IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT, IN AND
FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 81-1957-C

Division 40

STATE OF FLORIDA

v.

TED HERRING

FINAL ORDER VACATING SENTENCE OF DEATH

The above cause came to be heard on the defendant's Motion for an Order Vacating and Setting Aside Death Sentence. The Court conducted an evidentiary hearing on the motion on November 2 and 3, 2005.

I. The Motion

1. These findings of fact and conclusions of law constitute the court's decision on Ted Herring's motion, pursuant to Florida Rules of Civil Procedure 3.850 and 3.851, for an order vacating and setting aside the sentence of death imposed upon him by this court (hereinafter the "Motion"). The Motion asserts that Herring is a person with mental retardation and thus exempt from execution under the United States Constitution and Florida law. An evidentiary hearing was held on the Motion on November 2 and 3, 2005 (hereinafter the "Evidentiary Hearing" or "Hr'g").

2. For the reasons set forth herein, the Motion is granted, and Herring's sentence of death is hereby vacated and set aside.

II. Herring's Conviction, Sentencing, and Relevant Procedural Background

3. On May 29, 1981, a man working as a clerk in a 7-Eleven store in Daytona Beach, Florida, was shot and killed during a robbery at the store. In February, 1982, Herring was tried for armed robbery and murder in the first degree arising out of this incident. On February 25, 1982, the jury returned a verdict of guilty on both counts. The sentencing phase of Herring's trial was held on February 26, 1982, immediately following the conclusion of the guilt phase. The jury returned an advisory recommendation of death by an eight-to-four vote. The trial judge found that four aggravating and two mitigating circumstances applied and sentenced Herring to death.

4. Herring's death sentence has been the subject of six decisions by the Supreme Court of Florida, as well as decisions, on a petition for a writ of *habeas corpus* by the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit. None of those proceedings or decisions addressed the question of whether Herring is a person with mental retardation.[1]

5. The Motion and Evidentiary Hearing were prompted by the United States Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304 (2002), which holds that the execution of a person with mental retardation is cruel and unusual punishment in violation of the Eighth Amendment. At the August 8, 2003 preliminary hearing on the Motion, this court determined, over the objection of the State, that an evidentiary hearing on the question of whether Herring is a person with mental retardation was necessary and appropriate under the circumstances.

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[1] Herring v. State, 730 So. 2d 1264 (Fla. 1998); Teffeteller v. Dugger, 676 So. 2d 369 (Fla. 1996); Herring v. State, 580 So. 2d 135 (Fla. 1991); Herring v. Dugger, 528 So. 2d 1176 (Fla. 1988); Herring v. State, 501 So. 2d 1279 (Fla. 1987); Herring v. State, 446 So. 2d 1049 (Fla. 1984); Herring v. Sec'y, 397 F.3d 1338 (11th Cir. 2005); Herring v. O'Neil, No. 6:99-cv-1413-Orl-18KRS, slip op. (M.D. Fla. Apr. 14, 2003).

6. Three witnesses – all expert witnesses – were called at the Evidentiary Hearing and provided testimony upon direct examination and cross-examination. Various exhibits including psychological and intelligence testing data and results, school records, medical records, psychological evaluation records, records from prior proceedings, and psychology manuals and articles were received as evidence. Herring called as an expert witness Dr. Wilfred van Gorp, a licensed neurospsychologist and Professor of Clinical Psychology, Columbia University College of Physicians and Surgeons. The State called Dr. Greg Pritchard and Dr. Harry McClaren, both of whom are licensed clinical psychologists in forensic private practice. The court finds all three witnesses to be qualified to opine on whether Ted Herring has mental retardation. These witnesses based their opinions on their in-person evaluations of Herring, structured interviews of Herring's relatives, psychological and intelligence testing and test results, and Herring's medical, psychological, and scholastic records. In addition to his testimony, Dr. van Gorp provided a written report of his opinions and findings. [Hr'g Ex. 2 (June 16, 2003 Letter from Dr. Wilfred G. van Gorp to Jeremy Epstein, Esq)]. Dr. van Gorp opined that Herring satisfies the diagnostic criteria for mental retardation. The State's expert witnesses opined that Herring does not satisfy the criteria. The State's expert witnesses did not prepare any written reports of their findings.

