IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2200

STATE OF FLORIDA,

Appellant,

v.

TED HERRING,

Appellee.
_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE TED HERRING

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STATEMENT OF THE CASE

On November 23, 2009, the Circuit Court entered an order vacating appellee Ted Herring's sentence of death on the ground that he is a person with mental retardation and thus exempt from execution under Atkins v. Virginia, 536 U.S. 304 (2002). The circuit court, after conducting an evidentiary hearing, found that Herring satisfied all of the criteria for mental retardation by clear and convincing evidence. This is the State of Florida's appeal from that decision.[1]

The circuit court's order was supported by competent, substantial evidence of mental retardation, including a voluminous record and the testimony of three expert witnesses. The State's appellate brief ("App. Br.") principally asks this Court to re-weigh the evidence and "second-guess" the circuit court's factual findings. That is not permitted. Florida law requires deference to the circuit court's factual findings and that all doubts be resolved in Herring's favor.

The State also argues that the circuit court applied a standard for determining mental retardation that was inconsistent with Florida law. The circuit court, in fact, applied the standard for determining mental retardation (the DSM-IV-TR) that the State specifically requested and agreed upon. The State therefore waived any right to appeal the application of that standard.

[1] As explained in Herring's accompanying motion to dismiss, the State has no right to appeal the circuit court's decision and thus this Court has no jurisdiction over this appeal. This Answer Brief assumes, arguendo, that the court has jurisdiction.

Even assuming the State were not barred from challenging the standard upon which it agreed, the circuit court's determination of mental retardation fully satisfied Florida law. Moreover, reinstatement of Herring's death sentence would violate the U.S. Constitution and applicable Florida law. This Court should affirm.[2]

STATEMENT OF FACTS

A. The Conviction, Sentencing, And Procedural History

On May 29, 1981, a convenience store clerk in Daytona Beach, Florida was shot and killed during a robbery. On June 12, 1981, Herring (who was 19 years old) was arrested and gave a taped confession to these crimes. Herring v. State, 446 So. 2d 1049 (Fla. 1984). Herring was then tried and convicted for armed robbery and first degree murder. The circuit judge sentenced him to death, finding four aggravating and two mitigating circumstances. Id. at 1052-53. This was more than 20 years before the U.S. Supreme Court decided Atkins, and the issue of Herring's mental retardation was not addressed at trial or sentencing.

[2] The State asserts that this appeal should be decided without oral argument. Herring has requested oral argument. Oral argument clearly is appropriate where, as here, the State asks this Court to set aside the circuit court's evidentiary determination of mental retardation and reinstate a vacated death sentence.

Herring filed an unsuccessful appeal, as well as a series of ultimately unsuccessful motions and petitions for relief from his sentence.[3] Mental retardation was not litigated in any of these proceedings (all of which commenced pre-Atkins), and no court addressed Herring's mental retardation prior to the decision now on appeal.

B. The Circuit Court's Decision Vacating Herring's Death Sentence

After Atkins was decided, Herring timely filed a motion to vacate his death sentence pursuant to sections 3.850 and 3.851 of the Florida Code of Criminal Procedure. The motion argued that Herring's death sentence violated the Eighth and Fourteenth Amendments of the U.S. Constitution under Atkins because Herring has mental retardation. The circuit court held an evidentiary hearing on November 2 and 3, 2005. After the hearing and extensive briefing, the circuit court vacated Herring's death sentence, finding that he had proven mental retardation by clear and convincing evidence. (R. vol. 19 at 2984.) The State's appeal followed.

[3] See Herring v. State, 446 So. 2d 1049 (Fla. 1984); Herring v. State, 501 So. 2d 1279 (Fla. 1986); Herring v. Dugger, 528 So. 2d 1176 (Fla. 1988); Herring v. State, 580 So. 2d 135, 138 (Fla. 1991); Teffeteller v. Dugger, 676 So. 2d. 369 (Fla. 1996); Herring v. State, 730 So. 2d 1264 (1998); Herring v. O'Neal, No. 6:99-cv-1413-Orl-18KRS (M.D. Fla. Apr. 14, 2003), aff'd sub nom. Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338 (11th Cir. 2005), cert. denied, 546 U.S. 928 (2005); Herring v. Crosby, 862 So. 2d 727 (Fla. 2003), cert. denied, 541 U.S. 1042 (2004).

1. The Evidentiary Hearing

Three witnesses – all experts – were called at the hearing. Various exhibits, including psychological and intelligence testing results, school and medical records, psychological records, records from prior proceedings, and scholarly texts were received into evidence. Herring called Dr. van Gorp, a licensed neurospsychologist and Professor of Clinical Psychology, Columbia University College of Physicians and Surgeons. (R. vol. 19 at 2978.) The State called Drs. Pritchard and McClaren, both clinical psychologists in forensic private practice. The circuit court found all three qualified to opine on mental retardation. (Id.) Neither the State nor Herring challenged the qualification of any of these witnesses to testify as experts or objected to the admissibility of their opinions.

The experts based their opinions on in-person evaluations of Herring, structured interviews of his relatives, intelligence and adaptive functioning testing, and medical, psychological, and scholastic records. (Id.) Dr. van Gorp opined that Herring satisfies the criteria for mental retardation. (Id. (citation omitted).) The State's experts disagreed (id.), but one of them admitted on cross-examination that Herring is "in that uncertain area" where "you can be mentally retarded," and that "reasonable people could differ as to whether Ted [i]s mentally retarded." (R. vol. 19 at 2989; R. vol. 4 at 525.)

2. The Substantive Standard Applied By The Circuit Court

Atkins "categorically prohibits the execution of persons with mental retardation." (R. vol. 19 at 2978); 536 U.S. at 321. Atkins states that the "clinically accepted definition of mental retardation requires 'not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.'" (R. vol. 19 at 2978); 536 U.S. at 318. Atkins relied expressly on the "American Psychiatric Association's definition of mental retardation as set forth in the DSM-IV-TR." (R. vol. 19 at 2979); Atkins, 536 U.S. at 309 n.3, 317 n.22, and Gould v. State, 745 So. 2d 354 (Fla. 4th DCA 1999) (describing DSM-IV-TR as "widely accepted" in the psychological community).

The DSM-IV-TR diagnostic criteria for mental retardation are as follows:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

(R. vol. 19 at 2979; R. vol. 10 at 1527.)

The DSM-IV-TR definitions of "significantly subaverage general intellectual functioning" and "significant limitations in adaptive functioning" are, as the circuit court stated, as follows:

> General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children, 3rd Edition; Stanford-Binet, 4th Edition; Kaufman Assessment Battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning**.**
>
> Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.

(R. vol. 19 at 2979-80 (emphasis added); R. vol. 10 at 1527-28.)

As the circuit court stated, "subsequent to the filing of Herring's motion for relief under Atkins, the Supreme Court of Florida adopted Florida Rule of Criminal Procedure 3.203," which defines mental retardation as follows:

> "[M]ental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test. . . . The term "adaptive behavior," for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

(R. vol. 19 at 2980 (emphasis added) (quoting Fla. R. Crim P. 3.203(b)).) The circuit court found that Rule 3.203(b) is "essentially identical to the leading clinical standard; i.e., the standard set forth in the DSM-IV-TR." (Id.) Significantly, the State's "prehearing memorand[um] assert[ed] that the DSM-IV-TR definition of mental retardation and the standard set forth in Fla. R. Crim. Proc. 3.203(b) are functionally identical." (R. vol. 19 at 2980-81 (emphasis added) (citing R. vol. 8 at 1093; R. vol. 10 at 1473-74).)

3. The Parties Agreed That The DSM-IV-TR Governs

The State and Herring agreed repeatedly – both during and after the evidentiary hearing – that the DSM-IV-TR definition of mental retardation would govern Herring's motion. In its "Proposed Final Order Denying Defendant's Successor Motion for Capital Post Conviction Relief," submitted to the circuit court after the evidentiary hearing, the State memorialized that agreement in the clearest of words:

> The parties have agreed that the DSM-IV-TR definition of mental retardation is the one that should govern this Court's decision here, and is in fact, the definition of mental retardation that this Court will apply.

