q Okay. So if you go with the score of 74, it was signed off by a psychologist; is that correct?

A Yes, it was, the staff psychologist at Apalachee.

Q Is it unusual for a -- for the actual evaluator to -- the person who is giving the test not to be the psychologist but it to be an intern for the psychologist or some sort of psychological assistant?

A "Unusual" is an odd word to use. I would say it's not good practice, and I think most of my colleagues who are more of a hands-on type breed would agree that it's not good practice. But unusual? In schools, it's very unusual. In mental health facilities, sadly, it's not that unusual.

Q So it's not -- in somebody who is, for instance, seeking to get there doctoral degree in psychology --

A Uh-huh.

Q -- it's not unusual for someone interning under a licensed psychologist for that particular person to be giving these tests and it being signed off by a psychologist, is it?

A That is correct, yes.
Q Now, if we assumed the test was correctly administered --
A Uh-huh. Okay.
Q -- and the result we would expect from Mr. Nixon of the 88 would be artificially low based upon the studies of the WISC.
A Assuming it's correct, okay.
Q Is that it so far?
A Yeah, I'm with you.
Q Okay. And so, then, if you applied the Flynn Effect, it would still be well above -- still be well above the numbers that you wound up with, wouldn't it? For instance, what I'm asking is, you have an 88. And how much did you deduct for Flynn?
A Well, it's 25 years old, so eight points.
Q So it would be an 80?
A Yes.
Q So even with the deduction to an 80, if we assumed the test was given correctly and it falsely lowered African-American males, we would expect Mr. Nixon's IQ to be above 80, wouldn't we, even with the Flynn Effect?
A Again, assuming everything you're assuming, yes.
Q And, basically, the main thing I'm assuming is the fact that the test originally given was given correctly?

A That's a big assumption, yes.
Q Okay. Were you present at -- when the WAIS-R was given in '85?
A No, sir, I was not.
Q Or when the WAIS-R was given in '93?
A No, sir, I was not.
Q Or when the WAIS-III was given in 2006?
A No, sir, I was not.
Q Okay. So you have to take some degree of -- you have to give those tests some degree of reliability anyway. You have to --
A I do. I do.
Q And you have to take them somewhat on faith?
A I do.
Q Because you weren't present when they were given?
A That's correct. And I know those three people, too, who administered them.
Q And because you don't know the person who gave it in '74, you don't put the same amount of faith on it?
A I don't put the same amount on them, because, A, she was doing it for someone else; and, B, there was no evidence in what I read, her report, that suggested she had anything even close to what's considered legitimate training for someone to do something of that nature.
Q Okay.

A Anybody I have ever seen whose signs their tests, always signs it with the degree afterwards. She did not.

Q Okay. So you're basing all of your assumption on the fact that she didn't put a degree after her name?

A Certainly not. I'm basing my assumption on the fact that she didn't put a degree on her name. And when we checked to look to see if she was listed as ever having been licensed in this state, she was not included. The only person that they found, Wendy Miles was a radiological technician who had been licensed.

I also looked at the report and I found it abysmally lacking given the fact that if she was an intern in school psychology and one of my students, I would have been very disappointed, because she didn't really talk about the testing, the scatter, what she found, what the subtest scores were, how those might be useful for either a teacher or a counselor or someone who is working with Joe. Nothing of that nature was done.

Q But the psychologist who signed off on it didn't seem to have a problem with it, did they?

A Nope. They are very busy people in those places, I know.

Q But the psychologist did sign off on it?

A Yes, she did.

Q And you would expect a psychologist to have -- if

having any concerns, not to sign off on it?

A I would agree with that, yes. In my case, I would have expected a lot more details.

Q Okay. But the psychologist who signed off on it apparently didn't --

A Didn't, that's correct.

Q -- and thought it was acceptable?

A That's correct.

Q Now, the WAIS -- or the WAIS-R that was given in 1985 was a score of 73; correct?

A That would have been Dr. Doreman's.

Q Now, if we lay aside the Flynn Effect, then that would put his range, if you do the standard error rate, of a plus or minus 5.

A Correct.

Q So his IQ could actually have been as high as 78; correct?

A That's correct.

Q And if we go to the WAIS-R that was given in 1993, again, laying aside the Flynn Effect, the 72, that means his score could be as high as 77?

A That's correct.

Q And if we go to the WAIS-III given in '06, his score could be as high at 85?

A Correct.

Now, the Florida Statute cuts off the level at 70; is that correct?

MR. O'CONNOR: Objection to the question. Asks for a legal conclusion.

THE COURT: Well, he has already testified all about the -- on direct about the Florida standards. So I think it's -- I think I know the difference between his role and my role. So I'm going to overrule the objection. You can proceed.

BY MR. EVANS:

Q Okay. So the number that the Florida Statute uses and the rule uses is the number 70?

A That's correct.

Q And it doesn't have plus or minus, does it?

A No, it does not.

Q Now, some of the information you used on the reasons that Mr. Nixon, I believe, could fall into the category of being mentally retarded, one was the fact he had been abused as a child?

A Correct. I'm sorry.

Q And one where he had been injured as a child from falling into some scalding water?

A That's correct.

Q Now, you made note of that, and you were relying on a witness's affidavit for that; is that correct?

A That is correct.

Q Now, and you, I think, indicated that Mr. Nixon's face was burned to the bone?

A That was what the affidavit said, yes.

Q Okay. Was there information that you reviewed that Mr. Nixon had no such scarring?

A Yes, I did see that.

Q Okay. So there was a situation where it seemed some of the affidavits you relied on and pointed out seemed to be contradicted by the record?

A The record being that he had no scars, that's correct.

Q Right. Would you expect somebody having been burned to the bone to have some sort of scar?

A I would expect some, yes.

Q Okay. So not everything in those affidavits can be taken at face value; is that correct?

A No affidavit should ever be taken at its total straight value; that's true. On the other hand, there is nothing that says that it couldn't have happened.

Q But there seems to be some evidence that contradicted. If it did happen, it wasn't near as bad as what it was described?

A It wasn't near as bad, yes, I would agree to that, burned to the bone versus a severe burn.

Q Now, there were some notes -- or you had indicated during your testimony as to some of the adaptive behavior, that he was having problems in class. And I think you explained that away is his mental retardation showing that he was having trouble learning --

A Yes.

Q -- is that correct? Now, there was also some notes in the reports that indicated that he was often angry and had problem with authority?

A That's true.

Q Now, that doesn't necessarily have to derive from mental retardation, does it?

A It doesn't necessarily have to, but I think in this case it could have been a very good explanation for his level of aggression and his level of anger --

Q Okay.

A -- and frustration.

Q But as you pointed out, it doesn't necessarily have to --

A That's true.

Q -- correspond to that? And if someone is angry and has a problem with authority, you would expect them not to be paying a lot of attention in class or giving the teacher a whole lot of respect; is that correct? Or else they wouldn't be angry and have a problem with authority, would they?

A I think that from a context of a normal individual, anger and problem with authority could be a behavioral issue. From the context of a person who I believe is mentally retarded, anger and a problem with authority can be in many ways based upon their frustration and their lack of understanding and their feelings of inadequacy and self-esteem problems.

I think that particularly in situations where teachers weren't getting something across to him that he needed to learn, I've known that to happen in schools, where kids with mental retardation got just frustrated by not being able to learn something and that's when they act out.

Q Okay. But you're going back to the assumption that the anger and problems with authority are related to some sort of mental retardation issue. But do you agree that they could come from some other issue, and therefore his lower school grades could be related to the anger and problems with authority that, in fact, could be unrelated to mental retardation?

A Assuming he is not retarded?

Q Yes.

A Yes. I disagree with it, but I can understand what you're saying.

Q Okay. And if you didn't disagree with it, I wouldn't expect you to have been testifying today.

A Thanks, Mr. Evans. Nice to see you.
Q Were you a licensed psychologist when you gave the test?
A A certified psychologist, yes.
Q Okay. And what's the difference between certified and licensed?
A Certified by the State of South Carolina and by the National Association of School Psychologists.
Q Okay. And when did you become licensed? Was it before you received your Ph.D. or after?
A I was certified from 1985 -- '86. '86 is when I got licensed.
Q Okay. So you could have received a license before you received your Ph.D; is that correct?
A Correct.
Q Okay. And you had your master's at that time?
A I had a specialist's.
Q A specialist's.
A Well, I got my master's when I was -- yeah, I got my master's in '86. I got my specialist's in '88.
Q Okay. But you certified as early as '85?
A '86.
Q '86.
A I was certified as a school teacher from 1979 for special ed.

Q Okay. Did you give intelligence testing at that time?

A No.

Q Okay. When did you first start giving intelligence testing?

A When my training started in school psychology in 1985.

Q And what did that consist of doing?

A To learn to give the test specifically? I took one test in -- one course in test administration, which was one semester, I think it was fall of '85. And that taught us how to give the major intelligence tests. And then I took another course the next semester on test interpretation. And then a separate, totally separate course in personality testing.

And then in each one of those we had to administer at least 20 to 25 IQ tests, both the WAIS and the WISC and the Binet, all three of those. And that was before the new Binet had come out. So I actually learned on the -- LM edition of the Binet, which was old as the hills at that point.

And then you -- then we learned the Rorschach and the TAT and the personality tests. And then in the interpretation courses, we taught -- we learned how to interpret each one.

Q Now, when you completed the testing, do they have to be signed off by a licensed psychologist, or could you sign

off on them?

A In your internship, which lasts for a year after you finish your master's, during my internship, all of my evaluations were signed off by my supervisor, that's correct.

Q So it's not unusual for your supervisor to sign off on someone else's testing?

A No.

Q Okay.

A But I always signed it, Denis W. Keyes, BSEd, MEd MSEd, yes.

Q Okay. Now, you indicated this scatter that Mr. Nixon had.

A Uh-huh.

Q Now, what are the various explanations that could account for that? I think you indicated brain damage was a possibility?

A Yes.

Q Are there any other things that could possibly show scatter?

A The word "scatter" is kind of a problematic word here, because it can refer to so many different things. Scatter and subtests can refer to the things that we talked about earlier regarding, you know, getting some things right and getting some things wrong. That can be considered scatter, or variation of variability.

Then another word is looking at the actual standard -- or scale scores, rather, excuse me, and that -- those scale scores can range on the Wechsler from anywhere from 1 all the way to 19, where 1 would be very severely impaired in that area and 19 would be genius beyond record. And so what you find is that most people run around the mean, which is 10.

But scatter in subtest scores can refer to, say, a couple of 3s and 4s, a couple of 7s and 8s, and a couple of 10s and 11s. And you're looking on the Wechsler, for example, 10 to 12 subtests. And so you can get a pretty wide variation of scatter. And if you have really high scores and really low scores in scatter, that can suggest brain damage, as you were saying. But it also suggests some other things. It can also suggest -- it's been suggested in the literature that it can indicate emotional disabilities.

Q Anything else?

A Sometimes learning disabilities, in fact.

Q Malingering?

A Yes, it can indicate that, too.

Q Now, you adjusted the Stanford-Binet from a 65 to a 68.

A Correct.

Q Is that -- in your charts. Is that something that's generally done --

A No --

Q -- in the field?

A -- it's not generally done. I actually -- I wasn't really sure how I would go about doing it. And in reading Greg Prichard's deposition, he suggested that that would be a possible estimate. And I sat down and thought about it and thought, yeah, that sounds about right.

Q Okay. But there is nothing in the literature that gives you a conversion rate; is that correct?

A No, there isn't anything in the literature that completely converts.

Q So that would be a best guesstimate based upon --

A I admit openly that's a guesstimate, you're right. It's an educated guesstimate, but it's a guesstimate.

Q Now, if you would have given an MMPI, would you have received a false malingering result if you had given it to somebody with a mental disability or mental retardation?

A Mr. Evans, I would never give an MMPI to someone who is suspected of mental disabilities and mental retardation.

Q Okay. So anytime someone is given a mental retardation exam, they should not be given a malingering exam or an MMPI?

A In my professional opinion, I would say absolutely not. And I would wrote an article about that specifically.

Q So you would categorically reject giving a

malingering test to anyone suspected of mental retardation?

A I would, yes. And one thing I would say is that if you read the manual of the MMPI, it says point blank, you do not give it to people who are brain damaged. And mental retardation is included in that area.

Q Now, you indicated that you disagreed with the moderate, I guess, mental retardation that was opined by Dr. Whyte?

A I disagreed with his concept that he is moderately retarded. As I stated earlier, when you look at the levels of mental retardation, you are looking at mild, moderate, severe, and profound. And despite the fact that Mr. Nixon has what I would consider severe adaptive problems, intelligence-wise, he doesn't fall within the range of moderate mental retardation. In that part, I do disagree. I don't disagree with Dr. Whyte's assertion that he is mentally retarded.

Q Okay. But the moderate retardation, where would you place him on the scale?

A As far as intelligence?

Q Yes.

A Overall, I would say around a 72, 73.

Q Okay. Now, the -- so you would not find him in the moderate retardation but --

A Mild.

Q -- mild retardation?

A That is correct.
Q Now, you did -- if you take the average -- and I believe on the chart that was placed in evidence, that you averaged everything without -- with the Flynn Effect?
A That's correct.
Q And came up with the 73?
A That is correct.
Q All right. If you remove the Flynn Effect, the average is 76; isn't that correct?
A I believe that is correct, yes.
Q And then if you gave Mr. Nixon the benefit of the doubt, he could score as low as 71 then?
A Correct.
Q Or as high as 81?
A Correct, without correcting for Flynn.
Q Now, even if you did correct with Flynn, you would have to be giving Mr. Nixon the benefit of the negative side of the --
A Plus or minus, yes, uh-huh.
Q Yes. And so in order to get him below 70, if you went with the averages you had with the Flynn Effect, you would still have to give him -- knock a few points -- knock three points off, or actually four points off, in order to have him go below 70; is that correct?
A Oh, I see. For the statute, yes.

Q Yes.

A But that -- remember that there is a Standard Error of Measure which has to be considered. And both AAMR and APA both agree on that. In addition, there is that test, retest reliability angle that you have to think about, six to eight points of possible test, retest involvement. So, I mean, your numbers can change in one's lifetime. So that is of concern.

Q But you still have a situation where the only number that gets him without -- without any using the standard measure of deviation, the only number that ever gets him below 70 is, in fact, your number?

A That is correct.

Q In all other numbers you have to give him the benefit of the doubt of the minus side in order to get him below 70?

A I see what you're saying, yes.

Q Okay. And you never considered the fact that he could be to the plus side of the 70?

A Certainly I considered that fact. But when one looks at the adaptive skills and looks at a clinical judgment issue, no question in my behind that he functions within the range of a person with mental retardation.

Q Does the scoring manual indicate that before you can give the person the score, you have to look at the adaptive functioning?

A No, it does not.
Q Okay. Is it three prongs you have to look at before you can say mental retardation?
A That is correct.
Q And one has to be the onset before age 18?
A That is correct.
Q All right. And in Mr. Nixon's case, testing before age 18 puts him above the 70 score, doesn't it?
A That WISC, 25-year-old WISC, yes.
Q Now, was there anything that occurred to Mr. Nixon, specifically before 1985? Was there some indications that he was, in fact, in a fight in the Department of Corrections that --
A He was an aggressive kid, yes.
Q Okay. And that he ended up getting hit upside the head and there was some postulating in the reports that some brain injury may have occurred because of that?
A I did read to that affect, yes.
Q So it is possible, again assume the 88 was correct, that any lower scores could be accounted -- would not be the result of a mental retardation problem, but the fact of a brain injury?
A That would still not have accounted for the fact that two of his teachers specifically suggested he needed special education, and nothing was every done to that affect,

so.

Q Okay. But he never received special education?

A That's right.

Q All right. So you had two teachers who recommended it. And do you know how many teachers he had between 10th grade and kindergarten?

A I assume at least ten.

Q Okay. So he was --

A No. Actually, he probably had more because he was held back twice, so.

Q Okay. So he probably had quite a number of teachers?

A Yes.

Q And you were pointing to only two teachers of quite a number of teachers he had who said something about maybe needing special education?

A That's true. At least that's all that we have on the record. The records --

Q Okay. And are you familiar with the school systems in Leon County?

A Specifically? No.

Q Okay. Are you familiar with their reputations in the State?

A No.

Q So you don't know whether or not they are considered

very exceptional schools in Leon County or very poor schools?
A No. But Joe grew up in the '60s in Northern Florida and he is African-American and I suspect that that probably would have some bearing on the situation.
Q Okay. So you're assuming the schools would have been less than adequate, because they are in North Florida in the '70s?
A And the civil rights situation was not the best in those days.
Q But you are not familiar with Tallahassee or the schools, are you?
A Not Tallahassee specifically, no.
Q You are familiar with the fact that we have FAMU, Florida A&M University, and Florida State University located here?
A Yes, I do.
Q And you don't know whether or not there are a good pool or a bad pool for teachers in Leon County?
A Oh, I disagree. In fact, Florida State has a very good special ed program.
Q Okay. And --
A So does the University of Florida, for that matter.
Q How about FAMU? Do you know anything about FAMU?
A I really don't know much about Florida A&M.
Q Okay. Now, you indicated on the Vineland, you gave

a score of 48; is that correct?

A That's correct.

Q And the age equivalency of that would be seven years, eight months?

A Approximately, yeah.

Q But you felt that that was not necessarily an accurate indication of his current functioning?

A I would say that was a little low, yes.

Q Okay. And you indicated 10 or 11 years of age?

A Roughly.

Q And that that would go to roughly around a 70?

A A little below 70, actually. Sixty-five to 70, somewhere in that area.

Q Okay. The number I think you originally gave was 70.

A Yes, I think that's what I said on the original testimony.

Q Okay. Now, have you reviewed Mr. Nixon's criminal history?

A Yes. It's been a while, but, yes, I have.

Q Okay. And have you reviewed any of the reports in there?

A The police reports?

Q The reports as to the crime where he was convicted in this case and any of the other crimes he had committed?

A Yes, I have. It's been a while, like I said, but I have.

Q Now, in those particular cases, he demonstrated the -- I guess in this main case, he displayed the ability to come up with a plan in order to kidnap Ms. Bickner, didn't he?

MR. O'CONNOR: Objection.

MR. FREEDMAN: No we have no objection to a hypothetical question. I certainly object to the question that was asked.

THE COURT: Well, what --

MR. FREEDMAN: In this particular case --

THE COURT: We get one lawyer per witness. Go ahead.

MR. FREEDMAN: Sorry. Sorry.

MR. O'CONNOR: I just object to the question as to this particular case, to the -- sorry -- to the extent that he knows the facts, that Dr. Keyes --

THE COURT: So the objection is as to foundation? The objection is that -- the doctor's foundation of his knowledge of the facts of the evidence that was admitted at trial?

MR. O'CONNOR: No. His knowledge of the facts of what Joe actually did.

THE COURT: Okay. I'll sustain the objection as to form. Would you just restate, rephrase the question?

MR. EVANS: All right.

THE COURT: Just to make it clear exactly what you are asking, Mr. Evans. Go ahead.

MR. EVANS: All right.

BY MR. EVANS:

Q Did you review the transcript in this case of the trial?

A Some of it, not all of it.

Q Okay. And what parts of the transcript did you review?

A Not the part dealing specifically with the crime, I have to be honest.

Q Why not?

A I don't believe it was supplied to me. I'm not sure.

Q Okay. And would you have thought that would have been helpful for you to look at, whether there was anything in the way he committed this crime, that could shed some light on his adaptive functioning?

A Criminal behavior is definitely a part of adaptive functioning. I mean, if you are going to behave as a criminal, you are maladaptive, okay? And maladaptive behavior in the literature, is not considered adaptive, period.

If I had read the police accounts, for example, of detectives giving testimony on what was the alleged crime that

Mr. Nixon committed, or allegedly committed, then it might have given me some insights to the organization that he used in the process. But whether or not it would have told me about his actual adaptive skills in that area, I don't know.

Q All right. Did you read his confession in this case?

A A long time ago, yes. It's been a long time since I read it.

Q All right. And are you aware of the fact that the guilt of Mr. Nixon was not contested at the trial stage?

A Yes, I am.

Q Okay. Now, do you think it would have been helpful to you had you had the information of how he committed the crime, or was convicted of committing the crime, and how he was convicted of committing other burglaries to shed some light on the way -- the way he --

THE COURT: Can I stop you for a second, Mr. Evans? Can I ask you about something about you just said?

THE WITNESS: Certainly.

THE COURT: Did you just say, for purposes of your profession, criminal conduct always counts towards a finding of the second prong of the MR definition?

THE WITNESS: No. No. No. Maladaptive behavior is not considered adaptive, okay? That doesn't mean you have to -- you take it into consideration as a prong for

the definition, okay? Maladaptive or criminal behavior is considered by the mental retardation definition as non-useful, non-adaptive, and, as such, we really don't consider it as part of the prong of the definition.

THE COURT: So you don't consider -- the criminal conduct you don't consider one way or the other as supportive or not supportive of a diagnosis?

THE WITNESS: That is correct.

THE COURT: Okay. I'm sorry, Mr. Evans. Go ahead.

BY MR. EVANS:

Q Okay. But how someone committed the crime, what resources they used, if they planned it or didn't plan it, and their ability to carry it out, to function afterwards, and what they did afterwards would all be something that could be considered in adaptive behavior; is that correct?

A It might be considered as part of adaptive behavior, but keeping in mind that not all of these behaviors are weaknesses. Some -- unfortunately, some maladaptive behaviors can be things that they do rather well.

Q Okay. But it can show you whether a person has the -- their ability to think, to reason, to think ahead, to do --

A To plan and organize? Yes.

Q And of those would be reflective upon a person's adaptive functioning; is that correct?

A If not intelligence or both.
Q Okay. Now, you reviewed the affidavits that were furnished back in 1993 as to Mr. Nixon's behavior?
A That is correct, by his family and several other people that the VA, volunteer attorneys, put together.
Q Okay. And that was something that was put together by his attorneys and furnished to you; is that correct?
A That is correct.
Q Okay. The -- did you go out and look at any of his other school records?
A We took -- I looked for school records, yes. We tried to get school records. The school records that I was supplied with were minimal.
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.
Q So, all you --
A The only ones I saw were the ones we discussed.
Q So, at this stage, all you know is you were not supplied more?
A That is correct.
Q Now, as to his reports and the way he committed other crimes besides this one, any burglaries, thefts, or

anything such as that, could that also have given you some insight to his adaptive functioning while he was outside the --

THE COURT: Is there an objection?

MR. O'CONNOR: Objection. Yeah, I was going to give him --

THE COURT: Let him finish the question?

MR. O'CONNOR: Yes.

THE COURT: Okay. Go ahead.

MR. O'CONNOR: I object to the form. He could testify on the hypothetical or that Mr. Nixon was convicted but not to the underlying facts of what Mr. Nixon actually did.

THE COURT: Well, how would that be any different than all of the affidavits that he took into account?

MR. O'CONNOR: All I'm saying is that the conviction doesn't necessarily assume that the facts were actually carried out.

THE COURT: Well, sure. I mean, I know -- okay. I think I understand.

MR. O'CONNOR: It just stands for the fact that he was convicted.

THE COURT: I'm going to sustain as to the form. Would you rephrase it again, so I'm clear exactly what you're asking, Mr. Evans?

MR. EVANS: All right.

BY MR. EVANS:

Q If you had received police reports -- and assuming that they were accurate, much like you would, I assume, assume the affidavits that were provided you were accurate --

A Yes.

Q -- could that type of information have aided you in -- or helped you in looking at Mr. Nixon's adaptive functioning while he was outside the prison setting?

A I think any information is important, yes.

Q Okay. And that type of information was not supplied to you?

A No, it was not. I did have a lot of juvenile records. I did have his juvenile records, primarily from Dozier School and the other places he was placed.

Q Did they give you any detail as to how the crime was committed other than the basic --

A Marginal. Sometimes they, you know, in the intake reports and things like, they were described but not to any grave -- great extent.

Q Now, would you have believed a 10 year old or a 11 year old would have been put in -- as the way you described his age, could have lured someone away from -- and let's assume, first of all, Ms. Bickner was a person of average intelligence, okay?

A Okay.
Q And I don't think there is anything in the record that would contradict that?
A No.
Q And -- at least nothing you saw; is that correct?
A I saw some affidavits that suggested that Wanda was not terribly bright.
Q Okay.
THE COURT: Wanda, Wanda is someone else, I think, than what Mr. Evans --
THE WITNESS: I'm sorry. I'm sorry. Ms. Biggers (phonetic). I'm sorry.
THE COURT: I'm not sure that the two of you are communicating.
THE WITNESS: Biggers. Ms. Biggers.
MR. EVANS: You mean, Jeanne Bickner.
MR. O'CONNOR: Objection, your Honor. I don't think Dr. Keyes is an expert on the facts of this, the underlying crime and --
THE COURT: Well, that objection is overruled. Mr. Evans, go ahead and rephrase, so I'm clear on what exactly you're getting at.
MR. EVANS: Okay.
BY MR. EVANS:
Q If we assume the victim and the murderer in this

case was of average intelligence, Ms. Bickner --

A Yes.

Q -- not Wanda, but Jeanne Bickner.

A I will assume that.

Q Now, you would have to believe an 11 year old, a person with an 11 year old IQ would be able to lure her away with -- to help him jump a car off, then he be able to kidnap her, carry her out into the woods, torture her, burn her alive, then come back into town, driving her car, acting like everything was okay, giving away jewelry, pawning jewelry, and conduct himself to the point where people didn't know what type of crime he had committed. And, actually, he was able to get away with it for quite some time before he was caught. So do you believe that an 11 year old could have done that?

A You're oversimplifying the status of the 11 year old adaptive skill. I believe that a person who is mentally retarded could do something like that, and, sadly, have done it before.

Q So the fact that you think he is operating on a 10- or 11-year-old age group, you still think he would have been functioning high enough to have committed this crime in the manner in which he did?

A Again, people with mental retardation have areas of deficits and areas of strength, and, sadly, some of the areas of strength can commit crimes like this, help them commit

crimes like this.

Q It also helped him pawn jewelry, didn't it?

A People with mental retardation pawn things a lot, trust me.

Q But in order to steal something, know he is able to get money, and get the money and still elude police for quite some time?

A I know of a situation where a man lived in the woods for several months, in a case in Missouri, and they even wrote a song about him on the news -- on the radio, and he was mentally retarded, as well as mentally ill.

Q But Mr. Nixon was, in fact, during that time, functioning in society, wasn't he?

A 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.

Q Okay. Would you think -- have thought that type of information would have been important for you to have gathered before you reached a conclusion as to adaptive functioning?

A Specific information about the crime is of some importance but not of great importance.

Q No. No. No. The other thing you just said, whether he had a job, where he was living, what he was doing.

A Well, I know that he has at one time had jobs and kept them for a while and that he lived with other people and

that he was able to live alone for a while and that he left his parent's house at a relatively early age. There were all sorts of things that I know about him, but I don't know exactly what he was doing during the time around the crime.

Q Okay. Would that have been important -- would that have been helpful?

A Potentially, I suppose, yes.

Q And you were not provided that information?

A No, I was not.

Q Now, I think you indicated -- you were talking about some subtest scores that there -- that was a problem in some of the testing. Did Dr. Dee or Dr. Doerman provide subset (sic) scores in their reports?

A Dr. Dee's report supplied percentages, percentiles, for the subtest scores, yes.

Q Okay. Dr. Doerman?

A Dr. Doreman's, I don't believe did, no.

Q Okay.

A But as I said before, the issue with Ms. Miles' is that it was during the educational period. And what I would have wanted to know as a school psychologist and as a school teacher was how did he do on those subtests, so that I could get some idea of what things he is good at and some things he is not good at for the classroom purposes.

Q Okay. But that particular test was, in fact, the

one -- the only test that was given before Mr. Nixon's mental retardation, or lack thereof, was important because of the criminal case; is that correct?

A That is correct. To my knowledge, it's the only individualized test of intelligence that was given prior to the adjudication, yes.

Q Okay. So the test in '85 that took place there was, in fact, a situation where they were preparing for the penalty phase of the case?

A I believe that's correct, yes.

Q And the testing in the '93 occurred as part of the post-conviction?

A The 3.850, yeah.

Q Okay. So the test back in '74 was the only one conducted without the specter of this particular case in mind?

A Yes, that would be true.

Q Did you ever see where a Beta was given?

A I'm sorry?

Q A Beta.

A Oh, a Revised Beta?

Q Yes.

A Yes, I do know that there was one given, and there was a Slosson given too, I understand.

Q Okay. He scored an 88 on the Beta, didn't he?

A That's correct.

THE COURT: What is a Beta?

THE WITNESS: A Revised Beta is a non-individualized group of administered tests of intelligence.

THE COURT: Oh. I do remember reading about it. I'm sorry.

THE WITNESS: That's okay. No problem.

BY MR. EVANS:

Q And that was around '81?

A It was during an incarceration, I believe, but I can't remember what year it was.

Q Four years before the crime, I believe.

A The crime was in '84. So about '80? It was in the early '80s, so it was before the crime was committed, but I don't remember the exact date.

MR. EVANS: Thank you.

THE COURT: Are you finished, Mr. Evans?

MR. EVANS: Yes, Your Honor.

THE COURT: Very well. Any redirect?

MR. O'CONNOR: Yes. May I just have two minutes to confer with counsel before we begin?

THE COURT: Very well. We will take a brief break.

MR. O'CONNOR: Thank you, Your Honor.

(Break taken.)

MR. EVANS: Judge, before he starts up his cross, there are two short areas I -- in talking, I'd like to

ask about.

THE COURT: Very good. Go ahead, Mr. Evans. Whenever you are ready.

BY MR. EVANS:

Q Now, Dr. Keyes, on the scatter, that's looked for in all populations on IQ testing, not just mental retard (sic); is that correct?

A That is correct.

Q So it can occur on all IQ levels?

A Yes, it can.

Q And it just simply -- you're looking into that, you see strengths and weaknesses of a particular person?

A For anyone, yes, that's correct.

Q Okay. Now, the only reports that were given in review to you was what was presented in the defense's case, either preparing for the post-conviction motion or at trial; is that correct?

A That and a lot of testimony, yes.

Q Okay. And so you don't know if there were any other documents that were available or not discovered; is that correct?

A That were available to my attorneys but not to me?

Q Yes.

A Not to my knowledge, no.

Q Okay. You just know what was provided to you?

A I know what was provided to me, that's correct.
Q Sure. And so you don't know if there is any additional paperwork involving the 1974 scoring or not?
A No, I don't. I do know that the -- the -- I told them, the attorneys, as far as Anne Jacobs and Jenny Greeenberg back in 199 -- well, actually '92 is when I first got called on this one, I think, I told them that anything they had regarding education, I wanted. And anything they had regarding psychology, I wanted.
Q Okay.
A And I was under the impression I had everything.
MR. EVANS: All right. Thank you.
THE COURT: Very well. Redirect.
MR. O'CONNOR: Just a couple of questions.

REDIRECT EXAMINATION

BY MR. O'CONNOR:
Q Okay. Now, Dr. Keyes, earlier this morning Mr. Evans asked you whether it was appropriate and had a scientific basis to account for the Flynn Effect by adjusting individual scores. Do you know if there is, in fact, a scientific basis for that process?
A Yes. I believe that Dr. Flynn explains that very well in his "Tethering the Elephant".
Q Okay. And, actually, I wanted you to -- let's just look at that for a second.

A Excuse me.

MR. O'CONNOR: This is going to be Exhibit K to his 200' -- June 15th, 2006.

Can I approach the witness, Your Honor?

THE COURT: You can.

BY MR. O'CONNOR:

Q Okay, Dr. Keyes?

A Thank you.

Q Okay, Dr. Keyes. Can you please turn to page 176, go down to the third paragraph.

A Uh-huh.

THE COURT: What page are you on? One seventy-six?

MR. O'CONNOR: Yes.

Just one second, Your Honor, while the State gets to the page.

THE COURT: Oh, that's okay.

MR. EVANS: One hundred seventy-six.

THE COURT: One hundred seventy-six.

THE WITNESS: Third paragraph.

MR. O'CONNOR: Third paragraph.

BY MR. O'CONNOR:

Q Okay. The question is, has Dr. Flynn performed -- published on this issue and whether individual scores should be adjusted for the Flynn Effect?

A Yes.

Q And could you --

A Sure. Quote, I believe that jurors should allow the AAMR to decide issues concern what IQ score should serve as a criterion of mental retardation. Whatever its decision, the salient point is this, no matter whether the criterion is set at an IQ of 55 or 70 or 85, the defendant must be assessed against current norms and not obsolete norms that inflate his or her score. Otherwise, one person will meet the criterion of mental retardation and another person will be judged not to have done so, purely because one took a test with current norms and the other took a test with obsolete norms.

No matter what the criterion, who meets it must be -- must not be a matter of choice -- of chance, rather. Someone who took the WISC and reaped on -- and reaped an, quote, unearned, unquote, bonus of seven IQ points must not be executed, whereas, someone to was lucky enough to take the WISC-R is exempt. The only way to avoid such inequity is to adjust IQ scores in the light of IQ gains over time.

Q Okay. Thank you. And just one other quick note, if you could turn towards the end of the article, it's page 186.

A Okay.

Q And it's that last paragraph there.

MR. EVANS: What page?

MR. O'CONNOR: One hundred eighty-six.

THE WITNESS: Quote, I also wish to call attention

to another argument put forward by prosecutors, namely, that the Flynn Effect is a, quote, group phenomena, unquote, and cannot be applied to individuals. As the reader now knows, this is just a senseless mantra.

When the group making the IQ gains is composed of Americans, those gains render test norms obsolete and inflate the IQ of every individual being scored against obsolete norms, unquote.

BY MR. O'CONNOR:

Q Okay. And are you aware whether the methodology that you performed this morning, that was -- that was our series of graphs where we had the IQ score adjusted for the Flynn Effects, are you aware whether this methodology that you applied this morning has been accepted by clinicians in the community?

A Yes, I think it has.

Q What about researchers in the psychology field?

A Very much so, yes.

Q And are you aware, has it been accepted by any courts?

A Yes, it has. The -- most recently, I think, in the Fifth Circuit.

Q Okay. I want to quickly go to another topic.

You also testified this morning that, and actually just on cross too, that the MMPI is not applicable to persons

with mental disabilities.

A That is correct.

Q How do you know that's the case?

A Because I read the manual, first of all, and because I wrote an article about it, second of all.

MR. O'CONNOR: Your Honor, I would like to mark as Defense's --

THE COURT: I think we are on 7.

MR. O'CONNOR: I thought it was going to be 6.

THE COURT: Exhibit 7.

MR. O'CONNOR: Let me just make sure the identification is correct.

BY MR. O'CONNOR:

Q Professor Keyes, can you please identify this?

A This was an article that I wrote in 2004 that was published in the "Journal of Mental Retardation" dealing specifically with the State of Mississippi's rule that required the use of the MMPI to determine that an individual was not malingering, a rule that they have wisely rescinded since then.

Q And is there a specific reason why the MMPI should not be applied as a malingering test for individuals suspected of mental deficits and disabilities?

A Yes. Very simply, it is too complicated and too long and time consuming, and it requires a reading and

comprehension ability that is above their level.

Q Okay.

A The manual clearly indicates that an eighth grade reading level of comprehension must be achieved. And the old manual, for that matter, said that you had to have six years of successful education. And special education, in that sense, is not considered successful, sadly.

Q Okay. Just a couple more points.

MR. EVANS: Your Honor, could I please offer Defense Exhibit 7 into evidence.

THE COURT: Defense Exhibit 7.

MR. EVANS: Your Honor, I'm going to object. I think it is a little unusual to be offering evidence during redirect.

THE COURT: Well, I don't mind that too much. I'll give you a chance to cross examine him on it if that's what you want to do. But I will overrule that objection and admit Defense Exhibit 7.

(Defense Exhibit No. 7 received in evidence.)

MR. O'CONNOR: Thank you, Your Honor.

BY MR. O'CONNOR:

Q Dr. Keyes, I want to refer you actually to one more article.

MR. O'CONNOR: Can I approach again?

THE COURT: Yes.

MR. O'CONNOR: This is going to be to his supplemental affidavit that was submitted today. It's Exhibit W.

THE COURT: Supplemental affidavit.

MR. O'CONNOR: That was Defense Exhibit --

THE COURT: Oh, I'll find it. That's all right. Here it is. Here it is. Defense Exhibit 2. And there's W. It's WISC-R Subtest Reliability Overtime Implication for Practice and Research.

MR. O'CONNOR: Yes.

THE COURT: All right. I'm with you.

BY MR. O'CONNOR:

Q Dr. Keyes, can you go to page 152.

A Yes.

Q Can you look at those charts there?

A Okay.

Q Could you please tell us any significance to those charts there concerning your testimony prior, regarding the two issues of scatter and Standard Error of Measure?

A This is an article by, I believe, Scott Truscott. Excuse me. Steve Truscott, Stephen Truscott, for 1994 in "Psychological Reports". And it looks at the test, retest scores of individuals over time. Excuse me. Specifically, the one of interest is this Table 3 that says, frequency of changes, plus or minus, for IQs and by subtest scores over

three-year test, retest interval.

