IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2248

HARRY FRANKLIN PHILLIPS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

SUPPLEMENTAL BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State will rely upon its statement of case and facts contained in its initial brief, with the following additions:

Dr. Joyce Carbonell testified that she evaluated Defendant. (RSSR. 3-11) In doing so, she interviewed Defendant for 4½ hours and reviewed his prison records, personnel records, his parole records, his school records, his jail records, his attorney's file, testimony and depositions, police reports and affidavits from his family, friends and a school teacher. (RSSR. 12-13) She also personally spoke to one of Defendant's teachers. (RSSR. 12) She administered the WAIS-R, the Wide Range Achievement test, Level 2 Revised (WRAT-R-2), the Peabody Individual Achievement Test (PIAT), the Rorschach test, the Wechsler Memory Scale, the Canter Background Interference procedure for the Bender Gestalt and the MMPI. (RSSR. 12-14)

On the WAIS-R, Defendant scored 75 full scale, 75 verbal and 77 performance. (RSSR. 15) This score placed Defendant in the borderline range. (RSSR. 16) On the WRAT-R-2, Defendant scored 53 on arithmetic, 75 on reading recognition and 88 on spelling. (RSSR. 17) The score on arithmetic was lower than expected for his IQ level, the reading score on consistent with the IQ level and the spelling score was higher. (RSSR. 17) Dr. Carbonell stated that Defendant's reading of "word power" from the

Reader's Digest explained his higher spelling score. (RSSR. 17-18) On the PIAT, Defendant scored at the 3.8 grade level in reading comprehension and mathematics, the 8.1 grade level in recognition, the 8.0 grade level in spelling and the 9.4 grade level in general information. (RSSR. 18) Dr. Carbonell found these scores consistent with his performance on the WAIS-R and the WRAT-R-2. (RSSR. 18-19)

Dr. Carbonell stated that she used the Canter Background Interference procedure for the Bender Gestalt because it improved her ability to screen for brain damage. (RSSR. 20) Defendant performed badly on this test, in the brain damaged range. (RSSR. 21) However, Dr. Carbonell could not say that this was not the result of Defendant's low IQ. (RSSR. 21) Defendant also performed badly on the Rorschach test, which Dr. Carbonell found consistent with Defendant's IQ score and indicative of social isolation and being withdrawn. (RSSR. 21-22) On the Memory Scale, Defendant did well in the portions of the test concerning personal information, current events and rote memory but worse on prose passages and visual reproduction. (RSSR. 23)

On the MMPI, Defendant's scores were valid, consistent with being from a lower socioeconomic background and showed depression. (RSSR. 24-26) The MMPI results also indicated that Defendant was isolated, alienated, inadequately socialized and

passive-aggressive. (RSSR. 26-27) Defendant scored slightly above average on the psychopathic scale, which Dr. Carbonell found consistent with family and legal problems. (RSSR. 28-29) Defendant also had high scores on the paranoia and psychasthenia scales, which indicated that he was anxious and did not get pleasure out of life. (RSSR. 29-30)

From review of Defendant's prison records, Dr. Carbonell stated that Defendant had previously scored a 73 on the Revised Beta IQ test and that his IQ had ranged between 73 and 83. (RSSR. 32, 41) Defendant's school records showed that he had received C's, D's and a couple of F's. (RSSR. 32-33, 43-46) Dr. Carbonell found that her testing was consistent with the social history of Defendant as being withdrawn, socially isolated and passive-aggressive. (RSSR. 33) Dr. Carbonell found that Defendant had intellectual deficits and was schizoid. (RSSR. 33-34) Dr. Carbonell believed that these problems would impair Defendant's ability to interact with the world around him. (RSSR. 34-35) Dr. Carbonell did not believe that Defendant had much ability to express himself. (RSSR. 35)

Dr. Carbonell stated that Defendant had a history of being beaten as a child and that he was shot in the face and lost consciousness as a result of falling thereafter. (RSSR. 36) Dr. Carbonell stated that these injuries may have caused brain

damage. (RSSR. 36) However, Dr. Carbonell could not definitively state that Defendant was brain damaged because of his IQ level. (RSSR. 36) Dr. Carbonell stated that Defendant's problems were lifelong but got worse after the shooting. (RSSR. 38)

Dr. Carbonell believed that Defendant was very passive and easily led. (RSSR. 38-39) She found this consistent with the history provided by Defendant's family, friends and teacher. (RSSR. 39) Dr. Carbonell explained that Defendant's prison records showed that he was amiable, well-behaved and had a good attitude at times and that he was difficult and caused problems at other times. (RSSR. 39-40) Dr. Carbonell stated that this was consistent with Defendant being passive, not being able to interact with the world effectively, getting frustrated and acting out. (RSSR. 40-41)

