

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC09-1085**

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**WILLIAM THOMPSON**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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

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**REPLY BRIEF OF APPELLANT**

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## **TABLE OF CONTENTS**

<b>TABLE OF CONTENTS .....</b>	<b>ii</b>
<b>TABLE OF AUTHORITIES .....</b>	<b>iii</b>
<b>ARGUMENT IN REPLY</b>	
<b>Argument I: Ample evidence exists that Mr. Thompson is mentally retarded. .....</b>	<b>1</b>
<b>A. This Court’s IQ standard is unconstitutional in that it excludes Mr.     Thompson despite qualifying IQ scores. ....</b>	<b>1</b>
<b>B. Prolonged confinement hindered the ability to prove mental     retardation under <i>Cherry</i>. ....</b>	<b>8</b>
<b>C. It is unconstitutional to deny Mr. Thompson a fair assessment of     adaptive functioning when he is arguably mentally retarded. ....</b>	<b>10</b>
<b>D. The trial court’s findings are based on the flawed clinical judgment     of the State’s expert and are due no deference. ....</b>	<b>16</b>
<b>E. The State’s expert’s methodology was flawed and     incompetent. ....</b>	<b>18</b>
<b>F. Conclusion: competent and substantial evidence supports a finding     that Mr. Thompson is mentally retarded. ....</b>	<b>25</b>
<b>Arguments II &amp; III: Exclusion of the testimony of Dr. Greenspan and Mr.     Thompson was denied a full and fair hearing. ....</b>	<b>26</b>
<b>Argument IV: <i>Cherry</i> violates <i>Atkins</i> and the Due Process Protections of the     State and Federal Constitutions .....</b>	<b>32</b>
<b>Argument V: The Lower Court Erred by Applying an Unconstitutional     Burden of Proof. ....</b>	<b>33</b>
<b>CONCLUSION.....</b>	<b>34</b>
<b>CERTIFICATE OF FONT .....</b>	<b>34</b>
<b>CERTIFICATE OF SERVICE .....</b>	<b>35</b>

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	passim
<i>Cherry v. State</i> , 959 So. 2d 702 (Fla. 2007) .....	9
<i>Elledge v. Florida</i> , 525 U.S. 944 (1998) .....	10
<i>Ex parte Daniel Angel Plata</i> , 2008 Tex. Crim. App. LEXIS 1398 (2008) .....	30
<i>Foster v. Florida</i> , 537 U.S. 990 (1999) .....	10
<i>Hardwick v. Crosby</i> , 320 F.3d 1127 (11th Cir. 2003) .....	24
<i>Jones v. State</i> , 966 So. 2d 319 (Fla. 2007).....	9
<i>Knight v. Florida</i> , 528 U.S. 990 (1999).....	10
<i>Lackey v. Texas</i> , 514 U.S. 1045 (1995) .....	9
<i>Lewis v. Quarterman</i> , 541 F. 3d 280 (5th Cir. 2008) .....	27
<i>Nixon v. State</i> , 2 So. 3d 137 (Fla. 2009) .....	1, 5, 9, 17
<i>Phillips v. State</i> , 894 So. 2d 28 (Fla. 2004) .....	9
<i>Thompson v. McNeil</i> , 556 U.S. ____ (March 9, 2009) .....	9, 15
<i>Thompson v. State</i> , 351 So. 2d 701 (Fla. 1977).....	12
<i>Thompson v. State</i> , 389 So. 2d 197 (Fla. 1980).....	12
<i>United States of America v. Rocco Surace</i> , case no. 70CR-663 (September 24, 1970).....	13

## Other Authorities

Caroline Everington & J. Gregory Olley, <i>Implications of Atkins v. Virginia: Issues in Defining and Diagnosing Mental Retardation</i> , J. Forensic Psychol. Practice 1 (2008) .....	3
<i>Diagnostic and Statistical Manual of Mental Disorders</i> , 4th Ed. (2000).....	2, 5, 18
George C. Demkowski, <i>Am. J. Forensic Psychology</i> , Vol. 26 (2008) .....	24
Houston Chronicle, <i>Texas Death Row Inmate's Sentence is Reduced to Life</i> , Mike Tolson, Jan. 16, 2008.....	30
Lois A. Weiborn, <i>Conceptual Hurdles to the Application of Atkins v. Virginia</i> , 59 Hastings L.J. 1203 (2008) .....	32
<i>Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases</i> , 18 Cornell J.L. & Pub. Pol'y 689 (2009) .....	6
<i>User's Guide: Mental Retardation Definition, Classification and Systems of Support</i> 12 10 <sup>th</sup> ed. (2007).....	21

**Argument I: Ample evidence exists that Mr. Thompson is mentally retarded.**

**A. This Court's IQ standard is unconstitutional in that it excludes Mr. Thompson despite qualifying IQ scores.**

The State's argument is simply that because Mr. Thompson has a 71 IQ score he cannot be mentally retarded under Florida law. If this interpretation is correct, then *Cherry* has created an irrebutable presumption that no one with an IQ over 70 can be mentally retarded.

In *Nixon*, this Court stated that it had not created such an irrebutable presumption. *Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009). The Court explained that it had "consistently interpreted Section 921.137(1) as providing that a defendant may establish mental retardation by demonstrating all three of the following factors: 1. significant subaverage general intellectual functioning; 2. concurrent deficits in adaptive behavior; and 3. manifestation of the condition before age eighteen." *Id.* at 142. Lack of proof on any one of these elements results in the defendant not being found to be mentally retarded. The statute anticipates that this analysis will be done pre-trial and it presupposes that every mentally retarded person fits within the factors selected by this Court. It makes no provision for an outlier or an anomaly. It makes no provision for the mentally retarded individual who has been incarcerated for 33 years. Under *Cherry*, and the State's argument, no remedy exists for a person in Mr. Thompson's situation.