(R. vol. 19 at 2857 (emphasis added).) The State's proposed order stated further that the "DSM-IV-TR is generally accepted within the psychological community as authoritative, and the definition of mental retardation therein is functionally

identical to the definition of mental retardation contained in Fla. R. Crim. P. 3.203 and in § 921.137 of the Florida Statutes." (R. vol. 19 at 2856-57 (emphasis added).)

The proposed order also memorialized the State's request that the circuit court apply the "plain language of the DSM-IV-TR," and the State's acknowledgment that the DSM-IV-TR "recognizes" that a "reported Full-scale IQ score actually represents a range of plus/minus 5 points." (R. vol. 19 at 2857, 2878 (emphasis added).) That "range," of course, is the 5-point standard measurement error documented in the DSM-IV-TR, acknowledged by all experts in this case, relied on by the circuit court, and which serves as the basis for the DSM-IV-TR's explicit proscription that mental retardation properly can be diagnosed in a person with a measured IQ score between 70 and 75, where significant deficits in adaptive functioning are also observed.

Similarly, the first thing the State put on the record at the evidentiary hearing was the parties' agreement that the DSM-IV-TR would govern:

> **MR. NUNNELLEY** [for the State]: . . . . I think we have a couple of things we need to make sure that we are clear on before we begin. There does not seem to be any real disagreement between the parties that we are using the DSM IV TR diagnostic and statistical manual, 4th edition text revision definition of mental retardation. If I am incorrect in that understanding, I'm sure counsel will correct me.
>
> . . .

> **MR. EPSTEIN** [for Herring]: Your Honor, I certainly agree with Mr. Nunnelley's first point. We do agree to the DSM-IV as the governing standard and we intend to rely on it.[4]

(R. vol. 3 at 262-63 (emphasis added).)

Herring relied on the State's agreement in presenting his evidence and arguments to the circuit court. The circuit court relied, too. Yet, the State's appellate brief fails even to acknowledge its agreement that the DSM-IV-TR would govern. It appears the State is trying to renege on its agreement (memorialized in written and oral statements to the circuit court), so that it is free to argue, as it has in its appellate brief, that the circuit court "ignored" controlling precedent on the standard for mental retardation by applying the DSM-IV-TR.

4. The Burden Of Proof Applied By The Circuit Court

The circuit court determined that "Herring bears the burden of proving his mental retardation." (R. vol. 19 at 2981.) Herring contended below that, if he bears the burden, the appropriate standard is proof by a preponderance of the evidence. (Id.) The State contended that the standard is clear and convincing

[4] Attorney Jeremy G. Epstein, of the Shearman & Sterling law firm and a former prosecutor, acted as lead counsel for Herring, pro bono, in his post-conviction proceedings, including at the evidentiary hearing and multiple appearances in this Court, for more than 25 years. Mr. Epstein passed away in July 2009, a few months before Herring's death sentence was finally vacated.

evidence. (Id.)[5] The circuit court, relying on authority from this Court and other jurisdictions, concluded that a preponderance of the evidence is the proper standard, and that requiring clear and convincing evidence would be unconstitutional. (R. vol. 19 at 2981-84.) The issue was moot, however, because the circuit court determined that Herring proved mental retardation by both a preponderance of the evidence and clear and convincing evidence. (R. vol. 19 at 2984.)

5. The Circuit Court's Finding Of Mental Retardation

The circuit court found that Herring "meets the criteria for a diagnosis of mental retardation under both the DSM-IV-TR and Florida Rule of Criminal Procedure 3.203, which the parties agree are functionally identical for purposes of the Motion." (R. vol. 19 at 2984.) The circuit court based its conclusion "on the totality of the evidentiary record" and found that "Dr. van Gorp's testimony [was] particularly credible and compelling." (R. vol. 19 at 2984.)

a. Evidence Of Significantly Subaverage Intellectual Functioning

Significantly subaverage general intellectual functioning is the first of three criteria required for a finding of mental retardation. The expert witnesses agreed

[5] Section 921.137(4), Florida Statutes, requires clear and convincing evidence to establish mental retardation, but by its express terms it does not apply to persons – such as Herring – sentenced after July 12, 2001.

that "general intellectual functioning is determined through the administration of a standardized, individually administered intelligence test." (R. vol. 19 at 2985; R. vol. 3 at 302-03, 418-19.)

The circuit court stated (quoting the source) that the DSM-IV-TR – which the parties agreed would govern Herring's motion – "provides that an IQ score of 'about 70 or below' constitutes significantly subaverage general intellectual functioning, but also states clearly that 'there is a measurement error of approximately 5 points in assessing IQ' and that [as a result] 'it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.'" (R. vol. 19 at 2985 (quoting R. vol. 10 at 1527-28).) Significantly, the circuit court made the factual finding that "Herring's and the State's expert witnesses agreed that, consistent with the DSM-IV-TR, persons with IQ scores between 70 and 75 can be diagnosed as mentally retarded." (R. vol. 19 at 2985 (emphasis added); R. vol. 3 at 325-26; R. vol. 4 at 494.)

Records of four IQ tests administered to Herring were submitted as evidence during the Evidentiary Hearing. (R. vol. 19 at 2985.) The first was a November 23, 1976 administration of the Wechsler Intelligence Scale for Children – Revised ("WISC-R"), which was administered when Herring was fifteen years old. (R. vol. 19 at 2985; R. vol. 10 at 1563.) His score was 72. (R. vol. 19 at 2985.) The

second was Dr. McClaren's April 7, 2004 administration of the Wechsler Adult Intelligence Scale Third Edition ("WAIS-III"), which was administered when Herring was 42 years old. (R. vol. 19 at 2985; R. vol. 10 at 1573-86.) Herring scored a 74. (Id.)

Dr. van Gorp testified that Herring's score of 72 on the WISC-R in 1972 is especially reliable because (a) it was administered under ideal testing conditions (among other things, the testing data states that Herring worked "beautifully" with the examiner and that his "motivation to achieve was commendable"); (b) the WISC-R was, when administered to Herring, an improved and very recently re-normed version of Wechsler Intelligence Scale for Children (see discussion of "Flynn" effect, infra); and (c) the subcomponents of Herring's score on the WISC-R are nearly identical to the subcomponents Dr. McClaren found on the WAIS-III approximately 30 years later. (R. vol. 19 at 2986 (citations omitted).) As the circuit court noted, Dr. McClaren, testifying for the State, did not disagree. (R. vol. 19 at 2986) (citing R. vol. 4 at 499, 501-02).)

Two other IQ tests were received into evidence. The first was a June 30, 1972 examination, when Herring was only 10 years old. (R. vol. 19 at 2986; R. vol. 10 at 1552-59.) Herring's score was 83. The second was a January 21, 1974 administration of the same test. Herring's score was 81. (R. vol. 19 at 2986; R. vol. 10 at 1560.) Dr. van Gorp explained in his testimony that both of these scores

were subject to the "Flynn" effect, and thus reflected artificially inflated measurements of Herring's intelligence. (R. vol. 19 at 2986-87; R. vol. 3 at 315-20.) Based on this testimony – and the absence of dissent from the State's experts, both of whom essentially acknowledged the legitimacy of the Flynn effect – the circuit court made the factual finding that these scores were inflated and unreliable:

> The "Flynn" effect results from the fact that the intelligence of the population increases over time. As a result, the average IQ increases by .311 points per year. Because IQ tests are normed against the population at a particular point in time, one must deduct .311 points from measured scores on an IQ test for each year that passes after that test's date of publication in order to obtain an accurate score.

(R. vol. 19 at 2987; R. vol. 3 at 315-17; R. vol. 10 at 1539-51.) The circuit court found that Dr. van Gorp properly "applied the .311 point per year Flynn adjustment to each of the four IQ tests administered to Herring." (R. vol. 19 at 2987.)

