IN THE SUPREME COURT OF FLORIDA

JOE ELTON NIXON,

Appellant,

v. CASE NO. SC07-953

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASST. DEPUTY ATTORNEY GENERAL
FLORIDA BAR NO. 158541

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS[1]

The facts and circumstances surrounding the death of Jeanne Bickner may be found in the opinions of the Florida Supreme Court affirming Nixon's conviction and sentence of death, Nixon v. State, 572 So. 2d 1336 (Fla. 1990) and Nixon v. State, 932 So. 2d 1009 (Fla. 2006).[2]

Nixon was arrested August 14, 1984. At a pre-trial hearing on February 27, 1985, trial counsel stated that although he had raised the issue of Nixon's competency in another case which had gone to trial several weeks previously, he did not intend to raise the issue in this case (6TR 899-900).[3] Trial counsel did however, move for the appointment of mental health experts for use in mitigation (6TR 900), and filed a written motion for such (1TR 90-91). On March 12, 1985, Judge Hall appointed Dr. Ekwall (a psychiatrist)

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[1] TR - Original Trial Record; PCR - Postconviction Record and MRR - Mental Retardation Record are used to delineate citations to the records in this case.

[2] In Woods v. Quarterman, 493 F. 3d 580, 583 (5th Cir. July 23, 2007)("...when the salient issue is whether the Petitioner is mentally retarded, the circumstances of his crime and his testimony at trial can be instructive in evaluating the merits of his Atkins claim.").

[3] Michael Corin, Nixon defense counsel, had represented Nixon previously on another charge when Nixon was arrested for the instant murder. Judge Hall, who had presided over the other case, noted Nixon had been evaluated in that case by Dr. Stimel, who had given "assurances that we could proceed with confidence" (6TR 909-10).

and Dr. Doerman (a psychologist) to assist the defense (1TR 92-93).[4]

The State presented 35 witnesses in its guilt phase case in chief, including evidence that Nixon gave a lengthy statement to police (5PCR 915-965). Nixon told police he met the victim on Saturday in the Sears store at Governor's Square Mall (5PCR 919). Nixon claimed she knew him and they talked (5PCR 921). He said he had skinned his arm on a hot exhaust system component while working on his uncle James Igles' Monte Carlo, which he had in his possession (5PCR 920, 922). Nixon said he told the victim he did not want to drive his uncle's car any more with the muffler like it was (5PCR 921), so she offered him a ride home (5PCR 919, 921). They got into her orange MG sports car, with a black top, and headed out of the parking lot towards Tram Road, where he told her he lived (5PCR 922, 924). When they got to the truck route, Nixon hit her on the head, made her get out of the car, and put her into the trunk (5PCR 926-27). He found a wooded area (5PCR 928, 958), where he let the victim out of the trunk. Ms. Bickner begged him not to kill her and offered to get money, but he told her he had already given three years to society for something he had not done

[4] Jury selection began on July 15, 1986. Nixon was present during the first day of voir dire (7TR 1185 et. seq.). Thereafter Nixon voluntarily absenced himself from most of his trial.

(5PCR 928). He put a cloth bag over her head, and tied her to a tree in a sitting position with jumper cables around her waist and her left arm (5PCR 930-31, 958-59). He set fire to the stuff in the trunk and glove compartment, including her pocket book except for $5 cash, which he kept (5PCR 932-35). While the items burned, the victim talked to Nixon, and begged for her life. She sat tied to the tree with a bag over her head, offering to sign the title to her car over to him (5PCR 935). Nixon choked her with some rope, and then got the car's top or a tonneau cover out of the fire and threw it on her head (5PCR 935-36). He then returned to the mall, repaired his uncle's Monte Carlo, and left to pick up his friend Tiny Harris (5PCR 938-39). They returned to the mall, retrieved Nixon's uncle's car and deliver it to him (5PCR 940). Nixon later burned the victim's car on Tuesday morning after reading in the paper that the victim's body had been found (5PCR 949-50).

The keys to the MG and its gas cap were found in the locations described by Nixon (11TR 1926, 2015-16, 2043-44). His finger and palm prints were found in various locations on the vehicle, including the trunk lid (12TR 2041, 2043-44). Following his arrest, Nixon called his uncle, James Nixon, from jail, telling him, "I've done something real terrible. . . . I've done murdered somebody. . . . a lady" (11TR 1970-71).

Following Nixon's conviction, the penalty proceedings were held on July 24 and 25, 1985. In his opening statement, defense counsel told the jurors they would find out that Nixon was twenty-three years old and had been in trouble since he was ten. Nixon had called the Sheriff's Department four days before the murder, seeking help "before he hurt someone;" although law enforcement officers came to Nixon's home, they did not arrest him (5TR 756). Then, on the day before the murder, Nixon had attacked the woman he loved in front of police officers; this time, he was arrested, but was almost immediately released. When Wanda Robinson and Nixon's brother next saw Nixon, he acted "crazy" (5TR 756). Defense counsel told the jurors it would be obvious that Nixon was "not normal organically, intellectually, emotionally or educationally or in any other way." (5TR 756-757).[5]

Eight witnesses testified in mitigation. Nixon's mother, Betty Nixon, testified that Nixon, a middle child of eight children, had problems in school (5TR 764-766). Her son, however, had mental and emotional problems, and she thought that he needed

[5] The State's evidence consisted of judgments of conviction for armed robbery (in Georgia) and battery on a law enforcement officer (in Leon County), as well as, over defense counsel's objections, testimony concerning Nixon's statement that he had removed the victim's underwear in order to terrorize her (5TR 758-761).

help because he "didn't seem to be normal" (5TR 766). Wanda Robinson testified that Nixon had been living with her at the time of the murder and had been acting strangely (5TR 770). He had "looked wild" Saturday night, and, as a result, she had been afraid to spend the night at home; when she returned to her home at 3:00 p.m. Sunday afternoon, she found "strange" notes from Nixon scattered around (5TR 770-773).

Defense counsel called police officers who verified that Nixon had called the sheriff's office and asked to talk with someone before "he hurt somebody"; by the time officers arrived, however, Nixon was relatively calm and agreed to leave the premises (5TR 776-785). Nixon was arrested on August 11, 1985, for battery on Wanda Robinson; after he calmed down, he was released (5TR 786-793).

Defense counsel then called two mental health experts: Dr. Merton Ekwall, a medical doctor in neurology and psychiatry; and Dr. Allen Doerman, a Ph.D. psychologist (5TR 796-834). Dr. Ekwall examined Nixon twice and had reviewed family background documents, including Nixon's prior incarceration and treatment records (5TR 806, 820, 795).[6] Dr. Ekwall testified that psychiatric records "from way back" revealed that "there is something about this boy

[6] These documents, which were likewise relied upon by Dr. Doerman, were introduced into evidence by defense counsel.

nobody could quite understand" and that there was "something wrong someplace because he was different from others" (5TR 799). The documentary history indicated that Nixon did not learn from experience; every time he went to Marianna, he "came out just the same as when he went in" (5TR 799-800). Dr. Ekwall administered an EEG and conducted a neurological exam, but failed to find "any definite reason why he is the way he is" (5TR 800). Although Nixon was not psychotic, he did have "brief psychotic episodes," especially when he was intoxicated (5TR 800-801). Dr. Ekwall noted that Nixon's formal schooling was "interrupted by all the incarcerations," but, while Nixon's intelligence was "on the low side of normal," it was "adequate" (5TR 802). He testified that Nixon was anti-social, and noted that Nixon told the truth as he saw it "which is not necessarily the truth to anybody else" (5TR 801-802, 810); moreover, Nixon knew what he did was wrong, but "didn't feel it was wrong as others seem to feel it" (5TR 811-812). While Nixon, in his opinion, was competent to stand trial, both of the two statutory mental mitigating factors applied in his case (5TR 802-803). On cross-examination, Dr. Ekwall acknowledged that Nixon was not "a very good risk for society" (5TR 812).

Dr. Doerman considered witness statements and depositions from this case, family background documents, incarceration records and prior psychiatric reports (5TR 819-820); in addition, he had

administered a battery of neuropsychological and personality tests (5TR 817-18). According to Dr. Doerman's testing, Nixon's IQ was 74, which Dr. Doerman described as being in the "borderline range" (5TR 817-818). The focus of Dr. Doerman's neurological testing was the Halstead-Reitan battery test, producing scores in the "brain damage range" - they were "barely" in that range, but they did indicate that Nixon had "some" brain damage, which Dr. Doerman described as "spotty" and "diffuse" (5TR 818-819, 822). As for Nixon's personality functioning, Dr. Doerman's diagnosis was that Nixon suffered from mixed personality disorder with elements of anti-social personality, borderline personality and narcissistic personality (5TR 821). Nixon was not psychotic, but "when he's put under a lot of stress, he has the capacity to break down and not perceive reality as the rest of us do" (5TR 821). Dr. Doerman admitted that he had little hope for "remediation" and that Nixon was, in fact, dangerous (5TR 822-23). He did feel that the two statutory mental mitigators applied because Nixon had been under stress from the breakup of his relationship with Wanda Robinson and, by his own account, had been drinking and not sleeping at the time of the murder (5TR 823-824). Because of Nixon's low IQ, his brain damage, and his history of incarceration, Nixon does not have "the cognitive wherewithal that the rest of us do;" when Nixon "runs into a situation that's stressful" and there are no "obvious

solutions," Nixon "doesn't come up with the right answers" (5TR 823-24). In this case, Nixon had acted out of "misdirected rage" at his personal situation at the time of the murder (5TR 824-825). Dr. Doerman testified that Nixon would do better in a structured environment such as prison, rather than in free society; he did not think death was the appropriate penalty for Nixon, because he was not "an intact human being" (5TR 831-834).

The defense exhibits included school and institutional records and psychological reports covering Nixon's life from 1972 to 1985. The exhibits began with Nixon's commitment to the Dozier School for Boys in 1972 at age 10, for arson; at that time, no psychiatric cause for his behavior could be determined (Defense Exhibits 3 & 4). The evaluation in February of 1974, when Nixon faced charges of breaking and entering and vandalism to a school, noted that Appellant had an extensive history of anti-social behavior, as well as an IQ of 88 or low average intelligence (Defense Exhibit 7). As a result of these charges, Nixon was sent to a group treatment home (Defense Exhibits 11-15). According to a psychological evaluation on April 29, 1975, Nixon's test results were typical for his age, but the evaluator expressed pessimism for Appellant's subsequent adjustment or performance; later testing on May 1, 1975, indicated that Nixon operated intellectually at a dull-normal level, but had a "seriously disturbed" perception of reality (Defense Exhibits 19,

20). When Nixon was finally furloughed from the program, it was observed that he still had many problems (Defense Exhibit 24).

After his furlough, Nixon was again arrested, for burglary and arson, and committed to the Division of Youth Services until his majority (Defense Exhibit 25). Nixon was tested psychologically and psychiatrically in the preceding three years and "no organic complications can substantiate his behavior" (Defense Exhibit 6). Nixon returned to the Dozier School for Boys until he was again furloughed in October 1976 (Defense Exhibits 27-35). In 1980, Nixon was arrested for armed robbery in Georgia; he pled guilty and was placed on probation (Defense Exhibit 36). Nixon was next convicted of burglary in Florida and sentenced to the Department of Corrections for four years in September 1981; at the time of his admission to the facility, testing indicated an 83 IQ or a low-average/borderline intelligence, as well as a lack of psychosis (Defense Exhibit 39). Nixon received good disciplinary reports while incarcerated (Defense Exhibits 41-43).