The DSM-IV, on which this Court relies to interpret § 921.137, specifically rejects this one-size-fits-all approach to mental retardation. *Diagnostic and Statistical Manual of Mental Disorders*, 4th Ed. at 39-40 (2000) (“DSM-IV”) (it is possible to diagnose mental retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior). Such ranges of scores are scientifically acceptable because no one testing instrument is exact and statistical errors “may vary from instrument to instrument.” DSM-IV at 39.

At the evidentiary hearing, Mr. Thompson established that he had a current score on the most recent version of the Wechsler Adult Intelligence Scale (“WAIS-IV”) of 71 which means Mr. Thompson’s IQ is presently somewhere between 68 and 76 (T. 100-01). The range of scores is below the 70 cutoff point. The State’s testing, on which the trial court relied, was essentially worthless. The test was conducted a little less than two weeks after the administration of the WAIS-IV. A cross-practice effect was evident in the old version of the Stanford-Binet that contains substantially similar exercises to the WAIS. The State’s doctor used unauthorized methods of administering the test such as asking Mr. Thompson to guess at the answers (T2. 39-40). Dr. Prichard did not know whether the Stanford Binet manual precluded guessing. *Id.* The trial court refused to allow Mr. Thompson to call Dr. Stephen Greenspan who could have explained the errors in the State’s methodology.

The State ignores these problems in its brief and wrongly analogizes IQ testing to blood-alcohol testing for drunk driving cases. The State suggests IQ testing is similar to blood alcohol tests which are an “element of the offense” and the lower court agreed with that assessment. However, in proving the “element” of blood alcohol content there is a finite scientific result when testing the alcohol level in blood. If the tests are conducted properly, there is no question what the alcohol content is. But, with IQ testing there is no exact number that is Mr. Thompson’s definitive IQ score—no less a finite score 33 years after the crime was committed. “There is no finite score that can represent one’s intellectual functioning with 100% accuracy. There is always a measurement error . . . furthermore, this score does not stand in isolation but must be considered with other evidence (adaptive behavior).” Caroline Everington & J. Gregory Olley, *Implications of Atkins v. Virginia: Issues in Defining and Diagnosing Mental Retardation*, J. Forensic Psychol. Practice 1, 6 (2008). There is no definitive test with a reliable single number that is a person’s IQ.

Even the State’s expert, Dr. Gregory Prichard, acknowledged that a range of IQ scores is the only accurate assessment of IQ scores and that practice effect can occur between the WAIS and the Stanford Binet (T2. 18-19). In fact, he relied on it in *Cherry*. (T2. 53). Mr. Thompson, however, was not allowed to present evidence by Dr. Greenspan that showed why a finite IQ score is not possible. Just

as every person with high cholesterol does not have heart disease, not every mentally retarded person has an exact IQ number. Thus, it is not that Mr. Thompson did not prove significant subaverage general intellectual functioning, it is that his proof (one IQ point above 70) did not fit within the cookie cutter of *Cherry*. This is precisely the arbitrary and capricious application of law that *Atkins* was meant to prevent under the Eighth Amendment.

*Atkins* was supposed to be a reflection of the evolving standards of decency in that the Eighth Amendment exempts from execution individuals who meet the clinical definitions of mental retardation as set forth by the American Association on Intellectual and Developmental Disabilities (“AAIDD”) and the American Psychiatric Association (“APA”). *Atkins v. Virginia*, 536 U.S. 304 (2002). Both define mental retardation as significantly subaverage intellectual functioning accompanied by significant limitations in adaptive functioning, originating before age 18. Most jurisdictions have adopted definitions of mental retardation that conform to those definitions. Florida says that it follows these definitions but it has adopted an exclusionary cutoff that deviates from the clinical definitions and is more restrictive than even the Florida legislature anticipated when it adopted § 921.137.

The Senate’s staff analysis of § 921.137 specifically states:

The bill does not contain a set IQ level, but rather it provides that low intellectual functioning “means



performance that is two or more standard deviations from the mean score on standardized intelligence test specified in the rules of the Department of Children and Family Services. . . . two standard deviations from these tests is approximately a 70 IQ, **although it can be extended up to 75.** The effect in practical terms will be that a person that has an IQ of **around 70** or less will likely establish an exemption from the death penalty.

Senate Staff Analysis and Economic Impact Statement at 11 (February 14, 2001)  
(emphasis added).

This was the legislative intent that was anticipated by the Florida Senate before *Atkins* but ignored in *Cherry*. The Court cited to the DSM-IV definition in *Nixon* as support for the constitutionality of its strict cutoff IQ score of 70, stating that it has consistently held this to be the appropriate standard. The *Cherry* court believed *Atkins* gave it carte blanche to craft its definitions because “various sources and research differ on who should be classified mentally retarded.” *Nixon*, 2 So. 3d at 142.

Instead, the sources cited to support *Cherry* show a consensus on who should be classified as mentally retarded. The DSM-IV’s definition of mental retardation is “about” 70, “approximately two standard deviations below the mean” and specially says “it is possible to diagnose mental retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.” *Id.* at 143; DSM-IV at 39-40. The “Red Book” published by the American Association on Mental Retardation (now AAIDD) has had consistent definitions

since 1983 (IQ of 70 or below on standardized tests and upper limit is intended as guideline and could be extended to 75, 8<sup>th</sup> AAMR definition, Grossman (1983); IQ standard score of approximately 70 or 75 or below based on assessment that includes one or more individual administered general intelligence tests, 9<sup>th</sup> AAMR Definition, Luckasson, et al (1992); performance that is at least two standard deviations below the mean of an appropriate assessment, considering standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations, 10<sup>th</sup> AAMR Definition: Luckasson et al. (2002)).

*Atkins* itself adopted the definitions by the AAMR and DSM-IV noting that “the statutory definitions of mental retardation are not identical but generally conform to the clinical definitions...”). *Atkins*, 536 U. S. at 317 n.22.