There was 107 people -- I mentioned this earlier in my testimony -- in the sample. And if you look there it says that the WISC-R scale and subtests, this is the amount of score change from the first administration to the second administration. Look at the -- the score changes are in ranges of three. And you can see that the one that's probably the most important is the full scale, where it says that 36 of that 107 had score changes of less than -- of three points or less. Twenty-nine of those people had score changes of six points to -- four to six points. Twenty-one had changes from seven to nine points. Fifteen had 10 to 12 point changes. So what you're looking at here is that the number of people whose scores change over time on a test of intelligence is significantly high.

Q And, Dr. Keyes, let me be sure I'm pointing approaching at this correctly. This graph is simply looking at what you were referring to as that individual subset -- I'm sorry -- individual scatter over time. This is holding Standard Error of Measure constant. Not taking it into account sorry.

A This is the actual score achieved on the WAIS -- no, excuse me -- on the WISC-R scale over two administrations on each one of these individual people of 107 people. And what it's looking at is how much score change there were in those

individuals. And this is, like I said, for a question of what's called test, retest reliability. It's considered to be the gold standard of test reliability.

Q So some people might only have a -- between one test and then taking the test years later, only about a three-point difference, but it could be, you were saying, nine or more, up into the double digits is --

A Just about 50 percent. Just about 50 percent have score changes of six points or less. But that means that 60 -- or 50 percent or a little bit under 50 percent had score changes of seven points or more.

Q Okay.

A And when we looked at this, when I sat down and did the numbers on this, we came up to a 5.9 mean change, which is almost six points. That would be the mean.

Q Okay. Let me get --

A The extremes was two people had 24 -- 22 to 24 point changes.

Q And the last question. This is independent of applying the Standard Error of Measure?

A Independent of the Standard Error of Measurement and of the Flynn Effect.

Q Okay. Thank you. I just have one question about -- we talked a little bit the WISC test. Eddie asked you some questions. And earlier today we had discussed three different

problems before we got to the Flynn Effect and Standard Error of Measure. You had testified that there was a norming problem, how they selected the population. You actually had testified about the Flynn Effect about the obsolesce of the questions.

A Correct.

Q Are these three issues independent of each other?

A I don't think anything in an individualized test of intelligence is independent of each other. It all goes to be how reliable and how valid the test is.

Q I might have just asked the question wrong. If one of those three problems that you have identified are not applicable, does that mean that the other two theories are not capable?

A No. All three are very important.

Q Okay. And then this last topic, Mr. Evans, at the end of the -- last question to you was about this Beta exam he referred to. I don't know if you had the opportunity to explain what the Beta exam is. Could you please explain it to the Court?

A As I said, or as I started to say, the Beta, the Revised Beta is a paper and pencil group-administered IQ screener, intelligence screener. It is not an individualized test of intelligence. It does not have a great reputation among the psychological community. And I don't use it.

Q So when you say group tests, why is that not accepted in the psychological community?

A Because a group test won't tell you anything, first of all. It tells you -- it gives you screening information. What it -- any kind of test of intelligence to be used in something like schools or courts has to be an individually-administered test of intelligence, and that is not the Beta or the Slosson. Slosson is S-L-O-S-S-O-N.

Q And are you aware if the Florida statutory scheme accepts the Beta test as a valid test for determining subaverage intellectual functioning?

A The statute refers to the Family -- Child and Family Act. And the Child and Family Act clearly indicates that the only two acceptable tests are the Wechsler and the Binet.

MR. O'CONNOR: Thank you. No further questions.

THE COURT: Any follow up based on any of that?

MR. EVANS: Yes, Your Honor.

RECROSS EXAMINATION

BY MR. EVANS:

Q Now, first of all, the Truscott article that you just mentioned, that table you were showing was Table 3, I believe?

A Correct.

Q And that said the test were given within the three year period?

A Correct.
Q Isn't that what that --
A That is correct.
Q So -- and that's as to the Wechsler Exam?
A The Wechsler-R, WISC-R.
Q Okay. And Mr. Nixon was given the Wechsler twice; is that correct?
A He was never given the WISC-R. He was given the WISC, which is the precursor of this, and he was given the WAIS-R twice, and he was given the WAIS-III once.
Q All right. So he was never given the test that Truscott article talks about?
A Not this one, no.
Q All right. And if you take for a moment the assumption that they are similar enough that the Truscott study would apply to the other test, the Truscott article indicated that the tests that were given on the Table No. 3 were given within a three-year time period?
A Correct.
Q And that did not occur with Mr. Nixon, did it?
A No. He was given it in '93 and in 2000 -- no '93 -- his first time was in '85 and the second time was in '93.
Q Okay. And the other table that talks about the scoring, that it could vary quite a lot between each time it was given, that particular test, more than six -- it was given

three times in six years, is that correct, on the other table in the Truscott article?

A Oh, I'm sorry. Which table are you looking at?

Q I believe that was Table No. 2.

A Table 2? Okay. This was a subsample of the original sample. Of the 107, this is 41.

Q But the test --

A Was the page 151 you're talking about?

Q Yes. It was the total group tested three times over a six-year interval; correct?

A Correct.

Q And that didn't occur to Mr. Nixon either, did it?

A No. No, it did not.

Q So the timetable on the testing of Mr. Nixon takes him outside the test and the testing period that were referred to in the Truscott article?

A That is correct.

Q So to assume the explanation for the varying degrees of difference between Mr. Nixon's IQ, you would have to take him outside the Truscott's parameters and apply the Truscott article not only to a different test but to different testing over a different time period in order to try to explain away the ranges in his testing?

A Correct. What you are talking about is generalization. You're generalizing one situation to a

different situation.

Q Okay. But they have -- but you just can't make a generalization based upon an article until it's further studied and accepted in the scientific community, can you, to have a real scientific -- a valid scientific basis for it?

A Well, generalizing information from one situation to another is the basis of scientific study. But what you're saying is, essentially, that we can't look at that article and say that it has anything to do with the fact that Joe Nixon has taken the same -- a different test several times.

When you're looking at numbers, especially the WISC and the WAIS are really very similar in many ways. They are normed on different ages, but the stratification is essentially the same as far as the demographic stratification. And they are normed, I believe, the same numbers of people, total in the sample. And they also have, with the exception of one, two, three, four subtests, I think, they are exactly the same subtests. So I think that it's safe to generalize the information, really.

Q Okay. So you have to make certain assumptions before you can reach the conclusion that you have reached, and they were not assumptions and conclusions that the article, in fact, did reach; is that correct?

A That is true because they don't talk about the WAIS.

Q Now, if you knew someone who was faking mental

retardation, would it be safe to give them the MMPI in order to discover whether or not they're malingering?

A No. If I knew somebody was faking mental retardation?

Q Yeah. Or let's have the situation where you go back and look at a person's history in school.

A Okay.

Q They have done extremely well in honors classes. They have been tested in 110 plus in IQ.

A Okay.

Q And all of a sudden they get in trouble, and they need a lower IQ for a reason, and all of a sudden miraculously, a test is given and they have the lower IQ?

A Okay.

Q And you know of no intervening event that would explain the lower IQ except malingering.

A I'm with you. Okay.

Q Okay. In that situation, would it be safe, in your opinion, to give them the MMPI to see if they were, in fact, malingering?

A I'll be honest with you, Mr. Evans, I don't like the MMPI. I don't think it's a good test. I think even for normal people it's a bad test. But that's my professional opinion. I'm entitled to that.

What I would say is that I would give now -- a test

of memory malingering? I probably -- there are about three others on the market that I would consider, but they were not on the market in 1993 when I first met Joe Nixon.

Q Okay. When the Stanford --

A I wouldn't give the MMPI, though.

Q Okay. When the Stanford-Binet Five came out --

A Yes.

Q -- you did go back and test Mr. Nixon, is that correct?

A No, I did not.

MR. EVANS: Okay. Thank you.

THE COURT: Thank you, sir. You may step down. Thank you very much. Nice meeting you, sir.

THE WITNESS: Nice to meet you, too.

THE COURT: Any other witnesses or other evidence for Mr. Nixon?

MR. O'CONNOR: No, Your Honor.

THE COURT: Very well. Any other witnesses or other evidence for the State?

MR. EVANS: Yes, Your Honor. We would call Dr. Prichard.

THE COURT: Very well. Dr. Prichard, come on up, sir. We will swear you in and take your testimony. All right. Come on up. Would you raise your right hand?

Whereupon,

GREG PRICHARD

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

THE COURT: Very well. Be seated.

When you and the witness are ready, Mr. Evans.

MR. EVANS: Yes, sir.

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 And how long have you been so employed?

A I've been licensed in the State of Florida since 1996.

Q And what type of educational background do you have?

A I did my undergraduate work at the University of Florida. My major was psychology. I graduated from the University of Florida with honors in 1988.

I did my doctoral work at Forest Institute of Professional Psychology, which is an APA accredited institution, in Alabama. I had an academic specialization there in assessment and diagnostics, so that was my

specialization in school.

Following my academic work, I did my internship at Florida State Hospital in Chattachoochee. My internship was a combined forensic and civil track, which essentially is just, my specialization was going to be forensic psychology. Plus, I was dealing with the civil track, which is individuals who were mentally ill, schizophrenic, and had been admitted to the hospital for long-term care.

After I finished my internship in 1994, I was at the hospital on a dual diagnosis unit, which was a unit for individuals who had both mental illness and mental retardation. I was the behavioral department head there for about three years, dealing with, exclusively, the mentally retardation population, individuals who were also mentally ill and who were residentially based. I worked in that capacity for three years before transferring to a civil admission unit at the hospital. I stayed there for two years. And then I did a forensic unit. I worked on the forensic unit for about three years before going into the private practice in 2001.

Beginning in 1996 was when I licensed -- I did a day of private practice in the community (sic), and what I primarily did is forensic competency evaluations in the community. And my expertise in the community was mental retardation. I was doing assessments for the courts when the question was whether the person was incompetent based on

mental retardation. So the assessment required that I do an assessment for retardation and an assessment for competency.

I also did just mental retardation assessments in the community without a forensic component. In other words, is a person mentally retardation according to Florida Statutes. And the referral would come from the Agency for Persons with Disabilities, formerly the Developmental Disabilities Program. So it would refer to me and say somebody has applied for services from our agency. That agency serves the mentally retarded population. So my job was to assess and determine whether the person was mentally retarded or not.

Since -- I did that in 1996 until resigning from the hospital in 2001. I'm in full-time private practice now. My specialty is forensic psychology and mental retardation. I do, still, assessments for mental retardation and competency for the Courts, a number of assessments for mental retardation for the Agency for Persons with Disabilities still. I also have a specialization in the area of sexual offenders. And that's pretty much it. I do death penalty cases, too, obviously, for when the issue is, under Atkins, whether a person is mentally retarded or not.

Q Now, have you ever been qualified as an expert in forensic psychology with the specialization in mental retardation testing before?

A Yes, many times.

Q And approximately how many tests have -- mental retardation tests have you given?

A I've given well over a thousand by now. I've been doing it, again, since 1996 for the agency. Right now, I'm doing approximately two to three per week where the issue is the mental retardation. And it's been about that number since 1996. So well over a thousand for sure.

Q And have you -- you've testified as an expert in forensic psychology and mental retardation here in the Second Circuit in a death penalty case, in a couple death penalty cases; is that correct?

A Yes, I have.

Q And have you been employed both by the defense and by the State?

A Yes, I have.

MR. EVANS: Your Honor, at this time, we would tender Dr. Prichard as an expert in forensic psychology and mental retardation determination.

THE COURT: Is there an objection or voir dire?

MR. FREEDMAN: No objection, Your Honor.

THE COURT: Very well. You can proceed.

BY MR. EVANS:

Q Now, Dr. Prichard, can you explain to us what the three components for mental retardation are?

A I'm sorry. Sure. There is three prongs for a legitimate diagnosis of mental retardation. This is according to all criteria. This is according to the criteria put forth in the Diagnostic and Statistical Manuel of Mental Disorders, Fourth Edition, Text Revision, which is the manual that in the profession of psychology we use to make diagnose and to guide us in making the appropriate diagnose. It's the appropriate standard for the State of Florida in the determination of mental retardation. And it's the appropriate standard for the Agency of -- American Agency of Mental Retardation, AAMR.

It's essentially the same standard in all three contexts. That standard is, one, significantly subaverage intellectual functioning. Now, that is defined as a score that is two standard deviations below the mean. And the mean is 100 and the standard deviation is 15. So in terms of IQ, a IQ score must be two standard deviations or more below the mean of 100. So it's a score -- below 70 would correctly apply when a diagnosis of mental retardation is made in terms of intelligence.

The second prong is concurrent deficits in adaptive skills. And, essentially, the adaptive skill, it's defined in many different ways, but it's personal and social self-sufficiency. It's the capacity a person has to essentially function independently without the help of other people and how successful they are in adapting in a variety of

ways, in a variety of contexts, when compared to same age peers.

The third prong of mental retardation -- actually, let me go back to the second prong. Adaptive deficits have to be -- they are measured in the same way. They are measured with adaptive instruments. And adaptive deficits also have to be two standard deviations below the mean of 100. And they have a standard deviation of 15 as well.

So in adaptive language, it's the same language as the IQ language. If we get a score, an adaptive measure below a 70, that's consistent with deficiencies consistent with mental retardation, okay? So those are the first two prongs.

The third prong is manifestation prior to the age of 18. Mental retardation is a developmental disability, okay? By nature, to legitimately diagnosis this, it has to be present in the years from conception to 18, because it's characterized by developmental delays. So there are occasions where somebody might have a brain injury or something in adulthood, which results in subaverage intelligence, but that's not mental retardation, because it has to occur in the years between conception and 18, which is the developmental years.

So those are the three criteria for a diagnosis of mental retardation. All three prongs must be in order for the diagnosis to legitimately be made.

Q Okay. So if mental retardation -- or if the low IQ and adaptive functioning didn't onset before age 18, then the person is not mentally retarded; is that correct?

A That's correct.

Q Or if they have adaptive functioning which takes them out two standard deviations below the mean, then they're not mentally retarded; is that correct?

A That's correct. I have assessed many people that fall in the category where they will have an IQ above 70, adaptive deficits below 70, onset prior to the age of 18. That means they are not mentally retarded, because they don't meet that first prong. And, additionally, I have had cases where IQ was below 70, but adaptive skills were above 70. Onset may have been prior to the age of 18, but they still don't meet the criteria for a diagnosis of mental retardation, because all three prongs must be in order for that to be a legitimate diagnosis.

Q Now, you were referred at -- you were appointed as an expert for the State to do a mental retardation of Mr. Nixon; is that correct?

A Yes, I was.

Q And what did -- what evaluation procedure did you take and what did you review?

A Well, what I did is I reviewed all of the information that was given to me, which was a lot of

information. That would have been most of the information that has been talked about, different testing that was done historically with Mr. Nixon, Department of Corrections' records, various affidavits from family members and friends of Mr. Nixon, court transcripts, some records from death row, the evaluations by Dr. Whyte, Dr. Dee, Dr. Doerman, Dr. Keyes. So that was essentially the information that I reviewed. Some court testimony as well.

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

A I did. I reviewed all the information that was sent to me initially. And then I went to death row on the 15th of September to do the face-to-face assessment with Mr. Nixon.

What I did in the face-to-face assessment, his lawyers were present, I basically did a mental status examination, which is just talking to him. You're assessing memory. You're assessing recall. You're assessing thought fluency, speech. You're assessing various things to make sure, essentially, that the mental status at the time of the assessment, for the purpose of what I was doing, which was a mental retardation assessment, that there didn't seem to be any symptoms present or, you know, peculiar things going on that might affect the IQ score, because that was the main purpose of my meeting with Mr. Nixon.

Q Okay. And when informed of the purpose of the first

interview, was anyone else present?

A Yes. His attorney was present. The gentleman -- one of the gentlemen at the table and I guess --

Q Mr. O'Connor?

A Yes, Mr. O'Connor. I'm sorry. Mr. O'Connor. And his co-counsel. I don't see her present in the courtroom today.

Q Okay. And did Mr. Nixon appear to understand what the assessment was for and what was going to take place?

A Yes, he did. We had a brief discussion about it. I told him that I was there to assess him at the request of the State, and I would be doing some testing. It was important for him to work hard. That it wasn't confidential. It would be communicated in a report and talked about in open court.

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

IQ score of 80. On the test of 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

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.

Q Okay. Now, the -- was there also some indication -- you also had an opportunity to review any -- the prior testing; is that correct?

A Yes, I did.

Q And did you see any information that supported the finding that he would also not fall under the category of any mental retardation before the age of 18?

A Yes, I did. And that's something that I noted prior to meeting with Mr. Nixon, was the occasion of the IQ score of the Wechsler Intelligence Scale for Children that was administered in 1974 when Mr. Nixon was 12 years old. I noted that the result of that was a verbal IQ of 79, performance IQ score of 100, with a full scale IQ score of 88.

For me, that was a very important data point,

because it was the only data point we had of Mr. Nixon prior to the age of 18. So because of that data point and the score that testing occasion achieved with Mr. Nixon, a full scale of 88, that, for me, provides the best data point, aside from my own, to, you know, confirm or bolster my own finding that he is not mentally retarded when I tested him, and he wasn't mentally retarded prior to the age of 18 either.

Q Anything about the way that -- about the information on that test back in '74 causes you to -- any concern about giving it weight in this -- in these proceedings?

A No. Really, I mean, all the time -- I mean, I would say in the vast majority of the cases I do, especially when you're doing a retrospective analysis of retardation, you're examining data that is 20, 30 years old, data from pre-18 age. Usually, Wechsler Intelligence Scales for Children or Wechsler Intelligence Scales for Children, Revised Edition, it's done all the time.

I think that what is important to do is take a look at that data point and assume that that's a good, valid data point unless there is a good reason to believe it's not a valid data point. And I saw no indication in the write-up of that testing occasion that would suggest -- that would suggest that it wasn't communicated accurately. It seemed to me to be communicated very accurately.

It was signed off by a Ph.D. psychologist, which I

had hundreds of evaluations that were signed off by Ph.D. psychologists when I was doing my internship and when -- or my internship and my practica I've signed off on a lot of interns' reports and people in training, their reports. So it all looked in order to me. And, of course, it's important to pay attention to that. 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.

Q And anything unusual about the practice of an intern doing -- basically giving the test and its being signed of by the psychologist?

A No. I mean, that's how we learn. That is exactly how we learn and that's -- if you didn't do it that way, then you wouldn't be able to get the training you need. And the assumption is that that Ph.D. psychologist who signed off is the one responsible for Ms. Miles' testing and that data. And the signature indicates that, I'm okay with it and it's on my license. So I don't see anything that would lead me to say that uh-oh, this is bad data. Conversely, I would say that it's very good data, probably the most important data point. And absent a reason to say it's not good data, you should not dismiss it.

Q With the psychologist signing off on it, that -- does that equate to giving it their stamp of approval just

like if they had done the testing themselves?

A That's what I think. And I have run across an occasion or two when a psychologist signed off on somebody else's work who wasn't apparently licensed and the body of the report was bad. It was just fraught with error or making statements that simply weren't true. So I think that's important to take a look at. And in this occasion, I didn't see anything in the report that would suggest that it was poorly written or untrue in any way, which would suggest a questionable validity and I didn't see that at all.

Q Okay. Now, Mr. Nixon I believe indicates -- you indicated was born in August of 1961?

A Yes.

Q And this test was administered in -- that he received in '88 was administered in 1974?

A Correct.

Q So depending on the particular month it was given, he was somewhere between 12 and 13 years of age; right?

A I think he was 12 years, 7 months, I believe. Yes. February of '74 is when it was given.

Q And did you see anything to indicate that he was ever, in fact, placed in special education in the school system?

A No, I didn't. I saw references to one or two individuals saying this person may need special education.

But, again, that doesn't really mean anything. There's lots of reason for special education. Behavioral issues are a reason for special education. Emotional issues are a reason for special education. So I don't think those statements tell -- tell you anything in terms of, necessarily, that Mr. Nixon -- Mr. Nixon is mentally retarded or not. I don't think it has anything to do with it.

Q Okay. So even if that issue had been raised, the fact that he scored 88 in '74 and the -- and the fact that he was never placed in special education would tend to support a validity of the 88 score?

A Yeah, I think so. And that's a point that I wanted to make, is there is so much of this that is completely irrelevant, really. I mean, the most important thing as a clinician, to simplify it, and it doesn't need to be complicated, is look at his IQ. If his IQ is 80, 88, which on my occasion and this '74 occasion, you are not talking about an individual who is mentally retarded. You might be talking about something else, but you're not talking about mental retardation. So all of these things about special education and adaptive behavior, it's not relevant when you have IQ scores in those -- IQ scores that are that high, simply not relevant to the determination anymore.

Q Okay. Now, back in 1974, in this type of testing of the WISC, now, is it a situation where that -- the use of it

on African-American males, was it ever called into question?

A It was. I mean, that was the big issue between, say, '49, when the WISC came out, and '55, when the WAIS came out, which was the adult version of the intelligence measure. The big issue is it unfairly says that African-American males and African-American females are not as bright as white males and females. That was the theory, that this proves that they are not as bright. And, of course, that is not -- that did not hold up. What held up is the inherent problem with the test in measuring accurately African-Americans as opposed to whites. In other words, it was biased in favor of whites, biased against blacks. So blacks used to get lower scores. They were artificially deflated because of the inherent bias in the test.

Q Okay. And would it be a fair way to put it, that they received false lows?

A Absolutely it was false lows. It was not taking into account cultural background. So, you know, you get a deflated score when you compare them to whites.

Q Okay. Now, we have an 88 and an 80. Is there any way on the IQ test to fake smart?

A No, that's the other occasion. An important thing to understand is that IQ is not something that fluctuates over time. Your IQ is static. Your intelligence quotient is generally static. There may be a few point variation in your

IQ, but you are not talking about significant differences of ten, fifteen points in IQ.

IQ, generally, when you measure IQ in adolescence, that's going to be about the same over the course of the entire life span until late adulthood. So it does not fluctuate. So, when you get scores that are in variance or disparate from each other, you have to understand that what we are trying to test when we are testing IQ is ceiling, optimal capacity. We are trying to test the highest the person is capable of achieving.

So when you get a score of 88 and then you have somewhere in the history or somewhere in the process or over the course of time a score of 68, that's not because the persons IQ has changed over time. It's because there is something about that 68 that probably reflects some other situation was playing into the person's performance at the time, okay? Because you can't fake smart. You can't fake an 88, okay?

That's -- that's -- that would -- the correct assumption would be to assume that an 88 is probably representative of Mr. Nixon's best functioning; whereas, a score of 68, because of that variation, is probably representative of some other factor, A, motivation, anxiety, depression, something about the testing environment, something about the tester, poor sleep the night before, the person was

hungry. There is just a plethora of other reasons that can affect the IQ score. But when it is lowered and you have a score that says 88, you don't converge them and say, Let's get the mean. That's inappropriate way to do it. Okay.

You test -- you test for ceiling. And you assume that if you get a ceiling that is valid, like the 88 and like my 80, that those other scores, there is something about those testing occasions that artificially deflated the score and is not representative of optimal functioning.

Q Now, let's touch on the so-called Flynn Effect for a moment. Is that something that -- the Flynn Effect, is it something recognized in scoring manuals used with either the Stanford-Binet or the WAIS-III?

A No, it's not recognized in scoring manuals. What the Flynn Effect is, it was a theoretical issue that this gentleman, Dr. Flynn, explored. And what he recognized and established in his research is that, yes, this seems to be a legitimate phenomenon, where, over the course of time, individuals or generations seem to get smarter. He demonstrated this by testing individuals on the WISC, the same test we are talking about, and the WISC-R. And what he found is there was about an eight point difference in the scores on those two tests administered to the same people.

He has demonstrated generalizabilty in his research in the sense that he has established that this phenomenon

seems to be present in a bunch of different countries and all that. But it's not to be point that we, as a profession, make it standard practice to subtract IQ points when we do testing, which is why it's not in the manuals. If it was recognized in the scientific community, there would be allowance for subtracting IQ points. In the testing that you do in real life situations, there is no such allowance. The only allowance for changing the score is considering the Standard Error of Measurement, which is appropriate.

So, at this point, it may be in five, ten, twenty years that the Flynn Effect may be incorporated into standard practice in psychology, but at this point, it's not incorporated in the standard practice in psychology.

In fact, I think it was Defense Exhibit No. 5, where you referenced that article, I have the -- I read the -- this is the, what do you call it, the journal that it came out of. And I've read it many times. And, essentially, what the journal says in 2003 is we have got to research this thing more. We have to take a better look at it, because we have these preliminary findings. We have these ideas for mentally retarded folks, these ideas for normally functioning folks, but we don't know for sure. We need to research it more.

And that's the bottom line, is it needs to be explored further. Right now, we can't incorporate it into standard practice. There is now allowance for it. It's more

of an academic thing right now rather than something we do on a daily basis. I've never subtracted IQ points from an IQ, I have given a thousand administrations, because it's not standard practice. I see nothing in the manual that suggests I do that, that allows for that.

So, no, it's not something that should be carried out in individual cases, for a variety of reasons. And some of those reasons are, for an individual, we don't know how many points to subtract. I mean, the average was eight on some of the research Flynn did, but we don't know if for Mr. Nixon it's two. We don't know if it's 22. So you can't practically do it and, you know, assume that what you're doing is a valid application of the Flynn idea at this point in time.

Q Okay. And I think you touched on it, but is it something that is recognized whenever the mental retardation evaluations are done -- and, excuse me, which agency is it now?

A It's the Agency for Persons with Disabilities.

Q All right. Is the Flynn Effect applied there whenever you have reach a result as to determine whether or not it should be lowered using the Flynn Effect --

A No, absolutely not. It is not considered. And I will say that, you know, I acknowledge the Flynn Effect as probably a valid phenomenon, but it's something that we can

apply and it's wrong to do it.

And the other thing I will say is, even if you do consider it, you know, subtract eight points from the 88 that was achieved in '74, you get an 80. And then if you consider the Standard Error of Measurement, subtract all you want, you still get a 75.

The statute requires two or more standard deviations below the mean of 100, which should be a 69 or less. So not saying that you should subtract all of those numbers, but carrying that argument out to its logical extreme says, at the best, you will get is a 75. That's still not mental retardation.

Q Okay. And the number is, I think, the number of 70 has been thrown around. Actually, it's below 70, isn't it? So it would be 69 or below?

A Correct.

Q Now, the standard area -- standard error rate basically is plus or minus? So --

A The Standard Error of Measurement is plus or minus five on the Wechsler Scales, yes.

Q Okay. So it is a two-way street? It could be higher or it could be lower?

A That's the other issue. There's equal probability, with my score for 80, for example, okay, with the Standard Error of Measurement, we are talking about somewhere between a

75 and an 85. There is equal probability that that score is a 75 as it is that that score is an 85. Okay.

If you subtract for Flynn, which you don't do as a standard, for my testing, the WAIS-III is ten years old, so you subtract three points, if you must, which I don't agree with. But you subtract three points from my 80, taking into account the Standard Error of Measurement, taking, you know, only into account the negative 5, which is a 75 minus 3 is a 72, you still don't get below 70.

The reason the number 74 is allowed for is for the Standard Error of Measurement, because if you get a 74 with a Standard Error of Measure and plus or minus five, there is a possibility that that score of 74 obtained score can be a 69. There is that possibility. So only scores that are 74 or so can consider to be mentally retarded. Not 80. Not 88. It doesn't apply to those scores.

(Pause.)

BY MR. EVANS:

Q Now, I believe we were going back toward talking about the standard area of -- standard error rate or standard deviation and it being plus or minus five.

A Okay. That's the Standard Error of Measurement, right --

Q Okay.

A -- which is different from the standard deviation.

But the Standard Error of Measurement is plus or minus five.

Q Okay. Now, the -- is it true that as you get to either end, when you -- is it also in form of the bell curve, basically? The Standard Error of Measurement is more are going to tend to be at the middle and that fewer people would be away from it, so you expect the number of people who would actually be five points lower than, let's take a 75, for it to be fewer than the number that would actually be one point lower?

A All right. I don't think so. I think that there is equal probability of any number within that range. And what the Standard Error of Measurement, part of what it accounts for is just measurement error based on human error or based on artifacts of the instruments you're trying to use. So I think there is equal probability in that range of scores between negative five and positive five of that being a person's true intellectual quotient. So, for example, an IQ of 80, that's the obtained score, anything between 75 and 85 has equal probability of occurring.

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 if

I'm -- actually, I think Dr. Keyes said the 95 percent. But --

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.

THE COURT: All right. Go ahead, Mr. Evans.

BY MR. EVANS:

Q And on that case, you would still have to cover prong three, which would be onset before age 18?

A That's correct.

MR. EVANS: Okay. Now, the -- Your Honor got me off track for second. Let me try to think where I was.

THE COURT: I apologize, Mr. Evans. Take your time.

BY MR. EVANS:

Q Oh. The -- where I was going was, you saw the slide show that Dr. Keyes presented. And I think that was Defense Exhibit No. 3?

THE COURT: Yep.

MR. EVANS: Okay.

BY MR. EVANS:

Q Now, at one point on, I believe it was page -- excuse me. It was page 36.

MR. EVANS: And if I may approach, Your Honor?

THE COURT: Very well. You don't have to ask. Neither one of you has to ask to approach the witness.

BY MR. EVANS:

Q Now, it indicates on that sheet that he averaged and come up with a mean?

A Right.

Q Now, is that the way this works, you give five or six tests? And then you average them together and come up with a mean?

A No. And, again, because what you're doing, essentially, when you do that is you're invalidating every score that isn't right there at the mean. So you would be invalidating any of the outliers, saying that those aren't accurate representations of his IQ. Again, that's not the appropriate interpretation of it.

But remember that, again, IQ is IQ. And it's not subject to variation. When you're trying to determine a person's IQ, it's not going to be somewhere between mentally retarded and average. You know, you have five different testing occasions, and your range is mentally retarded to

average.

The appropriate thing to do is to say, no, wait a minute, that's not -- that's not possible. IQ doesn't work that way. Something is wrong. And then, basically, you examine the data. And, again, you, essentially, I think, if you're doing it correctly, arrive at the conclusion that I arrived at, that on my occasion and on the one historical occasion that was pre-18, with no forensic context, we have scores of 80 and 88. And, again, when you have those scores established on valid testing occasions, those other scores that are a lot lower, you don't average them and come to some kind of mean. What you say is probably the most appropriate scientific explanation for this variance that shouldn't occur is that there was some other variable present during those examining occasions, with the lower score that artificially lowered the score, primarily because you can't fake smart, and you're testing ceiling and optimal performance. That's what you want on an IQ.

Q Okay. Let me touch on scatter for a second.

A Sure.

Q Now, much to-do was made by an earlier witness about scatter. Could you explain to us what scatter is and what you would be -- what could cause it and what you look for when you see it?

A Essentially, what scatter is, is when you have a

full scale IQ score, your -- it's a conglomerate of subtests. There is 11 of them. So what you are looking at, one, is subtest scatter, what are the different scores on each the subtests and there is a big variation in those scores. Okay.

Number two, in terms of scatter, is intrasubtest scatter. In a particular subtest, in one single subtest, like, say, for example, information, is there a lot of scatter. Did the person get a lot right and then miss some and then get some more right and miss some? And those are the two ways that scatter is generally applied in intelligence testing.

It's important because, you know, one, it does -- it does give you an idea of strengths and weaknesses, what's the person good at and what's the person not so good at. Two, a lot of times scatter can give you an idea of possibly some learning disabilities, some brain damage, other things. It's not definitive. There isn't a pattern of scatter that tells us specifically a diagnosis, but it can give us some ideas about diagnosis, and, essentially, that's it.

If there is huge variations in subtest scores, like, for example, say you got on one subtest you got a two, and on another subtest you got a fifteen, that's a huge, huge significant difference, and you want to make some accounting for that kind of variation. There is a reason for that kind of scatter. And if it's usually significant, you need to talk

about it and figure out why it's occurring, essentially.

It does not, I will add, subtest scatter or intrasubtest scatter has nothing necessarily to do with mental retardation. Scatter occurs with genius IQs. Scatter occurs with normal IQs. In the criminal population that I test all the time, you have scatter -- that kind of scatter very regularly, which is more probably a function of some brain damage that's not global and that's not severe because it's not causing huge, huge deficits consistent with mental retardation, but these are criminals, say, that have some kind of brain damage who are average IQ or borderline IQ or even above average IQ. So subtest scatter, it doesn't really tell you necessarily anything.

Now, in a mentally retarded person, if you have scatter, simply what it is, is it tells you some strengths and weaknesses just like it does with an intellectually average person. It can give you an idea of strengths and weaknesses, too. So in the context of the mentally retarded, if you're trying to do a support plan or trying to figure out how to address the person's needs, then that would be useful information, because you have a pattern of strengths and weaknesses and you plan according to the person's strengths, essentially.

Q Now, Doctor, let's go over the -- let me hit some numbers real quick. With the 1985 WAIS-R that was given, they

came up with a score of 73; is that correct?

A Correct.

Q So if -- let's do the opposite of what Dr. Keyes was doing. Instead of subtracting five, let's add five. That could as high as 78; is that correct?

A That's correct.

Q On the Stanford-Binet, that number -- and it has a different standard error measuring rate?

A Standard Error of Measurement, yes.

Q Okay. And a 65. Now, what's a Standard Error of Measurement on it?

A I don't remember. I think it's about six points, though.

Q Okay. Let's assume it's six points. That would bring it up to what, a 71?

A Correct.

Q And if we did the WAIS-R in '93, if you add five points to that, it would bring it up to 77?

A Correct.

Q And we could even add five points on yours and bring it up to an 85?

A Correct. And I don't think we talked about the one in '74, but that could as high as a 93.

Q Okay. Now, let's -- you have your, the WAIS-III that you gave; correct?

A Yes.

Q I believe defense put it into evidence as State's Exhibit -- I mean, excuse me, Defense Exhibit No. 6.

MR. EVANS: Do you have a copy of it, Your Honor?

THE COURT: I've got a copy. It sitting up here somewhere. This one; right?

MR. EVANS: Yes, sir. You got it?

MR. O'CONNOR: Yes, I do.

BY MR. EVANS:

Q Now, Doctor, can you go over some of the type questions that were -- that are covered by this test and that you look at that you -- that you thought were particularly significant, the way Mr. Nixon scored?

A Well, this is -- I think one of the important things, because I've done this kind of assessment a lot, well over a thousand times, you kind of get internal norms where you kind of know what a mentally retarded person is going to be able to do versus not be able to do, reasonably well. 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. Okay.

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. And 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.

Q Now, I also look on -- see on number 19, he -- when asked about who Gandhi was --

A Yes.

Q -- how did he respond to it? Even though he didn't -- didn't look like he got the answer completely correct, but what --

A He said on Gandhi, number 19 -- I said, Who was Mahatma Gandhi. And he said, It's the bald dude. And I made a comment something like, Well, you're bald, too, Mr. Nixon, as kind of a joke, and I -- tell me more. He said it's the religious guy. So he was real close on that one. I didn't give him credit for it, but I think he had in his mind the accurate person and just didn't explain it very well.

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.

Q And going back on number 11 --

A Okay.

Q -- he was asked who the president was during the Civil War?

A Right. Who was President of the United States during the Civil War. And he said Jackson, which, again, wasn't correct. But it's a historical president. Most of the mentally retarded folks I talk to, they will say either, I

don't know, or they will say Bush or Clinton, present presidents.

So it was interesting in that sense, but the correct responses and some of the incorrect responses seem to strongly suggest that, you know, Mr. Nixon had the capacity for a great deal of knowledge.

Q Okay. Anything else in the -- maybe in the way he -- the abstraction and scores on the subtest that gave you insight?

A Not really. He -- he had a lot of 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.

Q Now, if we go to the profile page and score conversion page of the WAIS-III that you gave -- and I don't believe those were included in Defense Exhibit No. 6.

MR. O'CONNOR: Eddie, what page?

THE COURT: I don't think they are. Oh. They are in the exhibit.

MR. EVANS: We are going to need to make copies real quick. Apparently, they haven't gotten them.

THE COURT: That's fine. We will take a --

MR. EVANS: Not more than five.

THE COURT: We will take five minutes. That's fine.

(Break taken.)

(Proceedings continued in Volume II.)

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.
_____/

FILED
11-13-06
Bob Inzer
Clerk, Circuit Court
Leon County, FL

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| PROCEEDINGS: | MOTION HEARING |
| BEFORE: | THE HONORABLE JONATHAN SJOSTROM |
| DATE: | October 23, 2006 |
| TIME: | Commencing at 9:00 a.m.<br>Concluding at 4:30 p.m. |
| LOCATION: | Leon County Courthouse<br>Tallahassee, Florida |
| REPORTED BY: | LINDA CUNNINGHAM<br>Notary Public in and for the<br>State of Florida at Large |

LINDA CUNNINGHAM
Official Court Reporter
Leon County Courthouse, Room 341
Tallahassee, FL 32301

COPY

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P R O C E E D I N G S

THE COURT: Can we get an idea of how much more time you think you're going to have with the witness?