In rebuttal, Roy McKay, assistant superintendent for the Dozier School for Boys in Marianna, testified that he knew Nixon well from 1972 through 1976, when Nixon was at the school, and that Nixon's IQ was 88, which was a bit higher than the average IQ of 84 for children in that institution (5TR 836-37). He described Nixon as very manipulative (5TR 837-38). Sheriff's Deputy Larry Campbell

testified that, when he was with Nixon on August 14, Nixon showed no signs of being high on drugs or alcohol (5TR 841).

Defense counsel at the penalty phase closing argument, emphasized-- Nixon's low intelligence, his brain damage, his troubles in school, his age and his emotional disturbance and impaired capacity at the time of the murder (6TR 1022-1025). Defense counsel noted that Nixon had previously called the police to keep him from hurting someone and that he had cooperated with the police after his arrest and given a detailed confession in this case which included matters prejudicial to him (6TR 1025-1028). He reminded the jury of Wanda Robinson's testimony that Nixon had been a "wild man," and suggested that Nixon had fallen through cracks in the system (6TR 1028-1030). Defense counsel repeatedly emphasized that Nixon was "not normal," reminding the jury of Nixon's mother's testimony, the testimony of the two mental health experts and all of the circumstances of the case (6TR 1031-1037).

The jury recommended a death sentence by a vote of 10-2 (6TR 1053). The trial court followed that recommendation and sentenced Nixon to death on July 30, 1985.

The Remand Proceedings During The Direct Appeal

While pending on direct appeal, the Florida Supreme Court relinquished jurisdiction and remanded the case to the circuit court, directing the circuit court to conduct an "evidentiary

hearing" in connection with Nixon's claim of ineffective assistance of trial counsel.[7] On December 19, 1988, the circuit court re-convened for hearing on Nixon's Cronic claim.[8] The circuit court declined to make any findings, noting that although the first remand order from this Court explicitly directed the circuit court to make findings, the second one did not (3STR 58).

Once again, the case returned to Florida Supreme Court. By order dated February 1, 1989, the Court remanded the case for the third time. Following further evidentiary hearing by the trial court, on the evidence presented, the court found that Nixon had not sustained his burden of proof that he "(a) was neither informed nor knew of the trial strategy and tactic employed by Defense Trial Counsel Corin nor (b) did not consent thereto or (c) acquiesce therein" (4STR 7).

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[7] In light of the confusion as to the nature of further evidentiary hearing, on October 4, 1988, the Florida Supreme Court issued a second remand order, explaining on remand, "the trial court should conduct an evidentiary hearing with the rights of examination and cross-examination by the appellant and the State." The Court further noted that, "[s]ince it is the appellant who has the burden of establishing his claim of ineffective assistance of counsel, it is he who should be the proponent of the witnesses, with the state having the right to cross-examine." With these directions, the Court again remanded the case to the circuit court for evidentiary hearing.

[8] Michael Corin, defense counsel, testified as to what transpired between himself and Nixon dealing with strategy for trial.

On January 24, 1991, the Florida Supreme Court affirmed Nixon's conviction and death sentence. Nixon v. State, 572 So. 2d 1336 (Fla. 1990) (hereafter Nixon I).

The Postconviction Proceedings

On October 7, 1993, Nixon filed a rule 3.850 postconviction motion raising 14 grounds, including claims that Nixon's incompetence could be raised at any time, and "at the time of his trial in 1985 Mr. Nixon was mentally retarded and suffered from organic personality disorder that, under stress, resulted in psychotic decompensation. Reports of Drs. Dee, Keyes and Whyte, Appendices 2, 3 and 4." (Postconviction Motion dated October 7, 1993, p. 36-38 paragraph 52-55; p. 140-141; Failure to present mitigation that "Joe has mental retardation"; p. 209-215. "At the very least, he (Nixon) would have presented overwhelming evidence of mental illness in mitigation of his sentence that he would have received a life sentence.")

On October 22, 1997, relief was denied by Judge L. Ralph Smith, Jr. (19PCR 3561-3708). Nixon appealed, raising seven issues. Nixon v. Singletary, 758 So. 2d 618, 619 (fn. 1) (Fla. 2000) (Nixon II).[9]

[9] The Court addressed only one of the seven issues, finding "dispositive" the issue of whether there was "affirmative, explicit acceptance by Nixon" of trial counsel's strategy at the guilt phase of Nixon's trial, which this Court described as the "functional

This Court again remanded the case to the circuit court. Id. at 625. The evidentiary hearing was conducted on May 11, 2002.[10] Judge Ferris denied relief on September 20, 2001. Nixon v. State, 857 So. 2d 172 (Fla. 2003) *cert. granted, case reversed*, Florida v. Nixon, 543 U.S. 175 (2004). On remand the Florida Supreme Court, in Nixon v. State, 932 So. 2d 1009 (Fla. 2006), affirmed, finding that:

> Nixon next claims he was denied a competent mental health evaluation in violation of the principles enunciated in Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Pursuant to Ake, a defendant is entitled to have access to a competent mental health expert who will conduct an examination of the defendant and assist in evaluating, preparing, and presenting a mental health defense. The defendant in this case had the assistance of two mental health experts. Both Dr. Merton L. Ekwall and Dr. Allen L. Doerman performed extensive evaluations of Nixon that included neuropsychological testing, interviews, and reviews of pertinent documents and records. These documents and records included records of childhood discipline, records from correctional institutions, psychiatric reports, psychological reports, and records from group treatment homes. The fact that Nixon has now found mental health experts who have different opinions and who say he is mentally retarded does not demonstrate that the initial experts' evaluations were insufficient. *See* Rose v. State, 617 So. 2d 291, 295 (Fla. 1993).

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equivalent of a guilty plea." Id. at 620, 624.

[10] Corin once again testified that his strategy in representing Nixon was "to attempt to save his life" by "trying to show that even though the State may have been able to prove the acts for which he was accused...." (3SPCR 425).

The Court also concluded that counsel was not ineffective at the penalty phase regarding the presentation on mental retardation evidence and, Nixon was not incompetent to stand trial, in spite of testimony from defense doctors (Dr. Keyes for example), that Nixon suffered from mental retardation.

Post-decision Mental Retardation Litigation

As a result of this Court's "invitation", Nixon returned to the trial court to explore any possible mental retardation issues, (Motion Under Fla. R. Crim. P. 3.203 and 3.851), on June 16, 2006, asserted that he was mentally retarded and therefore not death eligible. An evidentiary hearing was held on October 23, 2006.

Nixon called Dr. Denis Keyes, who testified that doing a total distribution, that in reviewing his history, adaptive behavior and deficits and applying the Flynn effect and looking at the downward standards of measurement error, Nixon's IQ is 70 or that of a ten to eleven year old. (MRR Vol. 1 pp. 99-110).

Dr. Keyes, a school psychologist specializing in mental retardation regarding the death penalty and inclusion of mental retardation children into the classroom,[11] tested Nixon in 1993, on the Stanford-Binet 4th Edition intelligence test. (MRR Vol. 1 p.

[11] The record reflects that Dr. Keyes does not do intelligence testing, however he admitted to doing only 5 to 6 a year on individuals sentenced to the death penalty; he is opposed to the death penalty. (MRR Vol. 1 p.16-18).

17) Although he had neither tested nor collected any addition materials on Nixon since his testing in 1993, he prepared a "new affidavit" on October 22, 2006, enhanced by the factual record, reaffirming his belief that Nixon was mentally retarded. (MRR Vol. 1 p 20-21) In testifying, he explained his views regarding mental retardation generally and then related how the factual record demonstrated Nixon's mental retardation.

Dr. Keyes' testimony began with a discussion of the "risks" that Nixon was mentally retarded starting in early childhood finding that various issues from his mother's drinking during pregnancy to the psychological and physical abuse suffered at the hands of his parents when they called him stupid and punished him, culminated in evidence of mental retardation risks early on. (MRR Vol.1 p 38-42)

He also noted that there was significant evidence of deficits in adaptive behavior shown by Nixon's social deficiencies, to-wit: interpersonal difficulties, emotional withdrawal, belligerence, being called dummy and stupid, difficulties in school, need for special education, attempts to kill himself with Tylenol, gullibility, lack of ability to make his bed and inability to learn or satisfactorily communicate. (MRR Vol. 1 pp 43-48).

Dr. Keyes reviewed a number of tests conducted over the years assessing Nixon's intelligence and concluded that for a variety of

reasons, most likely because the results showed an IQ above 70, the tests were defective. The 1974 Wechsler Intelligence Scale for Children produced a full score of 88, with a verbal of 79 and performance of 100. Dr. Keyes opined that the test was old when given, however he was unable to show evidence that the test was invalid. Rather, he contended that he took issue with who gave the test, that there was more than 15 points variance in the verbal verses the performance score and that applying the Flynn effect, the test showed an IQ of 80 with factoring in the standard deviation measurement of +/- five points. (MRR Vol. 1 pp. 60-76).

Next he found the WAIS-R 1985 test, which produced a overall score of 73, with a verbal of 74 and performance of 72, showed that Nixon was in the "mental retardation range". (MRR Vol.1 p. 78-81).

As to the Stanford-Binet 4th Ed. test Dr. Keyes administered in 1993, he found Nixon's full scale IQ to be 65 then, adjusted it to 68, based on "some type of deviation conversion",[12] with sub-scores of verbal 70, abstract visual 70, quantitative 72, and short term memory 61. Adjusting for the Flynn effect he determined the full scale would be 66. (MRR Vol. 1 pp 82-84). In reviewing Dr.

[12] At MRR Vol. 2 p 127, DR. Keyes admitted there was no conversion rate to change his determination of a full scale score of 65 to 68, he testified he "guesstimated" and that practice was not normally done.

Dee's 1983 WAIS-R test he noted that the full scale was 72, with verbal of 73 and a performance of 78.

> 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.

(MRR Vol. 1 p 87).

Finally in assessing Dr. Prichard's 2006 evaluation, which found Nixon had a full score 80, with a verbal 81 and performance 83, and, a IQ of 77 "based on the Flynn effect", Dr. Keyes observed that there was subtest scatter consistent with mental retardation on Dr. Prichard's test. (MRR Vol. 1 pp 88-92).

In his view, looking overall at the tests, Nixon's IQ was 70 and his adaptive functions were impaired and this all occurred before 18 years of age. He concluded that Nixon was mentally

retarded at the time of the crime and was currently--in 2006--"evidencing adaptive dysfunctioning." (MRR Vol. 1 pp 100- 110).

On cross-examination, the State questioned Dr. Keyes regarding the Flynn effect and whether it was a viable standard of practice to which Dr. Keyes answered it was accepted and used. However, Dr. Keyes would not admit that the first test given in 1974, (which produced an IQ score of 88), the "old WISC" notoriously produced scores for minorities, specifically African-American males, which were suppressed – lower IQ scores, because it was weighed culturally against minorities. (MRR Vol. 1 pp 112-113). Thus Nixon's IQ score actually could be higher than the 88 IQ score.

Dr. Keyes was then cross-examined on his assessment of factual information he had secured from the records. He had testified on direct that there were childhood risks for mental retardation--one example being that Nixon had been dropped in scalding water and that "he had been burned to the bone". Upon exploring this with Dr. Keyes on cross, it was quite evident that the factual scenario which resulted in this traumatic event, possibly causing mental retardation, was not correct or was exacerbated, because Nixon had no facial or visual burn scars. Additionally for example, one could also conclude that the fact the Nixon was frustrated in school with his teachers did not necessarily mean he was retarded. (MRR Vol. 2 pp 120-122).