The "WISC" exam, on which Herring scored an 83 and 81 in 1972 and 1974, respectively, was published in 1949, and normed against the 1949 population. Herring took the exam almost 25 years after it was published and, after applying the Flynn adjustment, his scores on those exams were found by Dr. van Gorp (and the circuit court) to be approximately 76 and 74 respectively. Herring's score of 72 on the WISC-R in 1976 did not require significant adjustment because it was published approximately two years before he took the test. His score of 74 on the WAIS-III in 2004 required a Flynn-adjustment to

approximately 72 because it was published approximately seven years before he took the test. (R. vol. 19 at 2987; R. vol. 3 at 317-24.)

Accordingly, the circuit court made the factual finding that all of Herring's scores, after accounting for the Flynn effect, were "at or around the range of 70-75 and thus consistent with a diagnosis of mental retardation." (R. vol. 19 at 2987.) Significantly, the State's experts acknowledged the existence of the Flynn effect and offered no rebuttal to Dr. van Gorp's application of the Flynn effect to Herring's test scores. (Id.) Dr. Pritchard testified that the Flynn effect was "not a hypothetical phenomenon" but rather a "measured phenomenon" that could elevate scores if the "test is 20 years old" when administered, as was the case with Herring's scores of 83 and 81 on the WISC. (R. vol. 19 at 2987-88; R. vol. 3 at 449-50.) Similarly, Dr. McClaren testified that the "Flynn effect exists and that's why tests are periodically renormed." (R. vol. 19 at 2988; R. vol. 4 at 516.)

Thus, applying the DSM-IV-TR, which the State expressly and repeatedly agreed would be the standard governing Herring's motion, and also applying Florida Rule of Criminal Procedure 3.203, which the State repeatedly agreed was "functionally identical" to the DSM-IV-TR, the circuit court found that Herring satisfied the first criterion for mental retardation by clear and convincing evidence.

b. Evidence Of Significant Limitations In Adaptive Functioning

The second criterion for mental retardation is significant limitations in adaptive functioning. Adaptive functioning "'refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.'" (R. vol. 19 at 2990; R. vol. 10 at 1528.)

The circuit court found the record to be "replete with evidence that Herring satisfies [the adaptive functioning] criterion." (R. vol. 19 at 2990.) The circuit court filled nearly six pages of its decision documenting the overwhelming evidence that – throughout his life – Herring has had significant limitations in adaptive functioning. (R. vol. 19 at 2990-96.)

The evidence relied on by the circuit court included tests of past and present adaptive functioning administered by the State's experts, extensive citation to the testimony of the experts, the fact that Herring was reading at the 3.7 grade level and doing math at the 5.7 grade level when he was 15 years old (the DSM-IV-TR provides that mentally retarded persons "can acquire academic skills up to approximately the sixth-grade level" by their "late teens"), testimony from Dr. McClaren, the State's expert, that Herring's academic testing results were "consistent" with mental retardation, the fact that Herring's school records said he "could not adjust to the classroom situation," the fact that, at age 12, Herring was

found by a psychiatrist to be "undoubtedly functionally retarded," the fact that even "at his current age, Herring was unable to provide an answer when asked what he would do if lost in an airport with only a dollar in his pocket." (R. vol. 19 at 2992, 2993 (citations omitted) (emphasis added).)

c. Evidence Of Onset Before The Age Of 18

"Onset of the condition prior to the age of 18 is the third and final criterion for a diagnosis of mental retardation." (R. vol. 19 at 2996.) The circuit court concluded that there did "not appear to be any dispute among the parties that, whatever Herring's condition may be, it began well before he turned 18 years old," and that "a substantial percentage of the evidence in this case concerns Herring's intellectual and adaptive functioning prior to the age of 18." (R. vol. 19 at 2996.) Accordingly, the circuit court concluded that Herring satisfied the third criterion for mental retardation by clear and convincing evidence. (Id.)

SUMMARY OF ARGUMENT

Herring answers the State's appeal with three basic arguments.

First, the circuit court's finding of mental retardation clearly was supported by competent, substantial evidence. The circuit court relied on an extensive documentary record and the testimony of three expert witnesses. The State is seeking to re-litigate the circuit court's factual findings of mental retardation by asking this Court to re-weigh the evidence and re-assess expert witness opinions

and credibility. That is impermissible under Florida law, which gives great deference to the circuit court's factual finding of mental retardation.

Second, to the extent the State claims that the circuit court's application of the DSM-IV-TR violated Florida law, the State is barred from making that argument. The State agreed on the record and in writing that the DSM-IV-TR would govern Herring's motion to vacate his death sentence. Where, as here, a party agrees upon a standard of decision, it waives any right to challenge that standard on appeal.

Third, even if the circuit court's decision were not supported by competent, substantial evidence, and even if the State were not barred from appealing the standard applied by the circuit court, reinstating Herring's death sentence would violate the U.S. Constitution and Florida law.

ARGUMENT

I.

THE CIRCUIT COURT'S DETERMINATION OF MENTAL RETARDATION WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE

For the reasons set forth in Herring's accompanying motion to dismiss this appeal, the State has no right to appeal the circuit court's order vacating his death sentence. This brief assumes, arguendo, that this Court has jurisdiction over the appeal. The standard of review governing "a determination of mental retardation

[is] . . . whether competent, substantial evidence supports the circuit court's determination." Burns v. State, 944 So. 2d 234, 247 (Fla. 2006) (rejecting de novo standard) (citing Trotter v. State, 932 So. 2d 1045, 1049 (Fla. 2006)); Nixon v. State, 2 So. 3d 137, 141 (Fla. 2009) ("When reviewing mental retardation determinations, we must decide whether competent, substantial evidence supports the trial court's findings.") (citing Cherry v. State, 959 So. 2d 702, 712 (Fla. 2007)).

Accordingly, the circuit court's determination that Herring has mental retardation need only have been supported by competent, substantial evidence. This Court does "not 'reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses.'" Nixon, 2 So. 3d at 141 (quoting Brown v. State, 959 So. 2d 146, 149 (Fla. 2007)). Nor does this Court "substitute [its] judgment" for that of the circuit court in assessing the evidence of mental retardation. Cherry, 959 So. 2d at 705. Furthermore, "all conflicts in the evidence and all reasonable inferences therefrom [must be] resolved in favor of the [decision] on appeal." Brown, 959 So. 2d at 149.

A. The Circuit Court's Determination Of Mental Retardation Was Based On Competent, Substantial Evidence

The circuit court set forth its determination of mental retardation in a detailed decision painstakingly supported by the record. (R. vol. 19 at 2976-97.) Pages 10 through 16 of the Statement of Facts, supra, discuss in detail the

evidentiary bases for the circuit court's findings on the three criteria for mental retardation.

B. The State Impermissibly Asks This Court To Re-weigh The Evidence And Second-Guess The Circuit Court's Evaluation Of Testimony And Credibility

The State did not challenge the competency of any evidence in the circuit court. It attacked the weight of the evidence and what conclusions should be drawn from the voluminous record and detailed expert testimony. In the end, the State's own expert, Dr. McClaren, testified that in his view the question of whether Herring is mentally retarded is in an "uncertain area," "up for honest debate," and that "reasonable people could differ as to whether Ted [is] mentally retarded." (R. vol. 4 at 525.)

The circuit court resolved this "debate" in Herring's favor, finding that he had demonstrated mental retardation by clear and convincing evidence. The State has not identified a single case where this Court has reversed a trial court's factual finding of mental retardation. Where, as here, the circuit court's determination of mental retardation was grounded in an extensive record and in a comprehensive evaluation of evidence, the Court does not re-weigh the evidence or reassess the credibility of witnesses. See Phillips v. State, 984 So. 2d 503, 510 (Fla. 2008) ("[W]e give deference to the court's evaluation of the expert opinions.").

