IN THE SUPRME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. **Case No. SC09-2200**

TED HERRING

Appellee.
_____/

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

REPLY BRIEF OF APPELLANT

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RESPONSE TO "STATEMENT OF THE CASE"[1]

In the "statement of the case" set out on pages 1-2 of his brief, Herring opens with two legally and factually false positions. First, he claims that the order granting relief is "unappealable" for reasons that defy legal analysis. That is simply not the law, and that "argument" deserves no further discussion.

Second, and of greater concern, is Herring's false claim that the State has "changed" its position as to the "definition" of mental retardation that is applicable to this case. Specifically, Herring claims that the State never relied on this Court's decisions in *Zack, Cherry, Phillips,* and *Nixon*, all of which stand for the proposition that in order to be exempt from execution because of mental retardation, the defendant's IQ must be 70 or below. For the reasons set out below, Herring's claim is based on a false representation of the record. Because that is so, the majority of Herring's *Answer Brief* is based on a false premise.

RESPONSE TO "STATEMENT OF FACTS"

The "statement of facts" set out on pages 2-16 is argumentative and is denied. The State relies on the facts set

[1] To the extent that Herring says that the grant of relief is "unappealable," that claim is spurious. *Fla. R. Crim P*. 3.203 (h).

out in the *Initial Brief*.

To the extent that Herring says that the "parties agreed that the DSM-IV-TR governs," that statement ignores the true scope of the parties' statements. In a remarkably misleading omission, Herring conveniently made no reference to the following statement by counsel for the State (at the opening of the evidentiary hearing):

> Under *Zack versus State*, which is cited in the State's response, or the State's prehearing memorandum that's come out, the Florida Supreme Court has rejected the plus or minus five error of measure notion that attaches to in the mental health context to a diagnosis of mental retardation. *Zack* is very clear that if the defendant is not below 70, 70 or below, he is not mentally retarded. **We don't have a plus or minus five built into the statute, the rule or anything else that governs this case.**

(V3, R266). (emphasis added). **Any claim that Herring did not know about *Zack* or in some fashion "relied" to his detriment solely on the DSM-IV-TR is clearly rebutted by his opening statement, where defense counsel disputed the *Zack* holding.** (V3, R274).[2] The claim, on page 9 of his brief, that Herring and the circuit court "relied on the "state's agreement" is rebutted by the record and is a deliberate misrepresentation of the true

[2] As discussed in the *Initial Brief*, the circuit court re-wrote *Zack* to suit its purposes, and then ignored the subsequently-decided cases that clearly and unequivocally interpreted *Zack* in the manner argued by the State.

facts.[3]

ARGUMENT

I. THE CIRCUIT COURT MISAPPLIED LAW TO THE FACTS

On pages 17-32 of his brief, Herring argues that "competent substantial evidence" supports the lower court's finding that he is mentally retarded and therefore exempt from execution of his death sentence. Perhaps recognizing that the lower court failed to follow *Zack* and its progeny, Herring launches a series of *ad hominem* attacks against counsel in an apparent attempt to distract from the unreasonable and uncalled for error committed by the lower court. When stripped of its histrionics, Herring's brief is no more than a futile attempt to defend an order that has no basis at all in the law. As was discussed in the State's *Initial Brief*, the lower court found that Herring's full scale IQ was "approximately 75." **On its face, that finding does not allow for a finding of mental retardation as a bar to execution.** At the end of the day, the factual finding that Herrings IQ is "approximately 75" wholly disposes of the case. If that factual finding should be credited, **and Herring argues strenuously that it should be**, then he is not mentally retarded, and the lower court seriously misapplied well-settled Florida law in granting relief. This claim deserves no further discussion.

[3] The secondary question raised by this tactic is whether Herring actually believes that this Court, and counsel for the State, will not read the record of the hearing.

