IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-257

DEAN KILGORE,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Mr. Kilgore submits this Reply to the State's Answer Brief but will not reply to every argument raised by the State. Mr. Kilgore neither abandons nor concedes any issues or claims not specifically addressed in this Reply Brief. Additionally, he expressly relies on the arguments made in his Initial Brief for any claims or issues that are only partially addressed or not addressed at all in this Reply.

ARGUMENT I: IAC/*Brady*/ Newly Discovered Evidence

Trial counsel failed to retain an investigator or to request second chair counsel. This omission stands in contrast to predecessor counsel Holmes' attempt to have a second chair appointed. The State's brief says that there was no deficient performance here because "the murder was committed in a confined setting [a prison] and there was no need for trial counsel to hire an investigator to locate "street" witnesses." AB at 30.

The State's answer brief also says there is no prejudice where the lower court found that trial counsel Alcott's performance was deficient when he failed to review Appellant's prior violent felony aggravator files and records. AB at 30. The State points to the lower court's finding that the instant case was not like *Rompilla v. Beard*, 545 U.S. 374, 390 (2005), in that "Defendant has not shown that anything obtained from those prior conviction files would have changed the outcome of the proceedings." AB at 33. The Initial Brief explained that the

prejudice was present where the jury, which voted 9-to-3 for death, failed to hear significant information that was in the files and records never provided to Dr. Dee or other experts by trial counsel.

These items included the December 10, 1971 Post Sentence Investigation, indicating that, “Mother claims something is wrong with subject mentally.” The 1971 PSI was admitted into evidence at the June 2005 evidentiary hearing as Defendant’s Exhibit 36. (T. 95). Dr Dee reviewed this and other documents that were not supplied to him at trial. He answered a series of questions concerning Florida DOC Classification materials from 1971 and 1979 concerning Mr. Kilgore that he recently had reviewed, information that he was not provided with by trial counsel prior to the 1994 trial. PCR 3820. He stated that these materials were significant in supporting his opinions.

For example, Dr. Dee testified about a 1979 DOC classification summary that he had not been provided with at trial. He found it to be relevant and material to a diagnosis of mental retardation. PCR 3826-27. He testified that Mr. Kilgore’s low level of academic achievement was also memorialized in the 1979 report. The 1979 report also included, according to Dr. Dee, further affirmation from a counselor’s notes that “only the most basic vocations, road maintenance, concrete work, cement mixing and general construction helper” would be appropriate as goals for Mr. Kilgore. PCR 3821.

The *Brady* violation claimed below resulted from the Office of the State Attorney turning over previously undisclosed notes of interviews of witnesses Barbara Ann Jackson and her son Jeffrey Barnes concerning Mr. Kilgore's 1978 murder/kidnapping case, the convictions in which were ultimately used as aggravators in the instant case. Ms. Jackson also testified at the 1994 penalty phase in the instant case. These notes were first provided to undersigned counsel. This happened after an in-camera inspection of alleged exempt materials from the State Attorney files undertaken by Judge Padgett in Tampa during the post conviction public records process. There was never any record testimony taken about the notes and there was never any affirmative representation under oath about their source or why they were never provided to prior counsel in discovery from 1978 until Judge Padgett required the State to produce them. The lower court's findings that Appellant "failed to prove any *Brady* violation when the alleged notes were the State's notes taken during depositions and Defendant's [prior] counsel was at those depositions," cited in the Answer Brief at 34, are speculative and conclusory and based on nothing more than an informal opinion by the State. The findings were an abuse of discretion and belie the State's representation that "[t]he trial court's fact specific and detailed written order, which includes specific record excerpts relating to each post-conviction claim, is supported by competent,

substantial evidence and should be affirmed." AB at 35. Post-conviction counsel made numerous attempts to obtain a hearing on this issue without success.

ARGUMENT II: IAC Penalty Phase

The State's brief claims that "this is not a case where trial counsel failed to investigate and present mitigating evidence" and the evidence offered in post-conviction was "largely cumulative to the evidence offered in 1994." AB at 7. The Initial Brief outlined in some detail at pages 60-68 the information presented in postconviction that the jury never heard.

The defense experts presented at the postconviction evidentiary hearing included Professor Jimmy Bell, Dr. Thomas Hyde, Dr. Richard Dudley, Dr. Hyman Eisenstein and Dr. Henry Dee. Several of Mr. Kilgore's family members also testified, Including Dorothy Speight, Elbert Kilgore, and Jimmy Dean Kilgore. In addition the lower court heard the testimony of Charley Thompson, a former death row inmate who had been incarcerated at the same training school in Mississippi as the Appellant.

