IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-2309

JOE ELTON NIXON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, LEON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Appellant Joe Elton Nixon requests that oral argument be heard in this case. Mr. Nixon is under sentence of death and is entitled to "a fair opportunity to show that the Constitution prohibits [his] execution." Hall v. Florida, 134 S. Ct. 1986, 2001 (2014). Oral argument will fully develop the claims at issue in this case, on which Mr. Nixon's life will turn, and this Court has generally granted oral argument in capital cases similarly postured. Accordingly, pursuant to Rule 9.320 of the Florida Rules of Appellate Procedure, Mr. Nixon respectfully moves this Court for oral argument of his appeal.

CITATIONS TO THE RECORD

"R" refers to the current record on appeal filed in this court, of the Leon County Circuit Court's Order dated October 9, 2015.

"Supp. R." refers to the supplemental record filed by the Leon County Circuit Court Clerk on February 18, 2016.

"2006 Int. Dis. R." refers to the Record on Appeal before this Court in case number SC07-953, which resulted in Nixon v. State, 2 So. 3d 137 (Fla. 2009).[1]

[1] Appellant submitted the same record to the court below, on a separate CD-ROM, designating it "SR 5."

I. STATEMENT OF THE CASE AND OF THE FACTS

A. Overview

In 2009 this Court rejected the claim of capital appellant Joe Elton Nixon that its construction of Florida law as imposing a flat IQ score cutoff of 70 for a finding of intellectual disability violated the federal constitution. Nixon v. State, 2 So. 3d 137 (Fla. 2009). The Supreme Court of the United States subsequently agreed with Mr. Nixon. See Hall v. Florida, 134 S.Ct. 1986 (2014) (holding this Court's construction of Florida's intellectual disability statute in Cherry v. State, 959 So. 2d 702 (Fla. 2007) violated Atkins v. Virginia, 536 U.S. 304 (2002)).

Mr. Nixon accordingly reasserted his claim in a successive motion under Fla. R. Cr. Pr. 3.203 and 3.851. (Successive Motion and Appendix thereto ("2015 Motion"); R. 70-5080). The Circuit Court entertained the proceeding on the merits but, in an order of October 9, 2015 (("2015 Order"); R. 6655-7004), summarily dismissed it. Mr. Nixon appeals, seeking from this Court an order granting him an evidentiary hearing at which his mental condition is assessed under the standards mandated by Hall.

B. Background

Mr. Nixon was convicted and sentenced to death for the 1984 murder of a Tallahassee woman. This Court affirmed the conviction and sentence on direct appeal. Nixon v. State, 572 So. 2d 1336 (Fla. 1990) ("Nixon I").

Mr. Nixon subsequently filed a motion pursuant to Fla. R. Crim. P. 3.850

raising numerous claims. The motion was summarily denied by the Leon County Circuit Court, resulting in a reversal by this Court, which remanded for an evidentiary hearing on the specific issue of whether Mr. Nixon had consented to his attorney's strategy of conceding guilt in opening statement. Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000) ("Nixon II").

On remand, the Circuit Court ruled adversely to Mr. Nixon and was again reversed by this Court. Nixon v. State, 857 So. 2d 172 (Fla. 2003) ("Nixon III"). That ruling was in turn reversed by the United States Supreme Court, which held that this Court had applied an erroneous legal standard in evaluating the claim. Florida v. Nixon, 543 U.S. 175 (2004).

On remand from the Supreme Court's decision, this Court addressed and rejected most of Mr. Nixon's remaining claims. Nixon v. State, 932 So. 2d 1009 (Fla. 2006) ("Nixon IV"). With respect to the issue of intellectual disability, which Mr. Nixon had presented in a petition for a writ of habeas corpus, this Court ruled that he should pursue it by filing a motion in the Circuit Court pursuant to Fla. R. Crim. P. 3.203 within sixty days. Id. at 1024.

C. Prior Proceedings Concerning Intellectual Disability

Pursuant to this Court's mandate in Nixon IV, Mr. Nixon on June 19, 2006 filed a timely motion and supporting brief pursuant to Fla. R. Crim. P. 3.203 and 3.851 (("2006 Motion"); 2006 Int. Dis. R., vol. 1, pp. 1-6), claiming that his

conviction and sentence of death were violative of, *inter alia*, the reasoning and holding of Atkins v. Virginia, 536 U.S. 304 (2002).

The Leon County Circuit Court ordered a hearing on the motion, and in advance thereof Mr. Nixon sought permission to present evidence of mental illness as well as mental retardation, on the basis that, regardless of whether his condition fell within the technical definition of mental retardation, the Eighth Amendment as interpreted in Atkins precluded his execution. The Circuit Court denied Mr. Nixon's request in an order of October 17, 2006. (("2006 Order") pp. 1-3; 2006 Int. Dis. R., vol. 6, pp. 1141-43).

An evidentiary hearing was held on October 23, 2006. (See Transcript of Motion Hearing ("MH Tr."); 2006 Int. Dis. R., vols. 8-9).

At the hearing Mr. Nixon presented an expert witness, Dr. Denis William Keyes, who testified that: (1) Mr. Nixon met all the criteria for mental retardation (MH Tr., p. 109:4-19; 2006 Int. Dis. R., vol. 8); (2) Mr. Nixon had adaptive deficits that had manifested before the age of 18 (Id., p. 109:8-15); and (3) the most accurate value for Mr. Nixon's IQ score was 73 (Id., p. 100:1-6).

The State's expert, Dr. Gregory Prichard, conceded that mental retardation could be found up to an IQ score of 75 where significant deficits in adaptive behavior were present, but testified that recent testing showed Mr. Nixon had an IQ score of 80. (MH Tr., pp. 209:19-210:3, 216:12-22; 2006 Int. Dis. R., vol. 9).

Once having reached that conclusion, Dr. Prichard testified, he had not conducted an adaptive behavior analysis. (MH Tr., p. 210:4-9; 2006 Int. Dis. R., vol. 9).

Dr. Prichard conceded that Mr. Nixon had adaptive deficits. (See MH Tr., p. 212:23-24; 2006 Int. Dis. R., vol. 9) ("I'll concede he has got adaptive deficits. Okay. He has got adaptive deficits throughout his records."). But Dr. Prichard's position was that Mr. Nixon was disqualified from a mental retardation diagnosis by his IQ score alone. (MH Tr., p. 210:4-9; 2006 Int. Dis. R., vol. 9). Dr. Prichard explained that Mr. Nixon's ability to achieve an unadjusted IQ score of 88 on a test conducted in 1974, as well as an 80 on the testing Dr. Prichard himself had conducted shortly before the hearing, meant that Mr. Nixon would have been able to achieve such scores at any time in his life, and therefore Mr. Nixon's IQ at the time of the crime was outside the range of mental retardation. (MH Tr., pp. 181:3-182:9; 2006 Int. Dis. R., vol. 8).

While the 2006 Motion was under submission to the Circuit Court, this Court on April 12, 2007 issued its ruling in Cherry v. State, which held that an IQ score of 70 or below was an inflexible criterion of mental retardation under the Florida statutory system. See Cherry, 959 So. 2d 702, 712-13 (Fla. 2007). That same day, the State filed a notice of supplemental authority calling the Circuit Court's attention to Cherry, and in response Mr. Nixon on April 19, 2007 filed a motion for an order that Florida Statute Section 921.137 as interpreted in Cherry

violated the United States Constitution and the corresponding provisions of the Florida Constitution by creating an irrebutable IQ cutoff of 70 and by excluding mental illness. (See 2006 Int. Dis. R., vol. 7, pp. 1214-24).

