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

REPLY BRIEF OF APPELLANT

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CITATIONS TO THE RECORD

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

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

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

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

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

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

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

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

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

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

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

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SUMMARY OF ARGUMENT

The Circuit Court held that this Court's opinion in Cherry v. State, 959 So. 2d 702 (Fla. 2007) precluded it from ruling for Nixon.[1] But Cherry wrote a definition of mental retardation that is inconsistent with Federal Constitutional law. For this and related reasons, Nixon's Amended Initial Brief of Appellant (the "Amended Initial Brief" or "Am. Initial Br.") urged this Court to re-visit Cherry and abandon it.

In answer, the State's Answer Brief of Appellee (the "Answer Brief" or "Ans. Br.") attempts to re-write this Court's ruling in Cherry (see Part I below) and all but ignores the opinion below (see Part II below).[2] That response tellingly highlights the weaknesses of both decisions.

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[1] On April 18, 2007, Mr. Nixon filed a motion in the Circuit Court seeking a ruling 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.) The Circuit Court summarily denied the motion, ruling that Cherry was a "dispositive" decision that it was "without authority to reconsider." (Circuit Court Order, dated April 26, 2007 ("Final Order"), p. 25, at SR5. 1249.)

[2] The State also belatedly asserts that "no Eight Amendment argument was preserved at trial that mental retardation should bar imposition of the death penalty." See Ans. Br. 31-32 & n.14. Whatever might be the merits of this argument, which was not asserted below, it flies in the face of the decision of this Court which responded to Nixon's habeas corpus petition asserting the claim by inviting him to commence the present proceedings. See Nixon v. State, 932 So. 2d 1009, 1024 (2006); Am. Initial Br. 4. In reaching that decision, this Court was doubtless aware that Nixon would have a right under (footnote continued)

Even if this Court does not choose to abandon its opinion in Cherry, as Nixon continues to urge, but instead amends it, as the State advocates, the Court should vacate the opinion below and remand this case for a new hearing under the correct standard. The record contains ample evidence from which a factfinder, conducting proceedings that accorded with either party's proposed governing legal criteria, could reach the conclusion that Mr. Nixon is mentally retarded and therefore ineligible for execution under the Eighth Amendment and Atkins v. Virginia, 536 U.S. 304 (2002).

Penry v. Lynaugh, 492 U.S. 302 (1989), to raise the mental retardation issue in federal court in any event. See id. at 329 (stating that if the Court were to hold "that the Eighth Amendment prohibits the execution of mentally retarded persons … , such a rule … would be applicable to defendants on collateral review.").

For the benefit of the Court, Nixon will not attempt to pursue all the red herrings in the State's Answer Brief, but he does not abandon any arguments in his Amended Initial Brief and specifically re-asserts them all.

ARGUMENT

I. The State Attempts To Re-Write *Cherry*

Canvassing at length the decisions of numerous other jurisdictions, the State argues that there is nothing wrong with a "rebuttable presumption" that a person with a measured IQ score above 70 is not mentally retarded. See Ans. Br. 49-54.

The State conspicuously fails to connect this abstract proposition to the Cherry decision itself. The Answer Brief's assertion that "a full scale IQ score of 70 or above gives rise to a rebuttable presumption that a defendant is not mentally retarded" cites to many other states, but not to Florida[3] and not to the Cherry opinion. See Ans. Br. 50 n.19. The State plainly cannot close the circle and assert

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[3] This is hardly surprising because the State's current argument in favor of a IQ cutoff of 70 is contrary to its consistent reading of the Florida statute. 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, 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 score as high as 75. (October 23, 2006 Motion Hearing Transcript, at SR5. Vols. 8-9 ("MH Tr.") at 187:20-188:12, 215:4-216:7).