The State relies on *Bobby v. Van Hook*, 130 S. Ct 13 (2009), apparently for the proposition that trial counsel's performance was not deficient and that the ABA Guidelines are not applicable. In *Bobby* the United States Supreme Court recalls that in *Strickland* they held that the ABA Guidelines can play a role in determining whether trial counsel's actions were reasonable: "Restatements of professional

standards, we have recognized, can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place." *Bobby* at 16. A significant difference in the analysis in *Bobby* case and the instant case is that the Court in *Bobby* criticized the Sixth Circuit for using the 2003 ABA Guidelines instead of the ABA Standards for Criminal Justice, (2nd Edition 1980), the standards in effect in 1985 when *Bobby* was originally tried.

In the Initial Brief Appellant relied on the 1989 ABA Guidelines that were in effect at the time of the 1994 trial. The 1989 guidelines set forth that trial counsel in a capital case "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c), p 93 (1989)." *Id.* at 2537. The 1989 Guidelines are far more extensive and detailed than the 1980 ABA Standards noted in *Bobby.* [1] As noted in the Initial Brief, Mr. Kilgore's trial

[1] "The ABA Standards in effect in 1985 described defense counsel's duty to investigate both the merits and mitigating circumstances in general terms: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to the facts relevant to the merits of the case and the penalty in the event of conviction." 1 ABA Standards for Criminal Justice 4-4.1, p.4-53 (2d ed.1980) . The accompanying two page commentary noted that defense counsel have "a substantial and important role to perform in raising mitigating factors," and that "[i]nformation concerning the defendant's

counsel testified at the 2005 evidentiary hearing that although he was "aware" of the 1989 ABA Guidelines he believed they were only "aspirational goals" at the time of Mr. Kilgore's trial in 1994. PCR. 2226-27. *Bobby* does not stand for the proposition that the 1989 ABA Guidelines were only aspirational goals at the time of Mr. Kilgore's 1994 trial. The Supreme Court noted that "[t]he narrow ground for our opinion should not be regarded as accepting the legitimacy of a less categorical use of the Guidelines to evaluate post-2003 representation. For that to be proper the Guidelines must reflect "[p]revailing norms of practice," *Strickland*, 466 U.S. at 688, 104 S. Ct 2052, and "standard practice," *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct 2527, 156 L.Ed2d 471 (2003), and must not be so detailed that they would "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions," *Strickland*, *supra*, at 689, 104 S. Ct 2052. We express no views on whether the 2003 Guidelines meet these criteria. " *Bobby* at 17 f1.

By 1994 the 1989 Guidelines were reflective of the "prevailing norms of practice" and "standard practice" in the Circuit Court of Polk County, Florida. Alcott's many failures were noted in the Initial Brief, including his failure to obtain the records of Mr. Kilgore's prior offenses or to review the 1970 and 1978 PSI

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background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself." Id., at 4-55." *Bobby* at 17.

reports. The State's Brief takes the position that these omissions were OK because "he was aware of the same type of background information in 1994" AB at 57. Despite the State's claims to the contrary, there was the "undiscovered" information that Alcott negligently failed to put before the jury. The information related to the severe neglect, deprivation, physical abuse and mental abuse Mr. Kilgore suffered as a child both by his family and at the Oakley Training School in Mississippi, and related testimony about his mental and medical status later in prison where he spent much of his adult life.

Trial counsel testified that he relied on the trial preparation that had been done by predecessor counsel Holmes in 1989-90, although he could not remember talking with him or meeting with him about the case. Thus the failure to seek the appointment of an investigator, failure to do any independent investigation, failure to take advantage of the trial court's apparent willingness to appoint co-counsel, failure to depose any witnesses, failure to seek the appointment of any expert until he contacted psychologist Dr. Dee days before the trial, and failure to obtain impeachment materials concerning the inmate and law enforcement witnesses at the guilt phase were all attributable to the "excellent" work that prior counsel did years before. This is not a case like *Bobby*, where "[o]nly two witnesses even arguably would have added new, relevant information." *Id.* at 19. Alcott did not "contact [his] lay witnesses early and often," retain multiple expert witnesses who

he was "in touch with" for "more than a month before trial" or "met with for two hours a week before the trial court reached its verdict." *Id.* at 18. Alcott did not do as counsel did in *Bobby*, "look[ing] into enlisting a mitigation specialist when the trial was five weeks away." *Id.* In short, this was not a case like *Bobby* where "there c[ame] a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Id.* at 19.

