IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-953

JOE ELTON NIXON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

AMENDED INITIAL BRIEF OF APPELLANT

ERIC M. FREEDMAN
Attorney for Joe Elton Nixon
Law Offices of Eric M. Freedman
250 West 94th Street
New York, NY 10025
Tel: 212-665-2713
Fax: 212-665-2714
Florida Bar No.: Admitted Pro Hac Vice

ERIC S. O'CONNOR
Attorney for Joe Elton Nixon
Sheppard, Mullin, Richter & Hampton LLP
30 Rockefeller Plaza, 24th Floor
New York, NY 10112
Tel: 212-332-3800
Fax: 212-332-3888
Florida Bar No.: Admitted Pro Hac Vice

ARMANDO GARCIA
Attorney for Joe Elton Nixon
Garcia & Seliger
16 North Adams Street
Quincy, FL 32351
Tel: 850-875-4668
Fax: 850-875-2310
Florida Bar No. 02439

CITATIONS TO THE RECORD

"R." refers to the twelve volumes of transcript, pleadings and orders, numbered pages 1-2104.

"SR1." refers to the supplemental volume containing, *inter alia*, a transcript of the November 25, 1987 Circuit Court hearing and orders related thereto, numbered pages 1-33.

"SR2." refers to the supplemental volume containing, *inter alia*, a transcript of the December 19, 1988 Circuit Court hearing and orders related thereto, numbered pages 1-64.

"SR3." refers to the supplemental volume containing, *inter alia*, a transcript of the August 30, 1989 Circuit Court hearing and orders related thereto, numbered pages 1-165.

"3.850 Motion" refers to the verified Motion to Vacate Judgment of Conviction and Sentence, and Consolidated Request that Leave to Amend be Allowed, filed in this Court on October 1, 1993, numbered pages 1-304.

"3.850 R." refers to the 23-volume record on Mr. Nixon's 1993 appeal filed in this Court, numbered pages 1-4393.

"A1998--." refers to the Appendix submitted with Mr. Nixon's Brief in support of his June 5, 1998 Appeal.

"A2002--." refers to the Appendix submitted with Mr. Nixon's Initial Brief of Appeal and Amended Petition For Writ Of Habeas Corpus, filed in this Court on May 13, 2002, numbered pages 1-423.

"SR4." refers to the record on the appeal filed in this Court on May 13, 2002.

"SR5." refers to the record on this appeal.

In accord with Fla. R. App. P. 9.200(a)(1), Mr. Nixon relies upon all original documents, exhibits and transcripts hitherto filed in all courts including depositions and other discovery, and hereby designates such material as part of the record.

REQUEST FOR ORAL ARGUMENT

Joe Elton Nixon is under sentence of death. Adequate development of the issues raised on this appeal is essential for a determination of his case, which in turn may determine whether he lives or dies. This Court generally grants oral argument in capital cases of this nature. In accord with Rule 9.320 of the Florida Rules of Appellate Procedure, Mr. Nixon therefore respectfully moves this Court for oral argument on his appeal.

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I.
SUMMARY OF ARGUMENT

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

In the court below, the state did not even attempt to contest the overwhelming evidence of Joe Elton Nixon's sub-average intellectual functioning or his deficits in adaptive behavior. Its expert's opinion that Mr. Nixon was not retarded was based exclusively on the proposition that an obtained IQ score of 80 was dispositive of the issue. Mr. Nixon's expert, on the other hand, concluded that a full review of the record supported the conclusion that Mr. Nixon's actual IQ was 73. This value, he testified, was consistent with a finding of mental retardation in light of the fact – which the state's expert readily conceded (October 23, 2006 Motion Hearing Transcript, at SR5. Vols. 8-9 ("MH Tr."), at 216:15-217:25.) – that the profession recognizes that mental retardation, considering the standard error of measure, may appropriately be diagnosed in individuals with measured IQ scores as high as 75.

The Circuit Court rejected this testimony as legally irrelevant: "Essentially, Dr. Keyes' testimony is that the standard error of measure means that 75 is the

lower limit of eligibility for the death penalty – the same testimony rejected by the Florida Supreme Court in Cherry," (Circuit Court Order, dated April 26, 2007 ("Final Order"), p. 16, at SR5. 1240.) a precedent that the Circuit Court noted it "was without authority to reconsider." (Final Order, p. 25, at SR5. 1249.).

Because of its view of the binding effect of Cherry – which it described as "by far the most instructive of [this] Court's opinions for resolving the issues raised here" (Final Order, p. 7, at SR5. 1231.) – the Circuit Court found that Dr. Keyes's methodology was "inconsistent both with the plain language of the statute and the Florida Supreme Court's authority." (Final Order, p. 17, at SR5. 1241 (footnote citing Cherry omitted).). Its further conclusion "as an evidentiary matter" that Dr. Keyes's approach "is unpersuasive," (Final Order, p. 17, at SR5. 1241.) flowed from this premise: his testimony "was essentially an argument for the law to be something other than what it is" and was "of no evidentiary value at all" because it simply amounted "to disagree[ment] with the standard the Legislature established." (Final Order, pp. 19, 20, at SR5. 1243, 1244.).

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

In particular, it should be firmly directed that the categorical exclusion from death-eligibility for mentally retarded defendants established by the Supreme Court of the United States in Atkins v. Virginia, 536 U.S. 304 (2002), applies in every case, including ones where the judge's opinion is that the crime committed by the defendant is one – a deliberate "torture murder" – which reveals no evidence of diminished culpability. Not only has the contrary policy determination already been made as a matter of binding federal constitutional law, but, as the record here reveals, adopting that reasoning compounds the Atkins violation by basing decision-making on constitutionally unreliable "confessions."

To conform with the federal Constitution, the proceedings on remand must also be governed by an appropriate burden of proof, give Mr. Nixon the same constitutional rights respecting his mental retardation determination as current defendants enjoy, and allow him to litigate his claim that mental illness precludes his execution.

II.
PROCEDURAL HISTORY

Joe Elton Nixon was charged, convicted, and sentenced to death for the 1984 murder of a Tallahassee woman. This Court affirmed the conviction and sentence on direct appeal. See Nixon v. State, 572 So. 2d 1336 (Fla. 1990) ("Nixon I").

Mr. Nixon filed a motion pursuant to Fla. R. Crim. P. 3.850 raising numerous claims. This was summarily denied by the Circuit Court, resulting in a

reversal by this Court for an evidentiary hearing on the narrow issue of whether Mr. Nixon had consented to his attorney's strategy of conceding guilt in opening statement. Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000) ("Nixon II").

On remand, the Circuit Court ruled adversely to Mr. Nixon and was again reversed by this Court. Nixon v. State, 857 So. 2d 172 (Fla. 2003) ("Nixon III"). That ruling was in turn reversed by the United States Supreme Court, which held that this Court had applied an erroneous legal standard in evaluating the claim. Florida v. Nixon, 543 U.S. 175 (2004).

On remand from that decision, this Court addressed and rejected most of Mr. Nixon's remaining claims. Nixon v. State, 932 So. 2d 1009 (2006) ("Nixon IV"). With respect to the issue of mental retardation, which Mr. Nixon had presented in a petition for a writ of habeas corpus, this Court ruled that it should be pursued by means of a motion pursuant to Fla. R. Crim. P. 3.203 within sixty days. See Nixon IV, 932 So. 2d at 1024.

Accordingly, on June 19, 2006 Mr. Nixon filed a timely motion and supporting brief pursuant to Fla. R. Crim. P. 3.203 and 3.851 claiming that his conviction and sentence of death are violative of, *inter alia*, the reasoning and holding in Atkins v. Virginia, 536 U.S. 304 (2002). (Motion Under Fla. R. Crim. P. 3.203 and 3.851, at SR5. 1-570; Brief in Support of Motion Under Fla. R. Crim. P. 3.203 and 3.851 ("Rule 3.203 Brief"), at SR5. 575-622.). The State responded

in writing on July 11, 2006. (Response to Motion Under Fla. R. Crim. P. 3.203 and 3.851 Regarding Nixon's Allegations of Mental Retardation as a Bar to Imposition of the Death Penalty, at SR5. 923-50.). Mr. Nixon filed a reply brief on July 18, 2006. (Reply Brief in Further Support of Joe Elton Nixon's Motion Under Fla. R. Crim. P. 3.203 and 3.851, at SR5. 957-64.).

On October 11, 2006, in advance of a scheduled evidentiary hearing, counsel for Mr. Nixon asked the Circuit Court to address several legal matters raised by Mr. Nixon's Rule 3.203 Motion in order to guide the parties in their preparation for and conduct of the hearing. (Letter from Eric O'Connor to the Hon. Jonathan E. Sjostrom, dated October 11, 2006 ("Oct. 11 Letter"), p. 2).

On October 17, 2007, the Circuit Court held that: (i) "Mr. Nixon bears the burden of proof ...", citing Trotter v. State, 932 So. 2d 1045 (Fla. 2006), and Foster v. State, 929 So. 2d 524 (Fla. 2006); (ii) "Mr. Nixon's assertions that the issues of mental retardation must be determined by a jury and that the state is required to disprove mental retardation beyond a reasonable doubt are foreclosed by controlling authority", citing Arbelaez v. State, 898 So. 2d 25 (Fla. 2005); and (iii) "As regards the constitutional claim that Rule 3.203 is unconstitutional because it does not permit the assertion of a mental illness claim, relitigation of Mr. Nixon's mental illness apart from retardation is foreclosed by the Florida Supreme Court's decision squarely addressing such issues in [Nixon IV]. The evidentiary hearing is

limited to the mental retardation issue and will not be expanded beyond the mental retardation issue established in Atkins and its progeny." (Circuit Court Order, dated October 17, 2006 ("Oct. 17 Order"), pp. 2-3, at SR5. 1141-43.).

The evidentiary hearing was held on October 23, 2006. The State presented the testimony and report of Dr. Gregory A. Prichard; Mr. Nixon presented the testimony of Dr. Denis Keyes. On January 8, 2007, the State and Mr. Nixon filed their post-hearing briefs. (Joe Nixon's Post-Hearing Brief in Support of his Motion Under Fla. R. Crim. P. 3.203 and 3.851 ("Nixon Post-Hearing Brief"), at SR5. 1151-83; Post-Hearing Memorandum Regarding Nixon's Allegations of Mental Retardation as a Bar to Imposition of the Death Penalty, at SR5. 1184-1213.).

On April 12, 2007, the State filed a Notice of Supplemental Authority, citing Cherry v. State, 959 So. 2d 702 (Fla. 2007) and Brown v. State, 959 So. 2d 146 (Fla. 2007). On April 18, 2007, Mr. Nixon responded in a motion whose principal contention was that Florida Statute Section 921.137, as interpreted by Cherry, violates the Constitution of the United States and the corresponding provisions of the Florida Constitution. (Defendant Joe Elton Nixon's Motion to Declare Florida Statute Section 921.137 Unconstitutional, at SR5. 1214-24.).

On April 26, 2007, the Circuit Court issued its final order: (i) denying Mr. Nixon's April 18, 2007 motion to declare Section 921.137 of the Florida Statues unconstitutional; (ii) holding that, for the reasons already discussed,

Mr. Nixon's presentation failed to show that he was mentally retarded; and (iii) concluding, after a detailed five-page discussion of the crime as revealed in the 50-page confession annexed to the opinion as an exhibit, that the policy bases of the Supreme Court's holding in Atkins were inapplicable to this case because Mr. Nixon does not display any evidence of impulsivity or suggestibility that would support diminished culpability. (Final Order, at SR5. 1225-1301.).

III.
ARGUMENT

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

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

Unless it agrees with Mr. Nixon that the State has waived this argument,[2] or concludes that Cherry does not apply to this case,[3] this Court should revisit Cherry

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

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

(footnote continued)

since the effect of that ruling is to write a definition of mental retardation that is inconsistent with federal constitutional law.

A. The *Cherry* Definition Violates *Atkins*

Florida Statute Section 921.137(1) defines "significantly subaverage general intellectual functioning" to mean "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services." See FLA. STAT. ANN. § 921.137(1) (2006).[4] In Cherry, this Court interpreted Section 921.137(1) to require a defendant to prove that his IQ score meets a strict cut-off score of 70 or below. See Cherry, 959 So. 2d at 711-14. This Court then held that "Cherry does

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

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

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

not meet the first prong of the mental retardation determination [under Section 921.137 because] Cherry's IQ score of 72 does not fall within the statutory range for mental retardation." Id. at 714.

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

However, in Atkins, the Supreme Court defined mental retardation in accord with the consensus in the scientific community. See Atkins, 536 U.S. at 309 n.3 (quoting the definition of the AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) ("AAMR") and the APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000) ("DSM")). And, as found by the Court in Atkins, the consensus in the scientific community recognizes that an "IQ score between 70 and 75 or lower" is "typically considered the cutoff score for the intellectual function prong." Atkins, 536 U.S. at 309 n.5 (quoting 2 B. SADOCK & V. SADOCK, COMPREHENSIVE TEXT BOOK OF PSYCHIATRY 2952 (7th ed. 2000)).[5]

[5] As noted, the State's expert readily agreed with that proposition. When he was read the statement from the current edition of the DSM, "it is possible to (footnote continued)

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

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

B. To Deprive Nixon Of His Life On The Basis Of "Junk Science" Violates Federal And State Due Process Standards

This Court here is asked to reach a conclusion respecting a scientific fact, one that will form the basis of a "binding legal judgment – . . . of great consequence – about a particular set of events in the past." Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993). If the evidence in support of the

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diagnose mental retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for mental retardation," he responded, "Correct. I would agree with that, yes." (MH Tr. at 216:15-22.). Indeed, the government relied on this same witness in the Cherry case, in which he testified that mental retardation could not be ruled out based on the obtained IQ score of 72. (MH Tr. at 216:23-217:25; Psychological Evaluation by Dr. Prichard, presented Oct. 23, 2006, Def. Exh. 8, at SR5. Vol. 10.).

conclusion lacks scientific validity – as, for instance, if the conclusion that an individual acted irrationally on a certain night is sought to be premised on evidence that the moon was then in a certain phase, see id. at 591 – then to base the conclusion on that evidence violates due process. It would not matter how scrupulous the procedure was for demonstrating what phase the moon phase was in that night if there existed "no creditable grounds supporting . . . a link" between the moon phase and irrational behavior. Id.