Accordingly, it would be appropriate for the Court to dispose of this particular case by ruling the State waived any argument that the Florida statute has an absolute cutoff score of 70. Indeed, under these circumstances, the application of the Cherry interpretation of the statute – applied to Nixon 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. See Am. Initial Br. 7 n.2 (citing Bouie v. City of Columbia, 378 U.S. 347 (1964)).

that such a rebuttable presumption governs here because Cherry did not create a rebuttable presumption.

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. Hence, once it concluded that Cherry's IQ score was 72, its inquiry terminated. See id. at 714 ("Because we find that Cherry does not meet this first prong of the section 921.137(1) [mental retardation determination], we do not consider the other prongs of the mental retardation determination."). Indeed, for that reason, this Court did not conduct any further review of the opinion of the Circuit Court in the Cherry case, which had in fact gone on to consider the other two prongs of the definition of mental retardation. See id. at 711.[4] That is an *irrebuttable* presumption.

In any event, whether it did so rightly (as we believe) or wrongly (as the State now suggests), the Circuit Court did in fact interpret Cherry as erecting an

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[4] The State's case is not helped by its long but selective quotes from Brown v. State, 959 So. 2d 146, 148-50 (Fla. 2007). See Ans. Br. 38-40. In that case, decided on the same day as Cherry, this Court pointedly distinguished it while reviewing and affirming a Circuit Court ruling that had found the absence of mental retardation after considering competing evidentiary presentations on all the mental retardation factors (including IQ scores) and reaching reasonable conclusions after an assessment of the disputed facts. See Brown, 959 So. 2d at 150. That is precisely what did not happen in this case, see infra Part II – and precisely what Nixon urges should happen. See infra Part III.

irrebuttable presumption. Faced with a defendant who proffered an IQ score of 73, see Am. Initial Br. 46-59, the Court below ruled as a matter of law that he was not retarded, see Am. Initial Br. 1-2, and refused to consider the substantial evidence presented at the evidentiary hearing that Nixon manifested severe deficits in adaptive behavior beginning in his early years. See Am. Initial Br. 44-46 (summarizing evidence); Brief in Support of Motion Under Fla. R. Crim. P. 3.203 and 3.851 ("Rule 3.203 Brief"), pp. 23-26, at SR5. 607-10 (same).

The State, unwilling – for good reasons – to defend the Circuit Court's imposition of an irrebuttable presumption and its failure to even discuss the latter two prongs of a proper mental retardation determination, simply announces that "there is no evidence that Nixon has deficient adaptive functioning." See Ans. Br. 61. The need to retreat to that untenable position speaks volumes. There is ample such evidence. The Circuit Court simply believed that Cherry precluded its consideration. In offering here a conclusory summary of what it believes the Circuit Court might decide if it were to adjudicate the issue, see Ans. Br. 62, the State merely underscores the reality that the Court below did not in fact rule on the competing factual positions of the parties.

Mr. Nixon is entitled to an actual hearing at which the Circuit Court views the totality of the diagnostically relevant facts. That is so even if this Court does not repudiate Cherry but instead re-writes it, as the State proposes, to establish a

rebuttable rather than an irrebuttable presumption that a person with a measured IQ over 70 is not mentally retarded. In either event, Nixon is entitled to an evidentiary hearing that applies the revised standard. Cf. Panetti v. Quarterman, 127 S. Ct. 2842, 2863 (2007) (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.").

II. The State Flees From The Opinion Below

Both side's briefs summarize the course of the evidentiary hearing below at some length. See Am. Initial Br. 38-59; Ans. Br. 14-28. But only Nixon's Amended Initial Brief addresses the Circuit Court's Final Order. One will search the State's Answer Brief in vain for a substantive response to the simple point repeatedly made by Nixon's Amended Initial Brief:

> The ruling below rejected Nixon's claim because it read Cherry as erecting an insuperable legal barrier to a finding of mental retardation in the presence of an IQ of 73.

See Am. Initial Br. 1-2, 19-20.