The State argues that Mr. Kilgore "adjusted' to prison life by killing another inmate. See *Wong v. Belmontes*, 130 S. Ct. 383 (2009). The truth is that both the prison killing and the love triangle killing in 1978 had a lot in common, as Dr. Dudley testified in postconviction. They were more akin to domestic or family crimes. *Wong* involved entirely different circumstances where the defendant was trying to keep out information about a prior murder from the jury's consideration of mitigation at the penalty phase. In Mr. Kilgore's case the jury in 1994 heard live testimony from Barbara Ann Jackson, the surviving victim of the murder-kidnapping case for which Mr. Kilgore was serving a life sentence. The cat was already out of the bag. Trial counsel Alcott faced no strategic dilemma about potential restrictions on presenting additional evidence in mitigation because the prior violent felony might potentially be revealed. Appellant has argued that Alcott should have reviewed the records of the prior violent felonies including Jackson's

prior depositions and testimony, then deposed her, and reviewed the undiscovered PSIs for information about his client that would have been useful in mitigating the priors and the instant murder. Attorney performance in this case is not comparable to that in *Wong*, where "[i]t is hard to imagine expert testimony and additional facts about Belmontes' difficult childhood outweighing the facts of McConnell's murder. It becomes even harder to envision such a result when the evidence that Bemontes had committed another murder-"the most powerful imaginable aggravating evidence," as Judge Levi put it." *Wong* at 391. Given the 9-to-3 jury recommendation in Mr. Kilgore's case, an explanation of his behavior based on lay and expert testimony with proper documentation in support may well have resulted in a different outcome.

The State's Answer Brief sets up a straw man by suggesting that that the Appellant's only rationale for doing background investigation in Mississippi was "the remote possibility that they might be able to locate someone who knew Kilgore thirty years earlier." This position demonstrates a sorely limited view of what defense counsel's reasonable responsibilities are regarding mitigation investigation. AB at 57. The 1989 ABA Guidelines, Guideline 11.8.6, The Defense Case at the Sentencing Phase, notes that defense counsel should consider presenting, among other areas, the client's medical history, educational history, employment and training history, family and social history and record of prior

offenses. It is evident that investigation has to be done in order to be prepared to present any of these areas before the jury. The State's Brief is particularly troubling in light of the fact that mental retardation was an issue at the 1994 trial. Age of onset before age 18 was part of the definition of mental retardation back in 1994 just as it is today.

The State's Answer Brief argued in defense of Alcott's failure to do any Mississippi investigation, citing *Porter v. Attorney General*, 552 F. 3d 1260, 1274 (11th Cir. 2008). In *Porter*, the Eleventh Circuit held that this Court's holding that the remoteness in time of Porter's abusive childhood from the time of the murders negated mitigation, that periods of desertion diminished the mitigating effects of military service, and that defense mental health expert Dr. Dee was unreliable. The judgment of the Court of Appeals was recently reversed as to all three areas by the United States Supreme Court. See *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009)("[T]he Florida Supreme Court . . . unreasonably discounted the evidence of Porter's childhood abuse and military service. It is unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with Williams"). Williams was Porter's former girlfriend and the victim in the instant case was Mr. Kilgore's male lover.

The State's brief claims Mr. Kilgore is trying to relitigate the direct appeal because the trial Judge in his discretion found both statutory mental health mitigators but in his order denying relief concluded that "there is little or nothing about the facts of this case from which one could conclude that at the time of the murder, or during the twenty-four hours preceding the murder, Mr. Kilgore was under the influence of extreme mental or emotional disturbance." AB at 60. The notion that since the crime was not linked to the mental health mitigation found by the trial court, the mental health mitigation has little weight, is problematic. See *Tennard v. Dretke*, 542 U.S. 274, 124 S. Ct. 2562 (2004)("In *Atkins v. Virginia*, 536 U.S., at 316, 122 S. Ct. 2242, we explained that impaired intellectual functioning is inherently mitigating: "[T]oday our society views mentally retarded people as categorically less culpable than the average criminal." Nothing in our opinion suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered. Equally, we cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence").