III. The Substantive Standard for Determining Mental Retardation

7. The United States Supreme Court's decision in Atkins categorically prohibits the execution of persons with mental retardation. In Atkins, the Supreme Court did not mandate a bright-line test for retardation but rather left to the states "'the task of developing appropriate ways to enforce the constitutional restriction'" against the execution of persons with mental retardation. Atkins, 536 U.S. at 317 (citations omitted). The Court did note, however, that the clinically accepted definition of mental retardation requires "not only subaverage intellectual

functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." Id. at 318. The court cited as sources for these requirements (i) the American Psychiatric Association's definition of mental retardation as set forth in the DSM-IV-TR (which is widely regarded as the "Bible" for diagnosis of mental disorders); and (ii) the American Association of Mental Retardation's definition. Id. at 309 n.3; Gould v. State, 745 So. 2d 354, 356 (Fla. 4th DCA 1999) (describing DSM-IV-TR as "widely accepted" in the psychological community). The court also pointed out that these definitions are very similar and that the statutory definitions employed by the various states "generally conform to the clinical definitions." Atkins, 536 U.S. at 317 n.22.

8. The DSM-IV-TR diagnostic criteria for mental retardation are as follows:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

[Hr'g Ex. 3 (Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000) (the "DSM-IV-TR") at 41].

9. The DSM-IV-TR goes on to define significantly subaverage general intellectual functioning and significant limitations in adaptive functioning as follows:

> *General intellectual functioning* is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children, 3rd Edition; Stanford-Binet, 4th Edition; Kaufman Assessment Battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ,

> although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning.
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> * * *
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> *Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.

(Id. at 41-42) (emphasis added).

10. The DSM-IV-TR divides cases of mental retardation into four levels of severity: mild (IQ of 50-55 to approximately 70); moderate (IQ of 35-40 to 50-55); severe (IQ of 20-25 to 35-40); and profound (IQ below 20 or 25). (Id. at 42-43.) The Supreme Court's flat prohibition of the execution of persons with mental retardation applies to all four levels of severity.

11. Subsequent to the filing of the Motion, the Supreme Court of Florida adopted Florida Rule of Criminal Procedure 3.203. See Amendments to Fla. R. Crim. P. & Fla. R. App. P., 875 So. 2d 563 (Fla. 2004). The rule provides the following definition of mental retardation:

> "[M]ental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test . . . . The term "adaptive behavior," for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

Fla. R. Crim P. 3.203(b). Consistent with Atkins, this standard is essentially identical to leading clinical standard; i.e., the standard set forth in the DSM-IV-TR. Indeed, both Herring's and the State's pre-hearing memoranda assert that the DSM-IV-TR definition of mental retardation and

the standard set forth in Fla. R. Crim. Proc. 3.203(b) are functionally identical. (Pre-Hearing Brief of Movant Ted Herring, dated Oct. 14, 2005, at 5; State's Pre-Hearing Memorandum, dated Oct. 14, 2005, at 1-3.)

IV. Burden and Standard of Proof

12. Herring bears the burden of proving his mental retardation. Herring contends that the appropriate standard is proof by a preponderance of the evidence. The State contends that the standard is clear and convincing evidence.

13. The Supreme Court of Florida has already expressed deep skepticism toward a clear and convincing evidence standard for Atkins claims. In adopting Florida Rule of Criminal Procedure 3.203 in 2004, the court declined to include a clear and convincing standard in the rule despite a proposal that it do so. In a concurring opinion, Justice Pariente explained that the omission of a clear and convincing evidence standard stemmed from "concerns about the constitutionality of the 'clear and convincing' standard" under Atkins and Cooper. Amendments to Fla. R. Crim. Proc., 875 So. 2d at 566 (Pariente, J., concurring, joined by Anstead, C.J.). Significantly, none of the Justices endorsed the clear and convincing standard.[2]

14. Section 921.137, by its terms, does not apply to persons, such as Herring, who were sentenced prior to July 12, 2001. Because Section 921.137 does not apply to Herring, this Court need not formally declare the clear and convincing standard unconstitutional in order to

[2] Justice Pariente explained further that in cases under Section 921.137(4), Florida Statutes – which requires clear and convincing evidence of mental retardation but was enacted before Atkins was decided – "trial courts [are] obligated to either apply the clear and convincing standard of evidence of Section 921.137(4), or find that standard unconstitutional in a particular case." Id. at 567. According to Justice Pariente, that approach will allow the issue to come before the Supreme Court of Florida "in the form of an actual case or controversy rather than a nonadverserial rules proceeding." Id. Justice Pariente also suggested that "the Legislature amend the [clear and convincing evidence] burden of proof set forth in Section 921.137" (which, again, was enacted before Atkins) in light of Atkins and Cooper and in light of the "clear majority" of states requiring that a defendant only show mental retardation by a preponderance of the evidence. Id. The execution of persons with mental retardation had not yet been declared unconstitutional as of July 12, 2001, when Section 921.137 was enacted.