II. THE WRONG "STANDARD" WAS USED TO FIND MENTAL RETARDATION

Concealed behind a claim that the lower court applied the "proper standard for determining mental retardation" is the linchpin of Herring's brief. Specifically, his argument rises or falls based on his claim that the State "is barred from arguing on appeal that the circuit court erred by applying the DSM-IV-TR." *Answer Brief,* at 33. This claim is based on the false representation that the State "agreed that the DSM-IV-TR governs." That, as the saying goes, is only half of the story -- **the State specifically referred, on multiple occasions, to *Zack v. State*, which stands clearly for the proposition of law that mental retardation as a bar to execution requires an IQ of 70 or below. (V3, R266, 280).** Herring cannot satisfy that criteria, and is therefore left with reliance on a misrepresentation by omission in hopes of saving the improper and legally unsupportable grant of relief. The State's position was, at all times, that Herring could not receive relief unless he satisfied *Zack*. In the event, because of the lengthy delay between the conclusion of the hearing and the issuance of the order, **Florida law became even more clear (assuming that to be possible) that an IQ score of 70 is an absolute requirement for *Atkins*-based**

relief.[4] *See, Kilgore v. State/McNeil*, 35 Fla. L. Weekly S665 (Fla. Nov. 18, 2010); *Turner v. State*, 2010 WL 3802538 (Fla. Sept. 28, 2010); *Thompson v. State,* 41 So. 3d 219 (Fla. 2010); *Nixon v. State*, 2 So. 3d 137, 145 (Fla. 2009); *Walls v. State*, 3 So. 2d 1248 (Fla. 2008); *Phillips v. State,* 984 So. 2d 503, 510 (Fla. 2008); *Cherry v. State*, 959 So. 2d 702 (Fla. 2007); *Brown v. State*, 959 So. 2d 146, 149-150 (Fla. 2007). As this Court said in *Kilgore :*

> We have consistently held that a defendant seeking exemption from execution must prove he has an IQ of 70 or below. *See, e.g., Jones v. State*, 966 So. 2d 319, 329 (Fla. 2007); *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005).

Kilgore, supra.[5]

Herring's "waiver" argument (which runs throughout his brief) is based on a misrepresentation of the record -- *Zack* (and ultimately many of the cases that relied on it) was relied on by the State at every appropriate opportunity. Herring's contrary claims are false. Those false claims do not supply a basis for affirming the lower court's erroneous order. That

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[4] The cases that were decided before the issuance of the long-delayed order granting relief were provided to the lower court. As discussed in the *Answer Brief,* that court simply ignored them because the result was inconsistent with the court's re-writing of *Zack*.

[5] Similarly, the "approximately 75" IQ score is sufficient to have supported a summary dismissal. *See, Turner v. State*, 2010 WL3802538 (Fla., Sept. 28, 2010).

order simply ignored clear and well-established Florida law. It should be reversed and the death sentence reinstated.[6]

Finally, in response to Herring's defense of the unprincipled decision of the lower court, Florida law is long-settled that:

> The trial judge in this case expressed strong dissatisfaction with prior decisions of this Court and ruled contrary to them, basically on the ground that he took an oath to uphold the constitution as he construes it. **He is wrong in asserting his personal construction of the law in the face of authoritative determinations to the contrary by this Court, and his exercise in judicial independence has cost these litigants and the judicial system considerable time and money which should not have been expended. A trial judge may well be free to express his personal disagreement with the decisions of higher courts in some forums, but he is not free to disregard them in the exercise of his judicial duties**. *See State ex rel. Hawkins v. Board of Control*, 93 So. 2d 354 (Fla.), *cert. denied*, 355 U.S. 839, 78 S.Ct. 20, 2 L.Ed.2d 49 (1957) (Thomas, J., dissenting; Drew, J., dissenting). We assume that this admonition is sufficient to inform the trial judge that he is not, despite his best intentions, a law unto himself. [FN11]
>
> > [FN11] The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence.

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[6] On pages 43-44 of his brief, Herring pays lip service to *Cherry* and then says, incredibly, that the "+/- 5 standard error of measure" **rejected** in that decision should be utilized in this case. Herring's attempts to re-write Florida law are no more legitimate than what the lower court tried to do.