Keyes likewise admitted, that simply because there was scatter in the sub-groups of the IQ tests, it did not equate to mental retardation contrary to earlier testimony. (MRR Vol. 2 pp 125-126). He admitted that his tinkering with the full scale IQ of 65 to 68, produced from his testing in 1993, was not normally done and had no explanation for undertaking the change. (MRR Vol. 2 p 127).

He again affirmatively stated that Nixon's IQ was "around" 72 or 73, when explaining why Dr. Whyte's findings of moderate retardation were not sound. (MRR Vol. 2 p 128-129). However more importantly, Dr. Keyes admitted that the scoring manuals controlling IQ scoring, do not allow for an analysis of adaptive features "in assessing an IQ score." (MRR Vol. 2 p 131). Finally, Dr. Keyes assigned a Vineland score of 48 regarding Nixon adaptive skills, which he equated to a child's mental age of 7 years and 8 months. Believing this was inaccurate, Dr. Keyes testified that he thought Nixon's level was closer to a 10 to 11 year olds and said that, that corresponded to a person with a 70 IQ. (MRR Vol. 2 p 132-134).

The State called court appointed psychologist Dr. Greg Prichard, a clinical psychologist, who testified he has administered over a thousand IQ tests since becoming a psychologist in 1996. (MRR Vol. 2 pp 165-168). Tasked first with explaining what the Florida Statute requires, Dr. Prichard

emphasized that all three prongs must exist before a person can be found to be mentally retarded. (MRR Vol. 2 pp 169-170) On September 15, 2006, Dr. Prichard met Nixon and immediately informed him of the purpose for the evaluation. Nixon indicated that he understood. Nixon took the Wechsler series WAIS III 5th Ed. and the Test for Memory Malingering, know as the WRAT-3 or (TOMM). As a result of these tests, Dr. Prichard found Nixon's full scale IQ to be 80, with his verbal 81 and performance 83. There was no indication that Nixon was malingering. (MRR Vol. 2 P 174). Dr. Prichard testified that there was no need to go into adaptive behavior since Nixon's IQ did not fall within the retardation range and Nixon could not meet all three prongs of the statute. (MRR Vol. 2 pp 174-175).

Dr. Prichard reviewed Nixon's 1974 test, when Nixon was 12 or 13 years old. The test reflected an IQ full scale score of 88, verbal of 79 and performance 100. There was no evidence that brought into question the validity of the 1974 IQ score, therefore, it was clear to Dr. Prichard that Nixon could not demonstrate onset of mental retardation before 18 years of age. (MRR Vol. 2 pp 175-176, 178).

Dr. Prichard observed that while he read some reports that two teachers thought Nixon needed special education classes, he noted that: first Nixon was never placed in any special education class,

and second, there could have been a plethora of reasons why a child might be assigned such a placement--for example behavioral or emotional reasons not associated with mental retardation. Dr. Prichard opined that IQ testing and assessment was not complex and the literature simply required looking to test scores to make an assessment. (MRR Vol. 2 p 179).

In discussing the 1974 WAIS given to Nixon, Dr. Prichard acknowledged that there were well-known problems with the test when given to African-Americans based on biases in favor of whites--thus the scores for African-American were artificially deflated because they were not reflective of cultural background. It was Dr. Prichard's testimony that one cannot fake smart. Moreover IQ is not fluctuating but rather it is static, while IQ might vary by a few points, it would not fluctuate 10 to 15 points without other issues impacting the IQ. Once measured in adolescence, "IQ is IQ", (MRR Vol. 2 pp 180-181, 190):

> 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 no fluctuate. So, when you get scores that are in variance 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.

(MRR Vol. 2 pp 182-183).

Dr. Prichard also noted one would not use the Flynn effect to assess mental retardation. He noted, even under Nixon's theory presented by Dr. Keyes, and with the standard deviation, Nixon's IQ would be 75. And, Dr. Prichard observed *that* presumed that it

would be the lower side of an 80 IQ --not the upper half of the deviation measure, specifically an IQ of 85.

As to the notion of scatter, Dr. Prichard testified that scatter can occur in the normal IQ level evaluation or a genius's evaluation. Scatter is found in the 11 sub-tests making up the full scale which depicts variation in scoring of the sub-test and ideally demonstrates a person's strengths and weaknesses. It does not help in the diagnosis but rather gives information to explain the diagnosis. (MRR Vol. 2 pp 190-192).

Dr. Prichard was able to illustrate very graphically how a sub-test works and how Nixon provided insight into his mental abilities:

> 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.

(MRR Vol. 2 pp 194-198)

Based on Dr. Prichard's review of the sub-scores, he found that Nixon fell with the normal range in most sub-tests. Nixon fell just below a normal range in two categories, however, those deficits were not adequate to suggest that he should be labeled mentally retarded.

Finally as to the scoring done by Dr. Keyes on the Vineland Adaptive Behavior Scales test, Dr. Prichard was unable to discern how Dr. Keyes reached such a result. He observed that first Dr. Keyes scoring was not correct "48 became 41" --which meant that in interpreting the Vineland test, Nixon was at a range of severe retardation -- a clear misrepresentation of Nixon's adaptive skills. (MRR Vol. 2 pp 212-213). It was evident that Dr. Keyes results were not credible as far as Dr. Prichard could ascertain.

The trial court in rejecting Nixon's claim that he was mentally retarded, initially determined that any evidentiary hearing would be governed by Rule 3.203 Fla. R. Crim. P., that the purpose of the hearing would be to "solely" address "the issue of

mental retardation and not to relitigate the issue of mental lioness or competency to stand trial." (Order dated April 26, 2007, Record p. 1226).

The court concluded that because Nixon was sentenced prior to the effective date of the statute, it did not apply, but it was instructive as to assessing Nixon's claims. Regarding the burden of proof standard, resolution of the constitutional issue was unnecessary because Nixon failed to carry his burden of proof no matter the standard. As to credibility regarding the testimony of Dr. Keyes and Dr. Prichard, the court concluded:

> 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.

(Order dated April 26, 2007, Record p. 1240)

SUMMARY OF ARGUMENT

Nixon raises six issues for appellate review however, each is a subpart of the same complaint, that the trial court rejected his evidence that he is mentally retarded and therefore not death penalty eligible.

He specifically attacks this Court's decision in Cherry v. State, 959 So. 2d 702 (Fla. 2007), contending that it violates Atkins, especially the fact that this Court has held that an IQ of

70 has become a ceiling; that there are irrebuttable presumptions, legally and factually, imposed per §921.137, Fla. Stat. which cannot be breeched; and the statute has inadequate procedures to determine mental retardation and the definition violates the Eighth and Fourteenth Amendments and the Florida Constitution. None of these contentions are meritorious.

Issues II through IV, raise issues which are merely different attacks based on Nixon perception of Atkins. He challenges the fairness of the lower court's evidentiary hearing, arguing no deference should be afforded those findings. It is interesting to note that there is no statement of facts in Nixon's brief---directing the court to any deficiencies.

He takes issue with remarks made by the trial court as to Nixon's "culpability" as it relates to the circumstances of the crime and argues that those facts should play no part in reviewing the evidence re: mental retardation. The State would urge that those factors are important and must be placed in perspective in light of Nixon's next issue, to-wit: the validity of Nixon's taped confession. Neither issue has any merit.

The remaining two issues focus on Nixon's entitlement to another evidentiary hearing on his mental retardation and other universal legal complaints regarding the procedures and standards

used in assessing mental retardation. These claims also fail to present a valid claim upon which relief might obtain.

ARGUMENT

ISSUE I

WHETHER THIS COURT'S DECISION IN CHERRY V. STATE, 959 SO. 2D 702 (FLA. 2007) SHOULD BE RECONSIDERED IN LIGHT OF A NUMBER OF CONSTITUTIONAL ISSUES

Preliminarily, it is clear Nixon's case is governed by Rule 3.203(d)(4)(F) Fla. R. Crim. P. (2004), in that his first degree murder conviction and sentence of death were affirmed on direct appeal in 1990. Nixon's Rule 3.203 and successive 3.851 motion, fail to satisfy the pleading requirements of the rule, and therefore he was not entitled to an evidentiary hearing on the mental retardation claim. In support of his mental retardation contention, Nixon pointed to a June 16, 2006, affidavit from Dr. Keyes, attached to his pleadings below, which states Nixon is mentally retarded. That affidavit however is based on the last "evaluation" of Nixon performed by Dr. Keyes in 1993.[13] (Keyes, 2006

[13] Based on this previously submitted evidence, Dr. Keyes makes the following observations in his 2006 affidavit:

> "23. In my professional opinion it is now quite clear that, with the exception of my own in 1993, **all prior evaluations of Mr. Nixon have failed to include all the assessment areas necessary for a *professionally proper***

Affidavit) Dr. Keyes merely reasserted factual matters known and presented and rejected by the trial court in Nixon's previous 1993 postconviction litigation as to the mental retardation/competency conclusions of Dr. Keyes in 1993. As such, Nixon failed to "argue", "present" or "show" by clear and convincing evidence before the trial court that he had significant sub-average intellectual functioning, existing concurrently with deficits in adaptive behavior, and that his condition originated before the age of 18. Zack v. State, 911 So. 2d 1190, 1202 (Fla. 2005)(**No new evidence to support the argument that Zack is mentally retarded**.)

Moreover although mental retardation was discussed as a possible mitigating factor to the jury at the penalty phase of Nixon's trial, no Eighth Amendment argument was preserved at trial

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> **diagnosis of mental retardation**. Given the gravity of Mr. Nixon's situation, each of these assessment areas should have been explored in the context of their accuracy, timeliness, and purpose."

(2006 Affidavit p. 9)

And, he concludes:

> "54. **Joe Nixon has mental retardation** and has since he was a child. As an educational psychologist and expert in the field of mental retardation, and especially in light of the U.S. Supreme Court's ruling in Atkins v. Virginia, it remains my professional opinion that Joe Elton Nixon was mentally retarded at the time the instant offense was committed."

(2006 Affidavit p. 23)

that mental retardation should bar imposition of the death penalty.[14] Because of this deficiency, Nixon is collaterally estopped from claiming any Eighth Amendment bar to execution based on purported mental retardation.

However, an evidentiary hearing based on Nixon's IQ of more than 70, was held on Nixon's allegations of mental retardation. As a result of that evidentiary hearing, it is clear there is a total lack of any credible evidence that Nixon meets any of or all three prongs for mental retardation. And more importantly, in light of the compelling evidence produced by the State which utterly refutes any assertion that Nixon is mentally retarded, Nixon has neither satisfactorily argued nor proven by "any standard", that he has significant sub-average intellectual functioning, existing concurrently with deficits in adaptive behavior, and that his condition originated before the age of 18.

A. Reconsideration of Cherry v. State, 959 So. 2d 702 (Fla. 2007)

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[14] Claims of mental retardation are always available as either a bar to trial or mitigation of punishment. Indeed at trial and in postconviction, Nixon has argued incompetence in the form of mental deficiency in part as a basis to excuse conviction and the sentence of death. Nixon never specifically argued any Eighth Amendment-cruel or unusual argument. See for example: Penry v. Lynaugh, 492 U.S. 302 (1989) and Ford v. Wainwright, 477 U.S. 399, 401 (1986)(Eighth Amendment--incompetent to be executed). See also Ex Parte Carl Henry Blue, 2007 Tex. Crim. App. LEXIS 318 (Tex. Crim App. 2007)(Under state postconviction procedures, allegation of mental retardation to bar imposition of death penalty may be procedurally barred.)