apply the preponderance of the evidence standard (although if Section 921.137 did apply, the Court would find it unconstitutional). Rather, the Court may adopt the standard of proof it deems appropriate in light of Atkins. The Court adopts the preponderance of the evidence standard of proof for purposes of the Motion in light of the Supreme Court of Florida's refusal to endorse the use of the clear and convincing evidence standard, Justice Pariente's observations, and the following additional considerations:

a. The overwhelming majority of states that have death penalty statutes permit the defendant to establish his or her mental retardation by the preponderance of the evidence. Presently, only five states apply a stricter standard, whereas 24 states apply preponderance of the evidence.

b. In Cooper v. Oklahoma, 517 U.S. 348 (1996), the United States Supreme Court held that it is unconstitutional to require a defendant to prove his incompetence to stand trial by anything more than a preponderance of the evidence. The expressl underpinning of the Cooper holding was that the right to be tried only when competent is a fundamental constitutional right, and that applying a clear and convincing standard of proof impermissibly limits that right. Id. at 353-54. The court also relied on the fact that the overwhelming majority of states required only a preponderance of the evidence to establish incompetence. Id. at 348, 359-62. The same rationale does – and indeed must – apply to mental retardation. The Supreme Court held in Atkins that it is unconstitutional to impose a death sentence upon a mentally retarded person. Requiring persons such as Herring to prove their mental retardation by clear and convincing evidence

would have precisely the effect that was ruled unconstitutional in Cooper. There is simply nothing in Atkins or Cooper suggesting that mental retardation and incompetence should be treated differently from each other. As with the constitutional precept of trying only competent defendants, the Atkins prohibition of death sentences for the mentally retarded is intended, in part, to account for the difficulties impaired defendants have in protecting their interests at trial.

c. In Pruitt v. State, 834 N.E.2d 90, 101 (Ind. 2005), for example, the Supreme Court of Indiana rejected a clear and convincing evidence standard for determining mental retardation, finding that "[t]he reasoning of Cooper in finding a clear and convincing standard unconstitutional as to incompetency is directly applicable to the issue of mental retardation." See also Bowling v. Commonwealth, 163 S.W.3d 361 (Ky.) (applying preponderance of evidence standard to claim of mental retardation in capital case and citing Cooper as authority), cert. denied, 126 S. Ct. 652 (2005).

d. The arguments against applying a clear and convincing standard for proving mental retardation in capital cases are far stronger than the arguments accepted in Cooper with respect to competency. The United States Supreme Court has already held in Ford v. Wainwright, 477 U.S. 399 (1986), that in "capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the

knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." Id. at 411 (citation omitted). In obvious contrast, an erroneous finding of competency is not "irremediable." Moreover, in Cooper, the court found that the State's interests in avoiding erroneous findings of incompetence – which findings can exempt a defendant from being tried at all – were modest. 517 U.S. at 364-65. Applying the Cooper reasoning here, the State's interest in avoiding an erroneous finding of mental retardation is even more modest because such defendants can still be sentenced to life in prison.

15. Even if clear and convincing evidence were the appropriate standard of proof, for all of the reasons explained herein, Herring has in any event proved that he is a person with mental retardation by both a preponderance of the evidence and by the clear and convincing evidence.

V. Herring Has Established That He is a Person With Mental Retardation

16. Herring established at the Evidentiary Hearing that he meets the criteria for a diagnosis of mental retardation under both the DSM-IV-TR and Florida Rule of Criminal Procedure 3.203, which the parties agree are functionally identical for purposes of the Motion. While this conclusion is based on the totality of the evidentiary record, the court finds Dr. van Gorp's testimony particularly credible and compelling. Dr. van Gorp has extensive credentials and accomplishments in the field of psychology. Among other things, he is board certified in clinical neuropsychology, the editor of a prestigious psychology journal, a fellow of the American Psychological Association, and a past president of the American Academy of Neuropsychology. (Hr'g Tr. 30-39.)