Dr. Carbonell believed that the abuse and abandonment by his father, together with his mother's lack of supervision and his intellectual deficit cause Defendant to have personality problems and to withdraw. (RSSR. 48-53) Dr. Carbonell claimed that Defendant's passivity and his inability to cope caused Defendant to be unable to communicate. (RSSR. 53-54)

When asked if Defendant qualified as retarded, Dr. Carbonell stated that he did not score in the retarded range. (RSSR. 58) However, Dr. Carbonell explained that retardation depends on

three factors, (1) subaverage intelligence, (2) onset in the development stage and (3) deficits in adaptive functioning. (RSSR. 57-59) Dr. Carbonell believed that Defendant's problems had onset in the development stage and that he did not have problems in adaptive functioning because of his passivity. (RSSR. 58-59) As such, she did find that Defendant was intellectually impaired. (RSSR. 59)

Dr. Carbonell did not think Defendant was ever capable of planning or had ever planned anything. (RSSR. 87-88) Dr. Carbonell did think that Defendant was educatable. (RSSR. 89-90) Dr. Carbonell believed that Defendant's deficits in intellectual functioning, his difficulty in achievement and his history of being a loner and withdrawn should be considered mitigating. (RSSR. 97) Dr. Carbonell also believed that both statutory mental mitigators were applicable to Defendant. (RSSR. 102-04) She based this opinion on her claim that Defendant behaves passively and then acts out and her claim that Defendant did not have the intellectual ability to understand what was required of him. (RSSR. 103-04) She also claimed that CCP was inapplicable because Defendant allegedly could not plan. (RSSR. 105)

Dr. Carbonell did not believe that Drs. Haber and Miller had conducted professional, adequate evaluations because they did not consider background information and did not do enough

testing. (RSSR. 106-17) As such, Dr. Carbonell disagreed with their reports and felt that they were unreliable. (RSSR. 117-19)

Dr. Carbonell admitted on cross that her findings with regard to Defendant's passivity did not correspond with Defendant's assertion of innocence. (RSSR. 123) Dr. Carbonell thought that Defendant probably had brain damage. (RSSR. 128-29) Dr. Carbonell stated that Defendant was not schizophrenic or psychotic. (RSSR. 129) Dr. Carbonell stated that Defendant functioned "at the level of many retarded people." (RSSR. 129) Dr. Carbonell admitted that retardation generally required an IQ score less than 70 but stated that such scores had a margin of error of plus or minus 5 and that retardation was not based solely on IQ. (RSSR. 130, 168-70)

Dr. Carbonell admitted that her definition of assertive behavior required that the behavior not infringe on the rights on others and that she would not classify behavior that infringed on the rights of others as aggressive. (RSSR. 135) Dr. Carbonell insisted that Defendant was honest when he stated that he did not know that he could be sentenced to death even though he was in the courtroom during the extensive voir dire on the subject. (RSSR. 139-44)

Dr. Carbonell did not believe that the Bro White letter demonstrated that Defendant appreciated that the named

individuals were State witnesses and that he was intending to harm them and their families. (RSSR. 144-48) Instead, she felt the letter showed that he was angry and distressed and that the letter was primitive. (RSSR. 148) She believed that the portion of the letter indicating that the individuals that would be "handled accordingly" merely showed that Defendant was angry and lashing out in a totally useless way. (RSSR. 150) She believed the same of the threat against the witnesses' families. (RSSR. 151)

Dr. Carbonell also discounted the alibi notes because Defendant never wrote in the notes to call his attorney, give him this alibi and testify to it at trial. (RSSR. 152-56) Moreover, she felt the content of the alibi was too simple. (RSSR. 152-56)

Dr. Jethro Toomer testified that he evaluated Defendant in 1988 and again in 1994. (RST. 594-97) Dr. Toomer met with Defendant for 3 to 3½ hours in 1988 and for an hour in 1994. (RST. 597-99) During his interview, Dr. Toomer gave Defendant the revised Beta IQ test, the Carlson Psychological Survey, the Rorschach test, the Bender Gestalt Design test and the verbal reasoning portion of the WAIS. (RST. 602-03) In preparing to testify, Dr. Toomer had also reviewed affidavits from Defendant's family, friends, teachers and coworkers, his school

records, his DOC records, his personnel file, documents used during his interviews with Defendant, Defendant's trial attorney's file and the transcript of his prior testimony and of the original trial. (RST. 598, 603-05) Dr. Toomer stated that he reviewed the affidavits and records in order to corroborate the history provided by Defendant. (RST. 600-01)