> B. N. Cardozo, *The Nature of the Judicial Process* 141 (1921).

Hernandez v. Garwood, 390 So. 2d 357, 359 (Fla. 1980). It is beyond dispute that it is the obligation of the trial courts to follow precedent, not to create it:

> In *Metropolitan Dade County v. Department of Health and Rehabilitative Services*, 683 So. 2d 188 (Fla. 3d DCA 1996), the Third District reminded the trial court that "it is obligated to follow established law." (Emphasis in original). In *Wood v. Fraser*, 677 So. 2d 15 (Fla. 2d DCA 1996), this court stated:
>
> > In closing, we take this opportunity to remind trial courts again that they "do not create precedent." *State v. Bamber*, 592 So. 2d 1129, 1132 (Fla. 2d DCA 1991), *approved*, 630 So.2d 1048 (Fla.1994). Although they are free to express their disagreement with decisions of higher courts, trial courts are not free to disregard them in the adjudicatory process. *See Hernandez v. Garwood*, 390 So. 2d 357, 359 (Fla. 1980). We emphasize, therefore, in accord with the doctrine of *stare decisis*, that once a point of law has been decided by a judicial decision, it should be adhered to by courts of lesser jurisdiction, until overruled by another case, because it establishes a precedent to guide the courts in resolving future similar cases. *See In re Seaton's Estate*, 154 Fla. 446, 449, 18 So. 2d 20, 22 (1944); *Bunn [v. Bunn],* 311 So.2d [387] at 389 [(Fla. 4th DCA 1975)]. **Any deviation from this fundamental tenet of jurisprudence can only result in an erosion of the rule of law, thereby causing uncertainty and unpredictability in the resolution of judicial disputes, as well as a needless expenditure of litigant and judicial resources**. *See Hernandez*, 390 So. 2d at 359; *Bamber*, 592 So. 2d at 1132.

Nard, Inc. v. DeVito Contracting & Supply, Inc. 769 So. 2d

1138, 1140-1141 (Fla. 2nd DCA 2000). (emphasis added). In the words of the Third District:

> We remind the trial court that it is obligated to follow established law. *Putnam County School Board v. Debose,* 667 So. 2d 447, 449 (Fla. 1st DCA 1996) ("**Under the doctrine of *stare decisis*, lower courts are bound to adhere to the rulings of higher courts when considering similar issues even though the lower court might believe the law should be otherwise**."); *Wood v. Fraser*, 677 So.2d 15, 19 (Fla. 2d DCA 1996)(allowing trial courts to deviate from *stare decisis* would result in uncertainty and unpredictability, and "[a]lthough they are free to express their disagreements with decisions of higher courts, trial courts are not free to disregard them in the adjudicatory process.").

Metropolitan Dade County v. Department of Health and Rehabilitative Services, 683 So. 2d 188, 189 (Fla. 3rd DCA 1996). (emphasis added). The lower court obviously disagreed with the decisions of this Court, and that (in the abstract) is his prerogative. However, the lower court is not free to do what this court did and ignore the clear precedent of this Court on the precise issue before it. As this Court said 30 years ago in *Hernandez,* substantial time and expense has been needlessly expended simply because the lower court chose to re-write this Court's decision in *Zack* and to ignore all of the subsequent decisions of this Court which leave no doubt that *Zack* meant exactly what it said. The lower court was wrong as a matter of

law, and should be reversed.[7]

III. THE "CONSTITUTIONAL" CLAIM

On pages 45-49 of his brief, Herring claims that it would violate Herring's constitutional rights to require an IQ score of less than 70 to trigger the application of *Atkins*, that it is unconstitutional to require present adaptive deficits in the functioning of an incarcerated person, and that a "clear and convincing evidence" burden of proof is unconstitutional. None of those claims supply a basis for relief.

