IN THE SUPRME COURT OF FLORIDA

STATE OF FLORIDA, Case No. SC09-2200

Appellant,

v.

TED HERRING

Appellee.

_________________________/

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

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INTRODUCTION

Herring shot a convenience store clerk to death on May 29, 1981 during the course of a robbery. Herring was found guilty by a jury and, on March 1, 1982, was sentenced to death. Since that time, Herring's case has been in constant litigation in both state and federal court. Beginning with the 1982 sentencing, Herring's mental status has been a constant topic of consideration -- several appellate decisions have spoken to his mental capacity. No court (except the Circuit Court whose order is under review) to consider this case has ever suggested or implied that Herring is mentally retarded, a fact that is not surprising since Herring has never before claimed that he suffers from mental retardation. In fact, this court and the federal courts have explicitly found to the contrary in the context of ineffectiveness of counsel claims asserting that additional mental state evidence should have been presented.

A year after *Atkins v. Virginia*, 536 U.S. 304 (2002) was decided, Herring filed a successive post-conviction relief motion in which he claimed, **for the first time in the history of this case**, that he is mentally retarded and therefore cannot be executed.[1] The Circuit Court conducted an evidentiary hearing

[1] *Atkins* was decided on June 20, 2002. Herring filed his successive post-conviction relief motion on or about June 20, 2003.

over the State's objection (since there are, after all, factual findings that Herring is not mentally retarded), and, more than four years after the conclusion of that hearing, issued an order finding that Herring is mentally retarded and consequently ineligible for execution under *Atkins.*

In reaching that conclusion, the circuit court ignored this Court's decisions in *Nixon v. State,* 2 So. 3d 137 (Fla. 2009); *Phillips v. State/Crosby, 984* So. 2d 503 (Fla. 2008); *Jones v. State,* 966 So. 2d 319 (Fla. 2007); *Cherry v. State,* 959 So. 2d 702 (Fla.), *cert denied,* 128 S.Ct. 490 (2007); *and Zack v State*, 911 So. 2d 1190 (Fla. 2005),[2] which explicitly hold **that the defendant's IQ must be 70 or below in order to benefit from *Atkins*.**[3] In this case, even after improperly adjusting Herring's IQ score to lower it, **the lower court found that Herring's IQ was "approximately 75." Under settled precedent, the finding that Herring's IQ is approximately 75 is dispositive -- that score is too high to entitle him to relief under settled law.**

STATEMENT REGARDING ORAL ARGUMENT

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[2] With respect to *Zack*, the lower court decided that that decision said something other than what this Court has said it does. As to the other decisions, the circuit court simply ignored them.

[3] In a recent case, this Court reiterated "to assert a valid claim under *Atkins*, a defendant must establish that he or she has an IQ of 70 or below." *Schoenwetter v. State/ McNeil*, 2010 WL 2605961 (Fla. July 1, 2010).

The State suggests that oral argument is not necessary in this case. The lower court found, as a fact, that Herring's IQ is "approximately 75." While debate as to whether Herring's score is really higher is possible, even accepting the score of 75 as correct does not help Herring. This Court's precedent **requires** a score of 70 or below in order to trigger the *Atkins* prohibition on execution -- no matter how the lower court's finding is interpreted, it is, on its face, absolutely dispositive of the issue because Herring's IQ was found to be above the cut-off that this Court's decisions clearly delineate. The lower court totally ignored those decisions in granting relief, and the State suggests that refusal to follow binding precedent has already consumed enough scarce resources. This case can, and should, be decided without oral argument.

STATEMENT OF THE FACTS

During the evidentiary hearing conducted in this case, three mental health professionals testified. The testimony was as follows:

Dr. Wilfred VanGorp was retained by the defense. (V3, R288, 297). Dr. VanGorp, who is not licensed to practice psychology in Florida, has performed between 50 and 75 mental retardation evaluations as an independent professional. (V3, R300). Dr. VanGorp recognized the DSM as authoritative, and, in fact, referred to it as the "bible" of his profession. (V3, R301). He

testified that the DSM-IV-TR defines mental retardation as set out above. (V3, R303). *Florida Rule of Criminal Procedure* 3.203 and the DSM-IV-TR definition are the same, and require an IQ score of two standard deviations below the mean (70), along with concurrent deficits in present adaptive functioning as well as onset prior to age 18. (V3, R303, 309). Dr. VanGorp testified that a phenomenon known as the "Flynn effect" is coming into play in this case. (V3, R316). Essentially, the "Flynn effect" is that as time passes following the introduction of an intelligence test instrument, the same individual will score higher on the same test. (V3, R318). However, Dr. VanGorp also testified that there is no way to know how the "Flynn effect" applies to any particular individual, and also testified that given Herring's relatively consistent scores on the various intelligence tests he has taken, **there is not much impact from the "Flynn effect" on Herring's test scores**. (V3, R400-01).

The various intelligence tests at issue in this case are all Wechsler tests, which produce Verbal, Performance, and Full-scale IQ scores (which is essentially an average of the verbal and performance scores). (V3, R318-19). In 1972, Herring received a full-scale IQ test score of 83. In 1974, Herring received the following scores: Verbal of 81, Performance of 85, and Full-scale of 81. (V3, R319). The 1974 test is the only IQ test which did not produce a significant "split", or difference,

between the Verbal and Performance scores. (V3, R320). In 1976, Herring received the following scores: Verbal of 82, Performance of 67, and Full-scale of 72. (V3, R321). When tested in 2004 by Dr. McClaren, Herring received the following IQ scores: Verbal of 82, Performance of 69, and Full-scale of 74. (V3, R324). Dr. VanGorp spent less than two hours with Herring, conducted no testing of his own, and did not assess Herring's present level of adaptive functioning (which is a required component of a diagnosis under every definition of retardation). (V3, R343, 392). Dr. VanGorp testified that the evaluation process he used in this case is not how he would conduct an evaluation for mental retardation in his private practice, where he would administer intelligence testing in addition to assessing the test subject's present adaptive functioning. (V3, R392). This fact, of necessity, should diminish the reliability and weight given to Dr. VanGorp's ultimate conclusions in this case.

According to Dr. VanGorp, the 1976 testing provides the most accurate information of the four IQ tests Herring has been given. (V3, R374). Truancy affects school performance, as can one's environment and the presence of behavioral issues such as Attention Deficit Hyperactivity Disorder or conduct disorder. (V3, R375). The record evidence submitted in this case indicates that Herring had quite a number of behavioral issues as a child, and was truant a great deal.