MR. EVANS: Probably maybe 15.

THE COURT: That's fine. Are you all going to recall Dr. Keyes?

MR. FREEDMAN: Oh, no. We are not anticipating it.

THE COURT: Okay. Whenever you are ready, Dr. Prichard, come on up and make yourself comfortable. Take your time.

Mr. Evans, when you and the witness are ready.

BY MR. EVANS:

Q Okay. Dr. Prichard, if you will go to the profile page of the WAIS-III. And in that, it will State's Exhibit No. 1.

A Yes.

Q And do you recognize it?

A I do, yes.

Q Okay. Is that, in fact, a copy of the scoring you did on the profile page and the score conversion page of the WAIS-III that you gave Mr. Nixon?

A Yes, it is.

MR. EVANS: Your Honor, at this time, we would seek to have that admitted as State's Exhibit No. 1.

THE COURT: Any objection?

MR. FREEDMAN: No objection, Your Honor.

THE COURT: State's 1 is admitted.

(State's Exhibit No. 1 received in evidence.)

BY MR. EVANS:

Q Okay. Now, could you explain to us what these two pages are and what, if anything, you see significant on them?

A Well, the first page is the score conversion page. That is the -- you see --

THE COURT: Yeah, you don't really have to be the -- you don't really have to be a easel.

MS. SNURKOWSKI: I was just going to say, I'm too short for that.

THE COURT: Now that I have got the photocopies, I think we can follow along.

THE WITNESS: Doing a great job.

MS. SNURKOWSKI: Thank you.

THE WITNESS: You're welcome.

THE COURT: Whenever you are ready, Mr. Evans.

BY MR. EVANS:

Q Okay. All right. On the score conversation page.

A Score conversation page, you see the column that says raw score. That is the score obtained in terms of the number of correct responses on each of the subtests. Those raw scores are converted into scaled scores.

The scale scores are the numbers you see to the

right of the raw scores. The scale scores range from 1 to 19 on this Wechsler Scale, the WAIS-III. Ten is average functioning. So what is very significant about Mr. Nixon's profile is you see I have 11 different subtests with 11 different scale scores.

What I want to do is I want to look at those scaled scores and see how many of them are -- seem to be representative of the range of mental retardation. Okay. Average is between 8 and 12. Dead average is 10. And there is a standard error of about two. So between 8 and 12 is an average subtest score. Okay.

Of the 11 subtests for Mr. Nixon, on his profile, 6 of the 11 were in the average range. Eight, 9, he didn't have any 10, 11s or 12s, but he had 6 that were in the range of -- or is that 5? Let's see, 1, 2 -- no, he had 6 in the range of 8 to 9, which is average. Okay. That's -- the majority of the subtest scores were in the average rage. Now, borderline range is in the area between 6 and 8, which is 6 and 7. Subtest score in 6 and 7 are borderline, reflective of borderline intelligence.

Now, he has three additional subtests of 11 that are in the borderline range. So that is 9 of the total 11 subtests are in the average to borderline range. Okay. And that's really significant to me, because what I would say about this profile is the subtest scores suggest to me that

Mr. Nixon is a person with -- with average to high borderline intellectual potential. There were a couple of subtests in the MR range. Those two subtests were the Digit Span and the Digit Symbol. He got a 4 and a 5 on those two subtests. Those are in the MR range.

In an MR profile, what you would see on those 11 subtests ordinarily is a majority of the scores clustering around 4, 5, 6 or less. Okay. They -- a mentally retarded person might have a subtest score or two that's a little higher than that. That would be a relative strength. That's how you would characterize it.

In Mr. Nixon's case, I would characterize his profile as he has average to high borderline intellectual potential with a couple of areas that tend to pull him down, a couple of areas of weakness. And for Mr. Nixon, the Digit Symbol and the Digit Span, those are kind of immediate attention, ability to learn, visual information, you know, responding rapidly. He didn't do very well in that area. A lot of that has to do with attention and concentration. I would say he has a relative deficit in that area, but otherwise, the vast majority of the scatter that we were talking about suggests that he is capable of functioning in the average, low average, high borderline range, which is essentially what my testing was telling me, my full scale score told me.

Q Okay. So -- and let me ask -- if I understand this, that if you had a person with a 100 IQ --

A Yes.

Q -- you would expect them to be scoring what numbers?

A If you have somebody with a 100 IQ, you're going to expect that they're scoring somewhere between 8 and 12 on all of the 11 subtests.

Q Okay. So -- and that score, the 8 and 12, the number was 6, I believe you said he feel into?

A The number was 6 out of 11 subtests were between 8 and 12, yes.

Q Okay. If somebody was in the borderline intelligence, not the retarded but borderline, that is in what?

A In the range of -- usually 6 and 7s is borderline range. In fact, if a person on all 11 subtests gets a 6 as a scaled score, then his full scale IQ would be a 74. So all 6s would be indicative of a 74. And that's in the borderline range.

Q Okay. And Mr. Nixon scored in the majority of the areas well above the mental retardation range?

A Well above the mental retardation range. In fact, in the borderline and average range in 9 of the 11 subtests. So, again, if you want to characterize it in terms of strengths and weaknesses, he has strengths in most areas as

measured by this test. He had a weakness in a couple of areas that pulled his score down a little bit, but the vast majority of the scores were in the low average to high borderline range.

Q Okay. If we go the other direction with it and you have -- you see somebody with, you know, the 8 to 12 is the average range; correct?

A Correct.

Q And what's the -- what are the next levels up?

A Up would be -- 13 and 14 would be, essentially, high average. Fifteen to 17 would be superior. Eighteen and 19 would be very superior.

Q Okay. If you have got somebody who scores the majority in the average range --

A Right.

Q -- and have one or two up in the genius range --

A Right.

Q -- they couldn't being classified as being genius, could they?

A They not going to be genius. What they are going -- it's going to be -- the appropriate interpretation would be this person is somebody with average capacity with a couple of strengths that exceed average but certainly not superior.

Q Okay. Could the same be said for Mr. Nixon, that he is in the low to borderline range with maybe certain lower

functionings but not in the mental retardation range?

A That's exactly how you would characterize it, the same way, is most of the functioning for Mr. Nixon is about in the average to low average, high borderline range. A couple of things in the possibly deficient range, having to do with attention, concentration immediate recall, immediate memory, isolated skills and that's a weakness for him. But otherwise in the average to high borderline range.

And that's the beauty of these intellectual tests. You compare his performance to the standardization performance. Okay. Otherwise, if you are not comparing these scores or these numbers, then you are just using subjective ideas that -- it loses its value when you do that. That's why it's so nice to have these data points where we can compare them to other people and tell you exactly what it means. Otherwise, again, subjectivity, that is what is prone to a great deal of error and something that will make a test score be very invalid.

Q Okay. Now, on the profile page, we have the sum scales and the index scores?

A Correct. Those are, in the far left column, you see the VIQ. That's verbal IQ. The scaled scores, when I added them up, it added up to 41. So you convert that to IQ, verbal IQ, which is 81, according to the normative sample. Same for the PIQ, which is performance IQ. The sum is 37, which

converts to an 83. And then the sum of the verbal and performance scaled scores are 78, which converts to a full IQ score of 80.

Q Okay. Now, based upon your findings with an IQ of 80 and reinforced by the 88 from 74, you made a determination that you didn't need to look at adaptive functioning, because he didn't meet the IQ prong of the mental retardation test; is that correct?

A That's correct, yes.

Q Okay. And those types of scorings would also indicate there was no onset of any mental retardation period much less before age 18?

A That's correct.

Q Now, on the adaptive functioning -- you had an opportunity to talk to Mr. Nixon. And did you also have an opportunity to review anything dealing with the crimes Mr. Nixon had committed?

A Yes, I did.

Q And with the crime he committed in this case?

A Yes.

Q And anything about there that would cause you any concerns about saying that he was functioning at an age of a 10 or 11 year old?

A Well, I would say that the adaptive testing that Dr. Keyes performed, those numbers, it wasn't -- the composite

score wasn't a 48. It was a 41. Okay. Remember, that score essentially translates the same way an IQ score translates. It has a mean of 100 and a standard deviation of 15. So when you're getting down to a composite score of 40 on an adaptive behavior measure like the Vineland, you're talking about in the range of severe retardation, severe deficiency in adaptive skill. Okay.

It would be moderate -- low end of the moderate range to high end of the severe range of adaptive deficit. That does give us an age equivalent. The age equivalent is seven years, eight months. Okay. I don't know where this 11 came from, but in terms of adaptive skills, that is the translation, seven years, eight months. Okay.

Q Okay. So let me ask a question here. The seven years, eight months is what the scoring manual indicates?

A That's what the scoring manual indicates. And that's how it's useful to us as clinicians, is we want to get a picture of how this person functions relative to other people. So they give us age equivalent, saying this person, at whatever age they are, is functioning like a child that's seven years old. Developmentally, he is doing the skills of a seven year old child. That's what the adaptive testing told us according to what Dr. Keyes was reporting.

Q Okay. So a number of 10 or 11 years of age would be something that is not in the scoring manual but something --

somehow, Dr. Keyes came up with that age?

A I think that's more -- that's more IQ. That's more -- the hypothetical IQ equivalent of 70, around there, would be equivalent to about an age of 10, 11, 12 years old. I would agree with that.

The adaptive testing is different, separate from the IQ. You have to separate it out. And when you have the adaptive score of 41, we are talking about severe, almost severe -- if you consider the Standard Error of Measurement, it would be severe -- deficits in adaptive skills, means he is functioning at about the age of a seven-year-old child. And that's what you compare him to.

Is that -- does that seem to be valid data? Does the information you got from his relatives seem supported? When you look at Mr. Nixon and his history, does it look like he's functioned like a seven-year-old child his entire life? And, I mean, my thing is no. That's way too low. You can't say that Mr. Nixon's functioning like a seven year old. I mean, it doesn't -- it doesn't match up with the historical data. This is anecdotal. I can't tell you exactly what age he was functioning at, but I can tell you he is not functioning like a seven year old.

I'll concede he has got adaptive deficits. Okay. He has got adaptive deficits throughout his records. It doesn't necessarily mean it's adaptive deficits based in

mental retardation. Criminals have adaptive deficits all the time. People with conduct disorders have adaptive deficits. Drug addicts have adaptive deficits. Schizophrenics have adaptive deficits. Kids who are oppositional have adaptive deficits.

There's 30 other reasons why you might have adaptive deficits in childhood aside from retardation. In Mr. Nixon's case, it seems to be more reflective of criminal conduct, probably poor parenting, oppositionalism. He had just a plethora of behavioral issues as an adolescent that required placement in adolescent homes beginning at the age of 10 years old, which is reflective of severe conduct problems when placement in residential facilities begin that young.

So, I mean, to attribute -- to say he has adaptive deficits of a seven year old, I think that's a terrible misrepresentation of his adaptive ability.

MR. EVANS: Okay. No further questions.

THE COURT: Cross examination.

MR. FREEDMAN: I'm sorry, Your Honor. It will take a minute.

THE COURT: That's fine. Whenever you are ready, Counsel.

CROSS EXAMINATION

BY MR. FREEDMAN:

Q Good afternoon, sir.

A Hello, sir. How are you?
Q Now, your speciality in the psychological field is in doing assessments for forensic purposes?
A Correct.
Q You don't write scholarly articles?
A No. I'm not a research-oriented person.
Q In fact, you've never published in a peer-reviewed journal?
A That's correct.
Q And you do at least two or three mental retardation assessments a week?
A Yes.
Q And you also do many other categories of assessments?
A Yes.
Q And putting together the mental retardation evaluations, the sexual predator evaluations, the competent to stand trial evaluations, and the other categories, you do 10 or 15 per week?
A Yes.
Q And multiplied by 50 weeks a year, that's between 500 and 750 assessments a year?
A Yes.
Q In fact, you do enough of those assessments that you gross over $200,000 a year doing them?

A Correct.
Q Very busy guy.
A Yes, I am.
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 If -- and therefore, you, yourself, did not do any formal measures of his adaptive behavior?
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

and conclude that the likelihood is 95 percent 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.

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?

A I don't recall that from memory, but if you say so, I believe you.

MR. FREEDMAN: I would ask the clerk to mark this as the next exhibit in order.

THE COURT: I think we are on Defense 8. Is that right, Ms. Odom?

THE CLERK: Yes, sir, it is.

THE COURT: All right. And this is Dr. Prichards' report on Roger Cherry.

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: I'm sorry?

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

THE COURT: Any objection to Defense 8?

MR. EVANS: None.

THE COURT: Defense 8 is admitted.

(Defense Exhibit No. 8 received in evidence.)

BY MR. FREEDMAN:

Q Now, Doctor, if one were going to take several -- if I wanted to administer several IQ tests to a particular individual, say, four years apart, you wouldn't expect that all the numbers came out exactly the same? I assume a fairly normal pattern would be, well, you know, 70 on one occasion and 68 on another occasion, 72 on another occasion. That would be normal, wouldn't it?

A Yeah, ordinarily, you wouldn't expect a identical numbers. Ordinarily, also what happens, if there isn't much of an interval between testing occasions, the second test generally is a little bit higher than the first, based on practice effect, which is just exposure to the testing information.

Q So there is just normal variability of intertest reliability?

A Yeah. There is normal variability in the scores you obtain, Yes.

Q Okay. Now, each of those particular reported scores also has possible inaccuracy in it? That's what the Standard Error of Measure is supposed to be covering for us?

A It's supposed to account for that, correct.

Q Okay. Now, if we could return to page 43 on Defense

Exhibit 3. That's the slides.

THE COURT: Page 43 on the slide show?

MR. FREEDMAN: Yes.

THE COURT: All right. Do you have that in front of you?

THE WITNESS: This might be it. Let's see.

MR. FREEDMAN: That's it.

THE WITNESS: Yes. Okay. Yes, here it is.

BY MR. FREEDMAN:

Q Okay. This same picture was presented to our -- two witnesses and they were both -- Dr. Keyes was asked, there must be something wrong with that. And he said, no. And you looked at this and said there must be something wrong with this.

So the -- as we agreed, I think, it's perfectly possible that the 80 could really be a 75, right, just as we agreed that it's possible that the 66, raising a lower score, could really be a 71?

A Yes.

Q Okay. In which case, fine, then we would have a 71 and we would have a 75. And if we got a 71 and a 75, then, as we have just discussed, we wouldn't think anything shocking was going on. We would, in fact, think those results were statistically the same, wouldn't we?

A Not really. I mean, if you're accounting for the

Standard Error of Measurement on each test score and the two don't overlap, then, you know, your accounting for the five points --

Q I'm sorry. I'm sorry. We started -- we started -- we started -- you started out by telling me that you would expect that on repeated administrations of the test, you would see a range of different scores.

A Yeah.

Q And each of those scores might or might not be quite the right number.

A Yeah, but within reason. I'm not talking about variations in scores that are significant.

Q Sure.

A I'm talking about if you -- I think your point was like a -- you know, if you found a 68 and a 72, yes, in which case, if you had a 68 and a 72, the Standard Error of Measurements encompass those scores. So it would seem to be a valid reputation if that's the two data points you have.

Q And in this particular case, the two data points that we have at the furthest extreme are 71 and 74. And the point, I believe, of the testimony based on Exhibits V and W to Dr. Keyes' supplemental affidavit earlier this morning was that that kind of range, that four-point range, on separate administrations is perfectly statistically usual. And therefore, no, there is nothing wrong with this. Every one of

these could have been perfectly fine, and what you have is statistical variability well within normal ranges.

A 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.

Q Well, the studies that Dr. Keyes referred to which asked what the results were on retesting and showed that people, on average, there was a six-point variation, in some cases more, in some cases less, those were just the obtained numbers. Nobody applied any Standard Error of Measure to those. That was a six-point variation in obtained scores; correct?

A Yes.

Q Okay.

A Within three years of each other, yes.

Q Okay. So, that's one set of scatter as it relates to obtained scores, and the second set of corrections is applying the Standard Error of Measure to those obtained scores. So there is no contradiction?

A I think there is. Either we are miscommunicating or maybe you're not understanding what I'm saying or I'm not understanding what you're asking. But when you construct that confidence interval around the obtained score, you're saying that true IQ falls in that range. So on each obtained score, if those intervals do not overlap, then you cannot be -- you cannot be accurate on both of those assertions.

Q Well, in that case, presumably what you would do is precisely what Dr. Keyes has done here and draw a confidence -- draw a bell-shaped curve of the obtained data and see where you turn out?

A Now, I'll make a point about that. We will show how it's in error. Okay. Say, for example, somebody scores a 120 on an IQ one day and then he scores a 60 on an IQ on another day. Would the appropriate thing to be to find true intelligence is to average those scores and come up with an 80? That would be invalidating both the 60 and the 120 and coming up with a score that isn't representative of the person's intelligence.

Q Of course. Everyone agrees with you about that. I

agree with you. Dr. Keyes agrees with you. That would totally wrong. And the area in which we are miscommunicating is that I'm trying to show you that that is not what has been done here. If that had been done here, of course it would be invalid for exactly the reason to which you testified. If you had an accurate IQ score of 120 on one day, right, then quite -- then quite obviously, since, 95 you say, you can't -- your potential is a ceiling, right? Okay.

What is being suggested here is that the true number, because of the fact that there is varying of six points, let's say, in a range that you would expect of obtained scores when you give tests repeatedly, and each of those has its own error, every one of these tests could have been absolutely honestly and accurately given by an unbiassed examiner and an unbiased test-taker and statistically come to these results?

A I don't think that's accurate.

Q In fact -- in fact -- in fact -- in fact, the -- since in the article with the table in Exhibit W that Dr. Keyes was reviewed before, there were some people who, on repeated tests, scored as much as 13 points apart, that could possibly -- that could account for the whole variation with no reason -- no invalidity at all?

A Well, the applicability of that idea to Mr. Nixon make no sense. This research that we are referring to is

test, retest three years apart on one instrument. It's not referencing test, retest on different measures of the WISC over some occasions, what, eight years' time and some occasions on 10, 15 years' time. There is no reason to believe that we can accurately say -- I mean, to generalize from that data you're referencing and to say that we can say that it represents a variation of six points on the second testing occasion somehow, it just -- you can't do it. You can't apply that.

Q Again -- again, all we have to explain is the difference between 71 and 74. All right. Let us now take a look at another case.

Now, you were hired by the prosecution as a mental retardation expert in the capital case of State of Florida versus Clarence F. Jones, which was a prosecution right here in Leon County; correct?

A Yes, sir.

Q And, in fact, you testified at an evidentiary hearing in this building, didn't you?

A Yes, sir.

Q And the defense expert was Dr. Keyes?

A It was.

Q And the record in that case reflected a Stanford-Binet test that had been administered to the defendant when he was nine years old and on which he had

scored a 67; correct?

A Okay.

Q Okay. And you took the position that that score was unreliable, for various reasons. And then you testified: The other problem with that score is that we have no idea who administered it, and we have one single number on one single document. I wouldn't draw any conclusions based on that. If I don't see, you know, some of the subtest scores and know who administered it and see some reference to it in other places, you know, you are really going out on a limb if you are going to take that number that's referenced in one place and draw any conclusions about a person's presence or absence of mental retardation.

And, therefore you concluded: The best thing to do is take that number and just completely throw it out, because we don't have enough information about what was going on at that time, who administered the test, et cetera. Wasn't that your testimony?

A I would absolutely stand by that. And as I recall, that was a reference in a deposition or somebody's statement that there was a Stanford-Binet score of whatever it was, 67. I saw no -- I didn't have a report, who administered it, who signed off on it. Again, I like to review the body of the report and see if the body of the report makes sense in terms of what the person is reporting.

I've had occasions where the body of the report didn't make any sense, and so I didn't throw it out, saying it's invalid. On this occasion, it's completely different. It's the context of the psychological report. The scores are reported, verbal performance and full scale, which is what you want to know. The person who administered it is there, talked about motivation, said he seemed to be motivated, but on one subtest probably wasn't functioning optimally. That was important.

All of the other conclusions seemed absolutely valid, reasonable. Probably the same conclusions I would have drawn, given the administration of the test, signed off by an individual with a Ph.D. on the cosignature. Very different than what you're referencing.

Q Well, except that all of the information you don't know, like was the administration consistent with the training, testing, repetitive protocols of how a standardized test is supposed to be kept standardized, not to mention the test itself, but the -- all the administrative information you don't know is the same.

A No. I mean, I don't claim to know that on any historical testing occasion, whether it was administered exactly the way it was supposed to be administered. I don't claim to know that for sure. I'm assuming when it's in the body of a report with the reported score, the report makes

sense in how it explains the score, signed off by somebody, you know, an intern with a licensed psychologist, that's totally appropriate to me.

Q By the way, you are assuming that this person who signed off is a licensed psychologist?

A Yeah.

Q Okay. Now, we've had this discussion about motivation. And in this case, the State is seeking to execute Joe Nixon. And when you started this assessment, you informed Mr. Nixon that you were conducting it at the request of the State Attorney's Office; correct?

A Correct.

Q And he knew that the purpose of obtaining this information was for you to use it in court proceedings?

A Yes.

Q So this testing was in a forensic environment?

A Yes.

Q And in a forensic environment, there is this concern that the defendant might be motivated to perform poorly and might be malingering?

A Correct.

Q So you administered the psychological test that's now available called the Test of Memory Malingering in order to assess whether Mr. Nixon was malingering on this occasion?

A Correct.

Q And the maximum possible score on that test is 50, which means no malingering?
A Correct.
Q And on the first trial, Mr. Nixon scored a 49; correct?
A That's correct.
Q And on the second trial, he scored a 50; correct?
A Yes.
Q And you concluded that his motivation was good?
A Yes.
Q And he was working hard and making a good effort?
A Yes.
Q Okay. And then turning to the score protocol, which we have previously marked as Exhibit 6 --
THE COURT: This one?
MR. FREEDMAN: That one.
BY MR. FREEDMAN:
Q -- you had a discussion with Mr. Evans about the sophisticated responses on Section 9 about information?
A Yes.
Q Now, earlier -- the items are marked in order of difficulty, correct -- or arranged in order of difficulty?
A That's correct.
Q And so, for instance, he misses number 6, the question of, in which direction the sun rises?

A Yes.

Q Okay. And displays a scattered pattern of getting some right and some wrong until he ceilings out after 21?

A Yes.

Q And my question to you is, why isn't this completely consistent with the testimony of Dr. Keyes this morning that the pattern of aces and spaces reflects the fact that a mental retarded person accepts some information in the course of growing up and so, for instance, might know from a movie that Gandhi was a bald dude but not know that the sun doesn't rise in the south? Why does this, you know, mean that you understand the theory of relativity?

A Well, I mean, it's not -- it's certainly the pattern of aces and spaces, so it's been termed. That pattern does not necessarily reflective mental retardation. More importantly is, the score that he obtained on that subtest of an 11 is in the average range.

The assumption is that other folks who truly are mentally retarded are exposed to the same information, potentially, in movies and that kind of thing that Mr. Nixon was exposed to. The difference between Mr. Nixon and a truly retarded individual is Mr. Nixon was able to learn that information.

Q Right.

A And that's reflective of higher capacity than mental

retardation, obviously, because a mentally retardate isn't capable of learning that information ordinarily.

Q So that -- that has nothing to do with patterning. That has to do with your obtained score on this. He has learned this much information during the course of his life?

A Well, a mental retardation profile does not necessarily suggest that there is going to be aces and spaces or patterning. In other words, all mental retardates do not do this thing of aces and spaces. Some do. All average individuals do not do patterns of aces and spaces. Some do.

Does it tell us anything, really? Well, aside from strengths and weaknesses for a mentally retarded person and strengths and weakness for an average -- a person of average intellect, it really doesn't tell us anything at all.

Q Now, we talked about another instrument which seems to be a different kind of instrument, which is the Vineland Adaptive Behavior --

A Scale.

Q -- Scale.

A Yes, sir.

Q Now, as far as I understand, that is a structured questionnaire in which you ask for questions indicated. And then based on the responses, tally them up and come to some number which we then report.

A Essentially. It's a semi-structured format where

you're kind of conversationally talking to the individual who knows the person you're assessing, who is called the respondant. And you're kind of helping, getting that person to help you characterize the individual you're assessing so that you can adequately score the Vineland. And then you tally up the numbers and get a score, yes.

Q Yeah. Okay. But the -- to the extent that you weren't using a Vineland for this purpose, you would, in fact, go out and do exactly the same thing, which is talk to a number of people who know the person, collect information about the ability to adapt in all of these various areas, and come to an assessment?

A Yes.

Q Okay. So the fact that Dr. Keyes gave this one particular questionnaire to this one particular person who came up with this one particular score is not inconsistent with talking to a lot of people coming to a conclusion that, well, on the basis of what all of those people have to say about all of the same information, I conclude he is functioning at a higher level than the score of this particular questionnaire would indicate?

A Yeah, that's true.

MR. FREEDMAN: Thank you very much.

THE COURT: Any redirect?

MR. EVANS: Yes.

REDIRECT EXAMINATION

BY MR. EVANS:

Q You opined in the Cherry case that Mr. Cherry was mentally retarded; is that correct?

A I did opine that Mr. Cherry was mentally retarded, yes.

Q And Mr. Cherry was, in fact, found not to be mentally retarded by the court; is that correct?

A That's correct.

Q Now, the question about the testing and the various ranges that counsel was asking you about, on the I think it was Defense's Exhibit No. 2, the -- when trying to explain the possible variances in the numbers and the IQ results, that recording on the test, I'll ask you to look at V under the Dinning, D-I-N-N-I-N-G, report. And that was with what particular test?

A It was with the WAIS, the Wechsler Adult Intelligence Scale.

Q And what interval was that test given over?

A It was given over -- the test, retest data was given over a 32-month interval.

Q Now, was Mr. -- did that ever occur with Mr. Nixon?

A No, and that's the thing. It's -- I mean, I don't think this is at all applicable to the case of Mr. Nixon, because what we have is testing with the WISC, a different

Wechsler Scale, in '74. We have testing with the WAIS-R in '85, which is a different measure. Of course, the one in '74, a child measure. The one in '85 by Doerman, an adult measure. Then we had, actually, eight years later testing by Dr. Dee with the same WAIS-R, not the WAIS that this article references, but the revised WAIS. And the test, retest interval was eight to nine years rather than the 32 months that this article is referencing.

Q Okay. And Section W of Defense Exhibit No. 2 was --

A Okay.

Q And I had forgotten the name. What was the name of that?

A WISC-R Subtest Reliability Over Time, Implications for Practice and Research.

Q And the interview -- interval in those cases was, was it two years -- or two times within three years and then three times within six years?

A It was retest -- test, retest with the WISC-R, which is a revised version of the WISC that Mr. Nixon was never given, and it was three and six year intervals.

Q Okay. Now -- and does it look like it indicates that one interval was he was giving the person, the subjects in those -- in that literature was tested twice within three years and then three times within six years?

A That's correct. Twice in three years and three

times over a six year period.

Q Okay. Is it true, in neither one of those articles -- that Mr. Nixon was ever given those tests, much less those tests under similar circumstances?

A That is absolutely true. He was never given the WISC-R, was never given the WAIS, and I just referenced the interval of between test occasions, plus my own between '93 and 2006, which is 13 years.

Q Okay. Can you make such generalizations as to applying that research to situations that -- like Mr. Nixon's without it being tested in you all's relative community, the scientific psychological community?

A No, you really can't. What you do is, usually, in a good measure of intelligence, they are going to address the test, retest issue in the manual. And, essentially, the WISC -- or, excuse me, the WAIS-III manual that I administered with Mr. Nixon does address the test, retest issue. And, basically, it says their test says, we did test, retest with the WAIS-III over a six- to twelve-week interval and find -- found this practice effect. In other words, the second score did raise up, but their assessment was over only over six and twelve weeks.

So you can't make the assumption. They are different tests, they are different time periods, so that you just cannot try to put a square peg in a round hole like that.

Q Okay. Now, the reference to Dr. Keyes' bell curve and --

A Correct.

Q -- and I'm not 100 percent sure of the question, but did not Dr. Keyes graph take the Flynn Effect, which is something that is in effect -- wasn't the Flynn Effect applied in his bell curve, along with subtracting the standard area of measurement?

MR. FREEDMAN: Object to the form.

THE COURT: What's the --

MR. FREEDMAN: I don't understand the question.

THE COURT: Okay. Just rephrase it, Mr. Evans.

BY MR. EVANS:

Q Okay. The curve, when they were talking -- the question that defense counsel asked you about the bell curve.

A Yes.

Q All right. Dr. Keyes' graphics indicated that it took into effect the Flynn Effect and also the Standard Error of Measurement to try to get those -- the bell curves to overlap.

A Yes, it did take into account the Flynn Effect and the Standard Error of Measurement. And, again, on some of those occasions, it didn't produce scores below 70, which is problematic, you know, and I think it's an inappropriate way to apply those ideas.

Q And, again, the Flynn Effect is not something that is accepted as -- that you apply and to reach the numbers, IQ numbers?

A That's correct.

Q And on Clarence Jones, both you and Dr. Keyes had Mr. Jones' IQ above 70; wasn't that correct?

A Yes, we did.

Q Okay. And, again, that's not a situation, in Mr. Jones' case, just like in Mr. Nixon's case, you can't fake smart?

A That's correct.

MR. EVANS: No further questions.

THE WITNESS: Thank you, sir.

THE COURT: Anything else?

MR. FREEDMAN: No, Your Honor.

THE COURT: Thank you, sir, for your time and your testimony. You may step down, sir. The witnesses are released.

Was I missing something?

MR. EVANS: No, sir.

THE COURT: All right. Thank you.

All right. Well, what I would suggest, I'm going to get the -- I'm planning on getting this, the testimony so far transcribed. I would suggest rather than oral argument, written submissions sometime within 30 days

after that, and then I will issue an order. Is there any problem with that?

MR. FREEDMAN: I'm sorry. I just didn't hear you.

THE COURT: I'll get the testimony transcribed. And then both sides can submit their final written submissions within 30 days after that. And then I will issue an order. Is that acceptable?

MR. FREEDMAN: That will be fine.

THE COURT: All right. Very well.

MR. EVANS: It will be contemporaneously filed so that --

MS. SNURKOWSKI: Simultaneously filed.

THE COURT: Yes, that was my thought.

MS. SNURKOWSKI: Yes, Your Honor.

THE COURT: Both sides file within 30 days. I think the issue is pretty well -- pretty well plain now, so.

(Discussion held off the record.)

THE COURT: All right. So, a transcript 30 days. I will do an order.

Thank you both very much -- thank you all very much for your advocacy.

(The proceedings were concluded.)

CERTIFICATE

STATE OF FLORIDA:

COUNTY OF LEON:

I, LINDA CUNNINGHAM, Official Court Reporter, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter translated under my supervision; and the foregoing pages are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED this 13th day of November, 2006.

Linda Cunningham

LINDA CUNNINGHAM
OFFICIAL COURT REPORTER
LEON COUNTY COURTHOUSE
TALLAHASSEE, FLORIDA 32301

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

FILED
FELONY DIV.
2007 APR 26 P 2:19
2ND JUDICIAL CIRCUIT
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

**STATE OF FLORIDA**

**vs.** **Case No. 1984CF2324**

**JOE ELTON NIXON,** **SPN No. 4**
**Defendant.**
_____/

**Felony Division "C" - Sjostrom**

**ORDER**

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 (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

[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).

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 co-defendant 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 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

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

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]

**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.

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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 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.

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 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 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.

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

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

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. 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]

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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.

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. 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 and historical testing

[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 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

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 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

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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)).

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 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

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[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 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.

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.

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.

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

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.

**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 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

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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).

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 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

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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.

[15]Transcript of Confession at 14.

[16]Transcript of Confession at 18.

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]

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.

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[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 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.

JONATHAN SJOSTROM
CIRCUIT JUDGE

**Copies Provided To:**

Eddie D. Evans, Assistant State Attorney
Eric M. Freedman, Counsel for Defendant
Armando Garcia, Counsel for Defendant
Edward H. Tillinghast and Edward S. O'Conner, Counsel for Defendant

**EXHIBIT A**

**DEFENDANT'S CONFESSION**

FILED
2011 MAR 19 PM 2:38
BOB INZER
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

Campbell: Joe I'm going to repeat some things that I said to you earlier just a little while ago when I picked you up down there on Millard Street.

Nixon: Yes.

Campbell: You know that the people in this room right now is, I'm Larry Campbell, I'm Major with the Sheriff's Department and this is Dale Wise, he's Captain with the Sheriff's Department. After I picked you up I gave you your rights, you remember that?

Nixon: Yes.

Campbell: We're going to go over them again. This time I'm going to read them from this, from this form. It says name, Joe Elton Nixon, case number 84-27284, 14th of August 1984, at 12:15, place is the Leon County Sheriff's Department in my office, Warning of Constitutional Rights. Before we ask you any questions you must understand your rights as set forth in the Miranda court decision. One, you have the right to remain silent, two, anything you say can and will be used against you in a court of law, three, you have the right to talk to a lawyer for advise before we ask you any questions and to have him with you during questioning, four, if you cannot afford to hire a lawyer one will be appointed for you before any questioning if you wish, five, if you decide to answer questions now without a lawyer present you will still have the right to stop answering questions at anytime. You also have the right to stop answering at anytime until you talk to a lawyer. Your Constitutional rights, I have read and been read or been read this statement of my rights and I understand what my rights are. I am willing to make a statement and to answer any questions. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me. A little more fancy language than what I said this morning but basically we're not going to try and trick you or threaten you or hurt you or promise you good things or promise you bad things, we're just going man to man straight from the shoulder. Is that, you understand what I've said to you?

Nixon: Yeah.

Campbell: I want you to look at the statement there. You read good don't you Joe?

Nixon: Yes.

Campbell: Read that statement over and make sure I haven't said anything wrong. We're not doing any tricking or anything at this time. That's my signature there on the bottom, L. O. Campbell. Okay?

Nixon: Alright.

Campbell: I'd like for you to sign it there on the line where it says.....okay, Captain Wise is going to initial it or witness it.
Alright Joe; when, let's see, we arrested you what twenty, thirty minutes ago down at uh, 910 Millard Street?

Nixon: Yes.

Campbell: Anybody else there when we....

Nixon: No.

Campbell: ...arrested? Do you remember hearing me ring the doorbell?

Nixon: Uh, yeah, uh huh.

Campbell: What happened when I rung the doorbell, did you say anything to me or do anything?

Nixon: No sir, I started you know, I was fittin to go come look out the window.

Campbell: Uh huh.

Nixon: And uh, I always look out the window and see you know, who there and stuff. You know ain't too many people you know, kno, you know I stay over there.

Campbell: Uh huh.

Nixon: I was going to see and you opened the door. I figured you, you know,....

Campbell: What did you say to me when I opened the door?

Nixon: Well I was shocked, say hey, I am or somethin, you know.

Campbell: Okay. And what did I say back to you? You remember?

Nixon: Asked me was I Joe Nixon or something....

Campbell: Uh huh.

Nixon: ...anything, and I told you yeah.

Campbell: I told you to get up against the wall.

Nixion: Yeah.

Campbell: Okay. At that time I told you that I was Larry Campbell with the Sheriff's Department. Remember that?

Nixon: Yes.

Campbell: And I told you that I was arresting you for First Degree Murder.

Nixon: Yes.

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Campbell: You remember that?

Nixon: Yeah.

Campbell: Alright. Then I called Captain Wise who was around the back and he came inside and we shook you down.....

Nixon: Yeah.

Campbell: ....and took your property away from you and put it in a paper bag.

Nixon: Yes.

Campbell: Right? And we're gone give you a receipt for it.

Nixon: Yes.

Campbell: Alright we gave you the cigarettes back already right?

Nixon: Yes.

Campbell: Okay. Then as soon as we could get you loaded up in the car and get the house locked back up and such as,.....

Nixon: Yeah.

Campbell: .....then what happened?

Nixon: And I was, read me my rights.

Campbell: I read 'em to you or I just tell 'em to you?

Nixon: Told 'em to, you know, told 'em to me.

Campbell: Told 'em to, did you understand what they were?

Nixon: Yes.

Campbell: Do you understand what they are now?

Nixon: Yes.

Campbell: Since we've had you in custody is anybody said anything ugly to you or mistreated you, done you wrong in any way?

Nixon: No sir.

Campbell: Okay. Are you in any distress or bad situation or anything now other than having to be here talking to us?

Nixon: Just worry about a few things and that's it.

Campbell: Alright. Joe when we were uh, talking a wh, a while ago while we were waiting to get a tape recorder and the forms and such as.....

Nixon: Yes.

Campbell: .....signed up the uh, we said we were going to talk man to man and not try and kid each other or trick each other or bullskate it or whatever we want to refer to it, right?

Nixon: Yes.

Campbell: Okay. We told you that we didn't arrest you for suspicion of murder we arrested you for murder.

Nixon: Yeah.