On April 26, 2007, the Circuit Court issued an Order ((“2007 Order”); 2006 Int. Dis. R., vol. 7, pp. 1225-1301) which:

(1) denied Mr. Nixon’s motion to declare Section 921.137 of the Florida Statues unconstitutional (2007 Order, p. 25; 2006 Int. Dis. R., vol. 7, p. 1249);

(2) held that Mr. Nixon’s presentation failed to show that he was mentally retarded because his evidence was legally irrelevant: “Essentially, Dr. Keyes’s testimony is that the standard error of measure means that 75 is the lower limit of eligibility for the death penalty — the same testimony rejected by the Florida Supreme Court in Cherry,” (2007 Order, p. 16; 2006 Int. Dis. R., vol. 7, p. 1240), a decision that the Court noted it “was without authority to reconsider.” (2007 Order, p. 25; 2006 Int. Dis. R., vol. 7, p. 1249). Because of its view of the binding effect of Cherry—which it described as “by far the most instructive of [this] Court’s opinions for resolving the issues raised here” (2007 Order, p. 7; 2006 Int. Dis. R., vol. 7, p. 1231)—the Circuit Court ruled that Dr. Keyes’s methodology was “inconsistent

both with the plain language of the statute and the Florida Supreme Court's authority." (2007 Order, p. 17; 2006 Int. Dis. R., vol. 7, p. 1241). While questioning Dr. Keyes's approach to dealing with the "statistical and practical uncertainty associated with intelligence testing" (2007 Order, p. 15; 2006 Int. Dis. R., vol. 7, p. 1239), the Circuit Court's dispositive holding was a legal one. Dr. Keyes's testimony was "essentially an argument for the law to be something other than what it is," and "[i]t is of no evidentiary value at all to disagree with the standard the Legislature established." (2007 Order, pp. 19-20; 2006 Int. Dis. R., vol. 7, pp. 1243-44); and

(3) supported its conclusion that Mr. Nixon was not mentally retarded by a lengthy summary of the facts of the crime as revealed in Mr. Nixon's "confession" (2007 Order, pp. 20-25; 2006 Int. Dis. R., vol. 7, pp. 1244-49), which was annexed in full to the order. (2007 Order, Ex. A; 2006 Int. Dis. R., vol. 7, pp. 1250-1301).

Mr. Nixon appealed the Circuit Court's ruling, reiterating to this Court his argument that the Cherry rule was unconstitutional under Atkins. (See Amd. Initial Brief of Appellant filed November 14, 2007 ("Nixon V Brief"); R. 76-165). Specifically, he argued:

> This appeal from a determination by the Circuit Court that the defendant in a capital case was not mentally retarded turns primarily

> on a single question of law: should this Court adhere to its ruling in Cherry v. State, 959 So. 2d 702 (Fla. 2007), that the Florida statutory definition of mental retardation imposes a rigid IQ ceiling of 70?
>
> …
>
> If indeed Cherry controls, the decision below should be affirmed since Mr. Nixon's own contention was that his true IQ score was 73. But if, as we argue below, the ruling in Cherry cannot be reconciled with the Constitution, then there should be a reversal so that the Circuit Court may conduct further proceedings in which it views the facts through the correct legal lens.

(Nixon V Brief, pp. 1-2; R. 90-91).

In addition, Mr. Nixon attacked the use of his "confession" in support of a determination of non-retardation as an Atkins violation (Nixon V Brief, pp. 22-37; R. 111-126) and reiterated:

> his positions below that (i) mental illness renders him categorically ineligible for execution under the Eighth Amendment; [and] (ii) that he is entitled as a matter of federal procedural Due Process to a fair opportunity to make the appropriate evidentiary showing. . .

(Nixon V Brief, p. 70; R. 159).

On January 22, 2009, this Court rejected each of these legal attacks in Nixon v. State, 2 So. 3d 137 (Fla. 2009) ("Nixon V").[2]

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[2] Mr. Nixon reasserted these legal positions in a federal habeas corpus petition filed in the United States District Court for the Northern District of Florida on January 17, 2010. He supported them with a voluminous expert declaration that is part of the present record (See Decl. of George Woods, M.D.; R. 1571 *et seq*.). In connection with the filing of the successive motion below, Mr. Nixon asked the federal court to stay its proceedings and the federal court granted this request. ("Order Staying Proceedings", attached as Ex. A to Reply Brief in Support of Successive Motion Under Fla. R. Crim. P. 3.203 and 3.851; R. at pp. 5147-48).

D. Current Proceedings Concerning Intellectual Disability

1. The Decision in Hall v. Florida, 134 S.Ct. 1986 (2014)

On May 27, 2014, the United States Supreme Court in Hall v. Florida, 134 S.Ct. 1986 (2014) adopted the position that Mr. Nixon had previously asserted in this Court: that the strict Florida cutoff of an IQ score of 70 was an unconstitutional violation of Atkins. Id. at 1990.[3]

The Hall Court wrote: "The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of Atkins." Id. at 1999.

It further held:

♦ "Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise." Id. at 1995.

♦ "Intellectual disability is a condition, not a number. See DSM–5, at 37. Courts must recognize, as does the medical community, that the IQ test is

[3] The decision of this Court that the United States Supreme Court reversed had relied extensively upon Nixon V. See Hall v. State, 109 So. 3d 704, 707-10 (Fla. 2012).

imprecise. . . . [I]n using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number. . . . See APA Brief 17 ('Under the universally accepted clinical standards for diagnosing intellectual disability, the court's determination that Mr. Hall is not intellectually disabled cannot be considered valid')." Id. at 2001.

♦ "It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment. See DSM–5, at 37 ('(A) person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score'). The Florida statute, as interpreted by its courts, misuses IQ score on its own terms; and this, in turn, bars consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability." Id.

2. Mr. Nixon's Successive Motion

a. The Factual Proffer

Mr. Nixon filed his 2015 Motion on May 25, 2015. He supported it with the affidavit of a highly qualified expert, Dr. Stephen Greenspan.[4]

[4] Mr. Nixon subsequently filed a corrected version of the affidavit (see R. 5135). That version was the one relied upon below and is accordingly cited

After comprehensively canvassing the record and evaluating it under current clinical standards through the lens of Hall, Dr. Greenspan concluded to a reasonable scientific certainty that Mr. Nixon was intellectually disabled at the time of the capital offense for which he was convicted in this case and remains so today. (Amd. Greenspan Aff. ¶¶ 149-50; R. 5215-16).

Dr. Greenspan's conclusion was based on an integrated assessment of the three factors that are clinically accepted as requisite to support a diagnosis of intellectual disability: (1) subaverage intellectual functioning; (2) deficits in adaptive functioning; and (3) onset prior to the age of 18. (Amd. Greenspan Aff. ¶ 7; R. 5160-61).

(1) *Prong One: Subaverage Intellectual Functioning*

As described above, Mr. Nixon's 2006 Motion had been denied, and the denial affirmed here, on the ground that his claimed IQ of 73 was *ipso facto* legally insufficient to satisfy the first prong of an intellectual disability diagnosis.

Dr. Greenspan addressed the IQ score question from the perspective of the statement in Hall, 134 S.Ct. at 2001, accurately describing the clinical use of such scores: "Intellectual disability is a condition, not a number . . . [A]n IQ test score . . . is of considerable significance, as the medical community recognizes. But . . .

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herein. (Amended Expert Affidavit of Stephen Greenspan, Ph.D. in Support of Successive Motion Under Fla. R. Crim. P. 3.203 and 3.851 ("Amd. Greenspan Aff."); R. 5152-6629).

an IQ test score represents a range rather than a fixed number. It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." (Amd. Greenspan Aff. ¶ 128; R. 5206).

Dr. Greenspan's expert opinion that the requirements of the first prong of intellectual disability diagnosis had been met in this case (Amd. Greenspan Aff. ¶ 129; R. 5206) was based, in part, on the following:

♦ Dr. Greenspan endorsed as sound under current clinical practice Dr. Keyes's statistical treatment of all of the various IQ scores obtained during Mr. Nixon's lifetime, as well as Dr. Keyes's resulting conclusion that the most accurate single-number estimate of Mr. Nixon's IQ score would be 73. (Amd. Greenspan Aff. ¶¶ 112-18, 127; R. 5198-5202, 5205-06).

♦ Noting Hall's emphasis on the variability of IQ scores, Dr. Greenspan specifically rejected as unsound under current clinical standards the view presented by the state's expert, Dr. Prichard, that the mere fact that Mr. Nixon ever scored above the IQ threshold for intellectual disability necessarily disqualified Mr. Nixon from such a diagnosis. (Amd. Greenspan Aff. ¶ 123; R. 5204).

♦ Dr. Greenspan explained the many reasons why the one glaring outlier IQ score obtained from Mr. Nixon (an unadjusted 88 on a test that was obsolete when it was administered in 1974) should not be considered clinically valid or included in the first prong assessment. (Amd. Greenspan Aff. ¶¶ 124-27; R. 5204-06).