1. The State's Arguments Regarding Witness Credibility Should Be Disregarded

The State offers various arguments concerning expert witness credibility. As noted, however, the law is clear that credibility determinations are left to the sound judgment of the circuit court. For example, the State complains that Dr. van Gorp, Herring's expert witness, evaluated Herring in a way that differed from "how he would conduct an evaluation for mental retardation in his private practice." (App. Br. at 5.) The State argues that this "should diminish the reliability and weight given to Dr. van Gorp's ultimate conclusions in this case." (Id.) Similarly, the State argues that some of Dr. van Gorp's testimony "strongly suggests" (at least to the State) that his evaluation of Herring "was not a neutral and objective one." (Id. at 6 n.4.) But these were credibility determinations for the circuit court to make.[6] Likewise, the State's argument that its experts' testimony was more reliable than Dr. van Gorp's because the State's experts may have conducted more mental retardation assessments during their careers (see, e.g., App. Br. at 29) is yet another credibility argument that the State cannot re-litigate on appeal.[7]

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[6] In point of fact, the circuit court found that Dr. van Gorp's "testimony [was] particularly credible and compelling," and that Dr. van Gorp has "extensive credentials and accomplishments in the field of psychology." (R. vol. 19 at 2984.)

[7] The State argues that Dr. van Gorp's opinions may be of questionable "reliability" purportedly because "significant intelligence testing results were

2. The State's Request For A Re-Weighing Of The Evidence Is Impermissible

a. The Intellectual Functioning Evidence Should Not Be Re-Weighed

The State's brief notes that Herring, as a child, was "truant a great deal," and that his supposed lack of scholastic motivation artificially depressed his performance on IQ tests. (App. Br. at 5.) This is a classic attempt to re-litigate the weight of a particular item of evidence. Even worse, the State fails to acknowledge that its own expert admitted that he had "'absolutely no basis to dispute'" Herring's effort level on the 1976 IQ test where Herring scored a 72, and that the high level of effort noted in writing by the professional who administered the test actually "increase[d] the validity [and] reliability of a test." (R. vol. 19 at 2986; R. vol. 4 at 502.) The fact that the State's arguments and citations to the record are contradicted by other parts of the record is a good example of why the determination of mental retardation, so long as it appears to be based on competent, substantial evidence, is left to the sound judgment of the circuit court. See Burns v. State, 944 So. 2d 234, 247 (Fla. 2006) (circuit court has "'superior

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withheld" from him. (App. Br. at 30.) This is an evidentiary weight and credibility argument. It is also inaccurate, as the circuit court held. The circuit court made a factual finding that the supposedly omitted testing data (the actual results of which the State did not offer into evidence and no party or expert witness had even seen) deserve "no weight," and that "[t]o the extent [they are] given any weight, [they are] not inconsistent with a diagnosis of mental retardation." (R. vol. 19 at 2988.)

vantage point in assessing the credibility of witnesses and in making findings of fact'") (citation omitted).

The State argues throughout its brief that the circuit court gave too little weight to the State's experts' testimony concerning the "split" between Herring's verbal and performance scale scores on his IQ tests. (App. Br. at 4-5, 6-11, 31-32.) This argument plainly goes to the weight of the evidence and the circuit court's evaluation of expert opinions. See Jones v. State, 966 So. 2d 319, 327 (Fla. 2007) ("With regard to expert opinion, however, the court has discretion to accept or reject such testimony."). The argument is also inconsistent with Florida law and the DSM-IV-TR, both of which determine intellectual functioning based on a full scale score, not its sub-components.

Next, the State criticizes the circuit court for giving too much weight to Dr. van Gorp's testimony concerning the "Flynn effect" in assessing Herring's various scores on IQ tests. (App. Br. at 33.) This, too, is an impermissible attack on the circuit court's evaluation of expert testimony. The Flynn effect, as previously discussed, artificially inflates IQ scores when a person takes a version of an IQ test that was normed based on people's intelligence many years earlier. (See supra at 13.) The undisputed evidence was that on both IQ tests where Herring scored above the low seventies, the versions of the tests he took were several decades old, giving rise to the maximum inflationary effect. In any event, both parties made a

variety of arguments and evidentiary submissions asserting that Herring's measured IQ scores were not reflective of his true intelligence. Herring cited the Flynn effect as inflating his scores. The State cited the "splits" in the components of Herring's scores as evidence that his full-scale scores were misleadingly high. It was a classic "battle of the experts," and after weighing the evidence and appraising the experts' opinions, the court found mental retardation. The State is not entitled to repeat that process in this Court. Merck v. State, 975 So. 2d 1054, 1065 (Fla. 2007) ("When experts disagree, the trier of fact is entitled to resolve the resulting factual issue").

There are additional problems with the State's arguments concerning the Flynn effect. First, the State never sought to exclude evidence of the Flynn effect on the ground that it is not generally accepted.[8] Second, the State's own experts acknowledged the legitimacy of the Flynn effect and agreed that it artificially inflates IQ scores. Dr. Pritchard testified that the Flynn effect was "'not a hypothetical phenomenon'" but rather a "'measured phenomenon'" that could elevate test scores if the "'test is 20 years old'" when administered, which was the case with at least two of Herring's IQ scores. (R. vol. 19 at 2987-88.) Similarly, Dr. McClaren testified that the "'Flynn effect exists and that's why tests are

[8] According to the State's appellate brief, "this Court need not address the general acceptance of the Flynn effect in this case." (App. Br. 34.)

periodically renormed.'" (R. vol. 19 at 2988; R. vol. 4 at 516); see also Thomas v. Allen, 607 F.3d 749, 757-58 (11th Cir. 2010) (rejecting State of Alabama's challenge to the application of Flynn effect in appeal from lower court finding of mental retardation and finding that "all the experts acknowledged that the Flynn effect is a statistically-proven phenomenon" and that "we cannot say that the district court clearly erred in applying it" where the lower court "considered the Flynn effect just as it considered the other evidence in the record").

Third, as the circuit court noted, the State's experts "did not offer any specific rebuttal to Dr. van Gorp's application of the Flynn effect to Herring's test scores." (R. vol. 19 at 2987.) There simply is no evidentiary basis to challenge the circuit court's factual findings concerning the impact of the Flynn effect on Herring's IQ scores, and, even if there were contrary evidence, the circuit court's finding would be entitled to deference. See Jones, 966 So. 2d at 327 (in deciding mental retardation, circuit court can apply its discretion to determine which expert's testimony to accept concerning diagnostic standards).

b. The Adaptive Functioning Evidence Should Not Be Re-Weighed

The State does not genuinely dispute the validity of the circuit court's findings concerning the second criterion for mental retardation – significant limitations in adaptive functioning. Nor could it. As noted, adaptive functioning "'refers to how effectively individuals cope with common life demands and how

well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.'" (R. vol. 19 at 2990 (quoting Hr'g Ex. 3 at 49).) The circuit court made extensive findings as to Herring's adaptive deficits, citing myriad sources in the record. (R. vol. 19 at 2990-96.)

Nevertheless, the State claims the circuit court erred by "refus[ing] to recognize that the rule and statute require that the adaptive deficits exist concurrently with the IQ deficiency." (App. Br. at 36.) The State relies principally on this court's decisions in Phillips v. State, 984 So. 2d 503 (Fla. 2008), and Jones v. State, 966 So. 2d 319 (Fla. 2007), in support of this argument.[9] In Jones, the court held that significant deficits in adaptive functioning must begin before the age of 18, exist "concurrently" (i.e., at the same time), and persist through the present. 966 So. 2d at 326.

The State does not dispute that Herring had the requisite significant deficits in adaptive functioning prior to the age of 18. The circuit court found the record "replete" with such evidence. This evidence is summarized at pages 15 through 16, supra.