The State's brief recites that *Tennard* doesn't prescribe any certain weight to be given in these circumstances, it just requires "consideration" of "relevant" mitigation evidence. However, it seems evident that a trial court finding statutory mitigation (that Mr. Kilgore acted under the influence of extreme mental or

emotional disturbance; and that his capacity to conform his conduct to the requirements of the law was substantially impaired) is not the same thing as considering if it is present.

The Constitution does not require a State to ascribe any specific weight to particular aggravating or mitigating factors to be considered by the sentencer. *Harris v. Alabama*, 513 U.S. 504, 512 (1995). However, the *Tennard* Court noted that "We have never denied that gravity has a place in the relevance analysis, insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability." *Id.* at 286. Statutory mental health mitigation is not trivial. Some factors inherently have more weight than others and must be given effect in spite of the passage of time or lack of a direct link to the capital offense. See *Porter v. McCollum*.

ARGUMENT III: Mental Retardation

The State's basic position is that Mr. Kilgore's IQ scores exceed the cut-off for mental retardation under Florida law, therefore the inquiry ends.

The State's Answer brief refers to the lower court's finding that Appellant did not meet the Florida criteria for "significantly subaverage general intellectual functioning" as required for a finding of mental retardation (PCR V34/5163-66) AB at 65. The State's brief cites to Florida caselaw supporting the proposition that

"Under section 921.137(1), "significantly subaverage general intellectual functioning" correlates with an IQ of 70 or below, specifically citing to *Jones v. State*, 966 So. 2d 319 (Fla. 2007); *Cherry v. State*, 959 So. 2d 702 (Fla. 2007); *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005).

In *Atkins v. Virginia*, the United States Supreme Court held that the Eighth Amendment prohibits execution of the mentally retarded. 536 U.S. 304, 321 (2002). Mental retardation, or intellectual disability is a deficit in intellectual functioning defined and diagnosed by the professional psychological community. It is a term of science that does not exist outside the psychological community. It is not a legal term.

Florida, and the trial court here, constructed a legal statutory definition for mental retardation based on the scientific term, but omitted a significant part of the definition. Florida's capital sentencing scheme substituted a statutory definition that is different from and less inclusive than the clinical definition. The result is that clinically mental retardation individuals can be executed in Florida based on the legal fiction that they are not mental retarded when, in fact, they clinically are.

This Court's decision in *Cherry v. State* wrongly interpreted the definition of mental retardation in Florida's death penalty statute to set a rigid cutoff at an IQ of 70 or below, despite the scientific reality "universally accepted [as a] given fact" that "IQ is more accurately reported as a range of scores" due to a standard error of

measurement (“SEM”) inherent in testing. 959 So. 2d 702, 712 (2007) (quoting lower court opinion).

In *Cherry*, the state circuit court and this Court interpreted Florida’s death penalty statute to “provide a strict cutoff of an IQ score of 70” as part of the definition of mental retardation. 959 So. 2d 702, 712 (2007). This Court reached that holding despite its awareness that the clinical definition “recognizes IQ is more accurately reported as a range of scores” due to a SEM of +/-5 inherent in IQ testing. *Id*. This Court interpreted the statute not to incorporate the SEM because “the statute does not use the word “approximate, nor does it reference the SEM,” *Id*. at 713. Yet, the legislature’s staff analysis, that served as a basis for the current death penalty statute, recommends the adoption of all of the clinical definition including that the SEM **must** be considered. *See id*. at 712. The legislature’s analysis says the mental retardation threshold is “approximately a 70 IQ, although it can be extended up to 75,” and specifically explains that the bill “**does not contain a set IQ level**” and cites as authority and quotes extensively and repeatedly the clinical tests defining mental retardation (PCR-III 110-23) (emphasis added). These same definitions were relied on by Dr. Eisenstein and Dr. Dee in finding Mr. Kilgore mentally retarded. This Court affirmed the lower court’s ruling in *Cherry* as consistent with the strict cutoff interpretation even though the lower court stated that the SEM is “a universally accepted given fact

[which], as such, should logically be considered." *Cherry*, 959 So. 2d at 712. This Court did not find the "logical consideration" of the SEM to be inconsistent with a strict 70 cutoff IQ score that rejects the SEM.