Cherry permits the State to execute Mr. Nixon on the basis that his IQ is above 70 although below 75. Assuming that fact to be true, there is no scientifically valid link between it and the conclusion sought to be drawn from it, viz. that he is not mentally retarded. To draw the proposed conclusion from the proffered fact would be as irrational – and as violative of due process of law – as rendering a judgment based upon "generally accepted principles or astrology or of necromancy." Kumho Tire v. Carmichael, 526 U.S. 137, 151 (1999).

Indeed, recognizing these concerns, Florida jurisprudence has rejected even the standards of Daubert as too lenient and continued to apply the more stringent pre-existing test under Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923). See, e.g., Ramirez v. State, 810 So. 2d 836, 843 n.8, 853 (Fla. 2001) (reversing capital murder conviction and death sentence and emphasizing obligation of state courts "especially in a capital case" to "cull scientific fiction and

junk science from fact"); Marsh v. Valyou, 917 So. 2d. 313 (Fla. 5th DCA 2005) (no recovery permitted where plaintiff who was concededly in auto accidents and concededly suffered from fibromyalgia could not demonstrate scientifically valid link between the two); Kaelbel Wholesale, Inc. v. Soderstrom, 785 So. 2d 539 (Fla. 4th DCA 2001) (personal injury verdict reversed for lack of valid scientific link between eating fish and developing Guillain-Barre Syndrome).

The Cherry paradigm thus violates the due process standards of the United States Constitution and *a fortiori* Section 9 of Article I of the Florida Constitution.

C. This Court's Construction Of Section 921.137 Creates An Irrebuttable Presumption That Is Constitutionally Impermissible

This Court's presumption that no one with an IQ over 70 is mentally retarded violates Due Process. "[T]he due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated." Tot v. U.S., 319 U.S. 463, 467 (1943). Hence, "[a] statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." Id. at 467-68 (holding that Congress cannot create the statutory presumption that, "from the prisoner's prior conviction of a crime of violence and his present possession of a firearm or

ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute."); see also Leary v. U.S., 395 U.S. 6 (1969) (holding that statute authorizing jury to infer from defendant's possession of marihuana that defendant knew that marihuana was illegally imported or brought into the United States was invalid under due process clause); Hall v. Recchi Am., Inc., 671 So. 2d 197, 200 (Fla. 1st DCA 1996) (holding that "workers' compensation statute stating that injury in drug-free workplace to employee who has positive confirmation of drug is presumed to have been occasioned primarily by employee's intoxication established an irrebuttable or conclusive presumption which violated the constitutional right to due process.").

Irrespective of the principles applicable in particular to scientific evidence canvassed in Section B above, this Court's construction of Section 921.137(1) violates fundamental principles of due process restricting the permissible use of presumptions.

In Cherry, this Court created an irrebuttable presumption that a defendant is not mentally retarded, and thus subject to infliction of the death penalty, on the basis of a fact that has no rational relationship to the presumed fact. Compare Cherry, 959 So. 2d at 714 (defendant is not mentally retarded because his IQ score of 72 is greater than 70) with Atkins, 536 U.S. at 309 n.5 (an IQ score of 75 or

lower is considered the cutoff score for the intellectual function prong of a mental retardation assessment). That irrational and arbitrary presumption violates federal and state constitutional standards. See Leary, 395 U.S. at 36 ("[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.").

D. This Court's Construction Of Section 921.137 Creates A Factual Presumption That Nullifies A Constitutional Right Under The Guise Of Factfinding

Section 921.137(1), as construed by Cherry, not only violates fundamental principles of due process under the Fourteenth Amendment, but also offends the Supremacy Clause.

Even where a state is entitled to find a fact upon which a constitutional right depends, e.g. whether the police beat the defendant, it may not erect an evidentiary framework for making that determination which is hostile to the underlying right, e.g. requiring any defendant claiming to have been beaten by the police to prove it by the eyewitness testimony of twenty bishops. Were it otherwise, the State could destroy the underlying right by manipulating its factfinding procedures.

That is precisely what this Court has done here. It has created a factual presumption (i.e., a defendant is not mentally retarded with an IQ score above 70)

that constricts the substance of a federal constitutional right (i.e., under Atkins, a defendant with an IQ of 75 or below is immune from being executed by the state). Section 921.137(1), as construed by Cherry, goes beyond the constitutionally permissible scope of the state's discretion in factfinding because it overreaches the federal constitutional immunity of mentally retarded persons from being executed and permits such immunity to be nullified under the guise of factfinding. See, e.g., Bailey v. Alabama, 219 U.S. 219, 239 (1910) (invalidating Alabama statutory presumption of an employee's criminal intent to defraud his employer when the employee failed to perform services after payment as inimical to Thirteenth Amendment rights: "a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption . . . [and] [t]he power to create presumptions is not a means of escape from constitutional restrictions."); Taylor v. Georgia, 315 U.S. 25, 29 (1941) (same); Morrison v. California, 291 U.S. 82, 90-93 (1934) (reversing conviction based upon statutory presumption of criminal intent to enter into a conspiracy to furnish land to ineligible alien based on the alien's apparent race as inimical to equal protection); Speiser v. Randall, 357 U.S. 513, 526 (1958) (holding that a California statute which presumed an individual to advocate overthrowing the government based on his refusal to sign a loyalty oath on his tax form invalid as inimical to First Amendment).

E. This Court's Construction Of Section 921.137 Does Not Provide Constitutionally-Adequate Procedures To Determine Mental Retardation

The procedures for determining whether facts do or do not bring a case within a substantive federal constitutional prohibition are a matter of federal law. See Chapman v. California, 386 U.S. 18, 21 (1967) ("[W]hen a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied."). In violation of fundamental principles of due process of the Fourteenth Amendment and the Florida Constitution, this Court in Cherry construed Section 921.137(1) to create factfinding procedures that are incompatible with the constitutionally proper adjudication of Atkins claims.

A similarly flawed Florida statute led to the United States Supreme Court's decision in Ford v. Wainwright, 477 U.S. 399 (1986). In Ford, the former Florida statute required that, when informed that a person under sentence of death may be insane, the Florida Governor appoints a commission of three psychiatrists to examine the prisoner's sanity. 477 U.S. at 412. The procedure was the exclusive means for determining sanity and did not permit an evidentiary hearing or a jury trial. Id. The Court stated that "consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the

taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate." Id. at 414.

Recently, in Panetti v. Quarterman, the Court held that the test applied by the Fifth Circuit Court of Appeals to assess a Texas prisoner's competency to be executed was based on a flawed interpretation of Ford. 127 S. Ct. 2842, 2860 (2007). The Court of Appeals' three-factor inquiry for determining whether a prisoner is aware of the reason for his execution treated a prisoner's delusional belief system as irrelevant and disregarded clinical evidence of the prisoner's psychological dysfunction. Id. at 2861-62. The Court held that "[t]o refuse to consider evidence of this nature is to mistake Ford's holding and its logic." Id.

While Atkins allowed the states to develop appropriate ways to enforce the constitutional restrictions of the Eighth Amendment, Panetti counsels that the Eighth Amendment also restricts states' ability to establish procedures that allow the factfinder to ignore relevant evidence of mental retardation. Id. at 2859-62.

As described above, the Court in Atkins recognized the scientific consensus that an IQ score 75 or lower is "typically considered the cutoff score for the intellectual function prong" of a mental retardation evaluation. See Atkins, 536 U.S. at 309 n.5. However, this Court's holding in Cherry, establishing a strict IQ cutoff score of 70, necessarily precludes evidence – i.e., evidence of IQ scores

between 71 and 75 – relevant to determining the constitutional fact to be decided. In other words, like the procedure held constitutionally impermissible in Ford, Cherry establishes a procedure that precludes a defendant from presenting material relevant to his mental retardation and – as occurred in this case – bars consideration of such essential material by the factfinder.

F. This Court's Definition Of Mental Retardation Violates The Eighth And Fourteenth Amendments As Well As Corresponding Provisions Of The Florida Constitution

The Supreme Court ruled that a state cannot execute mentally retarded persons because the imposition of capital punishment on them is excessive under the Eighth and Fourteenth Amendments in light of the purposes of that punishment and practical realities. See Atkins, 536 U.S. at 321. The definition of mental retardation in Section 921.137, as construed by Cherry, is inconsistent with the constitutional bar on the execution of mentally retarded persons.

To comport with the scientific meaning of "mental retardation," standardized intelligence tests must be read for what they actually say and in the context of an overall clinical picture, not with a myopic focus on a particular test score. See, e.g., In re Hawthorne, 35 Cal. 4th 40, 48-49 (Cal. 2005) (finding that mental retardation is not measured according to a fixed IQ score, which is "insufficiently precise," but "rather constitutes an assessment of overall capacity based on a consideration of all relevant evidence."); People v. Superior Court, 40

Cal. 4th 999, 1003 (Cal. 2007) (The fact that defendant's IQ score "has generally been above the range considered to show mental retardation does not, as a matter of law, dictate a finding he is not mentally retarded. The legal definition of mental retardation for purposes of Atkins's constitutional rule does not incorporate a fixed requirement of a particular test score."); Pruitt v. State, 834 N.E.2d 90, 109-110 (Ind. 2005) (statute defining mental retardation was not to be interpreted to contain diagnostic criteria below the clinical standards because, in part, "the Eighth Amendment must have the same content in every state"); Commonwealth v. Miller, 888 A.2d 624 (Pa. 2005) ("consistent with both [the AAMR and the DSM] classification systems, we do not adopt a cutoff IQ score for determining mental retardation in Pennsylvania, since it is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation.").

Accordingly, even if the precise question presented here respecting the IQ cutoff had not already been authoritatively settled by Atkins, this Court's definition of mental retardation would be violative of the Eighth and Fourteenth Amendments to the United States Constitution, as well as corresponding provisions of the Florida Constitution.

POINT II: Factfinding Infected By Legal Error Is Entitled To No Deference And This Case Must Be Remanded

As discussed above, the Circuit Court dismissed Dr. Keyes's testimony in support of his conclusion of mental retardation as "essentially an argument for the

law to be something other than what it is," and "of no evidentiary value at all" because it simply "disagree[d] with the standard the Legislature established." (Final Order, pp. 19-20, at SR5. 1243-44.).

These conclusions were explicitly premised on the "dispositive" force of Cherry, which the court below "is without authority to reconsider." (Final Order, p. 25, at SR5. 1249.). But because Cherry does not in fact set forth the governing legal standard, the factual determinations reached by the Circuit Court must be set aside because they were "induced by an erroneous view of the law." Holland v. Gross, 89 So. 2d 255, 258 (Fla. 1956); see Central Waterworks, Inc. v. Town of Century, 754 So. 2d 814 (Fla. 1st DCA 2000) (same).

Mr. Nixon is entitled to factfinding by a judge whose view of the evidence is not distorted by looking at it through an erroneous – indeed unconstitutional – legal lens. Cf. Panetti, 127 S. Ct. at 2863 (because "the record was developed pursuant to a standard we have found to be improper," "[t]he underpinnings of petitioner's claims should be explained and evaluated in further detail on remand.").

In this case, however, the Circuit Court looked at the testimony before it through no less than three such lenses. The first was Cherry. The others are described in the two following points.

POINT III: Circuit Court Violated *Atkins* by Adding A "Culpability" Test

The task before the Circuit Court was to determine whether Mr. Nixon met the diagnostic criteria for mental retardation. If so, the Federal Constitution categorically bars his execution. That is what Atkins held.

"Neither Atkins nor [other precedent] suggest that [heinous] crimes render a defendant ineligible for exemption from the death penalty based on mental retardation." Holladay v. Campbell, 463 F. Supp. 2d 1324, 1346 (N.D. Ala. 2006); see also Lambert v. State, 126 P.3d 646 (Okla. Crim. App. 2005).

The Circuit Court, however, confused the Atkins rule (no execution of the mentally retarded) with one of its rationales (many retarded people act impulsively or under the influence of others) and decided that even a defendant who does meet the diagnostic criteria for mental retardation is only entitled to the Atkins exemption if the crime was the product of "impulsivity [or] suggestibility consistent with diminished culpability." (Final Order, p. 24, at SR5. 1248.).

Thus, the opinion below contains successive sections headed "Testimony and Evidence Regarding Mr. Nixon's Intellectual Capacity" and "The Record Refutes any Suggestion of Impulsivity or Suggestibility" and concludes "*For all of these reasons*, the court concludes that Mr. Nixon failed to establish by a preponderance of the evidence that he should be excluded from eligibility for the

death penalty by reason of mental retardation." (Final Order, p. 25, at SR5. 1249 (emphasis added).).