Campbell: Okay. And you made a statement back to me and said I know what it's about and we're gone shoot straight or words of that direction. Is that correct?

Nixon: Yes sir.

Campbell: Alright. You want to start? It's your story. I don't want to try and put no words in your mouth and I don't know how to be any fairer than that Joe. It's your story it's not, it's not my story and it's not Captain's story.

Nixon: Uh huh.

Campbell: You just start from where you want to start and tell me what you've got to say and then we'll, I'll ask you some questions as we go along trying to help along.

Nixon: Alright. I just you know, I don't know the last name or nothing like that, I just, just kilt her, took her life and kept her car and tried to burn it this morning.

Campbell: Tried to burn it this morning?

Nixon: Yeah.

Campbell: Alright why don't you start at the beginning Joe, did, do, do you know the lady at all?

Nixon: No.

Campbell: The lady's name is Jeanne Bickner, J-E-A-N-N-E B-I-C-K-N-E-R, Jeanne Bickner and that's what we're talking about is first degree murder of Jeanne Bickner.

Nixon: Yes.

Campbell: Alright now today is Tuesday the fourteenth of August.

Nixon: Yes.

Campbell: Uh, when did you first see the lady that I'm referring to as Jeanne Bickner?

Nixon: I had seen her uh, let's see, Saturday.

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Campbell: You saw her Saturday?

Nixon: Yes.

Campbell: Where about?

Nixon: Met her, met her at the Mall.

Campbell: What Mall?

Nixon: Governors Square.

Campbell: Where 'bouts?

Nixon: In, saw her in a store, Sears.

Campbell: In Sears Store?

Nixon: Yeah.

Campbell: How did you meet her, did you just see her or did you actually meet her and speak to her or what happened?

Nixon: Yeah, we were talking.

Campbell: How did you happen to be talking to Jeanne?

Nixon: I had hurt my arm or something, she offer, she offer you know, to take me home so.

Campbell: Where 'bouts in Sears were you Joe?

Nixon: In there where, when you first, that entrance there.

Campbell: Alright you can enter at either the main part of the Mall itself,.....

Nixon: Let me see, where, it's, they got all the t.v.s and stuff all there.

Campbell: Alright did you come from outside, out in the, out in the parking lot or from inside the Mall?

Nixon: Come outside from the parking lot.

Campbell: Okay. You come into where the t.v.'s were?

Nixon: Yeah, all that stuff like that.

Campbell: Okay. And you had hurt your arm?

Nixon: Yeah.

Campbell: How did you hurt your arm?

Nixon: I had skint it.

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Campbell: How did you do that?

Nixon: Trying to fix my uncle's car.

Campbell: Your uncle car?

Nixon: Yes.

Campbell: What kind of car is that?

Nixon: That's that green and white Monte Carlo.

Campbell: Alright, what's your uncle's name?

Nixon: Tom.

Campbell: Tom what?

Nixon: James Ingles

Campbell: Alright, I-N-G-L-E-S?

Nixon: Yes.

Campbell: Okay. Uh, about what time of day Saturday was it?

Nixon: Um, in the afternoon about three.

Campbell: About three?

Nixon: Yes.

Campbell: Your arm bleeding?

Nixon: Naw, it was just .....

Campbell: Skint?

Nixon: .....you know, trying to fix the muffler it was hot.

Campbell: Which arm was it?

Nixon: My right arm.

Campbell: It still got a skinned place on it now?

Nixon: Uh, I don't know.

Campbell: A little bit of skinned place there by your elbow?

Wise: You've got some there on the backside of it too Joe, you got some back there.

Campbell: Alright and she was in the t.v. place?

Nixon: Yeah.

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Campbell: Did she speak to you first or did you speak to her?

Nixon: She knows me. She knows my name and everything.

Campbell: How?

Nixon: Well she just, or something, up on campus, you know, I be up on Florida State or something. I think she was a teacher or something.

Campbell: Oh, okay. Uh, then she, you was walking in the store and she just said hey Joe?

Nixon: Yeah, she know me. 'Cause you know I used to be you know, in trouble and stuff coming up and all that.

Campbell: I see, do you know where she worked?

Nixon: She said up on campus, that's all I know.

Campbell Okay. So uh, what happened then?

Nixon: So she offered you know, to give me a ride home so I told her you know my mon, my uncle's car was messing up and all there, and I didn't want to drive it up you know, up the street with the muffler and stuff like that.

Campbell: Alright. What were you wearing Joe?

Nixon: Blue jeans.

Campbell: Blue jeans?

Nixon: Yes sir.

Campbell: What kind of shirt, were you wearing a shirt?

Nixon: Tank top, I wear a tank top most of the time, golf shirt?

Campbell: Uh huh. What color was it?

Nixon: White, one of the white golf shirts?

Campbell: Uh huh.

Nixon: I wear.....

Campbell: White golf shirt?

Nixon: Uh huh.

Campbell: Okay. What kind of shoes?

Nixon: Tennis shoes.

Campbell: Tennis shoes? Okay. And how long had you had your uncle's car there?

Nixon: Friday.

Campbell: Since Friday?

Nixon: Uh huh.

Campbell: Okay. Had anybody else been with you out there at the Mall?

Nixon: No.

Campbell: See anybody you knew out there at the Mall?

Nixon: Naw sir.

Campbell: Okay. So she said she'd give you a ride?

Nixon: Yeah.

Campbell: Okay. So what happened then?

Nixon: Um, and then we got in the car an.....

Campbell: What kind of car?

Nixon: A Fiat, not a Fiat it was a M.G..

Campbell: Tell me about it, describe it to me.

Nixon: Orange, sports car, convertible.

Campbell: Convertible? What color was the convertible?

Nixon: Black.

Campbell: Black? Okay. What was she wearing?

Nixon: Um, a, a brown or beigish, brownish beigish dress.

Campbell: Brown beigish dress?

Nixon: Yeah.

Campbell: What, what did she look like? Kinda describe her to me, would you?

Nixon: Wore glasses with about, ah, her hair's a little darker than your hair.

Campbell: A little darker than my hair?

Nixon: Yeah.

Campbell: Alright. Was she a white lady or a black lady?

Nixon: White lady.

Campbell: Alright, about how old is she?

Nixon: About thirty four, thirty five maybe.

Campbell: Alright, about how tall was she? She as tall as you or...

Nixon: Uh, I think I might be a little taller.

Campbell: How about, how's she, how's she built, she slim or heavy or medium or how would you describe her?

Nixon: Medium.

Campbell: Alright. Uh, she have on shoes that you noticed?

Nixon: Yeah she had on shoes.

Campbell: You notice what color or what kind or anything like that?

Nixon: I think they were, let me see, white.

Campbell: White?

Nixon: White.

Campbell: White like sandals or like high heel shoes or like tennis shoes or go go boots or.....

Nixon: Uh, maybe you know, the kind women just slip their feet in.

Campbell: I see. Alright did she have a pocketbook?

Nixon: Yeah.

Campbell: What kind of looking pocketbook was it?

Nixon: A white.

Campbell: A white pocket book and white shoes?

Nixon: Yeah.

Campbell: Okay. Was she like dressed up nice like you know going someplace or was she just kinda casual?

Nixon: Casual.

Campbell: Kinda casual? Okay. Anybody with her?

Nixon: No.

Campbell: Okay. Where was her car parked?

Nixon: At the Mall.

Campbell: Where about?

Nixon: Right over there by Sears

Campbell: Over by Sears, did you go out the same door to her car that you come in .....

Nixon: Yes.

Campbell: ....by the t.v. sets and all?

Nixon: Yes.

Campbell: Okay. Go ahead and tell me.

Nixon: And then we got in her car and 'cause she was headed to take me home and I told her.....

Campbell: Which way did you tell her to take you home?

Nixon: Left behind the Mall.

Campbell: Left behind the Mall?

Nixon: Yeah.

Campbell: Okay. That's on, on what Governor Square Boulevard there, that little street that runs into Magnolia and then into Blairstone Road?

Nixon: Yeah, that's right.

Campbell: Okay so you headed left toward Magnolia?

Nixon: Uh huh.

Campbell: Okay.

Nixon: And then we headed out there, then I hit, hit her in the head a few times.

Campbell: Where, wait a minute now, where did you, where did you tell her that you was living? 'Cause I mean to get her to turn left toward Magnolia.

Nixon: On the Tram, no, I told her I was going out to the Tram Road.

Campbell: Told her you was staying out on the Tram Road?

Nixon: Uh huh.

Campbell: And that's where you was going?

Nixon: Yeah.

Campbell: Okay. Which way did ya'll go to get there?

Nixon: Off the Truck Route.

Campbell: Went to the Truck Route to Tram Road?

Nixon: Yeah.

Campbell: And then which way did you turn?

Nixon: Which way I turn?

Campbell: Yeah, you come from down the Truck Route to the Tram Road.

Nixon: Took a right off on that dirt road.

Campbell: Wiat a minute, no, we, we, right now we're, we're at the Tr, on the TR, on the Truck Route going to the Tram Road.

Nixon: Uh huh.

Campbell: Tram Road runs right and left off the Truck Route, which way did ya'll turn? Away from town or toward town?

Nixon: It was away from town.

Campbell: Okay. And how far did you go down Tram Road?

Nixon: A long ways down to,....

Campbell: Alright. Did you, pretending like you know, like you knew, you know?

Nixon: Yeah.

Campbell: Okay. And then where did you come to? Is it runing?

Wise: Yeah.

Campbell: This is the continuation of the statement of Joe Elton Nixon. Disrupted statement is caused by the tape uh, running out. The time is now approximately 12:33, 14 August 1984.

Campbell: Alright Joe we've, you said you, you went on down Tram Road away from town.

Nixon: Yeah.

Campbell: And what kind of road did you, did you stay on Tram Road or did you turn off of it?

Nixon: We turnt off.

Campbell: Okay. Which way did you turn?

Nixon: Um, it was on a pipe line.

Campbell: On a pipe line?

Nixon: Dangerous something, a little white and red sign said warning or something. I forget the, what it read.

Campbell: Alright could it have been a power line instead of pipe line?

Nixon: Yeah.

Campbell: Okay. Who was driving, she was driving?

Nixon: Naw, I told you I had done hit her.

Campbell: Alright. I must have missed that. When did you hit her?

Nixon: When we got on the Truck Route.

Campbell: When got on, whereabout?

Nixon: Abouts, let's see that sign, it was, it was a yellow, on a curbe, on a curbe before you know, before we turnt, right down from it before we turnt off on the, on the Tram Road.

Campbell: Alright. How did you keep from wrecking if you hit her? She's driving and you sit,.....

Nixon: I grabbed the steering wheel.

Campbell: You grabbed the steering wheel?

Nixon: Yeah.

Campbell: Where did you hit her?

Nixon: In the head.

Campbell: With what?

Nixon: My fist.

Campbell: What did she do?

Nixon: Hollered.

Campbell: Hollered?

Nixon: Yeah.

Campbell: So what'd you do when she hollered?

Nixon: Cut the car off.

Campbell: Alright. Did she, did she bleed or anything?

Nixon: Yeah.

Campbell: Where?

Nixon: In the head.

Campbell: Whereabouts, I mean you know, like did her nose bleed or did her lip bleed or did her ear bleed, her eye bleed or...

Nixon: It just, blood all over her face.

Campbell: Blood all over her face?

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Nixon: Yeah.

Campbell: Did she say anything other than holler?

Nixon: She told me don't kill her.

Campbell: Don't kill her. Okay, then what did you do then? You got, you pulled the car off the side the road or something?

Nixon: Yeah.

Campbell: Okay, then tell me about it.

Nixon: And then I made her get out and put her in the trunk.

Campbell: You put her in the trunk?

Nixon: Yeah.

Campbell: Um, okay. And then what did, then, then you, you were driving down Tram Road.

Nixon: Yeah.

Campbell: Okay. Are you familiar with Tram Road are Joe?

Nixon: Uh, no.

Campbell: Okay. You ever been down in there before?

Nixon: I been down there when I was younger but you know, I know it's a long ways you know from town and places like that.

Campbell: Alright. When you put her in the trunk, was she still talking, she conscious?

Nixon: She was talking.

Campbell: Okay. And she was just telling you don't kill her?

Nixon: Yeah, that she give me money and all that right there. She'll, if I go to a phone booth and let her call, she'll call somebody to bring me some money.

Campbell: Okay. Alright so go around on down Tram Road with her locked in the trunk....

Nixon: Uh huh.

Campbell: ....and you turn onto a power line or a pipe line or something, right?

Nixon: Uh huh.

Campbell: And then where did you go?

Nixon: Went, took another left.

Campbell: Alright and you on paved roads now or dirt roads?

Nixon: Dirt road.

Campbell: Okay. And where did you go, just.....

Nixon: Just, just found a little wooded area and went out there.

Campbell: A wooded area?

Nixon: Yeah.

Campbell: Okay.

Nixon: A wooded area.

Campbell: Did you see anybody, did you pass any cars or trucks or anything that you remember while you were going down there?

Nixon: Um, I you know, on the highway, but not on that road.

Campbell: Not on Tram Road, not on a dirt road?

Nixon: Un un.

Campbell: Alright. So you finally went on back in, in there and found you a little wooded area?

Nixon: Yeah.

Campbell: Okay. What happened then?

Nixon: And then I, I let her out the trunk.

Campbell: She still bleeding?

Nixon: Yeah.

Campbell: Or is she pretty well healed up by then?

Nixon: She was still bleeding and all,...

Campbell: Alright.

Nixon: ....on her face.

Campbell: What did she say?

Nixon: Told me I could go out there and she would call, she kept on begging me, could she call somebody to bring her some money so I don't kill her an all that.

Campbell: Uh huh. What did you tell her?

Nixon: I told her I gave three years to society for nothing I didn't do.

Campbell: Is that right?

Nixon: Uh huh.

Campbell: What did she say about that?

Nixon: She said I see why you so upset.

Campbell: Uh huh.

Nixon: And all that right there.

Campbell: Alright. And then what happened?

Nixon: And then I, then I told her I, I asked her, I said I'm gone leave you here and keep your car.

Campbell: What did she say about that?

Nixon: She say, she say I don't believe you going to do that. I said why? She said 'cause you know I seen yo face and I could tell people.

Campbell: Uh huh.

Nixon: And I s, and I said you know something, you is right. I said you must to want to die, you know. And then I took her out, she was already out the trunk standing up with a bag over her head.

Campbell: With a bag over her head?

Nixon: Yeah.

Campbell: What, what kind of bag over her head?

Nixon: A grey bag.

Campbell: A cloth bag or a paper bag?

Nixon: A cloth bag.

Campbell: A cloth bag? Where did that come from?

Nixon: Out of her car.

Campbell: You hooked her up with it?

Nixon: Uh huh.

Campbell: Where did you find it?

Nixon: In the trunk.

Campbell: Alright. Big ol' bag, little ol' bag, what, what, what would you use that kind of bag for?

Nixon: Nailer put nails and stuff in it.

Campbell: How big was it? Like a foot?

Nixon: About a foot by, it was the kind you got the, got little, you tighten.

Campbell: A drawstring?

Nixon: Yeah. It got the drawstring in it.

Campbell: Is it like made out of canvas like stuff or, or like um cloth or leather or....

Nixon: Canvas, no cloth, cloth.

Campbell: A cloth bag?

Nixon: Yeah.

Campbell: Alright. You ever seen a bag like that before?

Nixon: Yes sir.

Campbell: Where, where have you seen a bag like that used for?

Nixon: In alot of mechanics cars.

Campbell: Okay. Was anything in it when you took it out of the trunk?

Nixon: No.

Campbell: When she went out of the Mall, did she have any packages or anything? Had she bought anything that you saw?

Nixon: Nails.

Campbell: She ahd bought some nails?

Nixon: Yeah.

Campbell: Okay. Alright you stand there and she got, when did you put the bag on her head?

Nixon: After I got her out of the trunk.

Campbell: As soon as you got her out of the trunk in the woods?

Nixon: Uh huh.

Campbell: Why.....

Nixon: No I didn't put it on then.

Campbell: Oh, you didn't put it on then?

Nixon: Naw, I'm talking about, I didn't the time I pulled her out of the car I didn't just put the bag on her head.

Campbell: I see. So,....

Nixon: I took her over there and tied her to a tree.

Campbell: Tied her to a tree?

Nixon: Yeah.

Campbell: What kind of tree?

Nixon: A pine tree.

Campbell: A pine tree?

Nixon: Yeah.

Campbell: How did you tie her to the tree?

Nixon: With some jumper cables.

Campbell: With jumper cables?

Nixon: Uh huh.

Campbell: Where'd you get them?

Nixon: Out of her car.

Campbell: Out of her car?

Nixon: Yeah.

Campbell: How did you tie her?

Nixon: First I tied her feet and tied one hand to the tree.

Campbell: What hand, do you remember?

Nixon: Left hand.

Campbell: You tied her left hand to the tree?

Nixon: Yeah.

Campbell: With the jumper cables?

Nixon: Yeah.

Campbell: Alright. What did you tie her feet with?

Nixon: The other, the other cable.

Campbell: You tied her feet with,.....

Nixon: You know the two cables are hooked?

Campbell: Uh huh. Were, were they two single cables?

Nixon: Seperate, seperate cables.

Campbell: They were two seperate cables. Do you remember what color they were?

Nixon: Um, I guess they were red and black 'cause most all cables are.....

Campbell: Okay.

Nixon: are like that.

Campbell: So you tied her left arm to the tree....

Nixon: Uh huh.

Campbell: ....and you tied her feet to the tree?

Nixon: Uh huh, naw I didn't tie her feet to the tree, I tied her feet.

Campbell: Oh, you just tied her feet?

Nixon: Yeah.

Campbell: Alright. Now with the other jumper cable?

Nixon: Yes.

Campbell: Alright. Did you do anymore tying to her at all?

Nixon: Yeah, before, I went and got that bag, after I did that she couldn't run off from me.

Campbell: Uh huh.

Nixon: I went and got the bag.

Campbell: And put the bag on her.

Nixon: I put the bag over her head.

Campbell: And what's she saying all this time?

Nixon: Still thinking why I want to do this and stuff, kept calling my name.

Campbell: Okay. And uh, so what then?

Nixon: Took her down there and turned around and went back to the car. And I was fittin' to leave, naw I sot fire to that stuff she had in the trunk.

Campbell: Saw what?

Nixon: I sot fire.

Campbell: Sat fire to the trunk?

Nixon: Naw, to the, you know then things like I guess go on the top of the car and stuff.

Campbell: Oh, okay. The thing that goes on top, like the car top?

Nixon: Yeah.

Campbell: And what color was it?

Nixon: Black.

Campbell: Alright where did you set fire to it?

Nixon: Right next to the car.

Campbell: Right next to the car?

Nixon: Yeah, right across from it.

Campbell: Alright, what all, what all was there?

Nixon: All her personal belongings.

Campbell: Where did you get them from?

Nixon: Out her pocket book. I just poured 'em on the ground.

Campbell: You poured her pocket book on the ground?

Nixon: Yeah.

Campbell: What did you do with her pocket book?

Nixon: I set, it burnt too, I throwed it all in.

Campbell: Throwed it all in a,

Nixon: Yeah, in a pile and I had sot fire.

Campbell: How did you set fire to it?

Nixon: With matches.

Campbell: With matches? Did you put anything on it, to make it burn?

Nixon: I looked for something but I didn't have nothin'.

Campbell: Didn't have nothing? What kind of stuff was in that pile that would make it burn? What all can you think of that was in that pile?

Nixon: Probably that fingernail polish and plus that stuff that go on the top of the car.

Campbell: That black.....

Nixon: Yeah.

Campbell: ....thing that goes on the top of the car?

Nixon: Yeah it's like rubber you know, like some tire do, once it get heated,....

Campbell: Uh huh.

Nixon: Started burning you know, for a long time.

Campbell: Uh huh. So you set that on fire there beside the car?

Nixon: Yeah.

Campbell: Did it burn the car or anything?

Nixon: Naw, I didn't have the car that close.

Campbell: Okay. Did you take anything outside the car other, what you just taking stuff out of the trunk and put, to, to build a fire with or what you, what you using to build that fire with? Where did you get the stuff?

Nixon: Out the trunk.

Campbell: Out of the trunk?

Nixon: Uh huh.

Campbell: Alright.

Nixon: And out of the glove compartment.

Campbell: Out of the glove compartment?

Nixon: Yeah.

Campbell: Alright and out of her pocket book?

Nixon: Yeah, no I just poured that out, I just.....

Campbell: You just poured it out and,..... .

Nixon: Just poured it out on the ground beside the car.

Campbell: ...you just dropped the pocket book in the rest of the fire?

Nixon: Yeah.

Campbell: Did she have a wallet in there or something?

Nixon: Yeah.

Campbell: Alright, she have some money in it?

Nixon: Five dollars.

Campbell: Five dollars? Is that the five dollars I took out of your pocket a while ago?

Nixon: No.

Campbell: No) It's not the same one?

Nixon: No see, let's see, I, I had pulled her stuff out 'cause she had five dollars rat there on the top you know, inside the pocket book...

Campbell: Uh huh.

Nixon: ...when I flipped it open and then I looked for somemore and they wasn't nothin' left in there so I just...

Campbell: No more money in there? How about credit cards or anything like that?

Nixon: They was a bunch of 'em but I had throwed 'em in the fire.

Campbell: Alright. Have any checks or a checkbook or anything?

Nixon: It might of been. I ain't, I was trying to get out of ther I ain't....

Campbell: You was trying to get out of there?

Nixon: ....just gettin' rid of all that evidence and stuff.

Campbell: Okay. So you burned it up with matches?

Nixon: Yes I did.

Campbell: Alright. And then what did you do?

Nixon: You know, I just kinda sot there and talked to her.

Campbell: What did ya'll talk about?

Nixon: I told her about my life, she told me about hers. She was a Christian and all that.

Campbell: What else did she say to you?

Nixon: She told me she want me to, me just, just leave her here and she'll sign her title over to my name, just keep the car and just you know, she don't want nothing like this to happen.

Campbell: What else did she say?

Nixon: She begged, you know, just begging me and all rat there.

Campbell: Alright.

Nixon: And then I took one of those black thangs, them old black thangs out the fire once it got heated up....

Campbell: Uh huh.

Nixon: She was tied up to the tree..

Campbell: Uh huh.

Nixon: And just throwed it on her.

Campbell: Throwed it on her?

Nixon: Uh huh.

Campbell: Whereabouts on her, do you remember?

Nixon: On her head.

Campbell: On her head?

Nixon: Yeah, over the bag and, it was a, she had a brown towel up in the car, I had tried to tie it around real tight, that bag,.....

Campbell: Trying to tie it around her, you're indicating with your hand, you tried to tie it around her neck.....

Nixon: Yes.

Campbell: .....to hold the bag on?

Nixon: Yes.

Campbell: And then you took a black thing, what we refer to as a car top or a tonneau cover.

Nixon: Uh huh.

Campbell: And it was hot from the fire and you throwed.....

Nixon: Yeah.

Campbell: ....that on top of her?

Nixon: Yes.

Campbell: Okay. And then what happened then? What did she say?

Nixon: Well, she didn't say nothin' 'cause see before I had done choked her.

Campbell: Oh you choked her?

Nixon: Yeah with a rope she had in the car.

Campbell: You choked her with a rope?

Nixon: Yeah.

Campbell: What did you do with the rope?

Nixon: Left it tied around here.

Campbell: Around her neck?

Nixon: Uh huh.

Campbell: That, did she die then or .....

Nixon: She died, well she died before that.

Campbell: She died before you set her on fire?

Nixon: Uh huh.

Campbell: Okay. Or before you put the hot thing on her?

Nixon: Yeah.

Campbell: Okay. Alright then what happend?

Nixon: I got in the car and left.

Campbell: Alright. Did you do anything towards setting her on fire?

Nixon: Yeah, when I throwed that top on her.....

Campbell: Uh huh.

Nixon: then that fire, I guess you know I set her on fire.

Campbell: Alright. How did you make that fire go?

Nixon: It was you know, one of them, that black thing I told you I had sot that fire with rat there?

Campbell: Yeah.

Nixon: I picked it up and throwed it on her.

Campbell: When it was buring good?

Nixon: Uh huh.

Campbell: Okay. Did you see her start catching on fire?

Nixon: I, didn't stay there, I left.

Campbell: You didn't stay there to watch that?

Nixon: Un un, she was down and her hand was in the air.

Campbell: Hand was in the air?

Nixon: Yeah. I you know, when I was choking her I could hear you know like if someone was fittin' to drown, you know like catching his last breath you know, that....

Campbell: Gurgling and gasping and stuff like that?

Nixon: Yeah.

Campbell: What's the last thing she said to you, you remember?

Nixon: You hurtin' me.

Campbell: You're hurting me?

Nixon: Yeah.

Campbell: Alright so you got back in the car?

Nixon: Yeah.

Campbell: And then where did you go?

Nixon: Back, backed out of there, went on to town.

Campbell: Alright. Did you go back out by the same way you went in or do you know?

Nixon: I went, went back to, went back the same way to get out.

Wise: Let me change this tape over.

Campbell: Okay.

Wise: It's almost run out.

Campbell: Statement will be following the change of tape. The time is approximately 12:45.

Campbell: Rolling? Continuation of the statement of Joe Elton Nixon. The time is approximately 12:46, 14 August 84. Alright Joe you got back in your car and you got back out of there. Where did you, where did you, where did you go when you left there?

Nixon: I went and parked the car.

Campbell: Whereabout?

Nixon: Down at, down there at the Mall.

Campbell: Same, Governor's Square Mall?

Nixon: Yeah. And see was my uncle car there.

Campbell: Alright.

Nixon: And I fixed it.

Campbell: You fixed your uncle's car?

Nixon: Yeah.

Campbell: Okay. And then what did you do?

Nixon: I went and picked up a friend.

Campbell: Who is that?

Nixon: Tiny.

Campbell: Tiny who?

Nixon: I don't know, his last name Harris.

Campbell: Tiny Harris?

Nixon: No that's his, you know, that's what everybody call him. You know I don't know, I ain't.....

Campbell: The street name's Tiny?

Nixon: Uh huh.

Campbell: His last name Harris or they just.....

Nixon: Harris.

Campbell: Where does he stay?

Nixon: Uh, he stay over there with the, he stay over there off, in Bond,...

Campbell: In Bond?

Nixon: ....I don't know the address and all that.

Campbell: You know what street it's on?

Nixon: Pasco I think.

Campbell: Where does he work, do you know that? Does he work?

Nixon: City.

Campbell: Work for the City, what part of the City?

Nixon: They go out on the road, I don't know where.

Campbell: Uh, his name Tiny Harris, works for the City and goes out on the road?

Nixon: Yeah.

Campbell: Alright. About what time of day, best you can remember was it that you left the lady out there in the woods?

Nixon: Must of waited there about twenty or thirty minutes.

Campbell: About what time would you put that as being?

Nixon: About five thirty or six.

Campbell: Still daylight?

Nixon: Yeah.

Campbell: Okay. Where did you find Tiny?

Nixon: Over there to, to Junior house.

Campbell: Junior's house? Who's Junior?

Nixon: My Godfather.

Campbell: What's his full name?

Nixon: Junior..inaudible...

Campbell: Junior who?

Nixon: ....inaudible...

Campbell: How you spell that?

Nixon: I don't know?

Campbell: What does he do?

Nixon: Blind man.

Campbell: Blind man? Where does he live?

Nixon: Over there in Bond.

Campbell: You know what street?

Nixon: He, he stay in Rito Jen Apartment.

Campbell: Rito Jen Apartments? In Bond subdivision?

Nixon: Yeah.

Campbell: The blind man?

Nixon: Yeah.

Campbell: Alright and uh, so where, where did you and Tiny go?

Nixon: I went to get him to take my uncle back his car.

Campbell: Okay. Did you do it?

Nixon: Yeah.

Campbell: Okay. So where, now where's your uncle live?

Nixon: Over there on Martin Luther King Boulevard.

Campbell: You know what his address is?

Nixon: Uh, no, but you know, it ain't his house he's staying there with his girlfriend.

Campbell: I see. Alright, who was there when you got there?

Nixon: She was.

Campbell: Who's a, who is she?

Nixon: Carolyn Harris, not Carolyn Harris, Karen, or Carolyn, I don't know Carolyn last name. It Jones, it might not, Carolyn, I don't know the last name.

Campbell: Alright. She was there, was your uncle there?

Nixon: No he was gone in her car to go pick up the kids.

Campbell: Okay. And was anybody else there?

Nixon: Uh, she came to the front door.

Campbell: Okay. And what did you do then? Just give.....

Nixon: I,....

Campbell: .....give her the keys or what?

Nixon: Yeah, give her the keys and tell her that the muffler was messed up on the car.

Campbell: Okay. And then where did you go? You're walking now or you got another car someplace?

Nixon: I got the orange car.

Campell: You got whose car?

Nixon: The orange car, the little M.G..

Campbell: Yeah but it's out at the Mall.

Nixon: Un un, I told you I went to pick up Tiny.

Campbell: Yeah.

Nixon: And the, and the way I had to get, I had to go back to the Mall to get his car.

Campbell: His car was at the Mall?

Nixon: Yeah. Yeah, you know I told you I had dropped his car off over to Carolyn house.

Campbell: Okay. I got lost here. I ain't, you know I'm not too bright.

Nixon: You know I told you I had went by that, Junior house to pick up Tiny?

Campbell: Yeah but I thought you had went from, you left the lady

Campbell: and you went back to Governor's Square Mall and left her car.

Nixon: Un un, no I didn't leave her car.

Campbell: Oh okay, you, you kept her car?

Nixon: Yeah,....

Campbell: And you went and got....

Nixon: Tiny.

Campbell: ....Tiny in her car?

Nixon: Yeah.

Campbell: Okay. Then you took Tiny to the Mall to pick up your uncle's....

Nixon: Uncle car.

Campbell: .....car?

Nixon: ....we transport it over there.

Campbell: Alright now tell me what your uncle's car is?

Nixon: A green and white Monte Carlo 74.

Campbell: 74?

Nixon: Yeah.

Campbell: Okay. What kind of license plate it got on it?

Nixon: Georgia.

Campbell: Georgia, alright. So then you took Tiny to the Mall picked up uncle's car and took uncle's car and dropped it off with Carolyn?

Nixon: Yeah.

Campbell: And then where did ya'll go?

Nixon: After we dropped the car off with Carolyn?

Campbell: Right.

Nixon: Went to French, no let's see, went to Frenchtown.

Campbell: What did you do down there?

Nixon: I sot down there and drunk a few beers.

Campbell: Whereabouts?

Nixon: Tropi, what you call it?

Campbell: Tropicana?

Nixon: Yeah.

Campbell: Okay. And you say this is Saturday night Joe?

Nixon: Uh huh.

Campbell: Are you sure it was Saturday night Joe?

Nixon: Yeah I'm positive it was Saturday.

Campbell: It couldn't of been Sunday? Today's Tuesday now.

Nixon: It could of been 'cause let's see,.....

Campbell: Alright let, let's try and backtrack a little bit. Alright, when did you burn the car?

Nixon: Today.

Campbell: Today?

Nixon: Yeah.

Campbell: Alright. Earlier this morning?

Nixon: Yeah.

Campbell: The same day we're talking on right now which is 14th August, Tuesday?

Nixon: Yes sir.

Campbell: Okay. Why did you burn the car?

Nixon: Handprints.

Campbell: Handprints on it?

Nixon: Yeah.

Campbell: Okay. Where did you burn it?

Nixon: Over there in South City.

Campbell: South, whereabouts, what, on what street or anything, you know?

Nixon: I don't know the name of that street over there. I don't....

Campbell: Okay how did you go to get there? Where, where did you leave from to go burn the car?

Nixon: From that store down there.

Campbell: From that store down there?

Nixon: Yeah. You know that food store, that food store right down from it? On the corner?

Campbell: Down from where the car was burned?

Nixon: Yeah.

Campbell: Little ca, the little food store there, the little white block looking.....

Nixon: Yeah.

Campbell: ..... building with a front porch, old grocery store looking place?

Nixon: Yeah.

Campbell: At the corner of Meridian and Orange Avenue, does that sound, you know where Orange Avenue is?

Nixon: Yeah, yeah that's on over, yeah.

Campbell: Okay. On Orange Avenue then.

Nixon: Yeah.

Campbell: What'd you do at the grocery store?

Nixon: Drunk a little soda.

Campbell: Bought you a soda, what kind of soda?

Nixon: Big Red.

Campbell: Who sold it to you? What kind of looking person?

Nixon: A white lady.

Campbell: A white lady?

Nixon: Yeah.

Campbell: Old lady, young lady?

Nixon: About twenty five.

Campbell: Twenty five, what color looking hair did she have?

Nixon: Uh, brownish I think, brownish or greyish looking.

Campbell: Alright, about what time was that?

Nixon: Sometin' to eight.

Campbell: Something to eight?

Campbell: Did the car have a gas cap on it?

Nixon: No. I throwed the gas cap away.

Campbell: When?

Nixon: When I took it loose.

Campbell: When you did what?

Nixon: When I popped it. I was thinking about throwing matches in the gas tank and I said no. I said I do that it might get me and so I had.....

Campbell: Alright that was this morning you took the gas cap off?

Nixon: Yeah.

Campbell: Where did you throw it?

Nixon: Over there by that white church.

Campbell: Over there by the white church?

Nixon: Yeah.

Campbell: Not right there where you burned the car, you.....

Nixon: Throw it away from.....

Campbell: ..... took it off when you left?

Nixon: Naw, I'm talking about the time I got there. My intentions was you know, to let it you know, blow up you know.

Campbell: I see.

Nixon: And I took the cap off and I wiped it and thowed it. Thowed it up towards that church, towards the church, over there across that ditch.

Campbell: Alright did it, right at the church over there right across the ditch from where the car was burned?

Nixon: Yeah.

Campbell: Okay. What color, what color looking gas cap was it Joe?

Nixon: Silver.

Campbell: Silver looking?

Nixon: Uh huh.

Campbell: You take anything else out of the car?

Nixon: The keys.

Campbell: The keys, where did you put them?

Nixon: In the trash can.

Campbell: Which trash can?

Nixon: At that store.

Campbell: At the store?

Nixon: Uh huh.

Campbell: What kind, where was the trash can located?

Nixon: In front of the store.

Campbell: In front of the store? Like a Dempsty Dumpster or a little regular trash can or what did it look like?

Nixon: A regular trash can.

Campbell: Alright. That was when you was coming back down the road, right?

Nixon: Yeah.

Campbell: What was you wearing when you did that this morning?

Nixon: This I got on.

Campbell: A black tee-shirt and white shorts or grey shorts?

Nixon: Grey shorts.

Campbell: Grey shorts with a pair of white shorts on under 'em?

Nixon: Blue.

Campbell: Blue shorts on under.....

Nixon: And grey, they grey with blue stripes.

Campbell: Okay. And where did you go from there?

Nixon: Up to, up to that other st, that allnight service station.

Campbell: Um, what kind of service station is it, you know?

Nixon: It's a Sing.

Campbell: The Sing Station?

Wise: On the, on, on uh, Meridian Seay's? That new store?

Nixon: No at, before it, it been there.

Campbell: On Monroe?

Nixon: You know like going up by the Fairgrounds?

Campbell: Yeah up there at Orange Avenue and Monroe? Big new Sing Store, I know which one, on same side the Fairgounds is on?

Nixon: Yeah.

Campbell: What did you do up there?

Nixon: I, I went up that way there you know to see did anybody you know foller me or anything.

Campbell: You see anybody?

Nixon: No, not that I know of, you know that looked suspicious.

Campbell: Right. Okay, did uh, what did you do when you got to the Sing Store?

Nixon: Stood there and looked around.

Campbell: What did you see?

Nixon: I saw a bright brown Monte Carlo across the road that had fishing poles in it.

Campbell: Uh huh. Did you, did you see the fire trucks coming or the police coming or anything?

Nixon: Yeah, all saw all of 'em.

Campbell: You see 'em all come?

Nixon: Yeah.

Campbell: Okay. Then what did you do?

Nixon: Kept my, put my head down and started walking.

Campbell: Where did you walk to?

Nixon: Back over there to Millard Road.

Campbell: Millard Road? How did you get in the house over there?

Nixon: How did I get in the house? Through the window.

Campbell: Through the window?

Nixon: Yeah.

Campbell: Whereabouts?

Nixon: In the back.

Campbell: In the back?

Campbell: Okay. Uh, alright, we used this morning, why did you, you said you burned the car this morning because of handprints,...

Nixon: Uh huh.

Campbell: .....alright, why did you know this morning was the morning to burn the car? You could have burnt it yesterday but you didn't, but this morning was the morning, right?

Nixon: Uh huh.

Campbell: Why?

Nixon: Paper.

Campbell: The paper? Okay. What, what did you see in the paper?

Nixon: A woman's body found ......

Campbell: Found a body.

Nixon: ....in a wooded area.

Campbell: Where did you, where did you see that paper Joe? Where were you when you saw that?

Nixon: I bought a paper this morning.

Campbell: Where at?