The State fleetingly implies, on the basis of a single truncated quote, that after hearing the conflicting testimony – Nixon's expert claiming an IQ of 73 and

the State's expert claiming an IQ of 80 – the Circuit Court held that Nixon's IQ was 80. See Ans. Br. 28. If indeed that had happened (or should it happen after remand), there would be a very different appeal before this Court. See supra n. 4.

But, in fact, what happened below is that the Circuit Court rejected the testimony of Nixon's expert, Dr. Keyes, 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." (Final Order, p. 16, at SR5. 1240).[5]

Because of the Circuit Court's 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))

The Circuit Court's further conclusion that "as an evidentiary matter", Dr. Keyes's approach "is unpersuasive," (Final Order, p. 17, at SR5. 1241) – the

[5] As indicated above, see supra n.1, the Circuit Court characterized Cherry as "dispositive" authority that it was "without authority to reconsider." (Final Order, p. 25, at SR5. 1249).

only snippet of the Circuit Court opinion that the State cites in its account of the proceedings below – flowed from this premise:

> Dr. Keyes's 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).

Faced with the testimony of Dr. Keyes that the most accurate single-number estimate of Nixon's IQ score was 73 and that this is within the range of scores of individuals classified as mentally retarded, see Am. Initial Br. 1 n.1, 46-59, the Circuit Court held, under the constraint of Cherry, that Nixon could not be retarded as matter of law. (Final Order, p. 16, at SR5. 1240 (stating that Dr. Keyes's treatment of the Standard Error of Measure ("SEm")[6] "is the same testimony rejected by the Florida Supreme Court in Cherry"); Final Order, p. 18-19, at SR5.

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[6] Although the Circuit Court disregarded evidence of SEm, it acknowledged that any obtained IQ score must be adjusted for SEm. (Final Order, p. 15 n.8, at SR5. 1239-40). Even the State's expert readily agreed that an obtained IQ score is only a point estimate and that "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." (MH Tr. 216:8-22 quoting APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS – TEXT REVISION 41 (4th ed. 2000) ("DSM-IV-TR"), at SR5. 792-95). The State's expert also readily admitted that because of the SEm, an obtained score of 74 would require an analysis of adaptive functioning. (MH Tr. 187:20-188:12).

1242-43 (stating that Dr. Keyes's testimony of the SEm, the Flynn Effect,[7] and the uncertainty of intelligence testing[8] "is of no evidentiary value at all" because it "disagree[d] with the standard the Legislature established.")).

The Circuit Court thus applied Cherry to hold legally irrelevant evidence that both experts, and the Court itself, agreed was scientifically relevant. See supra

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[7] Although the Circuit Court disregarded evidence of the Flynn Effect (i.e., "1/3 of a[n IQ] point should be subtracted from a test score for every year after the test was normed"), it acknowledged that reported IQ test scores are influenced by the Flynn Effect. (Final Order, p. 15 n.8, at SR5. 1239-40). See Am. Initial Br. 48-53 & n.30-31. Even the State's expert acknowledged that the Flynn Effect is a "valid phenomenon." (MH Tr. at 184:20-185:1). 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 courtroom. See Am. Initial Br. 51-52 (citing MH Tr. at 69:15-23, 72:18-23, 149:17-152:22); James R. Flynn, Tethering the Elephant - Capital Cases, IQ and the Flynn Effect, 12(2) PSYCHOLOGY PUBLIC POLICY AND THE LAW 170, 170-71, 186 (May 2006), at SR5. 832-33, 848; Walker v. True, 399 F.3d 315, 320-23 (4th Cir. 2005); Rivera v. Dretke, No. Civ. B-03-139, 2006 WL 870927, at *14 & n.28 (S.D. Tex. March 31, 2006), aff'd in part and vacated on other grounds, 505 F.3d 349 (5th Cir. 2007); Green v. Johnson, 431 F. Supp. 2d 601, 617 (E.D.Va. 2006); State v. Burke, 2005 WL 3557641, at *12-14 (Ohio App. 10 Dist. Dec. 30, 2005). 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 and Furman v. Georgia, 408 U.S. 238 (1972), by selecting people for execution on a purely arbitrary basis. See Am. Initial Br. 52-53.