POINT IV: The Circuit Court Violated *Atkins* By Basing Its Finding Of Non-Retardation On Nixon's "Confession"

Having erroneously decided that it should add the element of culpability to the legal requirement of mental retardation, the Court below proceeded to compound the error by determining culpability from the "facts" of the crime as revealed in Mr. Nixon's "confession" and the prosecution's case built thereon.

This was a flat violation of Atkins – one of whose specific premises is that that mentally retarded people are more prone than others to give false confessions and be wrongfully convicted. See Atkins, 536 U.S. at 320. Of course, legal actors do not know when that has happened; the whole point is that, acting in perfectly good faith as the court below did here, they may be led astray by the delusion that a confession is true when it is not. As Atkins explained, one "justification for a categorical rule making [mentally retarded] offenders ineligible for the death penalty" is to obviate this possibility by imposing a prophylactic rule. Id. To predicate a finding of non-retardation on the assumed truth of the contents of a "confession" is simply inconsistent with that rule.

The error was particularly egregious here since (a) the State specifically confined its evidentiary presentation to the IQ prong of the mental retardation diagnosis and took the position that the maladaptive behavior prong need not be

reached (MH Tr. at 174:11-175:12), with the result that the validity of the "confession" was not addressed at the evidentiary hearing or in the parties' briefing but was simply assumed *sua sponte* by the Court below during the writing of its opinion, and (b) there is in fact very substantial reason to doubt the accuracy of the prosecution's account of the crime in this case.

A. Confessions From Mentally Retarded Persons Like Nixon Are Unreliable And Have Led To Numerous False Confessions

In contrast to the Court below, the Atkins Court was fully advised before issuing its decision that the unreliability of confessions made by mentally retarded persons like Mr. Nixon is well documented in psychological and social research, which finds that standard interrogation techniques, when applied to particularly vulnerable persons, lead to a high number of false confessions.[6] Richard J. Ofshe

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[6] Two types of false confessions may result when vulnerable suspects, such as a mentally retarded, emotional and mentally stressed Joe Nixon, are subjected to interrogation, even standard techniques: "coerced-compliant" confessions, knowingly false or unreliable confessions given to obtain some goal (to go home or end the interrogation, for fear of higher sentencing, to protect others - one or more of which could have occurred in the instant case), or "coerced-internalized" false confessions, in which the suspect begins to believe in his own guilt. Welsh S. White, False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions, 32 HARV. C.R.-C.L.L. REV. 105, 109 (1997); see also GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 260-73 (1992).

False confessions have several factors in common: a mentally or emotionally vulnerable suspect; intense pressure on the police to solve the crime; lengthy interrogation without any neutral persons present; and police misrepresentations about extrinsic evidence. Gail Johnson, False Confessions and Fundamental

(footnote continued)

& Richard A. Leo, The Social Psychology of Police Interrogation, 16 STUDIES IN LAW, POLITICS AND SOCIETY 189 (1997); Gudjonsson, supra, at 260-73. Confessions from mentally retarded persons are highly suspect for several reasons. First, according to legal psychologists Ofshe and Leo, mentally retarded persons are "unusually responsive to pressure to submit to and comply with the demands of authorities" and "are especially vulnerable to the pressure of accusatorial interrogation." Ofshe & Leo, supra, at 189.[7] Because of their mental deficiencies,

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Fairness: the Need for Electronic Recording of Custodial Interrogations, 6 B.U. PUB. INT. L.J. 719, 721 (1997). All of these factors are present in Mr. Nixon's case.

[7] Mentally retarded suspects also give false or unreliable confessions for other reasons. For example, "mental health experts have long been aware of the risk that a mentally retarded suspect's eagerness to please authority figures will lead him to confess falsely." White, supra, at 123; see James W. Ellis & Ruth A. Luckasson, Symposium of the ABA Criminal Justice Mental Health Standards Mentally Retarded Criminal Defendants, 53 GEO. WASH. L. REV. 414, 446 (1985); see also MH Tr. at 26:12-27:9 (discussing the "Cloak of Competence" whereby individuals with mental retardation "hide their mental retardation in the best way they know how, by acting like they understand what's going on and understanding more than they really do. … [They are] more likely to just nod their head and agree…"). Studies also demonstrate what is called a "cheating to lose" phenomenon – a mentally retarded person will accept blame for some event so that the persons in authority who are asking about it will not be angry with him. White, supra, at 123.

The pressure that the police feel from the community to solve a case may lead them to use interrogation tactics inappropriate to the mentally retarded suspect. See id. at 133. "[T]he empirical data suggest that standard interrogation methods will lead to untrustworthy confessions when interrogators employ these methods on a particularly vulnerable suspect or employ specific stratagems or tactics on any suspect." Id. at 134.

"they are quite likely to be highly vulnerable to the stress inherent in a modern accusatory interrogation." Id. at 212; see also Ellis & Luckasson, supra, at 427. Second, one of the mechanisms that mentally retarded persons use to cope with stressful situations is consistently answering questions in the affirmative, regardless of whether the questions demand affirmative answers. And the form of a question can more easily bias the mentally retarded suspect's answer. See Ellis & Luckasson, supra, at 428. As a result, ordinary police interrogation techniques often yield false confessions from these suspects.[8]

In this case, the police officers read Mr. Nixon his rights in a cursory fashion and without adequate explanation given his concededly limited intellect. Officer Campbell, "explained" Mr. Nixon's rights to him as follows: "A little more fancy language than what I said this morning but basically we're not going to try and trick you or threaten you or hurt you or promise you good things or bad things, we're just going man to man straight from the shoulder. Is that, you understand what I've said to you?" (Confession of Joe Elton Nixon, August 14, 1984, Exhibit A to Final Order ("Confession"), p. 1, at SR5. 1251.). Mr. Nixon did not

[8] "Some mentally retarded suspects are inclined to confess falsely even if the interrogation methods are relatively benign." White, supra, at 131; see Ofshe & Leo, supra, at 213-214.

repeat back the rights, explain in his own words the rights he was waiving, or respond in other than monosyllabic tones to the officers' words.

Moreover, throughout the interview Officer Campbell used soothing, leading and ultimately deceptive questions. (Confession, p. 1, at SR5. 1251.). The record contains ample evidence that Mr. Nixon – as is common with retarded people – replied to these questions affirmatively in an effort to appear normal. See, e.g., Summary of Standard Test Results, prepared by Denis William Keyes, Ph.D., Sept. 25, 1993 ("1993 Keyes Report"), pp. 8-9, at SR5. 143-44; Report Re: Joe Elton Nixon, prepared by Alec J. Whyte, M.D., Oct. 6, 1993 ("Whyte Report"), p. 14, at SR5. 228; Resume of Neurological Evaluation Re: Joe Elton Nixon, prepared by Henry L. Dee, Ph.D., Oct. 6, 1993 ("Dee Report"), p.6, at SR5. 194.

The Court below considered none of this. But cf. Brown v. Crosby, 249 F. Supp. 2d 1285, 1290-1314 (S.D. Fla. 2003) (holding that mildly mentally retarded individual's waiver of his Miranda rights prior to making his post-arrest statement was not knowingly and intelligently made); Sims v. Georgia, 389 U.S. 404, 407 (1967); Miranda v. Arizona, 384 U.S. 436, 475 (1966); Smith v. Zant, 887 F.2d 1407 (11th Cir. 1989) (affirming grant of writ of habeas corpus because defendant with IQ of 65 and mental age of 10 did not knowingly and intelligently waive rights); Henry v. Dees, 658 F.2d 406, 409 (5th Cir. 1981) (same); Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972) (holding invalid the waivers given by two

individuals with IQs between 61 and 67, who read at a second-grade reading level); United States v. Garibay, 143 F.3d 534 (9th Cir. 1998) (defendant's borderline retardation and inability to understand oral instructions among prerequisite skills for knowing and intelligent waiver); Moore v. Ballone, 658 F.2d 218, 229 (4th Cir. 1981); Note, Constitutional Protection of Confessions Made by Mentally Retarded Defendants, 14 AM. J. L. MED. 431, 432, 440-44 (1989).[9]

B. The Circuit Court's Injudicious Use Of Evidence That Was Both Precluded By *Atkins* And Untested By Normal Adversarial Processes Was Particularly Egregious In This Case Because There Is Good Reason To Believe That The "Confession" Was In Fact False

Numerous important and unimportant details in Mr. Nixon's statements are implausible and inconsistent with either the physical facts of the crime or the statements of the State's two main witnesses: John Nixon and Wanda Robinson.

1. Joe's confession says that he encountered the victim, Jeanne Bickner, in the parking lot of the Governor's Square Mall and took her to the place where he killed her on a Saturday afternoon. (Confession, pp. 4-5, 6, 39-40, at SR5. 1254-

[9] Formal compliance with Miranda procedure does not automatically render a custodial statement admissible where the defendant may be mentally incompetent. See, e.g., Miller v. Dugger, 838 F.2d 1530, 1539 (11th Cir. 1988); State v. Caldwell, 611 So. 2d 1149, 1152 (Ala. Crim. App. 1992); Smith v. Kemp, 664 F. Supp 500 (M.D. Ga. 1987) aff'd sub nom., Smith v. Zant, 887 F.2d 1407 (11th Cir. 1989) (evidence of a defendant's mental retardation and low I.Q., though not dispositive, carries great weight in determining competency to confess); Myles v. State, 399 So. 2d 481 (Fla. 3d DCA 1981). See generally Charles Marvel, Mental Subnormality of Accused as Affecting Voluntariness or Admissibility of Confession, 8 A.L.R. 4TH 16 (1981).

55, 1256, 1288-89.). Notwithstanding numerous attempts by investigators to get Joe to change the Saturday date, he insisted that the acts took place on a Saturday. (Confession, pp. 4-5, 6, 39-40, at SR5. 1254-55, 1256, 1288-89.). In fact, Bickner was seen by at least two witnesses on Sunday, August 12, 1984. (Trial testimony, Mary Atteberry, at R. 1867-68; Trial testimony, Linda Gallagher, at R. 1871.).

2. Joe had a potential alibi for the time of the murder. Lamar Nixon, Joe's uncle, stated that he saw Joe in Woodville between 3:00 and 4:00 p.m. on Sunday August 12, and that Joe was driving a brown Buick.[10] It is about 12 miles from Woodville to the Mall and about 15 miles from Woodville to Tram Road at the turn-off to the murder scene, plus another 5-10 minutes of driving over rough dirt to get to the actual place of the murder. See Rand McNally Street Finder (1996 Ed. CD-ROM); A1998-216. One witness, Mary Atteberry, saw a black man speaking with a white woman near a yellow sports car at the Mall at "about a quarter until 3:00." (R.1868; A1998-185.). Another witness, Linda Gallagher, a friend of Bickner, saw a black male speaking with Bickner "between, I would say, 3:00 and 4:00 p.m." (R.1873; A1998-190.). Using either witness's time frame, it

[10] Lamar Nixon said that he and Mary Hayes had met Joe while Lamar was on a pass from the Tallahassee Correctional Center. Mary Hayes could have verified this account. Additional verification could have been obtained from others with whom Lamar Nixon told Mr. Mickens he met that afternoon after encountering Joe. (3.850 Motion at 235-36; 3.850R. 640-41.).

would be hard to imagine how Mr. Nixon could have been in Woodville and at the Mall committing the crime at the same time.

3. Joe's confession says that in the mall parking lot he told Ms. Bickner that he had a broken muffler on his uncle's Chevrolet Monte Carlo and had hurt his arm; Ms. Bickner offered him a ride and they left the mall in Bickner's 1973 M.G. two-seat, convertible, with Bickner driving voluntarily and Joe in the front passenger seat. At some point on the road, Joe says he hit Bickner on the head, overpowered her and – from the passenger side of the car – grabbed the steering wheel and maneuvered the M.G. safely over to the side of the road. He then got the still-conscious Bickner out of the car and forced her into the trunk. He then drove the M.G. to a logging road and then over the rutted dirt road to the secluded site where Ms. Bickner's body was found. (Confession, pp. 5-8, 10-14, at SR5. 1255-58, 1260-64.). The confession further says that he left the scene where the body was found driving the M.G. He picked up his friend, Willy ("Tiny") Harris, who helped him pick up the Monte Carlo and return it to his uncle's house. (Confession, pp. 24-28, at SR5. 1274-78.).

However, the trunk of a 1973 M.G. is so small that, in order to fit a person into it, the spare tire would have to be removed.[11] This would have required Joe (if

[11] As John Nixon testified on deposition:

(footnote continued)

the scenario in his confession were true) to single-handedly maintain control over Bickner at the roadside while opening the trunk, removing the spare tire, forcing her into a very small space, and then closing the trunk.

Furthermore, the crime scene was located in a remote area, at least 1.7 miles from the nearest road (Tram Road) and accessible only by a series of "two-rut" dirt roads.[12] The 1973 M.G. has only four and a half inches of ground clearance, new and unloaded. ("M.G. Series M.G.B. Specifications," M.G.B. Web Page, http://www.mgcars.org.uk/MGB/mgbspec.html, at A2002-208.).[13] Four and a half inches is about the height of a 12-ounce soda can.

> "A. What I haven't got the right idea on is which car he took the lady out there in. All he said was he put her in the trunk of the car. And I just looked at that little bitty car and I just figured, you know, he couldn't have took nobody in that little thing. The trunk ain't that big on that."
>
> "Q. Too small to put a person in?
>
> "A. That's what it seems like. I don't know if you could bet somebody in there or not." (Deposition of John Nixon, taken February 14, 1985 ("John Nixon Deposition"), at 3.850 R. 1039.).