Dr. VanGorp testified that the Full-scale score produced on a Wechsler intelligence test is regarded as representing a range of scores that can go up or down by as much as 5 points. (V3, R380-81). Dr. VanGorp testified that he **always** "subtracted 5 [points] because that's the question at hand" in this case. (V3, R381).[4] However, Dr. VanGorp did admit that it is not possible for an individual to "fake good" or "fake smart" on intelligence testing. (V3, R381). In other words, the attained scores (Verbal, Performance and Full-scale) reflect that Herring's potential is at least at that level, and may actually be higher. Herring falls in the low average range on his Verbal scores, and his spatial impairments reduced the Performance score, which in turn lowers the Full-scale score. (V3, R384, 388). Verbal scores of 99, 81, and 82 are not "in general" consistent with mental retardation. (V3, R384). Dr. VanGorp did state that it is necessary to look at both the Verbal and Performance scores, and also noted that Herring's school records contained many references to him not "working up to potential." (V3, R385). Notably, **Herring has never been diagnosed as mentally retarded by any other mental health professional in his life**. (V3, R386).

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[4] This testimony strongly suggests that VanGorp intended to diagnose mental retardation from the very beginning of his "evaluation," if not from his first involvement in this case. It certainly indicates that the evaluation was not a neutral and objective one.

Dr. VanGorp is not familiar with the rules and procedures of the Florida Agency for Persons with Disabilities, nor is he familiar with the requirements for a diagnosis of mental retardation in this State. (V3, R391). He did, however, testify that the work that he performed in this case would be **insufficient** for a disability determination in the State of New York. (V3, R391). The 1976 testing produced a Verbal score of 82, which is uncommon in mentally retarded persons -- the person administering that test reported that the Full-scale score of 72 was a "**minimal** reflection of [Herring's} potential." (V3, R396-97). (emphasis added). In mentally retarded persons, the Performance score is usually higher than the Verbal score. (V3, R397).

While Dr. VanGorp testified a great deal about the "Flynn effect," Herring's scores have been consistent across time, indicating that there is not very much "Flynn effect" coming into play -- Dr. VanGorp said as much. (V3, R401). Herring probably has ADHD, which can depress the attained IQ score, as will misbehavior during the test session. (V3, R402-03). Herring attained a Verbal score of 99 in one IQ test session, and it is not possible to "fake good." (V3, R403).

Dr. VanGorp was not aware of IQ testing performed on Herring in 1980, during which Herring received the following scores on the Wechsler test: Verbal of 82, Performance of 85,

and Full-scale of 82. (V3, R407). Dr. VanGorp testified that these scores were inconsistent with mental retardation, **and that he did not know about these results**. (V3, R407).

Dr. Greg Prichard was called as a witness by the State. (V3, R413). Dr. Prichard is a psychologist licensed in the State of Florida who has conducted between 500 and 750 mental retardation evaluations during the course of his career. (V3, R418). As noted above, Herring's 1972 IQ testing produced a Verbal score of 99 and a performance score of 69, for a Full-scale IQ of 83. (V3, R419). The 30-point split between the Verbal and Performance scores indicates a specific learning disability, and is not consistent with mental retardation -- it is not possible to fake good, and **a person with mental retardation is simply unable to attain a Verbal score of 99**. (V3, R420-21, 422). The variation in Herring's IQ scores on the various tests is not the same as a variation in his IQ -- the reports from prior testing indicate that the examiners thought that Herring was a "capable young man, but that his behavior gets in the way." (V3, R424).

Dr. Prichard attempted to assess Herring's adaptive behavior skills (the second component of the mental retardation definition) by administering the Vineland Adaptive Behavior Scales to an aunt with whom Herring had lived. (V3, R425). Herring received a score of 68 – it appeared that this score is

misleading because it was artificially depressed by a low score on one area of the Vineland. (V3, R426). Herring's daily living skills are good. (V3, R426).[5]

When making a determination of mental retardation for the State of Florida's Agency for Persons with Disabilities, an absolute IQ score of 70 or less is required. (V3, R427). The plus/minus 5 discussed by Dr. VanGorp in his testimony is not used, nor is there an adjustment for the "Flynn effect." (V3, R427-28). A review of Herring's prison file indicates that Herring is doing well in the context of his environment, which would certainly seem to imply adequate adaptive functioning. (V3, R429).

The 1980 IQ testing (which Dr. Prichard **did** know about) resulted in a Verbal score of 82, a Performance score of 85, and a Full-scale score of 82. (V3, R429). Those results are inconsistent with mental retardation, and Dr. Prichard opined that the 1976 Performance score of 67 is too low – he felt that the Performance score of 85 obtained in 1980 was probably accurate. (V3, R430-31).

Dr. Prichard conducted an adaptive assessment using the Vineland **even though Herring could not meet the criteria for mental retardation based on his IQ test scores**. (V3, R439). The

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[5] The circuit court completely ignored this testimony, which is uncontested.

overall Vineland score of 68 is misleading -- the scores in the 80s on the daily living and socialization area of the assessment must be considered. (V3, R440). Herring is probably ADHD, and his behavior contributed to his academic difficulties. (V3, R443, 448). Subtracting points to "deal" with the "Flynn effect" is not the standard of practice -- it is impossible to tell whether the average testified to by Dr. VanGorp is really applicable in a particular case. (V3, R449). The Verbal-Performance splits present in Herring's testing are not common in mentally retarded people. (V3, R451). In fact, Dr. Prichard testified that he has never seen splits this large in a retarded individual that he has evaluated -- the usual split is no more than 15 points. (V3, R451). This is noteworthy because he has performed many more evaluations for mental retardation than Dr. VanGorp. Dr. Prichard emphasized that **mentally retarded persons do not achieve Verbal IQ scores of 99**, and that, because IQ is essentially static, people in general simply do not achieve a Performance IQ of 67 on one administration of a test, and an 85 on another. (V3, R452-53). The low scores are misleading, and the assumption must be that the higher score indicates the individual's true level of functioning. (V3, R454).

The State also presented the testimony of Dr. Harry McClaren, who is a psychologist licensed in the State of Florida. (V4, R457-58). Dr. McClaren has extensive forensic

psychological experience, as well as extensive experience in the area of mental retardation, having diagnosed an individual as mentally retarded about 100 times over the course of his career. (V4, R464-65). Dr. McClaren's testimony concerning the definition and diagnostic criteria applicable to mental retardation was the same as the other witnesses -- *Florida Rule of Criminal Procedure* 3.203, § 921.137 of the *Florida Statutes*, and the DSM definition are essentially the same. (V4, R467). Dr. McClaren administered the Wechsler Adult Intelligence Scale - Third Edition test to Herring as well as the Scales of Independent Behavior - Revised. (V4, R468). The intelligence testing produced a Verbal score of 82, a Performance score of 69, and a Full-scale of 74 (V4, R469). Herring's Verbal score falls in the low average range, and his Performance score falls in the range of mild mental retardation. (V4, R471). The greater the split between scores, the more misleading the Full-scale score is -- the split must be taken into consideration. (V4, R470, 495). In this case, based upon the less than optimal testing conditions, Herring's documented behavior in the prison system, and Dr. McClaren's interview with Herring (during which Herring discussed, *inter alia*, reading Tom Clancy novels), Dr. McClaren testified that, in his opinion, Herring is not mentally retarded. (V4, R473, 475).