[8] 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 96:7-97:24). See Am. Initial Br. 47-48 & n.28. The State's expert agreed that multiple administrations of an IQ tests to an individual will not yield the exact same IQ score. (MH Tr. at 218:4-20.)

nn. 6-8. This legal preclusion from giving the scientific consensus evidentiary weight is unconstitutional, see Am Initial Br. 8-19, and requires that this Court remand for a full hearing on the factual issues.

III. On Remand, Nixon Is Entitled To A Hearing in Which the Circuit Court Conducts Factfinding Consistently With *Atkins*

At the hearing on remand, Nixon is entitled to have the conflicting evidence fairly considered by a Circuit Court whose view of the evidence "is not distorted by looking at it through an erroneous – indeed unconstitutional – legal lens." See Am. Initial Br. 20.

As argued in the Amended Initial Brief, the Circuit Court viewed the evidence before it through three erroneous lenses. This Court should clear the Circuit Court's vision and instruct that on remand:

(i) the Circuit Court, in accordance with Atkins, must apply the scientific definition of mental retardation without any unwarranted presumptions, see Am. Initial Br. at 9-10;

(ii) the Circuit Court is not permitted to use "culpability" as an independent evidentiary factor, see Am. Initial Br. at 21-22; and

(iii) the Circuit Court is not permitted to rely – as it did *sua sponte* in its first opinion – upon the validity of a confession whose unreliability as a matter of law

and fact Nixon documented at length in his Amended Initial Brief, see Am. Initial Br. at 23-37.

A. The Circuit Court Must Apply The Scientific Definition Of Mental Retardation

As indicated, we reject the State's proposed re-write of Cherry, under which an IQ score of 70 would shift the burden to the defendant to show that he is not mentally retarded. See Ans. Br. 50-53. Every such legalistic manipulation of the factfinding process places a thumb on the scientific scale and thereby undermines the core teaching of Atkins, which is that because mental retardation (unlike, say, insanity) is a medical condition and not a legal conclusion, it must be diagnosed by the standards of those whose profession it is to make those assessments.

On remand, the Circuit Court, in accordance with Atkins, must apply the scientific definition of mental retardation without any State-created presumptions. See Am. Initial Br. at 9-10. The Supreme Court in Atkins 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")).

To comport with the scientific meaning of "mental retardation" and avoid a violation of the constitutional ban on the execution of mentally retarded persons, 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 Am. Initial Br. 18-19 (citing 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.")); see also Am. Initial Br. 48-53 & n.30-31 and supra n.7 (discussion of the Flynn Effect); Am. Initial Br. 54-55 and supra n.6 (discussion of the SEm); Am. Initial Br. 47-48 & n.28 and supra n.8 (discussion of the uncertainty of intelligence testing).

We acknowledge that there are some courts that have chosen to go down the presumption-creating path the State urges. See Ans. Br. 50-53. Quite apart from the fact that such rulings have not yet been upheld on federal review – and we believe that they ultimately will not be – they are simply wrong in principal and should not be followed. Unlike cases in which burden-shifting frameworks are adopted by courts to implement a policy determination regarding the underlying substantive issue, in this case that determination has already been made by the Supreme Court of the United States: people who meet the scientific definition of mental retardation may not be executed. Atkins, 536 U.S. at 308 n.3, 309 n.5; id. at 318-19 & n.23-24 (discussing "clinical definitions of mental retardation").