[12] See Trial testimony of William Gunter (R. 1902.) and Directions in Leon County Sheriff's Office Death Investigation Report, August 24, 1984, Appendix to Defendant's Post-Argument Memorandum on the Scope of the Evidentiary Hearing on Defendant's Post-Conviction Claims, Tab M at 3.850 R. 3392-94.

[13] Ms. Bickner's car was an "M.G.B." (R. 1871.). It probably had even less than four and a half inches of ground clearance because it was over ten years old at the time of the crime and would have had wear on the springs and suspension. Joe's weight in the car and Bickner's in the trunk, directly over the rear differential and exhaust system, would have brought the car even lower to the

(footnote continued)

Also, Joe was not familiar with the area where body was found.[14] In contrast, the crime scene was in an area where Wanda Robinson's mother had often gone fishing. (Statement of John D. Nixon and Wanda Robinson, August 14, 1984 ("Joint Statement"), at 3.850 R. 976.).

Finally, the M.G. is an idiosyncratic car. Photos of the interior of Ms. Bickner's M.G. show a manual transmission in cramped quarters. (A2002-201.). Joe could barely drive the M.G. In fact, John Nixon said that days after the crime Joe could not get the car into reverse.[15] Yet Joe's confession appears to say that after killing Ms. Bickner, he left the scene by backing her car out. (Confession, p. 24, at SR5. 1274.).

John Nixon and Wanda Robinson both stated that Joe had told them that he put Bickner in the trunk of the Monte Carlo, not the M.G., in the parking lot of the

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ground. Finally, the wheels would likely have slipped into the ruts of the road, bringing the bottom of the car down even lower where the hump rose between the ruts.

[14] "Q: Are you familiar with Tram Road ... Joe? A: Uh, no. Q: Okay. You ever been down in there before? A: I been down there when I was younger but you know, I know it's a long ways you know from town and places like that." (Confession, p. 13, at SR5. 1263.).

[15] John Nixon said, "He tried to get the car in reverse. He couldn't hardly get it in reverse or whatever. He asked me would I show him, help him get it in reverse. I told him just pull it over there and he tried to get it in reverse and the car kept rolling down the hill and he couldn't never get it in reverse." (Statement of John D. Nixon, August 16, 1984 ("John Nixon Statement"), at 3.850 R. 1017-18.). See also Joint Statement at 3.850 R. 987.

Governor's Square Mall.[16] John said Joe told him that after killing Bickner, he returned to the Mall, parked the Monte Carlo, and then drove back out to the crime scene in the M.G. (John Nixon Statement at 3.850 R. 1009.). Wanda said Joe told her that after putting Bickner in the trunk of the Monte Carlo, Joe drove out to Wanda's mother's house with Bickner in the trunk. (Robinson Statement at 3.850

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[16] E.g., John Nixon Statement at 3.850 R. 1007, 1009, 1018; John Nixon Deposition at 3.850 R. 1037; Statement of Wanda Robinson, August 16, 1984, ("Robinson Statement"), at 3.850 R. 1073; Robinson Deposition at 3.850 R. 1120.

In stark contrast to Joe's confession specifying the M.G., John said that Joe had specified the Monte Carlo:

> "Q: [T]ell us what he told you [of how the crime happened].
>
> "A: I will tell you exactly what he told me. He told me that . . . out to Governor's Square Mall [he] parked my uncle's green and white Monte Carlo . . . The lady gave him a boost off and everything and he abducted her and threw her in the trunk of his car.
>
> "Q: The trunk of his car?
>
> "A: Uh huh." (John Nixon Statement at 3.850 R. 1007.).
>
> See also John Nixon Statement at 3.850 R. 1018; Joint Statement at 3.850 R. 976; Robinson Deposition at 3.850 R. 1119-20; Robinson Statement at 3.850 R. 1072.

John originally said the same thing in his deposition:

> "Q: Put her in the trunk of what car?
>
> "A: In the green and white car.
>
> "Q: Your Uncle Tom's Monte Carlo?
>
> "A: Uh Huh." (John Nixon Deposition at 3.850 R. 1037.).
>
> Later, he wobbled on the point.

R. 1073-74; Robinson Deposition at 3.850 R. 1120.).[17] This scenario would require Mr. Nixon, a lone black man, to have overpowered Ms. Bickner, a white woman, and forced her into the Monte Carlo's trunk in full view of Sunday afternoon shoppers at the mall.

4. Joe's confession says that, after having driven Ms. Bickner into a wooded area, he removed her from the trunk of the M.G. and tied her to a tree with two jumper cables from the car. Joe first said he tied her feet and left hand, using one cable for the feet and the other cable for her hand. He clarified that there were two separate cables. (Confession, pp. 15-18, at SR5. 1265-68.). Later, he said that maybe he did tie her around the waist, and that if he did, he guessed it was with a cable. (Confession, pp. 44-45, at SR5. 1293-94.). To support that statement, Joe changed his story, saying he must have loosened her feet, put a bag on her head, put a cable around her waist and then re-tied her feet. Moments later, he changed the story again to say that he never tied Jeanne Bickner's feet. (Confession, pp. 45-46, at SR5. 94-95.). The final story, elicited after police coaching, accords with the crime scene photographs.

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[17] Wanda Robinson said that her mother had seen Joe driving the Monte Carlo, not the M.G., past her house while her children played out in front and that Joe had told Wanda that Bickner was in the trunk of the car at this time. (Robinson Statement at 3.850 R. 1073-74.).

5. Joe's confession says that he set a fire with some things he found in the M.G., including the "tonneau" cover, a fabric piece that goes over the retracted convertible top. After some conversation with Bickner, he choked her until she died, then threw the burning tonneau cover onto what he thought was her dead body and left the scene. He detailed that he had choked her with a rope she had in her car and that he left it tied around her neck. He said that as he was choking her, he could hear noises like someone "fittin' to drown." (Confession, pp. 18-23, at SR5. 1268-73.).

However, the associate medical examiner who performed the autopsy indicated no signs of a rope, rope marks, or choking: his testimony and his autopsy report both reveal a painstaking examination of the larynx and adjacent areas which would have revealed any signs of strangulation but found none.[18]

6. Joe's confession says that his reason for killing Jeanne Bickner was that "she knows me. She knows my name and everything. . . . Well, she just, or something, up on campus, you know, I be up on Florida State or something. I

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[18] "Well, I did not find any evidence of external or outside injury to the larynx. The larynx is composed of rings of springy cartilage-like material that is fairly easily broken, and all of these were intact. ¶ "There is also a very delicate bone that goes across the larynx just above the region of the Adam's apple . . . . [I]t's a delicate bone that is frequently fractured in this area in the case of injuries. And that bone was intact." (R. 1949-50.). See also Autopsy Report, August 14, 1984, Exhibit F of Response to Motion to Vacate Judgment of Conviction and Sentence of Death, filed February 25, 1997 at 3.850 R. 1287.

think she was a teacher or something," and he was afraid she was going to tell on him. (Confession, pp. 7, 15, at SR5. 1257, 1265.).[19]

However, as John Nixon and Wanda Robinson reported, Joe said she was a complete stranger.[20] Also, the death certificate listed Bickner's occupation as "Personnel Program Analyst, Florida State Government."[21]

7. Joe's confession says he burned his trousers and shirt at the crime scene because they had blood on them, and he returned to town in his underwear. (Confession, pp. 40-42, at SR5. 1289-91.).

But Wanda Robinson and John Nixon said that Joe showed them the clothes Joe said he wore when committing the crime (Joint Statement at 3.850 R. 970-71, 973-74; John Nixon Statement at 3.850 R. 1001-02, 1017; John Nixon Deposition at 3.850 R. 1030, 1043; Robinson Statement at 3.850 R. 1076-78; Robinson Deposition at 3.850 R. 1114-16); John said they had blood on them and that he, John, had thrown Joe's blood-stained shirt in the garbage can (where, he asserted, it

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[19] He had originally denied knowing Ms. Bickner (or at least her last name). (Confession, p. 4, at SR5. 1254.).

[20] John Nixon told the police that Joe "told me he didn't know the woman at all. . . . She was a complete stranger to him." (John Nixon Statement at 3.850 R. 1020.). Wanda Robinson concurred: "I asked him who was it [sic] and he said he didn't know." (Robinson Statement at 3.850 R. 1073.).

[21] See State Exh. 15, at A1998-193.

still was at the time of John's statement to the police), while Joe "took the pants with him." (Joint Statement at 3.850 R. 970-71.).

8. Finally, there are indications in Wanda Robinson's deposition that she had originally considered John Nixon a likely suspect in the Jeanne Bickner murder – whether in addition to Joe or instead of Joe is unclear[22] – and that the police discouraged her from taking that line.[23] These indications become the more troubling in the light of deposition testimony that Wanda gave in a subsequent civil action brought by Jeanne Bickner's estate against the Governor's Square Mall. She testified that, a year before the Bickner murder, John Nixon had kidnapped her from the Mall by beating her, choking her and throwing her into a car – a procedure very much like the abduction of Jeanne Bicker [sic] under any account of the latter, except that John had accomplished it early in the morning, before the mall stores opened. (Deposition of Wanda Huggins McKinney in Roberts v. Governor's Square, Inc. ("Huggins Deposition"), at A2002-393-415.). Several

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[22] Robinson Deposition at 3.850 R. 1155: "And I was telling him [Detective Paul Phillips] like, 'How do you know John didn't have anything to do with killing this woman?' And, 'You've got Joe in jail, why don't you put John in jail?'"

[23] Robinson Deposition at 3.850 R. 1155-56: "And he [Detective Phillips] said, 'Wanda, you talking crazy. You need to shut up. You know John couldn't have killed the woman because John was with you,' you know, and all of that. Which John was with me that Saturday and that Sunday. ¶ And he just told me, you know, 'You are not supposed to be talking about the case. So, just drop it, you know. Go ahead with your life.'"

months before Joe's trial, Robinson said, John Nixon again abducted her in a similar fashion. (Huggins Deposition, at A2002-404.). In all, John had abducted and assaulted her four times, driving her around in a car and beating her on three of these occasions. (Huggins Deposition, at A2002-391, 393-94, 396, 400, 406, 416-21.). Robinson said that she always called the police or the sheriff about the abductions but they wouldn't do anything about it because John was a snitch. (Huggins Deposition, at A2002-406-10.). Wanda learned he was a snitch after he snitched on Joe. (Huggins Deposition, at A2002-409.).

These inconsistencies cast serious doubt on the veracity of Mr. Nixon's confession and exacerbate the seriousness of the federal constitutional violations committed by the Circuit Court in using his "confessions" to support a finding that he was not mentally retarded.

POINT V: Nixon Is Entitled To A Remand For A Legally Proper Hearing Because There Is Ample Evidence In The Record To Support His Claim Of Mental Retardation

Mr. Nixon does not contend that this Court on appeal should summarily agree with his position that he is indeed mentally retarded and therefore ineligible for execution under the Eighth Amendment. Recognizing that the question is a litigable one, his position in this Court is that because the record contains ample evidence from which a factfinder conducting proceedings that accorded with the

governing legal criteria could reach that conclusion, he is entitled to a remand for a fair hearing on the issue.

A. There Is Ample Evidence That Nixon Was At Grave Risk Of Developing Mental Retardation

According to the most recognized treatise on mental retardation, there are several well defined risk factors that make it more likely that an individual will develop mental retardation. (MH Tr. at 36:20-37:15; Supplemental Affidavit of Denis Keyes, Ph.D., presented Oct. 23, 2006, Def. Exh. 2, at SR5. Vol. 10 ("Keyes Supp. Aff."), at exh. S; Powerpoint, entitled 'Joe Elton Nixon,' presented by Denis William Keyes, Ph.D. Oct. 23, 2006, Def. Exh. 3, at SR5. Vol. 10 ("MH Powerpoint"), at 9.). These risk factors are grouped into four categories – Biomedical, Social, Behavioral, and Educational – and divided into three developmental periods. (MH Powerpoint at 10.).

Mr. Nixon was exposed to almost every recognized risk factor during the Prenatal, Perinatal, and Postnatal time periods for each of the Social, Behavioral, and Educational categories.[24] (MH Tr. at 37:16-41:22; MH Powerpoint at 9-16.). Virtually every aspect of Mr. Nixon's childhood environment significantly increased the likelihood that he would develop mental retardation.

[24] Considering Joe's impoverished background, it is not surprising that there is sparse biomedical information available.

For instance:

- "Mrs. Nixon admitted to drinking alcohol, both beer and gin, during her pregnancy."
- "She was unable to attain adequate medical care or nutrition while Joe was in utero."
- Joe was malnourished, and then she [Mrs. Nixon] would still withhold food for several days as punishment.[25]
- She [Mrs. Nixon] would encourage her husband to beat Joe. She also knew of and ignored the abuse by Joe's uncle.
- She "called [Joe] stupid all the time."

(Affidavit, Virginia Nixon, sister, ¶¶ 8, 13, 17, 20, Oct. 6, 1993, at SR5. 208-10; Affidavit, Eddie Ingram, cousin, ¶ 12, Sept. 21, 1993, at SR5. 158; Affidavit, Thomas Earl Nixon, cousin, ¶¶ 5-6, Oct. 5, 1993, at SR5. 181-82; Dee Report, p.2, at SR5. 190; 1993 Keyes Report, p. 2, at SR5. 137; MH Tr. at 38:7-39:20; MH Powerpoint at 12.).