Insofar as the burden of proof claim is concerned, this case is no different from *Kilgore*, where this Court said:

> Kilgore also alleges that if defendants have the burden of proving that they are not mentally retarded, they should only need to do so by a preponderance of the evidence. This Court need not address this claim because the postconviction court held that Kilgore could not establish his mental retardation under either the clear and convincing standard or the preponderance of the evidence standard. *See Nixon*, 2 So. 3d at 145 ("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

[7] In note 18 on page 45 of his brief, Herring continues the false claim that the State "agreed" to the DSM-IV-TR definition of mental retardation -- he continues to mislead the Court through his omission of the State's explicit reliance on *Zack*. His suggestion that remand for further proceedings should be the remedy is absurd. This Court has the facts necessary to decide the legal claim before it, and there is no valid reason (other than a desire for delay) to suggest that spending another five years in circuit court would benefit anyone other than Herring, for whom such a delay would be a *de facto* commutation of his death sentence for the span of the delay.

> the evidence standard.") (*citing Jones v. State*, 966 So. 2d 319, 329-30 (Fla. 2007)). Further, competent, substantial evidence exists to support the finding of the trial court that Kilgore is not mentally retarded.

Kilgore v. State/McNeil, 35 Fla. L. Weekly S665 (Fla. Nov. 18, 2010). In this case, the lower court found, as a fact, that Herring's IQ is "approximately 75." That finding of fact is uncontested by Herring, and that uncontested fact, **when measured against the correct legal standard**, establishes that Herring is not mentally retarded no matter what burden of proof standard is applied. Because that is so, there is no need for this Court to address this component of Herring's claim.

With respect to the "bright-line of 70 is unconstitutional" claim, this Court has repeatedly rejected that claim:

> A proper review of the postconviction court's determination that Kilgore is not mentally retarded must first begin with the postconviction court's determination that Cherry is applicable here. Kilgore claims that this Court's decision in *Cherry* violates the United States Supreme Court's decision in *Atkins v. Virginia,* 536 U.S. 304 (2002). This Court, however, has already explicitly rejected this exact argument in *Nixon:*
>
> > 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. [FN 4] 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. [FN 5] 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 ("As was our approach in *Ford v. Wainwright* [, 477 U.S. 399 (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).

[FN 4] 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 (2005)).

[FN 5] 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*, 2 So. 3d at 142.

Kilgore v. State/McNeil, 35 Fla. L. Weekly S665 (Fla. Nov. 18, 2010). While Herring has diligently avoided any mention of this (or any other) controlling precedent, it is clear that an unbroken line of authority has approved *Cherry*, and Herring has done nothing to call that decision into question. *Cherry* controls the issue, and the lower court was wrong when it refused to follow the law. This Court should correct that error.

Finally, with respect to the claim that it would be "unconstitutional" to require present adaptive deficits in an incarcerated inmate, this Court's decisions leave no doubt that Herring's claim (to the extent that it has even been preserved) has been considered and rejected:

> The first step in determining the meaning of a statute is to examine its plain language. *Koile v. State*, 934 So. 2d 1226, 1230 (Fla. 2006). When the language is clear and unambiguous, as it is here, we have no need to resort to rules of statutory construction to determine the legislature's intent. *Id.* at 1230-31 (*citing Lee County Elec. Coop., Inc. v. Jacobs*, 820 So. 2d 297, 303 (Fla. 2002)). Further, words must be given their plain meaning and statutes should be construed to give them their full effect. *Id.*
>
> Both Florida law and our rule state that the exception to the death penalty applies to a defendant who "is mentally retarded" or "has mental retardation." § 921.137(2), *Fla. Stat*. (stating no person may be sentenced to death "if it is determined in accordance with this section that the defendant has mental