Dr. Toomer stated that he used the Revised Beta IQ test because it was not dependent on acquired information. (RST. 605-06) Defendant scored 76, which was in the borderline range. (RST. 606) Dr. Toomer also noted that Defendant's prison records reflected a Revised Beta of 73 from 1984. (RST. 622) Dr. Toomer stated that the range for mental retardation was 70 to 75 and that IQ scores had a margin of error of plus or minus 5. (RST. 607) As a result, Dr. Toomer stated that Defendant's IQ could be between 81, above the borderline range, and 71, in the retarded range. (RST. 607) Dr. Toomer stated that he was not saying that Defendant was retarded. (RST. 607)

Dr. Toomer stated that the Bender Gestalt Design test was a screening test. (RST. 608) The test requires that the examinee copy a drawing, and the different variations from the original drawing are considered indicative of certain mental problems. (RST. 608-10) Dr. Toomer believed that Defendant's performance on this test was indicative of organic brain damage and of

someone who was depressed and timid. (RST. 610) Dr. Toomer found the indication of depression and timidness consistent with his observations of Defendant. (RST. 610) Dr. Toomer stated that the indication of brain damage did not necessarily mean that Defendant was brain damaged; it merely indicated the neuropsychological testing was necessary. (RST. 611)

Dr. Toomer stated that he only gave the verbal reasoning portion of the WAIS because the WAIS relied too heavily on acquired knowledge and was culturally biased. (RST. 611-13) The verbal reasoning portion is used to evaluate the individual's ability to reason abstractly. (RST. 613) According to Dr. Toomer, the test showed that Defendant's reasoning was very concrete. (RST. 614)

Dr. Toomer stated that the Carlson Psychological Survey tested personality and overall functioning and was normalized against individuals who had been charged with crimes. (RST. 615) Defendant's results were in the 5th percentile for substance abuse, the 55th percentile for thought disturbances, the 16th percentile for antisocial tendencies and the 90th percentile for self depreciation. (RST. 617-18) This indicated that Defendant did not abuse drugs or alcohol, had intellectual deficits, was not antisocial and had low self esteem. (RST. 617-18) Dr. Toomer found the self esteem score consistent with Defendant's

background and records. (RST. 618)

The Rorschach test involves showing a picture and asking the subject to create a story about the picture. (RST. 619-21) Dr. Toomer admitted that the test had been criticized for its culture bias but that it was valid for estimating intelligence because people with higher intelligence create more detailed stories. (RST. 621) Defendant was not very responsive on this test, and Dr. Toomer found that indicative of having low intelligence and being withdrawn and depressed. (RST. 621-22)

Based on the totality of his evaluation, Dr. Toomer felt that Defendant had deficits in intellectual and emotional functioning and mental status. (RST. 622) He found that Defendant's intellectual functioning was "borderline or slightly higher." (RST. 623) Dr. Toomer opined that Defendant was incapable of forming the mental state necessary for CCP because his intellectual deficits prevented him from engaging in long range planning and from weighing the consequences of his actions. (RST. 624-25) He also believed that both statutory mental mitigators were applicable to Defendant because Defendant has a lifelong intellectual deficit and history of being withdrawn. (RST. 630-32) He felt that Defendant suffered from a "developmental disorder," which caused a lifelong impairment of his "social interpretaion [sic] skills" and his intellectual

functioning. (RST. 632)

Dr. Toomer did not feel that Drs. Miller and Haber produced accurate findings regarding Defendant. (RST. 626-27) He felt that they relied too heavily on self report and contaminated one another's evaluations because they were conducted concurrently. (RST. 627-28) He also felt that Dr. Haber used the Bender test inaccurately. (RST. 627) Dr. Toomer believed that one expert could not rely upon another expert's raw data without a great deal of additional information regarding how the raw data was developed. (RST. 628-29) As such, Dr. Toomer did not believe it was acceptable for one expert to rely on the raw data of another with speaking to that other expert. (RST. 629)

On cross examination, Dr. Toomer admitted that he had testified on mitigation and insanity a number of time but always for the defense. (RST. 636-37) The only issue upon which he had ever testified for the State was competency. (RST. 637)