Similarly, Mr. Nixon's father was rarely at home to provide the necessary caretaking, parenting, and stimulation that a child requires, and when he was home he did not know any other way to control Joe (and the other children) besides beating him with "switches, belts, extension cords, ropes, fan belts, whatever was handy." (Ingram Aff., ¶¶ 4, 13, at SR5. 155-56, 158; Thomas Earl Nixon Aff., ¶¶ 4, 6, 7, at SR5. 181-82; Virginia Nixon Aff., ¶¶ 12, 16, at SR5. 209-10;

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[25] "[M]alnutrition is the number one cause of mental retardation in the world. … [I]f it occurs in any situation the brain does not develop properly." (MH Tr. at 39:7-11.).

Affidavit, Doris Graham, sister, ¶¶ 6-9, Sept. 26, 1993, at SR5. 163-64; Affidavit, John Nixon, Jr., brother, ¶ 7, Sept. 30, 1993, at SR5. 170; MH Tr. at 39:21-40:11; MH Powerpoint at 13.). This significantly contributed to the risk that Mr. Nixon would develop mental retardation.

Mr. Nixon also was subjected to various poisons and physical dangers that threatened the healthy development of his brain and intellectual functioning. For example:

- As a small child, Joe was exposed to nicotine and pesticides in the tobacco fields.
- Since he was very young, he was given alcohol to entertain others.
- As a toddler, he fell in a tub of scalding water and was severely burned.
- Joe is witnessed "huffing antiperspirant spray to a condition that he was in a inebriated state unable to communicate with anyone."

(Virginia Nixon Aff., ¶¶ 6-7, at SR5. 207-8; Ingram Aff., ¶ 11, at SR5. 157; Graham Aff., ¶ 5, at SR5. 162-63; John Nixon, Jr. Aff., ¶ 3, at SR5. 168-69; Affidavit, James Nixon, uncle, ¶ 3, Sept. 3, 1993, at 152; June 17, 1976 Detention-Adjustment Unit Admission/Release Form, at SR5. 87; MH Tr. at 40:12-41:12; MH Powerpoint at 14.).

And, sadly, Mr. Nixon was also repeatedly subject to sexual and physical abuse that not only left physical scars, but inflicted psychological and emotional trauma, further increasing his risk of developing mental retardation.

For example:

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

(James Nixon Aff., ¶¶ 5, 7, at SR5. 152-53; John Nixon, Jr. Aff., ¶ 7, at SR5. 170; MH Tr. at 39:16-20, 41:13-22; MH Powerpoint at 15.).

In short, there is ample evidence that Mr. Nixon was exposed to almost every risk factor described by the American Association on Mental Retardation. See MH Tr. at 37:16-41:22; MH Powerpoint at 9-16.

B. There is Ample Evidence That Nixon 's Intellectual Functioning was Significantly Sub-average From An Early Age.

Mr. Nixon manifested sub-average intellectual functioning throughout his childhood. Although he tried hard, substantial evidence submitted by those who knew him best – and which was uncontested by the State – demonstrates that he was a very slow learner and he was significantly behind his peers in basic aspects of intellectual performance. (Virginia Nixon Aff., ¶¶ 18, 19, 21, at SR5. 210-11; Ingram Aff., ¶¶ 3, 5, 7, at SR5. 155-57; John Nixon, Jr. Aff., ¶ 12, at SR5. 171-72; Graham Aff., ¶ 14, at SR5. 165-66; MH Tr. at 46:2-48:6; MH Powerpoint at 24-26.). For instance, the record is replete with evidence of Joe's inability to learn, his inability to understand his own teacher, and his inability to read. (Virginia Nixon

Aff., ¶ 18, at SR5. 210; Ingram Aff., ¶ 5, at SR5. 156; John Nixon, Jr. Aff., ¶ 12, at SR5. 171-72; MH Powerpoint at 24.).

Importantly, Mr. Nixon had very significant trouble with one of the main indicators of intelligence – the ability to communicate:

- Joe "had such a hard time learning anything in school and he couldn't carry on a conversation about anyone. He even had trouble talking about boxing, even though he loved boxing."
- "Joe didn't know how to put his words together well and he had a hard time putting his thoughts into words. He often said things the wrong way and I had to tell him the right words to use."
- "Joe was unable to participate in conversations with other people because he would not understand what the conversations were about. … [H]e used to tilt his head from side-to-side … trying to figure out what people were talking about. "

(Virginia Nixon Aff., ¶¶ 21, at SR5. 211; Ingram Aff., ¶¶ 3, 7, at SR5. 155, 156-57; John Nixon, Jr. Aff., ¶ 12, at SR5. 171-72; Graham Aff., ¶ 14, at SR5. 165-66; MH Tr. at 46:2-47:19; MH Powerpoint at 25.). It is a hallmark of mental retardation for an individual to be unable to participate in everyday conversations. See MH Tr. at 47:12-19.

Mr. Nixon also failed to grasp basic quantitative concepts, another prominent characteristic of persons with sub-average intellectual functioning. (Virginia Nixon Aff., ¶ 19, at SR5. 210; MH Tr. at 47:20-48:6; MH Powerpoint at 26-28.). For example:

- Joe Nixon could not understand that two dimes were not as good as one quarter;

- He could not master the basic concept of borrowing;
- On spelling tests, he had a well established characteristic of having only the initial letter correct and a pattern of the first and last letters correct; and
- He could not learn from his mistakes.

(Virginia Nixon Aff., ¶ 19, at SR5. 210; Aug. 1972 Dozier School for Boys records, at SR5. 24-25; May 14, 1974 Letter from Belcher, at SR5. 50-51; MH Tr. at 47:20-51:10; MH Powerpoint at 26-29.).

All of Mr. Nixon's educational records illustrate that his intellectual functioning was far below normal. One example is a California Achievement Test administered to Joe during his seventh grade (although he was given an easier test designed for second to fourth graders) which confirmed that Joe was performing significantly lower than his peers. (MH Tr. at 55:18-56:23; MH Powerpoint at 27-30.). As a result of performances like these, his teachers repeatedly recommended that he receive special education.[26] (Aug. 1972 Dozier School for Boys records, at

[26] The recommendations that Joe receive special education were coupled with the opinions that Joe "cannot perform academically" and that he "will need encouragement and understanding, along with a lot of help in the area of reading." (Aug. 1972 Dozier School for Boys records, at SR5. 24-25; Aug. 19, 1974 Transfer Summary, at SR5. 53-54.). These reports illuminate that the recommendations for special education were squarely based upon Joe's deficient intellectual functioning (as opposed, for instance, to difficulties in anger management). However, as Dr. Keyes discussed, Public Law 94-142 (the Education of All Handicapped Children Act), which required states to implement policies that assure the free identification, evaluation, and appropriate educational assistance to all children with disabilities (at the pain of (footnote continued)

SR5. 24-25; Aug. 19, 1974 Transfer Summary, at SR5. 53-54; MH Tr. at 43:12-44:3, 46:2-25, 51:11-52:12, 54:11-56:17; MH Powerpoint at 27, 29.).

The State presented no evidence whatsoever to contradict these facts.

C. There is Ample Evidence that Nixon Manifested Severe Deficits In Adaptive Behavior Beginning in His Early Years.

As defined by the AAMR, there are three categories of adaptive behavior, Conceptual, Social, and Practical, each with several subcategories. (MH Tr. at 42:15-43:7; Keyes Supp. Aff. at exh. T; MH Powerpoint at 19.). An individual who performs significantly below his peers in a few of these subcategories, meets the diagnostic criterion for mental retardation. (MH Tr. at 42:15-43:7; MH Powerpoint at 19.).

Significantly, in order to qualify, a person "is not required to have deficits in all areas. People with mental retardation have strengths as well as deficits." (MH Tr. at 42:22-43:7; MH Powerpoint at 19, 46; AAMR, MENTAL RETARDATION:

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losing federal funds), was only passed a few years later in 1975, see http://atto.buffalo.edu/registered/ATBasics/Foundation/Laws/specialed.php, so that the paper trail does not in every instance describe the basis of the referral in full clinical detail. See MH Tr. at 51:11-52:12. Thus, for example, a discussion of intellectual deficiencies may be mixed with one about anger management, without explicitly including the conclusion that the latter was secondary to the former (a result of frustration at inability to perform the assigned tasks (MH Tr. at 46:2-25, 51:11-55:17.)) rather than the primary problem. But Dr. Prichard's attempt to fill this silence with speculation about possible reasons for the referrals (MH Tr. at 178:21-179:7.) could hardly serve to displace the bedrock historical fact of the intellectual deficiencies themselves.

DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (10th ed. 2002), at SR5. 799.).[27] Thus the fact that an individual holds a job, has a family, or drives a car does not mean that one is not mentally retarded; the diagnosis turns on the deficits. (MH Tr. at 104:24-107:17.).

As the State's expert agreed, (MH Tr. at 212:23-24.), Mr. Nixon most certainly displayed significant deficits in several areas of adaptive behavior, beginning with interpersonal skills. According to the testimony of those who knew him, Joe was emotionally withdrawn, considered "a slow child," and was constantly called "dummy" and "stupid." (Affidavit, Marvin Carter, correctional officer, ¶¶ 2-4, Oct. 6, 1993, at SR5. 185-86; Ingram Aff., ¶ 3, at SR5. 156; John Nixon, Jr. Aff., ¶ 11, at SR5. 4; Virginia Nixon Aff., ¶ 18, at SR5. 210; MH Tr. at 43:15-44:3; MH Powerpoint at 20.). This victimization and abuse by his peers, (Ingram Aff., ¶ 15, at SR5. 159; Virginia Nixon Aff., ¶ 19, at SR5. 210; Thomas Earl Nixon Aff., ¶ 2, at SR5. 181; MH Tr. at 44:13-45:12; MH Powerpoint at 21-22.) and his resulting social ostracism, in turn further hindered his ability to learn and socially develop. (MH Tr. at 44:4-12.). Indeed, he suffered from a severe lack

[27] For instance, an individual with mild mental retardation is described as able to "usually achieve social and vocational skills adequate for minimum self support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings." (MH Powerpoint at 8.).

of self esteem – manifesting itself in a suicide attempt attested to by his cousin, who managed to prevent Joe from hanging himself. (Ingram Aff., ¶ 15, at SR5. 159; MH Powerpoint at 21.).

Mr. Nixon also was unable to take care of himself and perform basic daily living activities:

- Joe "wasn't just slow, he was totally unable to take care of himself. When he was almost full grown, he still couldn't do the basic things we all take for granted. My mother and I had to do everything for him, from fixing food to making his bed to telling him what to do and how to do it."
- "Joe was not good in making decisions and needed help to make even the most basic day-to-day decisions. I had to help Joe make decisions that were simple to me, but nearly impossible for Joe."
- "Joe couldn't even play cards. Anytime he tried, he would end up with extra cards and be all confused and embarrassed. …"

(Ingram Aff., ¶¶ 3, 6, at SR5. 155, 156; MH Tr. at 45:13-46:1; MH Powerpoint at 23.). Not surprisingly, Joe would wind up getting cheated out of money. (Virginia Nixon Aff., ¶ 19, at SR5. 210; MH Tr. at 44:13-45:10; MH Powerpoint at 22.).

D. There Is Ample Evidence To Support A Finding That The Most Accurate Single-Number Value For Nixon's IQ Score Is 73

To this point, then, the record at a properly conducted hearing on remand would be largely undisputed: Mr. Nixon was at serious risk for the development of mental retardation and during his youth displayed sub-average intellectual functioning and deficits in adaptive skills.

Within this framework, a fair factfinder who read the standardized intelligence tests in the record for what they actually say and in the context of an overall clinical picture[28] would have ample basis to conclude that they are entirely consistent with a diagnosis of mental retardation.

"IQ scores are not like a loaf of bread that simply is what it is. They are messages whose meaning is not intrinsically ambiguous but does require interpretation. Once the mode of interpretation is applied, adjusted IQ scores usually tell a coherent story." James R. Flynn, Tethering the Elephant - Capital Cases, IQ and the Flynn Effect, 12(2) PSYCHOLOGY PUBLIC POLICY AND THE LAW 170, 187 (May 2006) ("Tethering the Elephant"), at SR5. 849.

Not surprisingly, and as Dr. Prichard agreed, multiple administrations of an IQ tests to an individual will not yield the exact same IQ score. (MH Tr. at 218:4-20.). A variety of factors, including, but not limited to, scoring variations by administrators, variations in the administration of the test, and differences in disposition by the individual, can produce variations in scores. (MH Tr. at 96:7-

[28] See, e.g., In re Hawthorne, 35 Cal. 4th at 48-49 (finding that mental retardation is not measured according to a fixed IQ score, which is "insufficiently precise," but constitutes an assessment of overall capacity based on a consideration of all relevant evidence).

97:24.).[29] The scientific literature is consistent with this common sense concept. For instance, Dr. Keyes discussed one such study indicating that, before adjusting for the Flynn Effect or for the Standard Error of Measure, subsequent administrations of IQ tests to an individual resulted in a six to eight point difference – and sometimes up to a fifteen or even twenty-four point difference – in the individual's obtained scores. (MH Tr. at 97:6-98:17, 154:22-157:22; Keyes Supp. Aff. at exh. W.).

It is also uncontroversial that reported IQ test scores are influenced by the so-called Flynn Effect. (Final Order, p. 15 n.8, at SR5. 1239-40.).