♦ With respect to Mr. Nixon's IQ score of 80 which Dr. Prichard obtained in 2006, Dr. Greenspan discussed "recent research showing that intellectual abilities are more malleable for a longer period than once thought." (Amd. Greenspan Aff. ¶ 122; R. 5203). There was a dramatically less favorable environment for intellectual development surrounding Mr. Nixon at the time of the crime than he had enjoyed in the intervening decades leading up to Dr. Prichard's testing. Thus, applying current clinical knowledge, "I would not be in any way surprised if Joe's actual intellectual abilities were slightly greater in 2006 than in 1984." (Id.)

(2) *Prong Two: Deficits in Adaptive Functioning*

Hall summarizes "deficits in adaptive functioning" as "the inability to learn basic skills and adjust behavior to changing circumstances." Hall, 134 S.Ct. at 1994.

As noted above, the State chose not to put forward any evidence on the subject of adaptive functioning in 2006 (2007 Order, p. 14; 2006 Int. Dis. R., vol. 7, p. 1238) and the State's expert, Dr. Prichard, explicitly conceded that Mr. Nixon had adaptive deficits. (See MH Tr., p. 212:23-24; 2006 Int. Dis. R., vol. 9) ("I'll concede he has got adaptive deficits. Okay. He has got adaptive deficits throughout his records."). Dr. Prichard's concession on this point was more than sound; the record as to Mr. Nixon's adaptive deficits is simply

"overwhelming." (Amd. Greenspan Aff. ¶ 135; R. 5208). Information in institutional and academic records (see e.g., Amd. Greenspan Aff. ¶¶ 53-63, 65, 145, 147; R. 5179-83, 5213-15) buttresses the first-hand accounts of numerous observers (see e.g., Amd. Greenspan Aff. ¶¶ 136, 139, 147; R. 5208-10, 5214-15) showing that "Joe Nixon from childhood onward displayed significant adaptive deficits in a broad range of real-world situations." (Amd. Greenspan Aff. ¶ 141; R. 5211-12).

Not only couldn't Mr. Nixon play cards (see Amd. Greenspan Aff. ¶ 139; R. 5210) or make change (see Amd. Greenspan Aff. ¶ 148; R. 5215), he was unable to participate in ordinary social conversations (see Amd. Greenspan Aff. ¶¶ 141, 147; R. 5211-12, 5214-15). Peers and adults alike described him as "slow" and "strange." (See Amd. Greenspan Aff. ¶ 136; R. 5208-09).

Putting the voluminous record evidence into the clinically appropriate framework for the second prong of an intellectual disability diagnosis, Dr. Greenspan explained in his affidavit that "there are three categories of adaptive behavior, Conceptual, Social and Practical . . . An individual who performs significantly below appropriate levels in one of these categories meets the diagnostic criterion for mental retardation, regardless of his level of functioning in other areas." (Amd. Greenspan Aff. ¶ 134; R. 5208). Mr. Nixon "undoubtedly qualified in at least two areas (Conceptual and Social) and most likely in the third

area (Practical adaptive skills) as well." (Amd. Greenspan Aff. ¶ 135; R. 5208).

Intellectually disabled individuals, like any others, have strengths and weaknesses, but "the diagnosis turns on the deficits." (Amd. Greenspan Aff. ¶ 133; R. 5207-08). Clinical standards clearly forbid "using isolated supposed accomplishments to rule out" intellectual disability. (Amd. Greenspan Aff. ¶ 142; R. 5212). Those standards were violated "by the prior use by this Court and the Florida Supreme Court in pointing to the fact of Joe Nixon's 'confession' to rule out the possibility of his having mental retardation," and this "violation of clinical standards seems to have been specifically condemned by Hall." (See Amd. Greenspan Aff. ¶ 142; R. 5212).[5]

(3) *Prong Three: Age of Onset*

The State did not contest the "age of onset" prong in 2006 (2007 Order, p. 14; 2006 Int. Dis. R., vol. 7, p. 1238), and the record is, again, "overwhelming" that Mr. Nixon's "cognitive and adaptive deficits were first manifested at a quite early age." (Amd. Greenspan Aff. ¶ 144; R. 5213).

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[5] Citing Christopher Slobogin, Scientizing Culpability: The Implications of Hall v. Florida and the Possibility of a "Scientific Stare Decisis", 23 WM. & MARY BILL RTS. J. 415, 422 (2014) (attached to Amd. Greenspan Aff. at Tab 82; R. 6602-03) (explaining that clinically, "even a clear ability to function in the criminal context is irrelevant if the offender can identify an adaptive deficit in either communication, social participation, or independent living . . . Hall's endorsement of the APA definition appears to require this compartmentalized assessment of adaptive functioning as a constitutional matter").

b. Legal Claim Regarding Mental Illness

As indicated above, both the Circuit Court and this Court previously rejected as a matter of law Mr. Nixon's request to introduce evidence of mental illness. Mr. Nixon asserted below that these rulings cannot survive Hall, which explicitly focuses the Eighth Amendment analysis on the totality of an individual's mental functioning rather than technical distinctions that do not comport with the underlying policy purposes of the Atkins exclusion. Mr. Nixon accordingly requested that the Circuit Court set forth a schedule for the evidentiary development of this issue. (Brief in Support of Successive Motion ("Pet. Brief"), p. 9; R. 5099).

3. The State's Answer

The State answered Mr. Nixon's 2015 Motion on June 15, 2015. (Response to Successive Motion ("Opp. Br."); R. 5106-28). The State's position was that it was entitled to a summary decision in its favor. Its brief characterized the Circuit Court's prior rejection of Mr. Nixon's claims as based on factual rather than legal grounds (notably a factual finding as to Mr. Nixon's IQ score) (Opp. Br., p. 18; R. 5123), asserted that this putative finding was affirmed by this Court in 2009 (Opp. Br., p. 7-8; R. 5112-13), and concluded that the State was entitled to prevail summarily on Prong One of the intellectual disability diagnosis, subaverage intellectual functioning. (Opp. Br., pp. 18-22; R. 5123-27).

4. Mr. Nixon's Reply

Following a case management conference on July 14, 2015 and a Case Management Order of that date, Mr. Nixon filed a Reply Brief on August 13, 2015. (("Rep Br."); R. 5133-48).

In his reply, Mr. Nixon characterized the State's account of the prior proceedings as an attempt to "avoid a hearing in 2015 by relying on factfinding that did not happen in 2007." (Rep. Br., p. 6; R. 5144). Mr. Nixon explained that what the Circuit Court actually held in 2007, and this Court affirmed in Nixon V, was that Mr. Nixon's own proffered IQ score of 73 defeated his intellectual disability claim as a matter of law. (Id.)[6]

In support of that position, Mr. Nixon's reply reviewed the record in detail,

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[6] In a distracting tangent, the State also made a variety of assertions respecting adaptive deficits, ignoring its own prior concession. As Mr. Nixon pointed out in reply:

> The State's brief thoroughly muddles (Opp. Br. at 18): (1) the issue of sub-average intellectual functioning, which was contested at the prior evidentiary hearing but which, as discussed below, was resolved by this Court (erroneously as events proved) as a matter of law, and (2) that of adaptive deficits, which was uncontested as an evidentiary matter but not reached by this Court in light of its legal ruling on the first point. (Pet. Br. at 2-3). The [2007 Order] discusses only two categories of evidence: (1) IQ scores ([2007 Order] at 13-20; [2006 Int. Dis. R.], vol. 7, at 1237-44), and (2) impulsivity or suggestibility [2007 Order] at 20-24; [2006 Int. Dis. R.], vol. 7, at 1244-48; see Pet. Br. at 8-9). There is no discussion of adaptive deficits.

(Rep. Br., pp. 3-4, n. 4; R. 5141-42).

making three primary points:

First, Dr. Keyes testified at the 2006 evidentiary hearing that Mr. Nixon met all three criteria for mental retardation, and that the most accurate estimate of Mr. Nixon's IQ score at the time of the crime was 73. (Rep. Br., p. 4; R. 5142). On the other hand, the State's expert, Dr. Prichard, took the position that Mr. Nixon's IQ score was 80 and had been at least that at the time of the crime. (Id.)

