

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1085

WILLIAM THOMPSON

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
MIAMI-DADE COUNTY, FLORIDA**

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Mr. Thompson appeals the circuit court's denial of his motion for postconviction relief. The circuit court held that Mr. Thompson is not mentally retarded and *Atkins v. Virginia*, 536 U.S. 304 (2002) does not prohibit his execution.

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record: "R1" refers to the record on direct appeal to this Court from the 1976 sentencing; "R2" refers to the record on direct appeal to this Court from the 1978 sentencing; "R3" refers to the record on direct appeal to this Court from the 1989 resentencing; "PCR-I" refers to the first postconviction record on appeal to this Court from the denial of the 3.850 motion; "PCR-II" refers to the second postconviction record on 3.850 appeal to this Court; "T1" refers to the transcript of the first day of the present evidentiary hearing, conducted on April 13, 2009; "T2" refers to the transcript of the second day of the present evidentiary hearing, conducted on April 27, 2009; "PCR-III" refers to the present record on appeal. All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Thompson requests that oral argument be heard in this case. Mr. Thompson is under sentence of death. This Court has generally granted oral

argument in capital cases similarly postured. Oral argument is necessary to fully develop the claims at issue in this case, on which Mr. Thompson's life will turn. Thus, pursuant to Rule 9.320 of the Florida Rules of Appellate Procedure, Mr. Thompson respectfully moves this Court for oral argument on his appeal.

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STATEMENT OF CASE AND FACTS

On April 14, 1976, Mr. Thompson and codefendant Rocco James Surace were charged by grand jury indictment in Dade County, Florida with the first degree murder, kidnapping and involuntary sexual battery of Sally Ivester (R1. 845-46). Mr. Thompson pled guilty to the charges (R1. 854).

The jury recommended a sentence of death (R1. 886). The trial court sentenced Mr. Thompson to death on June 24, 1976 (R1. 887-89). Mr. Thompson was also sentenced to life imprisonment on the remaining charges, to run concurrent to his death sentence (R1. 887).

On direct appeal, the Florida Supreme Court allowed Mr. Thompson to withdraw his plea and remanded the case for a new trial because Mr. Thompson was prejudiced by an “honest misunderstanding which contaminated the voluntariness of the pleas.” *Thompson v. State*, 351 So. 2d 701 (Fla. 1977), *cert. denied*, 435 U.S. 998 (1978).

After remand, Mr. Thompson again pled guilty to the charges against him on September 18, 1978 (R2. 39-57). The penalty phase jury recommended a death sentence on September 20, 1978 (R2. 198a, 562-64). The trial court imposed a sentence of death, and Mr. Thompson was sentenced to life imprisonment for the remaining charges, with the sentences to run concurrently (R2. 199a, 567-73).

Mr. Thompson's guilty plea and death sentence were affirmed on direct appeal to the Florida Supreme Court. *Thompson v. State*, 389 So. 2d 197 (Fla. 1980).

Mr. Thompson then filed a motion under Florida Rule of Criminal Procedure 3.850, which was denied by the trial court. The denial was affirmed by the Florida Supreme Court. *Thompson v. State*, 410 So. 2d 500 (Fla. 1982).

After the denial of his 3.850 motion, Mr. Thompson sought federal habeas corpus relief. The United States District Court denied relief and the Eleventh Circuit Court of Appeals affirmed the denial. *Thompson v. Wainwright*, 787 F.2d 1447 (11th Cir. 1986), *cert. denied*, 481 U.S. 1042 (1987).

Mr. Thompson then filed a second Rule 3.850 motion, asserting the failure of the sentencing judge to allow presentation and jury consideration of non-statutory mitigating circumstances in the penalty phase. The trial court denied relief, but the Florida Supreme Court reversed under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and remanded for resentencing. *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987), *cert. denied*, 484 U.S. 960 (1988).

At his resentencing, Mr. Thompson's counsel filed a Motion to Declare the Florida Statute 921.141 Unconstitutional. The motion was denied. In its closing argument, the State argued that "Mr. Thompson is a retarded bump on a log" (R3. 3084). During the jury charge, Mr. Thompson's jury was instructed on all of the

statutory aggravating circumstances whether they applied to Mr. Thompson or not (R3. 3116–17). On June 6, 1989, Mr. Thompson’s jury recommended death by a vote of seven to five (R3. 3192-94). Since there was only a general verdict form, there was no indication of which aggravators the jury found. Following the jury’s recommendation, the trial court imposed a sentence of death on August 25, 1989 (R3. 3336). Mr. Thompson received life sentences for the remaining counts of the indictment, to run consecutive to each other (R3. 3336). *Thompson v. State*, 619 So. 2d 261 (Fla. 1993).

On direct appeal, Mr. Thompson again challenged the constitutionality of Florida’s death penalty statute and the aggravating circumstances. The Florida Supreme Court struck the “cold, calculated and premeditated” aggravating factor, but found the error to be harmless. The court found that any error in the “heinous, atrocious and cruel” jury instruction was also harmless. The court also found that the trial judge’s failure to find any mitigation despite the previous judge’s finding of two statutory mitigators was harmless. The Florida Supreme Court affirmed Mr. Thompson’s death sentence from his resentencing. *Thompson v. State*, 619 So. 2d 261 (Fla. 1993).¹ Mr. Thompson timely filed a petition for writ of certiorari,

¹ The issues raised on direct appeal were as follows: (1) the trial court erred in ruling the State’s chief witness was unavailable; (2) the trial court erred by failing to grant Mr. Thompson’s motion to strike the jury panel and failing to conduct individual voir dire; (3) the trial court erred by permitting the State to introduce Mr. Thomson’s prior inconsistent testimony; (4) the trial court erred in allowing

which the United States Supreme Court denied on November 8, 1993. *Thompson v. Florida*, 510 U.S. 966 (1993).

On November 8, 1995, Mr. Thompson timely filed a Rule 3.850 motion. This motion was summarily denied on December 12, 1995 because the trial court mistakenly believed that Mr. Thompson had not verified the pleading as required by Rule 3.850. Mr. Thompson appealed. On August 19, 1996, the Florida Supreme Court relinquished jurisdiction on the State's motion back to the trial court in order to hold a *Huff* hearing.²

On March 6, 1997, following the *Huff* hearing, circuit court Judge Robbie Barr summarily denied Mr. Thompson's motion.³ The Florida Supreme Court affirmed the lower court's denial. *Thompson v. State*, 759 So. 2d 650 (Fla. 2000).

the State to introduce gruesome photographs; (5) the trial court erred in unfairly limiting the testimony of defense witnesses; and, (6) the trial court erred in sentencing Mr. Thompson to death in violation of his due process and equal protection rights.

² *Huff v. State*, 622 So. 2d 982 (Fla. 1993) requires hearings to determine whether Rule 3.850 claimants will receive evidentiary hearings on certain claims.

³ Mr. Thompson raised the following claims: (1) denial of his rights under *Spalding v. Dugger*; (2) denial of access to public records; (3) lack of reliable transcript of his appeal; (4) denial of proper direct appeal due to omissions in the record; (5) guilty plea was not knowing, intelligent and voluntary; (6) no competent mental health expert was appointed; (7) failure to conduct an adequate competency evaluation; (8) Mr. Thompson was incompetent during his plea, sentencing and direct appeal; (9) a *Lackey* claim; (10) Mr. Thompson did not make a knowing, intelligent and voluntary waiver of any rights; (11) counsel had a conflict of interest and violated Mr. Thompson's Sixth Amendment right; (12) Mr. Thompson was denied adversarial testing on his first trial; (13) Mr. Thompson was

Mr. Thompson filed a petition for writ of habeas corpus on June 14, 2001. On December 14, 2001, the district court dismissed the petition as mixed because Mr. Thompson had raised issues regarding *Atkins v. Virginia*, 536 U.S. 304 (2002), which had been recently granted certiorari and which directly applied to Mr. Thompson.

An appeal was taken to the Eleventh Circuit Court of Appeals, which affirmed the lower court. *Thompson v. Moore*, 320 F.3d 1228 (11th Cir. 2003). On August 4, 2003, Mr. Thompson filed a petition for writ of certiorari in the

denied adversarial testing on his second trial and penalty phase; (14) gruesome photographs prevented a fair trial; (15) newly discovered evidence; (16) a *Brady* claim; (17) trial counsel was ineffective; (18) impermissible burden shifting; (19) failure to find mitigation in the record; (20) prosecutorial misconduct; (21) failure of Florida's capital sentencing statute to prevent arbitrary and capricious imposition of the death penalty; (22) erroneous failure to disqualify assistant state attorney; (23) improper automatic aggravating circumstance; (24) ineffective assistance of counsel at the guilt phase of Mr. Thompson's trial; (25) ineffective assistance of counsel at penalty phase; (26) an *Ake v. Oklahoma* claim; (27) a *Caldwell v. Mississippi* claim; (28) cold, calculated and premeditated aggravating circumstance is unconstitutionally vague; (29) constitutionally inadequate harmless error analysis; (30) no limiting construction on the heinous, atrocious, or cruel aggravating circumstance; (31) overbroad and vague aggravating circumstances; (32) failure to find statutory mitigating circumstances; (33) non-statutory aggravating circumstances; (34) improper doubling of aggravating circumstances; (35) cumulative error occurred; (36) failure by the court to define "reasonable doubt;" (37) failure to request instruction regarding length of life sentence; (38) inability to interview jurors; (39) juror misconduct; (40) failure by the trial court to strike the jury panel; (41) misleading of jury as to reasons for resentencing; (42) erroneous introduction of previous testimony by chief state witness; (43) invalid jury instruction on expert testimony; and, (44) failure by the trial court to allow testimony of prior judge at resentencing.

United States Supreme Court and on April 4, 2005, the petition was granted. The United States Supreme Court vacated the judgment and remanded the case to the Eleventh Circuit. *Thompson v. Crosby*, 544 U.S. 957 (2005). On September 26, 2005, the Eleventh Circuit vacated the dismissal of the petition and remanded to the district court. *Thompson v. Secretary for Dep't. of Corrections*, 425 F.3d 1364 (11th Cir. 2005).

On November 18, 2005, the district court denied Mr. Thompson's request for a stay to pursue his *Atkins* claim in state court. On December 19, 2005, Mr. Thompson elected to dismiss his unexhausted claims and proceed with his exhausted claims. On December 5, 2005, the district court issued an order reopening the case. On July 21, 2006, the district court denied the petition.

On November 15, 2001, Mr. Thompson filed a Rule 3.850 motion shortly after the enactment of Florida Statute § 921.137, which was signed into law by Governor Bush on June 12, 2001, one day before Mr. Thompson's federal habeas petition was due. Section 921.137 prohibits the execution of mentally retarded, or intellectually disabled ("MR") individuals. The State never responded to the motion.

An amended Rule 3.850 motion was filed on June 18, 2003 and was dismissed by the circuit court. The circuit court requested that the state prepare an order dismissing Mr. Thompson's Amended Rule 3.850 motion. This was done

without notice to Mr. Thompson or his counsel by *ex parte* hearings before the circuit court.

As a result, Mr. Thompson filed a motion to disqualify the judge on August 8, 2003. The first time Mr. Thompson's counsel was noticed and appeared before the court was after the motion to disqualify had been filed. During the disqualification hearing, the circuit court acknowledged that the clerk had noticed a defense attorney who was deceased. The circuit court denied Mr. Thompson's motion to disqualify on September 4, 2003. At no time was counsel given an opportunity to argue the propriety of dismissing the Rule 3.851 motion or that the amended motion was improperly dismissed based on the State's erroneous interpretation of the Florida Rule of Criminal Procedure 3.851.

Mr. Thompson filed a notice of appeal to the Florida Supreme Court. The State then moved to dismiss the appeal, stating that the order of the circuit court was not final and that it had ruled that Mr. Thompson could re-file. That information had not been communicated to Mr. Thompson.

Mr. Thompson argued to the Florida Supreme Court in his response that his amended motion had been properly filed under the rule. He argued that he should not have been required to re-file a motion within a 25-page limit, which is a requirement under Rule 3.851 for successive petitions. The State conceded that Mr. Thompson's initial November 15, 2001 motion did not exceed 25 pages. The

State had never responded to that motion, though under Rule 3.851, it was required to do so within 20 days. Fla. R. Crim. P. 3.851(f)(3)(B). The June 18, 2003 amended motion was an additional 10 pages, which was acceptable because under Rule 3.851(4), there is no page requirement for amendments to an initial motion.

The Florida Supreme Court issued an order on July 9, 2004, ruling that the June 18, 2003 amended 3.851 motion be stricken without prejudice. The Florida Supreme Court gave Mr. Thompson 30 days to re-file an amended motion that complied with the page limitation of Rule 3.851. It also treated Mr. Thompson's motion for disqualification as a writ of prohibition and denied the petition on the merits.