Specifically related to the intellectual function prong, the Court in Atkins found that 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)). Moreover, the current edition of the DSM, which the State's expert, Dr. Prichard,

recognized as authoritative (MH Tr. 216:8-11), also provides that "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." (MH Tr. 187:20-188:12; DSM-IV-TR, at SR5. 792-95). See Am. Initial Br. at 54-55. In fact, at the evidentiary hearing, when the State's expert was read such statement from the current edition of the DSM, he responded, "Correct. I would agree with that, yes." (MH Tr. at 216:15-22).[9] Further, the analysis preceding the pertinent Florida Statute also acknowledged that, "in practice", the intellectual functioning prong of a mental retardation evaluation can include an IQ of "up to 75."[10]

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

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[9] Indeed, the government relied on this same expert witness in the Cherry case, in which he testified that mental retardation could not be ruled out based on the obtained IQ score of 72. (MH Tr. at 216:23-217:25; Psychological Evaluation by Dr. Prichard, presented Oct. 23, 2006, Def. Exh. 8, at SR5. Vol. 10).

[10] 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). 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."

75 – recognized by the Court in Atkins as relevant to determine the constitutional fact to be decided. See Am. Initial Br. 16-18.[11] Because Nixon was subjected to precisely such preclusion (see supra Part II), he received a constitutionally inadequate process. See Am. Initial Br. 16-18 (citing Ford v. Wainwright, 477 U.S. 399 (1986) and Panetti, 127 S. Ct. at 2860).

This Court's creation of an irrebuttable presumption in Cherry also violates fundamental principles of due process under the Fourteenth Amendment of the United States Constitution, and *a fortiori* Section 9 of Article I of the Florida Constitution, and offends the Supremacy Clause because it (i) deprives Mr. Nixon

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[11] In fact, several other courts have found a defendant mentally retarded and barred from execution based upon IQ scores above 70. See, e.g., Rivera v. Dretke, 505 F.3d 349, 361-63 (5th Cir. 2007) (affirming finding that Mr. Rivera is mentally retarded, where his IQ scores were 68, 70, 80, 85, and 92); State v. Gumm, 2006 WL 3524435 (Ohio App. Dec. 8, 2006) (affirming finding that Mr. Gumm is mentally retarded, where his IQ scores were in the range of 70-73, with one score of 79); Commonwealth v. Gibson, 925 A.2d 167 (Pa. 2007) (affirming finding that Mr. Gibson is mentally retarded where his IQ scores were 67, 74, and 81); Jackson v. State, 963 So. 2d 150, 155-58 (Ala. Crim. App. 2006) (finding Mr. Jackson mentally retarded where his IQ scores were 65, 69, 69 and 72).

For this Court to adhere to the irrebuttable presumption of Cherry would thus result in a situation where a mentally retarded capital defendant in Florida with an IQ of 73 will be executed although the identical person in another state would have Eighth Amendment immunity from execution. This both offends the very concept of a national Constitution and turns eligibility for execution into a geographical lottery. The violation of fundamental principles of due process under the Fourteenth Amendment of the United States Constitution is manifest.

of his life on the basis of "junk science", see Am. Initial Br. 10-12; (ii) creates 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, see Am. Initial Br. 12-14; and (iii) creates a presumption under the guise of factfinding (i.e., a defendant is not mentally retarded with an IQ score above 70) that nullifies 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), see Am. Initial Br. 14-15.

Tellingly, the State neither denies any of this nor attempts to defend Cherry. In fact, it explicitly agrees with our attack on the actual Cherry rule, see Ans. Br. 50-51, and, as already discussed, chooses instead to argue that there is nothing wrong with a rebuttable presumption. But there is: "rebuttable presumption" is a legal concept, not a scientific one, and "mental retardation" is a scientific fact, not a legal conclusion.

Accordingly, the Circuit Court should be instructed that on remand it must apply the scientific definition of mental retardation undistorted by any non-scientific presumptions.

B. The Circuit Court Must Not Rely Upon "Culpability" As An Independent Evidentiary Factor On Remand

The Circuit Court confused the Atkins rule (no execution of persons found mentally retarded pursuant to diagnostic criteria) 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). See Am. Initial Br. 21-22. 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)).