In addition, there can be no dispute that, consistent with Jones, the circuit court relied on competent, substantial evidence that Herring's adaptive deficits

[9] Both decisions were issued after the evidentiary hearing.

continued into adulthood and through the present. For example, the circuit court cited Dr. van Gorp's expert testimony that, when interviewed at his current age, "Herring was unable to provide an answer when asked what he would do if lost in an airport with only a dollar in his pocket," and has never supported himself financially, paid rent, or maintained a credit card or bank account. (R. vol. 19 at 2993; R. vol. 3 at 347-48.) Moreover, Dr. McClaren, the State's expert, administered the SIB-R test of adaptive functioning to Herring shortly before the evidentiary hearing. The result of the test was a score of 49, a result several standard deviations below the mean.[10] (R. vol. 19 at 2993; R. vol. 4 at 527-31.)

Thus, the State's insistence that the circuit court "refused" to address present adaptive functioning (App. Br. at 36) is simply incorrect. The circuit court expressly addressed the State's argument and found that "there is substantial evidence, including Dr. van Gorp's findings and the results of the SIB-R test

[10] Unable to dispute that the SIB-R was a test of present adaptive functioning, the State argues that the score is too low to be relied upon. But the circuit court addressed this factual assertion and rejected it: "[w]hile it may be that this score was affected by the fact that some of the questions are inapplicable to a person living on death row . . . the score nonetheless is supportive of the conclusion that Herring has significant limitations in adaptive functioning." (R. vol. 19 at 2993.) Nor did Dr. McClaren state that Herring was malingering or otherwise trying to do poorly on the test.

administered by Dr. McClaren, [of] Herring's present functioning." (R. vol. 19 at 2995.)[11]

In addition, consistent with Jones, the circuit court clearly found that Herring's adaptive deficits existed concurrently with his significantly subaverage intellectual functioning. Jones found that "concurrent" means "'operating or occurring at the same time.'" 966 So. 2d at 326 (quoting Merriam-Webster's Collegiate Dictionary 239 (10th ed. 2001)). With respect to intellectual functioning, the circuit court expressly relied upon IQ tests administered to Herring from the 1970s through the present in finding significantly subaverage intellectual functioning. (R. vol. 19 at 2985-90.) The circuit court found significant deficits in Herring's adaptive functioning that were "concurrent" with his significantly subaverage intellectual functioning: the record evidence of Herring's adaptive deficits spanned from his childhood through the present. (See supra at 15-16.)

The circuit court in Jones appears to have found no significant deficits in present adaptive functioning. To the contrary, it found that Mr. Jones understood his medical problems and medication, "self-administer[ed]" his medication on a

[11] The circuit court did observe that a prisoner on death row has less ordinary life responsibilities than a person living outside of prison, and that the use of the word "present" in diagnostic manuals (which was adopted essentially verbatim by the applicable statutes and rules) appears to contemplate an ordinary life setting, not prison. (R. vol. 19 at 2995-96.) As noted, however, the circuit court found present and substantial adaptive deficits based on multiple sources of record evidence in any event.

schedule, suggested to his doctors "changes in [his] diet or medication," successfully "manage[d] the finances of his inmate account," followed up on money transfers, had "strong" "intellectual skills," "traveled alone" as a young adult, and "supported himself through various jobs." 966 So. 2d at 328 (emphasis added). Furthermore, Jones' school record included evidence that he was a "good student," who was in "regular classes and earned good grades." Id.

The facts here are essentially the opposite of those in Jones. As noted, the circuit court's determination of significant deficits in adaptive functioning included Herring's dreadful academic record and inability to function anywhere near his class level, his placement in special schools and a recommendation that he be transferred to a school for the mentally retarded, his history of never maintaining personal finances or prolonged employment, his failure to live independently, and his inability to successfully transfer buses en route to Florida. (See supra at 15-16; see also R. vol. 19 at 2990-96.)

In Phillips, the defense expert did not consider present adaptive functioning and instead relied exclusively on a retrospective analysis. 984 So. 2d at 511. The circuit court's finding of no mental retardation in Phillips was supported by "substantial evidence that Phillips [did] not suffer from deficiencies in adaptive functioning" at all. Id. Phillips was able to support himself financially, worked as a short-order cook, an "unusually high level" job for someone with mental

retardation, paid the bills for his entire household, and purchased a new car for his mother. See id. As with Jones, the evidentiary record on adaptive functioning in Phillips is essentially the opposite of Herring's record.

This Court also cited in Phillips the defendant's careful planning of his crime and sophisticated efforts to evade conviction as evidence of his lack of retardation. The Court observed that Phillips studied the patterns of his victim, carefully hid evidence, declined to be interviewed by the police when apprehended, and attempted to silence witnesses. 984 So. 2d at 512. This Court found that Phillips' acts of "self-preservation indicate that he has the ability to adapt to his surroundings." Id.

Herring behaved in the opposite fashion. He gave a taped confession of his crime, and then (despite the tape being played for the jury) took the stand and told the ludicrous story that, while he was committing the robbery in question, a second person coincidentally came in to rob the store and shot the clerk. (R. vol. 19 at 2994-95.) To say the least, it is difficult to see how a non-mentally retarded person would have expected the jury to believe that story. And the consequences of Herring's mental retardation were dire: Herring's original trial judge stated at sentencing that Herring's decision to tell this "preposterous story" "doomed the

Defendant not only as to conviction but as to sentence as well." (Id. (emphasis in original).)[12]

Making matters worse, as the circuit court noted in vacating Herring's death sentence, his trial counsel eventually testified that, based on discussions with the State and trial judge, Herring actually would have received a life sentence had he pleaded guilty, but that Herring ignored the advice of his counsel and proceeded to trial despite insurmountable evidence of guilt. (R. vol. 19 at 2995.) Consistent with Phillips, the circuit court (and Herring's expert) examined Herring's post-arrest behavior and found it to be further evidence of his mental retardation. (Id.) This also was consistent with Atkins itself, where the U.S. Supreme Court stated that one reason for excluding persons with mental retardation from execution is the enhanced "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" 536 U.S. at 320 (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)).

c. The Age Of Onset Evidence Should Not Be Re-Weighed

The State argues that Herring failed to satisfy the "onset before age 18" requirement for mental retardation because, according to the State, Herring was

[12] Giving false testimony, of course, is not an aggravating circumstance for purposes of capital sentencing under Florida law. The trial judge's acknowledgement that false testimony earned Herring a death sentence, coupled with the fact that Herring's mental retardation caused him to provide that testimony, reflect just how far out of bounds Herring's death sentence was.

never formally diagnosed with mental retardation before he turned 18. (App. Br. at 38.) This argument misstates the facts and law.

The State's argument appears to be that mental retardation must actually have been diagnosed before the defendant turned 18 in order for him to be protected under Atkins. That is not the law, and the State cites no case supporting this purported requirement. As discussed previously, the circuit court relied on IQ test scores and detailed evidence of adaptive deficits from Herring's childhood through the present. (See supra at 10-16.) In fact, the circuit court found that a "substantial percentage of the evidence in this case concerns Herring's intellectual and adaptive functioning prior to the age of 18" and that "[t]here does not appear to be any dispute among the parties that, whatever Herring's condition may be, it began well before he turned 18 years old." (R. vol. 19 at 2996.) The State also ignores the fact that, as a child, Herring was diagnosed as "undoubtedly functionally retarded," and recommended for transfer to a school for the "mildly mentally retarded." (See supra at 15-16.)

d. There Are No Judicial Findings That Herring Does Not Have Mental Retardation

The State argues that "Herring has never before claimed that he suffers from mental retardation," and that "this court and the federal courts have explicitly found to the contrary in the context of ineffectiveness of counsel claims." (App. Br. at 1.) It is correct that Herring first challenged his sentence on the ground of

mental retardation after the Supreme Court decided Atkins. That challenge, which was timely and successful, is the subject of this appeal.