Under every definition relied upon by this Court except *Cherry*, it would be cruel and unusual to execute Mr. Thompson. This deviation from the clinical definitions has the effect of excluding some individuals (such as Mr. Thompson) who plainly fall within the class *Atkins* was meant to protect. *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J.L. & Pub. Pol’y 689 (2009). Florida has interpreted *Atkins*’ statement that lower courts may define their own procedural rules to “enforce the constitutional restriction” as a license to apply methods that deviate from and are

more restrictive than the accepted scientific and clinical definitions. *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*). The definition of mental retardation, however, is not “procedural” but a scientific construct that does not exist outside the psychological community. Thus, the *Cherry* definition is unconstitutional and has created an unconstitutional irrebutable presumption that is contrary to *Atkins*.

More egregious than *Cherry* is Mr. Thompson’s case where there is no precedent for a retrospective determination of mental retardation 33 years after the crime was committed. Dr. Faye Sultan did a complete review of background materials and witness interviews and talked about the difficulty of determining adaptive skills after 33 years. She found Mr. Thompson to be mentally retarded when adaptive functioning testing and the WAIS-IV IQ score of 71 were assessed together. Her conclusions were supported by school psychologists who found Mr. Thompson mentally retarded in elementary school, and Dr. Arthur Stillman who found Mr. Thompson mentally retarded in 1989, and the State’s own prosecutor who argued that Mr. Thompson was a retarded bump on a log. School and military records support Dr. Sultan’s conclusion. Witness interviews support Dr. Sultan’s conclusions. The trial court, however, looked only at IQ scores and nothing else.

The State’s expert, Dr. Prichard, had never examined anyone who had been incarcerated for 33 years before attempting to ascertain his mental status, yet he was not particularly curious about finding out how to give an accurate diagnosis.

He gave an IQ test admittedly tainted by practice effect and did no adaptive functioning analysis at all beyond a superficial self-report from the mentally deficient subject--Mr. Thompson (T. 1129). Prichard's facts were wrong (e.g., he thought Mr. Thompson had a driver's license, which he never had; he thought Mr. Thompson had a military career, though he was discharged after a few months; and, he failed to even look at the background materials that showed Mr. Thompson had twice failed a GED in prison and did not pass until he cheated). See, Defense exhibits 1 & 2. Dr. Prichard testified that he did not need any "literature" to support his diagnosis or testing methods, but he apparently did not know that the original purpose of the concept of adaptive behavior analysis in clinical definitions was to check for false positives (T2. 34-35).

Adaptive behavior assessments first appeared in the AAMR clinical definition of mental retardation in 1959 with the intent to "better reflect the social characteristics of the disability, to reduce the reliance on IQ scores and to decrease the number of 'false positives,' or individuals falsely identified as having mental retardation." *AAMR 10<sup>th</sup> ed.*, note 5 at 24 (adaptive behavior is a "bulwark against false positives that would occur if IQ was used as the sole determinant of mental retardation.")). Dr. Prichard conducted no adaptive behavior assessments.

**B. Prolonged confinement hindered the ability to prove mental retardation under *Cherry*.**

The State argues that retrospective mental retardation analysis is not acceptable under Florida law. It does not mention the difficulties in attempting to prove mental retardation 33 years after the crime occurred, largely due to the State's actions and due process violations. *See Thompson v. McNeil*, 556 U.S. 1303-1304 (2009), *cert denied* (J. Stevens and Breyer dissenting "the delay here resulted in significant part from constitutionally defective death penalty procedures for which petitioner was not responsible.") (J. Thomas concurs). Neither Mr. Cherry, Mr. Phillips, Mr. Nixon nor Mr. Jones had been incarcerated for 33 years at the time their mental statuses were evaluated. *Cherry v. State*, 959 So. 2d 702 (Fla. 2007); *Phillips v. State*, 894 So. 2d 28 (Fla. 2004); *Nixon*, 2 So. 3d 137; *Jones v. State*, 966 So. 2d 319 (Fla. 2007).

In fact, no one knows the impact that 33 years of a highly restrictive environment has on an IQ score of an individual who exhibits all of the signs of mental retardation prior to incarceration. *Cf. Lackey v. Texas*, 514 U.S. 1045 (1995). What is clear is the inability of counsel and mental health experts to gather proof of mental retardation after a prolonged confinement. Due process is denied when witnesses die, such as family members and Mr. Thompson's co-defendant, Surace, all of whom would have been able to give valuable insights on Mr. Thompson's adaptive functioning. It is unconstitutional after 33 years to exclude Mr. Thompson from *Atkins* relief when he is arguably mentally retarded and the

delay has been caused by the State's actions. *Cf. Thompson v. McNeil*, 556 U.S. 1303-1304 (2009) (Justices Stevens and Breyer dissenting and Justice Thomas concurring); *cf. Foster v. Florida*, 537 U.S. 990 (1999); *Knight v. Florida*, 528 U.S. 990 (1999); *Elledge v. Florida*, 525 U.S. 944 (1998).

**C. It is unconstitutional to deny Mr. Thompson a fair assessment of adaptive functioning when he is arguably mentally retarded.**

The prosecutor at trial believed that Mr. Thompson was a “retarded bump on a log.” Yet, it was only when mental retardation became a constitutional bar to execution that the State suddenly argued Mr. Thompson is not mentally retarded. Contrary to *Cherry* and the lower court's order, Mr. Thompson is entitled to a fair assessment of adaptive functioning which the lower court did not do. Thus, no deference should be afforded the trial court's fact-findings when competent evidence does not support its conclusions.

Mr. Thompson was entitled to a fair assessment of his adaptive skills. In elementary and secondary school, Mr. Thompson's IQ scores were generally in the 70s (one score was a 90). The State repeatedly downplayed the Henmon-Nelson test on which Mr. Thompson scored a 70 as an invalid instrument for measuring IQ because it could be given as a “group” test, but the test also may be given individually (T. 44). Mr. Thompson's teacher, Bill Weaver, did not know whether the test had been given individually, but he testified that the school psychologist who administered the tests was an excellent mental health professional (T. 41-44).

Mr. Thompson was repeatedly and exhaustively tested and the conclusions by school psychologists were that Mr. Thompson was mentally retarded because of his IQ scores and poor adaptive behavior (the distinguishing factor in mental retardation).