After the Cherry opinion came down, the Circuit Court held that Dr. Keyes's testimony was legally irrelevant: "Essentially, Dr. Keyes's testimony is that the standard error of measure means that 75 is the lower limit of eligibility for the death penalty — the same testimony rejected by the Florida Supreme Court in Cherry." (Rep. Br., p. 4; R. 5142) (quoting 2007 Order, p. 16; 2006 Int. Dis. R., vol. 7, p. 1240). According to the Circuit Court in 2007, Dr. Keyes's testimony "was essentially an argument for the law to be something other than what it is," and it was "of no evidentiary value at all to disagree with the standard the Legislature established." (See Rep. Br., p. 4; R. 5142) (quoting 2007 Order, pp. 19-20; 2006 Int. Dis. R., vol. 7, pp. 1243-44). In short, the Circuit Court in 2007 rejected Dr. Keyes's testimony as a matter of law.

Moreover—and of key importance here—Mr. Nixon pointed out in his reply that to the extent the Circuit Court in 2007 weighed the competing expert opinions it did so within the framework of Cherry. (Rep. Br., pp. 4-5; R. 5142-43). In

making its assessment, the Court considered all of the "historical scores Mr. Nixon achieved . . . above the statutory threshold" as data unfavorable to his claim. (Id.) (quoting 2007 Order, p. 20; 2006 Int. Dis. R., vol. 7, pp. 1244). Thus, for example, two attained, and entirely unadjusted, IQ scores of 73 and 72 (see Amd. Greenspan Aff. ¶ 115; R. 5199-5200) that should have been viewed as supporting Mr. Nixon's position were instead viewed as undermining it. (Rep. Br., p. 5; R. 5143).

Second, Mr. Nixon's reply then explained that in light of the Circuit Court's 2007 disposition, Mr. Nixon made two arguments before this Court in the case that eventually became Nixon V. (Rep. Br., p. 5; R. 5143). The first was that Cherry should be overruled. The second was that "the trial court's fact-finding, which was infected by legal error, is entitled to no deference." Nixon V, 2 So. 3d at 141. Therefore, Mr. Nixon argued the case should be remanded so that the Circuit Court could "conduct further proceedings in which it views the facts through the correct legal lens." (Nixon V Brief, p. 2; R. 91).

This Court, of course, rejected the first argument and refused to overrule Cherry. As a result, this Court also rejected Mr. Nixon's second argument. In a section headed "Trial Court's Factfinding," it held that the Circuit Court's evaluation of Dr. Keyes's and Dr. Prichard's competing testimony was not "induced by an erroneous view of the law" and thus should not be disturbed. Nixon V, 2 So. 3d at 143-44.

Mr. Nixon's reply argued that the State's reliance on this passage to support an entitlement to summary dismissal (Opp. Br., p. 7-8; R. 5112-13) was meritless. This Court was incorrect in adhering to Cherry, and hence its statement that the Circuit Court's 2007 evaluation of the evidence was not induced by an erroneous view of the law "no longer has any precedential force and can hardly preclude Mr. Nixon from a hearing in which this Court's evaluation of the evidence conforms to constitutionally-mandated standards." (Rep. Br., p. 5; R. 5143).

Third Mr. Nixon's reply argued that in the years before Hall this Court repeatedly cited Nixon V as authority for the validity of the strict IQ score cutoff of 70 that that it had originated in Cherry. (Rep. Br., p. 5; R. 5143). In other words, Mr. Nixon argued, this Court had consistently treated Nixon V as having been as a ruling of law, not fact. (Id.)

Notably, Mr. Nixon's reply pointed out, this Court discussed Nixon V as a decision of law in the opinion in Hall that the United States Supreme Court later reversed. See Hall v. State, 109 So. 3d 704, 707-10 (Fla. 2012) ("In Nixon, the appellant challenged our decision in Cherry, also alleging that we improperly imposed a firm IQ cutoff of 70. We disagreed…"). Mr. Nixon argued below: "[t]his alone would appear to pose some difficulties for the State's argument that 'error … that the [U.S. Supreme] Court found in Hall simply did not occur in this case.'" (Rep. Br., p. 5; R. 5143).

Moreover, Mr. Nixon's reply continued, Hall v. State was not an isolated instance of this Court's treatment of Nixon V as a decision of law. (Rep. Br., p. 6; R. 5144). Other examples included Haliburton v. State, 123 So. 3d 1146 (Fla. 2013) (citing Nixon V as authority for the proposition that "[t]his Court has repeatedly rejected Haliburton's argument that imposing a bright-line cutoff IQ score of 70 for finding a defendant to be mentally retarded and ineligible to be executed is unconstitutional"); Franqui v. State, 59 So. 3d 82, 90, 94 (Fla. 2011) (describing Nixon V as having rejected Mr. Nixon's claim that "mandating a cut-off IQ score of 70" is unconstitutional and that "states must recognize the higher cut-off IQ score of 75"); Kilgore v. State, 55 So. 3d 487, 507-09 (Fla. 2010) (quoting Nixon V at length and describing it as having rejected the "exact argument" that an IQ cutoff of 70 is unconstitutional); and Schoenwetter v. State, 46 So. 3d 535, 562 (Fla. 2010) (citing Nixon V for the legal principle that "[t]o assert a valid claim [of mental retardation] a defendant must establish that he or she has an IQ of 70 or below").

Mr. Nixon's reply argued that, if the Circuit Court had indeed held in 2007 that his true IQ score was 80, and this Court had affirmed that finding as a matter of fact, "then Nixon V would have made its one and only appearance in the law reports on the day its case-specific conclusion was announced. And on that day there would have been no need for any discussion, much less an extended one, of

whether the Florida IQ cut-off IQ was 70 or 75." (Rep. Br., p. 6; R. 5144).

In short, Mr. Nixon's reply concluded, he lost the 2006 Motion on the basis of a legal proposition obliterated by Hall and was entitled to a determination of the facts. (Rep. Br., p. 6; R. 5144).

5. The State's Response

The State responded in a brief filed on August 31, 2015 (("Surreply Br."); R. 6632-45), which made two arguments. First, there had been no Hall violation because Cherry did not come down until the 2006 Motion was *sub judice*, and thus Mr. Nixon had not been precluded from presenting any evidence he wished in connection with that motion. (Surreply Br., pp. 6-7; R. 6637-38). In any event, the State argued, Cherry was not the basis on which Mr. Nixon lost the 2006 Motion: "The Florida Supreme Court found that the trial court was correct, not based on Cherry, but based upon the evidence presented at the 2006 evidentiary hearing." (Surreply Br., p. 10; R. 6641).

E. The Ruling Below

The Circuit Court's 2015 Order, issued on October 9, 2015, contained three holdings of present relevance.

First, the Circuit Court held that "Mr. Nixon's case falls outside of the principles established in Hall" because: (1) Mr. Nixon was not precluded from presenting any evidence he wished in 2006; and (2) "Mr. Nixon's score of 80 [on

Dr. Prichard's 2006 IQ test] mean[t] that Hall does not apply" because that score did not fall within the standard error of measure for intellectual disability. (2015 Order, pp. 3-6; R. 6657-60).

Second, the Circuit Court wrote that Dr. Prichard's 2006 test was the most reasonably current one in the record, and that the Atkins question is "whether a defendant 'is' mentally retarded, not whether he was." (2015 Order, p. 4; R. 6658) (citing Jones v. State, 966 So. 2d 319, 326-27 (Fla. 2007)). Because Dr. Greenspan did not conduct any new testing, the court held that Dr. Prichard's test was dispositive of Mr. Nixon's current intellectual disability. (Id.)

Third, the Circuit Court held that Hall did not require mental illness to be considered as a component of total functionality because "mental illness as degrading adaptive functioning is irrelevant for analysis of intellectual disability for an individual, like Mr. Nixon, who achieved a valid, current IQ score outside of the standard error of measure for intellectual disability." (2015 Order, p. 5; R. 6659).[7]

[7] On October 26, 2015 Mr. Nixon filed a motion for rehearing addressing this ground of the Circuit Court's decision. (("Rehearing Motion"); R. 7005-08; Supp. R. 7057). In it, he argued that the Circuit Court had "conflated two different issues" when it considered mental illness only as relevant to intellectual disability rather than as bearing on Mr. Nixon's overall mental condition "irrespective of the presence of intellectual disability." (Rehearing Motion, p. 2; Supp. R. 7057). The motion was summarily denied on November 10, 2015 in an order that did not contain any explanation for the disposition. (R. 7009-10).