Dr. Toomer admitted that he had not found Defendant to be retarded, psychotic or schizophrenic. (RST. 639) He had found that Defendant might have some mild organic brain damage. (RST. 639-40) Dr. Toomer admitted that people under long term incarceration were frequently depressed, but did not feel that the fact that Defendant had been incarcerated almost continually since 1962 was the cause of his depression. (RST. 641-42) When

asked if Defendant's criminal history and history of problems during incarceration demonstrated that Defendant was antisocial, Dr. Toomer stated that his family's description of Defendant as helpful, caring and concerned indicated that he was not antisocial. (RST. 643-45)

Dr. Toomer admitted that he had previously described the graze wound to Defendant's head as a very severe head wound because Defendant's family had claimed that he was incoherent, that he was released from the hospital because he could not pay and that he had severe headaches thereafter.[1] (RST. 645-46) Dr. Toomer stated that the reason why Defendant's siblings had become productive members of society and Defendant had become a criminal was that people react differently. (RST. 647) However, he admitted that the difference could be a matter of choice. (RST. 647) Dr. Toomer claimed that the reason Defendant repeatedly failed to follow the instructions of his parole officers was that the disobedience was a release of feeling brought on by doing things that Defendant did not want to do to feel accepted. (RST. 648-49)

When the State informed Dr. Toomer of the facts of the crime

[1] During resentencing, Defendant's mother and sister described the injury as a grazing wound and stated that Defendant was treated and released from the hospital. (RST. 539, 568)

and inquired how Dr. Toomer could say that Defendant could not plan, Dr. Toomer claimed that “just because you see behavior and that behavior appears to look as if the person plans it out and what have you it doesn’t mean that it’s necessarily the case.” (RST. 652) Dr. Toomer claimed that the fact that Defendant had been capable of conforming his conduct to the rules of the job did not mean that he could conform his conduct to the requirements of law because his abilities vacillated. (RST. 653)

Dr. Toomer admitted that he had seen the Bro White letter in which Defendant informed a fellow inmate to be careful of certain individuals, including certain witnesses against him, because they were informants, and stated that he had provided the names of the witnesses against him to people in prison and the addresses of their families to someone who was not incarcerated so that they could be handled accordingly. (RST. 653-55, RSR. 239) Dr. Toomer felt that the letter could have been written by a retarded person because of spelling and grammatical errors. (RST. 656-57) Dr. Toomer also felt that the letter was indicative of Defendant’s depression. (RST. 657) Dr. Toomer did not perceive the letter as stating that Defendant planned to have the witnesses against him and their families killed even though the letter included the line “I hate like hell to do that but the innocent must suffer” immediately after

the comment about providing the witnesses' families' address to a "source on the outside world." (RST. 657) Dr. Toomer felt that this phrase was misused and was indicative of Defendant's intellectual deficits. (RST. 657) Dr. Toomer claimed that the letter could mean anything and that he would need more information about what was happening to Defendant when he wrote the letter to provide an interpretation. (RST. 658-59)

Dr. Toomer admitted that Defendant was capable of having written the alibi notes because he was not retarded and his alleged intellectual deficits merely prevented him from considering consequences, weighing alternatives and behaving appropriately. (RST. 660-61) However, Dr. Toomer refused to interpret the notes as attempting to fabricate a false alibi to avoid conviction and punishment. (RST. 661-62)

In rebuttal, Dr. Lloyd Miller, a board certified psychiatrist, testified that Defendant's intelligence was in the average to borderline range. (RST. 509) Dr. Leonard Haber, a psychologist, testified that he performed a Bender Gestalt test and reviewed the tests given by Drs. Toomer and Carbonell. (RST. 689-94) He did not do further testing because a full battery of tests had already been done. (RST. 694)

He stated that the IQ scores showed that Defendant was in the borderline to below average level of intelligence. (RST.

695-99) He found that the Bro White letter, alibi notes and prior pro se pleadings by Defendant indicated that Defendant had the ability to conceive and communicate ideas and to plan and were indicative of intelligence. (RST. 695-700)

In its written sentencing order, the trial court rejected the testimony of Drs. Carbonell and Toomer about Defendant's alleged lack of intellectual ability:

> The testimony of Drs. Carbonell and Toomer, that the defendant did not have the intellectual capacity to calculate and plan the homicide is not only contradicted by Dr. Haber, but by the statements and actions by the defendant before and at the time of the homicide. Furthermore, the evidence of the letters from the defendant to his cellmates concerning threats to witnesses and falsifying an alibi, indicate a person who is capable of planning and calculating his actions. The Court finds that the murder of Bjorn Thomas Svenson was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification.
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> * * * *
>
> To support this mitigating circumstance [extreme mental or emotional disturbance], the defendant presented the testimony of Dr. Joyce Carbonnell and Dr. Jethro Toomer. Both psychologists testified that the defendant's intelligence level was low to borderline, and that such a level was indicative of deficits in intellectual functioning. Both doctors testified about the defendant's poor background, that he came from a migrant family in Belle Galde, and that the family remained poor when they moved to Miami, that his father was an alcoholic, who did not support the family as he should, and that he beat the defendant, as well as his siblings, and mother. They also testified that the defendant did poorly in school and that the defendant had been shot (grazed) in the head by a bullet as a young teenager. Although psychological tests indicated the possibility of some organicity or brain damage, neither doctor could state

that the defendant was brain damaged. Based on the totality of the circumstances, both doctors opined that the defendant was under the influence of extreme mental or emotional disturbance at the time he murdered Mr. Svenson.

In rebuttal, the State presented the testimony of Dr. Lloyd Miller, a board certified psychiatrist, and Dr. Leonard Haber, a psychologist. Dr. Miller testified that although the defendant was of low or borderline intelligence, his ability to learn was better than what the intelligence tests suggested. Dr. Miller found no psychosis, schizophrenia, or evidence of brain damage. He considered the defendant's background, and concluded that he did not suffer from any significant degree of mental illness or impairment. He found no significant or extreme or any mental disturbance.

Dr. Haber did not challenge the defendant's tested IQ score in the 72-76 range, but noted that he had once tested at 83. After reviewing the defendant's actions after the homicide, i.e., alibi notes, threats to witnesses, and pro se motions to the Court, Dr. Haber concluded that the defendant's mental abilities exceeded that which one would except from someone with an IQ in the 72-76 range. Dr. Haber opined that there was no evidence of brain damage or mental illness. He did not find any evidence to support a finding that the defendant was under the influence of an extreme mental or emotional disturbance when the homicide was committed.

The Court finds that this statutory mitigating circumstance does not reasonably exist. There is no evidence that the defendant suffered from a mental disturbance that "interfere(d) with but (did) not obviate the defendant's knowledge of right and wrong." Duncan v. State, 619 So. 2d 279 (Fla. 1993); State v. Dixon, 283 So. 2d 1 (Fla. 1973). There is simply no basis to support either Dr. Carbonnell's or Dr. Toomer's testimony that this mitigating factor exists. Dr. Miller and Dr. Haber's testimony were inherently more credible. Thus, the Court finds that this mitigating circumstance has not been reasonably established by the greater weight of the evidence, see Campbell v. State, 571 So. 2d 415 (Fla. 1990); and therefore it does not exist or apply.

* * * *

For the same reasons that they based their opinion on the mitigating circumstance under section 921.141(6)(b), Drs. Carbonnell and Toomer likewise opined that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Dr. Miller opined that despite the defendant's intelligence level, he could understand and conform his conduct to the requirements of the law, that there was nothing in his mental condition that prevented him from following the law, and that the defendant was able to do what he does according to his wishes. Dr. Haber likewise opined that the defendant had the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law. He stated that the defendant was capable of making choices that are his.

There was no evidence to indicate that the defendant suffered from a mental disturbance which interfered with, but did not obviate his knowledge of right or wrong. State v. Dixon, 283 So. 2d 1 (Fla. 1972). Again, the Court submits that Dr. Miller's and Dr. Haber's testimony was more credible than Dr. Carbonnell's or Dr. Toomer's. There was no credible evidence to show that the Defendant was impaired in any manner. Thus, the Court finds that this mitigating circumstance does not exist or apply.

* * * *

Ida Phillips Stanley, a librarian, also testified similarly to her mother and brother. In addition, she testified that after the defendant first got out of prison, he lived with her and their mother, worked for the City of Miami Sanitation Department, helped pay bills and bought her her first typewriter. She testified that the defendant was close to her and her children. She testified that when the defendant was initially paroled in 1980, he worked as a bus boy at Neighbor's Restaurant.

Samuel Ford testified that the defendant was very quiet and withdrawn in school. He stated that the defendant was a below average student, that he did not have ambition, that he was a follower, and not a leader. He did not know if the defendant had a learning disability, but that something was wrong.