In 1958, school psychologists urged Mr. Thompson's parents to delay his entry into school because they considered him "mildly mentally retarded." School records in 1961 also show him being classified as "mildly retarded and eligible for special class placement." Mr. Thompson was placed in special programs to no avail (T. 40-50). School records in 1959 indicated speech therapy was given to Mr. Thompson, but no hearing problems were noted as suggested by State at the evidentiary hearing. In fact, school records show a physical examination of his ears as being "normal" and his permanent health record reflects Bill having a speech impediment but no hearing problems. See, Defense exhibit 1.

In all, Mr. Thompson failed first, third, fifth and eighth grade twice (T. 50). School records show that Mr. Thompson's grade level in eighth grade was that of a sixth grader. He finally quit school at age 18 when he could not pass eighth grade in 1972. Mr. Thompson was only in the world outside school until 1976 when he was incarcerated for this case.

During his time in the outside world, Mr. Thompson enlisted with the assistance of a recruiter who helped him on the entrance exam and was discharged

from the Marines within a few months. Military records show that he was a weak and unfit soldier. See, Defense exhibits 1 & 2. Donna Adams, Mr. Thompson's common law wife, told Dr. Sultan that she "wore the pants" in the family and that she was constantly reminding Bill about his hygiene and how to perform basic tasks. His only prior conviction was for forging a check that Ms. Adams claimed she sent him to cash.

The facts and circumstances of this crime only underscore Mr. Thompson's mental retardation and his inability to understand the legal process. Mr. Thompson's initial guilty plea was reversed because he did not understand the ramifications of what the plea meant. *Thompson v. State*, 351 So. 2d 701 (Fla. 1977). On remand, however, Mr. Thompson pled guilty again. *Thompson v. State*, 389 So. 2d 197 (Fla. 1980). After pleading guilty and receiving a death sentence, Mr. Thompson testified in his co-defendant, Rocco Surace's trial on September 21, 1978. Mr. Thompson took sole responsibility for the entire crime, claiming that Surace was in the other room or drunk at the time of the crime, even though his testimony contradicted his original statement to police that said Surace was the dominant actor.

In June, 1981, Mr. Thompson explained in a sworn statement that he testified at Surace's trial because he was afraid. Surace had told him he had a contract out on him and would kill him if he did not testify that he was solely



responsible for the victim's death. Surace told him what to say, and if he did exactly what Surace said, he would be able to help Bill get off death row (June 26, 1981 sworn statement of Bill Thompson). Surace testified against Mr. Thompson at his penalty phase.

At the *Atkins* hearing, Mr. Thompson was forced to proffer evidence that showed Bill's gullibility. See, Defense exhibit 2. Surace was dead and Barbara Garritz had long disappeared.

Proffered evidence at the *Atkins* hearing showed that in 1970 Surace had been under surveillance by the FBI for leading a stolen car ring in New York, Alabama and Georgia. In September, 1970, Surace was indicted on three counts of threatening to "influence, intimidate and impede" John Hodges a witness in a case pending in the United States District Court of New York. See *United States of America v. Rocco Surace*, case no. 70CR-663 (September 24, 1970). He was charged with taking Mr. Hodges for an automobile ride during which Hodges was beaten and slashed with a knife on the face and hands. Surace tortured Hodges by rubbing salt in the man's open wounds. Surace also pointed a .38 caliber pistol to Hodges' head and threatened to kill him.

On Surace's FBI rap sheet, he had arrests for grand larceny of an automobile in 1961; forgery in 1961; grand larceny of an automobile in 1962; felony sodomy

and attempted rape in 1965; and battery in 1975. He was arrested for this crime in 1976.

In Justice Breyer's dissent in the United States Supreme Court's denial of Mr. Thompson's certiorari review, he said:

At petitioner's resentencing, [Mr. Thompson] presented substantial mitigating evidence, not previously presented, that suggested that he may be significantly less culpable than his codefendant, who did not receive the death penalty. Petitioner, for example, introduced an affidavit of Barbara Garritz, who witnessed the crime for which petitioner was sentenced to death. She described petitioner's codefendant Rocky Surace as "an evil man" and "the devil, himself" and explained that he "manipulate[d] people...[into]follow[ing] his orders." Tr. 2473 (May 31, 1989). By contrast, she described petitioner as "a big easy-going child who would do just about anything to please" and who "never seemed to have an idea of his own." *Id.* at 2474; see also *ibid.* ("He would do just about anything he was told"). She described the relationship between petitioner and Rocky as follows: "Bill was completely under Rocky's spell. He hung on every word Rocky said and would do and say everything Rocky did and said. He was like Rocky's dog. Rocky would give an order and Bill would do it, no questions asked." *Id.*, at 2475. With respect to the night in question, she explained that, "Everything Bill did, he did at Rocky's direction, just like he always did when I was around the two. I saw what happened and I know that Rocky started and finished the whole thing." *Ibid.*

Garritz's testimony was consistent with the picture of petitioner painted by other witnesses. For example, one of petitioner's teachers testified that while in elementary school petitioner consistently scored in the mid-70s on IQ tests; those scores qualified him for classes for the educable mentally retarded. *Id.*, at 2178 (May 30, 1989).

His teachers also described him as “slow,” a “follower” who was “always...eager to please.” *Id.*, at 2185, 2186, 2185, see also *id.*, at 2191-2192. A psychologist and a psychiatrist who examined him both described him as showing signs of brain damage, *id.*, at 2570-2571, 2577, and a psychiatrist testified that “the kind of disorder [petitioner] has, he’s easily led and felt very threatened by the codefendant,” *id.* at 2564; see also *id.*, at 2602 (“There is no doubt in the world that this man basically appeared to be a rather—rather dependent person who tends to follow the leader. He is not a leader himself. So, whatever Mr. Surace says, he probably goes along with it”). After hearing this evidence, the jury recommended a death sentence by a vote of 7 to 5.