Dr. McClaren testified that, applying a 95% confidence

interval to the IQ testing results he obtained, Herring's true Full-scale IQ falls within the range of 70-79. (V4, R476). Those scores fall outside the range of mental retardation, and Herring's school records point to an emotionally disturbed child who may have been Attention Deficit Hyperactivity Disordered. (V4, R476-77). All of Herring's previous intelligence testing produced Full-scale scores above 70, and, again, it is impressive that Herring **has never been diagnosed as mentally retarded by any evaluator** except for Dr. VanGorp. (V4, R478-480, 536). Dr. McClaren testified that, in his experience, he had never seen a mentally retarded person attain scores like Herring's. (V4, R480).

Herring presently reads at the High School level. (V4, R523). He does not meet the "significantly subaverage general intellectual functioning" prong of the diagnostic criteria, and, because that is so, there is no need to consider the adaptive function deficits prong of the definition. (V4, R524). The "Flynn effect" is derived from research done with a test called the "Raven's Standard Progressive Matrices" -- that test is not acceptable for use in determining retardation under *Fla. R. Crim. P.* 3.203. (V4, R516, 539).

Dr. McClaren's SIB-R test administration produced a score of 49 -- a person with such a score would have few reading, writing or arithmetic skills, would have poor communication and

social skills, and would need help with basic self-care such as eating and dressing. (V4, R529). Such a person would be readily identifiable to an observer as impaired. (V4, R529). There is nothing to suggest that Herring has deficiencies of that magnitude. (V4, R530).

Dr. McClaren testified that the DSM-IV-TR is not merely a cookbook that is applied without regard for clinical judgment about the individual -- the DSM itself states that when there is a significant Verbal/Performance split, the Full-scale score can be misleading. (V4, R534-35). Herring generated a 13-point split, and, because of that split, his Full-scale score is depressed to the extent that it does not give an accurate picture of Herring's true intellectual ability. *Florida Rule of Criminal Procedure* 3.203 makes no reference to assessing the Full-scale IQ score on a plus/minus five (5) scale, and, in any event, even if it could validly be done, the plus/minus 5 would have to be considered to potentially increase as well as reduce the defendant's Full-scale score. (V4, R533).

SUMMARY OF THE ARGUMENT

Under settled Florida law, an individual claiming mental retardation as a bar to execution must have a Full-scale IQ score of 70 or below. This proposition was well-settled at the time that the lower court issued its order setting aside Herring's death sentence. That ruling is wrong **as a matter of**

law because the lower court found as a fact that Herring's Full-scale IQ is "approximately 75." Assuming that score is an accurate representation of Herring's abilities, and that point is open to debate, it is too high to fall under the bar to execution. The lower court ignored settled law in setting Herring's death sentence aside.

ARGUMENT

THE CIRCUIT COURT IGNORED BINDING PRECEDENT

PRELIMINARY MATTERS

The lower court found that Herring's IQ is "approximately 75." (V19, R2988). Under the precedent of this Court, that should have been the end of the issue. However, the lower 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. The lower court's grant of relief is wrong as a matter of law.

THE STANDARD OF REVIEW

Because there was an evidentiary hearing in this case, this Court reviews the findings of the circuit court under the competent substantial evidence standard. *Melendez v. State*, 718 So. 2d 746 (Fla. 1998); *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997). This Court reviews the legal conclusions of the lower court *de novo*. *Sochor v. State*, 883 So. 2d 766, 771-72

(Fla. 2004). This case presents a rather unusual situation, in that the finding by the circuit court that Herring's IQ is "approximately 75" conclusively establishes that he is not entitled to relief as a matter of law.

THE LEGAL STANDARD

Since *Atkins,* this Court has made the legal standard for establishing mental retardation as a bar to execution as clear as it can possibly be:

> The evidence in this case shows Zack's lowest IQ score to be 79. Pursuant to *Atkins v. Virginia*, 536 U.S. 304, 317, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), a mentally retarded person cannot be executed, and it is up to the states to determine who is "mentally retarded." **Under Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below.** *See* § 916.106(12), *Fla. Stat.* (2003) (defining retardation as a significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age eighteen, and explaining that "[s]ignificantly subaverage general intellectual functioning" means performance which is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the department); *Cherry v. State*, 781 So. 2d 1040, 1041 (Fla.2000) (accepting expert testimony that in order to be found retarded, an individual must score 70 or below on standardized intelligence test).

Zack v. State, 911 So. 2d 1190, 1201 (Fla. 2005). (emphasis added). Rather than following that clear precedent, the circuit court described the State's citation to *Zack* as "entirely misplaced" and rewrote the holding quoted above, saying:

> Contrary to the State's arguments, *Zack* does not

> impose a bright-line cutoff of 70 or below for a finding of mental retardation. In *Zack*, the defendant's IQ score was 79, and there was no mention of any scores below 75. Thus, the case simply does not address the implications of IQ scores between 70 and 75 or the five-point standard error of measurement that the DSM-IV-TR and all of the expert witnesses in this case say is in [sic] inherent in intelligence testing. The State's own expert witnesses agree that a person with IQ scores between 70 and 75 appropriately can be diagnosed as mentally retarded.[6]

(V19, R2990 n. 4).

Even more disturbing than the lower court's wholesale re-write of *Zack* is that court's refusal to even acknowledge *Nixon, Jones, and Cherry*. Each of those decisions came in the time between the 2005 evidentiary hearing and the issuance of the order granting relief four (4) years later. Each decision was called to the court's attention (V19, (*Cherry*) R2928-53; (*Jones*) 2960-71; (*Nixon)* SRV20, R3014-3023), but none of those decisions, which are squarely contrary to the lower court's holding, are even mentioned in that order. Despite the lower court's rejection of *Zack* (and simply ignoring the other decisions), the law in this State is that unless the IQ is 70 or less, *Atkins* does not come into play. The lower court found that Herring's IQ was "approximately 75," and granted relief anyway -- that result is contrary to this Court's unbroken line of

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[6] In the mental health arena, the last sentence is technically correct. However, that concept was explicitly rejected in *Zack, Cherry, Phillips* and *Nixon* insofar as mental retardation as a bar to execution is concerned. The lower court simply ignored this basic distinction.

authority on this issue.