Nixon argues that this Court's decision in Cherry v. State, 959 So. 2d 702 (Fla. 2007) is in violation of the principles set forth in Atkins, as to the death penalty and eligibility of same for those found to be mentally retarded. His first complaint centers around the view that Atkins prohibits a "rigid IQ ceiling of 70." In Cherry, 959 So. 2d at 912-14, this court clearly articulated why the rule and statute properly allowed for the "three-pronged test" for assessing mental retardation. The trial court in Cherry, denied this argument:

> Neither Rule nor statute reference the standard error measurement or use the word "approximately". The Florida Department of Children and Families, in determining mental retardation for eligibility for developmental services, makes the 70 IQ score a bright-line cutoff. This Court notes, however, that the DSM-IV-TR recognizes IQ is more accurately reported as a range of scores, a position reflected in the staff analysis for (what was ultimately) Fla. Stat. § 921.137. 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.
>
> Supplemental Order at 7 (citations and footnotes omitted).
>
> Both section 921.137 and rule 3.203 provide that significantly subaverage general intellectual functioning means "performance that is two or more standard

deviations from the mean score on a standardized intelligence test." One standard deviation on the WAIS-III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70. As pointed out by the circuit court, the statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear. We defer to the plain meaning of statutes:

* * *

Because the circuit court applied the plain meaning of the statute, it did not err in its conclusion that Cherry failed to meet this first prong.

In Atkins,(7) the Supreme Court recognized that the various sources and research differ on who should be classified as mentally retarded. For this reason, it left to the states the task of setting specific rules in their determination statutes. The Legislature set the IQ cutoff score at two standard deviations from the mean, and this Court has enforced this cutoff:

> The evidence in this case shows [the defendant]'s lowest IQ score to be 79. **Pursuant to Atkins, . . . a mentally retarded person cannot be executed, and it is up to the states to determine who is "mentally retarded."** Under Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below. See § 916.106 (12), Fla. Stat. (2003) (defining retardation as a significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age eighteen, and explaining that "significantly subaverage general intellectual functioning" means performance which is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the department); Cherry v. State, 781 So. 2d 1040, 1041 (Fla. 2000) (accepting

> expert testimony that in order to be found retarded, an individual must score 70 or below on standardized intelligence test).

Zack v. State, 911 So. 2d 1190, 1201 (Fla. 2005).(8)

> 7 In Atkins, the Supreme Court noted that "[i]t is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." 536 U.S. at 309 n.5. However, the Court concluded, "As was our approach in Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' Id. at 405, 416-17." Atkins, 536 U.S. at 317 (alterations in original).
>
> 8 Indeed, another jurisdiction considering a similar claim noted that fourteen of the twenty-six jurisdictions with mental retardation statutes have a cutoff of seventy or two standard deviations below the mean. Bowling v. Commonwealth, 163 S.W.3d 361, 373-74 (Ky.) (upholding use of seventy IQ score cutoff), *cert. denied*, 546 U.S. 1017, 126 S.Ct. 652, 163 L. Ed. 2d 528 (2005).

Given the language in the statute and our precedent, we conclude that competent, substantial evidence supports the circuit court's determination that Cherry does not meet the first prong of the mental retardation determination. 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.

Because we find that Cherry does not meet this first prong of the section 921.137(1) criteria, we do not consider the two other prongs of the mental retardation

> determination. We affirm the circuit court's denial of Cherry's motion for a determination of mental retardation.

This Court found that there was no violation of Atkins, in Cherry, due to a failure to meet a minimum requirement for mental retardation and reaffirmed that notion in Brown v. State, 959 So. 2d 146, 148-150 (Fla. 2007). Nixon's argument that Cherry is not sound is without merit. See State v. Strode, 232 S.W.3d 1 (Tenn. 2007)(Enforcement of state statute setting forth criteria for state findings of mental retardation regarding death penalty eligibility.)

B. Junk Science

Nixon assumes that "junk science" is at work in any assessment setting an IQ score at 70, as a starting point for an evaluation of mental retardation for ineligibility in imposing the death penalty.[15] He argues that Cherry, "permits the State to execute" Nixon if his IQ "is above 70 although below 75." Of course that is

[15] Navigating through the turbid waters of the science of mental retardation will, no doubt, present difficulties. Not only must trial courts have at their disposal the requisite data and mental health evidence, the trial courts must analyze all proffered testimony and reject not only "junk science," but also "junk scientists." See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

not accurate.[16] In Florida, like many jurisdictions, the actual IQ number is just one prong of a three-prong factoring process in assessing IQ.[17] As Dr. Prichard found and the trial court credited, based on competent, substantial evidence, Nixon's IQ based on valid testing is in a range higher than 75 even when factoring the "potential junk science" of the "Flynn Effect." As such, in Dr.

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[16] See Jones v. State, 962 So. 2d 337 (Fla. 2007) wherein the Court opined:

> Under Florida law, one of the criteria to determine if a person is mentally retarded is that he or she must demonstrate "significantly subaverage general intellectual functioning," which is defined as performance two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services. Cherry v. State, 959 So. 2d 702, 712-13, 2007 Fla. LEXIS 661, *28-29, 32 Fla. L. Weekly S151, S154-55 (Fla. 2007). Jones did not demonstrate significantly subaverage general intellectual functioning. Thus, we affirm the circuit court's order denying Jones' motion to bar execution due to mental retardation.

[17] See Ex Parte Carl Henry Blue, 2007 Tex. Crim. App. LEXIS 318, * 40-41 (Tex. Crim App. 2007), wherein the court held that rather than try and extrapolate an accurate score based on unexamined scientific concepts, specifically the "Flynn Effect":

> "We will simply regard the record as it comes to us as devoid of any reliable IQ score. We hold that the only evidence of an IQ score that the applicant has tendered fails to present sufficient specific facts that, even if true, would establish significant sub-average general intellectual functioning by clear and convincing evidence."

Prichard's expert opinion based on every doctors' evaluation of Nixon, his IQ was above a level where an assessment of adaptive functioning was apropos.

As observed in Brown, 959 So. 2d at 148-49:

> To establish mental retardation, Brown must demonstrate all three of the following: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. Fla. R. Crim. P. 3.203(b). fn2 The trial court determined that based on the three experts' evaluations, Brown did not come within the definition of mental retardation. When reviewing the trial court's findings relative to the existence of mental retardation, this Court looks to whether competent, substantial evidence supports the trial court's findings. See Trotter v. State, 932 So. 2d 1045, 1049 (Fla. 2006). This Court does not reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses. Id. at 1050.
>
> * * *
>
> Likewise, section 921.137 defines mental retardation as follows:
>
> [T]he 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.

§ 921.137(1), Fla. Stat. (2006) (emphasis added).

The testimony presented at the evidentiary hearing showed that Brown has seen numerous mental health experts since he was ten years old. Several IQ tests placed Brown in the mildly mentally retarded range, and there were references as to some deficits in his adaptive functioning skills. On the other hand, some of his IQ scores were higher than what a mentally retarded person would have, particularly as to Brown's performance IQ. Dr. McClain offered one explanation of this disparity, contending that the higher scoring tests were not the proper tests or they were outdated and needed to be adjusted. The other experts disagreed that an adjustment was needed and further asserted that these higher IQ scores established that Brown was capable at times of performing better than one who is mentally retarded. As a result, they concluded that any deficits in Brown's IQ were not caused by mental retardation but were caused by malingering and mental disorders which appeared on a sporadic basis.

* * *

Here, the trial court found that there was a question as to the accuracy of the IQ testing and proceeded to the evaluation of the second prong of the statutory definition of mental retardation, i.e., concurrent deficits in adaptive behavior. As to this second prong, the case became a conflict between the opinions of the experts which had to be resolved by the trial judge after weighing the evidence, listening to the expert testimony, and judging overall credibility of each. The trial judge's order denying relief clearly showed that the court was troubled with the testimony of Brown's expert, Dr. McClain, particularly in regard to her report that Brown's adaptive functioning indicates that he is in the severely mentally retarded range and would need extensive or continuous support. This report was contradictory to the evidence that Brown was engaged in a five-year intimate relationship prior to the crime, that he had his

> driver's license and drove a car, and that he was employed in numerous jobs including as a mechanic.
>
> In this appeal, the defendant essentially argues that the trial court should have weighed Dr. McClain's testimony more heavily and discounted the testimony of Drs. Prichard and Maher based on the testimony of Dr. McClain. However, questions relating to evidentiary weight and credibility of witnesses are reserved to the trial court. See, e.g., Trotter, 932 So. 2d at 1050 ("[T]he question of evidentiary weight is reserved to the circuit court, and this Court does not reweigh the evidence. . . . The determination of the credibility of witnesses also is reserved to the trial court."); Bottoson v. State, 813 So. 2d 31, 33 n.3 (Fla. 2002) ("We give deference to the trial court's credibility evaluation of Dr. Pritchard's and Dr. Dee's opinions."); Porter v. State, 788 So. 2d 917, 923 (Fla. 2001) ("We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact."). In this case, the trial court clearly found that Dr. McClain's testimony was not as credible as the testimony presented by the other expert witnesses. After all conflicts in the evidence and all reasonable inferences have been resolved in favor of the trial court's decision, there is competent, substantial evidence to support this decision.
>
> As the record provides competent, substantial evidence supporting the trial court's findings, we affirm the decision that Brown is not mentally retarded.

See Perkins v. Quarterman, 2007 U.S. App. LEXIS 26523 (5th Cir. Nov. 15, 2007)(Texas statute constitutional per Atkins "Texas courts have responded to Atkins by requiring a person claiming to be mentally retarded to 'show that he suffers from a disability characterized by (1) significantly subaverage general intellectual functioning, usually defined as an I.Q. of about 70 or below; (2)

accompanied by related limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18.' In re Salazar, 443 F.3d 430, 432 (5th Cir. 2006) (citing Ex parte Briseno, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004)) (internal quotation marks omitted).");

Cole v. Branker, 2007 U.S. Dist. LEXIS 69904 (E.D. N.C. Sept. 20, 2007) wherein the federal district court addressed a number of similar claims as presented by Nixon and rejected them as not violating Atkins:

> ...Before Atkins, North Carolina enacted N.C. Gen. Stat. § 15A-2005, which prohibits the execution of a mentally retarded individual. See id. at 315. Section 15A-2005 defines mental retardation as: 1) significantly subaverage general intellectual functioning which is defined as an I.Q. of 70 or below and 2) significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills, and work skills. N.C. Gen. Stat. § 15A-2005(a)(1) (West Supp. 2006). Both significantly subaverage general intellectual functioning and the significant limitations in adaptive skills must have manifested before age 18. Id. **Petitioner has the burden of proof to show mental retardation. Id. § 15A-2005(a)(2).**
>
> In denying petitioner's claim, the state court held that petitioner failed to satisfy the statutory definition of mental retardation set forth in N.C. Gen. Stat. § 15A-2005. See Aug. 21, 2003 Order at 9. The state court order summarized the evidence presented by the parties and concluded that petitioner failed to show significant subaverage general intellectual functioning, significant limitations in adaptive functioning, or that mental retardation was manifested before age 18. Id. 29
>
> 29 An I.Q. score of "70 or below on an individually administered, scientifically

> recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning." N.C. Gen. Stat. § 15A-2005(a)(2).