Similar findings occurred in the instant case. The trial judge found that "Although Defendant argues that the Court should factor in the standard error of measurement when considering a defendant's intellectual functioning, Florida law dictates otherwise. In *Cherry v. State*, [citation omitted], the Florida Supreme Court affirmed the circuit court's ruling which rejected the defendant's argument that measurement of intellectual functioning is more appropriately expressed as a range of scores rather than just one number, and that the standard error (SEM) of plus or minus five points should be taken into account so that the actual cutoff score is 75." (PCR V34/5163-66). The unavoidable result of the trial judge's conclusion is that a clinical diagnosis of mental retardation [which Drs. Eisenstein and Dee gave] is irrelevant to a determination of whether a Florida capital defendant cannot be executed due to mental retardation.

In *Thomas v. Allen*, the court held that "even though the legal cut-off score for a finding of 'significantly subaverage intellectual functioning' is stated in the opinions of the Alabama Supreme Court as 'an IQ of 70 or below,' a court should not look at a raw IQ score as a *precise* measurement of intellectual functioning. A court must also consider the Flynn Effect and the standard error in measurement to

determine whether a petitioner's IQ score falls within a *range* containing scores that are less than 70." 614 F. Supp. 2d 1257, 1281 (N.D. Ala. 2009). The court explained that a "'true' IQ score is the hypothetical score a test subject would obtain if no measurement error influenced his or her performance. . ." and that "no clinician, much less this court, can state a test subject's 'true' IQ with *absolute* certainty, because error *always* is present. . ." *Id*. at 1269. "Every intelligence test has a *SEM*, which is used to calculate a range of scores lying along a continuum (think of a yardstick), and evenly arranged on each side of the IQ score obtained during an individual administration of the test. The test subject's 'true' IQ most likely lies within that range above and below his or her actual test score." *Id*. at 1270. "*Therefore, an IQ of 70 is most accurately understood not as a precise score, but as a range of confidence. . .*" *Id*. The court further noted that Alabama's rigid cutoff at 70 is "*not found* in . . . the *Atkins* decision. . ." *Id*. (citing *Bowling*, 422 F.3d 434, 442 (6th Cir. 2005) for proposition that "there appears to be considerable evidence that irrebuttable IQ ceilings are inconsistent with current generally-accepted clinical definitions. . ." (Moore, J., concurring in part and dissenting in part)). "*[A]ny state's use of a fixed IQ cutoff score, without reference to standard measurement error . . . risks an inaccurate assessment. . .*" *Id*. at 1274-75.

Thomas makes it clear that neither the AAMR nor the American Psychiatric Association support a fixed cutoff score of 70 or below for determination of mental retardation:

> It is clear that neither of the professional organizations dedicated to the diagnosis and treatment of mental deficiencies advocates a fixed, finite IQ "cut score" as an impregnable barrier, separating persons who are mentally retarded from those who are not. The AAMR explicitly states that " *a fixed cutoff for diagnosing an individual as having mental retardation was not intended, and cannot be justified psychometrically.*" Mental Retardation at 58 (emphasis supplied). That manual also states-not just once, but at least eight **1273* times-that the clinical standard for "significantly subaverage" intellectual functioning "is approximately two standard deviations below the mean, *considering the standard error of measurement for the specific assessment instruments used* and the instruments' strengths and limitations." *Id.* at 13 (emphasis supplied); *see also id.* at 14, Table 1.2 ("Intelligence") (same); 17 (same); 23, Table 2.1 ("IQ Cutoff") (same); 27 (same); 37 (same); 58 (same); 198 (same).
>
> *In effect, this expands the operational definition of mental retardation to 75, and that score of 75 may still contain measurement error.* Any trained examiner is aware that all tests contain measurement error; many present scores as confidence bands rather than finite scores. Incorporating measurement error in the definition of mental retardation serves to remind test administrators (who should understand the concept) that an achieved Wechsler IQ score of 65 means that one can be about 95% confident that the true score is somewhere between 59 and 71.

Id. at 59 (emphasis supplied) .

> In like manner, the American Psychiatric Association recognizes that measurement error must be taken into account when interpreting a full-scale IQ score obtained by assessment with any of the standardized, individually administered, intelligence assessment instruments discussed in this opinion.

> Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately two standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. . .
>
> APA, DSM-IV-TR at 41-42.
>
> The Fourth Circuit endorsed these generally-accepted clinical standards when instructing a district court to consider whether a state statute defining mental retardation permitted measurement error to be taken into account when determining whether a capital murder habeas petitioner's raw IQ score of 72 was " 'two standard deviations below the mean' as set forth under that statute." *Walker v. True*, 399 F.3d 315, 323 (4th Cir.2005). *See also In re: Bowling*, 422 F.3d 434, 442 (6th Cir.2005) (observing that "there appears to be considerable evidence that irrebuttable IQ ceilings are inconsistent with current generally-accepted clinical definitions of mental retardation and that any IQ thresholds that are used should take into account factors, such as a test's margin of error, that impact the accuracy of a particular test score") (Moore, J., concurring in part and dissenting in part) (footnote omitted).