To the extent that further discussion is necessary, *Phillips* addresses and rejects each premise relied on by the lower court in granting relief:

> Phillips first argues that the circuit court erred in finding that he does not function at a significantly subaverage intellectual level. **Phillips claims that because there is a measurement error of about five points in assessing IQ, mental retardation can be diagnosed in individuals with IQs ranging from 65 to 75. We disagree**, and affirm the trial court's finding that Phillips did not satisfy the first prong of the mental retardation definition.
>
> Section 921.137(1) defines subaverage general intellectual functioning as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." **We have consistently interpreted this definition to require a defendant seeking exemption from execution to establish he has an IQ of 70 or below.** *See Cherry*, 959 So. 2d at 711-714 (finding that section 921.137 provides a strict cutoff of an IQ score of 70); *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005) (**finding that to be exempt from execution under *Atkins*, a defendant must meet Florida's standard for mental retardation, which requires he establish that he has an IQ of 70 or below**); *see also Jones v. State*, 966 So. 2d 319, 329 (Fla. 2007) ("[U]nder the plain language of the statute, 'significantly subaverage general intellectual functioning' correlates with an IQ of 70 or below.")
>
> Phillips's scores on the WAIS were as follows: 75 (1987), 74 (2000), and 70 (2005). Based on these scores, the defense experts opined that Phillips has "significantly subaverage intellectual functioning." The State's expert concluded to the contrary, finding that Phillips's low intellectual scores were a result of malingering, not mental retardation. Because both defense experts failed to perform a complete evaluation of Phillips -- *i.e.*, they did not test for

malingering -- the court accepted the state's expert's opinion over that of the defense's experts. Although Phillips challenges the trial court's credibility finding, we give deference to the court's evaluation of the expert opinions. *See Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007) ("This Court does not ... second-guess the circuit court's findings as to the credibility of witnesses." (*citing Trotter v. State*, 932 So. 2d 1045, 1050 (Fla. 2006))); *Bottoson v. State,* 813 So. 2d 31, 33 n. 3 (Fla. 2002) ("We give deference to the trial court's credibility evaluation of Dr. Pritchard's and Dr. Dee's opinions."); *Porter v. State,* 788 So. 2d 917, 923 (Fla. 2001) ("We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.").

Even were we to disregard the circuit court's credibility finding, Phillips's IQ scores do not indicate that he is mentally retarded. In *Jones*, 966 So. 2d at 329, **we found that IQ scores ranging from 67 to 72 did not equate to significantly subaverage general intellectual functioning.** *See also Rodgers v. State,* 948 So. 2d 655, 661 (Fla. 2006) (finding that the defendant did not prove he was retarded under section 921.137 despite the defense expert's finding that the defendant had an IQ of 69 and was mentally retarded); *Burns v. State*, 944 So. 2d 234, 247 (Fla. 2006) (finding that even though the defendant scored an IQ of 69 on one of the expert's IQ tests, the defendant did not meet the first prong of the mental retardation determination because the more credible expert scored the defendant's IQ at 74).

Here, the majority of Phillips's IQ scores exceed that required under section 921.137. Moreover, the court questioned the validity of the only IQ score falling within the statutory range for mental retardation.[7] Therefore, competent substantial evidence supports the trial court's finding that Phillips did not meet the first prong of the mental retardation definition.

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[7] Herring had **no scores** falling in the retarded range -- the circuit court's refusal to even acknowledge binding precedent that requires a result contrary to that reached by the court is disturbing.

B. Adaptive Behavior

Next, Phillips argues that the trial court erred in concluding that he failed to demonstrate deficits in adaptive functioning sufficient for a diagnosis of mental retardation. In Florida, defendants claiming mental retardation are required to show that their low IQ is accompanied by deficits in adaptive behavior. *Rodriguez v. State*, 919 So. 2d at 1252, 1266 (Fla. 2005) ("[L]ow IQ does not mean mental retardation. For a valid diagnosis of mental retardation ... there must also be deficits in the defendant's adaptive functioning." (quoting trial court's order)). "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.'" *Id.* at 1266 n. 8 (quoting American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 42 (4th ed. 2000)). To be diagnosed mentally retarded, Phillips must show "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." *Id.*

The State's expert, Dr. Suarez, was the only mental health expert to test Phillips's adaptive functioning contemporaneously with his IQ. Dr. Keyes, the only defense expert to evaluate Phillips's adaptive functioning, relied on the technique of retrospective diagnosis, focusing on Phillips's adaptive behavior before age 18. **However, in *Jones,* 966 So.2d at 325-27, we held retrospective diagnosis insufficient to satisfy the second prong of the mental retardation definition.[8] We found that both the statute and the rule require significantly subaverage general**

[8] On page 20 of the order, the lower court criticized the State for daring to suggest that Rule 3.203 required deficits in present adaptive functioning. The emphasized portion of *Phillips* demonstrates that the trial court was wrong in its creative reading of the rule. *Accord, Brown v. State*, 959 So. 2d 146 (Fla. 2007).

intellectual functioning to exist concurrently with deficits in adaptive behavior. *Id.* (citing § 921.137(1), *Fla. Stat.* (2007); *Fla. R.Crim. P.* 3.203(b)). Dr. Keyes tested Phillips's intellectual functioning in 2000; however, he did not assess Phillips's adaptive functioning as of that date.

Moreover, the record contains competent substantial evidence that Phillips does not suffer from deficiencies in adaptive functioning. Phillips supported himself. He worked as short-order cook, a garbage collector, and a dishwasher. The mental health experts generally agreed that Phillips possessed job skills that people with mental retardation lacked. Specifically, the defense's expert admitted that Phillips's position as a short-order cook was an "unusually high level" job for someone who has mental retardation.

Phillips also functioned well at home. He resided with his mother. According to her, he paid most of the bills and did the majority of the household chores. Phillips was also described as a great son, brother, and uncle. Phillips purchased a new car for his mother and a typewriter for his sister. He spent a lot of time with his nieces and nephews, and "was real good with them." Phillips often kept the children overnight, took them for ice cream, and would give them rides when needed. In addition to driving, Phillips cooked and went grocery shopping, skills that are indicative of the ability to cope with life's common demands.

The experts also agreed that the planning of the murder and cover-up in this case are inconsistent with a finding that Phillips suffers from mental retardation. Although Phillips argues that his maladjusted behavior does not constitute adaptive behavior, we agree with the circuit court that argument is untenable. The mental health experts generally agreed that persons suffering from mental retardation lack goal-directedness and the ability to plan. Phillips had both. To commit the crime, Phillips, having discovered that his parole officer was generally the last to leave the office, lay in wait behind dumpsters outside of the building. When the parole officer emerged and there were no witnesses

present, Phillips unloaded his gun into the officer. He reloaded the gun and shot the parole officer three more times. Phillips then retrieved the shell casings from the ground, fled the scene, and disposed of the gun. After he was apprehended, officers tried on several occasions to interview Phillips, but he refused to speak.