I refer to the evidence only to point out that it is fair, not unfair, to take account of the delay the State caused when it initially refused to allow Thompson to present it at the punishment phase of trial. I would add that it is the punishment, not the gruesome nature of the crime, which is at issue. Reasonable jurors might, and did, disagree about the appropriateness of executing Thompson for his role in that crime. The question here, however, is whether the Constitution permits that execution after a delay of 32 years—a delay for which the State was in significant part responsible. I believe we should grant the writ to answer that question.

*Thompson v. McNeil*, 556 U.S. 1303, 1304 (2009) (Breyer dissenting).

Though Mr. Thompson was undoubtedly a participant in the crime, he was not the dominant party. He was the one who called a paramedics and he was the one who administered first aid and got sugar for the diabetic victim. *State v. Surace*, Case no. 76-3350A, Sept. 21, 1978 (RS. 821, 827). The facts of the crime are consistent with testimony from witnesses at the resentencing and at the *Atkins*

hearing that Mr. Thompson was a follower and not an instigator. Yet, Mr. Thompson could not call these witnesses to his *Atkins* hearing because they are dead or gone after 33 years. It is fundamentally unfair for the State to argue and the trial court to ignore retrospective assessments of Mr. Thompson's mental retardation when due process dictates that they should have been considered by the trial court. Dr. Stephen Greenspan, a contributor to the AAMR "Red Book," also would have addressed the necessity of retrospective assessment of Mr. Thompson had the trial court allowed his testimony (proffered Report of Stephen Greenspan, PhD. at 7).

**D. The trial court's findings are based on the flawed clinical judgment of the State's expert and are due no deference.**

The State argues that Dr. Prichard's findings are more valid because his flawed Stanford Benet V was consistent with IQ scores that were obtained in 1988 by Dr. Dorita Marina who obtained a WAIS-R score of 82. Dr. Greenspan could have explained that Dr. Marina's WAIS-R was ten years obsolete in 1988 and a Flynn effect adjustment of 3 points was justified, bringing the score down to 79. Dr. Marina was examining Mr. Thompson for brain damage which she found and said some subtests indicated mental retardation. Dr. Joyce Carbonell also gave a WAIS-R a year earlier during a competency evaluation, she obtained a score of 84. The test she gave was nine years obsolete and Flynn adjusted to 81 according to

Dr. Greenspan. There is no information on the validity of the administration of those two tests.

Neither doctors Marina or Carbonell however conducted a mental retardation examination. Both were testing for either brain damage or competency. Had Mr. Thompson been allowed to present Dr. Greenspan he could have explained the circumstances of those tests. But the lower court chose to prevent counsel from presenting evidence relevant to Dr. Prichard's methodology. *See Nixon*, 2 So. 3d at 143 (nothing in *Cherry* or § 921.137 precludes defendant from presenting any evidence that is germane to the issue of mental retardation). Dr. Marina testified that some of the subtests indicated mental retardation even though she got a full scale score of 82. Dr. Carbonell tested later and got a score of 84, though she also administered an MMPI at the same time in which she said the scores were so bizarre she could not score the test. Neither doctor believed Mr. Thompson was malingering.

Dr. Arthur Stillman, who did not conduct IQ testing, found Mr. Thompson to be mentally retarded. The state prosecutor argued that Mr. Thompson was a "retarded bump on a log." No mental health professional had been asked to explain the inherent discrepancies in the test scores until 2009 and no doctor had explained that the distinguishing factor that separates a learning disability from mental retardation is the level of adaptive functioning.

Instead of exploring why Mr. Thompson, an individual with a long-standing mental history and current and previous diagnoses of mental retardation, had such a dramatic differential diagnoses between the WAIS-IV full scale score of 71 and the Stanford-Benet V score of 88, which all of the current psychological literature says an expert must do, the State simply argues Mr. Thompson got a 71 therefore he isn't mentally retarded (Answer at 41); DSM-IV at 45; AAIDD/AAMR User's Guide. One IQ point separates Mr. Thompson from exclusion from the death penalty, just as one juror in the 7-5 death verdict separated Mr. Thompson from a life sentence.

**E. The State's expert's methodology was flawed and incompetent.**

Dr. Prichard failed to follow the proper procedures for a differential diagnosis. According to the DSM-IV, when confronted with a differential diagnoses (i.e. a variance in IQ scores), the procedure is clear cut. The mental health professional is required to conduct further assessments.

The diagnostic criteria for Mental Retardation do not include an exclusion criterion: therefore, the diagnosis should be made whenever the diagnostic criteria are met, regardless of and in addition to the presence of another disorder. In Learning Disorders or Communication Disorders (unassociated with Mental Retardation), the development in a specific area (e.g. reading, expressive language) is impaired but there is no generalized impairment in intellectual development and

adaptive functioning. A Learning Disorder or Communication Disorder can be diagnosed in an individual with Mental Retardation if the specific deficit is out of proportion to the severity of the Mental Retardation. DSM-IV at 45.

This is precisely the situation the State ignores. Dr. Prichard testified that he believed Dr. Sultan's results illustrated that Mr. Thompson has a learning disability not mental retardation. Yet, Prichard did no investigation to ascertain whether Mr. Thompson in fact had a learning disability or whether he had both—mental retardation and a learning disability. His blind addiction to only **his** IQ score is directly contradicted by the procedures outlined in the DSM-IV and the AAMR User's Guide. There are no other procedures, no less the one Dr. Prichard created, that are scientifically acceptable in the psychological community other than these two references.

According to the DSM-IV, it is possible to diagnose mental retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Dr. Prichard agreed with this statement when he testified for the defense in Mr. Cherry's case where he relied on another examiner's full scale WAIS score of 72. Prichard agreed that adaptive functioning testing was necessary in Mr. Cherry's case to rule out other possible mental disorders.