Petitioner extensively re-argues the facts and contends the evidence shows he is mentally retarded. He attacks the state court order, arguing it is an unreasonable decision because the court did not expressly resolve conflicts in the evidence and did not make specific findings of fact for each of the ten areas of adaptive functioning. Pet. at 14. He also criticizes the state court's failure to recognize or address certain various evidence that he finds favorable to his position. For example, he argues that the order does not acknowledge that petitioner, as part of a competency examination, "was given extensive psychological testing at Dorothea Dix, within weeks of the crime, after which four State-employed psychiatrists signed off on a diagnosis of mental retardation." Id. He also argues the order fails to acknowledge that "Dr. Brown's testimony is based solely on an I.Q. test done six years after the crime and does not include any evaluation of adaptive function." Id. He contends the state court's factual determination was unreasonable by clear and convincing evidence. Id. at 15. He argues that because the state court failed to make any findings that relate to three of the adaptive skills areas, this court must review the claim de novo. Id. at 39. 30

> 30 The three areas are self-care, self-direction, and health and safety. Pet. at 39.

The state court issued its order after a full presentation of the Atkins claim at an evidentiary hearing. See Aug. 21, 2003 Order at 4.

* * *

In reaching its decision, the state court recognized that petitioner had been given three I.Q. tests which were individually administered to petitioner by licensed professionals. See Aug. 21, 2003 Order at 5. Petitioner

received a full-scale score of 68 when he was administered the Wechsler Adult Intelligence Scale-Revised ("WAIS-R") at Dorothea Dix in October 1988, approximately four months after he killed Theresa Graham and Hattie Graham. Id. Petitioner received a full-scale score of 79 when he was administered the WAIS-R in 1989 by Dr. Emmanuelson, a clinical psychologist hired by the defense as an expert for the first trial. Petitioner received a full-scale score of 81 when he was administered the WAIS-R in 1994 by Dr. Grover, a clinical psychologist hired by the defense as an expert for the second trial. Id. The state court found that petitioner was not administered any standardized intelligence test before the age of 18, but recognized that he was administered types of intelligence tests twice during his school years. Id. at 6. When petitioner was tested in 1965 he scored 82 on the Otis Quick Score Mental test and when he was tested in 1968 he scored 83 on the Lorge-Thorndike test. 31 Id. The state court also found that Dr. Brown, who testified as a defense expert at the sentencing phase of petitioner's second trial, stated that he did not believe petitioner was mentally retarded, but characterized petitioner as being borderline. Id. at 5-6.

> 31 Petitioner was born in 1951; therefore, these tests were administered when he was approximately fourteen and seventeen years old.

The state court noted that Dr. Olley, a psychologist specializing in mental retardation, evaluated petitioner using the Scales of Independent Behavior-Revised and opined that petitioner was impaired in all ten of the adaptive skills areas. Id. at 6-7. The state court found, however, that "Dr. Olley produced no written records reflecting how the test was administered or scored. There was no evidence that Dr. Olley's evaluation was subjected to peer review." Id. at 7. The state court found that petitioner's first grade teacher described him as a slow learner, but also stated that he communicated well and interacted similarly to most six-year olds. Id. Petitioner's sixth grade teacher described petitioner as "stubborn" and "rebellious" and had difficulty distinguishing whether he was incapable of doing the work

or was refusing to do the work. Id. Shirley Simpson, a neighbor of petitioner's when he was growing up, testified he was "shy" and a "loner." Id. She also testified that petitioner at times would help care for her son. Id. at 8. The state court found that from 1985 until his arrest, petitioner was employed driving eighteen-wheel trucks for Meiggs Logging Company. Id. The state court found that petitioner had a steady relationship with the victim, Theresa Graham, they had two children together, and petitioner had purchased a car for Theresa. Id. Petitioner would sometimes drive Theresa and other family members to Virginia to go shopping. Id. at 9. When petitioner's mother was alive, she would give him a list and petitioner would grocery shop for her. Id. at 8. The state court further found that petitioner taught the son of Barbara Lamb to drive and had helped his own son with homework. 32 Id. at 8-9. The state court found petitioner would sometimes spend leisure time fixing cars. Id. at 9. Based upon these factual findings, the state court concluded petitioner failed to show he was mentally retarded as defined under North Carolina law. Id.

> 32 Ms. Lamb was the State's witness and related to the victims. She testified petitioner taught her son Carlos to drive. Mot. Hr'g at 258.

* * *

...The record is replete with evidence that supports the state court's finding that petitioner is not mentally retarded under the statute. ...petitioner was required to show that any mental retardation was manifested before the age of 18. See N.C. Gen. Stat. § 15A-2005(a)(1). The three individually administered I.Q. tests were all given to petitioner when he was well beyond age 18. It was the state court's role to consider the evidence and determine whether petitioner had demonstrated significantly subaverage general intellectual functioning before age 18. See id. The scores of 79 and 81 were not only consistent with one another, but also were consistent with petitioner's scores from group testing as a child. Further, Dr. Brown, a mental health expert who testified on behalf of the defense at petitioner's second trial,

affirmed that his testimony had been and his opinion remained the same that petitioner was not mentally retarded, but was in the borderline range of intellectual functioning. Brown Aff. P 16.

Petitioner now argues that Dr. Brown failed to consider the Flynn Effect, which posits that I.Q. scores rise over time and that I.Q. tests that are not "re-normed" to adjust for rising I.Q. levels will overstate a testee's I.Q. See Walker, 399 F.3d at 322. Petitioner does not, however, explain to what extent the Flynn Effect would reduce one of petitioner's later I.Q. scores to 70 or less or otherwise show manifestation of mental retardation before age 18. Petitioner's speculative allegations do not preclude rejecting his claim. See Walton v. Johnson, 440 F.3d 160, 178 (4th Cir. 2006) (en banc)(concluding that speculative allegations regarding Flynn Effect or other statistical standard errors of measurement do not require further evidentiary review); see also Hedrick v. True, 443 F.3d 342, 368 (4th Cir. 2006).

Next, petitioner likens his case to Walker v. True, where the Fourth Circuit indicated that the petitioner could show mental retardation under Virginia law if all alleged facts were true. See Walker, 339 F.3d at 321 (describing the petitioner's need for special education, inability to handle money, low frustration tolerance, and deficiencies in language, reading, and writing). However, Walker arose in Virginia and involved a different procedural posture. In Walker, the petitioner presented his Atkins claim for the first time to the federal district court. Id. at 319. "Accordingly, that claim [was] not subject to deference under 28 U.S.C. § 2254(d) because it ha[d] never been adjudicated on the merits" in Virginia state court. Thus, the Fourth Circuit reviewed the Atkins claim de novo and remanded for a full evidentiary hearing as to whether the petitioner was mentally retarded under the Virginia statute. Id.

Unlike Walker, petitioner received a full evidentiary hearing in North Carolina state court on his Atkins claim.... As stated above, the record is replete with evidence that supports the state court's finding that petitioner is not mentally retarded under North

> Carolina's statutory definition. Cf. Walker, 399 F.3d at 319 ("While [petitioner's] claim ultimately derives from his rights under the Eighth Amendment, whether he is mentally retarded is governed by Virginia law.")
>
> Although petitioner seeks to rely on Walker, the Fourth Circuit's decision in Conaway v. Polk, 453 F.3d 567 (4th Cir. 2006), more closely fits the facts of this case. In Conaway, the Fourth Circuit found the MAR Court's application of law and determination of facts reasonable and affirmed the district court's denial of the Atkins claim. Id. at 591-92. Petitioner Conaway submitted an I.Q. test score of 68 received at age 34, an affidavit from his doctor indicating mental retardation, and a lifetime record of major impairment in academics, employment, and life skills. Id. at 591. The MAR Court considered all of the evidence and rejected the petitioner's Atkins claim, concluding that Conaway had received I.Q. scores of 79 and 80 on tests administered before age 18 and failed to present compelling evidence that mental retardation manifested before age 18. Id. at 592. Further, Conaway failed to allege facts to support the conclusion that any of his childhood I.Q. tests were unreliable at the time the tests were administered. Id. at 592 n.27.
>
> Unlike Conaway, petitioner was not administered any standardized intelligence tests before age 18, but did receive scores of 82 and 83 on group testing performed during his school years. Nevertheless, as in Conaway, the state court considered these scores, his later I.Q. scores, and all other evidence presented at the hearing. The state court then found that petitioner failed to show that he was mentally retarded under North Carolina law.

See: Smith v. State, No. CR-97-1258, 2006 Ala. Crim. App. LEXIS 203, WL 2788994, *4-5 (Ala. Crim. App. Sept. 29, 2006)(IQ 70 or below); Jones v. State, 966 So. 2d 319 (Fla. 2007)(below 70 IQ); Rogers v. State, 282 Ga. 659 (Ga. 2007)(Rogers' IQ scores between 70 and 84, while indicating borderline intellectual functioning,

did not indicate mental retardation); Pizzuto v. State, 2007 Ida. LEXIS 209, *28-53 (Ida. Nov. 23, 2007):

> The focus upon whether Pizzuto is currently mentally retarded is consistent with Pizzuto's claim that Atkins v. Virginia protects offenders who become mentally retarded at any time prior to execution....
>
> The rationale for exempting mentally retarded murderers from the death penalty is based upon their mental impairments at the time they committed the killings and, to a lesser extent, during their criminal trials and sentencing hearings. The exemption should be no broader than its supporting rationale. Thus, an offender would not be entitled to relief based upon Atkins v. Virginia if he was mentally impaired at the time of his crime, and possibly through his sentencing, but it was not until later that his mental condition deteriorated to the point of becoming mentally retarded.
>
> In that respect, Atkins v. Virginia differs from Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986). In the latter case, the Supreme Court held that the Eighth Amendment prevents the execution of a person who became insane after his trial and sentencing. The reasons for that holding were: (1) "For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life" and (2) "Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today." 477 U.S. at 409. There is no contention that Pizzuto's mental functioning has declined to that point. In Penry v. Lynaugh, the Supreme Court recognized the distinction between the insane and the mildly mentally retarded. It stated that the profoundly or severely retarded who are wholly lacking the capacity to appreciate the wrongfulness of their conduct would likely not be convicted or face the prospect of punishment. The mildly retarded, however, are usually competent to stand trial, to consult with counsel with a reasonable degree of

rational understanding, and to have a rational and factual understanding of the proceedings against them. 6

> 6 In Penry v. Lynaugh, 492 U.S. 302, 333, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), the Supreme Court stated:

The common law prohibition against punishing "idiots" for their crimes suggests that it may indeed be "cruel and unusual" punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions. Because of the protections afforded by the insanity defense today, such a person is not likely to be convicted or face the prospect of punishment. See ABA Standards for Criminal Justice 7-9.1, commentary, p. 460 (2d ed. 1980) (most retarded people who reach the point of sentencing are mildly retarded). Moreover, under Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), someone who is "unaware of the punishment they are about to suffer and why they are to suffer it" cannot be executed. Id., at 422 (Powell, J., concurring in part and concurring in judgment).

Such a case is not before us today. Penry was found competent to stand trial. In other words, he was found to have the ability to consult with his lawyer with a reasonable degree of rational understanding, and was found to have a rational as well as factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960); App. 20-24. In addition, the jury rejected his insanity defense, which reflected their conclusion that Penry knew that his conduct was wrong and was capable of conforming his conduct to the requirements of the law.

Pizzuto was found to be competent to stand trial in his criminal case. In Dr. Emery's opinion, "Mr. Pizzuto clearly understands the nature of the charges against him and their potential consequences and he is capable of assisting in his own defense" and "Mr. Pizzuto has the capacity to enter into a state of mind which could be an element of the offense for which he is charged." Pizzuto did not challenge on appeal the finding that he was competent to stand trial. State v. Pizzuto, 119 Idaho

742, 810 P.2d 680 (1991). The jury found that he had the mental capacity to have the specific intents required for conviction of the crimes charged, and he did not challenge those findings on appeal. There is no contention that Pizzuto's execution would be barred by Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986).