Also, while in jail, Phillips authored an alibi letter and a letter dubbed the "Bro White" letter. In the "Bro White" letter, Phillips informed the recipient that he was aware of the State's witnesses against him and that he had sent the names and addresses of their family members to a "reliable source on the outside world." He further penned, "I hate like hell to do that. But the innocent must suffer."

Phillips's ability to orchestrate and carry out his crimes, his foresight, and his acts of self-preservation indicate that he has the ability to adapt to his surroundings. Also noteworthy is that Phillips killed the parole officer in a cold, calculated, and premeditated manner. A cold, calculated, premeditated murder is "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." *Franklin v. State*, 965 So. 2d 79, 98 (Fla. 2007). A CCP killing demonstrates "that the defendant had a careful plan or prearranged design to commit murder before the fatal incident ...; that the defendant exhibited heightened premeditation." *Id.* The actions required to satisfy the CCP aggravator are not indicative of mental retardation. *See Atkins*, 536 U.S. at 319-20, 122 S.Ct. 2242 ("Exempting the mentally retarded from [the death penalty] will not affect the 'cold calculus that precedes the decision' of other potential murderers. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders.")

It is clear from the evidence that Phillips does not suffer from adaptive impairments. Aside from personal independence, Phillips has demonstrated that he is healthy, wellnourished and wellgroomed, and exhibits good hygiene. Likewise, there was "no evidence of deficits of adaptive behavior in regards to home living, use of community resources, or leisure." Thus, as the foregoing illustrates, competent substantial

> evidence supports the trial court's conclusion that Phillips failed to prove the second prong-impairments in adaptive functioning.
>
> C. Onset Before Age Eighteen
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> The final factor in determining mental retardation is onset before age 18. Ample evidence supports the trial court's conclusion that Phillips failed to prove this prong. Phillips's school history does not suggest onset before the age of 18. While it is true that Phillips achieved C's and D's in school, his poor performance is easily attributed to his truancy, his repeated suspensions from school, and his juvenile delinquency. As the trial court found, "there was no evidence [t]o support the Defendant's contention that his poor grades were a result of mental retardation."

Phillips v. State, 984 So. 2d 503, 510-512 (Fla. 2008). (emphasis added). This Court needs to look no further than *Phillips* to conclude that the lower court completely failed to follow binding precedent.

In addition to *Phillips*, this Court decided *Nixon* almost a year before the lower court issued its order. That decision, like *Phillips*, left no doubt whatsoever about the state of the law. The lower court ignored its explicit language:

> The trial court concluded that Nixon failed to establish that he is ineligible for the death penalty due to mental retardation. We affirm the trial court's determination that Nixon is not mentally retarded. When reviewing mental retardation determinations, we must decide whether competent, substantial evidence supports the trial court's findings. *See Cherry*, 959 So. 2d at 712 (*citing Johnston v. State*, 960 So. 2d 757 (Fla. 2006)). We do not "reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007) (*citing Trotter v. State*, 932 So. 2d 1045, 1049 (Fla. 2006)). However, we review the

trial court's legal conclusions *de novo*. *See Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

Cherry Decision

Nixon first argues that this Court's interpretation of section 921.137 in *Cherry,* which requires a defendant to have an IQ score of 70 or below, violates *Atkins*. [FN4] Nixon asserts that because the Supreme Court noted in *Atkins* that the consensus in the scientific community recognizes an IQ between 70 and 75 or lower, states are only permitted to establish procedures to determine whether a capital defendant's IQ is 75 or below on a standardized intelligence test. Nixon's claim is without merit. [FN5] In *Atkins*, the Supreme Court recognized that various sources and research differ on who should be classified as mentally retarded. Accordingly, the Court left to the states the task of setting specific rules in their statutes. *See Atkins*, 536 U.S. at 317, 122 S.Ct. 2242 ("As was our approach in *Ford v. Wainwright*[, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed. 2d 335 (1986)] with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'") (citations omitted). This State in section 921.137(1) defines subaverage general intellectual functioning as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." **We have consistently interpreted this definition to require a defendant seeking exemption from execution to establish he has an IQ of 70 or below.** *See, e.g., Jones v. State,* 966 So. 2d 319, 329 (Fla. 2007) **("[U]nder the plain language of the statute, 'significantly subaverage general intellectual functioning' correlates with an IQ of 70 or below.")**; *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005) (finding that to be exempt from execution under *Atkins*, a defendant must establish that he has an IQ of 70 or below).[9]

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[9] Again, the law was clear **at the time of the evidentiary hearing** that a defendant was not exempt from execution unless his IQ was 70 or below. *Zack* established this baseline principle unequivocally, and the lower court ignored it.

> [FN4] In *Cherry*, we noted that another jurisdiction considering a similar claim found that "fourteen of the twenty-six jurisdictions with mental retardation statutes have a cutoff of seventy or two standard deviations below the mean." 959 So.2d at 713 n. 8 (*citing Bowling v. Commonwealth*, 163 S.W.3d 361, 373-74 (Ky.) (upholding use of seventy IQ score cutoff), *cert. denied*, 546 U.S. 1017, 126 S.Ct. 652, 163 L.Ed.2d 528 (2005)).
>
> [FN5] Nixon makes a number of assertions questioning this Court's *Cherry* decision. All of these arguments are versions of his main argument that an IQ of 70 or below should not be the standard and that such a standard is unconstitutional.

Nixon further asserts that our interpretation of section 921.137 in *Cherry* creates an irrebuttable presumption that no one with an IQ over 70 is mentally retarded. Nixon claims that we created an irrebuttable presumption because once we concluded that Cherry's IQ score was 72 our inquiry terminated, *i.e.*, we did not consider the two other prongs of the mental retardation determination. *See Cherry*, 959 So. 2d at 714. We have consistently interpreted section 921.137(1) as providing that a defendant may establish mental retardation by **demonstrating all three of the following factors**: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. *See, e.g., Jones*, 966 So. 2d at 325; *Johnston*, 960 So. 2d at 761. Thus, **the lack of proof on any one of these components of mental retardation would result in the defendant not being found to suffer from mental retardation.**

Nixon further asserts that our interpretation of section 921.137(1) does not provide constitutionally adequate procedures to determine mental retardation. More specifically, Nixon claims that in *Cherry*, we interpreted section 921.137(1) to create fact-finding procedures that preclude a defendant from presenting relevant material. Nothing in *Cherry* or section

921.137 precludes a defendant from presenting any evidence that is germane to the issues involved in a mental retardation claim. Section 921.137(1) and rule 3.203 provide defendants with notice of the type of evidence that is relevant to the issues and that will be considered by a trial court. In addition defendants are given an opportunity to present any relevant evidence to the court. This procedure was followed in this case. After an evidentiary hearing, the trial court issued a final order that thoroughly explained its decision, finding that Nixon had not established that he should be excluded from the death penalty by reason of mental retardation.