A. Significantly Subaverage General Intellectual Functioning

17. Significantly subaverage general intellectual functioning is the first of three criteria required for a finding of mental retardation. As explained previously, and as testified to by both Herring's and the State's expert witnesses, general intellectual functioning is determined through the administration of a standardized, individually administered intelligence test. (Hr'g Ex. 3 (DSM-IV-TR) at 41, 49); Fla. R. Crim. P. 3.203(b); (Hr'g Tr. 46-47 (van Gorp testimony), 160-61 (Pritchard testimony)).

18. The DSM-IV-TR provides that an IQ score of "about 70 or below" constitutes significantly subaverage general intellectual functioning, but also states clearly that "there is a measurement error of approximately 5 points in assessing IQ" and that "it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior." (Hr'g Ex. 3 (DSM-IV-TR) at 41-42.) Herring's and the State's expert witnesses agreed that, consistent with the DSM-IV-TR, persons with IQ scores between 70 and 75 can be diagnosed as mentally retarded. (Hr'g Tr. 67-68 (van Gorp testimony), 236 (McClaren testimony).)

19. Records of four IQ tests administered to Herring were received as evidence during the Evidentiary Hearing. Two of those tests yielded scores between 70 and 75. The first was a November 23, 1976, administration of the Wechsler Intelligence Scale for Children – Revised ("WISC-R"), which was administered to Herring when he was fifteen years old. (Hr'g Ex. 8.) Herring's full-scale score on this test was 72. The subcomponents of the score were a Verbal IQ score of 82 and a Performance IQ score of 67. The second IQ test where Herring scored below 75 was Dr. McClaren's April 7, 2004 administration of the Wechsler Adult Intelligence Scale – Third Edition ("WAIS-III"), which was administered when Herring was 42 years old. (Hr'g Ex.

9.) Herring's full-scale score on this test was 74. The subcomponents of the score were a Verbal IQ score of 82 and a Performance IQ score of 69.

20. Dr. van Gorp testified that Herring's score of 72 on the WISC-R in 1972 is especially reliable because (a) it was administered under ideal testing conditions (among other things, the testing data states that Herring worked "beautifully" with the examiner and that his "motivation to achieve was commendable") (see Hr'g Ex. 8 at VA 310); (b) the WISC-R was, when administered to Herring, an improved and very recently re-normed version of Weschler Intelligence Scale for Children (see discussion of "Flynn" effect, infra); and (c) the subcomponents of Herring's score on the WISC-R are nearly identical to the subcomponents Dr. McClaren found on the WAIS-III approximately 30 years later (Hr'g Tr. 62-67). Dr. McClaren, testifying for the State, did not disagree. Indeed, he agreed that when Herring was administered the WISC-R in 1976 it had recently been "re-normed and changed in some ways to better allow comparison of a person's performance on this test with other people of the same age." (Hr'g Tr. 241.) Dr. McClaren also acknowledged that he had "absolutely no basis to dispute" the characterization of Herring's level of effort on the 1976 test set forth in the testing data, and that such levels of effort "increase[] the validity [and] reliability of a test." (Hr'g Tr. 243-44.)

21. Two other IQ tests were introduced into evidence during the evidentiary hearing. The first was a June 30, 1972, Wechsler Intelligence Scale for Children ("WISC"), which was administered when Herring was almost 11 years old. (Hr'g Ex. 6.) Herring received a full-scale score of 83 on the test. The second was a January 21, 1974 administration to Herring of the same test (the WISC) less than two years later. Herring received a full-scale score of 81 on the test. (Hr'g Ex. 7.) Dr. van Gorp explained in his testimony that both of these scores were subject to the "Flynn" effect, thus reflecting inflated measurements of Herring's intelligence.

22. The "Flynn" effect results from the fact that the intelligence of the population increases over time. As a result, the average IQ increases by .311 points per year. Because IQ tests are normed against the population at a particular point in time, one must deduct .311 points from measured scores on an IQ test for each year that passes after that test's date of publication in order to obtain an accurate score. (Hr'g Tr. 57-59, 241; see also Hr'g Ex. 5 (The Flynn Effect and U.S. Policies: The Impact of Rising IQ Scores on American Society Via Mental Retardation Diagnosis, 58 Am. Psychologist 778 (Oct. 2003)).)