However, in Mr. Thompson's case where Dr. Sultan found a 71 on the WAIS-IV and Prichard found a higher score two weeks later, Prichard contends no

adaptive functioning analysis was necessary. What is more problematic than the inconsistent interpretations is that this flawed methodology is contrary to his own profession's standards. "Impairments in adaptive functioning rather than low IQ are usually the presenting symptoms in individuals with Mental Retardation." DSM-IV at 40. The distinguishing factor for mental retardation then is an adaptive functioning assessment which Dr. Prichard did not do. Instead, he contended that Mr. Thompson was of borderline intelligence. "Differentiating Mild Mental Retardation from Borderline Intellectual Functioning requires careful consideration of all available information." DSM-IV at 45. Dr. Prichard, however, failed to look at "all available information" even when two volumes of background materials were handed to him by defense counsel. See, Defense exhibits 1 and 2.

Instead of a competent evaluation, Dr. Prichard resorted to stereotypes and conjecture. He contended that it was "pretty easy to pick out" mentally retarded people and Mr. Thompson did not look retarded and seemed "pretty smart." (T. 218-19). The AAIDD warns that clinical judgment "should not be thought of as a justification for abbreviated evaluations, a vehicle for stereotypes or prejudices, a substitute for insufficiently explored questions, [or] an excuse for incomplete or missing data." *Clinical Judgment* 39 at 91 (2005), Robert L. Schalock & Ruth Luckasson; AAMR 10<sup>th</sup> ed. at 8; DSM-IV-TR at 42, 47.



Prichard also stretched professional ethics by agreeing to give another IQ test less than two weeks after Mr. Thompson had been given the WAIS-IV. While he acknowledged there was a cross-practice effect between the WAIS and the Stanford Benet, he did not communicate the problems to the Court or the State or note that “conditions were not optimal” when interpreting his results (T. T2. 10). Had Dr. Greenspan been allowed to testify, he would have shown that the results of Prichard’s testing was flawed and virtually useless. Taking an IQ test more than once during a short period of time (within six to twelve months) may result in an artificially high score. The AAIDD explains that “practice effect gains occur even when the examinee has not been given any feedback on his performance.” *User’s Guide: Mental Retardation Definition, Classification and Systems of Support* 12 10<sup>th</sup> ed. at 21 (2007). Taking the practice effect into account could make the difference in the diagnosis. Accordingly, the AAIDD warns clinicians to be “sensitive” to these practice effects and best practices recommend “against administering the same intelligence test to someone within the same year.” *Id.* at 21. Consequently, when looking at multiple IQ scores, it is imperative to know how the tests stand in relationship to one another in time.

Had he been allowed to testify, Dr. Greenspan would have been able to inform the trial court that Prichard’s score of 88 should have been Flynn adjusted for the Stanford Binet V which is 8 years obsolete to 85. He would have said that

it is generally consider “highly problematic to administer a second IQ test, even a Stanford Binet very soon after administering a WAIS (or vice versa) so soon after the first administration. This is because of what has been termed the so-called “Practice effect,” a term that refers to the fact that learning is very likely to occur and the scores on the second administration will go up substantially, even 10 IQ points or higher.” Dr. Greenspan explains in his report that it has been shown by Dr. Alan S. Kaufman—the leading authority on interpretation of WAIS and other IQ tests—that Practice effect occurs across different tests, specifically across the WAIS and the Stanford Binet (proffered Greenspan Report at 10).

Dr. Greenspan said over time, the Stanford Binet has come to very closely resemble the WAIS, and there are now very few differences in the content of the two tests, and the effect is much bigger for tests tapping “nonverbal” or “performance” sub-scales and that has to do with the fact that these involve very novel tasks which have not been encountered by the subject previously (such as puzzles or coding tasks). The exposure to such tasks gives the subject a big advantage the next time he or she encounters such tasks, and IQ scores will raise substantially. *Id.* Dr. Greenspan suggested the results on the Stanford Binet should be thrown out and disregarded or at the very least should be lowered by six more points from the Flynn adjusted 85 to a score in the high 70s due to “egregious

inappropriateness of giving a second IQ test two weeks after the first” (proffered Greenspan Report at 10).

Dr. Greenspan opined that for the reason of the egregious Practice effect problem with the Stanford Binet, he considered the WAIS–IV full scale score of 71 a more valid picture of Mr. Thompson’s actual intellectual function than the 88. The trial court did not consider Dr. Greenspan’s report.

Though he acknowledged a practice effect, Prichard downplayed any negative effect on his conclusions. Dr. Prichard tried to explain the difference in the two scores by attributing Dr. Sultan’s scores to a very low score on the processing speed subscales on the WAIS-IV. When asked if his opinion was supported by any reference or literature, Dr. Prichard said “[y]ou don’t need literature to base it on. You’ve got to assume...it’s common sense.” (T2. 34-35). Instead of considering the possibility that Prichard’s Stanford Binet V scores were spuriously high due to Flynn and Practice effects, he suggested that Dr. Sultan’s scores were spuriously low because Mr. Thompson did badly on the subtests requiring processing speed. Prichard suggested that such a large discrepancy suggests brain damage or Learning Disability. Prichard already knew or should have known Mr. Thompson has brain damage from a positive EEG and other evidence. Dr. Greenspan would have testified that brain damage is in no way incompatible with a diagnosis of mental retardation but is often the cause of it and

he knew of no research that suggests low processing speed is incompatible with a diagnosis of mental retardation. *Id.*

Dr. Greenspan proffered that the convention in all of the mental retardation diagnostic manuals is to rely mainly on measures of full-scale IQ to get at deficits in prong one. One of the major diagnostic differentiators between mental retardation and learning disability is prong two—adaptive behavior. People with mental retardation have poor adaptive behavior. People with learning disabilities generally have normal adaptive behaviors. See, Proffered Greenspan Report at 11. Dr. Prichard did no adaptive behavior assessment other than to cherry-pick a few isolated self-reported accomplishments that he believed supported his view that Mr. Thompson was not mentally retarded.

Dr. Prichard’s refusal to conduct a thorough assessment, stereotyping and incompetent testing methods skewed his diagnosis and only underscores the partisan methodology that has been exposed in other jurisdictions.