Although Mr. Thompson maintained that he did not violate the rule in the additional 10-page amendment, he complied with the Florida Supreme Court's order, cut the motion to 25 pages and timely filed the amendment on August 9, 2004. The State filed a response on August 30, 2004. A *Huff* hearing was conducted on October 27, 2004. On December 17, 2004, the circuit court denied the amended motion. Mr. Thompson filed a motion for rehearing on December 30, 2004. The motion was denied on January 5, 2005. On February 15, 2005, Mr. Thompson filed a Notice of Appeal to the Florida Supreme Court.

On July 9, 2007, this Court reversed the trial court's summary denial and remanded to the circuit court "in order to allow Thompson to plead and prove the

elements necessary to establish mental retardation, specifically including the threshold requirements set forth in *Cherry v. State*, 32 Fla. L. Weekly S151 (Fla. April 12, 2007).” The order stated, “[t]he trial court determined that Thompson’s claim was procedurally barred because the issue of mental retardation was raised as mitigation and litigated in Thompson’s 1989 resentencing proceeding. We conclude this determination was error because the evidence in this case was presented for mitigation, not as evidence of mental retardation as a bar to execution.” The order also stated that “[t]he trial court shall proceed in an expedited manner, and any evidentiary hearing must be held and an order entered within ninety (90) days of the date of this order.”

On August 8, 2007, Mr. Thompson filed a Rule 3.851 motion.⁴ Mr. Thompson also filed a Motion to Exceed Page Limitation.

On August 15, 2007, the State filed a response to the motion to exceed page limitations and a motion to strike the amended Rule 3.851 motion, arguing that the circuit court should not grant the motion to exceed page limitations because this Court’s order was only for the purpose of allowing Mr. Thompson to file another

⁴ The motion raised the following claims: (CLAIM I) the death sentence imposed upon Mr. Thompson, a MR person, violates the Florida and United States constitutions; (CLAIMS II) because Mr. Thompson has been on death row for 31 years, executing him violates the Eighth and Fourteenth amendments to the United States Constitution and corresponding provisions of the Florida Constitution; (CLAIM III) Florida’s lethal injection procedure is unconstitutional; (CLAIM IV) newly discovered evidence shows Mr. Thompson’s sentence is unconstitutional.

motion in which he could plead that he is mental retardation and that the circuit court should strike the postconviction motion.

The circuit court held a status conference on August 15, 2007. On August 21, 2007, the State filed a Response to Retardation Claim. On August 22, 2007, the circuit court held a *Huff* hearing and struck the additional claims (Claims II, III, and IV) on the grounds the remand from the Florida Supreme Court did not permit filing the additional claims. On August 27, 2007, Mr. Thompson filed a reply.

On August 27, 2007, the circuit court denied the postconviction motion without a hearing on the claim of mental retardation on the grounds that Mr. Thompson is not entitled to a hearing under Florida Rule of Criminal Procedure 3.203(e) because he did not properly plead MR. According to the circuit court order, under *Cherry v. State*, 959 So. 2d 702 (Fla. 2007) Mr. Thompson was required to allege in his postconviction motion that his IQ is under 70. Mr. Thompson's motion for rehearing was denied on September 19, 2007. Mr. Thompson filed a timely notice of appeal to the Florida Supreme Court.

On February 25, 2008, the United States Court of Appeals for the Eleventh Circuit denied Mr. Thompson's appeal of the district court's denial of his federal habeas petition.

Current proceedings

On February 27, 2009, the Florida Supreme Court remanded Mr. Thompson's case, again ordering the circuit court to conduct a hearing on Mr. Thompson's mental retardation claim.

On the following Monday, March 2, 2009, the circuit court contacted CCRC litigation director William Hennis and informed him that the court wished to have a status hearing that same day at 1:30 p.m. Mr. Hennis informed the judicial assistant that counsel was attending an evidentiary hearing in another case and was unavailable. At 11:16 a.m., the court faxed a scheduling order setting the evidentiary hearing for April 13, 2009 and a status conference for March 13, 2009. The court ordered the parties to be prepared to make any motions necessary for preparation for trial and to have witness availability ready at the status conference.

Counsel called the court the following day, March 3, 2009, and was told if there were any problems to file a motion. The following day, March 4, 2009, while counsel was still in an evidentiary hearing, the court issued a second scheduling order ordering Mr. Thompson, and not the State, to file a witness list prior to the March 13, 2009 status hearing. The order allowed the State to file its witness list one week later. More significantly, the order required Mr. Thompson, if he planned to have a mental health expert evaluate him, to have that evaluation completed prior to the March 13, 2009 hearing (less than two weeks from the

court's order). The order further required Mr. Thompson to timely obtain a report from the mental health evaluator and forward that report to the State. No time restrictions were placed on the State to obtain its expert and build its case.

The order further stated that the circuit court would not request an extension from this Court on the 90 day time period, although no extension had been requested by the parties, because the parties had "more than 4 years to prepare for an evidentiary hearing" (March 4, 2009 Order at 2).

On March 5, 2009, the State filed a motion to preclude Mr. Thompson from using more than one of the instruments designed to measure IQ that are recognized in Florida. On March 5, 2009, the circuit court set that motion for argument during the scheduled April 13, 2009 hearing.

On March 9, 2009,⁵ Mr. Thompson objected to the court's order truncating this Court's time limits. He filed a motion to extend the time in which to procure a mental health expert and to reset the scheduled March 13, 2009 status hearing, explaining to the court that it would be unable to find a competent expert who could drop appointments, fly to death row, conduct an extensive mental retardation evaluation and prepare a report before March 13, 2009. He also objected to the stringent timeline being applied only on Mr. Thompson, while the State would have an additional month to find an expert prior to the evidentiary hearing.

⁵ Also on March 9, 2009, the United States Supreme Court denied Mr. Thompson's pending application for writ of certiorari with two dissenting opinions.

On March 10, 2009, the circuit court granted Mr. Thompson's motion, reset the March 13, 2009 status hearing for March 26, 2009 and extended Mr. Thompson's deadline for submitting his witness list that date. The order moved Mr. Thompson's deadline for conducting his mental health evaluation to March 26, 2009.

On March 12, 2009, Mr. Thompson filed his third motion to disqualify the circuit court judge based on the continuing bias of the judge demonstrated anew by the court's scheduling orders. The court denied the motion the same day it was filed.

The status conference took place on March 26, 2009 where Mr. Thompson requested the full 90 day time period granted by this Court to have his mental retardation proceedings. The Court refused to extend the time period stating that it would add on a second date, April 25, 2009, a date Dr. Sultan was not available to testify. On March 27, 2009, the circuit court extended the time for Mr. Thompson to submit his mental health expert's report to the State to April 1, 2009 because the expert could not evaluate Mr. Thompson and do a report on the same day.

The evidentiary hearing took place April 13, 2009 and April 27, 2009. Mr. Thompson called William Weaver, Dr. Faye Sultan and Dr. Stephen Greenspan.

Evidentiary hearing testimony

Mr. Weaver was Mr. Thompson's grade-school teacher and principal (T. 22). Mr. Weaver testified that Mr. Thompson did not complete homework and not only failed tests but did not complete tests (T. 36-37). He fidgeted and was distracted (T. 37). However, he did not incite inflammatory behavior (T. 37). He was held back in the eighth grade (T. 37). His mother was advised upon his entry into preschool that he was mildly retarded and would benefit from delaying his entry into school (T. 38). She did not follow this advice.

Mr. Thompson's IQ scores were consistent and in the range of far below 80, which at the time in Ohio made a student eligible for educable mentally retarded ("EMR") classes. He was in an educable mentally retarded class in the third grade (T. 39), prior to moving to Mr. Weaver's school district. In the third grade, Mr. Weaver attributed any improvement in Bill's performance to the lower level of difficulty in the special needs class (T. 57). Mr. Thompson also attended educable mentally retarded classes in the fourth grade because he was at a school that provided such classes. When Bill was transferred to Mr. Weaver's district, he did not have EMR classes (T. 39, 44). As a result, he attended regular classes in that district, where his grades were D's and F's (T. 40).

Bill was given IQ testing multiple times in school. School psychologists told Mr. Weaver that Mr. Thompson should be in educable mentally retarded

classes (T. 70). Despite these requests, Bill was retained in the first, fifth, and eighth grades, and placed, as opposed to passing, in the sixth grade (T. 40).

Mr. Weaver knew the psychologist who administered the California Mental Maturity test, which produces a score representing IQ and measuring mental age and adaptive functioning, and found her to be an excellent psychologist (T. 41-42). That test can be administered in a group or individually. Mr. Weaver did not know how that test had been administered to Bill (T. 41). The Henmon-Nelson test, which was administered to Mr. Thompson as a child, can also be administered individually or to a group (T. 44). Mr. Weaver did not know how that test had been administered.

Mr. Weaver described Bill as a friendly child and student, but he performed poorly academically (T. 45-46). Bill wore his pants high with his white socks showing and walked in a clunky manner down the halls (T. 46).

One Christmas, he brought Mr. Weaver a Christmas tree for the classroom and got a kick out of being able to help in that way (T. 46). When other teachers asked for trees, Bill provided them until they discovered he was cutting the trees down from his neighbor's yard (T. 46).

Mr. Thompson was an "absolute follower" and always wanted to please (T. 46). He was not an initiator, but a mimic. He would get in trouble by doing things he saw other kids doing (T. 46). His peers made fun of him and rejected him as

silly (T. 47). He never missed more than five days of class a year because he wanted to be there, but he had difficulty doing the work (T. 47). He had speech issues and needed speech therapy (T. 47). Bill had poor motor skills and was clumsy (T. 48). His mental age was a couple of years below his chronological age when he was a child; he had a significant developmental delay (T. 49-50). As Bill went further in school, his academic performance got worse; D's turned to F's (T. 50). He flunked the fifth grade but was advanced or "placed" (T. 50). He was 18 in the eighth grade while his classmates were 14, which was Bill's last year in school (T. 50). His attention span was short (T. 52). He dropped out before ninth grade (T. 50). Bill was arrested for this crime at age 24. Mr. Weaver lost touch with Bill after school though he testified at Bill's 1989 resentencing.

After Bill was convicted in this case, he sent Mr. Weaver letters that were "childlike" with rainbows and smiley faces drawn on them (T. 53).

On cross-examination, the State mentioned that in the materials of Dr. Dorita Marina, who evaluated Mr. Thompson for the 1989 resentencing, it was noted that Mr. Thompson may have a hearing impairment in one ear (T. 59). The State asked Mr. Weaver, a former teacher and principal with no scientific expertise, if hearing loss may have accounted for Mr. Thompson's poor motor skills and speech problems as a child (T. 58-61). Mr. Weaver explained that he was not aware that Bill suffered from any hearing loss and was not qualified to speak to that (T. 60).

The State asked Mr. Weaver if hearing loss could also account for Mr. Thompson's poor academic performance (T. 61). Mr. Weaver did not believe hearing loss was the problem but that nothing was getting through to him (T. 61).

The State suggested that while Mr. Weaver testified that Mr. Thompson was a follower, he chopped down the Christmas trees on his own. Mr. Weaver explained that influence played a part in that incident because Mr. Thompson did it to gain the approval of his teachers (T. 63). The State noted that a principal had recommended vocational training for Mr. Thompson and offered that "it doesn't sound like someone who is retarded, does it?" (T. 64). Mr. Weaver explained that MR students often do well at manual tasks so they are recommended for vocational programs in light of their inability to perform academically (T. 64-65). The State asked Mr. Weaver if some of the "nerds turn[] out to be successful" (T. 65), and Mr. Weaver explained that given the right circumstances, low achieving students can achieve (T. 66).

As to the State's suggestion that Mr. Thompson "improved" during the eighth grade, Mr. Weaver testified that Mr. Thompson's grades were D's and F's—not an improvement (T. 67). Mr. Weaver confirmed that while the State focused on improvement in Mr. Thompson's first grade performance, that was his second time in the first grade, and after failing the first time, anything would be an improvement (T. 67-69).

Following Mr. Weaver's testimony, Mr. Thompson called Dr. Faye Sultan, a clinical psychologist. Dr. Sultan evaluated Mr. Thompson and concluded that Mr. Thompson is mental retardation (T. 139).

Dr. Sultan performs evaluations to determine mental retardation for purposes of determining social security benefits (T. 74). She has worked extensively for the Department of Corrections in North Carolina, and has administered more than 100 IQ tests (T. 75-76). The Court excluded Dr. Sultan's resume from being admitted into evidence (T. 79), which later led to the Court failing to remember Dr. Sultan's qualifications.⁶ The Court permitted Dr. Sultan to testify as an expert in forensic psychology (T. 78-79).

The State objected to Dr. Sultan testifying to the clinical definition of mental retardation because it was "irrelevant" in light of the legal definition (T. 79-80). The Court ruled that Dr. Sultan could testify to what she considered mental retardation to be (T. 80).