23. Dr. van Gorp applied the .311 point per year "Flynn" adjustment to each of the four IQ tests administered to Herring. The WISC, on which Herring scored an 83 and 81 in 1972 and 1974, respectively, was published in 1949, and thus normed against the population of that time period. Herring took the exam almost 25 years after it was published and, after applying a .311 point per year adjustment, his scores on those exams are revealed to be approximately 76 and 74 respectively. In contrast, Herring's score of 72 on the WISC-R does not require significant downward adjustment because it was published approximately two years before Herring took the test. Herring's score of 74 on the WAIS-III requires Flynn-adjustment to approximately 72 because it was published approximately seven years before Herring took the test. (Hr'g Tr. 59-66.)

24. Accordingly, all of Herring's scores, after accounting for the Flynn effect, are at or around the range of 70-75 and thus consistent with a diagnosis of mental retardation. Significantly, the State's experts acknowledged the Flynn effect and did not offer any specific rebuttal to Dr. van Gorp's application of the Flynn effect to Herring's test scores. Dr. Pritchard testified that the Flynn-effect was "not a hypothetical phenomenon" but rather a "measured phenomenon" that could elevate scores if the "test is 20 years old" when administered, as was

the case with Herring's scores of 83 and 81 on the WISC. (Hr'g Tr. 191-92). Similarly, Dr. McClaren testified that the "Flynn effect exists and that's why tests are periodically renormed." (Hr'g Tr. 258.)

25. Based on the evidence presented at the hearing, the court finds that Herring satisfies the first criterion for mental retardation – significantly subaverage general intellectual functioning given his IQ scores of 72 and 74. The State has not provided any legitimate basis to question the validity of these scores or show that Herring's scores of 81 and 83 on earlier tests are more valid. To the contrary, it is essentially undisputed that, after allowing for the Flynn effect, those scores are more reflective of scores of approximately 75.[3]

26. This determination is also supported by a growing body of legal cases finding persons with IQ scores between 70 and 75 to be mentally retarded and thus exempt from execution. See Bottoson v. State, 813 So. 2d 31, 33-34 (Fla. 2002) (trial court permitted evidentiary hearing where defendant's IQ tests "consistently indicated that he was not mentally retarded" and still considered whether defendant had adaptive deficits); Crook v. State, 813 So. 2d 68, 76-78 (Fla. 2002) (vacating death sentence where there was evidence of brain damage and defendant suffered only "borderline" (as opposed to "mild") mental retardation); Cooper v. State, 739 So. 2d. 82,85-86, 88-89 (Fla. 1999) (vacating death sentence where there was evidence of mental retardation and brain damage notwithstanding IQ test scores of 77 and 82); Downs v. State, 574 So. 2d 1095, 1099 (Fla. 1991) (vacating death sentence where defendant's IQ was 71);

[3] At the evidentiary hearing, the State's expert witnesses mentioned a fifth IQ test but did not offer it into evidence. Neither of the State's experts had seen the test scores, much less the test data. Instead, they made reference to a "deposition" (at which no counsel for Herring was present) from over twenty years ago where a psychologist testified that he administered an IQ test to Herring in 1980 on which Herring scored an 82. (H. Tr. 254-59.) Given that none of the expert witnesses reviewed the test scores or data or knows anything about the testing conditions, the court gives no weight to this "fifth" IQ test. To the extent it is given any weight, it is not inconsistent with a diagnosis of mental retardation. Indeed, the State's expert, Dr. McClaren, conceded that the test score likely would have been subject to a Flynn adjustment of 8 points, yielding an adjusted score of 74. (Id.)

Morris v. State, 557 So. 2d 27, 30 (Fla. 1990) (vacating death sentence where defendant had IQ of approximately 75); In re Hawthorne, 105 P.2d 552, 557 (Cal. 2005) (rejecting "IQ of 70 as the upper limit" for mental retardation); State v. Lorraine, No. 2003-T-0159, 2005 WL 1208119, at *3 (Ohio Ct. App. May 20, 2005) (IQ of 73 "not dispositive of the issue of mental retardation for *Atkins* purposes"); Ex parte Briseno, 135 S.W.3d 1, 7 n.24 (Tex. Crim. App. 2004) ("[S]ometimes a person whose IQ has tested above 70 may be diagnosed as mentally retarded...."); Foster v. State, 848 So. 2d 172, 174-75 (Miss. 2003) (petitioner's IQ scores - ranging between 62 and 80 - did not prevent a finding of mental retardation.); Moore v. Dretke, No. 603CV224, 2005 U.S. WL 1606437, at *4-5 (E.D. Tex. July 1, 2005) (holding that petitioner with IQ scores of 74, 76 and 66 had "satisfie[d] the AAMR criterion of subaverage intellectual functioning"); United States v. Johnson, No. 02 C 6998, 2003 WL 1193257, at *11 (N.D. Ill. Mar. 12, 2003) (holding that petitioner with full-scale IQ of 76 "may be able to state a colorable Eighth Amendment claim based on mental retardation"); Brownlee v. Haley, 306 F.3d 1043, 1073 (11th Cir. 2002) ("[I]t is abundantly clear that an individual 'right on the edge' of mental retardation suffers some of the same limitations of reasoning, understanding, and impulse control as those described by the Supreme Court in *Atkins*.").