Thomas at 1272-73. The *Thomas* Court found that the SEM and Flynn Effect are "well-supported by the accumulation of empirical data over many years" and "have been subjected to rigorous peer review" such that "no reputable member of the relevant professional communities denies that IQ scores have been increasing. . ." *Id*. at 1280.

Mr. Kilgore urges this Court to adopt the legislature's true intent as is reflected in the staff analysis and overturn *Cherry*. If the Court continues to find that interpretation consistent with legislative intent then the statute, as interpreted by this Court, is unconstitutional.

ARGUMENT IV: Applicability of Fla. R. Crim. P 3.203(d)(4)(C)

While state legislatures determine what evidence may be presented in state courts, "the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated." *Tot v. United States*, 319 U.S. 463, 467 (1943). Thus, statutory presumptions must be based on "rational connection[s] between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Id*. at 467-68. "[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary v. United States*, 395 U.S. 6, 36 (1969).

The irrebuttable presumption created by the definition of mental retardation in Florida's death penalty statute, found at § 921.137(1) of the Florida Statutes, as

construed by *Cherry*, that no individual with an IQ over 70 can be mentally retarded violates due process limitations on the constitutionally acceptable use of presumptions. See *Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009)("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"). That presumption cannot be said to have a rational connection to the fact of whether an individual is mentally retarded and indeed, as discussed above, the *Cherry* operates to create an irrebuttable presumption in direct opposition to the scientific fact of mental retardation. The *Tot* standard of common experience requires consideration of the universally recognized and undisputed scientific fact that, due to the SEM, IQ testing does not result in identification of an actual, precise, singular IQ score.

Further, when the invocation of a constitutional right depends on a determination of fact (e.g., Eighth Amendment protection under *Atkins* requires a finding of mental retardation), states cannot diminish the underlying right by creating arbitrary fact finding requirements. *See*, *e.g.*, *Bailey v. Alabama*, 219 U.S. 219, 239 (1910) ("a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumptions any more than it can be violated by direct enactment").

Similarly, the procedures states develop to make fact determinations on which constitutional protections hinge must not restrict those protections. *Ford v.*

Wainwright, 477 U.S. 399, 414 (1986) ("consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that . . . '[T]he minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected.'" (citing *Solesbee v. Balkcom*, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting))). Thus, where the trial judge rules that Dr. Eisenstein's and Dr. Dee's testimony regarding clinical diagnosis of mental retardation are irrelevant to the judicial determination of mental retardation, the statute, as the Court interpreted in *Cherry*, precludes Mr. Kilgore from proving his claim of mental retardation. This Court's interpretation of the legislative intent of the statute restricts the constitutional right articulated in *Atkins*.

Finally, a scientific principle "must be sufficiently established to have gained general acceptance in the particular field in which it belongs" before it can be constitutionally admitted as evidence in a criminal case. *Ramirez v. State*, 810 So. 2d 836, 843 (Fla. 2001) (citing *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) and retaining that standard in favor of the less stringent standard announced in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). Under both the *Frye* and *Daubert* standards, and this Court's interpretation of § 921.137(1) (and Fla. R. Crim. P. 3.203), *Cherry* must be rejected. This Court's

interpretation permits evidence that fails to meet scientific standards to be used to rebut findings of mental retardation that fit the psychological definitions, when the clearly stated legislative intent was to comply with the AAMR definitions of mental retardation. The psychological definition of mental retardation is a scientific construct that did not exist as a "legal definition" until it was adopted in *Atkins*. This Court should recede from its holding in *Cherry*.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Kilgore respectfully urges this Court to reverse the lower court order, grant a new trial and/or penalty phase proceeding, and grant such other relief as the Court deems just and proper.

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CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing REPLY BRIEF has been furnished by United States Mail, first class postage prepaid, on Tuesday, January 19, 2010, to Katherine Blanco, Esq., Office of the Attorney General, Department of Legal Affairs, 13507 East Frontage Road, Suite 200, Tampa, FL 33607.

I FURTHER HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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