II. SUMMARY OF ARGUMENT

The Circuit Court erred in dismissing Mr. Nixon's petition without a hearing. The record summarized above most certainly did not "conclusively show that [Mr. Nixon] is entitled to no relief." Fla. R. Crim. P. 3.851 (f)(5)(B). Rather, that record entitled him to a hearing on his claim under Hall. A failure to grant Mr. Nixon a hearing would be a violation of his federal due process right to a fair opportunity to establish a Constitutional violation. See e.g., Panetti v. Quarterman, 551 U.S. 930, 952 (2007); Ford v. Wainwright, 477 U.S. 399, 412-18 (1986); Chapman v. California, 386 U.S. 18, 21 (1967).

As outlined above, the Circuit Court's summary dismissal rested on three grounds. Each was erroneous and warrants reversal. However, the most judicious course would be for the Court to reverse on the first ground and defer ruling on the others until the need arises.

Ground 1: The court below held that "Mr. Nixon's case falls outside of the principles established in Hall." (2015 Order, p. 2; R. 6657). Its rationales were: (1) Mr. Nixon was not precluded from presenting any evidence he wished in 2006 (Id.), and (2) "Mr. Nixon's score of 80 [obtained in 2006] means that Hall does not apply" because that score did not fall within the standard error of measure for intellectual disability. (2015 Order, pp. 4-6; R. 6658-60).

As explained more fully in Point I.A below, Rationale 1 violated Hall. To

be sure, Mr. Nixon's evidentiary presentation at the 2006 hearing was not limited. But by the time the Circuit Court ruled in 2007 it was constrained by Cherry to exclude evidence that the Constitution required it to consider. Indeed it counted against Mr. Nixon evidence of IQ scores between 71 and 75 that it should have counted for him. Compare Penry v. Lynaugh, 492 U.S. 302, 324 (1989). Mr. Nixon has thus been denied his rights under Hall and is entitled to a hearing at which the evidence is given the effect that the Eighth Amendment mandates. See Hitchcock v. Dugger, 481 U.S. 393, 396-99 (1987).

For the reasons stated in Point I.B below, Rationale 2 of the Circuit Court also violated Hall. It is not the case that a defendant who ever achieves an IQ score above 75 is precluded as a matter of law from establishing intellectual disability. See Hall at 2001 ("Intellectual disability is a condition, not a number").

In the present case, the State's expert, Dr. Prichard, opined that Mr. Nixon's IQ score of 80 in 2006 disposed of the intellectual disability issue. However, Mr. Nixon's expert, Dr. Greenspan, disagreed. In his affidavit proffered in support of the 2015 Motion, Dr. Greenspan carefully applied current professional standards to examine all of the various IQ scores Mr. Nixon obtained during his lifetime. Dr. Greenspan concluded that the most accurate single-number estimate of that score is 73. He further opined that, in any event, Mr. Nixon qualified for a diagnosis of intellectual disability under the holistic analysis of the entire clinical picture

required by Hall. The experts' disagreement posed an issue of fact, not law. It requires a hearing for its resolution.

As this Court most recently re-iterated in Oats v. State, Hall requires a "conjunctive and interrelated assessment" (Oats, 181 So. 3d 457, 2015 Fla. LEXIS 2811, *4, *6 (Fla. 2015) (quoting Hall, 134 S.Ct. at 2001)), and no court has ever considered the full record bearing on Mr. Nixon's intellectual disability.

Ground 2: The court below wrote that Dr. Prichard's IQ test was the most reasonably contemporaneous one in the record, and that the Atkins question is "whether a defendant 'is' mentally retarded, not whether he was." (2015 Order, p. 4; R. 6658) (citing Jones v. State, 966 So. 2d 319, 326-27 (Fla. 2007)). Because Dr. Greenspan did not conduct any new testing, the Circuit Court held that Dr. Prichard's testing was dispositive of the question as so stated. (Id.)

This holding was doubly erroneous.

First, for the reasons more fully described in Point II.A below, Dr. Prichard's test did not conclusively establish as a factual matter that Mr. Nixon is not now intellectually disabled. In his affidavit, Dr. Greenspan applies current clinical standards to the entire record as mandated by Hall and opines that Mr. Nixon is currently intellectually disabled. (Amd. Greenspan Aff. ¶7; R. 5160).

Second, for the reasons set forth in Point II.B below, this Court's legal position in Jones is inconsistent with Hall, which makes clear that the Eighth

Amendment exemption from execution for the intellectually disabled is predicated on the culpability of the defendant at the time the crime is committed. If Mr. Nixon met the criteria for intellectual disability at that time, even if he did not in 2006 (and Dr. Greenspan's proffered affidavit explains why this might be true), the Constitution precludes his execution. If the Court decides to reach the issue, it should so rule.

But, prudence counsels against reaching the issue now. The legal question only requires determination if indeed there was a difference between Mr. Nixon's mental condition at the two times. This Court should order the Circuit Court to make that determination on remand. If the resulting findings require this Court to re-consider Jones, it will be able to do so on a full record.

Ground 3: The Circuit Court held that Hall did not require mental illness to be considered as a component of total functionality because Mr. Nixon "achieved a valid, current IQ outside of the standard error of measure for intellectual disability." (2015 Order, p. 5; R. 6659).

For the reasons set forth in Point III below, this ruling was inconsistent with Hall. The ultimate question to be determined is whether the defendant is protected from execution by the Eighth Amendment. All defendants who meet the diagnostic criteria for intellectual disability are so protected under Atkins. Other defendants, whose functionality is indistinguishable from those with intellectual

disabilities in the respects Hall identifies as relevant, may also be so protected. But this question need only need be decided if a defendant is found not to be intellectually disabled. The prudent course would be for this Court to remand for a determination of that factual issue in Mr. Nixon's case and pretermit legal rulings until the need for them arises.

III. ARGUMENT

Point I: The Circuit Court Violated Hall by Denying Mr. Nixon an Evidentiary Hearing

A. Mr. Nixon Was Entitled to a Factfinding That Gave Legal Weight to the Constitutionally Relevant Facts

According to the ruling below, there is no Hall violation in this case because:

> During the evidentiary hearing [in 2006], Mr. Nixon was permitted to and did present evidence and argument regarding each of the criteria that comprise the definition of intellectual disability. The Court imposed no restrictions on the presentation of evidence of intellectual disability and Mr. Nixon was not foreclosed from presenting any evidence of intellectual disability at the 2006 evidentiary hearing, including evidence of adaptive deficits.

(2015 Order, p. 3; R. 6657) (citations omitted).

The factual statement that Mr. Nixon was not limited in his presentation of evidence at the 2006 hearing is correct. The legal conclusion that Hall was not violated is not. To be sure, Mr. Nixon was permitted to present his evidence. But the factfinder refused to consider it. Compare Hitchcock v. Dugger, 481 U.S. 393, 396-99 (1987) (Scalia, J.) (unanimous) (reversing Florida death sentence where, although non-statutory mitigation evidence was presented, law prevented judge

and jury from considering it).

In its 2007 Order, the Circuit Court wrote that "Cherry v. State is … by far the most instructive of the Court's opinions for resolving the issues raised here." (2007 Order, p. 7; 2006 Int. Dis. R., vol. 7, p. 1231). It then dismissed the testimony of Dr. Keyes that Mr. Nixon had an IQ of 73 and was intellectually disabled as "inconsistent both with the plain language of the statute and the Florida Supreme Court's authority." (2007 Order, p. 17; 2006 Int. Dis. R., vol. 7, p. 1241). The Circuit Court wrote: "Essentially, Dr. Keyes's testimony is that the standard error of measure means that 75 is the lower limit of eligibility for the death penalty—the same testimony rejected by the Florida Supreme Court in Cherry." (2007 Order, p. 16; 2006 Int. Dis. R., vol. 7, p. 1240). This "was essentially an argument for the law to be something other than what it is," and "[i]t is of no evidentiary value at all to disagree with the standard the Legislature established." (2007 Order, pp. 19-20; 2006 Int. Dis. R., vol. 7, pp. 1243-44).