It is thus unclear why the State suggests that there are prior judicial findings that Herring is not mentally retarded. None of the purported prior "findings" are quoted or even cited in the State's brief. Nevertheless, at page 29 of its brief, the State asserts, without citation, that the "sentencing Court found, in mitigation, not that Herring was mentally retarded, but that he had a learning disability." The State fails to point out that Herring's sentencing decision, rendered decades before Atkins was decided, did not address and makes no mention of mental retardation, and that no experts or mental health professionals testified or submitted reports at the sentencing. Similarly, the State's suggestion (again without citation) at page 29 of its brief that this Court and the U.S. Court of Appeals for the Eleventh Circuit made "prior rulings" that Herring is not mentally retarded is incorrect. There are no such factual findings. There was no litigation of mental retardation in any of Herring's appeals. Indeed, Herring never even retained an expert until the present motion was filed.[13]

[13] The State's one-sentence suggestion, without citation to any legal authority, that mental retardation "appears to be an issue that is collaterally estopped" (App. Br. at 29) is thus baseless. Nor does collateral estoppel appear to be an argument the State is actually pursuing on appeal.

II.

THE CIRCUIT COURT APPLIED THE PROPER STANDARD FOR DETERMINING MENTAL RETARDATION

The State argues that the circuit court "completely failed to follow this Court's precedent which requires an IQ score of less than 70 before a defendant is considered mentally retarded for Atkins purposes." (App. Br. at 14.) The State is incorrect. First, there can be no dispute that the circuit court applied the standard for determining mental retardation that the parties agreed would govern: the DSM-IV-TR. (See supra at 7-9.) As such, the State is barred from arguing on appeal that the circuit court erred by applying the DSM-IV-TR. Second, the circuit court, in any event, applied a standard for determining mental retardation that is consistent with Florida Rule of Criminal Procedure 3.203 and not inconsistent with this Court's precedent.

A. The Circuit Court Applied The Standard The Parties Agreed To, And The State Is Barred From Challenging It

1. The State Agreed That The DSM-IV-TR Governs

Section B.3 of this brief, which appears at pages 7 through 9, sets forth the State's express agreement that the DSM-IV-TR standard for determining mental retardation would govern Herring's motion.

In summary, the State began the evidentiary hearing by stating to the circuit court – on the record – that "we need to make sure we are clear" that "we are using the DSM-IV TR diagnostic and statistical manual, 4th edition text revision

definition of mental retardation." (R. vol. 3 at 262 (emphasis added).) Immediately thereafter, and also on the record, Herring's counsel confirmed that "[w]e do agree to the DSM-IV as the governing standard and we intend to rely on it." (Id. at 263 (emphasis added).) The parties then proceeded with the hearing with the DSM-IV-TR serving as the governing standard. After the evidentiary hearing, and after the experts on both sides extensively relied on and discussed all relevant aspects of the DSM-IV-TR, the State submitted a proposed final order denying Herring's motion. The State's order again confirmed that the "parties have agreed that the DSM-IV-TR definition of mental retardation is the one that should govern this Court's decision here, and is in fact, the definition of mental retardation that this Court will apply." (R. vol. 19 at 2857 (emphasis added).)

2. The Circuit Court Properly Applied The DSM-IV-TR

As noted, the DSM-IV-TR states that the first criterion and "'essential feature of Mental Retardation is significantly subaverage general intellectual functioning.'" (R. vol. 19 at 2979; R. vol. 10 at 1527.) The DSM-IV-TR goes on to explain that "[g]eneral intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent)," and that "[s]ignificantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean)." (R. vol. 19 at 2979; R. vol. 10 at 1527 (second emphasis added).) Importantly, the DSM-IV-TR also states that:

> It should be noted that there is a measurement error of approximately 5 points in assessing IQ . . . . Thus, it is possible to diagnose Mental Retardation in individuals with IQ's between 70 and 75 who exhibit significant deficits in adaptive behavior.

(R. vol. 10 at 1523.) This is the standard the State agreed to and the standard the circuit court applied.

There is no dispute between the parties that, because of the standard measurement error of five points inherent in all accepted IQ tests, the DSM-IV-TR permits a finding of mental retardation in persons with measured IQ scores between 70 and 75 where, as here, significant deficits in adaptive functioning have been found. The State acknowledged this in its proposed final order, stating that the DSM-IV-TR "recognizes" that a "reported Full-scale IQ score actually represents a range of plus/minus 5 points." (R. vol. 19 at 2879.) The State's expert witness, Dr. McClaren, similarly acknowledged that the DSM-IV-TR permits a mental retardation finding in persons with measured IQ scores between 70 and 75. (R. vol. 4 at 494.)

The circuit court made the factual finding that Herring's IQ scores "are at or around the range of 70-75 and thus consistent with a diagnosis of mental retardation." (R. vol. 19 at 2987.) More specifically, the circuit court made a factual finding that:

> Based on the evidence presented at the hearing, the Court finds that Herring satisfies the first criterion for mental retardation . . . . given his IQ scores of 72 and 74. The State has not provided any legitimate

> basis to question the validity of these scores or show that Herring's [two other] scores of 81 and 83 on earlier tests are more valid. To the contrary, it is essentially undisputed that, after allowing for the Flynn effect, those scores [of 81 and 83] are more reflecting of scores of approximately 75.[14]

(R. vol. 19 at 2988.)

In the end, the State's proposed final order urged the circuit court to apply the "plain language of the DSM-IV-TR." (R. vol. 19 at 2857.) That is precisely what the circuit court did, including the DSM-IV-TR's plain words that "it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior." Drawing all inferences in favor of affirmance as required, the circuit court's findings were amply supported by competent, substantial evidence.[15]

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[14] In multiple instances, the State's brief asserts that "the lower court found that Herring's IQ was 'approximately 75.'" (App. Br. at 2.) As the quotations above make clear, the State is mistaken. The circuit court found that Herring's measured IQ scores were "at or around the range of 70-75." (R. vol. 19 at 2987.) The words "approximately 75" refer to Herring's two scores that the circuit court determined were inflated by the Flynn effect, once adjusted. The State does not cite any legal authority for the proposition that all IQ scores must be equally low to permit a diagnosis of mental retardation. See Thomas, 607 F.3d at 757 (rejecting proposition that a score of 77 "automatically defeat[ed] an Atkins claim when the totality of the evidence (scores) indicate[d] that a capital offender suffer[ed] subaverage intellectual functioning").

[15] To the extent the State's proposed order, where it stated its agreement that the DSM-IV-TR "should govern" and "will apply," includes contentions that may have been inconsistent with certain aspects of the DSM-IV-TR, those contentions should be disregarded on appeal. The State agreed to the application of the DSM-IV-TR without equivocation or conditions. It cannot self-servingly excise out selected

3. The State Waived Any Argument That The Circuit Court Applied A Standard For Determining Mental Retardation That Violated Florida Law

Having agreed that the DSM-IV-TR would govern Herring's motion, the State cannot argue on appeal that the circuit court violated Florida law by applying the DSM-IV-TR. It is well settled that a party that submits to the court a proposed standard of decision "'may not be heard to urge, on appeal'" that it was "error" to apply that standard. See, e.g., Diamond Regal Dev., Inc. v. Matinnaz Constr., Inc., 1 So. 3d 1104, 1106 n.1 (Fla. 1st DCA 2009) (citation omitted); see also Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990) ("Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal."); Norton v. State, 709 So. 2d 87, 94 (Fla. 1997) ("[A] party may not invite error during the trial and then attempt to raise that error on appeal."); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983) (applying invited error doctrine in appeal in capital case). "It is 'a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party.'" U.S. v. Ross, 131 F.3d 970, 988 (11th Cir. 1997); see also Calloway v. State, 37 So. 3d 891, 893 (Fla. 1st DCA 2010) (where a party "[o]n two separate occasions"

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portions of the DSM-IV-TR that support the circuit court's finding of mental retardation.

"acquiesced and agreed to the use" of an allegedly erroneous legal standard, "the error was invited and cannot result in reversal").