retardation"); *Fla. R.Crim. P.* 3.203(e) (providing for an evidentiary hearing to consider "the issue of whether the defendant is mentally retarded"). Thus, the question is whether a defendant "is" mentally retarded, not whether he was. Both the statute and our rule define mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." § 921.137(1), *Fla. Stat*. (2005) (emphasis added); Fla. R. Crim. P. 3.203(b). Jones does not dispute that the intellectual functioning component must be based on current testing. Moreover, his own expert based his determination of this prong largely on testing administered between 1991 and 2005, from the time Jones was 29 to the time of the rule 3.203 hearing. What Jones argues is that the second prong is concerned solely with an individual's adaptive behavior as a child under age 18. The legal definition, however, states that the intellectual functioning component must "exist[] concurrently with" the deficient adaptive behavior. The word "concurrent" means "operating or occurring at the same time." Merriam Webster's *Collegiate Dictionary* 239 (10th ed. 2001). Jones's analysis would require us to ignore the plain meaning of the phrase "existing concurrently with" that links the first two components of the definition. The third prong - "and manifested during the period from conception to age 18" - specifies that the present condition of "significantly subaverage general intellectual functioning" and concurrent "deficits in adaptive behavior" must have first become evident during childhood.

Further, as Jones admits, Florida's definition of mental retardation is consistent with the definition of the American Psychiatric Association, which provides the following diagnostic criteria for mental retardation:

> 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, *327 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.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 49 (4th ed. 2000) (DSM-IV). Thus, to the extent that Jones argues that the issue is not one of statutory construction but of an expert's interpretation of the DSM-IV, the argument fails as well. The DSM-IV states that the second criterion for mental retardation is "[c]oncurrent deficits or impairments in present adaptive functioning." (Emphasis added.) Dr. Eisenstein's testimony that in this phrase the word "present" actually refers to past, or childhood, adaptive functioning would impose an Alice-in-Wonderland definition of the word "present." See Lewis Carroll, *Through the Looking-Glass* (1872) ("When I use a word, it means just what I choose it to mean - neither more nor less."), *quoted in Hartford Ins. Co. of the Midwest v. Minagorri,* 675 So. 2d 142, 144 (Fla. 3d DCA 1996).

First, we note that the circuit court's task in this case was to apply the law, which is contained in the statute and rule cited above. With regard to expert opinion, however, the court has discretion to accept or reject such testimony. *See Evans v. State*, 800 So. 2d 182, 188 (Fla. 2001) (applying an abuse of discretion standard to the trial court's determination of competency made after hearing conflicting expert testimony). The court rejected Dr. Eisenstein's testimony and accepted Dr. Suarez's testimony that the word "present" means "now." Dr. Suarez testified that the second prong of Florida's definition of mental retardation and the second criterion of the DSM-IV mean the same thing. As we explained above, we agree. Further, on cross-examination Jones asked the State's

expert to explain the following passage from the DSM-IV:

> Mental Retardation is not necessarily a lifelong disorder. Individuals who had Mild Mental Retardation earlier in their lives manifested by failure in academic learning tasks may, with appropriate training and opportunities, develop good adaptive skills in other domains and may no longer have the level of impairment required for a diagnosis of Mental Retardation.

DSM-IV at 47. Dr. Suarez explained that this statement illustrates that, because mental retardation is lifelong, a child may meet the criteria for the diagnosis because of developmental delays without being mentally retarded. Unless the person also meets the criteria as an adult, the individual is not mentally retarded. Thus, diagnosis of mental retardation in an adult must be based on present or current intellectual functioning and adaptive skills and information that the condition also existed in childhood. Accordingly, the trial court accepted Dr. Suarez's interpretation of the DSM-IV, which was consistent with Florida law, and did not abuse its discretion in rejecting Dr. Eisenstein's contrary opinion.

Next, Jones argues that *Atkins* essentially prohibits a determination of an individual's current adaptive skills if that person, like Jones, is in prison. He claims that adaptive functioning has to be determined from an individual's adaptive functioning in the "outside world." To the contrary, as we stated above, the Court in *Atkins* left the definition and determination of mental retardation to the States. *See Atkins*, 536 U.S. at 317, 122 S.Ct. 2242 (*quoting Ford v. Wainwright*, 477 U.S. 399, 416-17, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)). Moreover, the State's expert did not base his opinion solely on his interviews with prison guards. In determining that Jones was not deficient in adaptive behavior, Dr. Suarez relied on his interview with and testing of Jones, his examination of records regarding Jones's life from his childhood to the time of the rule 3.203 hearing, and interviews and testing of DOC staffers who observed

Smith on a regular basis. Thus, as Dr. Suarez admitted, while the adaptive skills test administered to DOC staff regarding Jones's adaptive functioning is not ideally suited to a prison environment, the test was not his sole source of information. Further, the evidence demonstrates that both in and out of prison, Jones understands and manages his own life.