Nixon: I always buy a paper.

Campbell: Where?

Nixon: At that, that store on, on Orange Avenue, that, I think it's a Majik Market.

Campbell: Oh okay.

Nixon: You know where the projects at over there in Bond?

Campbell: Uh huh.

Nixon: That little store out there where everybody walking through that....

Campbell: Uh huh, down by Nims School?

Nixon: Yeah, rat in front there.

Campbell: Alright about what time you suppose that was?

Nixon: Ten minutes till seven.

Campbell: Ten minutes till seven?

Nixon: Uh huh.

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Campbell: Alright. You by yourself?

Nixon: Yeah.

Campbell: Okay. Did you go any place then or did you just, 'cause you got some time from ten minutes till seven till something before eight?

Nixon: I went over there to get my, I didn't have my boots on.

Campbell: You didn't have your boots on?

Nixon: Un un. I had to go get my work boots. My intentions was you know, I was going to drive the car but after I read all that I had to go over here on, on what you call it? Millard Road to get my boots.

Campbell: Alright. Did you go there?

Nixon: Yeah.

Campbell: Who was there when you got there?

Nixon: Wanda.

Campbell: Wanda?

Nixon: Uh huh.

Campbell: Who is Wanda?

Nixon: My girlfriend.

Campbell: What's her last name?

Nixon: Robinson.

Campbell: Robinson?

Nixon: Yeah.

Campbell: Who else was there, anybody?

Nixon: I didin't see 'em if they was you know they was locked up you know.

Campbell: I mean they wasn't no, there wasn't no children there?

Nixon: No sir.

Campbell: Okay. No, nobody else, just Wanda there? Okay, what did you tell Wanda?

Nixon: I told her I, I told her I got to get my work boots.

Campbell: Okay. Did you do anything else, have any other conversation there?

Nixon: We was just, she was just, she had my forty dollars, she was gettin' the car, the keys made.

Campbell: Getting the keys made for your car?

Nixon: Yeah you know, hers.

Campbell: Her car?

Nixon: Yeah.

Campbell: Okay. And then what did you do?

Nixon: Got my, told her to just give me the forty dollars and I go get the keys made and bring the car back.

Campbell: Okay. And then what did you do?

Nixon: The,

Campbell: Did she, huh?

Nixon: Then I did all that you know and went off and.....

Campbell: Then you went off and burned the car?

Nixon: Yeah.

Campbell: Okay. Well you burned the car this morning, on a Tuesday morning.....

Nixon: Yeah.

Campbell: Alright, what I'm trying to do is backtrack.....

Nixon: Right.

Campbell: .....to when you first got the car, is, how many nights have you had the car? That's what I'm trying to figure.

Nixon: Two or three, three I think.

Campbell: Alright so if you had it three nights that would be that you had it Monday night, Sunday night and Saturday night.

Nixon: Uh huh.

Campbell: That would be three nights.

Nixon: Yeah.

Campbell: Alright. Did you work Friday Joe?

Nixon: Yeah.

Campbell: Okay. Did you work Saturday?

Nixon: No.

Campbell: What did you do Saturday?

Nixon: That's what I say, I went out to the Mall.

Campbell: Alright, what did you do Sunday?

Nixon: Sunday? Suppose to been at work.

Campbell: On Sunday?

Nixon: Uh huh.

Campbell: Where were you working on Sunday?

Nixon: Out there on Ninety. That's where I suppose to went to work.

Campbell: You didn't though?

Nixon: Un un, no we spo, we working on, out there by where they got that new Warehouse Food at.

Campbell: On Ninety West?

Nixon: Yeah.

Campbell: Alright. Working for Mr. Pye?

Nixon: Yeah.

Campbell: As a mason?

Nixon: Yeah.

Campbell: Okay. You was supposed to work Sunday but you didn't go?

Nixon: Un un.

Campbell: What did you do Sunday?

Nixon: Sat, sat around there at the house.

Campbell: On Dillard Street?

Nixon: Dillard?

Campbell: I mean on Millard, Mallard?

Wise: Lord.

Campbell: Millard?

Nixon: Yeah.

Campbell: Alright. Who was around there with you?

Nixon: Let me see, her name is Wanda.

Campbell: Alright. You remember the Police getting called down there uh, .....

Nixon: Uh huh.

Campbell: What night was that? Sheriff got called into your house one night because of a little problem. Right? I think you and Wanda was having a little spat or something.

Nixon: I wasn't there then.

Campbell: You wasn't there?

Nixon: Un un.

Campbell: Well somebody thought.....

Nixon: Somebody else called then 'cause I was over at Junior house.

Campbell: You was over at Junior's house?

Nixon: Yeah.

Campbell: Alright. At that time, what, you know what night that was?

Wise: Okay.

Campbell: We just paused to change the tape. The time is approximately 1202, correction, 1302. The date is August 14th, 84. Alright. Wanda called the Police on you or the Sheriff on you one night.

Nixon: They, they said she did I wasn't, I wa,....

Campbell: You heard she did?

Nixon: Yeah.

Campbell: You know what night that was?

Nixon: I think it was Sunday.

Campbell: Sunday?

Nixon: Uh huh.

Campbell: You had the M.G. Sunday night though, right?

Nixon: Uh huh.

Campbell: Alright. Had you already had it before that?

Nixon: Uh huh.

Campbell: Okay. So the best you can recall, when you met the lady it was on Saturday afternoon?

Nixon: Uh huh.

Campbell: Uh, where did you put the clothes that you was wearing when you killed the lady?

Nixon: I burnt them.

Campbell: You burnt them?

Nixon: Uh huh.

Campbell: Where did you burn them?

Nixon: Out there.

Campbell: You come back to town naked?

Nixon: Uh uh, you see these yellow shorts I got on?

Campbell: Yeah.

Nixon: These, these grey shorts I got on?

Campbell: Right.

Nixon: I wear 'em, I can wear 'em by they self,.....

Campbell: Right.

Nixon: 'Cause I got sh, you know, underpants under 'em.

Campbell: Uh huh.

Nixon: And stuff like that.

Campbell: Alright. You told me while ago you was wearing what when you, when you killed the lady?

Nixon: Jeans.

Campbell: Jeans.

Nixon: And a white golf shirt.

Campbell: And a white golf shirt.

Nixon: Uh huh.

Campbell: Alright. And you tell me now that you burned 'em.

Nixon: Uh huh.

Campbell: Why did you burn 'em?

Nixon: They had blood on 'em.

Campbell: Whereabout?

Nixon: On the shirt and pants.

Campbell: Alright. Whereabouts on 'em?

Nixon: On the, on the jeans rat down here.

Campbell: On the leg?

Nixon: Uh huh.

Campbell: Alright, whereabout on the shirt? On the belly part of the shirt? Okay, where did you burn 'em?

Nixon: Rat out there where I burnt all that other stuff.

Campbell: Out there where you burned her and, an, and the stuff out of the car? In that pile by, on the road?

Nixon: Next to where the car was parked.

Campbell: Alright, so you come back to town with, you had them shorts on underneath 'em?

Nixon: Yeah under my jeans and then I came back to town in my yella shorts.

Cambpell: You came back to town in your yellow shorts?

Nixon: Uh huh.

Campbell: So you didn't come around the house with no bloody clothes on at all?

Nixon: Un un, I ain't had no bloody clothes.

Campbell: You ain't had no bloody clothes on any place while you was in Tallahassee?

Nixon: Un un.

Campbell: Just burnt 'em all out there in the woods?

Nixon: Yeah.

Campbell: Alright, uh, where is your tennis shoes?

Nixon: At the house.

Campbell: Wh,.....

Nixon: Where, where we left from.

Campbell: Where we left from?

Nixon: Uh huh.



Campbell: Whereabouts are they in there?

Nixon: In the second bedroom.

Campbell: Alright. Whose house is that?

Nixon: Wanda's.

Campbell: Wanda's house?

Nixon: Uh huh.

Campbell: You pay her rent to stay there?

Nixon: She's just a girlfriend and you know I, you know I help out.

Campbell: Right.

Nixon: You know.

Campbell: But it's Wanda's house?

Nixon: Yeah.

Campbell: And it, but it's your shoes?

Nixon: Yeah.

Campbell: They white tennis shoes?

Nixon: Grey.

Campbell: Grey tennis shoes?

Nixon: Uh huh.

Campbell: Did they have any blood on them?

Nixon: No.

Campbell: You sure?

Nixon: Uh huh.

Campbell: How you know?

Nixon: I looked at 'em.

Campbell: You looked at them?

Nixon: Yeah.

Campbell: Uh, did you take anything from that lady or from that lady's car other than that five dollars? That lady have any rings or jewelry or anything like that?

Nixon: Un, she didn't have it on.

Campbell: Didn't have it on?

Nixon: Un un.

Campbell: You don't, she didn't have any jewelry on that you remember at all?

Nixon: She had a watch on her arm.

Campbell: Had a watch on her arm?

Nixon: A white watch.

Campbell: A white looking watch?

Nixon: Uh huh.

Campbell: Did you take it?

Nixon: No it, it was burnt rat there by her.

Campbell: It was burned right there with her?

Nixon: Uh huh. It was.

Campbell: What arm did she have that watch on, do you remember? The one you tied or the one you didn't tie?

Nixon: I thank, the one I tied.

Campbell: The one you tied? Alright did she have on any other, like necklaces or, or ring, earring, anykind of jewelry? You know women wear jewelry, that you remember?

Nixon: Naw, I wa, I really wasn't paying no attention to it.

Campbell: Alright. On the key ring that you threw in the garbage can this morning, describe, how many keys did it have on it?

Nixon: Two.

Campbell: Two keys. What did they look, what, what kind of key ring did it look like and what did the keys look like?

Nixon: Just regular key ring.

Campbell: Alright. Silver or any, did it have anything else, like some of them have got initials and some of them have got little tags and stuff?

Nixon: Un, the keys probably had numbers on it it looked like.

Campbell: Two keys?

Nixon: Yeah.

Campbell: What color keys?

Nixon: Uh, grey and gold.

Campbell: Grey and gold key?

Nixon: Uh huh.

Campbell: Okay. Uh, Captain Wise have you got any questions that you would like to ask?

Wise: Just a couple of things Joe. And now I'm going to back up a little bit to uh, you said you hurt your arm and that's when she started talking to you when you were in Sears, did were you trying to fix your uncle's car in the parking lot and hurt your arm, is that what happened?

Nixon: Yeah.

Wise: And then went into Sears?

Nixon: Yeah.

Wise: Did you go in there to buy some parts for that car or something?

Nixon: Yeah.

Wise: Okay. Uh, was the top up in her car when ya'll were driving and you made her get into the car with you, was, was her convertible top up?

Nixon: Yeah. Until I let it down you know, after I made her get in the trunk you know.

Wise: And you let it down, let the top down?

Nixon: Yeah.

Wise: When, when you made her get in the trunk?

Nixon: Yeah.

Wise: Okay. And when you said you tied her, you said you tied her left arm to the tree if I'm not mistaken.

Nixon: Uh huh.

Wise: And you tied her feet.....

Nixon: Yeah.

Wise: .....with jumper cables, is that what you said?

Nixon: Yeah.

Wise: Okay. Did you tie her uh, .....

Nixon: Yeah, I, let me see, I think I took one of the, I, if, I might have tied her around the waist too. I'm not you know,

Wise: With what? What, if you tied her around the waist, what did you tie her with around the waist?

Nixon: It had to be the cable.

Campbell: Alright, was she standing up or sitting down, Joe?

Nixon: Sittin' down.

Campbell: Sitting down?

Nixon: Yeah.

Campbell: Was she sitting down by anything or with anything or....

Nixon: Tree.

Campbell: She was sitting by a tree?

Nixon: Yeah.

Campbell: So you tied her to.....

Nixon: That tree she was....

Campbell: ....to the tree with a jumper cable, then you took her hand, her left hand and tied it...

Nixon: Un huh.

Campbell: ....and then tied it to the same tree or a different tree?

Nixon: Oh yeah, I took her feet a loose.

Campbell: You took her feet a loose?

Nixon: Feet a loose after I got the bag on her and left her hand against the tree and put jumper cables around her waist, no, now, you know I re-tied her feet you know.

Campbell: Right. Okay.

Nixon: And stuff.

Campbell: So that, ....

Wise: What did you re-tie with?

Nixon: With the same, now I re-tied her, I took, I'm saying I, after I took the cables off her feet, I tied....

Wise: Okay.

Nixon: .....around her waist.

Wise: You said you didn't tie her feet.....

Nixon: No I didn't, I didn't her feet.

Wise: .....again?

Campbell: And she's still alive at this time now?

Nixon: Yes.

Campbell: Alright.

Wise: Okay uh, and the last time, she was alive until you choked her with the, the rope?

Nixon: Uh huh, yeah.

Wise: Okay, that's when she died?

Nixon: Yeah.

Wise: You choked her with the rope. Okay. Uh, did you have sex with her at all?

Nixon: No. Un un, naw I don't have, that's stuff I don't do, I don't have sex with the opposite my color you know it ain't like me to, so I just don't mix nothin' like that.

Campbell: Why did you kill her instead of leaving her out there Joe?

Nixon: She know me.

Campbell: She know you?

Nixon: She know my name and everything. You know I done did all this you know, and beat on her like that,.....

Campbell: Thought she was gonna tell on you?

Nixon: Yeah, cause I had you know, nine out of ten times they gone tell anyway you know, if you know you take they car and all that rat there.

Campbell: Right. Joe did you tell anybody what you had done?

Nixon: Yeah you know but I wouldn't go gettin' them in this.

Campbell: Well I'm, I'm gone need to know because if not we just gone be out there rootin' up everybody that we can find to see if, see if you told 'em. You just,....

Nixon: Well now.....

Campbell: ....you'd just save them some trouble.

Nixon: Yeah well you know I just, you know I told 'em but they didn't belie,.....

Campbell: They didn't believe you?

Nixon: .....you know they didn't believe me you know.

Campbell: Who?

Nixon: Huh?

Campbell: You to, you told Wanda.

Nixon: Well you know, she don't need no trouble.

Campbell: Naw, but I know why, I know you had to tell her.

Nixon: Uh huh.

Wise: We ain't looking to cause these people no problem.

Nixon: Yeah.

Campbell: When, when, when did you tell Wanda?

Nixon: Yesterday.

Campbell: Yesterday?

Nixon: Uh huh.

Campbell: What did she say? Didn't believe you?

Nixon: Still don't believe me.

Campbell: Don't believe you. Why did you tell her?

Nixon: I was, I was hurt you know, I just went over there and sot there and just crying and telling her.

Campbell: Okay. You tell anybody else? I know you did. Now we shootin' straight with each other.

Nixon: Yeah.

Campbell: Who else did you tell about it?

Nixon: My brother.

Campbell: Your brother? Who is your brother?

Nixon: John Nixon.

Campbell: John Nixon?

Nixon: Uh huh.

Campbell: When did you tell him?

Nixon: I told both of 'em yesterday.

Campbell: At the same time?

Nixon: Yeah.

Campbell: Where was that?

Nixon: Over there on Millard Road.

Campbell: About what time of day was that?

Nixon: It was, it was in the morning.

Campbell: In the morning? Was anybody else there, just John and uh, Wanda?

Nixon: Uh huh.

Campbell: That's all that was there?

Nixon: Yeah.

Campbell: Okay. Uh, how about ol' Tiny, what time, what did you tell Tiny you got the new car?

Nixon: Well you know he, he said, first thing he said when he got in it was about, who girl car you got? I know you, you know, single with the woman but who, who, so I just told him you know I was driving for you know, one of my girlfriends and that I would get it fixed you know, for her and stuff and all that.

Campbell: I see.

Nixon: But you know, as fur as you know, trusting him and that, you know, I .....

Campbell: Didn't trust him that far?

Nixon: See when I told John and Wanda that, I was fittin' to come turn myself in.

Campbell: Oh, I see.

Nixon: I told 'em, I said I, I'm fittin' to go up there and turn myself in.

Campbell: But then you didn't.

Nixon: I just, you know, I, I could.

Campbell: Yeah you could have.

Nixon: Yeah I coul, you know, but you know uh, scared and fear you know.

Campbell: Uh huh.

Wise: How about your Uncle James that works at the Airport, did you tell him?

Nixon: Un un.

Wise: You said you had talked with him.

Nixon: Yeah I talked to him.

Wise: But you didn't tell him anything about this?

Nixon: Un un.

Campbell: How about you, your Uncle Joe?

Nixon: James, talking about Tom?

Campbell: Tom the one that, one, one that owns the green and white Monte Carlo, you tell him about it? Alright. Joe is anything about this that we hadn't asked you that I should ask you?

Nixon: I don't, I don't know. You know that's just, I just ridin' and ridin', they probably, a lot of people might of seen the car. I just ride, I rode everyhwere. I rode all over town just ridin', just ridin.

Campbell: Where did you leave it parked at night?

Nixon: In the woods.

Campbell: Whereabouts?

Nixon: Up there by where my brother car at. Over there by Millard Road

Campbell: Parked it in the woods at night?

Nixon: Uh huh.

Campbell: Did you park it in the woods last night?

Nixon: Un un.

Campbell: Where did you park it last night?

Nixon: Over there at Rita Jen, apartment five.

Campbell: Just set out there in the parking lot all night?

Nixon: Uh huh. Rat next to my little orange, one little orange Fiat.

Campbell: Till you read the newspaper?

Nixon: Uh huh.

Campbell: Satur, uh, Saturday the day that you picked the lady up....

Nixon: Uh huh.

Campbell: ....had you been drinking?

Nixon: Um, no, I bought, I bought a beer after.

Campbell: After?

Nixon: Yeah.

Campbell: Alright.

Nixon: Let me see, let me see now, let's see, Sat, Saturday now what was I drinking.

Campbell: What ever day, wh, the day that you had the lady.

Nixon: No, before I got her I had, I had, I got a beer afterward.

Campbell: After?

Nixon: Yeah.

Campbell: Alright. Had you been doing any dope?

Nixon: No.

Campbell: Okay. Is there anything else that you can think of that, that you need to tell us about that we hadn't talked to you about?

Nixon: I you know, I just, I just told a bunch of lies to people when they asked me where I got it from.

Campbell: Right. Has everything you told us been the truth the best you can remember?

Nixon: Yeah.

Campbell: Has anybody since we picked you up this morning, and I've been with you every second since we picked you up, right?

Nixon: Yeah.

Campbell: Has anybody threatened you or done anything or said anything to scare you or make you give this statement?

Nixon: No sir.

Campbell: Has anybody promised you anything uh, to help you or do anything to get you to give this statement?

Nixon: No sir.

Campbell: Been no threats or coercion used to get you to talk to us, right?

Campbell: Uh, did you understand before you gave us this statement that you didn't have to talk to us?

Nixon: Yeah.

Campbell: Did you understand that you had the right to have a lawyer present while we was questioning you?

Nixon: Yeah.

Campbell: Did you understand that if you decided to talk with us and then wanted to stop at anytime to get a lawyer at that time that you could?

Nixon: Yeah.

Campbell: Did you understand that if you didn't have the money to get a lawyer for yourself that the State of Florida would furnish one to you at no expense?

Nixon: Yeah.

Campbell: Did you understand that anything you said could and would be used against you in a court of law?

Nixon: Yeah.

Campbell: Did you understand that Captain Wise and myself are both Deputy Sheriff's in Leon County?

Nixon: Yes.

Campbell: Okay. Uh, did, is everything that you said here today, been free and voluntary of your own free will?

Nixon: Yes.

Campbell: I want you now Joe to state your name just like you was signing the bottom of a written statement.

Nixon: Joe Elton Nixon.

Campbell: Witness by Larry Campbell.

Wise: And Captain Dale Wise.

Campbell: The time is approximately 1316 p.m., 14 August 1984.

## SECOND CIRCUIT COURT, LEON COUNTY, FLORIDA

State Of Florida

v.

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

Joe Elton Nixon, Defendant./

**Order Denying Defendant's Successive Post-Conviction Motion**

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.

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 convictions and sentences on direct appeal. Nixon v. State, 572 So. 2d 1336 (Fla. 1990) (Nixon I).

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LEON COUNTY, FLORIDA

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

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 "[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.

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.

**JONATHAN SJOSTROM**
**CIRCUIT JUDGE**

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PRE-DISPOSITION REPORT - SUBSEQUENT
RE: JOB ELTON NIXON
DOB: 8/23/61

OFFENSE

Two Counts of Burglary to Commit Petit Larceny, Five Counts of Petit Larceny, Three Counts of Arson and One Count of Grand Larceny.

PROBLEM

On 10/31/75 Job Elton Nixon was charged by the Tallahassee Police Department and Officer Cecil Towle with Nine Counts of Burglary, Six Counts of Arson, Eight Counts of Grand Larceny and One Count of Possession of Stolen Property. These alleged offenses reportedly occurred from 9/26/75 through 10/30/75. Job was charged and placed in the Leon County Area Regional Detention Center where he has remained to the date of this report. As a result of these alleged charges Job has been arrested and some property has been recovered and some property and damages are very excessive. In view of plea negotiations on 12/1/75, Job plead Nolo Contendre to Two Counts of Burglary to Commit Grand Larceny, Two Counts of Burglary to Commit Petit Larceny, Five Counts of Petit Larceny, Three Counts of Arson and One Count of Grand Larceny.

When Job was questioned by this counselor in reference to the alleged offenses and his attitude about these offenses Job's attitude was indifferent and he made no statements to this counselor in reference to the alleged charges.

The Arresting Officers Det. Cecil Towle, L. A. Howard and Sgt. Sanders of the Tallahassee Police Department when questioned by this counselor in reference to this youth stated that this youth's attitude was very bad and that the victims were very upset about the damages incurred. All officers felt that this youth should be prosecuted to the hilt in regards to the alleged offenses.

Job's adjustment while being in the Leon County Area Regional Detention Center has been considered satisfactory until 12/1/75 when at which time he became very disruptive and belligerent stopping up the water system in the Detention Center as well as destroying a mattress at the Detention Center.

Mr. and Mrs. Nixon indicated that Job has not physical problems to their knowledge and has always been a very healthy child. Mrs. Nixon stated that he has contacted most of the childhood diseases and other than this, has been very healthy. She states that he to her knowledge has not had any psychological or psychiatric problems. While in committed status during the year of 1972, at the Dozier School for Boys Job was psychologically and psychiatrically evaluated. However, it was determined at that time that he did not possess any organic maladjustments. It was felt that he was just a young boy who seemed to have a lot of anger and resentment in his past and did not appear to be psychotic. At that particular time, Dr. James F. Griswell, M. D. Psychiatrist did not have any particular suggestions for working with him. Job again was psychologically evaluated on 4/29/75 while being incarcerated at the Eckerds Foundation Boys Camp E-Ma-Chamee. The results of that test indicates that Job attempts to be grown-up by imitation but he is dissatisfied with himself. It was felt that his concern over sexual development may be giving him some minor problems. It was further felt that he was being motivated by many strong drives which he seldom attempted to control. He was seen as having a weak super ego strength which means he has not internalized any parental values or restrictions of thought and behavior. The Psychologist, Mr. Tom Heiman during the month of April, 1975 summarized his evaluation of this youth by saying "All in all, it is our feeling that Job would never meet the criterion of the good, well behaved, out of sight, out of mind adolescent and so we close by just wishing you luck". The test further suggested that in no way proved as yet, that Job in his childhood may have been a hyperactive child.

Job does not possess nor does he have any vocational experience, nor has he been employed on any job. Since coming from the Eckerds Camp this youth has only been affiliated with youths in his community some of which characters are very questionable. His associations are primarily with those of delinquent history and in view of his age, it is felt that he has had no experience with the opposite sex. His interests are limited and he mainly likes sports. Since being furloughed to this community on 8/22/75 Job resides with his family at 2206 Keith Street in a three bedroom block home. This home appears to be in very good structural condition and it is equipped with most of the modern conveniences. It is located in a low income neighborhood, which is predominantly black. This is a high delinquent prone area and Job lives in the home with his father, mother and six other brothers and sisters. It appears that there is very little communication between the parents and the children. Mr. and Mrs. Nixon both seemed very concerned, to some degree about the welfare of their children, however, it is felt that they do not have or have not taken the time to adequately supervise the children in the past. In the past Mr. and Mrs. Nixon both have provided very little, if any, supervision for Job or any other member of his family. This family has a delinquent prone history and this family has been known to the Division of Youth Services for some time. Most of the problems stem from lack of supervision and not being able to control their children sufficiently. However, in the last two years Mr. Nixon has taken an active interest and has done in this counselor's opinion his best.

From this counselor's observance in the last couple of years there is very little communication between Mr. and Mrs. Nixon and the children. Both parents are very concerned about the materialistic aspects of their family and therefore have not seen or have not known to this date the need for communication and understanding within the home. This possibly is very much a contributing factor.

Job has not attended the regular school program since being committed during the year of 1972. Since being returned to this community on 8/22/75 upon the recommendation of Camp E-Ma-Chamee 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. Attempts were made by this counselor to place him in the Work Experience Program in the system and in view of his age and his lack of interest and the programs being full he was not able to enter. Job was placed at the Alternative School and in view of their lax supervision and Job's lack of interest his attendance was not good. Periodic checks were made at the school in reference to Job's attendance and this counselor was not very pleased with the response that was given. This type of setting takes a lot of initiative for a youth of Job's age and Job does not possess that initiative or motivation to be academically inclined. Job used the time periods for school at the Alternative School to participate in his delinquent behavior.

Physically Job Nixon is a picture of health in the eyes of this counselor. Psychologically and psychiatrically there is some question. However, this counselor is no authority but in view of the type of behavior displayed by this youth there is some reasonable doubt as to his soundness. Job has been tested psychologically and psychiatrically in the last three years and no organic complications can substantiate his behavior. Personally he is a likeable young man however, he can turn it on and off as one would a light switch.

During the past several years it is in the opinion of this counselor that his family especially his father has taken an active interest in providing a more conducive home environment however, to date he has not been very successful. It is further felt that his father has done his very best but for sometime this home has lacked the strength really needed for this child.

It would appear that Job's relationships with his parents and with his brothers and sisters is deceiving to this counselor. Job has in the past been a very bad influence on a younger brother and since Job has been out of the home for the past year and a half this brother has made a very good adjustment. It appears that Job would have a very good relationship with his parents however, in view of his temper and being headstrong he only indicates that he is doing what they are saying as long as he is in their sight.

Job is in no way academically inclined or motivated to continue his education. Vocationally possibly, he might be inclined to participate. However, in view of his age he has not had any experience.

EVALUATION AND RECOMMENDATION

We have here before the Court a 14 year old black male who has in the past several years been a menace to this society and his social norms. This youth has found himself involved in delinquent behavior that has caused damages in excess of what he or his family are capable of repaying at this time. After working with this youth for an extended period of time it is the opinion of this counselor that this youth knows right from wrong and should suffer the consequences of his actions. All out efforts by this agency and other agencies in this community and out of this community have thus far failed to reach him. He has only superficially responded to all the resources made available to him and his actions in recent weeks clearly indicates this. At this time this counselor does not know the answer and it is felt that that answer is not in this community at this time. This youth has participated in activities within the last six weeks in this community and has plead Nolo Contendre to charges which are in the neighborhood of $25,000 in damages. These damages incurred by this youth in the opinion of this counselor he nor his family are financially able to reimburse. However, it is felt that in some way, someday, Job Nixon should be made to reimburse in some form or fashion the victims of his behavior. In view of this youth's behavior in recent weeks it is the opinion and recommendation of this counselor that he be committed to the Division of Youth Services for an indefinite period of time and placed in that facility which can best suit his needs.

TREATMENT PLAN

Needs

This counselor feels that Job needs to learn to respect the rights and property of others and that of authority. He needs to realize that society itself cannot and will not accept the type of behavior displayed by him the past several years. This counselor feels that he should be exposed to the best of psychological and psychiatric help that the Division and all other resources can make available to him. This counselor further feels that whatever and whenever his needs can be met, understood and corrected these needs would not be met in any short term program. It is hoped that a very close and extended look be looked at this youth's commitment for it could by far be his last commitment to the Division if he does not see the need to make the necessary adjustments in his behavior.

TREATMENT PLAN

This counselor feels that the treatment plan needed for Job Nixon is a very extensive one and it will not be an easy task. It is hoped that he can be exposed to the best if it is expected that he can be a productive citizen in the future.

The treatment plan suggested by this counselor is that he be committed to the Division of Youth Services and exposed to the best resources available. This is the treatment plan suggested by this counselor.

SUBMITTED BY: Robert J. Newkirk 12-4-75
ROBERT J. NEWKIRK, YOUTH COUNSELOR DATE

APPROVED BY: William Cummings 12/4/75
WILLIAM CUMMINGS, YOUTH COUNSELOR SUPERVISOR DATE

RJN:WC:janie 12/4/75

To: file

AB due 12/26 12/28

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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

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## CITATIONS TO THE RECORD

"R." refers to the twelve volumes of transcript, pleadings and orders, numbered pages 1-2104.

"SR1." refers to the supplemental volume containing, *inter alia*, a transcript of the November 25, 1987 Circuit Court hearing and orders related thereto, numbered pages 1-33.

"SR2." refers to the supplemental volume containing, *inter alia*, a transcript of the December 19, 1988 Circuit Court hearing and orders related thereto, numbered pages 1-64.

"SR3." refers to the supplemental volume containing, *inter alia*, a transcript of the August 30, 1989 Circuit Court hearing and orders related thereto, numbered pages 1-165.

"3.850 Motion" refers to the verified Motion to Vacate Judgment of Conviction and Sentence, and Consolidated Request that Leave to Amend be Allowed, filed in this Court on October 1, 1993, numbered pages 1-304.

"3.850 R." refers to the 23-volume record on Mr. Nixon's 1993 appeal filed in this Court, numbered pages 1-4393.

"A1998--." refers to the Appendix submitted with Mr. Nixon's Brief in support of his June 5, 1998 Appeal.

"A2002--." refers to the Appendix submitted with Mr. Nixon's Initial Brief of Appeal and Amended Petition For Writ Of Habeas Corpus, filed in this Court on May 13, 2002, numbered pages 1-423.

"SR4." refers to the record on the appeal filed in this Court on May 13, 2002.

"SR5." refers to the record on this appeal.

In accord with Fla. R. App. P. 9.200(a)(1), Mr. Nixon relies upon all original documents, exhibits and transcripts hitherto filed in all courts including depositions and other discovery, and hereby designates such material as part of the record.

## REQUEST FOR ORAL ARGUMENT

Joe Elton Nixon is under sentence of death. Adequate development of the issues raised on this appeal is essential for a determination of his case, which in turn may determine whether he lives or dies. This Court generally grants oral argument in capital cases of this nature. In accord with Rule 9.320 of the Florida Rules of Appellate Procedure, Mr. Nixon therefore respectfully moves this Court for oral argument on his appeal.

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# 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?

In the court below, the state did not even attempt to contest the overwhelming evidence of Joe Elton Nixon's sub-average intellectual functioning or his deficits in adaptive behavior. Its expert's opinion that Mr. Nixon was not retarded was based exclusively on the proposition that an obtained IQ score of 80 was dispositive of the issue. Mr. Nixon's expert, on the other hand, concluded that a full review of the record supported the conclusion that Mr. Nixon's actual IQ was 73. This value, he testified, was consistent with a finding of mental retardation in light of the fact – which the state's expert readily conceded (October 23, 2006 Motion Hearing Transcript, at SR5. Vols. 8-9 ("MH Tr."), at 216:15-217:25.) – that the profession recognizes that mental retardation, considering the standard error of measure, may appropriately be diagnosed in individuals with measured IQ scores as high as 75.

The Circuit Court rejected this testimony as legally irrelevant: "Essentially, Dr. Keyes' 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," (Circuit Court Order, dated April 26, 2007 ("Final Order"), p. 16, at SR5. 1240.) a precedent that the Circuit Court noted it "was without authority to reconsider." (Final Order, p. 25, at SR5. 1249.).

Because of its view of the binding effect of Cherry – which it described as "by far the most instructive of [this] Court's opinions for resolving the issues raised here" (Final Order, p. 7, at SR5. 1231.) – the Circuit Court found that Dr. Keyes's methodology was "inconsistent both with the plain language of the statute and the Florida Supreme Court's authority." (Final Order, p. 17, at SR5. 1241 (footnote citing Cherry omitted).). Its further conclusion "as an evidentiary matter" that Dr. Keyes's approach "is unpersuasive," (Final Order, p. 17, at SR5. 1241.) flowed from this premise: his testimony "was essentially an argument for the law to be something other than what it is" and was "of no evidentiary value at all" because it simply amounted "to disagree[ment] with the standard the Legislature established." (Final Order, pp. 19, 20, at SR5. 1243, 1244.).

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.

In particular, it should be firmly directed that the categorical exclusion from death-eligibility for mentally retarded defendants established by the Supreme Court of the United States in Atkins v. Virginia, 536 U.S. 304 (2002), applies in every case, including ones where the judge's opinion is that the crime committed by the defendant is one – a deliberate "torture murder" – which reveals no evidence of diminished culpability. Not only has the contrary policy determination already been made as a matter of binding federal constitutional law, but, as the record here reveals, adopting that reasoning compounds the Atkins violation by basing decision-making on constitutionally unreliable "confessions."

To conform with the federal Constitution, the proceedings on remand must also be governed by an appropriate burden of proof, give Mr. Nixon the same constitutional rights respecting his mental retardation determination as current defendants enjoy, and allow him to litigate his claim that mental illness precludes his execution.

## II.
## PROCEDURAL HISTORY

Joe Elton Nixon was charged, convicted, and sentenced to death for the 1984 murder of a Tallahassee woman. This Court affirmed the conviction and sentence on direct appeal. See Nixon v. State, 572 So. 2d 1336 (Fla. 1990) ("Nixon I").

Mr. Nixon filed a motion pursuant to Fla. R. Crim. P. 3.850 raising numerous claims. This was summarily denied by the Circuit Court, resulting in a

reversal by this Court for an evidentiary hearing on the narrow issue of whether Mr. Nixon had consented to his attorney's strategy of conceding guilt in opening statement. Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000) ("Nixon II").

On remand, the Circuit Court ruled adversely to Mr. Nixon and was again reversed by this Court. Nixon v. State, 857 So. 2d 172 (Fla. 2003) ("Nixon III"). That ruling was in turn reversed by the United States Supreme Court, which held that this Court had applied an erroneous legal standard in evaluating the claim. Florida v. Nixon, 543 U.S. 175 (2004).

On remand from that decision, this Court addressed and rejected most of Mr. Nixon's remaining claims. Nixon v. State, 932 So. 2d 1009 (2006) ("Nixon IV"). With respect to the issue of mental retardation, which Mr. Nixon had presented in a petition for a writ of habeas corpus, this Court ruled that it should be pursued by means of a motion pursuant to Fla. R. Crim. P. 3.203 within sixty days. See Nixon IV, 932 So. 2d at 1024.

Accordingly, on June 19, 2006 Mr. Nixon filed a timely motion and supporting brief pursuant to Fla. R. Crim. P. 3.203 and 3.851 claiming that his conviction and sentence of death are violative of, *inter alia*, the reasoning and holding in Atkins v. Virginia, 536 U.S. 304 (2002). (Motion Under Fla. R. Crim. P. 3.203 and 3.851, at SR5. 1-570; Brief in Support of Motion Under Fla. R. Crim. P. 3.203 and 3.851 ("Rule 3.203 Brief"), at SR5. 575-622.). The State responded

in writing on July 11, 2006. (Response to Motion Under Fla. R. Crim. P. 3.203 and 3.851 Regarding Nixon's Allegations of Mental Retardation as a Bar to Imposition of the Death Penalty, at SR5. 923-50.). Mr. Nixon filed a reply brief on July 18, 2006. (Reply Brief in Further Support of Joe Elton Nixon's Motion Under Fla. R. Crim. P. 3.203 and 3.851, at SR5. 957-64.).

On October 11, 2006, in advance of a scheduled evidentiary hearing, counsel for Mr. Nixon asked the Circuit Court to address several legal matters raised by Mr. Nixon's Rule 3.203 Motion in order to guide the parties in their preparation for and conduct of the hearing. (Letter from Eric O'Connor to the Hon. Jonathan E. Sjostrom, dated October 11, 2006 ("Oct. 11 Letter"), p. 2).

On October 17, 2007, the Circuit Court held that: (i) "Mr. Nixon bears the burden of proof ...", citing Trotter v. State, 932 So. 2d 1045 (Fla. 2006), and Foster v. State, 929 So. 2d 524 (Fla. 2006); (ii) "Mr. Nixon's assertions that the issues of mental retardation must be determined by a jury and that the state is required to disprove mental retardation beyond a reasonable doubt are foreclosed by controlling authority", citing Arbelaez v. State, 898 So. 2d 25 (Fla. 2005); and (iii) "As regards the constitutional claim that Rule 3.203 is unconstitutional because it does not permit the assertion of a mental illness claim, relitigation of Mr. Nixon's mental illness apart from retardation is foreclosed by the Florida Supreme Court's decision squarely addressing such issues in [Nixon IV]. 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." (Circuit Court Order, dated October 17, 2006 ("Oct. 17 Order"), pp. 2-3, at SR5. 1141-43.).