The State did far more than just "acquiesce" in the circuit court's application of the DSM-IV-TR. Rather, the State stipulated on the record that the DSM-IV-TR would govern. Likewise, in its proposed final order, the State affirmatively urged that the DSM-IV-TR "should govern" and "will apply." (See supra at 7-9.) This Court has squarely held that where, as here, a party enters into a "stipulation" or agreement, it must live with that agreement and is deemed to have "waived any claim of error" arising therefrom. Terry v. State, 668 So. 2d 954, 963 (Fla. 1996); see also Myrick v. Gillard Grove Serv., 577 So. 2d 655, 656 (1st DCA 1991) (stipulated matters cannot be undone on appeal).[16]

By agreeing to the application of the DSM-IV-TR, the State waived the right to argue on appeal that the circuit court erred by applying that standard. This, of course, includes the State's waiver of any objection to the court applying the DSM-IV-TR's express language that "it is possible to diagnose Mental Retardation in

[16] Although the doctrine of invited error and the authorities cited above are the most applicable, the State's attempted "U-turn" with respect to the DSM-IV-TR is also barred by principles of estoppel. See Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061, 1066 (Fla. 2001); see also Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278, 281 n.1 (5th Cir. 1999) (stating that judicial estoppel applies to hold a party to its prior stipulation).

individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior."[17]

B. The Standard For Mental Retardation Applied By The Circuit Court Is Consistent With Florida Law

The Court need not reach the State's argument that the substantive standard for determining mental retardation applied by the circuit court violated Florida law. As explained in the preceding section, the circuit court undisputedly applied a standard agreed upon by the State, and the State is thus precluded from challenging that standard on appeal. But even if the State's arguments were not precluded, its arguments fail because the circuit court applied a standard consistent with Florida law.

[17] Courts have consistently held that where, as here, the government on appeal challenges a standard it agreed to on the ground that the standard set a higher bar for the government than the law actually required, the government has been held to the standard to which it agreed. See U.S. v. Taylor, 933 F.2d 307, 310 (5th Cir. 1991) (requiring government to prove element not required by applicable law where government had consented to the inclusion of that element in jury instructions); see also U.S. v. Torres-Villalobos, 487 F.3d 607, 611 n.1 (8th Cir. 2007) (requiring government to prove two elements in conjunction with each other that were actually disjunctive under the applicable statute where the government failed to object to jury instruction that required conjunctive proof). Similarly, the State should be bound to its agreement to apply the DSM-IV-TR even if the Court finds that the DSM-IV-TR is more favorable to Herring's position than the otherwise applicable Florida law.

First, the State itself asserted repeatedly that the standard applied by the circuit court – the DSM-IV-TR – is "functionally identical" to the standards provided under Florida law. The State's proposed final order stated:

> The DSM-IV-TR is generally accepted within the psychological community as authoritative, and the definition of mental retardation therein is functionally identical to the definition of mental retardation contained in Fla. R. Crim. P. 3.203 and in § 921.137 of the Florida Statutes.

(R. vol. 19 at 2856-57 (emphasis added).) The State made the same statement in its pre-hearing memorandum in connection with the evidentiary hearing. (R. vol. 10 at 1473.) The circuit court relied on these representations and included them in its decision. (R. vol. 19 at 2980-81.) Obviously, applying the DSM-IV-TR cannot violate Florida law if the DSM-IV-TR is "functionally identical" to Florida law. To the extent the State now claims otherwise, the argument was waived when it agreed below that the tests were functionally identical. Norton, 709 So. 2d at 94; Pope, 441 So. 2d at 1076; Terry v. State, 668 So. 2d at 962.

Second, even if the State did not waive the argument that applying the DSM-IV-TR violated Florida law, its arguments are without merit. The definitions of mental retardation in the DSM-IV-TR and Florida Rule of Criminal Procedure 3.203(b) are effectively the same. The DSM-IV-TR speaks of an IQ score "approximately 2 standard deviations below the mean" on a "standardized, individually administered intelligence test[]." (R. vol. 19 at 2979; R. vol. 10 at

1527.) Rule 3.203(b) requires "performance that is two or more standard deviations from the mean score on a standardized intelligence test." (R. vol. 19 at 2980); Fla. R. Crim. P. 3.203(b).

The DSM-IV-TR mentions the 5-point standard error of measurement (and the consequent possibility that someone who scores between 70 and 75 is mentally retarded). (R. vol. 10 at 1527-28.) Rule 3.203(b) does not make that explicit, but it did not need to do so. Rule 3.203(b) does not use the number "70." It references standard deviations from the mean (which is a statistical concept) on a "standardized intelligence test." There is no dispute – and the experts below agreed – that the tests administered to Herring include a standard error of measurement (also a statistical concept) of 5 points, plus or minus. (R. vol. 19 at 2985; R. vol. 3 at 325-26; R. vol. 4 at 494.) The standard error of measurement is an inherent and essential feature of the tests, as recognized in a decision quoted with approval by this Court. See Cherry v. State, 959 So. 2d 702, 712 (Fla. 2007) ("[T]he +/-5 standard of error is a universally accepted given fact and, as such, should logically be considered, among other evidence, in regard to the factual finding of whether an individual is mentally retarded.") (citing unpublished lower court opinion) (emphasis added).

For example, if the Florida State University men's basketball team adopted a rule that its varsity players must be able to make 7 out of 10 free throws on a

"standardized basketball court" to join the team, it would not be necessary for the rule to specify that this means shooting from a line 15 feet from the basket. The 5-point standard of error is an inherent part of a standardized intelligence test, just as a 15-foot free-throw line is an inherent part of a regulation basketball court. Herring is not asking the Court to read unwritten words into Rule 3.203. Herring is merely asking the Court to give the words "standardized intelligence test" their ordinary meaning by including the standard error of measurement. Cherry, 959 So. 2d at 713 (the "statute's plain and ordinary meaning must control") (quoting Daniels v. Fla. Dep't of Health, 898 So. 2d 61, 64-65 (Fla. 2005) (emphasis added)); see also Thomas, 607 F.3d at 753 ("[T]he SEM [standard error of measurement] is a statistical measure that allows the evaluator to know the amount of error that could be present in any test.") (emphasis added).

Thus, the circuit court determined correctly, with the assistance of experts (as well as in reliance on the State's admission that the standards are "functionally identical"), that Florida Rule of Criminal Procedure 3.203 and the DSM-IV-TR are "essentially identical." (R. vol. 19 at 2980-81.) Accordingly, the standard applied by the circuit court did not violate Florida law.

Third, the State's reliance on this Court's decisions in Cherry v. State, 959 So. 2d 702 (Fla. 2007); Nixon v. State, 2 So. 3d 137 (Fla. 2009); Phillips v. State, 984 So. 2d 503 (Fla. 2008); Zack v. State, 911 So. 2d 1190 (2005), and Jones v.

State, 966 So. 2d 319 (Fla. 2007), is misplaced. The most obvious distinguishing feature of Herring's case is the State's agreement that the DSM-IV-TR would govern. That agreement renders moot the State's reliance on these cases, and the "bright-line" cutoff of 70 they supposedly require.

The other fundamental difference is that the cases on which the State relies involved a lower court's factual finding that the appellant did not have mental retardation. Fundamentally, the appellate decisions were not about the legal standard. The central focus was whether the appellants' IQ scores and other evidence were sufficiently compelling to warrant reversal of the trial courts' factual findings as to mental retardation. And, while it is true that this Court has, at times, pointed to an IQ score of 70 as a "cutoff" of sorts, it generally has done so in rejecting challenges to a factual finding that the appellant was not mentally retarded. Here, the circuit court made a factual finding that Herring has mental retardation based on the totality of the evidence. As such, the accepted rule (which benefits the State's position in most appeals), of drawing all inferences in the lower court's favor and requiring only competent, substantial evidence, should lead to an affirmance of the circuit court's order.

The circuit court's analysis in this case was consistent with the language cited in Cherry that "the +/-5 standard of error is a universally accepted given fact and, as such, should logically be considered, among other evidence, in regard to

the factual finding of whether an individual is mentally retarded." 959 So. 2d 702 at 712 (citation omitted). Contrary to the implication of the State's arguments, the circuit court did not reach any sweeping legal conclusion that persons with IQ's between 70 and 75 are exempt from the death penalty. It merely "logically considered" the standard error of measurement as one of many factors supporting a finding of mental retardation.