27. These decisions reflect appropriate caution on the part of courts in dealing with the question of whether to permit the execution of a human being on the basis of tests with standard error measurements of five points or more. Indeed, the State's own expert witness, Dr. McClaren, found Herring's case to be "in that uncertain area where you can be borderline mental functioning or you can be mentally retarded," "up for honest debate," and one where "reasonable people could differ as to whether Ted was mentally retarded." (Hr'g Tr. 267.) The United States Court of Appeals for the Eleventh Circuit – which ultimately would hear and decide any federal

petition for a writ of habeas corpus related to the issues presented by the motion – finds it "abundantly clear that an individual 'right on the edge' of mental retardation suffers some of the same limitations of reasoning, understanding, and impulse control as those described by the Supreme Court in *Atkins*." Brownlee, 306 F.3d at 1073. One of the State's expert witnesses effectively has conceded that Herring is "right on the edge," which itself is enough under Brownlee to trigger Atkins protection. Moreover, for all of the reasons explained herein, Herring has sufficiently proven that he is mentally retarded.[4]

B. Significant Limitations in Adaptive Functioning

28. The second of the three criteria for a diagnosis of mental retardation is the requirement of significant limitations in adaptive functioning. (Hr'g Ex. 3 (DSM-IV-TR) at 41-43, 49)); Fla. R. Crim. P. 3.203(b). According to the DSM-IV-TR, these limitations must manifest themselves in "at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." (Hr'g Ex. 3 (DSM-IV-TR) at 49.) According to the DSM-IV-TR, "*[a]daptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." (Id. at 42.)

29. The evidentiary hearing record is replete with evidence that Herring satisfies this criterion. While it is impracticable to set forth even a substantial portion of that evidence here, it

[4] The State's reliance on Zack v. State, 2005 Fla. LEXIS 1456 (Fla. 2005) (published at 911 So. 2d 1190), is entirely misplaced. Contrary to the State's arguments, Zack does not impose a bright-line cutoff of 70 or below for a finding of mental retardation. In Zack, the defendant's IQ score was 79, and there was no mention of any scores below 75. Thus, the case simply does not address the implications of IQ scores between 70 and 75 or the five-point standard error of measurement that the DSM-IV-TR and all of the expert witnesses in this case say is in inherent in intelligence testing. The State's own expert witnesses agree that a person with IQ scores between 70 and 75 appropriately can be diagnosed as mentally retarded.

can be found in the hearing transcript at pages 68 through 113, in hearing exhibits 8 and 10 through 22, and in Dr. van Gorp's expert report.

30. A few of many examples from the record concerning Herring's "functional academic skills" are as follows:

a. Herring was forced to repeat the first grade and struggled academically in grades one through four, earning mostly grades of "D" and "F." (Hr'g Tr. 70-71; Hr'g Ex. 10 (Elementary Record - Archdiocese of New York).);

b. At age 14, Herring's math scores were at a 4.2 grade level, and his reading scores were at a 4.7 grade level. (Hr'g Ex. 12 (Educational Evaluation, Dec. 2, 1975) at VA 217).);

c. When Herring was almost 15 years old, on a different set of tests, his reading scores were at a 3.7 grade level, and his math scores were at a 5.7 grade level. (Hr'g Ex. 13 (May 12 & 14, 1976 Testing Data) at VA 319.);

d. When Herring was 15 years, 4 months old, on a different set of tests, his reading scores were at a 4.8 grade level, and his math scores were at a 3.4 grade level. (Hr'g Ex. 8; Hr'g Tr. 262-63.);

31. Herring's performance on standardized academic tests is entirely consistent with the profile of a person with mild mental retardation. The DSM-IV-TR provides that "[b]y their late teens" such persons "can acquire academic skills up to approximately the sixth-grade level." (Hr'g Ex. 3 (DSM-IV-TR) at 43.) Herring was and is not close to that level. Dr. McClaren, one of the State's experts, agreed that these tests results were "consistent" with a diagnosis of mental retardation. (Hr'g Tr. 263.)