Dr. Sultan diagnosed Mr. Thompson using the definition of mental retardation found in the "Red Book," which is the clinical definition of mental retardation promulgated by the American Association of Intellectual and Developmental Disabilities ("AAIDD"), formerly the American Association for

⁶ In the court's final order, the court, in judging Dr. Sultan's credibility, inaccurately stated that Dr. Sultan had never testified in the State of Florida (May 21, 2009 Order at 3) when in fact Dr. Sultan testified to being qualified to testify as an expert in Florida 25 to 30 times (T. 77).

Mental retardation (“AAMR”). (T. 82). One of the criteria for determining mental retardation is adaptive functioning (T. 82). Dr. Sultan testified that “[b]ecause [Mr. Thompson] has been incarcerated since the age of 24, it’s not proper to try to assess adaptive behavior within a setting that doesn’t allow him to demonstrate his skill” (T. 83). Dr. Sultan further stated that “it can be said that all incarcerated individuals have poor adaptive functioning, because they are not managing their own finances, they’re not choosing their own clothing, they’re not selecting their own bathing schedule, they’re not preparing food for themselves, they’re not getting themselves up and dressed for work in the morning” (T. 83-84). Thus, Dr. Sultan was “instructed by [] professional literature to go to the . . . last point, at which the individual was able to make those kinds of choices and demonstrate skill in the real world” (T. 84). “Adaptive functioning is actually measured in real world circumstances, not in artificially simplified or overly structured circumstances” (T. 84).

Dr. Sultan stated that the onset of mental retardation for Mr. Thompson before the age of 18 “was made abundantly clear in the school records” (T. 85).

When counsel asked Dr. Sultan if she was aware whether Florida’s legal definition of mental retardation tracks the AAIDD definition, the State objected that Dr. Sultan was not “entitled to give an opinion about the legal definition” (T. 85). Dr. Sultan, at the court’s request, explained that her understanding of the

statutory definition was that it had a single cutoff IQ score of 70, current measurement of adaptive functioning and specific deficits in adaptive behavior (T. 86). The State restated its objection as being that “the nature of the definition is a legal question. What the terms of the statute reads [sic] are an issue of statutory construction, an issue of law, not subject to expert testimony” (T. 87). Despite counsel’s assurances that she was merely asking how the clinical definition, which Dr. Sultan, as a psychological professional, used to diagnose Mr. Thompson, related to the legal definition, the court sustained the objection, stating that “I’m the one who decides whether or not [the definitions] mirror one another and . . . what you need to ask . . . [concerning] her opinion if she has one, is under the Florida standard” (T. 87-88). The court stated that “[a]ll questions regarding her opinion should be traveling under what the Florida standard is” (T. 89). Counsel raised the concern that “the definition of retardation doesn’t exist outside the psychological community. It is a construct of the psychological community” (T. 89). The court then stated that “if the witness is not . . . using the criteria set out as the legal standard, then this Court really should not accept or even receive the opinion” (T. 90). The Court further explained that “for her to evaluate what her opinion is under some other standard, and so to weigh that against Florida, is really not relevant”⁷ (T. 91). The clinical definition of mental retardation recognizes a

⁷ The court noted in its final order that Dr. Sultan “is aware of Florida’s definition

standard error of measurement, meaning IQ scores are estimations and represent a range of potential actual IQs, while the statutory definition in Florida sets a rigid cutoff at 70. Dr. Sultan stated that she was cognizant of the statutory definition but “I make a diagnosis based on psychological principles” (T. 96). As for Dr. Sultan failing to use the hard cutoff of 70 in the statutory definition even though the clinical definition recognizes a standard error of measurement, the State argued that “[i]t’s kind of like with DUI. If you are above .08, your DUI . . . it’s an element of the offense” (T. 93).

Ultimately, the court permitted Dr. Sultan to testify, but within the confines of the court’s ruling that she could not testify about Florida’s definition of MR.

Dr. Sultan said she was asked to go very quickly⁸ to death row to administer an IQ test to Mr. Thompson, to review materials and interview people familiar with Mr. Thompson to determine if he met the diagnostic criteria for mental retardation (T. 97-89). Although application of the diagnostic criteria of mental retardation was contrary to the court’s admonition that only evaluations under the statutory standard were relevant, there was no objection to Dr. Sultan’s statement that she applied the diagnostic criteria.

of mental retardation [but] applied psychological standards to make her diagnosis” (May 21, 2009 Order at 4).

⁸ Due to the court’s stringent scheduling orders discussed above.

Dr. Sultan's evaluation occurred on March 20, 2009 (T. 99). She administered the WAIS-IV (Wechsler Adult Intelligence Scale, Fourth Edition), which is the most recent and currently normed IQ test (T. 98-99). Scoring of IQ tests must be normalized or keyed to the current level of human intelligence, which rises incrementally over time, and rose in the 15 years that the WAIS-III was being used, making the WAIS-IV the most accurate test currently available (T. 98-99).

Mr. Thompson cooperated with the administration of the exam and it was an accurate administration (T. 102). Mr. Thompson was working to the best of his ability and not malingering (T. 102-04).

Dr. Sultan found that Mr. Thompson's full scale IQ score "falls somewhere between 68 and 76, at the 95th percent confidence interval" (T. 100-01). The psychological community measures IQ based on a confidence interval, establishing a range of IQ scores in which the subject's IQ falls, in recognition of the limited degree of confidence with which an IQ score can be determined (T. 101). Within that range, Dr. Sultan reviewed the other data to conclude that Mr. Thompson's IQ was 71 (T. 101).

Since Mr. Thompson's IQ was within the range of potential mental retardation, Dr. Sultan had to consider his adaptive functioning to determine if he was mental retardation (T. 113). Since Mr. Thompson has been on death row for so many years, Dr. Sultan had to do a retrospective adaptive behavior analysis, in

which she gathered as much information from as many people familiar with Mr. Thompson as possible to answer questions such as when did Mr. Thompson first learn to walk, when did he become toilet trained, and how he responded to instruction at different ages (T. 117). Dr. Sultan explained that retrospective analysis in such situations is standard practice in her professional field when there is no concurrent adaptive functioning behavior to analyze (T. 181). Dr. Sultan found the school records to be an excellent source of information with extensive IQ testing by several psychologists (T. 104). For further data, Dr. Sultan interviewed Mr. Weaver, Mr. Thompson's mother and Donna Adams, Mr. Thompson's common law wife prior to his arrest, and reviewed records of Mr. Thompson's previous psychological evaluations (T. 104-05).

Dr. Sultan explained that Mr. Thompson's extensive psychological testing could affect his scores. They could rise with repeated testing and familiarity with the tests. This phenomenon is referred to as the Practice Effect (T. 105).

At his current age of 57, Mr. Thompson is functioning at the same intellectual level as he was at age 10, which shows onset before the age of 18 and excludes an injury later in life as a possible cause of Mr. Thompson's poor intellectual functioning (T. 107). As Mr. Thompson got older, "the discrepancy between his chronological age and his mental age grew" (T. 108). Mr. Thompson has the mental skills of roughly a 12-year-old, which are reading on a sixth to

seventh grade level and writing grammatically correct sentences and paragraphs (T. 108).

Dr. Sultan explained that while Mr. Thompson's low processing speed subscore on the WAIS-IV may represent a learning disability, the existence of that learning disability would not change the diagnosis of mental retardation under the professional diagnostic system (T. 111).

The trial court ruled that Dr. Sultan could not testify to information she obtained interviewing Mr. Thompson's family and friends about his adaptive functioning because such information was hearsay (T. 117-19, 127). Later, the court changed that ruling to permit testimony about such information as long as Dr. Sultan did not say who told her the information or what they said (T. 135).

Dr. Sultan learned from Mr. Weaver that Mr. Thompson performed below grade level. She learned about a discrepancy in his chronological and mental ages, delays in development of his coordination and motor skills, his inability to form friendships, isolation during school years, his inability to adapt to social contexts like knowing when to be silly and when to be quiet (T. 123). Dr. Sultan pointed out that while Mr. Thompson was at that precise moment in a court hearing to determine his fate, his affect was as if he was attending a party. He smiled, giggled and laughed, as he had during his evaluation (T. 136).

Donna Adams knew Mr. Thompson as a late teenager and early adult, which was significant to Dr. Sultan's analysis because that was the point at which Mr. Thompson should have become independent (T. 124). Ms. Adams provided information about Mr. Thompson's deficits in domestic activities, such as needing reminders to bath, change clothes and brush his teeth (T. 124). He did not handle money; he had no concept of money or how to pay bills (T. 124). He did not do laundry, go to the grocery store or prepare meals (T. 124). He behaved like a child (T. 124). He was isolated among his peers, even his siblings, and had poor self-care skills (T. 128).

The information that Dr. Sultan received about codefendant Surace telling Mr. Thompson what to do at the time of the offense and his following orders was consistent with Dr. Sultan's conclusion that Mr. Thompson is mental retardation (T. 133).

Dr. Sultan testified that there was evidence of gullibility or naïveté which were aspects of Mr. Thompson's deficits in adaptive functioning (T. 131-32). Mr. Thompson would engage in behaviors inappropriate and detrimental to himself at the mocking or encouragement of others (T. 132). Mr. Thompson engaged in behaviors that were not in his best interest in order to gain approval of others, as evidenced in his military records (T. 135-36). That is significant because mental

retardation individuals tend to be eager to please and interested in getting the approval of others (T. 132).

Mr. Thompson also has some facial ticks and distortions (T. 137). Dr. Sultan considered evidence of Mr. Thompson having brain damage, which would make his adaptive functioning lower than a typical individual with his IQ (T. 137). Dr. Sultan noted that Mr. Thompson's biological daughter and mother also have intellectual deficits or learning disabilities which demonstrated a hereditary aspect to his deficits (T. 142).

Dr. Sultan explained that the many factors she considered from Mr. Thompson's childhood which are reflected in the record and discussed in court also established onset of mental retardation before the age of 18 (T. 138-39).

On cross examination, the State challenged Dr. Sultan's opposition to the death penalty (T. 144-46). Dr. Sultan explained that she is a member of the American Psychological Association ("APA"), which has taken the position that the death penalty has deficiencies which require a moratorium (T. 145-46). Dr. Sultan directed the State to the APA's website to locate the position paper on capital punishment and its many deficiencies (T. 146).⁹ Dr. Sultan testified that

⁹ That publication is consistent with Dr. Sultan's testimony and can be found at www.apa.org/pi/deathpenalty.html.

her membership in that organization did not influence her testing in this case (T. 185).

Dr. Sultan assured the State that while the WIAS-IV is the new edition of a test which she had used before, she worked diligently to learn to use the new version of the test (T. 156). Dr. Sultan explained that the WAIS-IV scoring is standardized so that a full scale score is determined under the instruments procedures and not on the whim of the examiner (T. 162-66). The composite score is determined based on the weighing of the components performed by the creators of the test (T. 164-65). Dr. Sultan explained that the diagnostic instrument for testing IQ does not permit the examiner to allow the subject to guess his answers (T. 142). Dr. Sultan assured the State that by taking notes concerning Mr. Thompson's answers she did not affect the timing of the test administration (T. 167).

The State again raised its theory that some hearing impairment in one ear was the cause of Mr. Thompson's poor academic performance, speech impediment and poor motor skills (T. 170-78). Although the State conceded that nothing in the school records from Mr. Thompson's childhood indicated a hearing impairment (T. 170), the court thought that Mr. Weaver had testified to Mr. Thompson having a

hearing impairment¹⁰ (T. 173). Dr. Sultan later mentioned that there was no evidence of a hearing problem in the school records (T. 181).

When Dr. Sultan mentioned that Mr. Thompson's musical ability as a child suggested he did not have a hearing problem that interfered with his abilities to perform, the State suggested sarcastically that Mr. Thompson may be like Beethoven, in that despite an undocumented hearing problem created by the prosecution, he could be musically gifted (T. 177).

The State suggested that Mr. Thompson's hygiene problems could be explained as "typical of men who were raised in the 50's and 60's" (T. 179). Dr. Sultan strongly urged that Mr. Thompson not knowing to brush his teeth, change his clothes and bath is very different from the whatever impression the State has of men of that age (T. 179). The State concluded by having Dr. Sultan say that 71 is greater than 70 (T. 180).

Dr. Sultan further explained that prison guards should not be interviewed to make adaptive functioning determinations because they observe inmates like Mr.

¹⁰ In the court's final order it stated that "Weaver testified that an undetected hearing loss, which records indicate, could account for poor speech. Further, he testified that loss of attention span can be the result of hearing loss" (May 21, 2009 Order at 3). While Mr. Weaver may have speculated to these matters at the State's insistence, he did not waiver on his testimony that he was not qualified to speak to such matters and never detected hearing loss in Mr. Thompson. Any understanding on the part of the court that there is evidence of Mr. Thompson having a hearing impairment as a child would be unfounded.

Thompson in a prison environment, where their behavior is artificially structured and regulated, as opposed to a natural environment with the stresses of and opportunities to make decisions in day-to-day life (T. 129).