Mary Williams, a family friend testified that she used to watch the defendant and his siblings while

> their mother was at work. The defendant was initially outgoing and got along well with her children. As he got older, the defendant didn't talk much, but he was nice and respectful of her. The Reverend Jenkins testified that in the early 1980's, he had talked to the defendant two or three times while the defendant was in jail. He found the defendant to be quiet and reserved, "in and out of it."
>
> Drs. Carbonnell and Toomer reiterated the defendant's background as testified to by the defendant's family and friends. They opined that the defendant had low to borderline intelligence, was a loner, had low self-esteem and poor self-image. They also opined that the defendant had deficiencies in his intellectual functioning, and did not have the capacity for long-range planning and consideration of the consequences.
>
> The Court recognizes that the defendant came from a poor family, that his father was an alcoholic who was not around very much, and who when drunk would become violent and beat the defendant and his family. The Court would note however, that the defendant's brother and sister who were raised in the same family and circumstances were able to overcome their background and became law abiding, productive citizens. The Court also recognizes that the defendant had a low IQ. However, the evidence also shows that he is street smart. The defendant could follow the rules of work, or parole, when he wanted to. He was able to plan a false alibi and indirectly threaten witnesses. The Court finds that to the extent these nonstatutory mitigating circumstances are found to reasonably exist, then they should be given little weight, as they do not extenuate or reduce the degree or moral culpability of the defendant's actions in the committing this homicide.

(RSSR. 180, 182-85, 186-87) Defendant did not contest the resentencing court's treatment of his mitigation on direct appeal. Initial Brief of Appellant, Florida Supreme Court Case no. 83,731.

SUMMARY OF THE ARGUMENT

Defendant's claim regarding retardation should be rejected. *Atkins* should not be applied retroactively. The claim is procedurally barred. Moreover, the resentencing court already determined that Defendant is not retarded, and that finding is supported by the evidence.

ARGUMENT

I. DEFENDANT IS NOT ENTITLED TO ANY RELIEF UNDER *ATKINS V. VIRGINIA*, 122 S. CT. 2242 (2002).

Defendant asserts that he is entitled to relief under *Atkins v. Virginia*, 122 S. Ct. 2242 (2002). However, Defendant is not entitled to any relief because *Atkins* does not apply retroactively, the claim is procedurally barred and Defendant has already been determined not to be retarded.

Atkins was not decided until June 20, 2002. Defendant's conviction became final in 1985, when this Court affirmed his conviction. *Phillips v. State*, 476 So. 2d 194 (Fla. 1985). Defendant's sentence became final on October 5, 1998, when the United States Supreme Court denied certiorari after resentencing. *Phillips v. Florida*, 525 U.S. 880 (1998). As such, in order for Defendant to be granted relief under *Atkins*, *Atkins* would have to apply retroactively. None of the discussion by the United States Supreme Court in the opinion suggests that *Atkins* is to be applied retroactively.[2] *See*

[2] In *Penry v. Lynaugh*, 492 U.S. 302 (1989), Justice Stevens wrote, concurring in part and dissenting in part, that should the Court decide that the Eighth Amendment prohibits the execution of mentally retarded persons, said rule should be applied retroactively. To the extent that Stevens and other members of the Court speculate that a reversal of *Penry* could be retroactive, the comments are mere dicta.

Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002)(quoting *Rodriguez De Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989)("[I]n a comparable situation, the United States Supreme Court held: 'If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'").

Atkins expressly left the implementation of a constitutional restriction with regard to imposing the death penalty on mentally retarded individuals to the states. 122 S. Ct. at 2250. In Florida, the legislature crafted a procedure by which prospective death row inmates may assert ineligibility for the death sentence in a post-guilt phase but prior to the penalty phase of their trials. *Atkins* urges nothing more.[3] In the absence of an express ruling from the United States Supreme Court requiring retroactive application of *Atkins* or a decision from this Court striking the prospective-only application of section 921.137, Florida Statutes, this Court should not presume

[3] It is respectfully submitted that the United States Supreme Court recognized that Florida was one of those states that "joined the processional" in the evolving standards of decency category.

that retroactive application of *Atkins* is required. As such, the denial of post conviction relief should be affirmed, and the petition for writ of habeas corpus should be denied.

Further, the claim that Defendant is retarded is procedurally barred. Defendant did not claim that execution of the mentally retarded was unconstitutional at the time of resentencing. While Defendant asserted that he was retarded at the resentencing, he did not raise the resentencing court's rejection of this claim on appeal. Nor did he claim on resentencing appeal that his execution was unconstitutional because he was mentally retarded. In fact, Defendant did not claim that it was unconstitutional to execute him because he was mentally retarded until his appeal from the denial of his post conviction motion. As such, this claim is procedurally barred. *See Brown v. State*, 755 So. 2d 616, 621 n.7 (Fla. 2000) (postconviction claim that Eighth Amendment forbids the execution of mentally retarded was procedurally barred); *Woods v. State*, 531 So. 2d 79 (Fla. 1988). The denial of the motion for post conviction relief should be affirmed, and the state habeas petition should be denied.