Pizzuto had the burden of showing that at the time of his murders he was mentally retarded as defined in Idaho Code § 19-2515A(1)(a) and that his mental retardation occurred prior to his eighteenth birthday. To prevent summary judgment from being granted to the State, he had to create a genuine issue of material fact on each element of his claim. A mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact. Blickenstaff v. Clegg, 140 Idaho 572, 577, 97 P.3d 439, 444 (2004). One requirement of proving mental retardation is that Pizzuto had an IQ of 70 or below at the time of the murders and prior to his eighteenth birthday. He did not offer any expert opinion showing that he did. He likewise did not offer any expert opinion stating that he was mentally retarded at the time of the murders or prior to age eighteen. The district court did not err in granting summary judgment to the State.

Here there is no question whether any of the three-prong test for mental retardation was met by Nixon.[18]

C.-E. Section 921.137 Florida Statutes does not violate Nixon's Constitutional Rights

[18] Interestingly, at the evidentiary hearing below, aware of the standard in play, it was the state, not Nixon, who sought a Frye analysis as to what is meant by mental retardation, specifically the "Flynn Effect", and Nixon's "ineligibility" for the death penalty. (MRR Vol. 1 pp 67-76).

This Court disposed of the assertions made below by Nixon that there is some constitutional infirmity in the structure of the statute §921.137, Fla. Stat. in Cherry, as it might impact the application of Atkins. Nixon now argues that – an "irrebuttable presumption" is created by the statute providing that an IQ of below 70 must exist before a person will be disqualified for imposition of the death penalty. A presumption that an individual with an IQ of 70 or greater does not meet the statutory ineligibility for the death penalty is not irrebuttable and does not violate the United States Constitution.

"An IQ test score" is merely one measure of intellectual functioning that alone is not sufficient to make a final determination on the mental-retardation issue. However, a full-scale IQ score of 70 or above gives rise to "a rebuttable presumption that a defendant is not mentally retarded.[19] While

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[19] Courts have noted that intelligence quotients are one of the many factors that may be considered and are not alone determinative of mental retardation.

See: Md. Ann. Code § 2-202(b)(1)(i) (2002) (IQ "of 70 or below"); Ky. Rev. Stat. § 532.130(2) (2002) (IQ "of 70 or below"); Tenn. Code Ann. § 39-13-203(a)(1) (2003) (IQ "of 70 or below"); N.M. Stat. Ann. § 31-20A-2.1(A) (2003) (IQ "of 70 or below") ; Ark. Code Ann. § 5-4-618 (a)(2) (2003) ("rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below"); Wash. Rev. Code § 10.95.030(2)(c) (2003) (defining significantly below average intellectual functioning as IQ less than 70); Neb. Rev. Stat. § 28-105.01(3) (2002) (stating that IQ less than 70 is "presumptive evidence of mental retardation"); S.D. Codified Laws § 23A-27A-26.2 (2000)

rebuttable presumptions are not in and of themselves a violation of any constitutional concept; no violation occurs here were Nixon had every opportunity to rebut the "presumption." Credible testimony that Nixon's IQ fell below 70 would suffice to defeat the "presumption." And while a rebuttable presumption clearly should not impose an onerous burden like a "conclusive presumption", see Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 619 (1996) or a "nearly conclusive one" as discussed in Riley v. National Federation of Blind of N. C., Inc., 487 U.S. 781, 785-786 (1988), here, it was Nixon's failure to present any credible evidence that resulted the findings by the trial court. Requiring Nixon, in possession of all pertinent knowledge to come forward with viable and credible facts, did not and does not rise to the level of a constitutionally offensive encumbrance.[20]

(stating that IQ less than 70 is "presumptive evidence of mental retardation"); Ariz. Rev. Stat. Ann. 13-703.02 (2003) (pre-screening IQ score of 75 triggers additional assessment; IQ less than 65 establishes rebuttable presumption of mental retardation); Fla. Stat. Ann. § 921.137(1) (2002) ("'significantly subaverage general intellectual functioning' means performance that is two or more standard deviations from the mean score on a standardized intelligence test"); N.C. Sess. Law 2001-346 § 1 ("'significantly subaverage general intellectual functioning' means performance that is two or more standard deviations from the mean score on a standardized intelligence test").

[20] See State v. Brake, 796 So. 2d 522 (Fla. 2001) wherein the court opined "...Mandatory presumptions violate the Due Process

In State v. O'Neal, 2006 Ohio 6283, 2006 Ohio App. LEXIS 6243 (Ohio 2006), the Ohio court rejected O'Neal's challenge that his IQ scores over 70 gave rise to a presumption that he was not mentally retarded:

> O'Neal's over-70 IQ score raised the presumption that he was not mentally retarded. We conclude that reliable, credible evidence supported the trial court's determination that O'Neal had failed to overcome the presumption. We, therefore, overrule the assignment of error and affirm the judgment of the court below.

In O'Neal, the Ohio court cited an earlier decision in State v. Lott, 779 N.E.2d 1011 (Ohio 2002) which provided:

> The court in Lott cautioned that an IQ test score is merely one measure of intellectual functioning that "alone [is] not sufficient to make a final determination on [the mental-retardation] issue."5 **Nevertheless, the court declared that a full-scale IQ score above 70 gives rise to "a rebuttable presumption that a defendant [is] not mentally retarded.**"6
>
> (Footnotes omitted).

Clause if they relieve the state of the burden of persuasion on an element of an offense. See Francis v. Franklin, 471 U.S. 307, at 314 (1985); Marcolini v. State, 673 So. 2d 3, 4 (Fla. 1996).

In assessing the constitutionality of such presumptions, the United States Supreme Court "has generally examined the presumption on its face to determine the extent to which the basic and elemental facts coincide." County Court v. Allen, 442 U.S. 140, at 158 (1979). As the Supreme Court explained in Leary v. United States, 395 U.S. 6, 36, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969), "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."

> The court in Lott formulated its mental-retardation criteria based upon the clinical definitions of mental retardation provided in 1992 by the American Association of Mental Retardation ("AAMR") and in 2002 by the American Psychiatric Association ("APA") and cited with approval by the Supreme Court in Atkins.7 Both definitions provided these diagnostic criteria for mental retardation: substantial limitations in present functioning, manifested before the age of 18, and characterized by significantly subaverage intellectual functioning coexisting with significant limitations in two of the adaptive skills of communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, health and safety, functional academics, leisure, and work.8 In 2002, the AAMR amended its definition to require a finding of significant deficiencies in one of three categories of adaptive skills: "conceptual," which includes communication and functional academics skills; "social," which includes social/interpersonal and leisure skills; and "practical," which includes work, self-care, health, and safety skills.9

(Footnotes omitted; emphasis added).

There was neither an irrebuttable presumption nor a factual presumption flowing from the Florida statute applicable here that violated Nixon's constitutional rights. Bowling v. Commonwealth, 163 S.W.3d 361 (Kty. 2005)(bright line ceiling of 70 IQ not unconstitutional.)

Nixon also attacks the instant procedures based upon Panetti v. Quarterman, __ U.S. ___, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007), asserting that, 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."[21] (Appellant's Brief p 17). Florida's procedures do not run afoul of either Ford v. Wainwright, 477 U.S. 399 (1986) or Panetti, supra.

F. Nixon Is Not Mentally Retarded As Contemplated Under Atkins v. Virginia, 536 U.S. 304 (2002),

Following a recital of a plethora of unchanged facts previously presented in his 1993 post-conviction motion, Nixon reargued those facts he was mentally retarded at the time of the offense, and therefore may not be legally executed, citing Atkins v. Virginia, 536 U.S. 304 (2002). The facts reflect that while some experts may have differed regarding Nixon's mental abilities, the trial court credited those experts' finding that Nixon was not incompetent to stand trial or proceed with the penalty phase based on any notion of mental retardation.[22] At trial neither defense

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[21] Panetti dealt with he failure of the Texas state court to provide an opportunity to make a factual basis for a competency claim. The Supreme Court observed: "The state court failed to provide petitioner with a constitutionally adequate opportunity to be heard. After a prisoner has made the requisite threshold showing, Ford requires, at a minimum, that a court allow a prisoner's counsel the opportunity to make an adequate response to evidence solicited by the state court. See 477 U.S., at 424, 427, 106 S. Ct. 2595, 91 L. Ed. 2d 335. In petitioner's case this meant an opportunity to submit psychiatric evidence as a counterweight to the report filed by the court-appointed experts. Id., at 424, 106 S. Ct. 2595, 91 L. Ed. 2d 335. Yet petitioner failed to receive even this rudimentary process." Panetti, 127 S.Ct. at 2858.

[22] A number of jurisdictions have articulated that Atkins, may be applied retroactively, the Eleventh Circuit's statement in In re Holladay, 331 F.3d 1169, 1173 (11th Cir. 2003), strongly suggested same. In Phillips v. State, 894 So. 2d 28 (Fla 2004), while

doctor presented any evidence that Nixon was mentally retarded pursuant to the standard applicable at the time.

Indeed, the issue in this case is not so much the applicability of Atkins, or, for that matter, the recent amendments to the Florida Rules of Criminal Procedure which implicitly concluded that Atkins applies retroactively,[23] (Amendments to Fla. Rules of Criminal Procedure & Fla. Rules of Appellate Procedure, 875 So. 2d 563 (Fla. 2004)), but rather, whether Nixon has presented any evidence that would entitle him to further consideration. Since Nixon has presented nothing new, he merely repackaged his claim more succinctly in this latest postconviction motion, and has failed to meet his burden--which requires him to establish mental retardation as a bar to execution.

Under §921.137, Fla. Stat. (2002), Nixon must comply with the standards and assert and show by clear and convincing evidence that (1) his IQ is significantly subaverage; (2) he presently has

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skirting the issue, a number of justices clearly urged that Atkins, should be considered retroactively. See footnote 1 in Brown v. State, 959 So. 2d 146 (Fla. 2007).

[23] Rule 3.203(d)(4) creates a procedure for raising mental retardation as a bar to execution in pending cases, in future cases, and in cases that already are final.

deficits in adaptive functioning; and (3) both prongs (1) and (2) existed before he was 18.[24]

Because §921.137, Fla. Stat. (2002), was part of the justification for finding that execution of the mentally retarded was barred and is consistent with Florida's clinical definitions of retardation, the statute provides a template to us--in determining whether a defendant is mentally retarded to avoid the death penalty. For example, in Medina v. State, 690 So. 2d 1241, 1246-47 (Fla. 1997), the Florida Supreme Court examined whether, under Cooper v. Oklahoma, 517 U.S. 348 (1996), the standard proof required to establish a defendant's incompetency to be executed under Florida Statute was appropriate. In Medina, the Court held that Cooper's due process concerns with a lower standard for a pretrial determination of competency was not applicable in the post-conviction context, where the State has a more substantial

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[24] This Court has stated that a defendant prove retardation by clear and convincing evidence equating it to the standard of proof regarding other mental health issues. See, Florida Rule of Criminal Procedure 3.812(e) (competency to be executed); §775.027(20, Fla. Stat. (insanity as an affirmative defense); See also, §§394.467(1), 394.917(1), 916.13, Fla. Stat. (civil commitment proceedings). Note: Jones v. State, 966 So. 2d 319, 330 (Fla. 2007)("We need not address this claim. In this case, the circuit court found that '[t]here is no credible evidence to suggest that Jones is mentally retarded.' Thus, Jones did not present evidence sufficient to meet even the lesser standard of preponderance of the evidence.") See Trotter v. State, 932 So. 2d 1045, at 1049 n.5 (Fla. 2006)(same).

interest at stake in the heightened procedural protections are accordingly relaxed. Indeed, Cooper does not require a preponderance of the evidence standard in assessing claims of mental retardation as a bar to execution.