Dr. Gregory Prichard, the State's expert in forensic psychology, evaluated Mr. Thompson on April 6, 2009, less than two weeks after Mr. Thompson took the WAIS-IV IQ test (T. 194). Dr. Prichard concluded that Mr. Thompson is not mentally retarded (T. 202, 222). Dr. Prichard administered to Mr. Thompson the Stanford-Binet, Fifth Edition (T. 195). Dr. Prichard did not administer the WAIS to avoid the Practice Effect caused by Dr. Sultan's testing on March 20, 2009 (T. 196), as administrations of the same instrument need to be separated by about a year (T. 196). However, Dr. Prichard later acknowledged that the Practice Effect can occur between instruments, such as the WAIS and the Stanford-Binet; and the amount of increase in score due to the Practice Effect would be undeterminable (T2. 18-19). Dr. Prichard stated that the Practice Effect can be negated and is virtually non-existent beyond a year (T. 196-97) but later remembered testifying in a previous case that the Practice Effect can last beyond a year (T2. 22). Dr. Prichard testified that he was unaware of Dr. Allen Kauffman's research on the practice effect finding the practice effect to occur between the WAIS and the Stanford-Binet (T2. 24-25).

Dr. Prichard concluded Mr. Thompson's full scale IQ score is 88 (T. 198). Dr. Prichard noted that the results of a previously administered IQ exam resulted in a full scale score of 85, which he explained was "statistically not different" than his score of 88 (T. 204). Dr. Prichard later testified that 81 was statistically the same, or even identical, to 86 (T. 212).

Dr. Prichard testified that when index scores, or subscores, are significantly statistically different, the examiner must look for an explanation for that difference (T. 198). Dr. Prichard testified that the processing speed subscore in Dr. Sultan's administration, 56, was dragging the other subscores down to a full scale score of 71 (T. 215). Dr. Prichard attributed the 56 to a learning disability or fatigue¹¹ (T. 215). Dr. Prichard testified that Dr. Sultan scored the exam appropriately and reached valid scores as "[t]he numbers she came up with were just the numbers out of the manual," but it "is not valid to say that that score represents his full scale IQ score, his capacity, because to say that would mislead and would make one have the impression that Mr. Thompson is not as capable as he is" (T. 215).

¹¹ Due to the court's scheduling, which permitted the State more time and less restrictions to build its case, Dr. Prichard was able to review Dr. Sultan's raw data from her testing and challenge her methodology. Dr. Sultan did not receive Dr. Prichard's raw data prior to testifying (T. 223). The State did not provide Dr. Prichard's raw data to the defense until the morning of the hearing (T. 223), and the court excluded the defense's other expert, Dr. Greenspan, who had the benefit of seeing the raw data, from testifying as to Dr. Prichard's methodology (T2. 199).

While the court ruled that Dr. Sultan could not discuss clinical definitions in her field relating to the proper measure of IQ scores because they were “irrelevant to the Florida statutory definition of mental retardation,” the State’s expert was (T. 216-17). Dr. Prichard knew by “just basically interacting with Mr. Thompson, he is not mentally retarded. You get that sense when all of us are able to say this guy seems pretty smart . . . I’ve worked with mentally retarded folks for years. It is pretty easy to pick them out or somebody that is close to it” (T. 218-19).

Dr. Prichard did not review any information from Ms. Adams (T. 222). He was unaware of Mr. Thompson’s inability to care for himself. Dr. Prichard did not review the Department of Corrections file, except for maybe a small packet provided by the State (T2. 11).

Prior to administering the Stanford-Binet at the prison, Dr. Prichard mentioned to undersigned counsel, who was present, that the testing conditions were not optimal (T2. 10). When Mr. Thompson entered the room, Dr. Prichard asked if he smiled like that all the time, because it was unusual for a person to be smiling in that situation (T2. 11-12). Dr. Prichard did not note that fact in his report (T2. 12). Later on redirect, Dr. Prichard explained his question to counsel

by saying “[s]ome folks just like to smile. It’s not any kind of sign that a person is mentally retarded or crazy or anything necessarily”¹² (T2. 65).

Dr. Prichard admitted to relying on Mr. Thompson’s self-report to establish background information, along with documents from the State (T2. 12-13). Dr. Prichard had to judge the accuracy of what Mr. Thompson reported to him concerning his health and background based on Mr. Thompson’s statements from the past found in the materials provided by the State (T2. 13-14). Thus, when Mr. Thompson told Dr. Prichard that he never had a driver’s license and could not have been a truck driver, which Dr. Prichard listed as one of the reasons Mr. Thompson could not be mental retardation (T. 222), Dr. Prichard found that inconsistent with testimony he read that Mr. Thompson had a driver’s license (T2. 14). When defense counsel told Dr. Prichard that the Department of Motor Vehicle records both in Florida and Ohio, where Mr. Thompson grew up and previously lived, showed that Mr. Thompson never had a driver’s license, Dr. Prichard stated that it did not surprise him, but did not change his conclusion (T2. 14-15).

Dr. Prichard stated that the WAIS-IV is the more commonly used gold standard of testing,¹³ that he normally used the WAIS, and that it was easier to

¹² In the court’s final order it noted observing Mr. Thompson smiling during the evidentiary hearing and stated “there was nothing inappropriate about his smiling” in a hearing that would determine whether he lived or died (May 21, 2009 Order at 5).

administer than the Stanford-Binet, which he administered to Mr. Thompson (T2. 15). Dr. Prichard agreed that it was important to administer the most recent test with the most current norming (T2. 16) because the age of the test can affect the score due to the Flynn Effect (T2. 18). However, he acknowledged that the Stanford-Binet he gave to Mr. Thompson was normed in 2000, published in 2003, and was six years old when he administered it to Mr. Thompson (T2. 17-18).

Dr. Prichard acknowledged the need to recognize the confidence interval and the standard error of measure in IQ testing (T2. 17). Dr. Prichard stated unequivocally that “[w]hen you have a full scale score that is 75 or less and that appears to be representative of the person’s full scale IQ, then the person is considered to potentially meet the criteria for a diagnosis of mental retardation” (T2. 28-29). Dr. Prichard stated that it is “certainly true” that someone without a mentally retarded IQ, or with an adequate IQ, that had inadequate adaptive functioning could be mentally retarded (T2. 52). Dr. Prichard explained that in the *Cherry* case he diagnosed Mr. Cherry as being MR, even though his IQ was not below 70 due to adaptive functioning deficits and the fact that the confidence interval created “a potential that . . . the true IQ is actually below 70” (T2. 53).

¹³ In *Atkins*, the United States Supreme Court stated that the WAIS is “the standard instrument in the United States for assessing intellectual functioning.” 536 U.S. at 309 n.5. (citing AAMR)

Dr. Prichard stated that when you have higher scores and lower scores “you have to consider the higher scores are more likely representative of optimal functioning (T2. 33). Dr. Prichard admitted that he did not base that on literature; “[y]ou don’t need literature to base it on. You’ve got to assume . . . It’s common sense” (T2. 34-35). However, Dr. Prichard admitted to prompting Mr. Thompson to guess on answers, that he was not aware whether the testing instrument precluded guessing and that he was not sure if his allowing Mr. Thompson to guess might have artificially inflated the score, noting that it may if Mr. Thompson was “a really good guesser” (T2. 39-40).

While Dr. Prichard noted in his report his assessment of the degree to which Mr. Thompson appeared to be trying, he did not note that Mr. Thompson was counting on his fingers and sounding words out phonetically (T2. 36-37).

As to Mr. Thompson’s military service, Dr. Prichard stated that “[h]e enlisted in the Marine branch of the United States armed forces. Mentally retarded folks don’t do that” (T. 219). On cross, Dr. Prichard again asserted that serving in the military, as Mr. Thompson had, was not something that an mental retardation individual could do (T2. 41). However, Dr. Prichard admitted to knowing nothing about Mr. Thompson’s military service other than Mr. Thompson’s self-report and prior testimony indicating merely that he had served in the military (T2. 41). When Dr. Prichard was told that Mr. Thompson was only in the military for two

months before being dishonorably discharged, demonstrating that he was in fact incapable of military service, Dr. Prichard stated that he was more concerned with the fact that Mr. Thompson got into the military to begin with (T2. 42).¹⁴ However, Dr. Prichard did not consider that Mr. Thompson volunteered for military service in 1972 during the height of the Vietnam War, when recruits were needed, and that Mr. Thompson claimed the recruiters assisted him in completing the entrance exam (T2. 41, 43).

As to Mr. Thompson having received a GED in prison in 1984, Dr. Prichard stated that “[h]e is able to get his GED . . . Far beyond the capacity of mentally retarded folks” (T. 219). Dr. Prichard testified that a GED would make Mr. Thompson the academic equivalent of a twelfth grader (T. 219). When Dr. Prichard was told that Mr. Thompson cheated to pass the exam, with a GED answer booklet that was floating around the prison, and that his math score was sharply higher from this two previous and failed attempts, Dr. Prichard said it would not change his opinion as to an MR individual being able to pass the GED, even apparently if they had the answers (T2. 44-49).

As for Mr. Thompson’s work history, Dr. Prichard stated, “[h]e worked as a security guard. Common sense says that mentally retarded folks aren’t going to be

¹⁴Nevertheless, the court noted in its final order that military service is above the capabilities of an mental retardation individual (May 21, 2009 Order at 10).

able to procure employment as a security guard” (T. 220). Dr. Prichard testified that Mr. Thompson had jobs, as a “security guard, roofer, cook, truck driver,” that he would “not be hired for” if he were mental retardation (T. 222). Dr. Prichard wrote in his report that mental retardation individuals are incapable of being employed in “positions like a security guard that would require a certain level of independence, proper judgment, and responsibility” (Prichard Report at 6). When asked about Mr. Thompson’s requirements to become a security guard, Dr. Prichard admitted that “I don’t know what the requirement was, but again, you look at it common sensically” (T2. 50). Dr. Prichard testified that “it’s almost laughable to say that a mentally retarded guy is going to be a security guard anywhere” (T2. 50). Dr. Prichard asserted that a mentally retarded person could not be a security guard because they are incapable of being “responsible for the protection of an industry or store” (T2. 60).

Dr. Prichard then began to distinguish the other occupations he concluded a mental retardation individual could or could not perform, stating that a mentally retarded individual could likely be a cook if the level of responsibility was low but not a roofer “unless he’s just handing shingles to somebody” (T2. 50). Dr. Prichard did not inquire into any of the duties these positions required Mr. Thompson to perform (T2. 61). However, Dr. Prichard further explained that a mental retardation individual could flip a burger but could not cook at an Italian

restaurant, and that he could pass up shingles but could not nail a shingle, measure or cut (T2. 61).

Despite those qualifying statements, Dr. Prichard stated unequivocally in his report that being a security guard, a roofer and a cook are “achievements beyond what is plausible for a mentally retarded individual” (Prichard Report at 6).¹⁵

Dr. Prichard was asked if he recalled testifying in *Cherry* that Mr. Cherry, with an IQ of 72, was mentally retarded, despite the fact that Mr. Cherry had been a roofer (T2. 51). Dr. Prichard did not recall that fact (T2. 51).

Dr. Prichard explained that the confidence interval means that “any time you get a full scale IQ score it is actually an estimate. It does not represent a person’s actual IQ. It is an estimate because there is always error in measurement with an intellectual instrument” (T2. 72-73). Dr. Prichard explained that the standard error of measurement results in a range of scores around the obtained score in which the actual score can be said to fall (T2. 73). Dr. Prichard confirmed that the confidence interval is both “necessary because again, there is error in measurement” and excluded from Florida’s statutory definition of mental retardation (T2. 74).

¹⁵ In its final order, the court stated with regard to employment as a roofer, cook and truck driver that “[m]entally retarded persons don’t do these kinds of jobs” (May 21, 2009 Order at 7), showing not only a lack of appreciation for the unscientific nature of Dr. Prichard’s approach but also lack of attention to Dr. Prichard’s qualifications to his remarks.

Dr. Prichard stated that he would administer a new testing instrument on individuals requiring disability determinations for agency benefits before using it in a capital case (T2. 75), suggesting that the precision of Dr. Prichard's science, and thus potentially the result, changes given the circumstances and his view of the importance of the diagnosis.

After Dr. Prichard, the defense called Dr. Stephen Greenspan. Dr. Greenspan co-edited the book published by the AAIDD which is the leading text for defining and diagnosing the mentally retarded (T2. 97). Before Dr. Greenspan reached the crux of his testimony, however, the court excluded his testimony, finding it to be irrelevant because Dr. Greenspan had not personally evaluated and diagnosed Mr. Thompson because of the severe time constraints set by the judge (T2. 115).

Counsel explained that the purpose of the hearing was not just to recite IQ scores but to fully develop evidence regarding mental retardation and Mr. Thompson's intellectual disabilities (T2. 116). Counsel argued that Dr. Greenspan could shed light on the methodologies of the mental health experts in this case, but the court insisted that Dr. Greenspan was going to opine as to which expert is correct in this case, which the court stated is not permissible under Florida law (T2. 115-18). The court said that deciding whether the experts performed correctly was

her job, so Dr. Greenspan could not comment on the other expert's methodology (T2. 199).