When properly normed, an IQ test is calibrated initially to yield an average (mean) score of 100. (MH Tr. at 30:18-31:25; Chart, presented Oct. 23, 2006, Def. Exh. 4, at SR5. Vol. 10.). Thus, the scores received by the entire population at the time of proper norming would be expected to fall into a classic bell curve with a standard deviation of 15. (MH Tr. at 30:18-31:25; Chart, at SR5. Vol. 10.). An IQ score, therefore, is nothing more than a relative measure of performance, compared to a given population. This comparative concept is especially important in the

[29] However, there is no evidence that Mr. Nixon's IQ scores over time were affected by any lack of effort. Each administrator of Mr. Nixon's IQ tests, including the State's expert Dr. Prichard, consistently declared that Mr. Nixon put forth very good effort and did not malinger. (MH Tr. 65:2-5, 81:24-82:3, 84:20-86:11, 91:24-94:24, 152:23-154:7, 174:4-7, 227:18-228:12.).

context of a mental retardation assessment, where those who are mentally retarded – by definition – are those whose level of intellectual functioning places them in the lowest 2.2 percent of the population. (MH Tr. at 194:19-22.). See Atkins, 536 U.S. at 309 n.5 ("It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.").

If one assumes a population mean of 100 at the time a test is administered and a standard deviation of 15, "significantly subaverage intellectual functioning" measured as "two or more standard deviations from the mean score," see FL. R. CR. PRO. 3.203(b), is demonstrated with an IQ score of approximately 70 (before accounting for the Standard Error of Measure). But, where the mean is not 100, or where the mean changes over time, two standard deviations below the mean will not remain at 70.

For more than two decades, led by the research of Dr. James Flynn, psychologists have recognized that the performance level of the general population on intelligence tests changes over time. (MH Tr. at 67:8-12.). Dr. Flynn has found – and others have confirmed – that the mean performance of the population in the United States increases over time at a rate of 0.3 IQ points per year. (MH Tr. at

67:8-68:23; MH Powerpoint at 32.).[30] This annual increase means, for example, that if the mean IQ score of a sample population was 100 in 1981, then the upward improvement in IQ performance will increase the mean to 105 by 1997 (0.3 x 16 years = 4.8 IQ points). See PSYCHOLOGICAL CORPORATION, WAIS-III AND WMS-III TECHNICAL MANUAL 9 (2002) ("WAIS-III Manual"). This phenomenon is referred to in the literature and by psychologists as the "Flynn Effect." See id.

The impact of the Flynn Effect on the reliability and accuracy of an intelligence score can be significant. IQ scores usually are a reliable indicator of an individual's performance against the population at the time the test is properly normed. (MH Tr. at 149:17-152:22; Tethering the Elephant, at SR5. 832-51.). But because the reliability and accuracy of an IQ test is based on the assumption that mean performance is constant, the Flynn Effect over time will render IQ tests unreliable in measuring performance against the mean of the population unless adjustments are made to correct for the shifting mean. (Id.). Accordingly, an individual's score on an IQ test will increasingly overestimate his or her actual performance with each passing year after the test is properly normed by the test

[30] The Flynn Effect also has been verified regarding individuals, like Mr. Nixon, who have mental retardation. (MH Tr. at 70:2-72:15; Stephen J. Ceci, et al., The Flynn Effect and U.S. Policies, 58 (10) AM. PSYCHIATRIST 778 (Oct. 2003), presented Oct. 23, 2006, Def. Exh. 5, at SR5. Vol. 10.; Tethering the Elephant, at SR5. 832-51.).

developer. (Id.; MH Powerpoint at 32.). To reduce the reporting of an artificially high IQ scores, IQ tests are periodically "re-normed, " (MH Tr. at 68:15-23; MH Powerpoint at 32.), although, of course, the obtained IQ scores are still inaccurately inflated between these intermittent adjustments.

Therefore, the Flynn Effect *must* be taken into account. Indeed, the Flynn Effect is routinely applied to correct obtained scores to get a more accurate true score in all important contexts – by psychologists in practice, by researchers in the scientific field, and in the court room. (MH Tr. at 69:15-23, 72:18-23, 149:17-152:22; Tethering the Elephant, pp. 170-71, 186, at SR5. 832-33, 848.). See, e.g., Walker v. True, 399 F.3d 315, 320-23 (4th Cir. 2005), aff'd, 401 F.3d 574, cert. granted & vacated, 546 U.S. 1086 (2006) (remanding for an evidentiary hearing to determine whether the defendant was mentally retarded and stating that "the district court should consider the persuasiveness of [defendant's] Flynn Effect evidence" because "the relevant question is whether [defendant] scored two standard deviations below the mean, a question which is directly addressed by [defendant's] expert opinion as to the Flynn Effect."); Rivera v. Dretke, No. Civ. B-03-139, 2006 WL 870927, at *14 & n.28 (S.D.Tex. March 31, 2006) (citing the Flynn Effect as one consideration in determining that the defendant is mentally retarded) aff'd in part and vacated on other grounds --- F.3d ----, 2007 WL 3027070 (5th Cir. Oct. 18, 2007); Green v. Johnson, 431 F. Supp. 2d 601, 617

(E.D.Va. 2006) (ordering an evidentiary hearing whether defendant was mentally retarded, because lower court failed to consider material facts including the Flynn Effect); State v. Burke, 2005 WL 3557641, at *12-14 (Ohio App. 10 Dist. Dec. 30, 2005) (remanding for a new hearing taking into account Flynn Effect evidence).

The only remaining question is *how* to account for the Flynn Effect because even the State's expert acknowledged that the Flynn Effect is a "valid phenomenon." (MH Tr. at 184:20-185:1.). And the failure to account for the Flynn Effect altogether would leave decisions as to death-eligibility dependent on the decisions test-makers made as to when to re-norm their instruments.[31] If no adjustment were made for the Flynn Effect, the State would not only be violating Atkins by failing to make a reasonably reliable assessment of mental retardation, but also the Eighth Amendment of the Federal Constitution and Furman v. Georgia, 408 U.S. 238 (1972), by selecting people for execution on a purely

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[31] Dr. Flynn provides a vivid example –

> [I]magine [two boys] … perform[ing] identically on IQ tests. But one was executed because he was unlucky enough to take the WISC and score a 75 measured against its obsolete norms; the other is excused as mentally retarded because he is lucky enough to take the WISC-R and scored a 68 when measure against its relatively current norms. Failure to adjust IQ scores in the light of IQ gains over time turns eligibility for execution into a lottery – a matter of luck about what test a school psychologist happened to administer.

(Tethering the Elephant, pp. 174-75, at SR5. 836-37.).

arbitrary basis. See, e.g., Furman, 408 U.S. at 256 ("The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.").

At the Motion Hearing, Dr. Keyes explained that it is standard practice in the educational testing community and in the scientific literature for psychologists and researchers (and Judges) to adjust individually obtained IQ scores to take account of the Flynn Effect. (MH Tr. at 69:15-23, 72:18-23, 149:17-152:22.).

Dr. Keyes supported this testimony with a quote from a recent article by Dr. Flynn:

> I also wish to call attention to another argument put forward by prosecutors, namely, that the Flynn effect is a "group phenomenon" and cannot be applied to individuals. As the reader now knows, this is just a senseless mantra. When the group making the IQ gains is composed of Americans, those gains render test norms obsolete and inflate the IQ of every individual being scored against obsolete norms.

(Tethering the Elephant, p. 186, at SR5. 848.). In contrast, Dr. Prichard failed to specify any methodology to account for the Flynn Effect. There is no reason to believe that a factfinder whose vision was not distorted by the errors described in the previous Points would "conclude that Dr. Keyes's testimony is plainly outweighed by Dr. Prichard's testimony." (Final Order, p. 16, at SR5. 1240.).

It is also acknowledged on all hands that any obtained IQ score must in addition be adjusted for Standard Error of Measure. (Final Order, p. 15 n.8, at SR5. 1239-40.).

As Dr. Prichard readily agreed, an obtained IQ score is only a point estimate. (MH Tr. at 216:8-22.). "An obtained IQ standard score must always be considered in terms of the accuracy of its measurement. . .", also referred to as the Standard Error of Measure ("SEm"). (MH Powerpoint at 33 (citation omitted).). This makes sense because, for instance, a ruler marked in inches is inherently only capable of measuring lengths to the nearest half inch.

As both experts agreed, in the case of the most widely used intelligence tests, the SEm is such that one can state with 95% confidence that the individual's true IQ score is within plus or minus 5 points of the obtained score. (MH Tr. 77:1-78:11, 187:1-188:13; 215:19-216:22.). Thus, as the authoritative treatise provides, and as Dr. Prichard also readily agreed (MH Tr. 216:8-22.), "it is possible to diagnose mental retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for mental retardation." APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS – TEXT REVISION 41 (4th ed. 2000) ("DSM-IV-TR"), at SR5. 792-95; see also MH Tr. 187:20-188:12.

But, as indicated above, the Circuit Court under the constraint of Cherry was unable to give this scientific consensus the legal weight mandated by the Eighth Amendment. That constraint, in turn, led it to reject Dr. Keyes's testimony regarding the statistically appropriate meaning to be given to the obtained IQ scores. (Final Order, p. 16, at SR5. 1240 (stating that Dr. Keyes's treatment of SEm "is the same testimony rejected by the Florida Supreme Court in Cherry").).

In any set of repeated observations, such as the batting averages of all major league players or the bar test scores of all takers, the results will tend to fall into a normal distribution. A bell-shaped curve will graphically illustrate which results are closest to the mean and which are outliers; the result at the top of the curve of a normal distribution will be the mean of the population. (MH Tr. 30:18-31:15, 82:12-18, 169:13-17.). See DICTIONARY OF STATISTICS 35, 303-06 (Oxford University Press 2006). IQ tests are no exception to this rule; if an IQ test is administered multiple times, the scatter of the obtained scores will also fall roughly into a normal distribution and a bell-shaped curve will capture the mean value.

Mr. Nixon was administered five standardized intelligence tests during his life time. (MH Tr. at 52:13-20, 54:18-55:17; MH Powerpoint at 27, 29.). Dr. Keyes explained that, according to standard practice, each individual test score was properly adjusted for the Flynn Effect and the SEm.

The results are shown in the following table:

Test	Administered	Obtained Score	Sub Scores	Flynn Effect Adjustment	SEm Range
WISC	2/12/1974	88	Verbal: 79 Performance: 100	80	75-85
WAIS-R	6/4/1985	73	Verbal: 74 Performance: 72	72	67-77
Stanford-Binet	9/9/1993	"68"[32]	Verbal: 70 Abstract/Visual: 75 Quantitative: 72 Short-Term Memory: 61	66	61-71
WAIS-R	10/6/1993	72	Verbal: 73 Performance: 78	68	63-73
WAIS III	9/15/2006	80[33]	Verbal: 81 Performance: 83	77	72-82
				Mean: 73	**Mean: 68-78**

[32] The actual obtained score was much lower, a 65. But, to provide an accurate comparison of the tests, because the old Stanford-Binet had a standard deviation of 16 points in contrast to 15 points in the Wechsler, Dr. Keyes conservatively adjusted this score to a "68." (MH Tr. 82:12-83:9.).

[33] Because this test was administered by Dr. Prichard, there was detailed discussion at the hearing of the significance of the scatter of the answers that Mr. Nixon gave on its subtests. Dr. Keyes testified that their "aces and spaces" pattern, which Mr. Nixon has repeatedly displayed during standardized testing, was consistent with mental retardation. (MH Tr. at 104:24-107-17; 79:21-81:19, 88:4-8, 90:4-91: 23.). Dr. Prichard agreed that Mr. Nixon "certainly [displayed] the pattern of aces and spaces," but added that this phenomenon is not unique to mental retardation. (MH Tr. at 228:21-230:14.). In any event, the DSM-IV-TR, which Dr. Prichard recognized as authoritative, (MH Tr. at 216:8-11.), notes that "[w]hen there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived fully scale IQ score, will more accurately reflect the person's learning abilities." DSM-IV-TR, p. 42, at SR5. 795.

Dr. Keyes testified that, assuming the validity of every obtained test score, including the very problematic 1974 administration of the WISC,[34] there is no statistical difference between the highest and lowest adjusted score (i.e., there is no statistical significance between the score of 80 on the 1974 administration of the WISC and the score of 66 on the 1993 administration of the Stanford Binet). (MH Tr. at 96:7-98:17.). The SEm for the 1974 administration of the WISC shows that the IQ score could be as low as a 75 and SEm for the 1993 administration of the Stanford Binet shows that the IQ score could be as high as a 71. There is no statistically significant difference between an IQ score of 71 and an IQ score of 75. (MH Tr. at 97:25-98:17.). Because the obtained results reflect a spread well within the expected range,[35] each could have been validly measured.[36]

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[34] There are grave concerns with the 1974 WISC: (i) the sample demographic was middle class Caucasian persons, very much unlike Mr. Nixon; this is "not valid testing and it certainly isn't the way standards are today." (MH Tr. at 59:19-60:19.); (ii) IQ tests today are re-normed every ten years because of significant scoring issues and archaic questions, which raises acute validity issues with this 25 year old test. (MH Tr. at 60:20-61:24.); (iii) the test administrator was not properly licensed. (MH Tr. at 62:3-63:16; MH Powerpoint at 31.); (iv) there was no scored protocols or subtest data. (MH Tr. at 63:17-64:21.); and (v) the large discrepancy between the reported verbal and performance scores – 21 points, or more than one standard deviation – is very indicative of brain damage. (MH Tr. at 64:22-66:2.). See DSM-IV-TR, p. 42, at SR5. 795 ("When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full scale IQ can be misleading.").