Applying the definition of mental retardation and standard of proof here, Nixon has not sufficiently alleged a claim of retardation. See Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998), and Bowling v. Commonwealth, 163 S.W.3d 361, 375-76, supra. wherein that court observed:

> Recognizing "serious disagreement . . . in determining which offenders are in fact retarded," and that "not all people who claim to be mentally retarded will be so impaired. . .," Atkins, 536 U.S. at 317, 122 S. Ct. at 2250, the United States Supreme Court left it to the states to formulate their own definitions, so long as they "generally conformed to the clinical definitions" established by the AAMR and the American Psychiatric Association as approved in Atkins. Id. at 317 n.22; Hill, 300 F.3d at 682. Both the potential margin of error and the "Flynn effect" were known at the time our statutes were enacted. The General Assembly chose not to expand the mental retardation ceiling by requiring consideration of those factors, but instead, like most other states that quantify the definition, 13 chose a bright-line cutoff ceiling of an IQ of 70, a generally recognized level at which persons are considered mentally retarded. Atkins did not discuss margins of error or the "Flynn effect" and held that the definition in KRS 532.130(2) "generally conformed" to the approved clinical definitions. 536 U.S. at 317 n.22, 122 S. Ct. at 2250 n.22.
>
> (Footnote omitted).
>
> Arizona 14 and Illinois 15 do define "significantly subaverage intellectual functioning" as an "IQ of 75 or

below." No doubt, otherwise "death-eligible" defendants in those states with IQs higher than 75 will claim that those statutes should be interpreted to mean that a person with an IQ of 80 to 85 is "exempt-eligible." Arkansas's statute, on the other hand, creates a rebuttable presumption of mental retardation if the defendant has an IQ of 65 or below, 16 and Atkins also held that statute to "generally conform" to the approved clinical definitions. Id. at 317 n.22. The remaining nine states 17 with statutory exemptions have chosen not to numerically quantify the definition of "significantly subaverage intellectual functioning," presumably relegating the issue to a "battle of the experts." "Generally, accepted definitions within the scientific community will no doubt be refined as our knowledge of this area advances." Howell v. State, 151 S.W.3d 450, 457 (Tenn. 2004). However, absent proof that the statutory definition of "significantly subaverage general intellectual functioning" in KRS 532.130(2) is unconstitutional, any change in that definition must emanate from the General Assembly, not this Court.

(Footnotes omitted)

When it decided in Atkins to delegate to the states the authority to formulate their own definitions of "mentally retarded," the United States Supreme Court obviously anticipated that the definitions would vary in some respects but would be acceptable if they "generally conformed to the clinical definitions" approved therein. 536 U.S. at 317, n.22; 122 S. Ct. at 2250, n.22; Hill, 300 F.3d at 682. The General Assembly's adoption of a bright-line maximum IQ of 70 as the ceiling for mental retardation "generally conform[s]" to the clinical definitions approved in Atkins, thus does not implicate the Eighth Amendment's proscription against "cruel and unusual" punishment. As did the Supreme Court of Tennessee when faced with this same argument, we decline to rewrite this unambiguous statute. Howell, 151 S.W.3d 450, 455 .

Of course, the Florida statute does not suffer from any ambiguity as found by this Court in Cherry, supra.

In essence, Nixon's point is another regurgitation of his theme that the Cherry is wrong, because it establishes "a strict IQ cutoff score of 70," which "necessarily precludes evidence–i.e. evidence of IQ scores between 71 and 75–relevant to determining the constitutional fact to be decided." In this case however, neither the trial court nor his finding of no mental retardation, were the product of a flawed procedure, rather the evidence for mental retardation was deficient. The finding of no mental retardation was supported by prior and recent IQ test scores, as well as, the facts presented.

Nixon relied heavily on the 2006 affidavit of Dr. Denis Keyes, who merely "rewrote" the evidence that was before him when he last provided an affidavit in 1993. Below, as he did previously, Dr. Keyes suggested that he is the only one who has ever had a true read as to Nixon's IQ. In fact, however, the record reflects that at the time of trial, defense counsel called two mental health experts, Dr. Merton Ekwall, a medical doctor whose practice was neurology and psychiatry, and Dr. Alan Doerman, a Ph.D. psychologist, who examined Nixon, as well as reviewed a lifetime of records regarding Nixon's mental health. Dr. Ekwall did not assign an IQ number to his evaluation however, he did observe that Nixon had an anti-social personality and that any formal education was disrupted by the number of incarcerations Nixon suffered. Dr.

Ekwall testified (5TR 802) that Nixon's intelligence was "on the low side of normal" but it was "adequate." Dr. Doerman testified that he administered a battery of neuropsychological and personality tests and, as a result of those tests, concluded that Nixon's IQ was 74 (5TR 817-818). Dr. Doerman found that Nixon had "some" brain damage and that he suffered from mixed personality disorder with elements of anti-social personality, borderline personality and narcissistic personality (5TR 821). Dr. Doerman testified at trial that because of Nixon's "low IQ, his brain damage, and his history of incarceration" Nixon did not have the same cognitive wherewithal as the rest of society. He observed that when Nixon runs into a situation that might be stressful, he obviously does not come up with the right answer in trying to resolve the problem.[25]

Based on this record, there is no evidence that Nixon, prior to age eighteen (18), had an IQ under 70, therefore, at least one of the three prongs of Rule 3.203, has never been met. *See* Zack, supra, and §937.137, Fla. Stat. (2004).

Moreover, as evidenced in the affidavit by Dr. Keyes, it is quite clear that although Dr. Alec Whyte and Dr. Henry Dee, both examined Nixon at approximately the same time as Dr. Keyes in 1993,

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[25] See State's Statement of the Facts. (Appellee Brief pp. 7-8).

neither of those medical professionals reflect that Nixon had an IQ below 70. In fact, Dr. Dee found that Nixon had a full scale IQ of 72, with a verbal IQ of 73 and a performance IQ of 78. Dr. Whyte apparently never came up with a specific number. On page 4 of the 2006 Affidavit, Dr. Keyes testified that in 1993 "Joe's performance (verbal reasoning - 70; abstract/visual reasoning - 75; quantitative reasoning - 72; short term memory - 61; composite score - 65) was within mental deficient range. Apparently, based on the Stanford Benet 4th Ed. Test given to Nixon in 1993, Keyes merely averaged out the score--noting a composite score of 65. Clearly that score was not in keeping with the consistent scores of 72 through 88 found by all prior examinations of Mr. Nixon or the score found by Dr. Dee contemporaneous to Dr. Keyes' score in 1993. And while that particular score would appear to meet one of the criteria to determine if a person is mentally retarded, under the statute, is certainly would not satisfy the three-prong test based on the totality of the record before this Court with regard to Nixon's IQ score, a lack of any defects in adaptive behavior and the lack of any evidence that mental retardation manifested itself before the age of 18.

Additionally, there is no evidence that Nixon has deficient adaptive functioning. In fact what is outstanding in this record other than the affidavits of Dr. Keyes, is that Nixon has no mental

disease but rather is a manipulative person with a personality disorder with elements of anti-social personality- to wit: a repeat offender who has been in and out of jail or prison his entire life. In a structured environment he is able to adapt to his circumstances and not violate the rules (see prison records where in 1981, Nixon spent four years just prior to this offense in the Department of Corrections on a burglary conviction without disciplinary reports).

Like Zack v. State, 911 So. 2d 1190 (Fla. 2005), Hill v. State, 921 So. 2d 579 (Fla. 2006), and Foster v. State, 929 So. 2d 524 (Fla. 2006), Nixon has not made a prima facie showing that he is entitled to relief on the claim that he is mentally retarded and therefore ineligible to be executed.

ISSUE II

FACTFINDING INFECTED BY LEGAL ERROR AND NOT ENTITLED TO DEFERENCE

Nixon argues here that the trial court gave short order to the testimony of Dr. Keyes and hence, Nixon proclaims that legal error was committed. The record and order of the trial court belies such a contention. The trial court carefully articulated the testimony of the two battling experts and concluded that Dr. Prichard's analysis was sound and compelling and Dr. Keyes's analysis was off the mark. The trial court observed:

> 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.

(MRR Vol 7, p 1239).

The trial court record presents credible, substantial evidence that supports the trial court's conclusion that as to Dr. Keyes:

> 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.

(MRR Vol. 7, P 1244).

ISSUE III

THE TRIAL COURT ERRED IN ADDING A "CULPABILITY" TEST CONTRARY TO Atkins

Nixon next tries to suggest that the trial court's findings were erroneous when the court stated that there existed other reason for not disqualifying him from the death penalty besides a lack of mental retardation. In this case, the trial court in reviewing Atkins, noted that the Supreme Court opined that mental

retardation might be evidence by "impulsivity or suggestibility" which are "hallmarks of the diminished culpability that renders execution of the mentally retarded cruel and unusual in violation of the Eighth Amendment." (MRR Vol. 7, p 1244).

The trial court noted that the facts of Nixon's crime revealed no evidence of impulsivity or suggestibility, therefore those factors were not a part of any mental retardation analysis.[26]

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[26] The United States Supreme Court's opinion is likewise replete with conclusions refuting any suggestion that Mr. Nixon's conduct 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

ISSUE IV

THE TRIAL COURT VIOLATED ATKINS BY BASING ITS FINDINGS ON NIXON'S CONFESSION

The findings of the trial court that Nixon is not mentally retarded was not premised on Nixon's confession at trial, rather that finding was based on a failure of Nixon to prove he met the three-prongs of the §921.137 Fla. Stat. The record below show that Nixon did not challenge the validity of his confession because of mental retardation or any reason. Further, he did not seek rehearing of the trial court's order below, regarding any reference made to Nixon's confession and therefore, has not preserved this issue for review.[27]

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suggestion of diminished culpability as envisioned by the Supreme Court in Atkinson.(sic)

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.
(MRR Vol. 7, p 1248).

[27] In Nixon v. State, 572 So. 2d 1336, 1344 (Fla. 1990) the court discussed Nixon's confession finding there had been a valid waiver of Miranda after Nixon was repeatedly informed of those rights:

> There is no requirement that an accused be continually reminded of his rights once he has intelligently waived them. Bush v. State, 461 So.2d at 939. Nixon had been given full Miranda warnings on at least four separate occasions prior to his taped confession, twice at the time of his arrest, once in route to the police station, and once at 12:20 p.m. prior to giving the taped confession. Each time he stated that he understood his rights and prior to giving the taped confession he executed a written waiver which has not been challenged.

At the evidentiary hearing below, Nixon was able to present whatever testimony he had available; his focus was Dr. Keyes's testimony,[28] not whether there was any issue with Nixon's taped confession.[29]

ISSUE V

REMAND IS NOT REQUIRED FOR A LEGALLY PROPER HEARING BASED ON THE EVIDENCE PRESENTED AS TO NIXON'S MENTAL RETARDATION

Nixon next argues that additional evidence exists to show that he is mentally retarded, relying on evidence that was presented in

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Approximately eight hours after giving the taped confession, Detective Livings told Nixon that he had a question to ask him. The detective advised Nixon "that [Nixon] didn't have to talk with [him]; that [Nixon] did not have to give [him] any information; that [Nixon] still had the right to remain silent." After being reminded of his rights, Nixon indicated his willingness to speak with Detective Livings by stating "I got no problems talking with you." Although the detective did not give Nixon a full Miranda warning, the trial court correctly ruled that Nixon understood his rights and knowingly and intelligently waived them prior to the challenged statement and that his statement that he had no problem discussing the case was a valid waiver.