When counsel offered to proffer Dr. Greenspan's testimony instead, the court would not permit questioning and required counsel to briefly summarize what Dr. Greenspan would testify to (T2. 120).

Counsel informed the court that Dr. Greenspan would have opined that the data supports Dr. Sultan's methodology, that Dr. Prichard failed to do a complete evaluation, that Dr. Prichard failed to consider the Flynn Effect or practice effect, that Dr. Prichard failed to do adaptive functioning testing even though there were varying IQ scores. Counsel said Dr. Greenspan would discuss that Mr. Thompson's deficits in adaptive functioning explain the varying IQ scores, all information that would have gone to methodology (T2. 121-23). The court found that Greenspan's testimony would only buttress the defense's argument (T2. 123). When given the opportunity to respond, the prosecutor declined to make an argument stating, " You [the judge] are making my argument beautifully. Thank you" (T2. 125).

The court refused to consider written closing memoranda and wanted closing arguments. In closing, counsel urged the court to consider that there are more scores in the 70's than in the 80's in this case and that Dr. Prichard failed to evaluate Mr. Thompson's adaptive functioning to determine the significance of

those scores or offer any explanation (T2. 131). Dr. Sultan considered adaptive functioning data to reach her diagnosis (T2. 134). Counsel urged the court to consider that in *Cherry*, Dr. Prichard found an individual who had an IQ above 70 and had been a roofer to be mental retardation, though he used those same facts to determine Mr. Thompson is not mental retardation (T2. 133).

During the hearing, the court reminded the parties that “the Supreme Court did order us to go forward with this entire evidentiary hearing, which I originally felt was not necessary” (T2. 88).

Post-evidentiary hearing proceedings

Shortly after the hearing on May 7, 2009, Mr. Thompson filed another motion to disqualify the judge from issuing an opinion on the case based on her closing comments and further indications of bias. That motion was denied on May 12, 2009. On that same day, Mr. Thompson filed in this Court a petition for writ of prohibition and in the circuit court a motion to stay the proceedings pending this Court’s review of the petition. The circuit court refused to rule on the stay motion.

Instead, the circuit court quickly issued an order denying Mr. Thompson’s postconviction motion on May 21, 2009 before this Court could rule. The May 21, 2009 order found Mr. Thompson’s IQ was not below the rigid cutoff of 70, that he did not have deficits in adaptive functioning and he failed to show onset before the

age of 18.

Mr. Thompson filed timely notice of appeal. On July 17, 2009, this Court subsequently dismissed the writ of prohibition as moot without prejudice to raise the issue in the instant appeal.

SUMMARY OF THE ARGUMENTS

1. The lower court erred in denying Mr. Thompson's motion because there is ample evidence to support his claim of mental retardation.

2. The trial court erred in excluding the testimony of Dr. Greenspan.

3. Mr. Thompson was denied a full and fair hearing.

4. The circuit court's ruling is unconstitutional, as it is based on *Cherry v. State*, which violates the Eighth Amendment as interpreted by *Atkins v. Virginia*, and the due process clauses of the state and federal constitutions. *Cherry* interprets the definition of mental retardation in Florida's death penalty statute to set a rigid cutoff at an IQ of 70, which is contrary to the clinical psychological definition which provides for a standard error in measurement inherent in testing. The fact that the statutory definition, as interpreted by *Cherry*, results in the admission of evidence that is unscientific and prohibits the admission of scientifically valid evidence creates a due process violation.

5. The trial court erred in applying an improper burden of proof.

STANDARD OF REVIEW

The lower court's findings of fact are owed no deference by this Court when they are tainted by legal error. Factual determinations "induced by an erroneous view of the law" should be set aside. *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956); *see also Central Waterworks, Inc. v. Town of Century*, 754 So. 2d 814 (Fla. 1st DCA 2000). The lower court adhered to *Cherry's* rigid IQ cutoff of 70, stating "[n]owhere is the Circuit Court imbued with authority to reverse or ignore the decisions of the Supreme Court" (May 21, 2009 Order at 14). That finding was based on the misconception that *Cherry* is the governing force as to the scope of the federal constitutional right in *Atkins*. As the lower court's factual determinations were predicated on an unconstitutional misapplication of the law, Mr. Thompson urges this Court not to give those determinations deference.

Cherry instructs that the Court should ask "whether competent, substantial evidence" supports the power court's factual determinations. 959 So. 2d at 712. The lower court did not allow "competent and substantial evidence" to be admitted when it truncated and excluded the manner in which evidence could be presented at the evidentiary hearing. With regard to the lower court's legal determinations, this Court's review is *de novo*. *Id.*

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. THOMPSON'S ATKINS CLAIM BECAUSE AMPLE

EVIDENCE EXISTS TO SUPPORT A FINDING OF MENTAL RETARDATION.

The trial judge's incomplete and truncated *Atkins* evidentiary hearing led to factual determinations that are erroneous, biased and unreliable. No deference can be given to fact findings that are clearly contradictory and where the defense had no adequate opportunity to rebut the State's evidence. *Cf. Hardwick v. Crosby*, 320 F.3d 1127 (11th Cir. 2003) (no deference when state court fact findings are contrary to the record).

Even if the Court finds it appropriate to defer to the factual determinations of the trial judge, those determinations must be based on "competent, substantial evidence." *Cherry*, 959 So. 2d at 712. The lower court's determination that he is not mentally retarded or intellectually deficient is not supported by competent, substantial evidence.

The statutory definition of mental retardation, as construed by *Cherry*, requires showings of (1) significantly subaverage general intellectual functioning, (2) concurrently existing deficits in adaptive behavior, and (3) onset before the age of 18. *Id.* at 711. The complicating factor in Mr. Thompson's case is that he has been incarcerated in a highly controlled environment for 33 years, since age 24. Mr. Thompson is now 57 years old. None of the experts called to testify at the evidentiary hearing had dealt with Mr. Thompson's unique situation where they were testing an individual who had been in a controlled environment for 33 years.

Significantly subaverage intellectual functioning

Drs. Sultan, Greenspan and Prichard agreed that it was necessary to assess Mr. Thompson's IQ scores as a range of potential true IQs. At the evidentiary hearing, the evidence overwhelmingly established that Mr. Thompson has long-standing significantly subaverage intellectual functioning. Counsel argued and proved that Mr. Thompson has a currently IQ score of 71. Counsel argued and proved that over Mr. Thompson's lifetime, there are more IQ scores in the 70's than in the 80's. The IQ score of 71 was received from a more currently normed WAIS-IV test given by Dr. Sultan. The score was not subject to artificially inflated numbers due to a practice or Flynn effect. Dr. Sultan testified that this number was a full scale score that represented a range of potential scores well within the mentally retarded/intellectually deficient range. Even Dr. Prichard could find no error in Dr. Sultan's administration of the test which leaves no room for analyst interpretation. The scores are what they are.

The Stanford Binet V administered by the State's expert was given a little less than two weeks after Mr. Thompson took the WAIS IV. Dr. Prichard could not use the test he believed was the gold standard, and that he uses most often on MR cases. The Stanford Binet V had not been currently normed. The Stanford Binet V is more cumbersome to administer than the WAIS IV. The trial judge found Dr. Prichard's score to be the valid IQ score despite the problems with Dr.

Prichard's methods of administering the test. Dr. Prichard prompted Mr. Thompson to guess when he could not answer questions during the test. He ignored school psychologists repeated diagnosis of Mr. Thompson as mentally retarded over the years in his education as a child. He attempted to explain away that school psychologists had diagnosed Mr. Thompson as educable mentally retarded (T. 70); that he was retained in the first, fifth, and eighth grades, and placed, as opposed to passing, in the sixth grade (T. 40); that he dropped out before ninth grade (T. 50), and he was 18 in the eighth grade (where his classmates were 14) (T. 50). Dr. Prichard thought Mr. Thompson did not "look" mentally retarded.

Further, the trial court's fact assessment was not complete. She had only the State's explanation for the discrepancy in the two test scores. The trial judge refused to allow defense expert, Dr. Greenspan, to testify about the differences in the two test results or offer an explanation for the discrepancies. She based this ruling on the fact that Dr. Greenspan had not personally conducted the testing on Mr. Thompson, even though he ethically could not test the client within the truncated time limits set by the trial court. Nor did the trial judge allow Dr. Sultan, the only defense expert the court would consider, to rebut Prichard's testimony with the benefit of his raw data which had not been provided on the day she testified. The weight of the evidence in the record shows that Mr. Thompson currently has severely limited intellectual functioning.

Deficits in adaptive functioning

Dr. Sultan found severe deficits in her retrospective examination of Mr. Thompson's adaptive behavior. The State's expert did not test for any adaptive functioning, but relied on "common sense" and Mr. Thompson's self-report instead. Competent and substantial evidence support Dr. Sultan's conclusions.

At the evidentiary hearing, Mr. Thompson's school principal, Bill Weaver, testified about Mr. Thompson's inability to interact socially with his peers (T. 47), his mental age lagging behind his chronological age (T. 49-50) and his childlike writing (T. 53). Dr. Sultan testified about the necessity after 33 years of incarceration in a controlled environment for a retrospective assessment of adaptive function in this case (T. 83-84, 117, 181). Dr. Sultan described school records that showed Mr. Thompson's inability to form friendships and adapt to social situations (T. 123). Dr. Sultan was only allowed by the trial court to summarize Donna Adams statements about Mr. Thompson's inability to care for himself, brush his teeth, change his clothes, bath, handle money, pay bills, do laundry, go to the grocery store, and prepare meals (T. 124, 179). Dr. Sultan testified that Ms. Adams observed Mr. Thompson's isolation among his peers, including his siblings (T. 128). Mr. Weaver, Ms. Adam and Dr. Sultan observed Mr. Thompson's long-standing gullibility and naïveté (T. 131-36).

Despite this evidence, the trial court relied on Dr. Prichard's testimony even though Mr. Thompson exposed the deficiencies in Dr. Prichard's opinion, including his contradictory testimony on the Practice Effect (T. 196-97; T2. 22), his failure to review records or consider evidence about Mr. Thompson's inability to take care of himself and perform everyday tasks (T. 222; T2. 11).

Dr. Prichard was questions about his failure to include all of the information in his report to the court (T2. 12, 36-37) such as his questions about Mr. Thompson's inappropriate demeanor (i.e. inappropriate responses such as smiling does not mean that Mr. Thompson is "crazy") (T2. 65), and his reliance on Mr. Thompson's self-report despite the possibility that the information was wrong (T2. 12-14). For example, Prichard assumed Mr. Thompson had been a truck driver even though Mr. Thompson never had a driver's license (T. 222; T2. 14-15). He relied on Mr. Thompson's having served in the military, even though Mr. Thompson reported that the recruiter helped him on the admission test and military records show he was considered weak and unfit soldier who was only active for a few months before being dishonorably discharged (T2. 41-43). Dr. Prichard also relied on Mr. Thompson having had the ability to obtain a GED while in prison as evidence he could not be mentally retarded, even though Department of Corrections records show he had to take the exam three times before passing and

despite his report and strong evidence that showed he cheated to obtain a passing score¹⁶ (T2. 44-49).

Dr. Prichard repeatedly relied on his “common sense” instead of actual testing or independent interviews to show that Mr. Thompson could not be mentally retarded. He opined that mentally retarded individuals could not be security guards without any facts as to whether Mr. Thompson actually had been a guard or if he were, how Mr. Thompson became a security guard (T. 220). Dr. Prichard assumed Mr. Thompson could not be mentally retarded if he had been employed as a cook or a roofer (T. 222) despite his testimony in *Cherry* where he found Mr. Cherry, a former roofer, to be mentally retarded with an IQ score of 72 (T2. 51). The lack of science in Dr. Prichard’s approach was apparent. He knew very little about Mr. Thompson, even though he insisted that common sense showed Mr. Thompson was not mentally retarded. His repeated reliance on inaccurate assumptions about occupations he assumed Mr. Thompson held was not

¹⁶ In its final order, the lower court relied on Dr. Prichard’s testimony that Mr. Thompson cannot be mentally retarded because he would have to function at the level of an eleventh or twelfth grader to get a GED, as mentally retarded individuals can only function at the level of a sixth grader (May 21, 2009 Order at 8). However, the fact that Mr. Thompson could not pass the eighth grade strongly evidences his inability to function at the level of an eleventh or twelfth grader. That fact is far more consistent with Dr. Sultan’s assessment that Mr. Thompson has the mental skills of roughly a 12-year-old, which are reading on a sixth to seventh grade level and writing grammatically correct sentences and paragraphs (T. 108).

a proper basis for a psychologically sound diagnosis. Yet, this is what the trial court relied on in her fact findings.