Moreover, even if *Atkins* did apply retroactively and the claim was not procedurally barred, Defendant would still not be entitled to relief. At resentencing, Defendant presented the

testimony of Dr. Carbonell that he was mentally retarded. However, Drs. Toomer, Miller and Haber all testified that Defendant was not mentally retarded. In its sentencing order, the resentencing court rejected Dr. Carbonell's testimony about Defendant's abilities on credibility grounds. While the resentencing court accepted the testimony that Defendant has a low IQ score, it found that the score was not indicative of Defendant's level of functioning:

> The Court also recognizes that the defendant had a low IQ. However, the evidence also shows that he is street smart. The defendant could follow the rules of work, or parole, when he wanted to. He was able to plan a false alibi and indirectly threaten witnesses.

(RSSR. 187) As this issue has already been presented and rejected, collateral estoppel now bars relitigation of this issue.

In fact, in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), this Court rejected a similar claim by a defendant. Bottoson had filed a post conviction claim that he was retarded. The lower court held an evidentiary hearing on this issue and rejected the claim, finding that Bottoson was not retarded. This Court affirmed the rejection of this claim prior to the issuance of *Atkins*. *Bottoson v. State*, 813 So. 2d 31, 33-34 (Fla. 2002). After *Atkins* was decided, Bottoson raised the claim again, asserting that he was entitled to a new hearing on

this issue. This Court rejected the claim because Bottoson had already had a hearing on the issue and failed to prove his claim. *Bottoson*, 833 So. 2d at 695. As such, under *Bottoson*, the resentencing court's prior rejection of this claim bars Defendant's attempt to relitigate it.

The prior rejection of the claim should be particularly binding in this case. At resentencing, Defendant sought to establish his alleged retardation as mitigation. Pursuant to *Campbell v. State*, 571 So. 2d 415, 419-20 (Fla. 1990), the resentencing court would have been required to have found retardation as mitigation had Defendant been able to prove that he was retarded by the greater weight of the evidence. In contrast, pursuant to §921.137, Fla. Stat., a defendant must prove that he is retarded by clear and convincing evidence. Given that Defendant was unable to show that he was retarded by the greater weight of the evidence at resentencing, Defendant would not be able to meet the higher standard of proof. The claim should be denied.

To the extent that Defendant may assert that a new hearing is necessary because he did not have guidance of what was necessary to prove that he was retarded at the time of resentencing, this claim is meritless. The definition of retardation contained in §921.137, Fla. Stat., is the same as

the definition of retardation that was contained in §393.063(41), Fla. Stat. (1993), at the time of resentencing.

§393.063(41), Fla. Stat. (1993)	§921.137, Fla. Stat.
"Retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. "Significantly subaverage general intellectual functioning," for the purpose of this definition, means performance which is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the department. "Adaptive behavior," for the purpose of this definition, 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.	As used in this section, the term "mental 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 section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services. The term "adaptive behavior," for the purpose of this definition, 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.

Moreover, this definition is consistent with the definitions of retardation provided by the American Psychiatric Association and other leading organizations. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISEASES 46 (4th ed. 1994);

Atkins, 122 S. Ct. at 2245 n.3 (discussing this definition from DSM-IV and similar definition from the American Association of Mental Retardation); *Bottoson v. Moore*, 813 So. 2d 31, 33-34 (Fla.) (rejecting claim that there was no definition of mental retardation in place in Florida, where trial court used functional equivalent of definition above), *cert. denied*, 122 S. Ct. 2670 (2002). In fact, Dr. Carbonell admitted that these three criteria were used to diagnose retardation in her testimony. (RSSR. 57-59) Given that the criteria for retardation did exist under Florida law at the time of resentencing, that these criteria are consistent with the definition in §921.137, Fla. Stat., and leading authorities and that Defendant's expert purported to use these criteria, there was no lack of notice regarding the definition of retardation. The claim should be rejected.

To the extent that Defendant may assert that he should not be required to prove his retardation by clear and convincing evidence, the claim should be rejected. In determining that execution of the mentally retarded was unconstitutional, the United States Supreme Court looked at the number of states that had adopted statutes barring death sentences on mentally retarded individuals. *Atkins*, 122 S. Ct. at 2248-50. The Court then left to the states the task of determining how to decide

whether defendants were mentally retarded. *Id.* at 2250. Florida was one of the states that had adopted such a statute. §921.137, Fla. Stat. (2002). That statute sets the burden of proof at clear and convincing. §921.137(4), Fla. Stat. (2002). Given that this statute was part of the justification for finding that execution of the mentally retarded was barred, this statute should be applied to any determination of whether Defendant is mentally retarded. Moreover, this standard of proof is consistent with the standard of proof regarding other mental health issues. *See* Fla. R. Crim. P. 3.812(e) (competency to be executed); §775.027(2), Fla. Stat. (insanity as affirmative defense); *see also* §§394.467(1), 394.917(1), 916.13, Fla. Stat. (civil commitment proceedings). Thus, the claim should be denied.