The United States Supreme Court held in Hall that the Cherry rule was an unconstitutional implementation of Atkins because "It takes an IQ score [greater than 70] as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence." Hall, 134 S.Ct., at 1995; see Oats, 181 So. 3d 457, 2015 Fla. LEXIS at *26-28. That is precisely what the Circuit Court did in 2007.

Worse, some evidence that ought to have counted in Mr. Nixon's favor was affirmatively counted against him. Cf. Penry v. Lynaugh, 492 U.S. 302, 324 (1989) (invalidating death sentence, where Texas statute improperly categorized evidence of mental retardation as aggravating when it should have been mitigating).

Mr. Nixon's attained IQ score nearest to the time of the crime was a 73 in 1985. (See Amd. Greenspan Aff. ¶ 115; R. 5200); Cf. Wilson v. Commonwealth, 381 S.W. 3d 180, 187-88 (Ky. 2012) (courts should give weight to IQ tests administered around the time of crime and the trial). In 1993, Mr. Nixon attained a score of 72. (See Amd. Greenspan Aff. ¶ 115; R. 5200). Both scores should have supported Mr. Nixon's case for intellectual disability, but were instead specifically counted against Mr. Nixon in the 2007 Order, which characterized them as "historical scores Mr. Nixon achieved … above the statutory threshold." (2007 Order, p. 20; 2006 Int. Dis. R., vol. 7, p. 1244). Thus, to the extent the Circuit Court in 2007 even considered the facts, its conclusions were "induced by an erroneous view of the law." Holland v. Gross, 89 So. 2d 255, 258 (Fla. 1956). The error may have been understandable under Florida law as then interpreted by this Court, but it was certainly error, as Hall subsequently made clear.

The Circuit Court ought to have corrected its 2007 error in 2015. Instead, the Circuit Court dismissed Mr. Nixon's 2015 Motion without a hearing and

adhered to its prior insupportable determination—one which relied exclusively on the IQ score factor, and mis-applied even that factor by excluding scores above 70. That was inconsistent with Hall. See Haliburton v. State, 163 So. 3d 509 (Fla. 2015) (vacating in light of Hall prior decision sustaining summary dismissal of post-conviction proceeding where defendant had IQ of 74, and remanding for evidentiary hearing); see also Cardona v. State, 41 Fla. L. Weekly S 45, 2016 Fla. LEXIS 332, at *32 (Fla. Feb. 18, 2016) (requiring on remand that the trial court—which had rejected intellectual disability claim pre-Hall because it disregarded experts' opinions on validity of obtained IQ scores—"not disregard the IQ tests ... and ... also perform a comprehensive analysis of all three prongs as set forth in Hall and its progeny. See Oats v. State [supra]").

B. Hall Does Not Permit Summary Dismissal of an Intellectual Disability Claim on the Sole Basis of an IQ Score Above 75

The Circuit Court gave a second reason why "Hall does not apply" to this case: Mr. Nixon attained an IQ score of 80 in 2006, and "a valid, current score above 75 … eliminates the constitutional infirmity established by Hall." (2015 Order, p. 4; R. 6658). This rationale seriously misread Hall, and erroneously disposed of an issue of fact as a matter of law.

True, the IQ test administered to Mr. Nixon in 2006 by the State's expert, Dr. Prichard, yielded an IQ score of 80. Dr. Prichard testified at the time that he considered that result as dispositive of the intellectual disability question.

(See MH Tr., pp. 209:19-210:9, 216:12-22; 2006 Int. Dis. R., vol. 9). Hence, although Dr. Prichard conceded the presence of adaptive deficits (MH Tr., p. 212:23-24; 2006 Int. Dis. R., vol. 9) ("I'll concede he has got adaptive deficits. Okay. He has got adaptive deficits throughout his records"), they played no part in his diagnosis. (MH Tr., p. 210:4-9; 2006 Int. Dis. R., vol. 9).

But, as Hall holds, "[i]ntellectual disability is a condition, not a number". Hall, 134 S.Ct. at 2001. Whether or not the condition exists in any particular case is a matter for clinical judgment. Id. One relevant factor is IQ scores. Clinical experts understand, though, "that an IQ test score represents a range rather than a fixed number" and that IQ tests have "inherent imprecision." Id.

Yet the Circuit Court refused to hear from Mr. Nixon's clinical expert. This was inconsistent with Hall. See Id., p. 2001 ("Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.").

Guided by Hall, Mr. Nixon's expert, Dr. Greenspan, conducted a comprehensive review of the record, including the circumstances of Mr. Nixon's upbringing and the "overwhelming" record respecting adaptive behavior.

(Amd. Greenspan Aff. ¶ 135; R. 5208).[8] Dr. Greenspan concluded that, making the "conjunctive and interrelated assessment" that Hall rightly describes as being the clinically appropriate inquiry, Mr. Nixon qualifies for a diagnosis of intellectual disability. (Amd. Greenspan Aff. ¶¶ 128, 150; R. 5206, 5216).

Dr. Greenspan disagreed with Dr. Prichard's view of the dispositive effect of the IQ score of 80 obtained in 2006 on a variety of grounds.

First, Dr. Greenspan reviewed all the various IQ scores in the record, including the one obtained by Dr. Prichard, considered their statistical imprecision, and endorsed as sound under current clinical practice Dr. Keyes's prior conclusion that the most accurate single-number estimate of Mr. Nixon's IQ score is 73. (Amd. Greenspan Aff. ¶¶ 113-18, 127; R. 5198-5202, 5205-06).

Second, Dr. Greenspan rejected as unsound under current clinical standards

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[8] Because this prong was uncontested by the State in 2006 and the record respecting adaptive behavior remains substantially unchanged, Mr. Nixon did not, and does not, seek an additional evidentiary hearing regarding it. As Mr. Nixon's counsel advised the Circuit Court, "the hearing we have in mind is not a repetition of what you've already heard, but narrowly focused on why current clinical knowledge supports … finding intellectual disability now on bases under Hall that were not part of your decision last time. So we would call Dr. Greenspan to testify specifically…to those things that are different now in the post-Hall environment." (Transcript of Case Management Conference of July 14, 2015 ("CMC Tr."), p. 4:11-21; R. 7023). In response to a clarifying inquiry from the court, counsel confirmed Mr. Nixon's position that the new evidentiary proceedings should be limited to "the development [of] the state of the art in the evaluation of intellectual disability." (Id., pp. 4:22-5:8; R. 7023-24). The Circuit Court should then make its intellectual disability determination on the entire record before it regarding all three prongs of the diagnosis.

Dr. Prichard's view that the fact of Mr. Nixon's ever having scored above the threshold for intellectual disability disqualifies him from that diagnosis. (Amd. Greenspan Aff. ¶ 123; R. 5204). Addressing specifically the IQ score that Dr. Prichard obtained in 2006, Dr. Greenspan discussed "recent research showing that intellectual abilities are more malleable for a longer period than once thought." (Amd. Greenspan Aff. ¶ 122; R. 5203). Mr. Nixon was in a dramatically less favorable environment for intellectual development throughout his life up until the time of the crime than in the intervening decades leading up to Dr. Prichard's testing. (Id.) Thus, applying current clinical knowledge, Dr. Greenspan explained that he "would not be in any way surprised if Joe's actual intellectual abilities were slightly greater in 2006 than in 1984." (Id.)

Assuming that Dr. Prichard's test was a precisely accurate measurement on the day it was administered, this fact would not be inconsistent with a diagnosis of intellectual disability. In the post-Hall case of State v. Agee, 358 Ore. 325 (2015), in which Dr. Greenspan appeared as a defense expert, the Oregon Supreme Court reached exactly that conclusion. The evidence in Agee showed that the defendant had obtained IQ scores from 82-84 and had shown signs of:

- fetal alcohol disorder (Agee, 358 Ore. at 342-44; compare Amd. Greenspan Aff. ¶¶ 8, 9, 110 & Tab 84; R. 5161-62, 5197-98, 6617-29);
- psychosis (Agee, 358 Ore. at 342-44; compare Expert Hearing Dec. of

George Woods, M.D. ("Woods Dec."), ¶¶ 194, 197-210; R. 1659-66); and

♦ significant deficits in adaptive functioning (Agee, 358 Ore. at 342-44; compare Amd. Greenspan Aff. ¶¶ 135-43, R. 5208-12).