The trial court informed Nixon of his opportunity to present his case, provided an evidentiary hearing, determined Nixon's mental retardation claim on the basis of the examinations performed by two psychiatrists, and provided Nixon with an adequate opportunity to submit expert evidence in response to the report and testimony of the court-appointed expert. We find that Nixon was included in the truth-seeking process and had a full and fair opportunity to present evidence relevant to his mental retardation claim and to challenge the state-appointed psychiatrist's opinions. Because the statute, rule, and caselaw outline adequate procedures for the presentation of mental retardation claims, Nixon is not entitled to relief on this issue.

Nixon further contends that this Court's definition of mental retardation violates both the United States and Florida Constitutions because the definition of mental retardation in section 921.137, as construed in *Cherry*, is inconsistent with the constitutional bar on the execution of mentally retarded persons. In *Jones v. State*, 966 So. 2d 319, 326 (Fla. 2007), we found that Florida's definition of mental retardation is consistent with the American Psychiatric Association's diagnostic criteria for mental retardation. [FN6] Moreover, in *Atkins*, the Supreme Court noted that the statutory definitions of mental retardation throughout the country are not identical to the one outlined in *Atkins* but generally conform to the clinical definitions set forth in the case. *See* 536 U.S. at 317 n. 22, 122 S.Ct. 2242. Florida's statutory definition of mental retardation is not identical but conforms to

the one outlined in Atkins. *See id.* at 309 n. 3, 122 S.Ct. 2242; § 921.137(1), *Fla. Stat.* (2007). Nixon's claim involving the definition of mental retardation is also without merit.

> [FN6] The American Psychiatric Association's definition provides the following diagnostic criteria for mental retardation:
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> A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test (for infants, a clinical judgment of significantly subaverage intellectual functioning).
>
> B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.
>
> C. The onset is before age 18 years.
>
> *Jones v. State*, 966 So. 2d 319, 326-27 (Fla. 2007) (*quoting* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 49 (4th ed. 2000)).

. . .

As stated earlier, we review mental retardation issues to determine whether competent, substantial evidence supports the trial court's determination. *See Cherry*, 959 So. 2d at 712 (*citing Johnston*, 960 So. 2d 757). We have reserved to the trial court the determination of the credibility of witnesses. *See Trotter*, 932 So. 2d at 1050 (*citing Windom v. State*, 886 So. 2d 915, 927 (Fla. 2004)). The trial court found "Dr. Keyes' historical cumulative average scoring approach is not persuasive and the persuasive effect of this approach

is outweighed by Dr. Pritchard's unrebutted testimony that Mr. Nixon scored 80 on a test validly administered last year." The trial court further found that Dr. Keyes' score could have resulted from Nixon's malingering, that Nixon's historical scores were consistent with Dr. Prichard's measurement of an IQ of 80, and that Dr. Keyes' approach of rescoring and averaging the current and historical scores was inappropriate and inconsistent with both the plain language of section 921.137 and this Court's precedent. Thus, the trial court determined that Nixon did not meet the first prong of the mental retardation determination. We affirm the trial court's determination that Nixon does not satisfy the criteria for mental retardation.

Burden of Proof

Nixon argues that the trial court erred by requiring him to prove his mental retardation. Nixon opines that the State is required to prove that he is not mentally retarded beyond a reasonable doubt. **Contrary to this assertion, we have consistently held that it is the defendant who must establish the three prongs for mental retardation.** *See, e.g., Cherry*, 959 So. 2d at 711; *Fla. R. Crim. P.* 3.203(e). Moreover, Nixon argues that if he bears the burden of showing his mental retardation, the appropriate standard is preponderance of the evidence. However, section 921.137(4) specifically states:

> At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has mental retardation. If the court finds, by **clear and convincing evidence,** that the defendant has mental retardation as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.

(Emphasis added.) We need not address this claim because the circuit court held that Nixon could not

> establish his mental retardation under either the clear and convincing evidence standard or the preponderance of the evidence standard. *See Jones*, 966 So.2d at 329-30 (noting that we did not need to address the claim because the trial court found that "Jones did not present evidence sufficient to meet even the lesser standard of preponderance of the evidence") (*citing Trotter*, 932 So. 2d at 1049 n. 5).

Nixon v. State, 2 So. 3d 137, 141-145 (Fla. 2009). (emphasis added). The lower court's finding that Herring satisfies the criteria for exemption from execution because of mental retardation is not supported by competent substantial evidence because Herring's IQ score, **as found by the lower court,** is higher than the cut-off established by the precedent of this Court. The grant of relief is wrong as a matter of law, and should be reversed.[10]

THE LOWER COURT'S LEGAL CONCLUSION IS WRONG BASED ON THE FACTS FOUND BY THAT COURT

The IQ Scores.

The record contains numerous intelligence assessments of

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[10] Because there was a delay of more than four years between the evidentiary hearing and the final order, the law from this Court became very clear while this case was pending. The lower court's obligation was to apply that case law, and it did not do so. As this Court is well aware, there is a three-part standard for finding the presence of mental retardation -- if any one of the three parts is missing, the defendant is not mentally retarded. Those components are an IQ of 70 or below, concurrent deficits in present adaptive functioning, and onset of the condition before the age of 18. Those criteria are in the conjunctive, and the absence of one obviates the need for further inquiry. When those three criteria are applied to Herring, he failed to establish an IQ of less than 70 **based on the trial court's factfindings.** Because that is so, there is no real need to discuss the remaining two components.

Herring, which date back to the time that he was ten (10) years old. Except for the assessments conducted in 1980 and in 2004, those assessments were conducted in connection with school placement. Herring has never, prior to this proceeding, claimed that he is mentally retarded. More significantly, **Herring has never been diagnosed as mentally retarded by any mental health professional other than Dr. VanGorp,** who testified below. The evidence at his capital sentencing proceeding was squarely to the contrary, and the sentencing Court found, in mitigation, not that Herring was mentally retarded, but that he had a learning disability. Both this and the Eleventh Circuit Court of Appeals have found (albeit in the ineffectiveness of counsel context) that Herring is not mentally retarded. Assuming *arguendo* that the retardation claim is open to relitigation (even though it appears to be an issue that is collaterally estopped), there is no persuasive evidence sufficient to raise any question about the correctness of those prior rulings.