Dr. Prichard adopted whatever undocumented theory the prosecution proposed such as Mr. Thompson's inability to clean and care for himself was due to the fact that he belonged to a certain generation of males who did not clean or care for themselves in the 50's and 60's. Equally fantastic was the State's theory that Mr. Thompson had a hearing impairment in one ear and that hearing impaired individuals cannot perform academically and have poor motor skills when there were no records to indicate that was true. School records show that Mr. Thompson was thoroughly tested for years and there were no indications of hearing impairments. Moreover, it showed that Mr. Thompson participated in musical programs that would contradict the "hearing impairment" tale woven by the prosecutor. Those theories were unsubstantiated fiction that the trial court used as a basis for her fact findings. The only documented examination done by Dr. Sultan showed that Mr. Thompson's adaptive functioning deficits are legitimate, longstanding and attributable only to his severely limited intellectual and social functioning.

Onset before the age of 18

Mr. Thompson's extensive school records are replete with evidence of mental retardation at a young age, including diagnoses by school psychologists and

IQ tests showing diminished intellectual functioning. Dr. Sultan testified that the school records she reviewed and her interviews with Mr. Weaver and Mr. Thompson's mother documented Bill's intellectual deficits at a young age. Dr. Prichard refused to acknowledge the validity of this information. Had Dr. Greenspan been allowed to testify and as he documented in his report, Mr. Thompson had a longstanding history of mental deficits. In fact, Mr. Thompson's adaptive functioning deficits were so severe that was the distinguishing factor to Dr. Sultan in her finding that Mr. Thompson is mentally retarded.

The trial court incorrectly rejected these facts based on Dr. Prichard's incompetent testing and undocumented assumptions. For this Court to give those fact findings deference, the findings must be based on accurate information after an adversarial testing. No such testing can occur when the trial court excluded defense evidence and limited Dr. Sultan to such an extent that no rebuttal of the State's evidence was allowed. The greater weight of the documented evidence shows that the prosecutor was correct when he called Mr. Thompson a "retarded bump on a log" at trial. Mr. Thompson is mentally retarded now with a WAIS-IV score of 71 and significant deficits in adaptive functioning, just as he was found educable mentally retarded in grade school and was found mentally retarded by Dr. Stillman at trial. This Court should review this case *de novo*, remand for a full and

fair evidentiary hearing before an unbiased judge or find that substantial and competent evidence exists to show that Mr. Thompson is mentally retarded.

ARGUMENT II

THE LOWER COURT ERRED IN EXCLUDING THE TESTIMONY OF DR. GREENSPAN

The trial judge erred in excluding defense mental retardation expert, Dr. Stephen Greenspan, Ph.D., based on an unfounded assumption that Dr. Greenspan would merely comment on the competence or reputation of the other experts in this case. That assumption was incorrect.

Dr. Greenspan's testimony was critical to assist the court in interpreting the evidence before it. Mr. Thompson sought to offer Dr. Greenspan as a mental retardation expert, who as a contributor to AAMR Red Book, could explain the discrepancies in Mr. Thompson's IQ scores throughout his life. Dr. Greenspan would have testified about the methodologies used to test Mr. Thompson and the proper way to read those scores and to arrive at a reliable assessment of a true IQ score. He was the only defense expert who could rebut Dr. Prichard's testimony as he was the only expert available on the date chosen by the trial judge and he was the only expert whose specialty was mental retardation. This Court allowed 90 days to conduct an *Atkins* hearing in this case. The trial court gave Mr. Thompson less than half that time.

Because of the trial court's truncated time schedule, (in which she gave undersigned only two weeks to find an expert who could to clear their schedule, fly to Florida, evaluate Mr. Thompson and create a report by March 26, 2009), counsel was forced to have one expert administer the IQ test and another assist in the interpretation of that data, just as Dr. Prichard did in *Cherry*. The State objected to Dr. Greenspan's testimony because he did not "personally" evaluate Mr. Thompson. Undersigned counsel explained that it was nearly impossible to get a competent expert who was unfamiliar with a case to agree to evaluate and do a complete mental retardation exam in less than 30 days. The trial court rejected those arguments and cut this Court's deadline in half--holding the evidentiary hearing on April 13, 2009 and April 27, 2009.

Mr. Thompson argued in his Response to State's Motion In Limine regarding Dr. Greenspan's testimony that as an editor of and cited authority in the preeminent clinical diagnostic reference book, Dr. Greenspan was uniquely qualified to shed light on the nuances of a mental retardation diagnosis (PCR-III at 771). Given the stark contrast in the methodologies of Dr. Sultan and Dr. Prichard, Dr. Greenspan's expertise was critical to the trial court's understanding of how to interpret the discrepancies in the diagnoses.

Dr. Greenspan did not evaluate Mr. Thompson personally and testified that he did not form an opinion as to whether Mr. Thompson was mentally retarded.

Thus, his testimony could not be interpreted to be the sort of bolstering testimony prohibited as hearsay evidence. In Florida, “[a]n expert may properly explain his opinion on an issue in controversy by outlining the claimed deficiencies in the opposing expert's methodology, so long as the expert does not attack the opposing expert's ability, credibility, reputation or competence.” *Caban v. State*, 9 So. 3d 50, 53 (Fla. 5th DCA 2009). Rule 3.203 permits Mr. Thompson to present “any evidence” that supports his claim of mental retardation.

Dr. Greenspan’s insight into the recommended procedures was relevant because Dr. Prichard testified that he followed the guidelines set forth by the AAIDD in his evaluation. However, given the stark contrast between the test administrations performed by Dr. Sultan and Dr. Prichard, both of whom followed the guidelines of the AAIDD, Dr. Greenspan’s expertise could have been used to explain the discrepancy in the test administrations.

Dr. Prichard claimed in his testimony that he followed the administration manuals when administering the Stanford Binet V standardized test and considered it important to do so. When a standardized assessment instrument is not used in the manner in which it was developed, normed and standardized, the results of that test administration will be invalid. Given that there is a large difference of opinion between Dr. Sultan and Dr. Prichard as to the correct interpretation of the WAIS IV and Stanford Binet V results, Dr. Greenspan was in the best position to educate

the trial court on the correct methodologies. Furthermore, as a renowned academic and publisher in this field, Dr. Greenspan was also in a position to opine as to whether the available data support the conclusions reached by Dr. Sultan and Dr. Prichard. It was not the “legal” definition of mental retardation under Florida law that was at issue with Dr. Greenspan, but the appropriateness of the procedures utilized by the evaluators in this case.

Dr. Greenspan would have testified that in the vast majority of cases, when an individual is determined to be mentally retarded before age 18 and has not received appropriate support and services, the diagnosis will be lifelong. Thus, a retrospective diagnosis of adaptive functioning in the community, together with an absence of appropriate intervention and support will necessarily mean that the individual still has concurrent adaptive deficits.

Dr. Greenspan was not being offered to discuss the definition of mental retardation but to testify as to the appropriate means of assessing intellectual and adaptive functioning, an area on which he had created a tripartite approach to adaptive functioning and published extensively about that subject.

Dr. Greenspan was not “attempting to explain the difference between his opinion regarding Defendant’s retardation and that of others” by being “critical” of Dr. Prichard and supportive of Dr. Sultan’s opinion. Dr. Greenspan had not formed an opinion as to whether or not Mr. Thompson is mentally retarded because he had

not personally tested him. Due to the time constraints of the trial court, the testing had to be conducted before Dr. Greenspan was available. Because both the WAIS and the Stanford Binet had been given, he could not ethically conduct further testing. Dr. Greenspan's opinion was offered for the limited purpose of addressing whether the doctors who evaluated Mr. Thompson followed the guidelines of the AAIDD which is the proper methodology to be used in assessing mental retardation.

It is acceptable under Florida law for an expert to testify as to how his conclusion differs from another expert's conclusion to show that the other expert failed to consider the proper factors. *Caban v. State*, 34 Fla. L. Weekly D607 (Fla. 5th DCA March 20, 2009) (expert may properly explain opinion on issue in controversy by attacking deficiencies in other expert's methodology). Dr. Prichard testified that he followed the guidelines of the AAIDD, and the test administration manual for the Stanford-Binet V when he conducted his *Atkins* evaluation. Dr. Greenspan had formed an opinion as to whether Drs. Prichard and Sultan followed the procedures set forth in authoritative books on mental retardation. Dr. Prichard testified that he believed Dr. Sultan did not follow the proper methods in conducting her testing. Thus, Dr. Greenspan's opinion about whether the experts followed the proper methodology is separate and distinct from any comments on the relative credibility of Drs. Sultan and Prichard. An expert may properly

explain his or her opinion on an issue in controversy by outlining the claimed deficiencies in the opposing expert's methodology so long as the expert does not attack the opposing expert's credibility, reputation or competence." *Network Publications Inc. v. Bjorkman*, 755 So. 2d 1028, 1031 (Fla. 5th DCA 2000). Mr. Thompson specifically argued that it was for the trial court to assess the importance of the Dr. Sultan's and Dr. Prichard's adherence to or departure from the guidelines and the manual. It is proper to use such authoritative books to attack an expert's testimony.

Mr. Thompson was entitled to a full and fair hearing on the issue of his mental retardation. Fla. R. Crim. P. 3.203 states that a defendant may present "any evidence" that supports his claim of mental retardation. The rule places no limits on how Mr. Thompson carries this burden of proof. *See Dingle v. State*, 654 So. 2d 164, 166 (Fla. 3d DCA 1995) (principles of fundamental fairness require that defendant be given the opportunity to present his case adequately within the adversarial system) (citing *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)). In determining the relative credibility of the State and defense witnesses, the trial judge should have been as fully informed as possible as to whether Drs. Sultan and Prichard used the proper diagnostic criteria and methodologies set forth in the authoritative tests on the subject.

Contrary to the State's argument during the hearing, everyone is in agreement as to the statutory definition of mental retardation in Florida. It is the method of evaluation that is at issue. The State cited *Lee County v. Barnett Banks Inc.*, 711 So. 2d 34, 34 (Fla. 2d DCA 1997). *Lee* is distinguishable from the instant cause because the sole basis of the expert's testimony was the legal interpretation of the statute in question. Such is not the case here. *Cf. Nowitzke v. State*, 572 So. 2d 1346 (Fla. 1990) (expert may delineate factors used in forming opposing expert's opinion, his own opinion and compare the predicates on which the two opinions are based). The same distinctions are true with the "bolstering" cases cited by the State during the hearing. Ms. Jaggard claimed that Dr. Sultan's testimony was improper bolstering and hearsay. She offered *Linn v. Fossum*, 946 So. 2d 1032 (Fla. 2006) and *Telfort v. State*, 978 So. 2d 225 (Fla. 4th DCA 2008) to support her claim but neither are applicable here. In *Linn*, this Court held that an expert could not testify that she had relied on consultations with a group of other experts in forming her opinion about whether a doctor had met the standard of care for his profession. The court's concern was that such testimony impermissibly allowed testifying experts to bolster their opinions and served as a "conduit for the opinions of others not subject to cross examination." *Linn*, 946 So. 2d at 1033. The court specifically stated that it in no way precluded experts from "relying on facts or data that are not independently admissible in evidence if

the facts or data are a type reasonably relied on by experts in the subject.” *Id.* *Linn* is a civil medical malpractice case where the “group of doctors” who were consulted never testified. Mr. Thompson’s case is distinguishable in that Dr. Greenspan was present to testify at the April 27, 2009 hearing and would have been subject to cross examination. Moreover, this was an *Atkins* hearing, **not** a trial. There was no prejudice to the State in having the trial court well informed before making a decision on a psychological condition in that Mr. Thompson had the burden of proof. Not the State.

The State also relied on *Telfort* where the prosecution’s fingerprint examiner testified that there was no doubt in his identification of Mr. Telfort’s fingerprint because he had another examiner verify his work. *See Telfort v. State*, 978 So. 2d at 225. The defense objected as improper bolstering, stating that experts cannot bolster their opinions with the opinions of other experts who do not testify. The court reversed because the second examiner who verified the work did not testify and was not subject to cross examination. Again, the *Telfort* case is different from the situation here. Dr. Greenspan would have been subject to cross examination by the State.

The State also cited *Cherry v. State*, 959 So. 2d 702, 711-14 (Fla. 2007); *Phillips v. State*, 984 So. 2d 503, 509-513 (Fla. 2008), and *Jones v. State*, 966 So. 2d 319, 325-30 (Fla. 2007) for their argument that Dr. Greenspan could not testify

about the legal definition of mental retardation. Yet, nowhere in these three cases does this Court preclude experts from testifying about the criteria for mental retardation. The criteria under Florida law and under the AAIDD User's Guide and Red Book are the same. It is the interpretation of the criteria by the Court that is the difference.

Dr. Greenspan's opinion went to whether the evaluations conducted by Drs. Sultan and Prichard conformed to the recommendations of the AAIDD and the administration manuals and supporting literature for their tests. This is acceptable under Florida law. *See Dickens v. State*, 976 So. 2d 660, 661 (Fla. 1st DCA 2008) ("testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact"). Dr. Greenspan would have testified about how an evaluation of mental retardation should be conducted according to professional norms and recommendations within the field of mental retardation.