To the extent that Defendant may assert that the application of such a standard is unconstitutional under *Cooper v. Oklahoma*, 517 U.S. 348 (1996), the assertion should be rejected. In *Medina v. State*, 690 So. 2d 1241, 1246-47 (Fla. 1997), this Court examined *Cooper* with regard to the standard of proof required to establish that a defendant is incompetent to be executed. *Medina* held that *Cooper*'s due process concern with a lower standard for a pretrial determination of competency was not applicable in the postconviction context, where the state

has a more substantial interest at stake and the heightened procedural protections are accordingly relaxed. Similarly, *Cooper* does not require a preponderance of the evidence standard in assessing claims of mental retardation as a bar to execution. Therefore, the clear and convincing standard adopted by the legislature must be applied.

To the extent that Defendant may assert that the prior rejection of this claim by the resentencing court is insufficient because *Ring v. Arizona*, 122 S. Ct. 2428 (2002), requires that this claim be presented to a jury, the claim should be rejected. *Ring* applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to Arizona's capital sentencing scheme. *Apprendi* held that other than the fact of a prior conviction, any fact that increases the statutory maximum for an offense must be submitted to a jury. In *Harris v. United States*, 536 U.S. 545 (2002), the Court made clear that *Apprendi* does not apply to all factual determinations regarding sentencing; *Apprendi* only applies to those facts (other than a prior conviction) that increase the statutory maximum. Whether Defendant is mentally retarded or not, the statutory maximum for first degree murder will not increase; particularly given that this Court has held that death is the statutory maximum for first degree murder in Florida. *Shere v. Moore*, 830 So. 2d 56,

61 (Fla. 2002). As such, there is no merit to Defendant's claim that he is entitled to a jury determination of whether he is retarded. The resentencing court's prior rejection of this claim is sufficient and binding. The claim should be rejected.

Moreover, the testimony presented by Defendant at resentencing shows that he is not retarded. In order to be diagnosed as retarded, Defendant would have had to present evidence of significant subaverage intelligence. This generally requires an IQ of 70 or below. Here, Defendant scored a 75 on the IQ test (WAIS-R) he was given by Dr. Carbonell. (RSSR. 15) He had a history of reported IQ scores between 73 and 83. (RSSR. 32, 41) Defendant scored a 76 on the IQ test given to him to Dr. Toomer. (RST. 606) Given this consistent history of IQ scores above 70, Defendant fails the first requirement for establishing that he is retarded. Further, Dr. Carbonell based her testimony that Defendant had deficits in adaptive functioning on Defendant's alleged passivity. (RSSR. 58-59) However, the finding of passivity was based on Dr. Carbonell's definition of being passive, which required that the aggressive behavior not violate other peoples' rights. (RSSR. 135) Not only was this finding contradicted by the aggressive behavior in which Defendant had engaged, but this finding also ignored the fact that Defendant had been capable of holding a job and caring

for himself. Moreover, none of the other experts found difficulties in adaptive behavior. Further, both Dr. Carbonell and Dr. Toomer thought that Defendant was incapable of planning. (RSSR. 87-88, RST. 624-25) However, Defendant was able to plan to lie in wait for his victim. He was able to plan to do this at a time and in a place where there would be no witnesses. He was able to plan a false alibi and he was able to plan to seek revenge against those who reported his activities. As such, there was no credible evidence that Defendant had deficits in adaptive functioning. Thus, Defendant fails the second criteria for a finding of mental retardation.

Finally, Defendant was 37 at the time he committed this crime in 1982. (RSSR. 188) Given the lack of a history of low IQ scores and a lack of history of problems in adaptive functioning, any attempt by Defendant to present new evidence to show that he is retarded would be unavailing. It would not show that his allegedly subaverage intelligence and his deficits in adaptive functioning occurred prior to the age of 18. As such, Defendant cannot show that he is retarded. Thus, *Atkins* would have no effect on this case. The denial of the motion for post conviction relief should be affirmed, and the habeas petition should be denied.

CONCLUSION

For the foregoing reasons, the denial of the motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to William M. Hennis, III, Assistant CCRC, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this ____ day of April, 2003.

SANDRA S. JAGGARD
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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