In Texas, one psychologist, whose expert opinions about condemned prisoner’s IQs in 29 cases—nearly two thirds of all *Atkins* appeals in the state—now faces the loss of his license for errors that systematically favored prosecutors. The psychologist created his own method he called “composite methodology” to inflate scores of persons from the criminal socioculture on the grounds that formal testing assesses mainstream skills that that criminal offenders never learn. *Texas*

*Death Row Inmate's Sentence is Reduced to Life*, Houston Chronicle, Mike Tolson, Jan. 16, 2008; *Ex parte Daniel Angel Plata*, 2008 Tex. Crim. App. LEXIS 1398 (Jan. 16, 2008); George C. Demkowski, *Am. J. Forensic Psychology*, Vol. 26, Issue 3, at 43-61 (2008) .

In this case, Dr. Prichard also appeared to create his own methodology, eschewing psychological reference literature for his own abbreviated assessment, guesses and incomplete clinical judgments. Prichard explained that he found Mr. Cherry mentally retarded with an IQ of 72 due to adaptive deficits and the confidence interval on the test created “a potential that...the true IQ is actually below 70” (T2. 53). Mr. Cherry, however, had less egregious adaptive deficits than Mr. Thompson and Thompson got a lower IQ score on his most recently normed test. See, *Cherry, supra*. There was no difference in the two cases except who had paid Dr. Prichard. Such diagnoses-for-hire cannot be competent and substantial evidence and should be afforded no deference by this Court. See *Hardwick v. Crosby*, 320 F.3d 1127 (11th Cir. 2003) (no deference when state court fact findings are contrary to the record).

**F. Conclusion: competent and substantial evidence supports a finding that Mr. Thompson is mentally retarded.**

The trial judge's incomplete and truncated *Atkins* evidentiary hearing led to factual determinations that are erroneous and biased. The trial court relied exclusively on Prichard's flawed testing and conclusions, therefore its fact findings

are equally 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. *Id.*

Mr. Thompson is entitled to a new *Atkins* hearing with the opportunity to present all of his evidence of mental retardation before an unbiased judge. In the alternative, this Court should find that competent and substantial evidence exists to support a finding that Mr. Thompson is and always has been mentally retarded.

**Arguments II & III: Exclusion of the testimony of Dr. Greenspan and Mr. Thompson was denied a full and fair hearing.**

Mr. Thompson argued that his *Atkins* hearing was fatally flawed by the trial judge's bias which was illustrated by her truncated time limits and exclusion of any rebuttal to the State's case by Dr. Greenspan. The State argues that Dr. Greenspan had no opinion on whether Mr. Thompson is mentally retarded therefore he was properly excluded because he would merely comment on the opinions of other experts. Answer Brief at 58. This is exactly what the state's expert did as he attacked not only Dr. Sultan's findings but her character (T. 198-215). Yet, Prichard admitted Dr. Sultan had correctly scored the WAIS-IV and she reached valid scores. Though for reasons he could not support, he believed her score did not represent Mr. Thompson's full scale IQ (T. 215).

As was true the first two times this case was remanded back to this trial judge, the State created a due process violation by failing to disclose Dr. Prichard's

raw data in time for Dr. Sultan to read it. Then the State objected to Dr. Greenspan's testimony when he was the only expert available who had access to the State's raw data. It was obvious to everyone that Dr. Greenspan could not conduct IQ testing himself. Because of the trial judge's unreasonable time limits, the IQ tests could not ethically be given to Mr. Thompson again. However, Dr. Greenspan could have commented on the experts' methodology because he was the only defense expert who had access to the State's raw data. Conversely, Prichard had Dr. Sultan's raw data well before he testified and he commented on every part of her evaluation, character and even gave legal opinions as legal expert.

Dr. Greenspan's proffered report shows that he renders an opinion only on the data gathered by the two experts to support their conclusions. He should have been able to testify under *Nixon* and the statute in that Mr. Thompson was entitled to present "any evidence germane to the issue of mental retardation." Instead, Mr. Thompson, who had the burden of proof, was not allowed to present his own expert. But, the State's expert, who was qualified as a psychologist and a "legal" expert could testify about Florida law.

The obvious bias of the trial judge against Mr. Thompson and his counsel was evident in this ruling. The defense expert was not allowed to testify or have the raw data to rebut the State's expert. The State's expert was allowed to comment extensively on the Florida statute, and attack the defense case with

impunity. *Lewis v. Quarterman*, 541 F. 3d 280 (5th Cir. 2008) (holding district court erred in refusing to consider affidavit of the author of Stanford Binet test stating that psychologist who administered the test to the defendant did not follow proper procedures).

Had Dr. Greenspan been allowed to testify, he would have explained that Mr. Thompson clearly has significant impairments in intellectual functioning, with many IQ tests throughout his life, and most of them falling in the range of Mild Mental Retardation. The main issue seems to center on some scores that fall in the so-called borderline or low-normal range. Dr. Prichard opined that even one high score rules out mental retardation, as one cannot “fake high”. This suggests that Mr. Thompson was faking low on the lower scores, but no evidence was ever presented by him or anyone else suggesting that Mr. Thompson was malingering or faking an impairment (even in the years predating any criminal case).

Dr. Prichard also stated that intelligence stays constant throughout life and he saw something exceptional in some variability in the scores, with somewhat higher functioning in his later years. Such a statement overlooks the fact that there are many explanations for score variability (norm obsolescence, practice effects, etc.) and that mildly mentally retarded people can get somewhat “smarter” when exposed to years of opportunity in prison, such as acquisition of literacy and exposure to educational materials, including television. Prichard gave no



indication he even considered that Mr. Thompson has been incarcerated in a highly controlled environment for 33 years.

Dr. Greenspan stated there was no doubt that Mr. Thompson had mental retardation as a child, adolescent and young man, even if some cognitive growth seems to have occurred more recently. However, even if cognitive growth has occurred for Mr. Thompson in prison, he still shows evidence of very significant cognitive impairment as reflected in the WAIS-IV test results obtained by Dr. Sultan.