The circuit court's decision relied on, among other things, prior findings that Herring was "undoubtedly functionally retarded" and belonged in a school for the mentally retarded, the fact that Herring scored below 70 on all tests of adaptive functioning, the dramatic manifestation of Herring's mental retardation during his trial, which, in the words of the sentencing court, "doomed" him to a death sentence, and the testimony of Dr. McClaren, the State's expert, that Herring's mental retardation was "up for debate" and in an "uncertain area" where he could be mentally retarded. (See supra at 4.) This constellation of factors, and the circuit court's consequent finding of mental retardation, clearly distinguish this case from the cases relied on by the State.

The circuit court did not "ignore" the law. It made a multi-layered factual finding of mental retardation based on competent, substantial evidence. That

finding is entitled to deference and every supporting inference. It should be affirmed.[18]

III.

THE STATE'S ARGUMENTS, IF ACCEPTED, WOULD VIOLATE HERRING'S CONSTITUTIONAL RIGHTS

The State's arguments, if accepted, would violate Herring's rights under the U.S. Constitution, including, but not limited to the Fifth, Eighth, and Fourteenth Amendments, and their equivalents under Florida's Constitution. For all of the reasons stated herein, the Court need not reach these constitutional issues to affirm the circuit court's order.

[18] The State asserts that "Herring's death sentence should be reinstated." (App. Br. at 39.) As is crystal clear from the record, the parties and the circuit court proceeded with the evidentiary hearing on the agreement and understanding that DSM-IV-TR governed. If, as the State contends, the circuit court erred in applying the DSM-IV-TR, and if the State did not waive that purported error by agreeing to the application of the DSM-IV-TR, the appropriate remedy would not be reinstatement of Herring's death sentence. The appropriate remedy would be remand, so that the circuit court could hold an evidentiary hearing under the standard this court dictates. See Smith v. State, 866 So. 2d 51, 67 (Fla. 2004) (reversing and remanding for trial court to re-sentence defendant where trial court had applied the wrong standard to impose the death sentence). Particularly in a capital case involving the testimony of experts, there is no basis for the State's demand that this Court engage in an independent fact-finding exercise to determine that Herring is not mentally retarded. In any event, none of this should happen given that the circuit court applied the standard the State agreed upon and relied on competent, substantial evidence to vacate Herring's death sentence.

A. Bright-Line IQ Score Cutoff Of 70 Is Unconstitutional

Applying a bright-line cutoff of 70 for a determination of mental retardation would violate Herring's rights under the Eighth, Fifth, and Fourteenth Amendments of the U.S. Constitution and their equivalents under the Florida Constitution. To the extent Sections 916.106 and 921.937, Florida Statutes, Florida Rule of Criminal Procedure 3.203, or this Court's precedent require an IQ score of 70 or below (or are interpreted to so require for a finding of mental retardation), they are unconstitutional.

In Atkins, the U.S. Supreme Court held that executing persons with mental retardation violates the Eighth Amendment. 536 U.S. at 321. Atkins directed the states to adopt standards for determining mental retardation that "generally conform[] to the clinical definitions." Id. at 317 n.22. The clinical definitions Atkins recognized were the DSM-IV-TR and the American Association of Mental Retardation's publication, Mental Retardation: Definition, Classification and Systems Supports (10th ed. 2002). Id.

A strict IQ score cutoff of 70 violates and is not consistent with these clinical standards because it ignores, among other things, (1) the standard error of measurement inherent in IQ tests, (2) the fact that an IQ score constitutes only a range of intelligence, (3) the DSM-IV-TR's directive that persons with an IQ score of 70 to 75 properly can be diagnosed with mental retardation, (4) the approximate

nature of IQ scores, (5) the "Flynn" effect, (6) the "practice effect," (7) testing error, and other clinically accepted factors affecting IQ scores. Put simply, a bright-line cutoff of 70 unconstitutionally permits the execution of persons with mental retardation and this violates Atkins.[19]

Furthermore, the diverging interpretations of Atkins by different courts in different states, including in the interpretation of substantively identical statutes, evidences both an Eighth Amendment violation (Florida's strict cutoff of 70 is "unusual" and not clinically accepted) and an Equal Protection constitutional violation. Cf. Kennedy v. Louisiana, 128 S. Ct. 2641, 2665 (2008) ("arbitrary and capricious application" of death penalty is not permissible).

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[19] See generally Foster v. State, 929 So. 2d 524, 532 (Fla. 2006) (accepting IQ score above 70 as evidence of mental retardation); Johnston v. State, 960 So. 2d 757, 760 (Fla. 2006) (recognizing IQ score as a range); Webb v. Florida Dep't of Children & Family Servs., 939 So. 2d 1182, 1184 (Fla. 4th DCA 2006) (recognizing standard error of measurement); Thomas v. Allen, 607 F.3d 749, 757-58 (11th Cir. 2010) (recognizing standard error of measurement and Flynn effect); Lynch v. State, 951 So. 2d 549, 557 (Miss. 2007) (scores between 70 and 75 can be sufficient for mental retardation); U.S. v. Davis, 611 F. Supp. 2d 472 (D. Md. 2009) (same); In re Hawthorne, 105 P.3d 552 (Cal. 2005) (rejecting "IQ of 70 as upper limit"); Ex parte Briseno, 135 S.W.3d 1, 7 n.24 (Tex. Crim. App. 2004) (same); Cooper v. State, 739 So. 2d 82, 88-89 (Fla. 1999) (vacating death sentence where there was evidence of mental retardation notwithstanding IQ test scores of 77 and 82); People v. Super. Ct., 155 P.3d 259 (Cal. 2007) (rejecting bright-line IQ cutoff); Chase v. State, 873 So. 2d 1013, 1028 (Miss. 2004) (recognizing possibility of mental retardation in persons with IQ scores "of up to 75"); see also Ford v. Wainwright, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability.").

B. Requirement Of Present Adaptive Deficits In A Person Incarcerated Is Unconstitutional

The State argues that the circuit court erred in finding mental retardation because Herring failed to demonstrate that he presently suffers from significant deficits in adaptive functioning. (App. Br. at 36-38.) The State relies on Jones, where the Court held that significant deficits in adaptive functioning must persist through the date of examination by the experts in the case. 966 So. 2d at 326. As explained previously, Herring satisfies Jones because there was competent, substantial evidence of both past and present adaptive deficits.

Herring respectfully submits that the requirement of present adaptive deficits as applied to incarcerated persons violates the Fifth, Eighth, and Fourteenth Amendments because, as the circuit court observed, "the structured environment of incarceration by definition does not allow for the sort of independent living where limitations in adaptive functioning are likely to reveal themselves." (R. vol. 19 at 2995.) Insofar as the State's arguments and/or the Jones decision erect a standard for proving adaptive deficits that would be unduly burdensome or even impossible for an incarcerated person to satisfy, they violate Atkins and are unconstitutional. Retrospective examinations of a defendant's history of adaptive functioning should be sufficient grounds to establish mental retardation.

C. Requiring Proof Of Mental Retardation By Clear And Convincing Evidence Is Unconstitutional

The State argues that Herring was required to prove mental retardation by clear and convincing evidence. The circuit court found this standard of proof to be unconstitutional, but also found that Herring had proven mental retardation by clear and convincing evidence in any event. (R. vol. 19 at 2981-84.) Thus, the Court need not reach this issue.

Requiring clear and convincing evidence of mental retardation is, in fact, unconstitutional. See Cooper v. Oklahoma, 517 U.S. 348, 363 (1996) (requiring proof of incompetence by clear and convincing evidence is unconstitutional); see also Pruitt v. State, 834 N.E.2d 90, 101 (Ind. 2005) (rejecting clear and convincing evidence standard for determining mental retardation).

CONCLUSION

For the foregoing reasons, the circuit court's order should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail this 12th day of October, 2010, to: Kenneth S. Nunnelley, Esq., Senior Assistant Attorney, counsel for the appellant, at 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118.

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