Defense witness Dr. VanGorp (who did no testing of Herring) has far less experience in the diagnosis of mental retardation than the experts called by the State. Dr. VanGorp has conducted between 50 and 75 mental retardation assessments in his career. Dr. Prichard has conducted between **500 and 750** such assessments, and Dr. McClaren has actually diagnosed mental retardation about 100 times. In terms of sheer experience in the relevant field,

Dr. VanGorp is significantly less qualified than the other two experts, and, as set out above, **is the only mental health professional who has ever diagnosed Herring as being mentally retarded**. That psychologist conducted no testing of Herring himself, and was unaware (because Herring's attorneys withheld it) of testing conducted at the time of trial which placed Herring's IQ at 82, a score that is wholly inconsistent with mental retardation. There is no principled reason that VanGorp's testimony -- which is inconsistent with all of the other evidence -- should have been credited as extensively as it was.

Another factor calling the reliability of Dr. VanGorp's opinion testimony into question is that significant intelligence testing results were withheld from him. Despite having specifically requested all mental health information available on Herring up until the time he was sentenced, Dr. VanGorp was not provided with any information concerning intelligence testing conducted in 1980[11] during which Herring generated a Full-scale IQ score of 82, nor was he provided with any information about the evaluation conducted by Dr. Friedenberg in

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[11] In footnote 3 on page 13 of the order, (V19, R2988), the lower court says that this IQ testing is entitled to no weight. The Eleventh Circuit apparently disagreed, since this testing featured prominently in its decision. In any event, even the lower court recognized that the most that the score of 82 could be reduced was to a score of 74, which is still too high to benefit from *Atkins.*

preparation for Herring's capital trial -- Dr. Friedenberg found that Herring fell in the dull-normal range of intelligence. When confronted with this information during cross-examination, Dr. VanGorp stated that those facts were inconsistent with mental retardation. Dr. VanGorp's opinion was obviously based upon incomplete information about Herring's true mental status.[12]

Both Dr. McClaren and Dr. Prichard have extensive experience in conducting assessments to determine whether an individual is mentally retarded under Florida law. These psychologists explained why it is misleading and inaccurate to look merely at the Full-scale IQ score when there is a large split between the Verbal and Performance scores, as is the case here. The lower court chose to ignore that distinction by simply not discussing it. The Full-scale score is essentially an average of the Verbal and Performance scores -- understanding that, it is obvious that when one score is significantly lower than the other, the Full-scale score will likewise be significantly (and artificially) depressed. In the context of

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[12] As was discussed *infra*, Dr. Friedenberg has been in this case since prior to the time of trial in 1982. Herring's present attorney has represented him for the past 21 years, and Dr. Friedenberg was discussed at length in the 2005 decision of the Eleventh Circuit Court of Appeals. A copy of that decision was filed with the Circuit Court shortly after it was released, and Dr. Friedenberg's pre-trial deposition is the first item listed on the "documents reviewed" inventories filed under oath by the State's expert witnesses at the insistence of Herring.

intelligence assessment, the DSM-IV-TR states, and the State's experts agreed, that in the case of a significant difference (or "split") between Verbal and Performance scores, the Full-scale score may be, and in this case is, a misleading assessment of the individual. Dr. McClaren and Dr. Prichard testified that Herring's various scores on the **Verbal scale (which have ranged from 81 to 99) are the sorts of scores that an individual with mental retardation simply cannot produce.** The reason for the disparity in scores is not pertinent to the issue before this Court -- Dr. Prichard testified that it was likely the result of a learning disability and Dr. VanGorp testified that the depressed performance scale scores were the result of spatial-perceptual problems. Either, or both, may be the case, but neither one supports the conclusion that Herring is mentally retarded.

Further, it is significant that the 1980 testing produced a Verbal score of 82, a Performance score of 85, and a Full-scale IQ score of 82. **No "split" is present in this testing, and it is likely that this Performance scale score is the most accurate assessment of Herring's true ability** -- all of the experts agreed that it is not possible for an individual to artificially inflate the test results (*i.e.,* it is not possible to fake smart). Despite that testimony, the lower court completely ignored that testing.

Herring has **never** produced a Verbal score in the range of mental retardation, nor has he ever received a Full-scale score in that range. Instead, but for the 1980 variation in the Performance scale score, Herring's scores have been relatively consistent. This consistency in test scores is significant because it is contrary to the implication in Dr. Van Gorp's testimony that the "Flynn effect" may have falsely raised Herring's Full-scale score.[13] The relative consistency of the test results (both on the scales and as to the Full-scale score) is inconsistent with any significant artificial inflation of Herring's scores. Because that is so, the lower court's reliance on the "Flynn effect" is factually improper -- while the Flynn effect may be a generally observed phenomenon, there is no way to say whether it is affecting an individual test score, nor is there any legal authority at all for subtracting "Flynn effect points" -- that score manipulation is wholly inconsistent with the clear rule of *Zack, Cherry, Jones, Phillips,* and *Nixon*, where this Court rejected the practice of deducting from full-scale IQ scores. However, this Court need not expend much time on this issue, because **the lower court granted relief based on a**

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[13] The DSM-IV-TR says nothing about subtracting IQ points to account for the "Flynn effect," and such is contrary to the standard of the profession of psychology. *See,* Hagan, L., Drogin, E., Guilmette T., *Adjusting IQ scores for the Flynn Effect: Consistent with the Standard of Practice*, Professional Psychology: Research and Practice, 2008, Vol. 39, No. 6, 619-25.

"Flynn adjusted score" that was <u>not</u> 70 or below, in direct contravention of clear precedent.[14] Even with Flynn, Herring's full-scale IQ score does not bring him under the *Atkins* bar to execution.

The Legal Error is Based on Ignoring Settled Precedent.

Dr. McClaren testified that, with a 95% confidence interval, Herring's Full-scale IQ falls within the range of 70-79, and testified, as did Dr. Prichard, that Herring is not mentally retarded. The Court was presented with testimony that a reported Full-scale IQ score actually represents a range of plus/minus 5 points. While the DSM-IV-TR recognizes this fluctuation, **Florida law does not.** *Jones, supra; Cherry, supra.* Moreover, the DSM-IV-TR does not direct or suggest that the default is to always **subtract** five (5) points, as Dr. VanGorp has done. As Dr. McClaren testified, the fluctuation can just as easily be an addition of five (5) points. Dr. Prichard explained that the Florida Agency for Persons with Disabilities requires an absolute Full-scale IQ of 70 or less before a person is considered mentally retarded, and that agency does not accept the plus/minus 5 fluctuation. Likewise, *Florida Rule of Criminal*

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[14] The State's position is, and always has been, that the Flynn effect, as applied to this case by the lower court, is not a generally accepted practice in the psychological community. Because Herring's IQ score is above 70 regardless of the manipulation applied to it, this Court need not address the general acceptance of the Flynn effect in this case.