[28] See: Nixon v. State, 932 So. 2d at 1019.

[29] In fact, Nixon's recital of these alternative facts surrounding the accuracy of Nixon's confession are found in the statement of the facts in Respondent's Brief in the United States Supreme Court, State v. Nixon, Respondent's Brief 2003 U.S. Briefs 931 (July 2004). (Appellant's Brief pp.27-37). Absent some finding that Nixon's confession was wanting, the trial court was certainly permitted to view that evidence in fully assessing Nixon's mental state.

mitigation at trial and expounded upon by Nixon's counsel in his powerpoint to the court and through Dr. Keyes.

The instant evidence was reviewed by this Court in Nixon's last round of postconviction litigation and found unpersuasive under the challenge there, that counsel was ineffective and Nixon was denied adequate mental health testing. Nixon, 932 So. 2d at 1021.

While admitting that everyone would agree "Nixon's IQ is probably 73," Nixon wants this Court to reinvestigate his facts in light of the rejected testimony of Dr. Keyes. As reported in detail in its statement of the facts, the state through Dr. Prichard, credibly overcame the questionable reasoning of Dr. Keyes and his calculations based on the "Flynn Effect." The trial court after coursing through the testimony found that "Dr. Keyes's testimony is plainly outweighed by Dr. Pritchard's testimony." Dr. Pritchard's unrebutted testimony was that Nixon scored 80 on a test validly administered the year before the hearing.

Nixon is not entitled to remand or further evidentiary hearings on his mental retardation claim. See also: United States v. Webster, 421 F.3d 308, 311-14 (5th Cir. 2005), *cert. denied*, 127 S.Ct. 45, 166 L.Ed.2d 47, 2006 U.S. LEXIS 5935 (2006), wherein the

court found Dr. Keyes equally incredible in that case as the trial court did here.[30]

ISSUE VI

REMAND FOR HEARING FREE OF ERRONEOUS REQUIREMENTS

Nixon'S last claim is a catchall argument regarding his complaints previously made as to the applicability of Cherry, and the issue of whether he has the burden of proof.

A. Bearing Burden of Proof

Nixon argues that the State must bear the burden of proving that he is not retarded under Ring v. Arizona, 536 U.S. 584 (2002). Ring provides no authority for such a contention.[31] In Harris v. United States, 536 U.S. 545 (2002), the Court made clear that Apprendi does not apply to all factual determinations regarding

[30] See footnote 15: In fact, not only were government experts able to refute many of the specific findings obtained from the "Vineland test" administered by Keyes, see Webster v. United States, 2003 U.S. Dist. LEXIS 17383, 2003 WL 23109787 (N.D. Tex. Sept. 30, 2003), but they testified that the test was an inappropriate and deceptive measure of Webster's adaptive skills, given his lifestyle as a drug dealer. Moreover, government experts noted that Webster had shown cleverness and adaptability when he sneaked into the women's portion of the jail in which he was held, concocted cover stories and made excuses to police when he was arrested with a key in his pocket to the motel room in which Lisa Rene was held and raped repeatedly, and burned his clothes to destroy evidence after her murder.

[31] Ring applied Apprendi v. New Jersey, 530 U.S. 466 (2000), to Arizona's capital sentencing scheme. Apprendi held that other than the fact of a prior conviction, any fact that increases the statutory maximum for an offense must be submitted to the jury.

sentencing; Apprendi only applies to those facts (other than a prior conviction) that increases the statutory maximum. Whether Nixon is mentally retarded does not impact the statutory maximum for first-degree murder; that penalty will not be increased, rather it will decrease the sentence. See Shere v. Moore, 830 So. 2d 56, 61 (Fla. 2002) (death is the statutory maximum for first-degree murder in Florida). See also Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); Wood v. Allen, 465 F.Supp.2d 1211 (N.D. Ala. 2006) (Apprendi does not apply to Atkins findings.); see: United States v. Webster, 421 F.3d 308, 311-14 (5th Cir. 2005), *cert. denied*, 127 S.Ct. 45, 166 L.Ed.2d 47, 2006 U.S. LEXIS 5935 (2006).

Nixon argues that Ring v. Arizona, 536 U.S. 584 (2002), requires a jury must entertain his claim. In Rodriguez v. State, 919 So. 2d 1252, 1267 (Fla. 2005) this court found the same argument meritless:

> "Rodriguez also argues that section 921.137, Florida Statutes (2004), which prohibits imposition of the death sentence on mentally retarded defendants, is unconstitutional under Ring v. Arizona, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002), because it permits a judge to make the factual determination of mental retardation. We have rejected similar claims attempting to "feed Atkins [v. Virginia, 536 U.S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (2002)] through Ring." Arbelaez v. State, 898 So. 2d 25, 2005 Fla. LEXIS 89, 30 Fla. L. Weekly S65, S71 (Fla. Jan. 27, 2005). Rodriguez "has no right under Ring and Atkins to a jury determination of whether he is mentally retarded." Id. Thus, there is no merit to his claim regarding the constitutionality of the statute."

Schriro v. Smith, 546 U.S. 6 (2005)(9th Circuit erred in commanding Arizona courts to conduct a jury trial to resolve mental retardation issue per Apprendi; mental retardation determination does not increase punishment); and Bowling v. Commonwealth, 163 S.W.3d 361 (Kty. 2005).

B. Standard of Proof

There is no question that Nixon bears the burden of proof and, as to what that burden is, the trial court did not rule on the issue because he found that:

> 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.

(MRR Vol. 7, p 1237).

See In re Johnson, 334 F.3d 403, 405 (5th Cir. 2003)(Defendant must carry the burden.); Woods v. Quarterman, 493 F.3d 580 (5th Cir. 2007)(same); Hendrich v. True, 443 F.3d 342 (4th Cir. 2006)(same); Green v. Johnson, 2006 U.S. Dist. LEXIS 90644, *109 (E.D. Va. 2006)(same), and People v. Vasquez, 84 P.3d 1019, 1020-21 (Colo. 2004) wherein the Colorado Supreme Court held:

> Vasquez requests that this court declare section 18-1.3-1102 unconstitutional. He contends that the prohibition announced in Atkins cannot be sustained by requiring a defendant to bear the burden of proof concerning the fact of mental retardation. Instead, he

> insists that it is the prosecution that must prove the defendant's lack of retardation beyond a reasonable doubt.
>
> Alternatively, Vasquez argues that because the Eighth Amendment imposes a categorical bar on the execution of the mentally retarded, it follows that the burden placed on the defendant in 18-1.3-1102 is unconstitutionally high. He states that requiring a defendant to prove his own mental retardation by clear and convincing evidence does not adequately protect the constitutional prohibition heralded by Atkins. Rather, he requests that this court limit the defendant's burden to a preponderance of the evidence standard.
>
> **We conclude, however, that because section 18-1.3-1102 merely sets out a process by which a court determines whether a criminal defendant is indeed mentally retarded in order to avoid an unnecessary capital trial, and because nothing in Atkins would prohibit such a process, the statute's allocation of burdens is constitutionally permissible. Further, we also hold that the standard of proof placed upon the defendant - clear and convincing evidence - is constitutionally adequate.**

(Emphasis added).

Again here the question of what level of burden must be met is not properly before the Court, since the trial court stated that under any burden Nixon failed at his attempt to present sufficient evidence of mental retardation.

C. Adequacy of Procedure Under Rule 3.203

Nixon argues that he is being deprived of full appellate review to which he is entitled because he was currently under sentence of death at the time of enactment of Rule 3.203, Fla. R. Crim. P.

He argues because of possible unfairness based on when he was sentenced, he is entitled to a new penalty phase or hearing before a jury as to mental retardation, presumably to make him whole with other death row inmates who have received death sentences post enactment of Rule 3.203.

There is nothing in the case law in Florida that would suggest that whether sentenced to death prior to or after the enactment of the statute or the rule, that Florida death row inmates are not provided full opportunity to air any mental retardation claims. Indeed quite the contrary is so. Having not identified a circumstance where his complaint has been shown to be accurate, it is presumed Nixon will suffer a full appellate airing of the trial court's conclusion that Nixon is not mentally retarded.

D. New Hearing on Mental Retardation

Lastly, Nixon contends that he "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. (Appellate Brief p 74)

To date no court of competent jurisdiction has declared that "mental illness" is the functional equivalent of "mental retardation" therefore, making such a showing, would bar imposition

of the death penalty. Nixon admits that this notion is a work in progress, but urges that under the state statute and rule, failure to do so violates the United States Constitution. See: In re Woods, 155 Fed. Appx. 132 (5th Cir. 2005):

> We also reject Woods's argument that he should be permitted to present his claim that he is mentally ill and, for that reason, cannot be executed in accordance with the Constitution. Section 2244(b) orders the dismissal of a successive petition insofar as a claim presented does not meet at least one of several requirements, in short, a new rule of constitutional law made retroactive by the Supreme Court. Atkins did not cover mental illness separate and apart from mental retardation, and Woods points to no Supreme Court case creating such a rule. Therefore, his mental illness claim may not be presented to the district court because it does not satisfy § 2244(b)(2)(A). Moreover, Woods failed to raise this claim before the state courts of Texas.

Holladay v. Campbell, 463 F.Supp.2d 1324 (N.D. Ala. 2006) (mental illness not mental retardation); Berry v. Epps, 2006 U.S. Dist. LEXIS 72879 (N.D. Miss. 2006)(same).

Finally in Lawrence v. State, 2007 Fla. LEXIS 2012 (Fla. Nov. 1, 2007) this Court, in a footnote, held:

> For the following reasons, we deny the subsequent claims without extended discussion. In issue four, Lawrence contends that under Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), equal protection requires that his mental illness be treated similarly to those with mental retardation because both conditions result in reduced culpability. We reject his assertion that the Equal Protection Clause requires this Court to extend Atkins to the mentally ill. See, *e.g.*, Lewis v. State, 279 Ga. 756, 620 S.E.2d 778, 786 (Ga. 2005) (declining to extend Atkins to the mentally ill); Tigner v. Texas, 310 U.S. 141, 147, 60 S. Ct. 879, 84 L. Ed.

1124 (1940) (holding equal protection "does not require things which are different in fact or opinion to be treated in law as though they were the same"); State v. Hancock, 108 Ohio St. 3d 57, 2006 Ohio 160, 840 N.E.2d 1032, 1059-1060 (Ohio 2006) (declining to extend Atkins to the mentally ill because mental illnesses come in many forms and different illnesses may affect a defendant in different ways and to different degrees, thus creating an ill-defined category of exemption from the death penalty without regard to the individualized balance between aggravation and mitigation in a specific case).

Nixon is entitled to no relief as the issue.

CONCLUSION

Based on the foregoing, all relief should be denied.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASST. DEPUTY ATTORNEY GENERAL
Florida Bar No. 158541

OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, FL 32399-1050
Phone: (850) 414-3300

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Eric S. O'Connor, 30 Rockefeller Plaza, 24th Floor, New York, New York, 10112, this 26th day of December, 2007.

CAROLYN M. SNURKOWSKI
ASST. DEPUTY ATTORNEY GENERAL

CERTIFICATE OF FONT COMPLIANCE

This pleading was produced in Courier New 12 point, a font which is not proportionately spaced.

CAROLYN M. SNURKOWSKI
ASST. DEPUTY ATTORNEY GENERAL