At the evidentiary hearing, the State claimed that Dr. Greenspan was used simply to bolster the credibility of Dr. Sultan. It is clear from his report that this is not true. Dr. Greenspan had not formed any opinion as to whether or not Mr. Thompson is mentally retarded. Because of the truncated time period to conduct this hearing, Mr. Greenspan could not personally test Mr. Thompson within the restrictions set out by this Court. Because the State did not agree with continuance

motions made by Mr. Thompson, he had been forced to go forward in any fashion he could in order to get this information on the record. Moreover, Dr. Prichard had already attacked Dr. Sultan's methodology and conclusions in his direct examination. Mr. Thompson was, at least, entitled to rebut his testimony after having his raw data to review. An expert may properly explain his opinion on an issue in controversy by outlining the claimed deficiencies in the opposing expert's methodology so long as the expert does not attack the opposing expert's credibility, reputation or competence." *Bjorkman*, 755 So. 2d at 1031. It was for the court to assess the relative importance of the Drs. Sultan and Prichard's adherence to or departure from the proper guidelines for their profession. Dr. Greenspan is uniquely qualified to testify and it was improper for the trial judge to exclude him because he had been prevented by the trial court from having the opportunity to evaluate Mr. Thompson personally.

Moreover, due process applies in mental retardation proceedings. The State cannot withhold its expert's raw data until the morning of the hearing, have its expert attack the defense expert's findings and then foreclose any opportunity for rebuttal by claiming the defense expert did not "see" Mr. Thompson. It is the State who forced Mr. Thompson to offer his case in pieces. As the State said in its motion in limine, this Court gave Mr. Thompson 90 days to hold a hearing and

have this Court render a decision. The trial judge, at the State's urging, gave him less than half that time--44 days.

The State argued that Dr. Greenspan could not be critical of the findings of the State's expert even though the State's expert had already given testimony on direct examination that was critical of Dr. Sultan. Dr. Prichard did not attack Dr. Sultan's impressions of Mr. Thompson, he attacked her methodology in interpreting the test results specifically stating that the data do not support her conclusions. Under Florida law, Dr. Greenspan can comment on and be critical of the data and methodology of the experts. He does not have to "see" Mr. Thompson or give a diagnosis of him to do so. Without his testimony, the court was left to rule based on Dr. Prichard's misleading testimony, misconceptions about how mental retardation is diagnosed, and with a misunderstanding of the capabilities of mentally retarded individuals. Mr. Thompson is entitled to a new hearing.

ARGUMENT III

MR. THOMPSON WAS DENIED A FULL AND FAIR HEARING IN VIOLATION OF THE DUE PROCESS PROTECTIONS OF THE STATE AND FEDERAL CONSTITUTIONS

On February 27, 2009, this Court remanded Mr. Thompson's Rule 3.851 post-conviction motion for a full and fair evidentiary hearing based on *Atkins v. Virginia*, 536 U.S. 304 (2002). It was the second remand to this trial judge on this matter. After the February 2009 remand, two motions to disqualify were filed to

prevent Judge Hogan-Scola from presiding over this case due to her animosity toward counsel and inability to be fair and impartial to Mr. Thompson.

Prior to this Court's 2009 decision, two other motions--a motion to disqualify and a motion to get facts--were filed against the same judge on different grounds. However, the recurring theme in all of these motions was that Judge Hogan-Scola could not be fair and impartial in deciding Mr. Thompson's mental retardation claims.

From the outset of this Court's *Atkins* remand, it was clear that Mr. Thompson was not going to receive a full and fair hearing before Circuit Judge Hogan-Scola. Instead of giving Mr. Thompson the 90 days allowed by this Court, she cut that in half giving him 44 days to present evidence at an evidentiary hearing. During that hearing, Judge Hogan-Scola limited the testimony of both defense experts to the extent that those experts could testify about the definition of mental retardation because their testimony was "irrelevant," and because the defense experts were not "legal experts." The State's expert, however, was allowed to testify as a legal expert on the legal definition of mental retardation.

Dr. Sultan, the only expert to do an adaptive functioning exam, was precluded from testifying about what she had learned from the witness interviews she had conducted on the basis of hearsay, even though hearsay is regularly relied upon by experts in her field. Judge Hogan-Scola refused to allow Dr. Sultan's

curriculum vita to be admitted into evidence. Portions of the background materials Dr. Sultan relied upon were excised from the record so that this Court would not have the benefit of those documents on appellate review.

Dr. Greenspan was completely excluded on the grounds that he had not personally tested Mr. Thompson, even though he could not test him because other experts had already given the IQ tests to comply with the trial judge's expedited timetable. Due to ethical considerations and practice effect, Dr. Greenspan could not retest Mr. Thompson.

After hearing evidence for two days, Judge Hogan-Scola made statements on the record that showed she had prejudged the facts of this case and could not be impartial. *Cf. Valltos v. State*, 707 So. 2d 343 (Fla. 2d DCA 1997). Mr. Thompson filed a writ of prohibition to this Court to preclude Judge Hogan-Scola from deciding his case. He filed a motion for stay in the trial court noticing it of the writ. Instead of considering the stay motion, Judge Hogan-Scola refused to grant it and instead hurried to issue its opinion before this Court could rule on the writ.

Because Judge Hogan-Scola had already ruled on the *Atkins* hearing, this Court denied Mr. Thompson's writ as moot. *Cf. Brown v. Rowe*, 118 So. 2d 9 (1928) (cited in *Bundy v. Rudd*, 366 So. 2d 440 (Fla. 1978)).

Mr. Thompson argued that the basis for writ was that on March 2, 2009, the first business day after this Court's remand, Judge Hogan-Scola ordered a status

hearing that afternoon, even though counsel was unavailable and in court on an evidentiary hearing in Daytona Beach (a case also on remand from this Court on a tight deadline). After learning of counsel's unavailability, Judge Hogan-Scola issued an order, that Mr. Thompson was to name a mental retardation expert; have an evaluation and IQ test by March 13, 2009 and then complete a report and turn it over to the State as soon as possible. The evidentiary hearing was set for April 13, 2009, 44 days after this Court's order. The State was given no deadlines whatsoever.

On March 8, 2009, Mr. Thompson filed another motion to disqualify because he had a legitimate and reasonable fear that Judge Hogan-Scola would continue to marginalize defense counsel and truncate his hearing to the extent that he could not have due process or a full and fair hearing. He cited four grounds for disqualification:

1. Judge Hogan-Scola's accusation in August, 2007 that defense counsel was unethical and unprofessional when she referred counsel to the Code of Professional Conduct for perceived unethical and unprofessional behavior.
2. Judge Hogan-Scola's repeated *ex parte* contact with the prosecution without notice to the defense;
3. Judge Hogan-Scola's employment as a prosecutor in the Dade County State Attorney's Office during the time of Mr. Thompson's 1989 resentencing from which much of the testimony regarding mental retardation was admitted; and

4. Judge Hogan-Scola's attempts to give Mr. Thompson only half the time allotted by this Court and place unreasonable deadlines on counsel to obtain competent mental health evaluations with no such time constraints on the prosecution.

The judge denied the motion to disqualify. Despite Mr. Thompson's concerns of bias and prejudice, he believed this Court had spoken and did not file a Writ of Prohibition to this Court.

However, favoritism for the State and marginalization of the defense did not abate. *Cf. Bundy v. Rudd*, 366 So. 2d 440 (Fla. 1978) (disqualification rule was designed to prevent creation of intolerable adversary atmosphere between trial judge and defendant). Judge Hogan-Scola set out to prevent Mr. Thompson from presenting his case for mental retardation.

When counsel informed the judge that no mental health expert was available to evaluate Mr. Thompson on such short notice, she reset the deadline from March 13 to the 29th. She refused to reset the evidentiary hearing from April 13th even though this Court had given 90 days to complete the hearing (until May 28, 2009). Judge Hogan-Scola said that defense counsel had "four years" to get ready for this evidentiary hearing, even though Mr. Thompson had been repeatedly denied an evidentiary hearing for the last eight years. Counsel did not have an opportunity to choose a qualified mental retardation expert to evaluate and test Mr. Thompson within reasonable time limits as due process dictates. The State had no time limit.

Dr. Faye Sultan, who had evaluated Mr. Thompson for mitigation in previous proceedings, agreed as a favor to counsel to test him by March 29, 2009. Dr. Stephen Greenspan, a nationally recognized mental retardation expert, was not available until April. Dr. Sultan gave Mr. Thompson the WAIS IV IQ test on March 29, 2009. Dr. Gregory Prichard, the State's expert, gave Mr. Thompson the Stanford Benet V on April 6, 2009. Due to the practice effect of repeated testing, Dr. Greenspan could not test Mr. Thompson under the judge's time constraints. Dr. Greenspan was forced to rely on doctors Sultan and Prichard's testing and raw data for his opinions. As a result, he could not diagnose Mr. Thompson based on his own testing, but could only comment on the data and methodologies used by both experts and could opine about their results.

On April 13, 2009, the first day of the evidentiary hearing, Mr. Thompson presented the testimony of Dr. Sultan. From the beginning, it was clear that Judge Hogan-Scola was not going to allow her to testify about any definition of mental retardation, no less the legal definition under the Florida statute. Dr. Sultan was unable to testify about the definition of mental retardation, the American Association for Mental Retardation ("AAMR") or psychological standards for mental retardation or give any opinion about them. Thus, Mr. Thompson could lay no foundation for Dr. Sultan's testimony.

Dr. Sultan also was prohibited from testifying about witness interviews she conducted for the adaptive behavior prong of the mental retardation test because of the State's hearsay objections. Judge Hogan-Scola acknowledged that even though hearsay is admissible in these types of proceedings and that an expert can rely on hearsay for her findings, she would only allow Dr. Sultan to testify as to the diagnostic significance of the witness information, without revealing the anecdotal information and descriptions of Mr. Thompson's behavior and circumstances that the witnesses shared with her. Without the anecdotal information and descriptions from the witnesses, the court's ruling eviscerated the probative effect of the narrative of Mr. Thompson's behavioral history provided to Dr. Sultan. Even though hearsay statements are normally relied upon by experts in these proceedings and are admissible, Judge Hogan-Scola decided that Mr. Thompson could not have the benefit of that Florida law.

Because the State had not disclosed Dr. Prichard's raw data on his testing until the first day of the April 13th evidentiary hearing, Dr. Sultan could not give her opinion of the State's testing. In fact, Mr. Thompson could not cross examine Dr. Prichard at all until April 27th (the only other day the judge would allow to present evidence) because Dr. Prichard's raw data was not disclosed until the morning of April 13th hearing and counsel had not had time to review it.

On April 27th, Mr. Thompson cross examined Dr. Prichard on the telephone. It was clear from the trial judge's rulings on cross and the State's re-direct that Dr. Prichard was allowed to testify to all of the definitions Dr. Sultan was not. Dr. Prichard testified about the definitions of mental retardation and the legal definition under Florida law. He attacked the credibility of Dr. Sultan and her findings. He was allowed to speculate on facts not in evidence (such as a fictitious hearing disorder that is not documented in any of Mr. Thompson's history nor in his self report). Dr. Prichard was even referred to and qualified by the State as a "legal expert" during re-direct so he could comment on the Florida statutory definition, when he had not been qualified or previously offered as such an expert. Mr. Thompson repeatedly objected to the extent that Judge Hogan-Scola became angry, in that she raised her voice and her face got red. The judge refused to limit Dr. Prichard's opinions in any way including considering him a "legal expert."

When Mr. Thompson attempted to present Dr. Greenspan, a nationally recognized mental retardation expert, Judge Hogan-Scola again limited his ability to speak about the definition of mental retardation. The State, as it did in its motion in limine, objected to the relevance of Dr. Greenspan's testimony. After four or five questions and answers, Judge Hogan-Scola stopped the direct examination and reversed her previous ruling on the State's motion in limine—excluding Dr. Greenspan.

Mr. Thompson was forced to proffer Dr. Greenspan's testimony by oral summary. He was not allowed to rebut Dr. Prichard or talk about the methodology or data relied on by the two experts. Dr. Prichard's testimony was admitted without limitation. Both of Mr. Thompson's experts were severely limited in their testimony, even Dr. Greenspan who was the only psychologist qualified as a mental retardation expert.

During the hearing, Judge Hogan-Scola reminded the parties that "the Supreme Court did order us to go forward with this entire evidentiary hearing, which I originally felt was not necessary" (T2. 88). When Judge Hogan-Scola asked the State for its responsive argument, Assistant Attorney General Sandra Jaggard said she had nothing further to say because the judge had made the prosecution's arguments quite well. *Cf. Chastine v. Broome*, 629 So. 2d 293, 295 (Fla. 4th DCA 1993) (when judge becomes participant disqualification required).