[35] Dr. Keyes was the only expert who could explain the significance of all the administered IQ tests. Dr. Prichard, in contrast, only relied upon the two

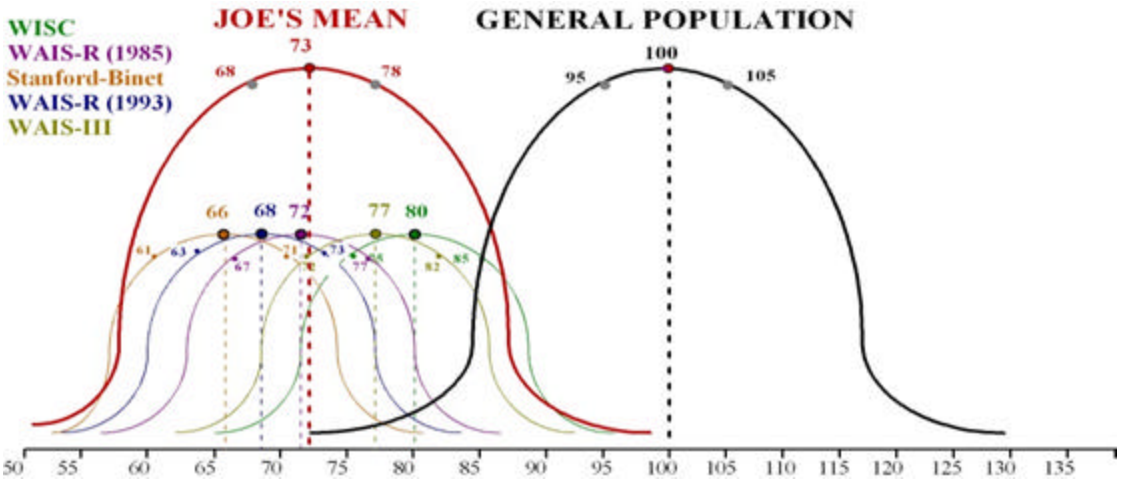
(footnote continued)

But if one wanted to come to the most accurate single-number estimate as a result of these repeated trials, one would – just as in any series of repeated trials – map the results onto a normal curve. That is just what Dr. Keyes did in his concluding slide reproduced below. (MH Powerpoint at 44.).

highest obtained scores and – contrary to the evidence – baselessly questioned Mr. Nixon's motivation or effort in taking all of the other IQ tests. (MH Tr. 65:2-5, 81:24-82:3, 84:20-86:11, 91:24-94:24, 152:23-154:7, 174:4-7, 227:18-228:12.). Dr. Prichard's speculation about Mr. Nixon's ostensible poor motivation and effort during other IQ tests in a forensic environment is particularly strained because he admitted that during his administration, which also was in a forensic environment, "there was no indication that Mr. Nixon was malingering. He performed well, suggesting good motivation on my testing occasion." (MH Tr. at 174:4-7; 227:18-228:12.).

[36] Dr. Prichard's testimony simply ignored this point. He quite rightly stated that if someone obtained an IQ score of 60 on one day and 120 on another day, one could hardly calculate the person's true IQ by averaging the two results. (MH Tr. at 222:13-224:12.). But that is because the two obtained scores, even when properly adjusted, are different by a statistically significant degree – meaning that one of them must be wrong. Here, there is no such statistical difference – meaning that all of the obtained scores could be right.

JOE'S MEAN VS. GENERAL POPULATION



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The peak of the curve shows Mr. Nixon with an IQ score of 73, which is within the range of scores of individuals classified as mentally retarded. (MH Tr. 100:1-16; MH Powerpoint at 38-45.). See Atkins, 536 U.S. at 309 n.5 (an "IQ score between 70 and 75 or lower" is "typically considered the cutoff score for the intellectual function prong." (citation omitted)).

Again, it is not our position that this Court should on appeal summarily agree with these conclusions. It is our position that Mr. Nixon was denied a fair – and constitutionally mandated – opportunity to persuade a factfinder of them and that a remand is required to permit him to do so.

POINT VI: To Conform To The Federal Constitution, This Court Must Require That The Proceedings On Remand Be Freed From Several Erroneous Legal Rulings Previously Made By The Circuit Court

A. The Circuit Court Erroneously Required Nixon To Bear The Burden Of Proof Because Under The Eighth and Fourteenth Amendments Of The Federal Constitution And Its Florida Counterpart The State Is Required To Prove That Nixon Is Not Mentally Retarded Beyond A Reasonable Doubt.

In both its October 17, 2007 pre-hearing order (Oct. 17 Order, p. 2, at SR5. 1142.) and in its April 26, 2007 final order (Final Order, p. 7 n.4, at SR5. 1231.), the Circuit Court held that Mr. Nixon bears the burden of proof. However, it is the State's burden to prove that Mr. Nixon is not mentally retarded beyond a reasonable doubt. Mr. Nixon bases his argument on the premise that the absence of mental retardation is an element of capital first-degree murder, and thus, the State must prove the element to a jury beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970); Cf. Cruzan v. Missouri Dept. of Health, 497 U.S. 261, 282-83 (1990) (canvassing instances of civil proceedings in which due process requires state to bear burden of proof by "clear and convincing" standard before inflicting deprivation upon individual). Under Ring v. Arizona, due process requires any finding of fact which makes a defendant eligible for the death penalty must be unanimously found by a jury beyond a reasonable doubt. 536 U.S. 584, 602 (2002). While Ring dealt specifically with statutory aggravating circumstances, its holding applies to "factfinding[s] necessary to . . . put [a

defendant] to death." Id. at 609. Atkins held that the Eighth and Fourteenth Amendments prohibit a mentally retarded defendant from being put to death. 536 U.S. at 321. Since mental retardation is now a factual issue upon which a defendants eligibility for death turns, due process and the Eighth and Fourteenth Amendments require that a jury make the decision, that the State bear the burden of proof, and that the State prove beyond a reasonable doubt that the defendant is not mentally retarded.

B. In The Alternative, If Nixon Must Show His Mental Retardation, The Appropriate Standard Is Preponderance Of The Evidence.

In the alternative, if Mr. Nixon bears the burden of proof, then that burden must be no heavier than a preponderance of evidence. While Mr. Nixon raised this issue below, the Circuit Court found it "unnecessary to resolve the constitutional issue [of the level of Mr. Nixon's burden.]." (Final Order, p. 13, at SR5. 1237.). As a matter of judicial economy, this Court should do so now in advance of the remand.

"The allocation of the burden of proof reflects a societal judgment about how the risk of error should be distributed between litigants. [The Supreme Court of the United States] has said it well before: 'The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.'" Medina v. California, 505 U.S. 437, 466-67 (1992) (O'Connor dissenting).

The U.S. Supreme Court's decision in Cooper v. Oklahoma, 517 U.S. 348 (1997), sets the constitutional floor regarding the standard of proof. In Cooper, the Supreme Court held that no standard of proof greater than a preponderance of the evidence could be placed upon a capital murder defendant challenging his competency to stand trial. 517 U.S. at 355. The Court's examination of both English common law and contemporary law revealed that the burden of proof for a competency determination has long been a preponderance of the evidence. Id. at 356-61. Historically, mentally retarded persons have been viewed and treated similarly to incompetent persons by courts and under the law. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 332 (1989), rev'd on other grounds (citing Ellis & Luckasson, supra, at 432); accord State v. Wilson, 306 S.C. 498, 509, 413 S.E.2d 19, 25 (1992). The Cooper Court found that the procedural consequences to a defendant of an erroneous determination of competency were dire, and outweighed any interest the state had in creating procedural rules or standards, especially those with little or no historical roots or modern acceptance. Cooper, 517 U.S. at 364-68.

The consequence of an erroneous determination regarding mental retardation for a capital murder defendant (which is amplified here by the potential use of untrustworthy information) is even more dire, because such a determination could result in an impermissible imposition of a death sentence. In fact, in the course of recognizing the right under the Eighth Amendment of mentally retarded defendants

not to be executed, the Supreme Court has identified that right as grounded in a fundamental principle of justice. See Atkins, 536 U.S. at 311. Accordingly, when confronted with this same issue, the Indiana Supreme Court reasoned:

> We do not deny that the state has an important interest in seeking justice, but we think the implication of Atkins and Cooper is that the defendant's right not to be executed if mentally retarded outweighs the state's interest as a matter of federal constitutional law. We therefore hold that the state may not require proof of mental retardation by clear and convincing evidence.

Pruitt, 834 N.E.2d at 103. If Mr. Nixon is required to prove his mental retardation, no standard of proof higher than a preponderance of the evidence may be imposed upon him.[37]

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[37] Currently, 28 of the 32 jurisdictions that have decided which standard of proof is required to prove retardation have adopted the preponderance of the evidence standard. See ARK. CODE ANN. §5-4-618 (2006); CAL. PENAL CODE §1376 (West 2006); IDAHO CODE ANN. §19-2515A (2005); 725 ILL. COMP. STAT.5/114-15 (2006); IND. CODE §35-36-9-6 (2005); KY. REV. STAT. ANN. §532.135 (LexisNexis 2005); LA. REV. STAT. ANN. §28:381; MD. CODE. ANN., CRIM. LAW §2-202 (LexisNexis 2006); MO. REV. STAT. §565.030 (2005); NEB. REV. STAT. §28-105.01 (2005); NEV. REV. STAT. §174.098 (2005); N.M. STAT. ANN. §31-20A-2.1 (West 2006); N.C. GEN. STAT. §15A-2005 (2005); S.D. CODIFIED LAWS §23A-27A-26.1 (2005); TENN. CODE ANN. §39-13-203 (2005); UTAH CODE ANN. §77-15a-104 (2005); VA. CODE ANN. §19.2-264.3:1.1 (2005); WASH. REV. CODE ANN. §10.95.030 (2006); 18 U.S.C. §3596(c) (West 2006). See also Holladay v. Campbell, 463 F. Supp. 2d at 1341 n.21; Morrison v. State, 276 Ga. 829, 839 (Ga. 2003); Chase v. State, 873 So. 2d 1013 (Miss. 2004); State v. Lott, 779 N.E.2d 1011 (Oh. 2002); Blonner v. State, 127 P.3d 1135 (Okla. 2006); Commonwealth v. Miller, 888 A.2d 624; Franklin v. Maynard, 588 S.E.2d 604 (S.C. 2003); Ex parte Briseno, 135 S.W.3d 1, 12 (footnote continued)

C. The Circuit Court Erroneously Rejected Nixon's Argument That Rule 3.203 Does Not Provide A Constitutionally-Adequate Procedure For Resolving Mental Retardation Claims By Persons Whose Death Sentences Were Final Before The Supreme Court Decided *Atkins*

In Mr. Nixon's Rule 3.203 Motion, he argued that Rule 3.203 does not provide a constitutionally-adequate procedure for resolving mental retardation claims by persons whose death sentences were final before the Supreme Court decided Atkins. (Rule 3.203 Brief, pp. 30-34, at SR5. 614-18.). Mr. Nixon raised this claim again in his October 11, 2006 submission to the Circuit Court. (Oct. 11 Letter, p. 2.). The Circuit Court, however, erroneously rejected Mr. Nixon's argument in its October 17, 2006 Order. (Oct. 17 Order, p. 2, at SR5. 1142.).

According to Fla. R. Crim. P. 3.203(d)(4), a death-sentenced defendant whose conviction and sentence were final, and who argued that their mental retardation precluded a death sentence, "shall" raise their Eighth and Fourteenth Amendments challenge in a motion pursuant to Rule 3.851 of the Florida Rules of Criminal Procedure. See FLA. R. CRIM. P. 3.203(d)(4). While Rule 3.203 does extend due process and other constitutional guarantees to those who have not yet

(Tex. Crim. App. 2004); State v. Jimenez, 188 N.J. 390 (N.J. 2006). Thirty-six states and the U.S. Government provide for the death penalty.

been sentenced to death,[38] those currently under a sentence of death are potentially stripped of such constitutional guarantees.

By providing that the proceedings for determining the already-death-sentenced defendant's mental retardation shall be conducted in a Rule 3.851 proceeding, the defendant is at risk of not receiving the benefit of important procedural and constitutional rights. There will be no Strickland guarantee. See Lambrix v. State, 698 So. 2d 247 (Fla. 1996); Strickland v. Washington, 466 U.S. 668 (1984). This Court has never held that Ake v. Oklahoma, 470 U.S. 68 (1985), applies in Rule 3.851 proceedings. Further, Rule 3.851 proceedings have been defined as quasi-criminal in nature. See State ex rel. Butterworth v. Kenny, 714

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[38] Those individuals who have no death sentence in place will receive the right to the effective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), at the Rule 3.203 proceeding. They will have the right to the disclosure of exculpatory or favorable evidence bearing on the mental retardation defense that is in the State's possession. See Brady v. Maryland, 373 U.S. 83, 87 (1963). They will have the right to the assistance of a competent mental health professional. See Ake v. Oklahoma, 470 U.S. 68 (1985). They will have the right to request a Frye hearing on the reliability of IQ tests. See Frye, 293 F. at 1014. Similarly, these individuals will have a proceeding that includes the right of confrontation and the right to a jury. See Crawford v. Washington, 541 U.S. 36 (2004); Blakely v. Washington, 542 U.S. 296 (2004). Additionally, an individual not yet under a sentence of death will have the right to a direct appeal of an adverse verdict, a right that includes an enforceable guarantee that the individual receive effective appellate representation. Following the direct appeal, the defendant will be entitled to a post-conviction process in which they may challenge the effectiveness of the representation they received and any failure by the State to disclose exculpatory or favorable evidence.