Procedure 3.203 and § 921.137 *Florida Statutes* say nothing about building in an automatic deduction of 5 points to the defendant's IQ score. And, this Court rejected just that practice in *Zack*, which had been decided at the time of this evidentiary hearing, has been reaffirmed numerous times in the interim between that decision and the entry of this order, **and which the lower court refused to follow**. There is no justification for the lower court's failure to uphold its obligation and follow clear precedent.

On pages 13-14 of the order, (V19, R2988-89), the lower court lists a number of cases which it says support the notion that an individual scoring between 70 and 75 on an IQ test still falls under the scope of *Atkins.* The fallacy with that reasoning varies from case to case -- however, the cited cases are either pre-*Atkins* decisions, cases that were remanded for a hearing after *Atkins,* cases from foreign jurisdictions, or *dicta*. As this Court has said:

> In *Atkins*, the Court stated that "**[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.**" *Atkins*, 122 S.Ct. at 2250. After considering all the evidence and personally observing Defendant testify, this is just such an instance as contemplated by the United States Supreme Court. This Court finds that Defendant is not mentally retarded as defined in *Atkins.*

Foster v. State, 929 So. 2d 524, 533 (Fla. 2006) (IQ of 75). The

lower court's explicit adoption of a plus-or-minus five "error of measure" has been directly and repeatedly rejected by this Court. *Zack, supra; Cherry, supra; Jones, supra; Phillips, supra; Nixon, supra.* That court's statements on pages 14-15 of its order in paragraph 27 (V19, R2989-90) have been rejected by this Court. The lower court erred when it refused to follow unambiguous precedent.

THE ADAPTIVE FUNCTIONING COMPONENT[15]

Because Herring's IQ is above 70, he cannot satisfy the definition of mental retardation, and there is no necessity for discussion of the other two components of the definition. However, to the extent that discussion of the adaptive functioning component is even necessary, that discussion must start with the trial court's refusal to recognize that the rule and statute require that the adaptive deficits exist concurrently with the IQ deficiency. In *Phillips*, this Court made that clear:

> However, in *Jones,* 966 So.2d at 325-27, we held retrospective diagnosis insufficient to satisfy the second prong of the mental retardation definition.[16] We

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[15] One State expert, Dr. Prichard, undertook a retrospective assessment of Herring's adaptive skills. Of course, under *Phillips,* it is not necessary to conduct a reconstructive assessment because the focus is on **current** adaptive behavior. The other State expert did assess Herring's **current** adaptive skills.

[16] On page 20 of the order, (V19, R2995), the lower court criticized the State for daring to suggest that Rule 3.203

> found that both the statute and the rule require significantly subaverage general intellectual functioning to exist concurrently with deficits in adaptive behavior.

Phillips, supra. *Accord, Brown v. State,* 959 So. 2d 146 (Fla. 2007). This Court's holding is clear, and the redrafting of the rule found on pages 20-21 of the trial court's order is another failure to follow clear precedent.[17] Finally, it appears that the linchpin of the trial court's finding of adaptive deficiency is Herring's trial testimony. While Herring's version of the murder was obviously rejected by the jury, he is not the first defendant to confess to a crime and subsequently enter a plea of not guilty and testify to a version of events that is less than credible. While likely an ill-advised strategy, there is no support for the trial court's apparent belief that any defendant

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required deficits in present adaptive functioning. *Phillips* demonstrates that the trial court was wrong in its creative reading of the rule. *Accord, Brown v. State*, 959 So. 2d 146 (Fla. 2007).

[17] To the extent that the trial court discusses the scores obtained by Herring on the adaptive assessment measures conducted by the State experts, the *Brown* decision explains why those low scores do not indicate mental retardation. The testimony in this case was essentially the same as that in *Brown*, and the trial court simply refused to recognize that Herring's adaptive scores were so low that he would not even be able to feed himself without help **had those scores been accurate**. Curiously, on page 18 of the order, the court credits the idea that adaptive scores may be situationally affected, and at the same time rejects the concept that sub-scale scores must be evaluated. The DSM-IV-TR explicitly makes both statements, and it makes no sense to accept one statement from that text and reject another statement appearing on the same page.

who follows such a course of action is mentally retarded. To the extent that Herring's adaptive behavior is even relevant (and given his IQ score it is not) it does not establish that he is mentally retarded. The trial court's order to the contrary should be reversed.

The Pre-18 Onset Component.

The lower court devoted one paragraph of its order to the substantive pre-18 onset component of a diagnosis of mental retardation. The defect in that "holding" is that Herring was never diagnosed as being mentally retarded prior to the age of 18. Dr. VanGorp, who testified for herring in this proceeding, is the **only** mental health expert to opine that Herring is mentally retarded, and even Dr. VanGorp admitted that his "evaluation" would not be sufficient to reach that conclusion under New York law. The lower court's finding is not supported by any evidence at all, and should be rejected.

CONCLUSION

This case is far less complex than the size of the record suggests. At the most fundamental level, this case can be resolved based upon the lower court's express finding that Herring's IQ is "approximately 75." Under Florida law, that score is too high to establish that Herring is mentally retarded. This Court's precedent on that aspect of retardation as a bar to execution is crystal clear, and is subject to

neither discussion nor interpretation. The lower court ignored that clear precedent, and committed error in doing so. This Court need go no further than the factfinding that Herring's IQ is "approximately 75" to conclude that the lower court was wrong to grant relief.

The State recognizes that oral argument is routinely granted in capital cases. However, because of the clear legal error committed by the lower court, the State suggests that argument would be of no assistance to the Court in deciding this case. Simply put, enough time and resources have been expended on this issue, which was not even deemed worthy of presentation until after the United States Supreme Court released its *Atkins* decision. Herring is not mentally retarded, and the circuit court was wrong to conclude that he was. That holding should be reversed, and Herring's death sentence should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has

been furnished by U.S. Mail to: I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **John R. Hamilton**, Esquire, and **Jon M. Wilson**, Esquire, Foley & Lardner LLP, 111 N. Orange Avenue, Suite 1800, Orlando, Florida 32801-2386, **Leon H. Handley**, Esquire, Rumberger, Kirk & Caldwell, P.A., Lincoln Plaza, 300 S. Orange Avenue, Suite 1400, Orlando, Florida 32801, and **Alan S. Goudiss**, *et al.*, Shearman & Sterling LLP, 599 Lexington Avenue, New York, NY 10022 on this 8th day of July, 2010.

____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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