32. In addition, there are numerous examples in the record of Herring's significant limitations in adaptive functioning in various other areas, to wit:

a. School records indicate that Herring "could not adjust to the classroom situation." (Hr'g Ex. 11 (Nov. 11, 1975 Wiltwyck School Record) at VA 295);

b. At age 12, Herring was found by a psychiatrist to be "undoubtedly functionally retarded." (Hr'g Ex. 14 (Nov. 28, 1973 Psychiatric Evaluation) at VA 241).);

c. When Herring was approximately 13 years old, although he was already in a special school, it was recommended that he be placed in a "600 school, which is designated for children who have educational handicaps complimented [sic] by minor mental retardation." (Hr'g Ex. 11 at 295 (emphasis added); Hr'g Tr. 74.)

d. At age 14, Herring "experienced difficulties grasping concepts, organizing his thoughts and relating them in a logical, organized manner." (Hr'g Ex. 12 (Dec. 2, 1975 Educational Evaluation) at VA 216);

e. At age 15, Herring "did not know the sequence of the seasons ... or what makes a sailboat move." (Hr'g Ex. 13 (May 12 & 14, 1976 Examination Report).);

f. At age 15, Herring was found by psychologist to be "very dependent upon outside help for a child of his age." (Hr'g Ex. 8 at VA 311.)

g. Herring never developed age-appropriate peer relationships, choosing instead to spend time with older persons who would take care of him, and did not seek normal personal independence. (Hr'g Tr. 86-87.);

h. Herring could not sustain employment of any kind and failed at multiple jobs. (Hr'g Tr. 88.);

i. Based on her experience raising him, Herring's mother did not think Herring was capable in his late teens of changing buses on his own on a trip from New York to Florida. (Hr'g Tr. 87);

j. Herring never supported himself financially, never paid rent, and never had a credit card or bank account. (Hr'g Tr. 88-89); and

k. Even at his current age, Herring was unable to provide an answer when asked what he would do if lost in an airport with only a dollar in his pocket. (Hr'g Tr. 89-90).

33. Tests performed by the State's expert witnesses further confirm that Herring has had – and continues to have – significant deficiencies in adaptive functioning. Dr. Pritchard administered the "Vineland" test, which is a structured interview of someone who knows the person in question well, to a relative who lived with Herring while Herring was in his late teens. (Hr'g Ex. 15; Hr'g Tr. 92-96.) The test resulted in an adaptive functioning score of 68 -- a score that, like an IQ score of 68, is more than two standard deviations below the mean and strongly supportive of a diagnosis of mental retardation. (Id.)[5] Dr. McClaren administered the SIB-R test, another test of adaptive functioning, to Herring. Herring received a score of 49, which is a result several standard deviations below the mean. (Hr'g Tr. 269-70.) While it may be that this score was affected by the fact that some of the questions are inapplicable to a person living on death row (see id.), the score nonetheless is supportive of the conclusion that Herring has significant limitations in adaptive functioning.

[5] Dr. Pritchard testified at the Evidentiary Hearing that Herring's composite score of 68 on the Vineland test is "misleading" because it is the subcomponents of the score that are most important. (Hr'g Tr. 181-82.) This testimony is inconsistent with the DSM-IV-TR, which provides that in applying the Vineland test and other tests of adaptive functioning, the "composite" score "provide[s] a clinical cutoff" in assessing adaptive functioning. Herring falls below the cutoff score of 70. (Hr'g Ex. 3 at 41-42.)

34. Finally, the record of Herring's conduct during his trial also suggests significant limitations in adaptive functioning. Dr. van Gorp addressed the psychological implications of that conduct in detail during his testimony. (See Hr'g Tr. 105-12 and related exhibits).

35. The Court finds that Herring's behavior during his trial and sentencing, as reflected in the record of those proceedings, was consistent with the very concerns that the Supreme Court articulated in Atkins. In Atkins, the Supreme Court explained that one reason for excluding persons with mental retardation from execution is because "[t]he risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty' is enhanced" in the case of such persons. Atkins, 536 U.S. at 320 (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)). Specifically, the Court cited the increased risk of false confessions, the limited ability of persons with mental retardation to assist counsel effectively, and the fact that the demeanor of such persons "may create an unwarranted impression of lack of remorse." Id. at 321. These risks became realities at Herring's trial.