In a response as thin in substance as it is short in length, the State acknowledges that the Circuit Court analyzed "suggestibility" in coming to its ruling. See Ans. Br. 64 n.26 (quoting Final Order). It agrees that this was "not a part of any mental retardation analysis," see Ans. Br. 64, but rather an "*other* reason for not disqualifying him from the death penalty *besides* a lack of mental retardation." See Ans. Br. 63 (emphasis supplied). That is the end of the

discussion. Perhaps wisely, the State does not even attempt to justify the Circuit Court's consideration of this "other reason" in a proceeding whose sole purpose was to determine whether Nixon was mentally retarded. It thus tacitly admits that the Circuit Court misperceived its role under Atkins.

The Court below should be clearly instructed that on remand its exclusive task is to provide a full hearing on whether Mr. Nixon meets the diagnostic criteria for mental retardation.

C. The Circuit Court Must Not Rely Upon Nixon's "Confession" As A Basis For Finding Him To Be Not Mentally Retarded

Considering an issue that the parties had not addressed at all, the Circuit Court relied heavily upon the validity of a confession (which, in fact, was a series of evolving and conflicting statements), whose unreliability as a matter of law and fact Nixon documented at length in his Amended Initial Brief. See Am. Initial Br. 23-37.

This was a flat violation of Atkins – one of whose specific premises is 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" – even one that has been credited by several prior courts – is simply inconsistent with that rule.

Confessions from mentally retarded persons are highly suspect for several reasons, including, but not limited to, that they are unusually responsive to pressure to submit to and comply with the demands of authorities, and they cope with stressful situations by consistently answering questions in the affirmative. See Am. Initial Br. 23-25. Just these suspect elements exist in Mr. Nixon's case. See Am. Initial Br. 25-26. Moreover, as Nixon described in over eleven pages in his Amended Initial Brief, 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. See Am. Initial Br. 27-37 (listing numerous important and unimportant details in Mr. Nixon's statements that are implausible and inconsistent with either the physical facts of the crime or the statements of the State's two main witnesses). Finally, unlike the Atkins Court, the Court below was not even advised before issuing its decision of the unreliability of confessions made by mentally retarded persons like Mr. Nixon – or of the ones made by Mr.

Nixon in particular – because the Circuit Court considered the confession for the first time *sua sponte* in its opinion (almost six months after the evidentiary hearing). See Am. Initial Br. 23-27.

Tellingly, the State does not respond in any way to the substance of this extensive showing. By way of answer it simply announces two conclusions, one of fact and one of law.

(i) The State baldly asserts that the Circuit Court's ruling "was not premised on Nixon's confession at trial." See Ans. Br. 65. Left unexplained is how this claim can be squared with the Circuit Court's decision to annex the full text of the "confession" to its opinion.

(ii) "Absent some finding that Nixon's confession was wanting, the trial court was certainly permitted to view that evidence in fully assessing Nixon's mental state." See Ans. Br. 66 n.29. That *ipse dixit* hardly suffices as a response to Nixon's extended argument, see Am. Initial Br. 22-37, described above, that under Atkins the Circuit Court could not use the confession as evidence of mental retardation.

As the Constitution requires, the Circuit Court should be instructed on remand not to rely upon Nixon's "confession" as a basis for finding him not to be mentally retarded.

CONCLUSION

Whether this Court abandons Cherry – as we urge is necessary to conform with the requirements of the Constitution of the United States – or rewrites Cherry in accordance with the salvage effort mounted by the State, Nixon is entitled to a remand for a hearing comporting with constitutional standards.

Dated: February 8, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Initial Brief of Appellant have been mailed by Federal Express to Carolyn Snurkowski, Assistant Deputy General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-1050, on February 8, 2008.

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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: February 8, 2008.

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Eric O'Connor, Attorney for Appellant Joe Elton Nixon