As to adaptive behavior, Dr. Greenspan said there was evidence strongly indicating a pattern of impairment in everyday practical and social functioning that rises to the level needed to support a diagnosis of mental retardation. He cited to data from interviews and ratings, failures in various life roles, and a pattern of dependency on others. Again, Dr. Prichard points to a few facts that he believes are incompatible with mental retardation, but Greenspan believes do not rule out mental retardation. Especially when Dr. Prichard's supporting facts are wrong.

For example, Prichard pointed to Mr. Thompson's having been in the military as incompatible with mental retardation, as he notes that the military does not take enlistees who are mentally retarded. In fact, Dr. Greenspan said there is substantial research literature going back to WWI when enlistees went directly from mental retarded state schools into the military indicating that in time of

manpower need—such as the Vietnam War when Mr. Thompson enlisted—military entrance standards were lowered and people with mild mental retardation enlist. However, they are more likely to fail in the military, which was the case with Mr. Thompson who washed out after a few months. See, Def. exhibit 1&2.

Dr. Prichard also pointed to the fact that Mr. Thompson held a string of jobs, obtained a driver's license and obtained a GED in prison as signs he was not mentally retarded. Dr. Greenspan opined that neither the AAMR "Red Book" nor the DSM-IV rule out mental retardation with isolated areas of accomplishment, but more importantly, he noted that the data did not support Prichard's conclusion. Mr. Thompson's employment was in very menial jobs which he invariably failed after a brief time, he had to take the GED in prison three times (as reflected by prison records) before he could pass the exam and there was evidence (from him and from his dramatic performance increase from the second to third try) that on his last attempt he was given improper assistance. See, Def. exhibits 1 & 2. There was also no evidence from either Ohio or Florida Department of Motor Vehicles that Mr. Thompson ever obtained a driver's license.

Dr. Greenspan would have testified that Dr. Sultan uncovered considerable evidence of adaptive behavior impairment while Dr. Prichard made no effort – systematic or otherwise—to evaluate Mr. Thompson's adaptive behavior, even stating that the IQ test results made such an investigation unnecessary.

Furthermore, Dr. Prichard relies heavily on Mr. Thompson's self-description of his accomplishment, without taking note of the very well-established phenomenon (called the "cloak of competence") whereby individuals with mild mental retardation will—even when it is clearly against their interests—greatly exaggerate their past accomplishments in order to appear more able than they are. Based on these reasons, Dr. Greenspan opined to a reasonable degree of scientific certainty that data supported Dr. Sultan's diagnosis of mental retardation and failed to support Dr. Prichard's claim to the contrary. See, Proffered Greenspan Report at 15-16.

As is evident from Dr. Greenspan's report, he did not attack Dr. Prichard's character, only his methods and the data. Mr. Thompson was entitled to present this information, and the State would have had an opportunity to cross examine him. Contrary to the State's histrionics before the trial judge, this was not a trial in front of an unsophisticated jury where the danger of prejudice from an expert is high. This was an *Atkins* hearing before a judge who was capable of discerning admissible evidence from inadmissible evidence. Not allowing Mr. Thompson any effective rebuttal to Prichard's testimony or testing was unfair and prevented him from carrying his burden of proof. A new *Atkins* hearing before a fair and impartial judge is warranted.

#### **Argument IV: *Cherry* violates *Atkins* and the Due Process Protections of the State and Federal Constitutions**

In its Response, the State argues that Mr. Thompson failed to present an IQ test resulting in a score below 70, and thus, under *Cherry*, Mr. Thompson cannot be mentally retarded. Mr. Thompson made a lengthy argument in his Initial Brief and in Argument I in Reply concerning the propriety of continued adherence to *Cherry*. However, the State chooses not to address the appropriateness of the *Cherry* standard. The State treats *Cherry* as ironclad authority, above consideration, instead of recognizing that it is within the power of this Court to correct the unconstitutional provisions of *Cherry*. The State refused to make an argument for the virtues of *Cherry* because there are none.

*Cherry's* definition is contrary to the Florida legislature's intent and flatly misquotes the DSM-IV on which it relies for support for its statutory interpretation. The definition of mental retardation is a term of art in the psychological community which has no meaning in the legal context other than that given to it by the psychological community. The State can cite to no authority to contrary to this argument. Nor can it quarrel with the plain language of the Senate Staff Analysis and Economic Impact Statement that quoted the bill that created Sec. 921.137 Fla. Stat. which states "1. Definition. The bill does not contain a set IQ level..." Senate Staff Analysis at 11. It was not until *Cherry* that this Court set an arbitrary number of 70 even though neither the DSM-IV nor the AAIDD Red Book contain

such an exclusion. It is impossible to reconcile the *Cherry* interpretation with the sources it purports to rely. The sources do not have a bright line cutoff because there is no way to determine a finite IQ score with the current testing instruments.

The unconstitutional results of *Cherry* are, for the State, better swept under the rug than confronted. The State hides behind *Cherry*'s precedential status rather than engaging in consideration of its propriety.

The equal protection clause violations alone are staggering. Had Mr. Thompson have been incarcerated in federal prison under a death sentence, he would not be eligible for the death penalty. Had he been charged in California, he would not be eligible for the death penalty because a defendant with full scale scores of 81-96 was found to be ineligible in California. In Florida, a defendant with full scale scores of 68-86 is eligible for the death penalty. Lois A. Weiborn, *Conceptual Hurdles to the Application of Atkins v. Virginia*, 59 Hastings L.J. 1203, 1231 (2008). Mr. Thompson is entitled under the constitution to be treated the same as other inmates similarly situated, regardless of jurisdiction. *Cherry* should be overturned.

**Argument V: The Lower Court Erred by Applying an Unconstitutional Burden of Proof.**

Mr. Thompson's Initial Brief sufficiently addresses the State's argument on this issue.

## **CONCLUSION**

Mr. Thompson is entitled to a new *Atkins* hearing before a fair and impartial judge at which he is allowed to present all of his evidence to prove his mental retardation claims. In the alternative, Mr. Thompson prays that this Court finds he is mentally retarded and barred from execution.

## **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 29th day of January 2010.

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