The evidentiary hearing was held on October 23, 2006. The State presented the testimony and report of Dr. Gregory A. Prichard; Mr. Nixon presented the testimony of Dr. Denis Keyes. On January 8, 2007, the State and Mr. Nixon filed their post-hearing briefs. (Joe Nixon's Post-Hearing Brief in Support of his Motion Under Fla. R. Crim. P. 3.203 and 3.851 ("Nixon Post-Hearing Brief"), at SR5. 1151-83; Post-Hearing Memorandum Regarding Nixon's Allegations of Mental Retardation as a Bar to Imposition of the Death Penalty, at SR5. 1184-1213.).

On April 12, 2007, the State filed a Notice of Supplemental Authority, citing Cherry v. State, 959 So. 2d 702 (Fla. 2007) and Brown v. State, 959 So. 2d 146 (Fla. 2007). On April 18, 2007, Mr. Nixon responded in a motion whose principal contention was that Florida Statute Section 921.137, as interpreted by Cherry, violates the Constitution of the United States and the corresponding provisions of the Florida Constitution. (Defendant Joe Elton Nixon's Motion to Declare Florida Statute Section 921.137 Unconstitutional, at SR5. 1214-24.).

On April 26, 2007, the Circuit Court issued its final order: (i) denying Mr. Nixon's April 18, 2007 motion to declare Section 921.137 of the Florida Statues unconstitutional; (ii) holding that, for the reasons already discussed,

Mr. Nixon's presentation failed to show that he was mentally retarded; and (iii) concluding, after a detailed five-page discussion of the crime as revealed in the 50-page confession annexed to the opinion as an exhibit, that the policy bases of the Supreme Court's holding in Atkins were inapplicable to this case because Mr. Nixon does not display any evidence of impulsivity or suggestibility that would support diminished culpability. (Final Order, at SR5. 1225-1301.).

## 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 not apply to this case,[3] this Court should revisit Cherry

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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 in a person with an obtained IQ

(footnote continued)

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 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

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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."

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]

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[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 (footnote continued)

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.

**B. To Deprive Nixon Of His Life On The Basis Of "Junk Science" Violates Federal And State Due Process Standards**

This Court here is asked to reach a conclusion respecting a scientific fact, one that will form the basis of a "binding legal judgment – . . . of great consequence – about a particular set of events in the past." Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993). If the evidence in support of the

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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.).

conclusion lacks scientific validity – as, for instance, if the conclusion that an individual acted irrationally on a certain night is sought to be premised on evidence that the moon was then in a certain phase, see id. at 591 – then to base the conclusion on that evidence violates due process. It would not matter how scrupulous the procedure was for demonstrating what phase the moon phase was in that night if there existed "no creditable grounds supporting . . . a link" between the moon phase and irrational behavior. Id.

Cherry permits the State to execute Mr. Nixon on the basis that his IQ is above 70 although below 75. Assuming that fact to be true, there is no scientifically valid link between it and the conclusion sought to be drawn from it, viz. that he is not mentally retarded. To draw the proposed conclusion from the proffered fact would be as irrational – and as violative of due process of law – as rendering a judgment based upon "generally accepted principles or astrology or of necromancy." Kumho Tire v. Carmichael, 526 U.S. 137, 151 (1999).

Indeed, recognizing these concerns, Florida jurisprudence has rejected even the standards of Daubert as too lenient and continued to apply the more stringent pre-existing test under Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923). See, e.g., Ramirez v. State, 810 So. 2d 836, 843 n.8, 853 (Fla. 2001) (reversing capital murder conviction and death sentence and emphasizing obligation of state courts "especially in a capital case" to "cull scientific fiction and

junk science from fact"); Marsh v. Valyou, 917 So. 2d. 313 (Fla. 5th DCA 2005) (no recovery permitted where plaintiff who was concededly in auto accidents and concededly suffered from fibromyalgia could not demonstrate scientifically valid link between the two); Kaelbel Wholesale, Inc. v. Soderstrom, 785 So. 2d 539 (Fla. 4th DCA 2001) (personal injury verdict reversed for lack of valid scientific link between eating fish and developing Guillain-Barre Syndrome).

The Cherry paradigm thus violates the due process standards of the United States Constitution and *a fortiori* Section 9 of Article I of the Florida Constitution.

## C. This Court's Construction Of Section 921.137 Creates An Irrebuttable Presumption That Is Constitutionally Impermissible

This Court's presumption that no one with an IQ over 70 is mentally retarded violates Due Process. "[T]he due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated." Tot v. U.S., 319 U.S. 463, 467 (1943). Hence, "[a] statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." Id. at 467-68 (holding that Congress cannot create the statutory presumption that, "from the prisoner's prior conviction of a crime of violence and his present possession of a firearm or

ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute."); see also Leary v. U.S., 395 U.S. 6 (1969) (holding that statute authorizing jury to infer from defendant's possession of marihuana that defendant knew that marihuana was illegally imported or brought into the United States was invalid under due process clause); Hall v. Recchi Am., Inc., 671 So. 2d 197, 200 (Fla. 1st DCA 1996) (holding that "workers' compensation statute stating that injury in drug-free workplace to employee who has positive confirmation of drug is presumed to have been occasioned primarily by employee's intoxication established an irrebuttable or conclusive presumption which violated the constitutional right to due process.").

Irrespective of the principles applicable in particular to scientific evidence canvassed in Section B above, this Court's construction of Section 921.137(1) violates fundamental principles of due process restricting the permissible use of presumptions.

In Cherry, this Court created an irrebuttable presumption that a defendant is not mentally retarded, and thus subject to infliction of the death penalty, on the basis of a fact that has no rational relationship to the presumed fact. Compare Cherry, 959 So. 2d at 714 (defendant is not mentally retarded because his IQ score of 72 is greater than 70) with Atkins, 536 U.S. at 309 n.5 (an IQ score of 75 or

lower is considered the cutoff score for the intellectual function prong of a mental retardation assessment). That irrational and arbitrary presumption violates federal and state constitutional standards. See Leary, 395 U.S. at 36 ("[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.").

**D. This Court's Construction Of Section 921.137 Creates A Factual Presumption That Nullifies A Constitutional Right Under The Guise Of Factfinding**

Section 921.137(1), as construed by Cherry, not only violates fundamental principles of due process under the Fourteenth Amendment, but also offends the Supremacy Clause.

Even where a state is entitled to find a fact upon which a constitutional right depends, e.g. whether the police beat the defendant, it may not erect an evidentiary framework for making that determination which is hostile to the underlying right, e.g. requiring any defendant claiming to have been beaten by the police to prove it by the eyewitness testimony of twenty bishops. Were it otherwise, the State could destroy the underlying right by manipulating its factfinding procedures.

That is precisely what this Court has done here. It has created a factual presumption (i.e., a defendant is not mentally retarded with an IQ score above 70)

that constricts the substance of a federal constitutional right (i.e., under Atkins, a defendant with an IQ of 75 or below is immune from being executed by the state). Section 921.137(1), as construed by Cherry, goes beyond the constitutionally permissible scope of the state's discretion in factfinding because it overreaches the federal constitutional immunity of mentally retarded persons from being executed and permits such immunity to be nullified under the guise of factfinding. See, e.g., Bailey v. Alabama, 219 U.S. 219, 239 (1910) (invalidating Alabama statutory presumption of an employee's criminal intent to defraud his employer when the employee failed to perform services after payment as inimical to Thirteenth Amendment rights: "a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption . . . [and] [t]he power to create presumptions is not a means of escape from constitutional restrictions."); Taylor v. Georgia, 315 U.S. 25, 29 (1941) (same); Morrison v. California, 291 U.S. 82, 90-93 (1934) (reversing conviction based upon statutory presumption of criminal intent to enter into a conspiracy to furnish land to ineligible alien based on the alien's apparent race as inimical to equal protection); Speiser v. Randall, 357 U.S. 513, 526 (1958) (holding that a California statute which presumed an individual to advocate overthrowing the government based on his refusal to sign a loyalty oath on his tax form invalid as inimical to First Amendment).

## E. This Court's Construction Of Section 921.137 Does Not Provide Constitutionally-Adequate Procedures To Determine Mental Retardation

The procedures for determining whether facts do or do not bring a case within a substantive federal constitutional prohibition are a matter of federal law. See Chapman v. California, 386 U.S. 18, 21 (1967) ("[W]hen a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied."). In violation of fundamental principles of due process of the Fourteenth Amendment and the Florida Constitution, this Court in Cherry construed Section 921.137(1) to create factfinding procedures that are incompatible with the constitutionally proper adjudication of Atkins claims.

A similarly flawed Florida statute led to the United States Supreme Court's decision in Ford v. Wainwright, 477 U.S. 399 (1986). In Ford, the former Florida statute required that, when informed that a person under sentence of death may be insane, the Florida Governor appoints a commission of three psychiatrists to examine the prisoner's sanity. 477 U.S. at 412. The procedure was the exclusive means for determining sanity and did not permit an evidentiary hearing or a jury trial. Id. The Court stated that "consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the

taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate." Id. at 414.

Recently, in Panetti v. Quarterman, the Court held that the test applied by the Fifth Circuit Court of Appeals to assess a Texas prisoner's competency to be executed was based on a flawed interpretation of Ford. 127 S. Ct. 2842, 2860 (2007). The Court of Appeals' three-factor inquiry for determining whether a prisoner is aware of the reason for his execution treated a prisoner's delusional belief system as irrelevant and disregarded clinical evidence of the prisoner's psychological dysfunction. Id. at 2861-62. The Court held that "[t]o refuse to consider evidence of this nature is to mistake Ford's holding and its logic." Id.

While Atkins allowed the states to develop appropriate ways to enforce the constitutional restrictions of the Eighth Amendment, Panetti counsels that the Eighth Amendment also restricts states' ability to establish procedures that allow the factfinder to ignore relevant evidence of mental retardation. Id. at 2859-62.

As described above, the Court in Atkins recognized the scientific consensus that an IQ score 75 or lower is "typically considered the cutoff score for the intellectual function prong" of a mental retardation evaluation. See Atkins, 536 U.S. at 309 n.5. However, this Court's holding in Cherry, establishing a strict IQ cutoff score of 70, necessarily precludes evidence – i.e., evidence of IQ scores

between 71 and 75 – relevant to determining the constitutional fact to be decided. In other words, like the procedure held constitutionally impermissible in Ford, Cherry establishes a procedure that precludes a defendant from presenting material relevant to his mental retardation and – as occurred in this case – bars consideration of such essential material by the factfinder.

## F. This Court's Definition Of Mental Retardation Violates The Eighth And Fourteenth Amendments As Well As Corresponding Provisions Of The Florida Constitution

The Supreme Court ruled that a state cannot execute mentally retarded persons because the imposition of capital punishment on them is excessive under the Eighth and Fourteenth Amendments in light of the purposes of that punishment and practical realities. See Atkins, 536 U.S. at 321. The definition of mental retardation in Section 921.137, as construed by Cherry, is inconsistent with the constitutional bar on the execution of mentally retarded persons.

To comport with the scientific meaning of "mental retardation," standardized intelligence tests must be read for what they actually say and in the context of an overall clinical picture, not with a myopic focus on a particular test score. See, e.g., In re Hawthorne, 35 Cal. 4th 40, 48-49 (Cal. 2005) (finding that mental retardation is not measured according to a fixed IQ score, which is "insufficiently precise," but "rather constitutes an assessment of overall capacity based on a consideration of all relevant evidence."); People v. Superior Court, 40

Cal. 4th 999, 1003 (Cal. 2007) (The fact that defendant's IQ score "has generally been above the range considered to show mental retardation does not, as a matter of law, dictate a finding he is not mentally retarded. The legal definition of mental retardation for purposes of Atkins's constitutional rule does not incorporate a fixed requirement of a particular test score."); Pruitt v. State, 834 N.E.2d 90, 109-110 (Ind. 2005) (statute defining mental retardation was not to be interpreted to contain diagnostic criteria below the clinical standards because, in part, "the Eighth Amendment must have the same content in every state"); Commonwealth v. Miller, 888 A.2d 624 (Pa. 2005) ("consistent with both [the AAMR and the DSM] classification systems, we do not adopt a cutoff IQ score for determining mental retardation in Pennsylvania, since it is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation.").

Accordingly, even if the precise question presented here respecting the IQ cutoff had not already been authoritatively settled by Atkins, this Court's definition of mental retardation would be violative of the Eighth and Fourteenth Amendments to the United States Constitution, as well as corresponding provisions of the Florida Constitution.

**POINT II: Factfinding Infected By Legal Error Is Entitled To No Deference And This Case Must Be Remanded**

As discussed above, the Circuit Court dismissed Dr. Keyes's testimony in support of his conclusion of mental retardation as "essentially an argument for the

law to be something other than what it is," and "of no evidentiary value at all" because it simply "disagree[d] with the standard the Legislature established." (Final Order, pp. 19-20, at SR5. 1243-44.).

These conclusions were explicitly premised on the "dispositive" force of Cherry, which the court below "is without authority to reconsider." (Final Order, p. 25, at SR5. 1249.). But because Cherry does not in fact set forth the governing legal standard, the factual determinations reached by the Circuit Court must be set aside because they were "induced by an erroneous view of the law." Holland v. Gross, 89 So. 2d 255, 258 (Fla. 1956); see Central Waterworks, Inc. v. Town of Century, 754 So. 2d 814 (Fla. 1st DCA 2000) (same).

Mr. Nixon is entitled to factfinding by a judge whose view of the evidence is not distorted by looking at it through an erroneous – indeed unconstitutional – legal lens. Cf. Panetti, 127 S. Ct. at 2863 (because "the record was developed pursuant to a standard we have found to be improper," "[t]he underpinnings of petitioner's claims should be explained and evaluated in further detail on remand.").

In this case, however, the Circuit Court looked at the testimony before it through no less than three such lenses. The first was Cherry. The others are described in the two following points.

**POINT III: Circuit Court Violated *Atkins* by Adding A "Culpability" Test**

The task before the Circuit Court was to determine whether Mr. Nixon met the diagnostic criteria for mental retardation. If so, the Federal Constitution categorically bars his execution. That is what Atkins held.

"Neither Atkins nor [other precedent] suggest that [heinous] crimes render a defendant ineligible for exemption from the death penalty based on mental retardation." Holladay v. Campbell, 463 F. Supp. 2d 1324, 1346 (N.D. Ala. 2006); see also Lambert v. State, 126 P.3d 646 (Okla. Crim. App. 2005).

The Circuit Court, however, confused the Atkins rule (no execution of the mentally retarded) with one of its rationales (many retarded people act impulsively or under the influence of others) and decided that even a defendant who does meet the diagnostic criteria for mental retardation is only entitled to the Atkins exemption if the crime was the product of "impulsivity [or] suggestibility consistent with diminished culpability." (Final Order, p. 24, at SR5. 1248.).

Thus, the opinion below contains successive sections headed "Testimony and Evidence Regarding Mr. Nixon's Intellectual Capacity" and "The Record Refutes any Suggestion of Impulsivity or Suggestibility" and concludes "*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." (Final Order, p. 25, at SR5. 1249 (emphasis added).).

**POINT IV: The Circuit Court Violated *Atkins* By Basing Its Finding Of Non-Retardation On Nixon's "Confession"**

Having erroneously decided that it should add the element of culpability to the legal requirement of mental retardation, the Court below proceeded to compound the error by determining culpability from the "facts" of the crime as revealed in Mr. Nixon's "confession" and the prosecution's case built thereon.

This was a flat violation of Atkins – one of whose specific premises is that that mentally retarded people are more prone than others to give false confessions and be wrongfully convicted. See Atkins, 536 U.S. at 320. Of course, legal actors do not know when that has happened; the whole point is that, acting in perfectly good faith as the court below did here, they may be led astray by the delusion that a confession is true when it is not. As Atkins explained, one "justification for a categorical rule making [mentally retarded] offenders ineligible for the death penalty" is to obviate this possibility by imposing a prophylactic rule. Id. To predicate a finding of non-retardation on the assumed truth of the contents of a "confession" is simply inconsistent with that rule.

The error was particularly egregious here since (a) the State specifically confined its evidentiary presentation to the IQ prong of the mental retardation diagnosis and took the position that the maladaptive behavior prong need not be

reached (MH Tr. at 174:11-175:12), with the result that the validity of the "confession" was not addressed at the evidentiary hearing or in the parties' briefing but was simply assumed *sua sponte* by the Court below during the writing of its opinion, and (b) there is in fact very substantial reason to doubt the accuracy of the prosecution's account of the crime in this case.

## A. Confessions From Mentally Retarded Persons Like Nixon Are Unreliable And Have Led To Numerous False Confessions

In contrast to the Court below, the Atkins Court was fully advised before issuing its decision that the unreliability of confessions made by mentally retarded persons like Mr. Nixon is well documented in psychological and social research, which finds that standard interrogation techniques, when applied to particularly vulnerable persons, lead to a high number of false confessions.[6] Richard J. Ofshe

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[6] Two types of false confessions may result when vulnerable suspects, such as a mentally retarded, emotional and mentally stressed Joe Nixon, are subjected to interrogation, even standard techniques: "coerced-compliant" confessions, knowingly false or unreliable confessions given to obtain some goal (to go home or end the interrogation, for fear of higher sentencing, to protect others - one or more of which could have occurred in the instant case), or "coerced-internalized" false confessions, in which the suspect begins to believe in his own guilt. Welsh S. White, False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions, 32 HARV. C.R.-C.L.L. REV. 105, 109 (1997); see also GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 260-73 (1992).

False confessions have several factors in common: a mentally or emotionally vulnerable suspect; intense pressure on the police to solve the crime; lengthy interrogation without any neutral persons present; and police misrepresentations about extrinsic evidence. Gail Johnson, False Confessions and Fundamental

(footnote continued)

& Richard A. Leo, The Social Psychology of Police Interrogation, 16 STUDIES IN LAW, POLITICS AND SOCIETY 189 (1997); Gudjonsson, supra, at 260-73. Confessions from mentally retarded persons are highly suspect for several reasons. First, according to legal psychologists Ofshe and Leo, mentally retarded persons are "unusually responsive to pressure to submit to and comply with the demands of authorities" and "are especially vulnerable to the pressure of accusatorial interrogation." Ofshe & Leo, supra, at 189.[7] Because of their mental deficiencies,

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Fairness: the Need for Electronic Recording of Custodial Interrogations, 6 B.U. PUB. INT. L.J. 719, 721 (1997). All of these factors are present in Mr. Nixon's case.

[7] Mentally retarded suspects also give false or unreliable confessions for other reasons. For example, "mental health experts have long been aware of the risk that a mentally retarded suspect's eagerness to please authority figures will lead him to confess falsely." White, supra, at 123; see James W. Ellis & Ruth A. Luckasson, Symposium of the ABA Criminal Justice Mental Health Standards Mentally Retarded Criminal Defendants, 53 GEO. WASH. L. REV. 414, 446 (1985); see also MH Tr. at 26:12-27:9 (discussing the "Cloak of Competence" whereby individuals with mental retardation "hide their mental retardation in the best way they know how, by acting like they understand what's going on and understanding more than they really do. ... [They are] more likely to just nod their head and agree..."). Studies also demonstrate what is called a "cheating to lose" phenomenon – a mentally retarded person will accept blame for some event so that the persons in authority who are asking about it will not be angry with him. White, supra, at 123.

The pressure that the police feel from the community to solve a case may lead them to use interrogation tactics inappropriate to the mentally retarded suspect. See id. at 133. "[T]he empirical data suggest that standard interrogation methods will lead to untrustworthy confessions when interrogators employ these methods on a particularly vulnerable suspect or employ specific stratagems or tactics on any suspect." Id. at 134.

"they are quite likely to be highly vulnerable to the stress inherent in a modern accusatory interrogation." Id. at 212; see also Ellis & Luckasson, supra, at 427. Second, one of the mechanisms that mentally retarded persons use to cope with stressful situations is consistently answering questions in the affirmative, regardless of whether the questions demand affirmative answers. And the form of a question can more easily bias the mentally retarded suspect's answer. See Ellis & Luckasson, supra, at 428. As a result, ordinary police interrogation techniques often yield false confessions from these suspects.[8]

In this case, the police officers read Mr. Nixon his rights in a cursory fashion and without adequate explanation given his concededly limited intellect. Officer Campbell, "explained" Mr. Nixon's rights to him as follows: "A little more fancy language than what I said this morning but basically we're not going to try and trick you or threaten you or hurt you or promise you good things or bad things, we're just going man to man straight from the shoulder. Is that, you understand what I've said to you?" (Confession of Joe Elton Nixon, August 14, 1984, Exhibit A to Final Order ("Confession"), p. 1, at SR5. 1251.). Mr. Nixon did not

[8] "Some mentally retarded suspects are inclined to confess falsely even if the interrogation methods are relatively benign." White, supra, at 131; see Ofshe & Leo, supra, at 213-214.

repeat back the rights, explain in his own words the rights he was waiving, or respond in other than monosyllabic tones to the officers' words.

Moreover, throughout the interview Officer Campbell used soothing, leading and ultimately deceptive questions. (Confession, p. 1, at SR5. 1251.). The record contains ample evidence that Mr. Nixon – as is common with retarded people – replied to these questions affirmatively in an effort to appear normal. See, e.g., Summary of Standard Test Results, prepared by Denis William Keyes, Ph.D., Sept. 25, 1993 ("1993 Keyes Report"), pp. 8-9, at SR5. 143-44; Report Re: Joe Elton Nixon, prepared by Alec J. Whyte, M.D., Oct. 6, 1993 ("Whyte Report"), p. 14, at SR5. 228; Resume of Neurological Evaluation Re: Joe Elton Nixon, prepared by Henry L. Dee, Ph.D., Oct. 6, 1993 ("Dee Report"), p.6, at SR5. 194.

The Court below considered none of this. But cf. Brown v. Crosby, 249 F. Supp. 2d 1285, 1290-1314 (S.D. Fla. 2003) (holding that mildly mentally retarded individual's waiver of his Miranda rights prior to making his post-arrest statement was not knowingly and intelligently made); Sims v. Georgia, 389 U.S. 404, 407 (1967); Miranda v. Arizona, 384 U.S. 436, 475 (1966); Smith v. Zant, 887 F.2d 1407 (11th Cir. 1989) (affirming grant of writ of habeas corpus because defendant with IQ of 65 and mental age of 10 did not knowingly and intelligently waive rights); Henry v. Dees, 658 F.2d 406, 409 (5th Cir. 1981) (same); Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972) (holding invalid the waivers given by two

individuals with IQs between 61 and 67, who read at a second-grade reading level); United States v. Garibay, 143 F.3d 534 (9th Cir. 1998) (defendant's borderline retardation and inability to understand oral instructions among prerequisite skills for knowing and intelligent waiver); Moore v. Ballone, 658 F.2d 218, 229 (4th Cir. 1981); Note, Constitutional Protection of Confessions Made by Mentally Retarded Defendants, 14 AM. J. L. MED. 431, 432, 440-44 (1989).[9]

## B. The Circuit Court's Injudicious Use Of Evidence That Was Both Precluded By *Atkins* And Untested By Normal Adversarial Processes Was Particularly Egregious In This Case Because There Is Good Reason To Believe That The "Confession" Was In Fact False

Numerous important and unimportant details in Mr. Nixon's statements are implausible and inconsistent with either the physical facts of the crime or the statements of the State's two main witnesses: John Nixon and Wanda Robinson.

1. Joe's confession says that he encountered the victim, Jeanne Bickner, in the parking lot of the Governor's Square Mall and took her to the place where he killed her on a Saturday afternoon. (Confession, pp. 4-5, 6, 39-40, at SR5. 1254-

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[9] Formal compliance with Miranda procedure does not automatically render a custodial statement admissible where the defendant may be mentally incompetent. See, e.g., Miller v. Dugger, 838 F.2d 1530, 1539 (11th Cir. 1988); State v. Caldwell, 611 So. 2d 1149, 1152 (Ala. Crim. App. 1992); Smith v. Kemp, 664 F. Supp 500 (M.D. Ga. 1987) aff'd sub nom., Smith v. Zant, 887 F.2d 1407 (11th Cir. 1989) (evidence of a defendant's mental retardation and low I.Q., though not dispositive, carries great weight in determining competency to confess); Myles v. State, 399 So. 2d 481 (Fla. 3d DCA 1981). See generally Charles Marvel, Mental Subnormality of Accused as Affecting Voluntariness or Admissibility of Confession, 8 A.L.R. 4TH 16 (1981).

55, 1256, 1288-89.). Notwithstanding numerous attempts by investigators to get Joe to change the Saturday date, he insisted that the acts took place on a Saturday. (Confession, pp. 4-5, 6, 39-40, at SR5. 1254-55, 1256, 1288-89.). In fact, Bickner was seen by at least two witnesses on Sunday, August 12, 1984. (Trial testimony, Mary Atteberry, at R. 1867-68; Trial testimony, Linda Gallagher, at R. 1871.).

2. Joe had a potential alibi for the time of the murder. Lamar Nixon, Joe's uncle, stated that he saw Joe in Woodville between 3:00 and 4:00 p.m. on Sunday August 12, and that Joe was driving a brown Buick.[10] It is about 12 miles from Woodville to the Mall and about 15 miles from Woodville to Tram Road at the turn-off to the murder scene, plus another 5-10 minutes of driving over rough dirt to get to the actual place of the murder. See Rand McNally Street Finder (1996 Ed. CD-ROM); A1998-216. One witness, Mary Atteberry, saw a black man speaking with a white woman near a yellow sports car at the Mall at "about a quarter until 3:00." (R.1868; A1998-185.). Another witness, Linda Gallagher, a friend of Bickner, saw a black male speaking with Bickner "between, I would say, 3:00 and 4:00 p.m." (R.1873; A1998-190.). Using either witness's time frame, it

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[10] Lamar Nixon said that he and Mary Hayes had met Joe while Lamar was on a pass from the Tallahassee Correctional Center. Mary Hayes could have verified this account. Additional verification could have been obtained from others with whom Lamar Nixon told Mr. Mickens he met that afternoon after encountering Joe. (3.850 Motion at 235-36; 3.850R. 640-41.).

would be hard to imagine how Mr. Nixon could have been in Woodville and at the Mall committing the crime at the same time.

3. Joe's confession says that in the mall parking lot he told Ms. Bickner that he had a broken muffler on his uncle's Chevrolet Monte Carlo and had hurt his arm; Ms. Bickner offered him a ride and they left the mall in Bickner's 1973 M.G. two-seat, convertible, with Bickner driving voluntarily and Joe in the front passenger seat. At some point on the road, Joe says he hit Bickner on the head, overpowered her and – from the passenger side of the car – grabbed the steering wheel and maneuvered the M.G. safely over to the side of the road. He then got the still-conscious Bickner out of the car and forced her into the trunk. He then drove the M.G. to a logging road and then over the rutted dirt road to the secluded site where Ms. Bickner's body was found. (Confession, pp. 5-8, 10-14, at SR5. 1255-58, 1260-64.). The confession further says that he left the scene where the body was found driving the M.G. He picked up his friend, Willy ("Tiny") Harris, who helped him pick up the Monte Carlo and return it to his uncle's house. (Confession, pp. 24-28, at SR5. 1274-78.).

However, the trunk of a 1973 M.G. is so small that, in order to fit a person into it, the spare tire would have to be removed.[11] This would have required Joe (if

[11] As John Nixon testified on deposition:
(footnote continued)

the scenario in his confession were true) to single-handedly maintain control over Bickner at the roadside while opening the trunk, removing the spare tire, forcing her into a very small space, and then closing the trunk.

Furthermore, the crime scene was located in a remote area, at least 1.7 miles from the nearest road (Tram Road) and accessible only by a series of "two-rut" dirt roads.[12] The 1973 M.G. has only four and a half inches of ground clearance, new and unloaded. ("M.G. Series M.G.B. Specifications," M.G.B. Web Page, http://www.mgcars.org.uk/MGB/mgbspec.html, at A2002-208.).[13] Four and a half inches is about the height of a 12-ounce soda can.

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> "A. What I haven't got the right idea on is which car he took the lady out there in. All he said was he put her in the trunk of the car. And I just looked at that little bitty car and I just figured, you know, he couldn't have took nobody in that little thing. The trunk ain't that big on that."
>
> "Q. Too small to put a person in?
>
> "A. That's what it seems like. I don't know if you could bet somebody in there or not." (Deposition of John Nixon, taken February 14, 1985 ("John Nixon Deposition"), at 3.850 R. 1039.).

[12] See Trial testimony of William Gunter (R. 1902.) and Directions in Leon County Sheriff's Office Death Investigation Report, August 24, 1984, Appendix to Defendant's Post-Argument Memorandum on the Scope of the Evidentiary Hearing on Defendant's Post-Conviction Claims, Tab M at 3.850 R. 3392-94.

[13] Ms. Bickner's car was an "M.G.B." (R. 1871.). It probably had even less than four and a half inches of ground clearance because it was over ten years old at the time of the crime and would have had wear on the springs and suspension. Joe's weight in the car and Bickner's in the trunk, directly over the rear differential and exhaust system, would have brought the car even lower to the (footnote continued)

Also, Joe was not familiar with the area where body was found.[14] In contrast, the crime scene was in an area where Wanda Robinson's mother had often gone fishing. (Statement of John D. Nixon and Wanda Robinson, August 14, 1984 ("Joint Statement"), at 3.850 R. 976.).

Finally, the M.G. is an idiosyncratic car. Photos of the interior of Ms. Bickner's M.G. show a manual transmission in cramped quarters. (A2002-201.). Joe could barely drive the M.G. In fact, John Nixon said that days after the crime Joe could not get the car into reverse.[15] Yet Joe's confession appears to say that after killing Ms. Bickner, he left the scene by backing her car out. (Confession, p. 24, at SR5. 1274.).

John Nixon and Wanda Robinson both stated that Joe had told them that he put Bickner in the trunk of the Monte Carlo, not the M.G., in the parking lot of the

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ground. Finally, the wheels would likely have slipped into the ruts of the road, bringing the bottom of the car down even lower where the hump rose between the ruts.

[14] "Q: Are you familiar with Tram Road ... Joe? A: Uh, no. Q: Okay. You ever been down in there before? A: I been down there when I was younger but you know, I know it's a long ways you know from town and places like that." (Confession, p. 13, at SR5. 1263.).

[15] John Nixon said, "He tried to get the car in reverse. He couldn't hardly get it in reverse or whatever. He asked me would I show him, help him get it in reverse. I told him just pull it over there and he tried to get it in reverse and the car kept rolling down the hill and he couldn't never get it in reverse." (Statement of John D. Nixon, August 16, 1984 ("John Nixon Statement"), at 3.850 R. 1017-18.). See also Joint Statement at 3.850 R. 987.

Governor's Square Mall.[16] John said Joe told him that after killing Bickner, he returned to the Mall, parked the Monte Carlo, and then drove back out to the crime scene in the M.G. (John Nixon Statement at 3.850 R. 1009.). Wanda said Joe told her that after putting Bickner in the trunk of the Monte Carlo, Joe drove out to Wanda's mother's house with Bickner in the trunk. (Robinson Statement at 3.850

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[16] E.g., John Nixon Statement at 3.850 R. 1007, 1009, 1018; John Nixon Deposition at 3.850 R. 1037; Statement of Wanda Robinson, August 16, 1984, ("Robinson Statement"), at 3.850 R. 1073; Robinson Deposition at 3.850 R. 1120.

In stark contrast to Joe's confession specifying the M.G., John said that Joe had specified the Monte Carlo:

> "Q: [T]ell us what he told you [of how the crime happened].
>
> "A: I will tell you exactly what he told me. He told me that . . . out to Governor's Square Mall [he] parked my uncle's green and white Monte Carlo . . . The lady gave him a boost off and everything and he abducted her and threw her in the trunk of his car.
>
> "Q: The trunk of his car?
>
> "A: Uh huh." (John Nixon Statement at 3.850 R. 1007.).
>
> See also John Nixon Statement at 3.850 R. 1018; Joint Statement at 3.850 R. 976; Robinson Deposition at 3.850 R. 1119-20; Robinson Statement at 3.850 R. 1072.

John originally said the same thing in his deposition:

> "Q: Put her in the trunk of what car?
>
> "A: In the green and white car.
>
> "Q: Your Uncle Tom's Monte Carlo?
>
> "A: Uh Huh." (John Nixon Deposition at 3.850 R. 1037.).

Later, he wobbled on the point.

R. 1073-74; Robinson Deposition at 3.850 R. 1120.).[17] This scenario would require Mr. Nixon, a lone black man, to have overpowered Ms. Bickner, a white woman, and forced her into the Monte Carlo's trunk in full view of Sunday afternoon shoppers at the mall.

4. Joe's confession says that, after having driven Ms. Bickner into a wooded area, he removed her from the trunk of the M.G. and tied her to a tree with two jumper cables from the car. Joe first said he tied her feet and left hand, using one cable for the feet and the other cable for her hand. He clarified that there were two separate cables. (Confession, pp. 15-18, at SR5. 1265-68.). Later, he said that maybe he did tie her around the waist, and that if he did, he guessed it was with a cable. (Confession, pp. 44-45, at SR5. 1293-94.). To support that statement, Joe changed his story, saying he must have loosened her feet, put a bag on her head, put a cable around her waist and then re-tied her feet. Moments later, he changed the story again to say that he never tied Jeanne Bickner's feet. (Confession, pp. 45-46, at SR5. 94-95.). The final story, elicited after police coaching, accords with the crime scene photographs.

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[17] Wanda Robinson said that her mother had seen Joe driving the Monte Carlo, not the M.G., past her house while her children played out in front and that Joe had told Wanda that Bickner was in the trunk of the car at this time. (Robinson Statement at 3.850 R. 1073-74.).

5. Joe's confession says that he set a fire with some things he found in the M.G., including the "tonneau" cover, a fabric piece that goes over the retracted convertible top. After some conversation with Bickner, he choked her until she died, then threw the burning tonneau cover onto what he thought was her dead body and left the scene. He detailed that he had choked her with a rope she had in her car and that he left it tied around her neck. He said that as he was choking her, he could hear noises like someone "fittin' to drown." (Confession, pp. 18-23, at SR5. 1268-73.).

However, the associate medical examiner who performed the autopsy indicated no signs of a rope, rope marks, or choking: his testimony and his autopsy report both reveal a painstaking examination of the larynx and adjacent areas which would have revealed any signs of strangulation but found none.[18]

6. Joe's confession says that his reason for killing Jeanne Bickner was that "she knows me. She knows my name and everything. . . . Well, she just, or something, up on campus, you know, I be up on Florida State or something. I

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[18] "Well, I did not find any evidence of external or outside injury to the larynx. The larynx is composed of rings of springy cartilage-like material that is fairly easily broken, and all of these were intact. ¶ "There is also a very delicate bone that goes across the larynx just above the region of the Adam's apple . . . . [I]t's a delicate bone that is frequently fractured in this area in the case of injuries. And that bone was intact." (R. 1949-50.). See also Autopsy Report, August 14, 1984, Exhibit F of Response to Motion to Vacate Judgment of Conviction and Sentence of Death, filed February 25, 1997 at 3.850 R. 1287.

think she was a teacher or something," and he was afraid she was going to tell on him. (Confession, pp. 7, 15, at SR5. 1257, 1265.).[19]

However, as John Nixon and Wanda Robinson reported, Joe said she was a complete stranger.[20] Also, the death certificate listed Bickner's occupation as "Personnel Program Analyst, Florida State Government."[21]

7. Joe's confession says he burned his trousers and shirt at the crime scene because they had blood on them, and he returned to town in his underwear. (Confession, pp. 40-42, at SR5. 1289-91.).

But Wanda Robinson and John Nixon said that Joe showed them the clothes Joe said he wore when committing the crime (Joint Statement at 3.850 R. 970-71, 973-74; John Nixon Statement at 3.850 R. 1001-02, 1017; John Nixon Deposition at 3.850 R. 1030, 1043; Robinson Statement at 3.850 R. 1076-78; Robinson Deposition at 3.850 R. 1114-16); John said they had blood on them and that he, John, had thrown Joe's blood-stained shirt in the garbage can (where, he asserted, it

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[19] He had originally denied knowing Ms. Bickner (or at least her last name). (Confession, p. 4, at SR5. 1254.).

[20] John Nixon told the police that Joe "told me he didn't know the woman at all. . . . She was a complete stranger to him." (John Nixon Statement at 3.850 R. 1020.). Wanda Robinson concurred: "I asked him who was it [sic] and he said he didn't know." (Robinson Statement at 3.850 R. 1073.).

[21] See State Exh. 15, at A1998-193.

still was at the time of John's statement to the police), while Joe "took the pants with him." (Joint Statement at 3.850 R. 970-71.).