Judge Hogan-Scola's bias and prejudice are again a matter of record. On May 7, 2009, Mr. Thompson filed a second motion to disqualify to prevent the judge from any further actions or decisions in this case. The grounds for disqualification in this case have run the gamut from *ex parte* communications to blatant bias against Mr. Thompson to the extent that he was foreclosed from presenting all of this evidence on his mental retardation claims.

Mr. Thompson has waited eight years for an opportunity to present his claims, yet despite this Court's best efforts, a full and fair hearing still has not occurred. This Court gave Mr. Thompson 90 for a full and fair hearing. Judge Hogan-Scola gave him 44. This Court ordered a full and fair hearing, but Mr. Thompson got a truncated proceeding that limited his ability to present evidence. The State had no such limitation, even though it did not have the burden of proof.

Actual prejudice has been shown. Mr. Thompson was prevented from presenting a complete presentation of his evidence from either expert, regardless of whether they tested Mr. Thompson or not. Mr. Thompson was prevented from rebutting Dr. Prichard's testimony by the exclusion of his expert and the late disclosure of Prichard's raw data. The State was unfairly given the opportunity to qualify their psychologist during re-direct examination as a "legal expert" when they offered no proof that he was an expert on Florida law. *Cf. Bundy v. Rudd*, 366 So. 2d 440, 442 (Fla. 1978).

Mr. Thompson was entitled to full and fair post-conviction proceeding, *Holland v. State*, 503 So. 2d 1250 (Fla. 1987); *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994), including the fair determination of the issues by a neutral, detached judge. He did not receive it. The circumstances of this case were "sufficient to warrant fear on [Mr. Thompson's] part that he would not receive a fair hearing by

the assigned judge." *Suarez v. Dugger*, 527 So. 2d 191, 192 (Fla. 1988). In fact, Judge Hogan-Scola had prejudged the issues.

In capital cases, the trial judge "should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983). This is the third time Judge Hogan-Scola has had an opportunity to conduct a full and fair proceeding, which this Court ordered. This is the third time that Mr. Thompson has been denied that chance.

ARGUMENT IV

THE CIRCUIT COURT'S RULING BASED ON CHERRY IS UNCONSTITUTIONAL BECAUSE CHERRY VIOLATES ATKINS AND THE DUE PROCESS PROTECTIONS OF THE STATE AND FEDERAL CONSTITUTIONS

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 retardation when, in fact, they clinically are.

That paradox was created by this Court's decision in *Cherry v. State*, that 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). The *Cherry* paradox is contrary to science, reason and, under *Atkins*, the Eighth Amendment. "A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of [the] limitations [of mentally retarded individuals] in a meaningful way." *Atkins*, 536 U.S. at 310 (citing *Atkins v. Virginia*, 534 S.E.2d 312, 325 (2000) (Hassell, J., and Koontz, J., dissenting)).

Even the State's psychologist, Dr. Gregory Pritchard conceded in this case that "any time you get a full scale IQ score it is actually an estimate. It does not represent a person's actual IQ. It is an estimate because there is always error in

measurement with an intellectual instrument” (T2. 72-73). The legislature recognized this in its staff analysis at the time the statute was formed.

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. Sultan in finding Mr. Thompson 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.¹⁷

Similar findings occurred here. The trial judge urged in one sentence that “[c]onfidence intervals should be taken into account” (May 21, 2009 Order at 9), then stated that “if the witness is not . . . using the criteria set out as the legal standard [i.e. the 70 cutoff score without consideration of SEM], then this Court really should not accept or even receive the opinion”¹⁸ (T. 90). The two positions are contradictory. The trial judge, however, saw any attempt to reconcile the definitions as irrelevant, “for [Dr. Sultan] to evaluate what her opinion is under some other standard, and so to weigh that against Florida, is really not relevant” (T.

¹⁷ Equally baffling is the fact that the lower court cited *Atkins* for the clinical definition of mental retardation, stating that it was consistent with the statutory definition (May 21, 2009 Order at 12). The court also stated that the diagnosis of a mental health expert from a prior proceeding did not “meet the legal or clinical definitions of mental retardation,” betraying its awareness of the distinction between the definitions (May 21, 2009 Order at 13).

¹⁸ The court’s confusion as to how to treat the *Cherry* paradox is also evidenced by the fact that after the Court stated that Dr. Sultan’s testimony based on the clinical definition was irrelevant, no objection and no warning from the court was made when Dr. Sultan testified that she was asked to determine if Mr. Thompson meets the diagnostic criteria for mental retardation (T. 97-89). Presumably, the court and the State had some awareness of the absurdity of preventing a psychologist from testifying as to a medical diagnosis but could not square that with their prior conclusions that only expert opinions reached under the statutory definition were admissible and relevant.

91). The unavoidable result of the trial judge's conclusion is that a clinical diagnosis of mental retardation [which Dr. Sultan gave] is irrelevant to a determination of whether a Florida capital defendant cannot be executed due to mental retardation. The trial judge refused to allow any defense expert to explain how the Florida definition runs afoul of the clinical definition, thereby attempting to circumvent any evidence on which Mr. Thompson could base his constitutional challenge. The State, however, was allowed to qualify their psychologist as a "legal expert" so that he could explain his interpretation of the legal and clinical definitions.

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 (citing Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them From Execution*, 30 J. Legis. 77, 95-96 (2003)).

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. Thompson urges this Court to adopt the legislature’s true intent as is reflected in the staff analysis and overturn *Cherry*.¹⁹ If the Court continues to find that interpretation consistent with legislative intent then the statute, as interpreted by this Court, is unconstitutional.

***Cherry* violates *Atkins* and the Eighth Amendment**

In *Cherry*, this Court determined that the rigid 70 cutoff was permissible under *Atkins* because *Atkins* “left to the states the task of setting specific rules in their determination statutes.” 959 So. 2d at 713. However, *Atkins* did not give unfettered deference to states to define mental retardation. *Atkins* expressly left to the states “the task of developing appropriate ways to enforce the constitutional

¹⁹ Mr. Thompson notes that overruling *Cherry* would not have a drastic effect on the number of *Atkins* claims. In a recent study, researchers determined that Justice Scalia’s fear in *Atkins* that the majority opinion would result in a flood of litigation has not been realized in the years following the decision. John H. Blume, Sheri Lynn Johnson and Christopher Seeds, *An Empirical Look at Atkins v. Virginia and its Application in Capital Cases*, 76 Tenn. L. Rev. 625, 628 (2009). Only 7% of death row inmates file *Atkins* claims, and those claims are not frivolous, as nearly 40% have proved mental retardation. *Id.*

The article also analyzes the enormous disparity of treatment of *Atkins* claims among states, noting that while North Carolina courts grants about 80% of *Atkins* claims, Alabama courts only grants about 12%. *Id.* at 629. The article attributes that disparity to Alabama’s rigid cutoff at an IQ of 70. “Employing a strict IQ score cutoff of 70 . . . may wrongly exclude some individuals with mental retardation from *Atkins*’s protection.” *Id.* at 632.

As Florida has adopted that same cutoff, Florida joins the few states that have chosen to execute mentally retarded individuals based on an unscientific legal designation.

restriction upon [their] execution of sentences,” 536 U.S. at 317 (citing *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) (alterations in original)), but not the authority to *define the scope* of the constitutional restriction.

The holding in *Atkins* that execution of mentally retarded individuals is unconstitutional is unchanged by the court’s deference to states regarding codification of the constitutional rule, formation of procedures of enforcement and other issues with executing the constitutional restriction.

Atkins explicitly draws its constitutional line at the scientific meaning of mental retardation. *Atkins* defines mental retardation in accordance with the clinical definition, 536 U.S. at 309 n.3 (quoting the definition of mental retardation promulgated by the American Association of Intellectual and Developmental Disabilities (“AAIDD”), formerly the American Association of Mental retardation (“AAMR”)), which recognizes the SEM and views 70 as an approximation. *Id.* *Atkins* notes favorably that the state statutes, at the time the *Atkins* Court surveyed them, generally conformed to clinical definitions, *id.* at 317 n.22, and expressly stated that “it is estimated” that “an IQ between 70 and 75 [is] typically considered” the threshold for mental retardation. *Id.* at 309 n.5.

Further, the constitutional analysis of the *Atkins* Court is dependent on the scientific definitions of mental retardation. The court examined the “relationship between mental retardation and the penological purposes served by the death

penalty” to draw the constitutional line, *id.* at 317, and determined that the “clinical definitions of mental retardation” identify “diminished capacities” resulting in a “lesser culpability” that precludes the penal justifications of retribution and deterrence. *Id.* at 318-20. It is the scientifically identified psychological effects of mental retardation, not the formal designation, that establishes the constitutional imperative.

The *Atkins* Court found support for its holding in the Federal Death Penalty Act’s exception for mentally retarded individuals, which has been interpreted to define mental retardation based on the clinical definition. *United States v. Cisneros*, 385 F. Supp. 2d 567, 569 (E.D. Va. 2005) (holding that the court will “use the definition of mental retardation” promulgated by the AAIDD “as cited by the Supreme Court in *Atkins*”).²⁰

Mr. Thompson urges this Court to reconcile Florida law with the *Atkins* prohibition against executing individuals deemed by the psychological community to possess a limited degree of intelligence.²¹

²⁰ The use of the clinical term “mental retardation” in *Atkins* evidences a commitment to the clinical definition, as opposed to simply describing a group of intellectually deficient individuals for which execution is unconstitutional, thereby preventing science from determining the scope of the constitutional right.

²¹ By creating a statutory definition different from the clinical definition, it leads to confusion and repeated misinterpretation by trial judges. Here, the court focused on the fact that Dr. Prichard found the low processing speed score of Dr. Sultan’s WAIS administration “clinically problematic” and that “clinically there is a

Cherry violates due process requirements

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

problem with her scores” (May 21, 2009 Order at 8) which it was not. The court found that “Dr. Sultan never satisfactorily answered the question about the discrepancy between the speed score and the verbal and performance scores. The trial judge apparently forgot that Dr. Sultan did not get an opportunity to respond to Dr. Prichard’s testimony because the court refused to allow another hearing date where Dr. Sultan would be available. By contrast, Dr. Prichard was allowed to respond to Dr. Sultan and suggest that each subpart of the WAIS IV was more important than the full scale score. Prichard suggested that the low processing speed score could be due to a learning disability” as opposed to actual mental retardation (May 21, 2009 Order at 13). The court then refers to the red book definitions from the AAMR.

Thus, the trial judge chose to incorporate into the statutory definition of mental retardation a clinical definitions that are not contained in the language of the statute. Every reason that might favor consideration of that feature (i.e. that a slow processing speed can be an indicator of a learning disability) also supports consideration of a range of IQ scores as the standard error of measure. To reach a conclusion the trial judge wanted to find, the court was able to cherry pick the parts of the clinical definition that supported its conclusion, but refused to allow the defense to rely or even testify about any part of it.

Mr. Thompson submits that it is disingenuous and unconstitutional to permit courts to choose what features of the clinical definition they want to consider, while prohibiting consideration of SEM.

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. 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* paradox can operate 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 Drs. Sultan and Greenspan’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. Thompson 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*. By adopting only part of the psychological definition, this Court has created a definition consisting of part science and part law which results in a unconstitutional Frankenstein of mismatched parts where a clinically mentally retarded individual can still be found not legally mentally retarded. This Court should recede from its holding in *Cherry*.

ARGUMENT V

THE LOWER COURT ERRED BY APPLYING AN UNCONSTITUTIONAL BURDEN OF PROOF

The trial court required Mr. Thompson to prove that he is mentally retarded based on clear and convincing evidence (May 21, 2009 Order at 14). However,

state and federal constitutions require the State to prove that Mr. Thompson is not retarded beyond a reasonable doubt, as the absence of mental retardation should be considered to be an element of first degree murder. *See In re Winship*, 397 U.S. 358 (1970). *Ring v. Arizona* requires any fact finding making an individual eligible for the death penalty to be unanimously found by a jury to be proven beyond a reasonable doubt. 536 U.S. 584, 602 (2002). *Ring* requires such a finding for all facts “necessary to . . . put [a defendant] to death.” *Id.* at 609.

Under *Atkins*, mentally retarded individuals are excluded from execution. Thus, mental retardation is now a factual issue that is determinative of death eligibility and among the findings that *Ring* requires juries to make beyond a reasonable doubt based on the State’s proof.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, Mr. Thompson submits that he is entitled to have the lower court’s order reversed. Mr. Thompson should receive a new evidentiary hearing before a fair and impartial judge in which he is entitled to present his all of his evidence and given the opportunity to rebut the State’s evidence. In the alternative, this Court should find that Mr. Thompson is mentally retarded and constitutionally excluded from execution based on *Atkins*.

CERTIFICATE OF FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that counsel has furnished true and correct copies of the foregoing via U.S. Mail, first class postage prepaid, to opposing counsel this 10th day of December 2009.

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