Prior to Hall, the lower court in Agee held that the defendant was not intellectually disabled because, in view of his IQ score of 84, he had failed to prove that he qualified for the diagnosis under Prong One, sub-average intellectual functioning. Agee, 358 Ore. at 345-48. The lower court therefore refused to evaluate the remaining prongs. Id.

On appeal the Oregon Supreme Court found "that the trial court's Atkins ruling was not erroneous at the time it was made, and we reject defendant's argument to the contrary." Agee, 358 Ore. at 348. Nonetheless, in the wake of Hall, the Oregon Supreme Court vacated the ruling below and remanded the case for consideration in accordance with "now-current medical standards … discussed in Hall" (Id. at 354), under which "intellectual functioning should be interpreted in conjunction with adaptive functioning in diagnosing intellectual disability," rather than in isolation from it (Id. at 353).

Not only are IQ scores of 75 or higher, "entirely consistent with intellectual disability" (Brumfield v. Cain, 135 S.Ct. 2269, 2277 (2015); Pruitt v. Neal, 788 F. 3d 248, 270 (7th Cir. 2015) (granting federal habeas relief on finding that defendant "demonstrated with clear and convincing evidence that he is

intellectually disabled" notwithstanding an attained IQ score of 76); Commonwealth v. Taylor, No. 12-CR-2381, Opinion and Order of December 23, 2014 (Jefferson Circuit Court, KY) (finding after evidentiary hearing conducted under Hall standards that defendant was intellectually disabled notwithstanding IQ scores of 79 and 91 obtained by Kentucky Correctional Psychiatric Center in 2007 and 2014)), but an exclusive reliance on IQ scores to rule out the presence of intellectual disability is itself impermissible. In order to comply with the Eighth Amendment "courts must consider all three prongs in determining an intellectual disability, as opposed to relying on just one factor as dispositive." Oats, 181 So. 3d 457, 2015 Fla. LEXIS 2811 at *27.

Mr. Nixon has never had the benefit of a judicial evaluation that fully considered his condition and viewed it in the integrated manner that a clinician would. The 2007 Order discussed only two categories of evidence: (1) IQ scores (2007 Order, pp. 13-20; 2006 Int. Dis. R., vol. 7, pp. 1237-44) and (2) impulsivity or suggestibility (2007 Order, pp. 20-24; 2006 Int. Dis. R., vol. 7, pp. 1244-48) (see Pet. Br., pp. 8-9; R. 5098-99). There was no discussion of adaptive deficits.

Yet the evidence of adaptive deficits in this record is so "overwhelming" (Amd. Greenspan Aff. ¶ 135; R. 5208) that the State's expert, Dr. Prichard, testified: "I'll concede he has got adaptive deficits. Okay. He has got adaptive deficits throughout his records." (See MH Tr., p. 212:23-24; 2006 Int. Dis. R.

vol. 9).

Mr. Nixon "may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability." Hall, 134 S.Ct. at 2001. The Circuit Court violated Hall when it denied Mr. Nixon that opportunity. It should have granted Mr. Nixon a hearing in which current clinical standards were applied to the question of his intellectual disability. Then it should have answered the question by evaluating the relevant factors in "a conjunctive and interrelated assessment." Hall, 134 S.Ct. at 2001.

The Circuit Court failed to do so, and thereby denied Mr. Nixon his rights under the Eighth and Fourteenth Amendments to the United States Constitution. This Court should reverse.

Point II: The Circuit Court Erred by Dismissing Mr. Nixon's Motion on the Basis That He Is Not Currently Intellectually Disabled

The Circuit Court ruled:

(1) Under Atkins the question for determination is "whether a defendant 'is' mentally retarded, not whether he was." (2015 Order, p. 4; R. 6658) (citing Jones v. State, 966 So. 2d 319, 326-27 (Fla. 2007)).

(2) Because Dr. Greenspan did not conduct any new testing, and Dr. Prichard's 2006 IQ test was the most reasonably contemporaneous one in the record, it was dispositive of the relevant question. (Id.)

The first ruling was a correct statement of this Court's precedent. But that

precedent is wrong. Under the Eighth Amendment the legally relevant question for determining a defendant's eligibility for execution is whether he was intellectually disabled at the time of the offense.

The second ruling was erroneous because it summarily denied Mr. Nixon the fact-finding he was entitled to under Hall.

The legal issue of whether Jones correctly states the Atkins question need not be decided now. It will only arise if Nixon was intellectually disabled at the time of the offense but is not currently so. The most judicious course would be to remand for fact-finding on that point, and defer re-consideration of Jones.

A. Whether or Not Mr. Nixon Is Currently Intellectually Disabled Is a Contested Issue of Fact on Which He Is Entitled to a Hearing

On the assumption that the Circuit Court correctly stated the relevant legal question, it erred in dismissing the 2015 Motion because Dr. Prichard's IQ test did not conclusively establish that Mr. Nixon is not currently intellectually disabled. The record below showed a dispute on that very point. Taking full account of Dr. Prichard's result, Dr. Greenspan expressed an expert opinion, grounded in the current clinical methodology required by Hall, that Mr. Nixon "continues to be" intellectually disabled. (Amd. Greenspan Aff. ¶¶ 7, 149; R. 5160, 5215-16).

If, therefore, the court below had determined to reject Mr. Nixon's legal

position as to the question at hand,[9] it ought to have ordered a hearing.

As a matter of Florida law, dismissal is improper unless the record "conclusively show[s] that the movant is entitled to no relief." Fla. R. Crim. P. 3.851 (f)(5)(B); see e.g., Rivera v. State, 995 So. 2d 191, 197 (Fla. 2008) (ordering hearing on successive post-conviction motion in capital case); Parker v. State, 904 So. 2d 370, 379 (Fla. 2005), relief granted after hearing, 3 So. 3d 974 (Fla. 2009); Floyd v. State, 808 So. 2d 175, 182-83 (Fla. 2002) (emphasizing importance of post-conviction hearings in capital cases); Cueto v. State, 37 Fla. L. Weekly D 1347, 2012 Fla. App. LEXIS 8898, *8 (Fla. 3d DCA Jun. 6, 2012); Arseneau v. State, 77 So. 3d 1280, 1284 (Fla. 2d DCA 2012).

As a matter of federal due process a State is required to provide a litigant with a fair opportunity to establish the violation of a right guaranteed by the Constitution of the United States. See e.g., Panetti v. Quarterman, 551 U.S. 930, 952 (2007); Ford v. Wainwright, 477 U.S. 399, 412-18 (1986); Chapman v. California, 386 U.S. 18, 21 (1967).

The decision of the Circuit Court to rule summarily on a contested issue of fact was wrong under both bodies of law. Unless this Court decides to re-visit

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[9] At the Case Management Conference of July 14, 2015, counsel articulated Mr. Nixon's legal position that "the relevant legal question is what was his mental functioning on the date of the crime. And, so we don't see any need for further testing today now." (CMC Tr., p. 5:4-8; R. 7024).

Jones, it should remand to the Circuit Court with directions to give plenary consideration to the factual issue of whether Mr. Nixon is currently intellectually disabled under the criteria established by Hall.

B. Hall Makes Clear That the Legally Relevant Question Under Atkins Is Whether Mr. Nixon Was Intellectually Disabled at the Time of the Crime

Whether the relevant question under Atkins is the defendant's condition at the time of the crime (as Mr. Nixon contends) or at the time of the post-conviction hearing (as Jones held) is material only if there is a difference between the two. As noted above, the Court would be acting prudently if it deferred resolution of the issue until the facts are established on remand.

But if it chooses not to do so, the Court should, in light of Hall, revisit and overrule Jones. That case construed the Florida statutes to mean that the relevant time is that of post-conviction proceedings, but failed to grapple with the underlying logic of Atkins.

As Hall pointedly re-emphasized (see Christopher Slobogin, Scientizing Culpability: The Implications of Hall v. Florida and the Possibility of a "Scientific Stare Decisis", 23 WM. & MARY BILL RTS. J. 415, 423-24 (2014) (attached to Amd. Greenspan Aff. at Tab 82; R. 6603-04)), the considerations that led the Court in Atkins to create a categorical exclusion from the death penalty for the intellectually disabled were:

♦ Deterrence. "[T]hose with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrence rationale. They have a 'diminished ability' to 'process information, to learn from experience, to engage in logical reasoning, or to control impulses ... [which] make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.'" Hall, 134 S.Ct. at 1993 (citing Atkins, 536 U.S., at 320).