8. Finally, there are indications in Wanda Robinson's deposition that she had originally considered John Nixon a likely suspect in the Jeanne Bickner murder – whether in addition to Joe or instead of Joe is unclear[22] – and that the police discouraged her from taking that line.[23] These indications become the more troubling in the light of deposition testimony that Wanda gave in a subsequent civil action brought by Jeanne Bickner's estate against the Governor's Square Mall. She testified that, a year before the Bickner murder, John Nixon had kidnapped her from the Mall by beating her, choking her and throwing her into a car – a procedure very much like the abduction of Jeanne Bicker [sic] under any account of the latter, except that John had accomplished it early in the morning, before the mall stores opened. (Deposition of Wanda Huggins McKinney in Roberts v. Governor's Square, Inc. ("Huggins Deposition"), at A2002-393-415.). Several

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[22] Robinson Deposition at 3.850 R. 1155: "And I was telling him [Detective Paul Phillips] like, 'How do you know John didn't have anything to do with killing this woman?' And, 'You've got Joe in jail, why don't you put John in jail?'"

[23] Robinson Deposition at 3.850 R. 1155-56: "And he [Detective Phillips] said, 'Wanda, you talking crazy. You need to shut up. You know John couldn't have killed the woman because John was with you,' you know, and all of that. Which John was with me that Saturday and that Sunday. ¶ And he just told me, you know, 'You are not supposed to be talking about the case. So, just drop it, you know. Go ahead with your life.'"

months before Joe's trial, Robinson said, John Nixon again abducted her in a similar fashion. (Huggins Deposition, at A2002-404.). In all, John had abducted and assaulted her four times, driving her around in a car and beating her on three of these occasions. (Huggins Deposition, at A2002-391, 393-94, 396, 400, 406, 416-21.). Robinson said that she always called the police or the sheriff about the abductions but they wouldn't do anything about it because John was a snitch. (Huggins Deposition, at A2002-406-10.). Wanda learned he was a snitch after he snitched on Joe. (Huggins Deposition, at A2002-409.).

These inconsistencies cast serious doubt on the veracity of Mr. Nixon's confession and exacerbate the seriousness of the federal constitutional violations committed by the Circuit Court in using his "confessions" to support a finding that he was not mentally retarded.

**POINT V: Nixon 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**

Mr. Nixon does not contend that this Court on appeal should summarily agree with his position that he is indeed mentally retarded and therefore ineligible for execution under the Eighth Amendment. Recognizing that the question is a litigable one, his position in this Court is that because the record contains ample evidence from which a factfinder conducting proceedings that accorded with the

governing legal criteria could reach that conclusion, he is entitled to a remand for a fair hearing on the issue.

## A. There Is Ample Evidence That Nixon Was At Grave Risk Of Developing Mental Retardation

According to the most recognized treatise on mental retardation, there are several well defined risk factors that make it more likely that an individual will develop mental retardation. (MH Tr. at 36:20-37:15; Supplemental Affidavit of Denis Keyes, Ph.D., presented Oct. 23, 2006, Def. Exh. 2, at SR5. Vol. 10 ("Keyes Supp. Aff."), at exh. S; Powerpoint, entitled 'Joe Elton Nixon,' presented by Denis William Keyes, Ph.D. Oct. 23, 2006, Def. Exh. 3, at SR5. Vol. 10 ("MH Powerpoint"), at 9.). These risk factors are grouped into four categories – Biomedical, Social, Behavioral, and Educational – and divided into three developmental periods. (MH Powerpoint at 10.).

Mr. Nixon was exposed to almost every recognized risk factor during the Prenatal, Perinatal, and Postnatal time periods for each of the Social, Behavioral, and Educational categories.[24] (MH Tr. at 37:16-41:22; MH Powerpoint at 9-16.). Virtually every aspect of Mr. Nixon's childhood environment significantly increased the likelihood that he would develop mental retardation.

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[24] Considering Joe's impoverished background, it is not surprising that there is sparse biomedical information available.

For instance:

- "Mrs. Nixon admitted to drinking alcohol, both beer and gin, during her pregnancy."
- "She was unable to attain adequate medical care or nutrition while Joe was in utero."
- Joe was malnourished, and then she [Mrs. Nixon] would still withhold food for several days as punishment.[25]
- She [Mrs. Nixon] would encourage her husband to beat Joe. She also knew of and ignored the abuse by Joe's uncle.
- She "called [Joe] stupid all the time."

(Affidavit, Virginia Nixon, sister, ¶¶ 8, 13, 17, 20, Oct. 6, 1993, at SR5. 208-10; Affidavit, Eddie Ingram, cousin, ¶ 12, Sept. 21, 1993, at SR5. 158; Affidavit, Thomas Earl Nixon, cousin, ¶¶ 5-6, Oct. 5, 1993, at SR5. 181-82; Dee Report, p.2, at SR5. 190; 1993 Keyes Report, p. 2, at SR5. 137; MH Tr. at 38:7-39:20; MH Powerpoint at 12.).

Similarly, 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 (and the other children) besides beating him with "switches, belts, extension cords, ropes, fan belts, whatever was handy." (Ingram Aff., ¶¶ 4, 13, at SR5. 155-56, 158; Thomas Earl Nixon Aff., ¶¶ 4, 6, 7, at SR5. 181-82; Virginia Nixon Aff., ¶¶ 12, 16, at SR5. 209-10;

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[25] "[M]alnutrition is the number one cause of mental retardation in the world. ... [I]f it occurs in any situation the brain does not develop properly." (MH Tr. at 39:7-11.).

Affidavit, Doris Graham, sister, ¶¶ 6-9, Sept. 26, 1993, at SR5. 163-64; Affidavit, John Nixon, Jr., brother, ¶ 7, Sept. 30, 1993, at SR5. 170; MH Tr. at 39:21-40:11; MH Powerpoint at 13.). This significantly contributed to the risk that Mr. Nixon would develop mental retardation.

Mr. Nixon also was subjected to various poisons and physical dangers that threatened the healthy development of his brain and intellectual functioning. For example:

- As a small child, Joe was exposed to nicotine and pesticides in the tobacco fields.
- Since he was very young, he was given alcohol to entertain others.
- As a toddler, he fell in a tub of scalding water and was severely burned.
- Joe is witnessed "huffing antiperspirant spray to a condition that he was in a inebriated state unable to communicate with anyone."

(Virginia Nixon Aff., ¶¶ 6-7, at SR5. 207-8; Ingram Aff., ¶ 11, at SR5. 157; Graham Aff., ¶ 5, at SR5. 162-63; John Nixon, Jr. Aff., ¶ 3, at SR5. 168-69; Affidavit, James Nixon, uncle, ¶ 3, Sept. 3, 1993, at 152; June 17, 1976 Detention-Adjustment Unit Admission/Release Form, at SR5. 87; MH Tr. at 40:12-41:12; MH Powerpoint at 14.).

And, sadly, Mr. Nixon was also repeatedly subject to sexual and physical abuse that not only left physical scars, but inflicted psychological and emotional trauma, further increasing his risk of developing mental retardation.

For example:

- Joe's uncle admits to having sex with Joe "against his wishes" when Joe "was very young" until Joe was in his teens.
- Joe was beat by his brother and his 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, 7, at SR5. 152-53; John Nixon, Jr. Aff., ¶ 7, at SR5. 170; MH Tr. at 39:16-20, 41:13-22; MH Powerpoint at 15.).

In short, there is ample evidence that Mr. Nixon was exposed to almost every risk factor described by the American Association on Mental Retardation. See MH Tr. at 37:16-41:22; MH Powerpoint at 9-16.

**B. There is Ample Evidence That Nixon 's Intellectual Functioning was Significantly Sub-average From An Early Age.**

Mr. Nixon manifested sub-average intellectual functioning throughout his childhood. Although he tried hard, substantial evidence submitted by those who knew him best – and which was uncontested by the State – demonstrates that he was a very slow learner and he was significantly behind his peers in basic aspects of intellectual performance. (Virginia Nixon Aff., ¶¶ 18, 19, 21, at SR5. 210-11; Ingram Aff., ¶¶ 3, 5, 7, at SR5. 155-57; John Nixon, Jr. Aff., ¶ 12, at SR5. 171-72; Graham Aff., ¶ 14, at SR5. 165-66; MH Tr. at 46:2-48:6; MH Powerpoint at 24-26.). For instance, the record is replete with evidence of Joe's inability to learn, his inability to understand his own teacher, and his inability to read. (Virginia Nixon

Aff., ¶ 18, at SR5. 210; Ingram Aff., ¶ 5, at SR5. 156; John Nixon, Jr. Aff., ¶ 12, at SR5. 171-72; MH Powerpoint at 24.).

Importantly, Mr. Nixon had very significant trouble with one of the main indicators of intelligence – the ability to communicate:

- 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."
- "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."
- "Joe was unable to participate in conversations with other people because he would not understand what the conversations were about. … [H]e used to tilt his head from side-to-side … trying to figure out what people were talking about. "

(Virginia Nixon Aff., ¶¶ 21, at SR5. 211; Ingram Aff., ¶¶ 3, 7, at SR5. 155, 156-57; John Nixon, Jr. Aff., ¶ 12, at SR5. 171-72; Graham Aff., ¶ 14, at SR5. 165-66; MH Tr. at 46:2-47:19; MH Powerpoint at 25.). It is a hallmark of mental retardation for an individual to be unable to participate in everyday conversations. See MH Tr. at 47:12-19.

Mr. Nixon also failed to grasp basic quantitative concepts, another prominent characteristic of persons with sub-average intellectual functioning. (Virginia Nixon Aff., ¶ 19, at SR5. 210; MH Tr. at 47:20-48:6; MH Powerpoint at 26-28.). For example:

- Joe Nixon could not understand that two dimes were not as good as one quarter;

- He could not master the basic concept of borrowing;
- On spelling tests, he had a well established characteristic of having only the initial letter correct and a pattern of the first and last letters correct; and
- He could not learn from his mistakes.

(Virginia Nixon Aff., ¶ 19, at SR5. 210; Aug. 1972 Dozier School for Boys records, at SR5. 24-25; May 14, 1974 Letter from Belcher, at SR5. 50-51; MH Tr. at 47:20-51:10; MH Powerpoint at 26-29.).

All of Mr. Nixon's educational records illustrate that his intellectual functioning was far below normal. One example is a California Achievement Test administered to Joe during his seventh grade (although he was given an easier test designed for second to fourth graders) which confirmed that Joe was performing significantly lower than his peers. (MH Tr. at 55:18-56:23; MH Powerpoint at 27-30.). As a result of performances like these, his teachers repeatedly recommended that he receive special education.[26] (Aug. 1972 Dozier School for Boys records, at

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[26] The recommendations that Joe receive special education were coupled with the opinions that Joe "cannot perform academically" and that he "will need encouragement and understanding, along with a lot of help in the area of reading." (Aug. 1972 Dozier School for Boys records, at SR5. 24-25; Aug. 19, 1974 Transfer Summary, at SR5. 53-54.). These reports illuminate that the recommendations for special education were squarely based upon Joe's deficient intellectual functioning (as opposed, for instance, to difficulties in anger management). However, as Dr. Keyes discussed, Public Law 94-142 (the Education of All Handicapped Children Act), which required states to implement policies that assure the free identification, evaluation, and appropriate educational assistance to all children with disabilities (at the pain of (footnote continued)

SR5. 24-25; Aug. 19, 1974 Transfer Summary, at SR5. 53-54; MH Tr. at 43:12-44:3, 46:2-25, 51:11-52:12, 54:11-56:17; MH Powerpoint at 27, 29.).

The State presented no evidence whatsoever to contradict these facts.

## C. There is Ample Evidence that Nixon Manifested Severe Deficits In Adaptive Behavior Beginning in His Early Years.

As defined by the AAMR, there are three categories of adaptive behavior, Conceptual, Social, and Practical, each with several subcategories. (MH Tr. at 42:15-43:7; Keyes Supp. Aff. at exh. T; MH Powerpoint at 19.). An individual who performs significantly below his peers in a few of these subcategories, meets the diagnostic criterion for mental retardation. (MH Tr. at 42:15-43:7; MH Powerpoint at 19.).

Significantly, in order to qualify, a person "is not required to have deficits in all areas. People with mental retardation have strengths as well as deficits." (MH Tr. at 42:22-43:7; MH Powerpoint at 19, 46; AAMR, MENTAL RETARDATION:

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losing federal funds), was only passed a few years later in 1975, see http://atto.buffalo.edu/registered/ATBasics/Foundation/Laws/specialed.php, so that the paper trail does not in every instance describe the basis of the referral in full clinical detail. See MH Tr. at 51:11-52:12. Thus, for example, a discussion of intellectual deficiencies may be mixed with one about anger management, without explicitly including the conclusion that the latter was secondary to the former (a result of frustration at inability to perform the assigned tasks (MH Tr. at 46:2-25, 51:11-55:17.)) rather than the primary problem. But Dr. Prichard's attempt to fill this silence with speculation about possible reasons for the referrals (MH Tr. at 178:21-179:7.) could hardly serve to displace the bedrock historical fact of the intellectual deficiencies themselves.

DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (10th ed. 2002), at SR5. 799.).[27] Thus the fact that an individual holds a job, has a family, or drives a car does not mean that one is not mentally retarded; the diagnosis turns on the deficits. (MH Tr. at 104:24-107:17.).

As the State's expert agreed, (MH Tr. at 212:23-24.), Mr. Nixon most certainly displayed significant deficits in several areas of adaptive behavior, beginning with interpersonal skills. According to the testimony of those who knew him, Joe was emotionally withdrawn, considered "a slow child," and was constantly called "dummy" and "stupid." (Affidavit, Marvin Carter, correctional officer, ¶¶ 2-4, Oct. 6, 1993, at SR5. 185-86; Ingram Aff., ¶ 3, at SR5. 156; John Nixon, Jr. Aff., ¶ 11, at SR5. 4; Virginia Nixon Aff., ¶ 18, at SR5. 210; MH Tr. at 43:15-44:3; MH Powerpoint at 20.). This victimization and abuse by his peers, (Ingram Aff., ¶ 15, at SR5. 159; Virginia Nixon Aff., ¶ 19, at SR5. 210; Thomas Earl Nixon Aff., ¶ 2, at SR5. 181; MH Tr. at 44:13-45:12; MH Powerpoint at 21-22.) and his resulting social ostracism, in turn further hindered his ability to learn and socially develop. (MH Tr. at 44:4-12.). Indeed, he suffered from a severe lack

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[27] For instance, an individual with mild mental retardation is described as able to "usually achieve social and vocational skills adequate for minimum self support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings." (MH Powerpoint at 8.).

of self esteem – manifesting itself in a suicide attempt attested to by his cousin, who managed to prevent Joe from hanging himself. (Ingram Aff., ¶ 15, at SR5. 159; MH Powerpoint at 21.).

Mr. Nixon also was unable to take care of himself and perform basic daily living activities:

- 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."
- "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."
- "Joe couldn't even play cards. Anytime he tried, he would end up with extra cards and be all confused and embarrassed. ..."

(Ingram Aff., ¶¶ 3, 6, at SR5. 155, 156; MH Tr. at 45:13-46:1; MH Powerpoint at 23.). Not surprisingly, Joe would wind up getting cheated out of money. (Virginia Nixon Aff., ¶ 19, at SR5. 210; MH Tr. at 44:13-45:10; MH Powerpoint at 22.).

## D. There Is Ample Evidence To Support A Finding That The Most Accurate Single-Number Value For Nixon's IQ Score Is 73

To this point, then, the record at a properly conducted hearing on remand would be largely undisputed: Mr. Nixon was at serious risk for the development of mental retardation and during his youth displayed sub-average intellectual functioning and deficits in adaptive skills.

Within this framework, a fair factfinder who read the standardized intelligence tests in the record for what they actually say and in the context of an overall clinical picture[28] would have ample basis to conclude that they are entirely consistent with a diagnosis of mental retardation.

"IQ scores are not like a loaf of bread that simply is what it is. They are messages whose meaning is not intrinsically ambiguous but does require interpretation. Once the mode of interpretation is applied, adjusted IQ scores usually tell a coherent story." James R. Flynn, Tethering the Elephant - Capital Cases, IQ and the Flynn Effect, 12(2) PSYCHOLOGY PUBLIC POLICY AND THE LAW 170, 187 (May 2006) ("Tethering the Elephant"), at SR5. 849.

Not surprisingly, and as Dr. Prichard agreed, multiple administrations of an IQ tests to an individual will not yield the exact same IQ score. (MH Tr. at 218:4-20.). A variety of factors, including, but not limited to, scoring variations by administrators, variations in the administration of the test, and differences in disposition by the individual, can produce variations in scores. (MH Tr. at 96:7-

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[28] See, e.g., In re Hawthorne, 35 Cal. 4th at 48-49 (finding that mental retardation is not measured according to a fixed IQ score, which is "insufficiently precise," but constitutes an assessment of overall capacity based on a consideration of all relevant evidence).

97:24.).[29] The scientific literature is consistent with this common sense concept. For instance, Dr. Keyes discussed one such study indicating that, before adjusting for the Flynn Effect or for the Standard Error of Measure, subsequent administrations of IQ tests to an individual resulted in a six to eight point difference – and sometimes up to a fifteen or even twenty-four point difference – in the individual's obtained scores. (MH Tr. at 97:6-98:17, 154:22-157:22; Keyes Supp. Aff. at exh. W.).

It is also uncontroversial that reported IQ test scores are influenced by the so-called Flynn Effect. (Final Order, p. 15 n.8, at SR5. 1239-40.).

When properly normed, an IQ test is calibrated initially to yield an average (mean) score of 100. (MH Tr. at 30:18-31:25; Chart, presented Oct. 23, 2006, Def. Exh. 4, at SR5. Vol. 10.). Thus, the scores received by the entire population at the time of proper norming would be expected to fall into a classic bell curve with a standard deviation of 15. (MH Tr. at 30:18-31:25; Chart, at SR5. Vol. 10.). An IQ score, therefore, is nothing more than a relative measure of performance, compared to a given population. This comparative concept is especially important in the

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[29] However, there is no evidence that Mr. Nixon's IQ scores over time were affected by any lack of effort. Each administrator of Mr. Nixon's IQ tests, including the State's expert Dr. Prichard, consistently declared that Mr. Nixon put forth very good effort and did not malinger. (MH Tr. 65:2-5, 81:24-82:3, 84:20-86:11, 91:24-94:24, 152:23-154:7, 174:4-7, 227:18-228:12.).

context of a mental retardation assessment, where those who are mentally retarded – by definition – are those whose level of intellectual functioning places them in the lowest 2.2 percent of the population. (MH Tr. at 194:19-22.). See Atkins, 536 U.S. at 309 n.5 ("It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.").

If one assumes a population mean of 100 at the time a test is administered and a standard deviation of 15, "significantly subaverage intellectual functioning" measured as "two or more standard deviations from the mean score," see FL. R. CR. PRO. 3.203(b), is demonstrated with an IQ score of approximately 70 (before accounting for the Standard Error of Measure). But, where the mean is not 100, or where the mean changes over time, two standard deviations below the mean will not remain at 70.

For more than two decades, led by the research of Dr. James Flynn, psychologists have recognized that the performance level of the general population on intelligence tests changes over time. (MH Tr. at 67:8-12.). Dr. Flynn has found – and others have confirmed – that the mean performance of the population in the United States increases over time at a rate of 0.3 IQ points per year. (MH Tr. at

67:8-68:23; MH Powerpoint at 32.).[30] This annual increase means, for example, that if the mean IQ score of a sample population was 100 in 1981, then the upward improvement in IQ performance will increase the mean to 105 by 1997 (0.3 x 16 years = 4.8 IQ points). See PSYCHOLOGICAL CORPORATION, WAIS-III AND WMS-III TECHNICAL MANUAL 9 (2002) ("WAIS-III Manual"). This phenomenon is referred to in the literature and by psychologists as the "Flynn Effect." See id.

The impact of the Flynn Effect on the reliability and accuracy of an intelligence score can be significant. IQ scores usually are a reliable indicator of an individual's performance against the population at the time the test is properly normed. (MH Tr. at 149:17-152:22; Tethering the Elephant, at SR5. 832-51.). But because the reliability and accuracy of an IQ test is based on the assumption that mean performance is constant, the Flynn Effect over time will render IQ tests unreliable in measuring performance against the mean of the population unless adjustments are made to correct for the shifting mean. (Id.). Accordingly, an individual's score on an IQ test will increasingly overestimate his or her actual performance with each passing year after the test is properly normed by the test

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[30] The Flynn Effect also has been verified regarding individuals, like Mr. Nixon, who have mental retardation. (MH Tr. at 70:2-72:15; Stephen J. Ceci, et al., The Flynn Effect and U.S. Policies, 58 (10) AM. PSYCHIATRIST 778 (Oct. 2003), presented Oct. 23, 2006, Def. Exh. 5, at SR5. Vol. 10.; Tethering the Elephant, at SR5. 832-51.).

developer. (Id.; MH Powerpoint at 32.). To reduce the reporting of an artificially high IQ scores, IQ tests are periodically "re-normed, " (MH Tr. at 68:15-23; MH Powerpoint at 32.), although, of course, the obtained IQ scores are still inaccurately inflated between these intermittent adjustments.

Therefore, the Flynn Effect *must* be taken into account. Indeed, the Flynn Effect is routinely applied to correct obtained scores to get a more accurate true score in all important contexts – by psychologists in practice, by researchers in the scientific field, and in the court room. (MH Tr. at 69:15-23, 72:18-23, 149:17-152:22; Tethering the Elephant, pp. 170-71, 186, at SR5. 832-33, 848.). See, e.g., Walker v. True, 399 F.3d 315, 320-23 (4th Cir. 2005), aff'd, 401 F.3d 574, cert. granted & vacated, 546 U.S. 1086 (2006) (remanding for an evidentiary hearing to determine whether the defendant was mentally retarded and stating that "the district court should consider the persuasiveness of [defendant's] Flynn Effect evidence" because "the relevant question is whether [defendant] scored two standard deviations below the mean, a question which is directly addressed by [defendant's] expert opinion as to the Flynn Effect."); Rivera v. Dretke, No. Civ. B-03-139, 2006 WL 870927, at *14 & n.28 (S.D.Tex. March 31, 2006) (citing the Flynn Effect as one consideration in determining that the defendant is mentally retarded) aff'd in part and vacated on other grounds --- F.3d ----, 2007 WL 3027070 (5th Cir. Oct. 18, 2007); Green v. Johnson, 431 F. Supp. 2d 601, 617

(E.D.Va. 2006) (ordering an evidentiary hearing whether defendant was mentally retarded, because lower court failed to consider material facts including the Flynn Effect); State v. Burke, 2005 WL 3557641, at *12-14 (Ohio App. 10 Dist. Dec. 30, 2005) (remanding for a new hearing taking into account Flynn Effect evidence).

The only remaining question is *how* to account for the Flynn Effect because even the State's expert acknowledged that the Flynn Effect is a "valid phenomenon." (MH Tr. at 184:20-185:1.). And the failure to account for the Flynn Effect altogether would leave decisions as to death-eligibility dependent on the decisions test-makers made as to when to re-norm their instruments.[31] If no adjustment were made for the Flynn Effect, the State would not only be violating Atkins by failing to make a reasonably reliable assessment of mental retardation, but also the Eighth Amendment of the Federal Constitution and Furman v. Georgia, 408 U.S. 238 (1972), by selecting people for execution on a purely

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[31] Dr. Flynn provides a vivid example –

> [I]magine [two boys] ... perform[ing] identically on IQ tests. But one was executed because he was unlucky enough to take the WISC and score a 75 measured against its obsolete norms; the other is excused as mentally retarded because he is lucky enough to take the WISC-R and scored a 68 when measure against its relatively current norms. Failure to adjust IQ scores in the light of IQ gains over time turns eligibility for execution into a lottery – a matter of luck about what test a school psychologist happened to administer.

(Tethering the Elephant, pp. 174-75, at SR5. 836-37.).

arbitrary basis. See, e.g., Furman, 408 U.S. at 256 ("The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.").

At the Motion Hearing, Dr. Keyes explained that it is standard practice in the educational testing community and in the scientific literature for psychologists and researchers (and Judges) to adjust individually obtained IQ scores to take account of the Flynn Effect. (MH Tr. at 69:15-23, 72:18-23, 149:17-152:22.).

Dr. Keyes supported this testimony with a quote from a recent article by Dr. Flynn:

> I also wish to call attention to another argument put forward by prosecutors, namely, that the Flynn effect is a "group phenomenon" and cannot be applied to individuals. As the reader now knows, this is just a senseless mantra. When the group making the IQ gains is composed of Americans, those gains render test norms obsolete and inflate the IQ of every individual being scored against obsolete norms.

(Tethering the Elephant, p. 186, at SR5. 848.). In contrast, Dr. Prichard failed to specify any methodology to account for the Flynn Effect. There is no reason to believe that a factfinder whose vision was not distorted by the errors described in the previous Points would "conclude that Dr. Keyes's testimony is plainly outweighed by Dr. Prichard's testimony." (Final Order, p. 16, at SR5. 1240.).

It is also acknowledged on all hands that any obtained IQ score must in addition be adjusted for Standard Error of Measure. (Final Order, p. 15 n.8, at SR5. 1239-40.).

As Dr. Prichard readily agreed, an obtained IQ score is only a point estimate. (MH Tr. at 216:8-22.). "An obtained IQ standard score must always be considered in terms of the accuracy of its measurement. . .", also referred to as the Standard Error of Measure ("SEm"). (MH Powerpoint at 33 (citation omitted).). This makes sense because, for instance, a ruler marked in inches is inherently only capable of measuring lengths to the nearest half inch.

As both experts agreed, in the case of the most widely used intelligence tests, the SEm is such that one can state with 95% confidence that the individual's true IQ score is within plus or minus 5 points of the obtained score. (MH Tr. 77:1-78:11, 187:1-188:13; 215:19-216:22.). Thus, as the authoritative treatise provides, and as Dr. Prichard also readily agreed (MH Tr. 216:8-22.), "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." APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS – TEXT REVISION 41 (4th ed. 2000) ("DSM-IV-TR"), at SR5. 792-95; see also MH Tr. 187:20-188:12.

But, as indicated above, the Circuit Court under the constraint of Cherry was unable to give this scientific consensus the legal weight mandated by the Eighth Amendment. That constraint, in turn, led it to reject Dr. Keyes's testimony regarding the statistically appropriate meaning to be given to the obtained IQ scores. (Final Order, p. 16, at SR5. 1240 (stating that Dr. Keyes's treatment of SEm "is the same testimony rejected by the Florida Supreme Court in Cherry").).

In any set of repeated observations, such as the batting averages of all major league players or the bar test scores of all takers, the results will tend to fall into a normal distribution. A bell-shaped curve will graphically illustrate which results are closest to the mean and which are outliers; the result at the top of the curve of a normal distribution will be the mean of the population. (MH Tr. 30:18-31:15, 82:12-18, 169:13-17.). See DICTIONARY OF STATISTICS 35, 303-06 (Oxford University Press 2006). IQ tests are no exception to this rule; if an IQ test is administered multiple times, the scatter of the obtained scores will also fall roughly into a normal distribution and a bell-shaped curve will capture the mean value.

Mr. Nixon was administered five standardized intelligence tests during his life time. (MH Tr. at 52:13-20, 54:18-55:17; MH Powerpoint at 27, 29.). Dr. Keyes explained that, according to standard practice, each individual test score was properly adjusted for the Flynn Effect and the SEm.

The results are shown in the following table:

| Test | Administered | Obtained Score | Sub Scores | Flynn Effect Adjustment | SEm Range |
|---|---|---|---|---|---|
| WISC | 2/12/1974 | 88 | Verbal: 79<br>Performance: 100 | 80 | 75-85 |
| WAIS-R | 6/4/1985 | 73 | Verbal: 74<br>Performance: 72 | 72 | 67-77 |
| Stanford-Binet | 9/9/1993 | "68"[32] | Verbal: 70<br>Abstract/Visual: 75<br>Quantitative: 72<br>Short-Term Memory: 61 | 66 | 61-71 |
| WAIS-R | 10/6/1993 | 72 | Verbal: 73<br>Performance: 78 | 68 | 63-73 |
| WAIS III | 9/15/2006 | 80[33] | Verbal: 81<br>Performance: 83 | 77 | 72-82 |
| | | | | **Mean: 73** | **Mean: 68-78** |

[32] The actual obtained score was much lower, a 65. But, to provide an accurate comparison of the tests, because the old Stanford-Binet had a standard deviation of 16 points in contrast to 15 points in the Wechsler, Dr. Keyes conservatively adjusted this score to a "68." (MH Tr. 82:12-83:9.).

[33] Because this test was administered by Dr. Prichard, there was detailed discussion at the hearing of the significance of the scatter of the answers that Mr. Nixon gave on its subtests. Dr. Keyes testified that their "aces and spaces" pattern, which Mr. Nixon has repeatedly displayed during standardized testing, was consistent with mental retardation. (MH Tr. at 104:24-107-17; 79:21-81:19, 88:4-8, 90:4-91: 23.). Dr. Prichard agreed that Mr. Nixon "certainly [displayed] the pattern of aces and spaces," but added that this phenomenon is not unique to mental retardation. (MH Tr. at 228:21-230:14.). In any event, the DSM-IV-TR, which Dr. Prichard recognized as authoritative, (MH Tr. at 216:8-11.), notes that "[w]hen there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived fully scale IQ score, will more accurately reflect the person's learning abilities." DSM-IV-TR, p. 42, at SR5. 795.

Dr. Keyes testified that, assuming the validity of every obtained test score, including the very problematic 1974 administration of the WISC,[34] there is no statistical difference between the highest and lowest adjusted score (i.e., there is no statistical significance between the score of 80 on the 1974 administration of the WISC and the score of 66 on the 1993 administration of the Stanford Binet). (MH Tr. at 96:7-98:17.). The SEm for the 1974 administration of the WISC shows that the IQ score could be as low as a 75 and SEm for the 1993 administration of the Stanford Binet shows that the IQ score could be as high as a 71. There is no statistically significant difference between an IQ score of 71 and an IQ score of 75. (MH Tr. at 97:25-98:17.). Because the obtained results reflect a spread well within the expected range,[35] each could have been validly measured.[36]

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[34] There are grave concerns with the 1974 WISC: (i) the sample demographic was middle class Caucasian persons, very much unlike Mr. Nixon; this is "not valid testing and it certainly isn't the way standards are today." (MH Tr. at 59:19-60:19.); (ii) IQ tests today are re-normed every ten years because of significant scoring issues and archaic questions, which raises acute validity issues with this 25 year old test. (MH Tr. at 60:20-61:24.); (iii) the test administrator was not properly licensed. (MH Tr. at 62:3-63:16; MH Powerpoint at 31.); (iv) there was no scored protocols or subtest data. (MH Tr. at 63:17-64:21.); and (v) the large discrepancy between the reported verbal and performance scores – 21 points, or more than one standard deviation – is very indicative of brain damage. (MH Tr. at 64:22-66:2.). See DSM-IV-TR, p. 42, at SR5. 795 ("When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full scale IQ can be misleading.").

[35] Dr. Keyes was the only expert who could explain the significance of all the administered IQ tests. Dr. Prichard, in contrast, only relied upon the two

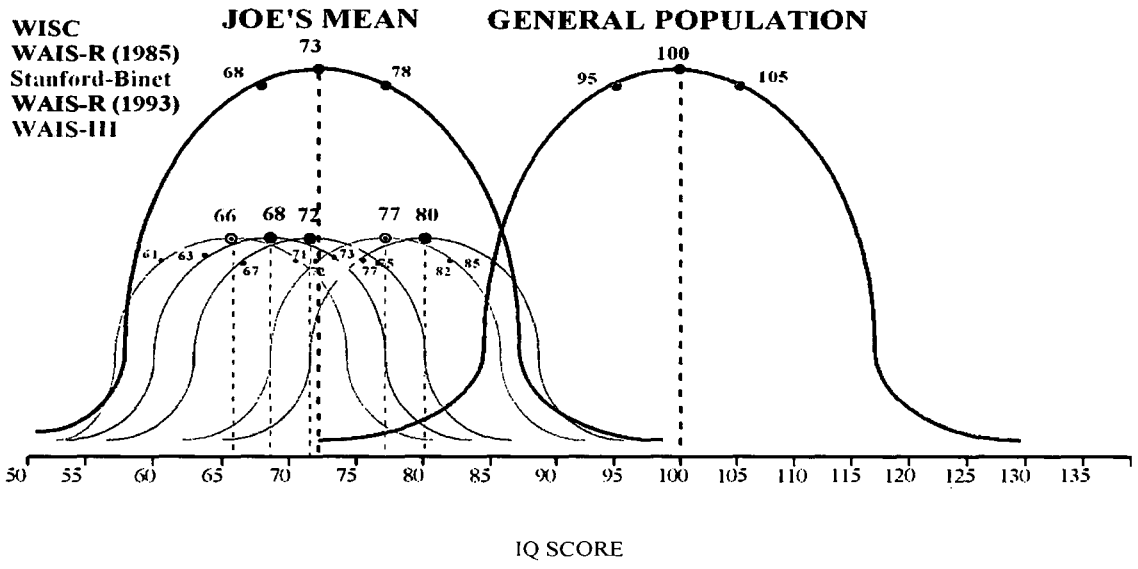
(footnote continued)

But if one wanted to come to the most accurate single-number estimate as a result of these repeated trials, one would – just as in any series of repeated trials – map the results onto a normal curve. That is just what Dr. Keyes did in his concluding slide reproduced below. (MH Powerpoint at 44.).

highest obtained scores and – contrary to the evidence – baselessly questioned Mr. Nixon's motivation or effort in taking all of the other IQ tests. (MH Tr. 65:2-5, 81:24-82:3, 84:20-86:11, 91:24-94:24, 152:23-154:7, 174:4-7, 227:18-228:12.). Dr. Prichard's speculation about Mr. Nixon's ostensible poor motivation and effort during other IQ tests in a forensic environment is particularly strained because he admitted that during his administration, which also was in a forensic environment, "there was no indication that Mr. Nixon was malingering. He performed well, suggesting good motivation on my testing occasion." (MH Tr. at 174:4-7; 227:18-228:12.).

[36] Dr. Prichard's testimony simply ignored this point. He quite rightly stated that if someone obtained an IQ score of 60 on one day and 120 on another day, one could hardly calculate the person's true IQ by averaging the two results. (MH Tr. at 222:13-224:12.). But that is because the two obtained scores, even when properly adjusted, are different by a statistically significant degree – meaning that one of them must be wrong. Here, there is no such statistical difference – meaning that all of the obtained scores could be right.

# JOE'S MEAN VS. GENERAL POPULATION

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The peak of the curve shows Mr. Nixon with an IQ score of 73, which is within the range of scores of individuals classified as mentally retarded. (MH Tr. 100:1-16; MH Powerpoint at 38-45.). See Atkins, 536 U.S. at 309 n.5 (an "IQ score between 70 and 75 or lower" is "typically considered the cutoff score for the intellectual function prong." (citation omitted)).

Again, it is not our position that this Court should on appeal summarily agree with these conclusions. It is our position that Mr. Nixon was denied a fair – and constitutionally mandated – opportunity to persuade a factfinder of them and that a remand is required to permit him to do so.

**POINT VI: To Conform To The Federal Constitution, This Court Must Require That The Proceedings On Remand Be Freed From Several Erroneous Legal Rulings Previously Made By The Circuit Court**

**A. The Circuit Court Erroneously Required Nixon To Bear The Burden Of Proof Because Under The Eighth and Fourteenth Amendments Of The Federal Constitution And Its Florida Counterpart The State Is Required To Prove That Nixon Is Not Mentally Retarded Beyond A Reasonable Doubt.**

In both its October 17, 2007 pre-hearing order (Oct. 17 Order, p. 2, at SR5. 1142.) and in its April 26, 2007 final order (Final Order, p. 7 n.4, at SR5. 1231.), the Circuit Court held that Mr. Nixon bears the burden of proof. However, it is the State's burden to prove that Mr. Nixon is not mentally retarded beyond a reasonable doubt. Mr. Nixon bases his argument on the premise that the absence of mental retardation is an element of capital first-degree murder, and thus, the State must prove the element to a jury beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970); Cf. Cruzan v. Missouri Dept. of Health, 497 U.S. 261, 282-83 (1990) (canvassing instances of civil proceedings in which due process requires state to bear burden of proof by "clear and convincing" standard before inflicting deprivation upon individual). Under Ring v. Arizona, due process requires any finding of fact which makes a defendant eligible for the death penalty must be unanimously found by a jury beyond a reasonable doubt. 536 U.S. 584, 602 (2002). While Ring dealt specifically with statutory aggravating circumstances, its holding applies to "factfinding[s] necessary to . . . put [a

defendant] to death." Id. at 609. Atkins held that the Eighth and Fourteenth Amendments prohibit a mentally retarded defendant from being put to death. 536 U.S. at 321. Since mental retardation is now a factual issue upon which a defendants eligibility for death turns, due process and the Eighth and Fourteenth Amendments require that a jury make the decision, that the State bear the burden of proof, and that the State prove beyond a reasonable doubt that the defendant is not mentally retarded.