In prison, Jones follows a daily exercise regimen of his own devising and uses improvised equipment to gain, according to Jones, the benefits of health and stress relief. He understands his various medical problems, the related medication, and self-administers it on schedule. He writes requests to see doctors, specifically defining his medical problems, and suggests changes in diet or medication. He manages the finances of his inmate account, including obtaining appropriate documentation, following up on money transfers from foreign countries, and filing grievances when he finds a discrepancy in the account. He keeps himself and his cell clean and orderly and visits the prison library twice a week. His language skills in writing, speaking, and other intellectual skills are strong in light of his dropping out of school at an early age. In addition, in the “outside world” as a young adult from age 18 to 29 (before he committed the murders), Jones traveled alone, lived in several states, and supported himself through various jobs. He had girlfriends at various times and for several years lived with a “common law wife,” as he correctly termed her.

Jones insists that the statements his relatives gave Dr. Eisenstein about his childhood are the only valid evidence regarding his adaptive functioning. First, as we explained above, the adaptive functioning criterion is not limited to childhood, and, second, the validity of his relatives' statements is questionable. The statements Jones's Aunt Laura apparently gave Dr. Eisenstein directly contradicted her prior testimony at Jones's penalty phase, and the court in Jones's prior postconviction hearing found his sister Pamela's and his cousin Carl's testimony not credible. Further, these statements by relatives are contradicted by the record. For example, Jones's relatives said he was a slow learner who was placed in special classes. However, his elementary school teacher testified

> previously that Jones was a good student, who was in regular classes and earned good grades. Jones's school records support her statement. The record shows that Jones's failing grades in junior high coincide with his disciplinary problems and lack of effort. In addition, Jones's own detailed statements about his childhood contradict his relatives' statements.
>
> Finally, Jones argues that the circuit court erred in finding that Jones "does not suffer from deficiencies in adaptive functioning." As illustrated by the foregoing discussion, competent, substantial evidence supports the trial court's determination. See Trotter v. State, 932 So.2d 1045, 1049 (Fla.2006) (finding that "competent, substantial evidence support[ed]" circuit court's determination that Trotter was not mentally retarded).

Jones v. State, 966 So. 2d 319, 326-328 (Fla. 2007).[8] (emphasis added). Herring's pseudo-constitutional argument has no legal basis.

CONCLUSION

When stripped of its pretensions, Herring's brief does no more than argue that he is entitled to preferential treatment because he claims to be entitled to it. However, as the United States Supreme Court said in deciding ineffectiveness of counsel claims, "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Strickland v. Washington*, 466 U.S. 668,

[8] This Court's reference in *Jones* to the DSM-IV significantly undercuts Herring's principal claim that the State, by "agreeing" to the DSM definition, somehow waived this Court's interpretation of Florida law. Herring would have his cake and eat it too, much in the manner of the *Jones* expert who earned a well-deserved reference to Alice-in-Wonderland as a description of his interpretation of the law.

695, 104 S.Ct. 2052, 2068 (1984). That same observation holds true here -- merely because Herring was able to convince the lower court to ignore the law and grant relief does not mean that that result was correct. To the contrary, that result flies squarely in the face of this Court's consistent (and binding) precedent on the issue of mental retardation as a bar to execution. Contrary to the claims in Herring's brief, the lower court, and Herring himself, were well aware of the State's reliance on *Zack* -- the lower court's error began when it accepted the contrived interpretation Herring gave to that decision, continued with the lower court's refusal to even recognize this Court's **multiple** decisions interpreting *Zack*, and concluded with a legally erroneous grant of relief. This Court can correct that error without the time and expense of oral argument, and that is what this Court should do.

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 _____ day of December, 2010.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

KENNETH S. NUNNELLEY
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