♦ Retribution. "Retributive values are also ill-served by executing those with intellectual disability. The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment." Hall, 134 S.Ct. at 1993.

♦ Accuracy. "A further reason for not imposing the death penalty on a person who is intellectually disabled is to protect the integrity of the trial process. These persons face 'a special risk of wrongful execution' because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel." Id. (citing Atkins, 536 U.S., at 320-321).

Each of these considerations applies only to the mental condition of the defendant at the time of the crime. None of them bear any relationship to the defendant's mental condition at the time of a post-conviction hearing—an event whose timing is influenced by innumerable factors which are unrelated to the

defendant's culpability for the offense.

Recognizing this, most state and federal authority even before Hall held that the Atkins question was whether the defendant was intellectually disabled at the time of the crime. See e.g., Goodin v. State, 102 So. 3d 1102, 1114 (Miss. 2012); Coleman v. State, 341 S.W. 3d 221, 223 (Tenn. 2011); Pizzuto v. State, 202 P. 3d 642, 653 (Idaho 2008); Bowling v. Commonwealth, 163 S.W. 3d 361, 376 (Ky. 2005); Ex parte Cathey, 451 S.W. 3d 1, 19 (Tex. Crim. App. 2014); United States v. Montgomery, No. 2:11-CR-20044-JPM-1, 2014 U.S. Dist. LEXIS 57689, *15-16 (W.D. Tenn. Jan. 28, 2014); United States v. Northington, No. 07-550-05, 2012 U.S. Dist. LEXIS 130624, *3 n.2 (E.D. Pa. Sept. 12, 2012); United States v. Wilson, 920 F. Supp. 2d 287, 297 (E.D.N.Y. 2012); United States v. Hardy, 762 F. Supp. 2d 849, 881–882 (E.D. La. 2010); Rodriguez v. Quarterman, No. CIV. SA-05-CA-659-RF, 2006 U.S. Dist. LEXIS 49376, *44 (W.D. Tex. July 11, 2006).

Only the high courts of Alabama and Oklahoma had reached the same conclusion as this Court did in Jones. See Smith v. State, No. 1060427, 2007 Ala. LEXIS 91, *30 (Ala. May 25, 2007); Ochoa v. State, 136 P. 3d 661, 665-66 (Okla. Crim. App. 2006).

Hall's restatement of the premises of Atkins is further evidence that the decision in Jones is simply inconsistent with the Eighth Amendment. See Smith v. Schriro, Nos. 96-99025, 96-99026, 10-99011, 2016 U.S. App. LEXIS 1879, *15-

18 (9th Cir. Feb. 4, 2016) (deciding post-Hall that because the "rationales underlying the right announced in Atkins concentrate on the time the crime was committed and the ensuing trial, we hold that a defendant comes within the protection of Atkins if he can demonstrate that he was intellectually disabled during either of these periods. Consequently, a defendant's present condition is relevant only to the extent that it is probative of his condition during the relevant periods.").

If it chooses to reach the issue, this Court should overrule Jones. But the Court need not reach the issue in this case at this time.

Point III: Under Hall, Mr. Nixon Is Entitled to an Assessment of His Total Intellectual Functioning

As summarized in Point II.B above, Hall makes clear that the Eighth Amendment exemption from execution for certain mentally impaired offenders does not turn on a particular diagnosis but on policy considerations relating to deterrence, retribution and accuracy. These include the offender's ability to premeditate, to control his impulses, to make sound choices or to be deterred by extreme punishment, as well as the likelihood of false confessions, of making a poor impression on a jury, and of being impaired in the ability to assist counsel.

The exemption from execution extends to all defendants who qualify for an intellectual disability diagnosis. That is the meaning of Atkins. The meaning of Hall is that this exemption may also extend to offenders who do not qualify for that

diagnosis but whose mental condition makes them functionally indistinguishable for Eighth Amendment purposes from people who do qualify.

In addressing this claim, the Circuit Court wrote that Mr. Nixon was seeking to introduce his mental illness as evidence in support of the adaptive functioning prong of intellectual disability, and rejected the effort: "mental illness as degrading adaptive functioning is irrelevant for analysis of intellectual disability for an individual, like Mr. Nixon, who achieved a valid, current IQ score outside of the standard error of measure for intellectual disability." (2015 Order, p. 5; R. 6659).

This ruling was doubly erroneous.

The Circuit Court's first error, treating an IQ score as conclusive on the issue of mental disability and refusing to consider adaptive functioning, has already been discussed in Point I above.

The Circuit Court's second error was to misstate Mr. Nixon's claim respecting mental illness. As Mr. Nixon pointed out in his motion for rehearing, his actual position "was and remains that his mental condition renders him ineligible for execution under the Eighth Amendment regardless of whether that condition technically qualifies as mental retardation. This is the same theory that he stated in federal court prior to Hall, that he contends Hall vindicated, and on which he now seeks to present evidence." (Rehearing motion, pp. 1-2; R. 7006; Supp. R. 7057 (footnote omitted)). Mr. Nixon specifically asserted below that the

totality of his mental condition—including such matters as his inability to premeditate, control his impulses, or be deterred by extreme punishment—exempted him from execution "irrespective of the presence of intellectual disability." (Rehearing Motion, p. 2; Supp. R. 7057). This argument, he urged, "flows from the Supreme Court's holistic analysis in Hall and should be addressed by this Court."

Mr. Nixon proffered, and specifically called to the attention of the Circuit Court, a comprehensive expert review of the record done in connection with federal habeas proceedings (see Rehearing Motion, p. 2, at n. 1; Supp. R. 7057), in order to make a prima facie case below that—independently of intellectual disability—he suffers from an identifiable serious mental disorder whose functional manifestations include:

- ♦ impaired ability to make consistent, rational decisions;
- ♦ impaired ability to rationally assist counsel in his defense;
- ♦ impaired judgment;
- ♦ inability to conform conduct to the requirements of the law;
- ♦ diminished appreciation of the consequences of his actions;
- ♦ mood lability;
- ♦ difficulty controlling impulses;
- ♦ hallucinations;

- ♦ paranoid delusions;
- ♦ impaired ability to effectively weigh and deliberate; and
- ♦ impaired reality testing.

(Woods Dec., ¶¶ 194, 197-210; R. 1659-66).

This Court need not rule now on the legal implications of this proffer in the wake of Hall. If Mr. Nixon is found on remand to be intellectually disabled, Atkins will preclude his execution in any event. If not, this Court should have the benefit of a full evidentiary record before it considers the effects of Hall on its prior jurisprudence respecting mental illness. See e.g., Nixon V, 2 So. 3d at 146.

The Circuit Court should accordingly be directed to address the intellectual disability issue first. If—after conducting a hearing and evaluating that issue under the standards mandated by Hall—the Circuit Court rules adversely to Mr. Nixon, then it should permit him to make a full record to support his argument that, whether or not he is intellectually disabled, his mental condition is such that the Eighth Amendment as elucidated by Hall precludes his execution.

IV. CONCLUSION

This Court should reverse the decision below and remand the case to the Circuit Court for a hearing. On remand, Mr. Nixon should be permitted to present the evidence needed to enable the Court below to engage in fact-finding on the following issues:

(1) Under present clinical standards, was Mr. Nixon intellectually disabled at the time of the offense?

(a) If the answer to this question is no, was Mr. Nixon's total intellectual functioning at the time of the offense such as to be indistinguishable for Eighth Amendment purposes from intellectual disability?

(2) Under present clinical standards, is Mr. Nixon intellectually disabled today?

(b) If the answer to this question is no, is Mr. Nixon's total intellectual functioning today such as to be indistinguishable for Eighth Amendment purposes from intellectual disability?

Respectfully Submitted,

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Dated: March 7, 2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **INITIAL BRIEF OF APPELLANT** has been electronically filed with the Court on this 7th day of March, 2016 using the Florida E-Filing Portal and electronically served to the parties listed below and by U.S. mail to Joe Elton Nixon.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.210 (a)(2), undersigned counsel certifies that this computer-generated brief is being filed in Times New Roman 14-point font.

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