**B. In The Alternative, If Nixon Must Show His Mental Retardation, The Appropriate Standard Is Preponderance Of The Evidence.**

In the alternative, if Mr. Nixon bears the burden of proof, then that burden must be no heavier than a preponderance of evidence. While Mr. Nixon raised this issue below, the Circuit Court found it "unnecessary to resolve the constitutional issue [of the level of Mr. Nixon's burden.]." (Final Order, p. 13, at SR5. 1237.). As a matter of judicial economy, this Court should do so now in advance of the remand.

"The allocation of the burden of proof reflects a societal judgment about how the risk of error should be distributed between litigants. [The Supreme Court of the United States] has said it well before: 'The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.'" Medina v. California, 505 U.S. 437, 466-67 (1992) (O'Connor dissenting).

The U.S. Supreme Court's decision in Cooper v. Oklahoma, 517 U.S. 348 (1997), sets the constitutional floor regarding the standard of proof. In Cooper, the Supreme Court held that no standard of proof greater than a preponderance of the evidence could be placed upon a capital murder defendant challenging his competency to stand trial. 517 U.S. at 355. The Court's examination of both English common law and contemporary law revealed that the burden of proof for a competency determination has long been a preponderance of the evidence. Id. at 356-61. Historically, mentally retarded persons have been viewed and treated similarly to incompetent persons by courts and under the law. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 332 (1989), rev'd on other grounds (citing Ellis & Luckasson, supra, at 432); accord State v. Wilson, 306 S.C. 498, 509, 413 S.E.2d 19, 25 (1992). The Cooper Court found that the procedural consequences to a defendant of an erroneous determination of competency were dire, and outweighed any interest the state had in creating procedural rules or standards, especially those with little or no historical roots or modern acceptance. Cooper, 517 U.S. at 364-68.

The consequence of an erroneous determination regarding mental retardation for a capital murder defendant (which is amplified here by the potential use of untrustworthy information) is even more dire, because such a determination could result in an impermissible imposition of a death sentence. In fact, in the course of recognizing the right under the Eighth Amendment of mentally retarded defendants

not to be executed, the Supreme Court has identified that right as grounded in a fundamental principle of justice. See Atkins, 536 U.S. at 311. Accordingly, when confronted with this same issue, the Indiana Supreme Court reasoned:

> We do not deny that the state has an important interest in seeking justice, but we think the implication of Atkins and Cooper is that the defendant's right not to be executed if mentally retarded outweighs the state's interest as a matter of federal constitutional law. We therefore hold that the state may not require proof of mental retardation by clear and convincing evidence.

Pruitt, 834 N.E.2d at 103. If Mr. Nixon is required to prove his mental retardation, no standard of proof higher than a preponderance of the evidence may be imposed upon him.[37]

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[37] Currently, 28 of the 32 jurisdictions that have decided which standard of proof is required to prove retardation have adopted the preponderance of the evidence standard. See ARK. CODE ANN. §5-4-618 (2006); CAL. PENAL CODE §1376 (West 2006); IDAHO CODE ANN. §19-2515A (2005); 725 ILL. COMP. STAT.5/114-15 (2006); IND. CODE §35-36-9-6 (2005); KY. REV. STAT. ANN. §532.135 (LexisNexis 2005); LA. REV. STAT. ANN. §28:381; MD. CODE. ANN., CRIM. LAW §2-202 (LexisNexis 2006); MO. REV. STAT. §565.030 (2005); NEB. REV. STAT. §28-105.01 (2005); NEV. REV. STAT. §174.098 (2005); N.M. STAT. ANN. §31-20A-2.1 (West 2006); N.C. GEN. STAT. §15A-2005 (2005); S.D. CODIFIED LAWS §23A-27A-26.1 (2005); TENN. CODE ANN. §39-13-203 (2005); UTAH CODE ANN. §77-15a-104 (2005); VA. CODE ANN. §19.2-264.3:1.1 (2005); WASH. REV. CODE ANN. §10.95.030 (2006); 18 U.S.C. §3596(c) (West 2006). See also Holladay v. Campbell, 463 F. Supp. 2d at 1341 n.21; Morrison v. State, 276 Ga. 829, 839 (Ga. 2003); Chase v. State, 873 So. 2d 1013 (Miss. 2004); State v. Lott, 779 N.E.2d 1011 (Oh. 2002); Blonner v. State, 127 P.3d 1135 (Okla. 2006); Commonwealth v. Miller, 888 A.2d 624; Franklin v. Maynard, 588 S.E.2d 604 (S.C. 2003); Ex parte Briseno, 135 S.W.3d 1, 12 (footnote continued)

## C. The Circuit Court Erroneously Rejected Nixon's 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*

In Mr. Nixon's Rule 3.203 Motion, he argued 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. (Rule 3.203 Brief, pp. 30-34, at SR5. 614-18.). Mr. Nixon raised this claim again in his October 11, 2006 submission to the Circuit Court. (Oct. 11 Letter, p. 2.). The Circuit Court, however, erroneously rejected Mr. Nixon's argument in its October 17, 2006 Order. (Oct. 17 Order, p. 2, at SR5. 1142.).

According to Fla. R. Crim. P. 3.203(d)(4), a death-sentenced defendant whose conviction and sentence were final, and who argued that their mental retardation precluded a death sentence, "shall" raise their Eighth and Fourteenth Amendments challenge in a motion pursuant to Rule 3.851 of the Florida Rules of Criminal Procedure. See FLA. R. CRIM. P. 3.203(d)(4). While Rule 3.203 does extend due process and other constitutional guarantees to those who have not yet

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(Tex. Crim. App. 2004); State v. Jimenez, 188 N.J. 390 (N.J. 2006). Thirty-six states and the U.S. Government provide for the death penalty.

been sentenced to death,[38] those currently under a sentence of death are potentially stripped of such constitutional guarantees.

By providing that the proceedings for determining the already-death-sentenced defendant's mental retardation shall be conducted in a Rule 3.851 proceeding, the defendant is at risk of not receiving the benefit of important procedural and constitutional rights. There will be no Strickland guarantee. See Lambrix v. State, 698 So. 2d 247 (Fla. 1996); Strickland v. Washington, 466 U.S. 668 (1984). This Court has never held that Ake v. Oklahoma, 470 U.S. 68 (1985), applies in Rule 3.851 proceedings. Further, Rule 3.851 proceedings have been defined as quasi-criminal in nature. See State ex rel. Butterworth v. Kenny, 714

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[38] Those individuals who have no death sentence in place will receive the right to the effective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), at the Rule 3.203 proceeding. They will have the right to the disclosure of exculpatory or favorable evidence bearing on the mental retardation defense that is in the State's possession. See Brady v. Maryland, 373 U.S. 83, 87 (1963). They will have the right to the assistance of a competent mental health professional. See Ake v. Oklahoma, 470 U.S. 68 (1985). They will have the right to request a Frye hearing on the reliability of IQ tests. See Frye, 293 F. at 1014. Similarly, these individuals will have a proceeding that includes the right of confrontation and the right to a jury. See Crawford v. Washington, 541 U.S. 36 (2004); Blakely v. Washington, 542 U.S. 296 (2004). Additionally, an individual not yet under a sentence of death will have the right to a direct appeal of an adverse verdict, a right that includes an enforceable guarantee that the individual receive effective appellate representation. Following the direct appeal, the defendant will be entitled to a post-conviction process in which they may challenge the effectiveness of the representation they received and any failure by the State to disclose exculpatory or favorable evidence.

So. 2d 404, 409-10 (Fla. 1998). An appeal from the denial of Rule 3.851 relief is not a direct appeal that includes an enforceable right to effective representation under due process. Finally, a defendant raising a mental retardation claim under Rule 3.851 may not have an effectual post-conviction procedure in which he may challenge his counsel's effectiveness or the State's failure to disclose any exculpatory or favorable evidence.

Thus, in violation of fundamental principles of equal protection and due process, Rule 3.203(d)(4) provides – without any basis that can withstand meaningful scrutiny – those who are already under a sentence of death with less constitutional protection than those who are not. Every individual facing a sentence of death who asserts mental retardation must be afforded the same opportunity with the same constitutional protections to present his claims under the Eighth and Fourteenth Amendments to the United States Constitution as well as Florida Constitutional and statutory law. See discussion of Ford v. Wainwright, 477 U.S. 399 (1986), supra Point I.E.

In light of the foregoing, Mr. Nixon is entitled on remand to receive a new penalty phase hearing or, at least, an evidentiary hearing before a jury on the mental retardation issue.

Other jurisdictions have grappled with this situation and attempted to reach accommodations that do not deprive the already-death-sentenced inmate of the

same constitutional guarantees and protections extended to those who are facing a criminal prosecution. For example, in Johnson v. State, 102 S.W.3d 535 (Mo. 2003), the Missouri Supreme Court was presented with an appeal from the denial of post-conviction relief in which substantial evidence of mental retardation had been developed. The evidence of mental retardation had not been presented to the jury that imposed the sentence of death. The Missouri Supreme Court concluded:

> The evidence necessary in light of Atkins was not presented adequately to a finder of fact, nor was the constitutional right to be free from the death penalty where mental retardation exists. Because it is cruel and unusual to inflict the death penalty on those who are mentally retarded, because incomplete evidence of Movant's mental capacity was presented, and because Movant's mental capabilities are questionable, the cause is reversed and remanded. On remand, the court shall set aside Movant's sentence and order a new penalty phase hearing.

Johnson, 102 S.W.3d at 541. Because "reasonable minds could differ" as to whether Mr. Johnson was retarded, the Missouri Supreme Court ordered a "new penalty phase hearing" that would obviously be subject to the Sixth Amendment. Id. at 540-41.

Similarly, in State v. Jimenez, the New Jersey Supreme Court held that a mental retardation claim must be proved to a jury, and remanded to the lower court. 188 N.J. 390, 408 (N.J. 2006) ("Jimenez II"). The Court then granted defendant's motion to clarify its opinion and held:

> Because the finding of mental retardation is like a dispositive mitigating factor, we hold that *if a single juror finds defendant has met his burden of proving mental retardation by a preponderance of the evidence, defendant is not eligible to receive a penalty of death....* [W]e conclude that the appropriate procedure is to give a defendant the opportunity to demonstrate to the jury in the penalty phase, by a preponderance of the evidence, that he or she is mentally retarded. If a single juror is satisfied that a defendant has met his or her burden, the defendant will be sentenced to a term of imprisonment."

State v. Jimenez, 191 N.J. 453 (N.J. 2007) ("Jimenez III") (emphasis added).

Further, the Oklahoma Court of Criminal Appeals granted post-conviction relief on a successive petition raising the capital defendants claim of mental retardation. Lambert v. State, 71 P.3d 30, 31 (Okla. Crim. App. 2003). Finding that "Lambert has raised sufficient evidence to create a question of fact on the issue of mental retardation," the court remanded for a jury trial solely on the issue of Lambert's mental retardation, stating:

> Lambert has already been convicted of first-degree murder, and the determination of mental retardation is not a finding of guilt or innocence. However, to ensure due process and simplicity of procedure, the capital defendant seeking a determination of mental retardation will be afforded the same protections he is given by statute on a charge of first degree murder.

Id. at 32 n.11. The court set forth procedures for determining mental retardation in post-conviction proceedings, including in procedures for "complete discovery" and a twelve-person jury. Id. at 31-32; see also Blonner, 127 P.3d 1135 (same).

In Atkins v. Commonwealth, on remand from the United States Supreme Court, the Virginia Supreme Court found that the "claim of mental retardation is not frivolous." 581 S.E.2d 514, 517 (Va. 2003). Thus, the court ordered a new jury empaneled "for the sole purpose of making a determination of mental retardation." Id.

In addition, many states have explicitly enacted statutory guarantees to the right to have a jury consider a capital defendant's mental retardation. See, e.g., CAL. PENAL CODE §1376 (2007 Supp.); LA. CODE CRIM. PROC. ANN. art. 905.5.1(c) (2007 Supp.); MD. CODE. ANN. CRIM. L. § 2-202 (2002); MO. REV. STAT. ANN. § 565.030 (4)(1) (2007 Supp.); VA. CODE ANN. § 19.2- 264.3:1.1 (2004 Repl.).

Florida's Rule 3.203(d)(4), as currently written, does not provide a constitutionally adequate procedure for resolution of mental retardation claims presented by those individuals already under a sentence of death. Mr. Nixon submits that any pending death sentence, including his own, should be vacated where a prima facie showing of mental retardation is made, and a penalty phase trial – by a jury – that comports with constitutional and due process ordered in order to determine whether the defendant is in fact retarded under Atkins.

## D. The Circuit Court Erroneously Denied Nixon A Hearing on His Claim That Mental Illness Bars His Execution

In Mr. Nixon's Rule 3.203 Motion, he argued that "Rule 3.203 Does Not Provide A Constitutionally-Adequate Procedure For Resolving Mental Illness

Claims." (Rule 3.203 Brief, pp. 34-37, at SR5. 618-21.). Then, on October 11, 2006, in advance of the October 23, 2006 evidentiary hearing, counsel for Mr. Nixon reminded the Circuit Court to address several legal matters raised by his Rule 3.203 Motion, including:

> Rule 3.203 is unconstitutional because it does not permit the assertion of claims that the defendant is ineligible for execution by reason of mental illness. See Nixon's Brief, Point VII at pp. 34-37 and Nixon's Reply at p. 4 n.6.

(Oct. 11 Letter, p. 2.).

On October 17, 2007, the Circuit Court issued an order holding, in part:

> As regards the constitutional claim that Rule 3.203 is unconstitutional because it does not permit the assertion of a mental illness claim, relitigation of Mr. Nixon's mental illness apart from retardation is foreclosed by the Florida Supreme Court's decision squarely addressing such issues in [Nixon IV]. 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.

(Oct. 17 Order, pp. 2-3, at SR5. 1142-43.).

The Circuit Court's errors should be corrected by this Court prior to remand.

Mr. Nixon reiterates here his positions below that (i) mental illness renders him categorically ineligible for execution under the Eighth Amendment; (ii) that he is entitled as a matter of federal procedural Due Process to a fair opportunity to make the appropriate evidentiary showing; and (iii) that the Florida statutory

scheme violates Federal Equal Protection by providing such an opportunity with respect to mental retardation but not mental illness.

Florida Statute Section 921.137 provides a categorical exclusion from execution for those that are mentally retarded based upon the United States Supreme Court's holding in Atkins, which, as already discussed, held that a capital defendant who was mentally retarded at the time of the offense cannot be executed because such a person is less culpable, faces a greater risk of false or coerced confessions, is less likely to be deterred, is less able to act pursuant to a thought-out plan, and is more likely to be falsely convicted. See Atkins, 536 U.S. 304. All of these same serious policy concerns apply to a capital defendant who is mentally ill. The Florida Statute, however, fails to include mental illness as a categorical exclusion from the death penalty, in violation of the Equal Protection Clause and the Eighth Amendment of the Constitution of the United States and the corresponding provisions of the Florida Constitution.

In an unprecedented joint action, the American Bar Association, American Psychiatric Association and American Psychological Association have adopted common standards explicating the situations in which mental illness stands as an Eighth Amendment barrier to the imposition of the death penalty. See Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, 30(5) MENTAL & PHYSICAL DISABILITY LAW REPORTER 668-677

(September-October 2006) available at http://www.abanet.org/disability/docs/DP122A.pdf. These standards derive from the principles of law that the Supreme Court of the United States followed in Atkins and Roper v. Simmons, 543 U.S. 551 (2005), see C. Slobogin, Symposium: The Death Penalty and Mental Illness: Mental Disorder as an Exemption From the Death Penalty: The ABA-IRR Task Force Recommendations, 15 CATH. U. L. REV. 1133 (Summer 2005), and are designed to identify those defendants whose execution is inconsistent with the retributive and deterrent functions of the death penalty. Cf. Enmund v. Florida, 458 U.S. 782, 788 (1982); Coker v. Georgia, 433 U.S. 584 (1977); Offord v. State, 959 So. 2d 187 (Fla. 2007) (holding that death penalty was a disproportionate punishment due to defendant's long-standing mental illness); State v. Ketterer, 111 Ohio St. 3d 70, 101-08 (Ohio 2006) (Lundberg Stratton, J., concurring) (citing and discussing ABA's Recommendation in calling for a re-examination of whether society should administer the death penalty to a person with a serious mental illness); see also Helen Shin, Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants, 76 (1) FORDHAM L. REV. 465-516 (Oct. 2007) available at http://ssrn.com/abstract=1023321.

Basic principles of Equal Protection mandate that the protections of Atkins and Roper extend to those persons whose mental functioning is identical although

caused by mental illness rather than mental retardation or youth. See Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972) (Equal Protection required that the access of married persons to contraceptives recognized by Griswold be extended to unmarried persons).

Although not yet fully developed, there is substantial evidence of Mr. Nixon's mental illness at the time of the alleged offense. See, e.g., Whyte Report, pp. 11-12, at SR5. 225-26 ("a severely impaired mental state [of Mr. Nixon] played a determining role [the day of the offense] in two crucial ways. First, the cumulative and gradually progressive effects on his cognitive faculties caused by the Mental Retardation and Organic Brain Disorder rendered him before, during and after the time of the offense, incapable of rational premeditation and incapable of conforming his conduct to the requirements of the law. Second, the specific mosaic of bizarre and pseudo-purposeful actions surrounding the offense can only be understood as the disjointed, purposeless, increasingly panicked and impulsive products of the paranoid decompensation of a grossly impaired mental and volitional capacity"); Report Re: Joe Elton Nixon, prepared by Alan L. Doerman, Psy. D., June 4, 1985, p. 4, at SR5. 129 ("A summation of the above neuropsychological studies using the Halstead Reitan Impairment Index would index clear organic impairments. The Halstead Reitan Index equaled 1.0 (.5

or above is considered brain impaired).").[39] Moreover, not long before the offense, Mr. Nixon was extremely unsettled and disturbed, he drank excessive amounts, and barely ate or slept during the weekend of the offense. (Dee Report, p. 3, at SR5. 191.). Several accounts indicate that during that very weekend, Mr. Nixon 'went blank' and was experiencing hallucinations. (Dee Report, p. 7, at SR5. 195.).

During Mr. Nixon's trial, he refused to attend court and "remained in the holding cell, dressed only in his undershorts, sitting backward on the commode, telling the Judge that he (Joe) did not have 'no business in there . . . I want to go to the moon. That's what I want to do.'" (1993 Keyes Report, p. 5, at SR5. 140.). In May 1985, not long after the offense, Mr. Nixon also sent a disturbing letter to his defense counsel. (May 2, 1985 Letter from Nixon, at SR5. 123.).

Mr. Nixon thus has a substantial Eighth Amendment claim. However, according to the Circuit Court, Florida has no process whereby a capital defendant can assert mental illness as a barrier to execution. If that is so, the Florida statutory scheme violates the Eighth and Fourteenth Amendments.

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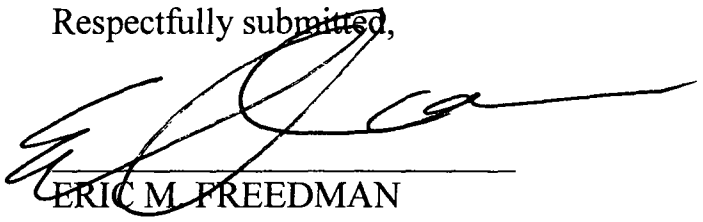
[39] There is substantial evidence that Mr. Nixon had brain damage and organic impairments throughout his life. See, e.g., Whyte Report, p. 4, at SR5. 218 (Joe had "brain tissue damage" and "Organic Personality Syndrome"); Dee Report, p. 2, at SR5. 190 ("Juvenile reports generated during this time indicate that Joe exhibited signs of mental deficiency and mental illness").

## IV.
## Conclusion

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

Dated: November 13, 2007

Respectfully submitted,



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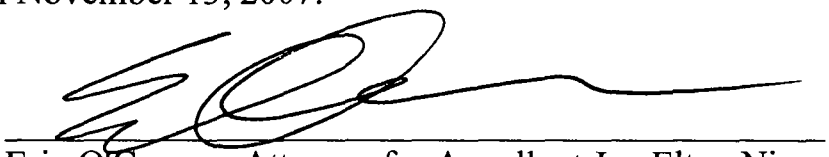
## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Initial Brief of Appellant have been mailed by Federal Express to: (i) Carolyn Snurkowski, Assistant Deputy General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-1050, and (ii) Eddie D. Evans, Assistant State Attorney, Office of the State Attorney, Leon County Courthouse, Room 475, Tallahassee, FL 32301 on November 13, 2007.



Eric O'Connor, Attorney for Appellant Joe Elton Nixon

## CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion for Rehearing complies with Florida Rule of Appellate Procedure 9.210(a)(2).

Dated: November 13, 2007.

Eric O'Connor, Attorney for Appellant Joe Elton Nixon

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

**REPLY BRIEF IN SUPPORT OF SUCCESSIVE MOTION UNDER FLA. R. CRIM. P. 3.203 AND 3.851**


| | | |
|---|---|---|
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## PRELIMINARY STATEMENT

At the Case Management Conference held herein on July 14, 2015, Petitioner, Joe Elton Nixon, sought leave to file a reply memorandum in order to clarify for the Court the parties' respective positions on certain key issues. The Court granted leave in its Case Management Order of that date.

Petitioner files this reply brief accordingly. In so doing, he adheres to his prior positions but avoids to the extent possible repeating the arguments he has already made in his opening brief filed on May 25, 2015 ("Pet. Br."). Nor, without waiver, has he felt called upon to respond to every statement made in the State's responsive brief, filed on June 15, 2015 ("Opp. Br."). Rather, he focuses on those questions as to which he believes that the precise issues in dispute need to be more sharply defined in advance of the Court's ruling thereon.

## CITATIONS TO THE RECORD

Record citations in this reply brief follow the same form as in Pet. Br.

In addition, Petitioner is submitting herewith on CD-ROM an updated version of the Expert Affidavit of Dr. Stephen Greenspan, Ph.D. initially filed in support of his successive motion, viz. "Amended Expert Affidavit of Stephen Greenspan, Ph.D. in Support of Successive Motion Under Fla. R. Crim. P. 3.203 and 3.851," dated August 10, 2015 ("Amd. Greenspan Aff.").

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## I.
## UPDATED PROCEDURAL HISTORY

The claim predicated on Hall v. Florida, 134 S. Ct. 1986 (2014), that is presented here had also been presented to the United States District Court for the Northern District of Florida in federal habeas corpus proceedings. Shortly before filing this motion Petitioner moved to stay those proceedings in deference to these. (Pet. Br. at 4 n.1; Opp. Br. at 8). On August 11, 2015, the District Court granted the requested stay. A copy of its order is annexed hereto as Exhibit A.

## II.
## ARGUMENT: Petitioner Has Filed a Proper Motion and is Entitled to a Hearing on It

### A. Mr. Nixon's Successive Motion On the Basis of *Hall* is Appropriately and Timely Filed

The parties are talking past each other on this issue.

In conformity with Fl. R. Crim. P. 3.851(e)(2), Petitioner asserted quite plainly in his opening brief, "The ruling in Hall, correcting the prior statutory reading of the Florida courts, constitutes 'new grounds' for the grant of relief, ones which did not exist at the time of the prior motion. This motion is filed within one year of their coming into existence." (Pet. Br. at 5). Therefore, the motion was timely under Fla. R. Crim. P. 3.851(d)(2)(A) (facts previously unavailable).

The State's brief argued at length that Hall was not retroactive (Opp. Br. at 12-16), and thus Petitioner's filing was not authorized by Fl. R. Crim. P. 3.851(d)(2)(B) (fundamental constitutional right retroactively applicable). The State supported this argument by an extended discussion of the retroactivity analysis propounded by Witt v. State, 387 So.2d 922 (Fl. 1980).[1]

The State's argument is simply irrelevant to Petitioner's position. Retroactivity analysis like that of Witt is necessary where there has been an intervening decision involving a change of

[1] The State also discussed a number of cases decided under the federal retroactivity standard of Teague v. Lane, 489 U.S. 288 (1989). Even on the State's own terms, that discussion was inapposite because the Florida retroactivity standard differs from the federal one. See Falcon v. State, 162 S.3d 954, 956 n.1 (Fl. 2015).

constitutional law — not where there has been one that construes a statute in a way beneficial to criminal defendants. Decisions of the latter type are always applied retroactively. See Schriro v. Summerlin, 542 U.S. 348, 351 (2004); Bousley v. United States, 523 U.S. 614 (1998).

In Hall, as the State correctly notes (Opp. Br. at 10), the United States Supreme Court did not declare Florida's mental retardation statute unconstitutional; the Court simply construed the statute to mean just what it had always meant up until the moment that the Florida Supreme Court decided Cherry v. State, 959 So. 2d 702 (Fla. 2007).

On this basis, the Florida Supreme Court has in fact applied Hall retroactively in state postconviction proceedings. On July 18, 2013, that court decided Haliburton v. State, 123 So. 3d 1146 (Fl. 2013), in which it determined that, because his IQ score was 74, Haliburton's second successive postconviction motion under Fl. R. Crim. P. 3.203 and 3.851 had properly been denied summarily on the authority of Cherry and Nixon v. State, 2 So. 3d 137 (Fl. 2009) ("Nixon V") (affirming this Court's Final Order of 2007). Haliburton sought certiorari review. On May 27, 2014, the Supreme Court decided Hall. On October 6, 2014, it granted Haliburton's certiorari petition, vacated the ruling of the Florida Supreme Court, and remanded for further consideration in light of Hall. See Haliburton v. Florida, 135 S.Ct. 178 (2014).

If the State's theory here were correct, the Florida Supreme Court on remand would have engaged in an extended Witt analysis as to the retroactivity of Hall. The Florida Supreme Court did no such thing.[2] On February 5, 2015, it issued an order reading in full:

> Upon reconsideration of this matter as ordered by the United States Supreme Court in Haliburton v. Florida, 135 S. Ct. 178, 190 L. Ed. 2d 8 (2014), we vacate our previous order of affirmance dated July 18, 2013, and remand this case to the trial court for an evidentiary hearing under Florida Rule of Criminal Procedure 3.203.

Haliburton v. Florida, 163 So. 3d 509 (Fl. 2015).

[2] Or if it did, it did so silently and concluded that Hall was indeed retroactive under Witt.

Reviewing this sequence of events, a Circuit Judge presiding over a case like this one has written, "[T]his Court concludes that the Supreme Court of Florida has, at least implicitly, given Hall retroactive application." See Order Denying Successive Motion to Vacate at 3, Florida v. Zack, No. 1996 CF 002517A (1st Cir., Escambia Co, July 8, 2015) (Nobles, J.).

Because Hall was fully retroactive, all Petitioner needed to do in order to invoke it was to file this successive motion within a year of the date of the decision (May 27, 2014), which he did, on May 25, 2015.

**B. Mr. Nixon Has Made A Prima Facie Showing Of His Intellectual Disability Under the Legal Standard Set Forth in *Hall* and is Entitled to an Evidentiary Hearing That Applies Current Clinical Standards**

Petitioner's opening brief shows that the factual showing supporting his motion is fully sufficient to require the Court to hold the hearing mandated by Fl. R. Crim. P. 3.203 (e) and due process. (Pet. Br. at 5-9). Petitioner is entitled under Hall to an intellectual disability determination based on current clinical standards and he has not had one. (See, e.g., Amd. Greenspan Aff. ¶¶113-28, 131 n.8; 142).[3]

The State responds that it is entitled to a summary decision in its favor. Its brief (Opp. Br. at 7-9, 18-22) characterizes this Court's prior rejection of Petitioner's claims as based on factual rather than legal grounds (notably a factual finding as to Mr. Nixon's IQ score), asserts that this putative finding was affirmed by the Florida Supreme Court, and concludes that the State is entitled to prevail summarily on Prong One of the intellectual disability diagnosis, subaverage intellectual functioning. (See Amd. Greenspan Aff. ¶106).

Considering that during the prior proceedings the State wisely conceded the existence of adaptive deficits (Prong Two) (Pet. Br. at 8)[4] and, equally wisely (Pet. Br. at 9), silently refrained

[3]The State's generalized disparagement of Dr. Greenspan's affidavit as legally insufficient (Opp. Br. at 22 n.6) fails to grapple with its thrust: No clinically accurate assessment of Mr. Nixon's intellectual disability status has yet been made by the judicial system.

[4] The State's brief thoroughly muddles (Opp. Br. at 18): (1) the issue of sub-average intellectual functioning, which was contested at the prior evidentiary hearing but which, as discussed below,

from contesting the overwhelming record that Mr. Nixon's symptoms have been manifest since childhood (Prong Three), it is understandable that the State desires to avoid an evidentiary hearing at which it will have to deal with Prong One under the clinical standards restored to the law by Hall. (Pet. Br. at 6-7).

But the State's description of the prior proceedings in this case is, at best, radically incomplete. Notwithstanding the full discussion in Petitioner's initial brief (Pet. Br. at 2-5), the State ignores three key points.

*First.* At the evidentiary hearing held here in 2006, Mr. Nixon's expert, Dr. Denis William Keyes, testified that all three criteria for mental retardation were met and that the most accurate estimate of Mr. Nixon's IQ score at the time of the crime was 73. (Pet. Br. at 1). The State's expert took the position that Mr. Nixon's IQ score was 80, and had been at least that at the time of the crime. (Pet. Br. at 2). After the Cherry opinion came down, this Court held that Dr. Keyes's testimony was legally irrelevant: "Essentially, Dr. Keyes' 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." (Final Order at 16; SR5, vol. 7, at 1240). Because Dr. Keyes's testimony "was essentially an argument for the law to be something other than what it is," it was "of no evidentiary value at all" and simply amounted "to disagree[ment] with the standard the Legislature established." (Final Order at 19, 20; SR5, vol. 7, at 1243, 1244). In short, the testimony was rejected as a matter of law.

Moreover, to the extent it discussed the competing views of the experts in order to evaluate the degree to which the evidence was "convincing," this Court, consistent with its view of the law,

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was resolved by this Court (erroneously as events proved) as a matter of law, and (2) that of adaptive deficits, which was uncontested as an evidentiary matter but not reached by this Court in light of its legal ruling on the first point. (Pet. Br. at 2-3). The Final Order discusses only two categories of evidence: (1) IQ scores (Final Order at 13-20; SR5, vol. 7, at 1237-44), and (2) impulsivity or suggestibility (Final Order at 20-24; SR5, vol. 7, at 1244-48; see Pet. Br. at 8-9). There is no discussion of adaptive deficits.

considered as unfavorable to Mr. Nixon all the "historical scores Mr. Nixon achieved ... above the statutory threshold." (Final Order at 20; SR5, vol. 7, at 1244). Thus, for example, two attained, and entirely unadjusted, IQ scores of 73 and 72 (See Amd. Greenspan Aff. ¶ 115) hurt Mr. Nixon's case rather than helped it.

*Second.* In light of this Court's disposition, Mr. Nixon made two arguments on appeal to the Florida Supreme Court in the case that eventually became Nixon V. (Pet Br. at 3). The first was that Cherry should be overruled. The second was that "the trial court's fact-finding, which was infected by legal error, is entitled to no deference," Nixon V, 2 So. 3d at 141. Therefore, Mr. Nixon argued, the case should be remanded so that this Court could "conduct further proceedings in which it views the facts through the correct legal lens." (Nixon V Brief at 2; A2015 at 16).

The Florida Supreme Court, of course, refused to overrule Cherry. Therefore, it ruled in a section headed "Trial Court's Factfinding" that this Court's evaluation of the experts' competing testimony was not "induced by an erroneous view of the law" and refused to disturb it. (Nixon V, 2 So. 3d at 143-44). We now know that the Florida Supreme Court was wrong on the first point. Necessarily, therefore, its statement respecting the second no longer has any precedential force and can hardly preclude Mr. Nixon from a hearing in which this Court's evaluation of the evidence conforms to constitutionally-mandated standards.

*Third.* In the years before Hall, the Florida Supreme Court repeatedly cited Nixon V as authority for the validity of the strict IQ score cutoff of 70 that it had originated in Cherry. In other words, the Florida Supreme Court treated Nixon V having been as a decision of law, not fact.

Notably, as pointed out in the initial brief (Pet. Br. at 4 n.1), the Florida Supreme Court did so at some length its decision in the Hall case that the United States Supreme Court reversed. See Hall v. State, 109 So.3d 704, 707-10 (Fla. 2012) ("In Nixon, the appellant challenged our decision in Cherry, also alleging that we improperly imposed a firm IQ cutoff of 70. We disagreed.") This alone would appear to pose some difficulties for the State's argument that "error ... that the [U.S. Supreme] Court found in Hall simply did not occur in this case." (Opp. Br. at 21).

But Hall v. State is not an isolated example. Others include not only the above-mentioned Haliburton v. State ("The Court has repeatedly rejected Haliburton's argument that imposing a bright-line cutoff IQ score of 70 for finding a defendant to be mentally retarded and ineligible to be executed is unconstitutional," citing Nixon V), but also Franqui v. State, 59 So. 3d 82, 90, 94 (Fl. 2011) (describing Nixon V as having rejected Nixon's claim that "mandating a cut-off IQ score of 70" is unconstitutional and that "states must recognize the higher cut-off IQ score of 75"), Kilgore v. State, 55 So. 3d 487, 507-09 (Fl. 2010) (quoting Nixon V at length and describing it as having rejected "the exact argument" that an IQ cutoff of 70 is unconstitutional), and Schoenwetter v. State, 46 So.3d 535, 562 (Fl. 2010) ("To assert a valid claim [of mental retardation] a defendant must establish that he or she has an IQ of 70 or below. [Nixon V]").

Either the Florida Supreme Court has repeatedly stated the holding of Nixon V inaccurately or the State has done so in its brief here.

Of course it is the latter alternative that is correct. If this Court had indeed held that Mr. Nixon's true IQ score was 80 and the Florida Supreme Court had affirmed that factual finding then Nixon V would have made its one and only appearance in the law reports on the day its case-specific conclusion was announced. And on that day there would have been no need for any discussion, much less an extended one, of whether the Florida IQ cut-off IQ was 70 or 75.

In fact, what this Court held and the Florida Supreme Court affirmed in Nixon V was that Mr. Nixon's own proffered IQ score of 73 defeated his intellectual disability claim as a matter of law. That legal proposition has been obliterated by Hall, and Mr. Nixon is entitled to a determination of the facts. The State may not avoid a hearing in 2015 by relying on factfinding that did not happen in 2007.

## III.
## CONCLUSION

In light of Hall, the Court should conduct an evidentiary hearing on this motion and then vacate Mr. Nixon's death sentence as violative of the Eighth and Fourteenth Amendments to the United States Constitution as well as Florida constitutional and statutory law.

Dated: August 13, 2015

Respectfully submitted,

/s/ Marie-Louise Samuels Parmer

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# Exhibit A

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF FLORIDA**
**TALLAHASSEE DIVISION**

**JOE ELTON NIXON,**
**Petitioner,**

**v.** **Case No.: 4:10cv20/MCR**

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

**ORDER STAYING PROCEEDINGS**

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** this11th day of August, 2015.

*M. Casey Rodgers*
**M. CASEY RODGERS**
**CHIEF UNITED STATES DISTRICT JUDGE**

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Support of Successive Motion Under Fla. R. Crim. P. 3.203 and 3.851 has been electronically served via the Florida Courts E-Filing Portal on: (i) Carolyn Snurkowski, Assistant Deputy Attorney General, Office of the Attorney General, PL01, The Capitol, Tallahassee, FL 32399; and (ii) Eddie D. Evans, Assistant State Attorney, Office of the State Attorney, 301 S. Monroe Street, Tallahassee, FL 32301 on August 13, 2015.

/s/Marie-Louise Samuels Parmer
Marie-Louise Samuels Parmer
Attorney for Joe Elton Nixon

SMRH:209544900.1

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

**DECLARATION OF ERIC M. FREEDMAN**

I, Eric M. Freedman, declare as follows:

1. I am the principal of the Law Offices of Eric M. Freedman and represent Joe Elton Nixon in these proceedings.

2. All the evidentiary materials submitted in support of Mr. Nixon's Successive Motion Under Fla. R. Crim. P. 3.203 and 3.851 have been previously authenticated in these proceedings except for the following documents, each of which I certify to be a true and correct copy: Pages 787-796, 889-924, 1013-1015, 1084-1090, 1461-1464, and 1465-1478 of the Amended Expert Affidavit of Stephen Greenspan submitted on a CD-ROM herewith

I declare under penalty of perjury under the laws of the United States and the states of Florida and New York that the foregoing is true and correct.

Executed on August 12, 2015 in New York, New York.

ERIC M. FREEDMAN

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Declaration of Eric M. Freedman has been electronically served via the Florida Courts E-Filing Portal on: (i) Carolyn Snurkowski, Assistant Deputy Attorney General, Office of the Attorney General, PL01, The Capitol, Tallahassee, FL 32399; and (ii) Eddie D. Evans, Assistant State Attorney, Office of the State Attorney, 301 S. Monroe Street, Tallahassee, FL 32301 on August 13, 2015.

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