36. Furthermore, Herring's inability to adapt to and properly perceive his circumstances manifested itself in other ways. Despite providing a taped confession to the killing, Herring testified at his trial that while he went to the store with the intent to commit a robbery, a stranger followed him into the store, robbed the clerk, and killed him. Herring's trial counsel later conceded under oath (during post-conviction proceedings) that this defense was "incredible." (Hr'g Ex. C (Nov. 26, 1006 Hr'g Tr., State v. Herring, No. 81-1957 (Fla. Cir. Ct.)), at 400-01.) Worse still, the trial judge stated that Herring's testimony about the second gunman "doomed" Herring to receive a death sentence: "[M]ost damaging of all [Herring] told the jury the preposterous story of how a second robber 'beat him to the punch' [the trial judge's words, not Herring's].... Frankly, this preposterous story doomed the Defendant not only as to a

conviction but as to sentence as well." (Hr'g Ex. 22 (Order, State v. Herring, No. 81-1957, slip. op. (Fla. Cir. Ct. July 24, 1985)) at 5-6 (emphasis added).) Herring's trial counsel also testified that "it was clear," based on discussions with the trial judge and the State, that Herring would have received a life sentence had he pleaded guilty. (Hr'g Ex. A (Dep. of James ("Peyton") Quarles, taken Dec. 12, 1991), State v. Herring, No. 81-1957 (Fla. Cir. Ct.)), at 19-20.) Herring refused to do so, despite the advice of his counsel, and instead proceeded to verdict – notwithstanding his taped confession – on the absurd theory that a second, unrelated gunman killed the clerk. Herring's performance during a trial where his life was at stake validates the concern expressed by the United States Supreme Court in Atkins. Iindeed, it is the clearest possible demonstration of a failure of adaptive functioning.

37. During the evidentiary hearing, the state made much of the DSM-IV-TR's use of the phrase "present adaptive functioning," arguing that there is insufficient evidence of present limitations in Herring's adaptive functioning. The court finds the state's arguments unavailing. First, as shown above, there is substantial evidence, including Dr. van Gorp's findings and the results of the SIB-R test administered by Dr. McClaren, on Herring's present functioning level. Second, Dr. van Gorp testified that his assessment includes Herring's present adaptive functioning. (Hr'g Tr. 114.) Third, the DSM-IV was obviously intended for general application to clinical patients, not persons who have resided on death row for twenty-five years. The structured environment of incarceration by definition does not allow for the sort of independent living where limitations in adaptive functioning are likely to reveal themselves – e.g., finding suitable housing, managing independent finances, paying taxes, preparing meals, managing a household, obtaining and maintaining employment, developing family relationships, and the like. Fourth, the modifier "present" does not appear in Florida Rule of Criminal Procedure 3.203(b)'s

definition of mental retardation. As a matter of law, this rule governs, and the DSM-IV-TR can be used in this proceeding only to the extent consistent with the law. Furthermore, the state should not be heard to argue that the DSM-IV-TR requires more than Florida law for a finding of mental retardation after having submitted a pre-hearing memorandum asserting that the two standards are "functionally identical."

38. Accordingly, the court finds that Herring has satisfied the second criterion for a diagnosis of mental retardation. There is ample evidence in the record that, throughout his life, Herring has suffered from significant limitations in adaptive functioning in multiple areas.

C. Onset Before Age 18

39. Onset of the condition prior to the age of 18 is the third and final criterion for a diagnosis of mental retardation. (Hr'g Ex. 3 at 49); Fla R. Crim. P. 3.203(b).

40. There does not appear to be any dispute among the parties that, whatever Herring's condition may be, it began well before he turned 18 years old. Indeed, a substantial percentage of the evidence in this case concerns Herring's intellectual and adaptive functioning prior to the age of 18. Accordingly, Herring has satisfied the third and final criterion for a diagnosis of mental retardation.

UPON THE FOREGOING findings of fact and conclusions of law, the Motion is granted and Herring's sentence of death is hereby vacated and set aside.

DONE AND ORDERED in Daytona Beach, Volusia County, Florida, this 23rd day of November, 2009.

Joseph G. Will
Circuit Judge

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