So. 2d 404, 409-10 (Fla. 1998). An appeal from the denial of Rule 3.851 relief is not a direct appeal that includes an enforceable right to effective representation under due process. Finally, a defendant raising a mental retardation claim under Rule 3.851 may not have an effectual post-conviction procedure in which he may challenge his counsel's effectiveness or the State's failure to disclose any exculpatory or favorable evidence.

Thus, in violation of fundamental principles of equal protection and due process, Rule 3.203(d)(4) provides – without any basis that can withstand meaningful scrutiny – those who are already under a sentence of death with less constitutional protection than those who are not. Every individual facing a sentence of death who asserts mental retardation must be afforded the same opportunity with the same constitutional protections to present his claims under the Eighth and Fourteenth Amendments to the United States Constitution as well as Florida Constitutional and statutory law. See discussion of Ford v. Wainwright, 477 U.S. 399 (1986), supra Point I.E.

In light of the foregoing, Mr. Nixon is entitled on remand to receive a new penalty phase hearing or, at least, an evidentiary hearing before a jury on the mental retardation issue.

Other jurisdictions have grappled with this situation and attempted to reach accommodations that do not deprive the already-death-sentenced inmate of the

same constitutional guarantees and protections extended to those who are facing a criminal prosecution. For example, in Johnson v. State, 102 S.W.3d 535 (Mo. 2003), the Missouri Supreme Court was presented with an appeal from the denial of post-conviction relief in which substantial evidence of mental retardation had been developed. The evidence of mental retardation had not been presented to the jury that imposed the sentence of death. The Missouri Supreme Court concluded:

> The evidence necessary in light of Atkins was not presented adequately to a finder of fact, nor was the constitutional right to be free from the death penalty where mental retardation exists. Because it is cruel and unusual to inflict the death penalty on those who are mentally retarded, because incomplete evidence of Movant's mental capacity was presented, and because Movant's mental capabilities are questionable, the cause is reversed and remanded. On remand, the court shall set aside Movant's sentence and order a new penalty phase hearing.

Johnson, 102 S.W.3d at 541. Because "reasonable minds could differ" as to whether Mr. Johnson was retarded, the Missouri Supreme Court ordered a "new penalty phase hearing" that would obviously be subject to the Sixth Amendment. Id. at 540-41.

Similarly, in State v. Jimenez, the New Jersey Supreme Court held that a mental retardation claim must be proved to a jury, and remanded to the lower court. 188 N.J. 390, 408 (N.J. 2006) ("Jimenez II"). The Court then granted defendant's motion to clarify its opinion and held:

> Because the finding of mental retardation is like a dispositive mitigating factor, we hold that *if a single juror finds defendant has met his burden of proving mental retardation by a preponderance of the evidence, defendant is not eligible to receive a penalty of death....* [W]e conclude that the appropriate procedure is to give a defendant the opportunity to demonstrate to the jury in the penalty phase, by a preponderance of the evidence, that he or she is mentally retarded. If a single juror is satisfied that a defendant has met his or her burden, the defendant will be sentenced to a term of imprisonment."

State v. Jimenez, 191 N.J. 453 (N.J. 2007) ("Jimenez III") (emphasis added).

Further, the Oklahoma Court of Criminal Appeals granted post-conviction relief on a successive petition raising the capital defendants claim of mental retardation. Lambert v. State, 71 P.3d 30, 31 (Okla. Crim. App. 2003). Finding that "Lambert has raised sufficient evidence to create a question of fact on the issue of mental retardation," the court remanded for a jury trial solely on the issue of Lambert's mental retardation, stating:

> Lambert has already been convicted of first-degree murder, and the determination of mental retardation is not a finding of guilt or innocence. However, to ensure due process and simplicity of procedure, the capital defendant seeking a determination of mental retardation will be afforded the same protections he is given by statute on a charge of first degree murder.

Id. at 32 n.11. The court set forth procedures for determining mental retardation in post-conviction proceedings, including in procedures for "complete discovery" and a twelve-person jury. Id. at 31-32; see also Blonner, 127 P.3d 1135 (same).

In Atkins v. Commonwealth, on remand from the United States Supreme Court, the Virginia Supreme Court found that the "claim of mental retardation is not frivolous." 581 S.E.2d 514, 517 (Va. 2003). Thus, the court ordered a new jury empaneled "for the sole purpose of making a determination of mental retardation." Id.

In addition, many states have explicitly enacted statutory guarantees to the right to have a jury consider a capital defendant's mental retardation. See, e.g., CAL. PENAL CODE §1376 (2007 Supp.); LA. CODE CRIM. PROC. ANN. art. 905.5.1(c) (2007 Supp.); MD. CODE. ANN. CRIM. L. § 2-202 (2002); MO. REV. STAT. ANN. § 565.030 (4)(1) (2007 Supp.); VA. CODE ANN. § 19.2- 264.3:1.1 (2004 Repl.).

Florida's Rule 3.203(d)(4), as currently written, does not provide a constitutionally adequate procedure for resolution of mental retardation claims presented by those individuals already under a sentence of death. Mr. Nixon submits that any pending death sentence, including his own, should be vacated where a prima facie showing of mental retardation is made, and a penalty phase trial – by a jury – that comports with constitutional and due process ordered in order to determine whether the defendant is in fact retarded under Atkins.

D. The Circuit Court Erroneously Denied Nixon A Hearing on His Claim That Mental Illness Bars His Execution

In Mr. Nixon's Rule 3.203 Motion, he argued that "Rule 3.203 Does Not Provide A Constitutionally-Adequate Procedure For Resolving Mental Illness

Claims." (Rule 3.203 Brief, pp. 34-37, at SR5. 618-21.). Then, on October 11, 2006, in advance of the October 23, 2006 evidentiary hearing, counsel for Mr. Nixon reminded the Circuit Court to address several legal matters raised by his Rule 3.203 Motion, including:

> Rule 3.203 is unconstitutional because it does not permit the assertion of claims that the defendant is ineligible for execution by reason of mental illness. See Nixon's Brief, Point VII at pp. 34-37 and Nixon's Reply at p. 4 n.6.

(Oct. 11 Letter, p. 2.).

On October 17, 2007, the Circuit Court issued an order holding, in part:

> As regards the constitutional claim that Rule 3.203 is unconstitutional because it does not permit the assertion of a mental illness claim, relitigation of Mr. Nixon's mental illness apart from retardation is foreclosed by the Florida Supreme Court's decision squarely addressing such issues in [Nixon IV]. The evidentiary hearing is limited to the mental retardation issue and will not be expanded beyond the mental retardation issue established in *Atkins* and its progeny.

(Oct. 17 Order, pp. 2-3, at SR5. 1142-43.).

The Circuit Court's errors should be corrected by this Court prior to remand.

Mr. Nixon reiterates here his positions below that (i) mental illness renders him categorically ineligible for execution under the Eighth Amendment; (ii) that he is entitled as a matter of federal procedural Due Process to a fair opportunity to make the appropriate evidentiary showing; and (iii) that the Florida statutory

scheme violates Federal Equal Protection by providing such an opportunity with respect to mental retardation but not mental illness.

Florida Statute Section 921.137 provides a categorical exclusion from execution for those that are mentally retarded based upon the United States Supreme Court's holding in Atkins, which, as already discussed, held that a capital defendant who was mentally retarded at the time of the offense cannot be executed because such a person is less culpable, faces a greater risk of false or coerced confessions, is less likely to be deterred, is less able to act pursuant to a thought-out plan, and is more likely to be falsely convicted. See Atkins, 536 U.S. 304. All of these same serious policy concerns apply to a capital defendant who is mentally ill. The Florida Statute, however, fails to include mental illness as a categorical exclusion from the death penalty, in violation of the Equal Protection Clause and the Eighth Amendment of the Constitution of the United States and the corresponding provisions of the Florida Constitution.

In an unprecedented joint action, the American Bar Association, American Psychiatric Association and American Psychological Association have adopted common standards explicating the situations in which mental illness stands as an Eighth Amendment barrier to the imposition of the death penalty. See Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, 30(5) MENTAL & PHYSICAL DISABILITY LAW REPORTER 668-677

(September-October 2006) available at http://www.abanet.org/disability/docs/DP122A.pdf. These standards derive from the principles of law that the Supreme Court of the United States followed in Atkins and Roper v. Simmons, 543 U.S. 551 (2005), see C. Slobogin, Symposium: The Death Penalty and Mental Illness: Mental Disorder as an Exemption From the Death Penalty: The ABA-IRR Task Force Recommendations, 15 CATH. U. L. REV. 1133 (Summer 2005), and are designed to identify those defendants whose execution is inconsistent with the retributive and deterrent functions of the death penalty. Cf. Enmund v. Florida, 458 U.S. 782, 788 (1982); Coker v. Georgia, 433 U.S. 584 (1977); Offord v. State, 959 So. 2d 187 (Fla. 2007) (holding that death penalty was a disproportionate punishment due to defendant's long-standing mental illness); State v. Ketterer, 111 Ohio St. 3d 70, 101-08 (Ohio 2006) (Lundberg Stratton, J., concurring) (citing and discussing ABA's Recommendation in calling for a re-examination of whether society should administer the death penalty to a person with a serious mental illness); see also Helen Shin, Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants, 76 (1) FORDHAM L. REV. 465-516 (Oct. 2007) available at http://ssrn.com/abstract=1023321.

Basic principles of Equal Protection mandate that the protections of Atkins and Roper extend to those persons whose mental functioning is identical although

caused by mental illness rather than mental retardation or youth. See Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972) (Equal Protection required that the access of married persons to contraceptives recognized by Griswold be extended to unmarried persons).

Although not yet fully developed, there is substantial evidence of Mr. Nixon's mental illness at the time of the alleged offense. See, e.g., Whyte Report, pp. 11-12, at SR5. 225-26 ("a severely impaired mental state [of Mr. Nixon] played a determining role [the day of the offense] in two crucial ways. First, the cumulative and gradually progressive effects on his cognitive faculties caused by the Mental Retardation and Organic Brain Disorder rendered him before, during and after the time of the offense, incapable of rational premeditation and incapable of conforming his conduct to the requirements of the law. Second, the specific mosaic of bizarre and pseudo-purposeful actions surrounding the offense can only be understood as the disjointed, purposeless, increasingly panicked and impulsive products of the paranoid decompensation of a grossly impaired mental and volitional capacity"); Report Re: Joe Elton Nixon, prepared by Alan L. Doerman, Psy. D., June 4, 1985, p. 4, at SR5. 129 ("A summation of the above neuropsychological studies using the Halstead Reitan Impairment Index would index clear organic impairments. The Halstead Reitan Index equaled 1.0 (.5

or above is considered brain impaired).").[39] Moreover, not long before the offense, Mr. Nixon was extremely unsettled and disturbed, he drank excessive amounts, and barely ate or slept during the weekend of the offense. (Dee Report, p. 3, at SR5. 191.). Several accounts indicate that during that very weekend, Mr. Nixon 'went blank' and was experiencing hallucinations. (Dee Report, p. 7, at SR5. 195.).

During Mr. Nixon's trial, he refused to attend court and "remained in the holding cell, dressed only in his undershorts, sitting backward on the commode, telling the Judge that he (Joe) did not have 'no business in there . . . I want to go to the moon. That's what I want to do.'" (1993 Keyes Report, p. 5, at SR5. 140.). In May 1985, not long after the offense, Mr. Nixon also sent a disturbing letter to his defense counsel. (May 2, 1985 Letter from Nixon, at SR5. 123.).

Mr. Nixon thus has a substantial Eighth Amendment claim. However, according to the Circuit Court, Florida has no process whereby a capital defendant can assert mental illness as a barrier to execution. If that is so, the Florida statutory scheme violates the Eighth and Fourteenth Amendments.

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[39] There is substantial evidence that Mr. Nixon had brain damage and organic impairments throughout his life. See, e.g., Whyte Report, p. 4, at SR5. 218 (Joe had "brain tissue damage" and "Organic Personality Syndrome"); Dee Report, p. 2, at SR5. 190 ("Juvenile reports generated during this time indicate that Joe exhibited signs of mental deficiency and mental illness").

IV.
Conclusion

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

Dated: November 13, 2007

Respectfully submitted,

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ERIC M. FREEDMAN
Attorney for Joe Elton Nixon
Law Offices of Eric M. Freedman
250 West 94th Street
New York, NY 10025
Tel: 212-665-2713; Fax: 212-665-2714
Florida Bar No.: Admitted Pro Hac Vice

ARMANDO GARCIA
Attorney for Joe Elton Nixon
Garcia & Seliger
16 North Adams Street
Quincy, FL 32351
Tel: 850-875-4668; Fax: 850-875-2310
Florida Bar No. 02439

ERIC S. O'CONNOR
Attorney for Joe Elton Nixon
Sheppard, Mullin, Richter & Hampton LLP
30 Rockefeller Plaza, 24th Floor
New York, NY 10112
Tel: 212-332-3800; Fax: 212-332-3888
Florida Bar No.: Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Initial Brief of Appellant have been mailed by Federal Express to: (i) Carolyn Snurkowski, Assistant Deputy General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-1050, and (ii) Eddie D. Evans, Assistant State Attorney, Office of the State Attorney, Leon County Courthouse, Room 475, Tallahassee, FL 32301 on November 13, 2007.

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Eric O'Connor, Attorney for Appellant Joe Elton Nixon

CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion for Rehearing complies with Florida Rule of Appellate Procedure 9.210(a)(2).

Dated: November 13, 2007.

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Eric O'Connor, Attorney for Appellant Joe Elton Nixon