IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2248

HARRY FRANKLIN PHILLIPS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

SUPPLEMENTAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's summary denial of Rule 3.850 relief, as well as various rulings made during the course of Mr. Phillips's request for postconviction relief. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal of 1994 resentencing to this Court;

"T" -- transcript of 1994 resentencing hearing;

"Supp. R" -- supplemental record on 1994 resentencing appeal;

"PCR" -- record on instant postconviction appeal;

"Supp. PCR" -- supplemental record on instant postconviction appeal;

"PCR1" -- record on direct appeal of 1988 postconviction appeal.

REQUEST FOR ORAL ARGUMENT

Mr. Phillips has been sentenced to death. The resolution of the issues in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in

a similar posture. A full opportunity to air the additional issues that resulted in the grant of supplemental briefing through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Phillips, through counsel, accordingly urges that the Court permit additional oral argument.

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SUMMARY OF ARGUMENTS

1. The lower court's summary denial of Mr. Phillips's 3.850 motion without an evidentiary hearing on the claims concerning his mental retardation was erroneous and failed to meet the minimal standards set forth in Fla. R. Crim. P. 3.850. Mr. Phillips was prepared to present expert testimony at an evidentiary hearing that Mr. Phillips was and is mentally retarded and suffers from organic brain damage. Resentencing counsel's deficient performance prejudiced Mr. Phillips. At a bare minimum Mr. Phillips should have the opportunity to prove at an evidentiary hearing in circuit court that he meets the criteria for mental retardation described in § 921.137 Florida Statutes, which as of June 2001 prospectively ended the practice of sentencing mentally retarded persons to death in Florida. Preferably, Mr. Phillips should have a Atkins v. Virginia, 122 S.Ct. 2242 (2002) proceeding with a full jury trial assuring all the rights of the accused under Florida state law and federal law.

I. ARGUMENT

A. INTRODUCTION

Mr. Phillips is mentally retarded and, therefore, his

death sentence violates the Eighth Amendment to the United States Constitution. Atkins v. Virginia, 122 S. Ct. 2242 (2002). In Atkins, the Supreme Court held that the execution of a mentally retarded person "is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." 122 S. Ct. at 2252 (citation omitted). Atkins describes this holding as "a categorical rule making [mentally retarded] offenders ineligible for the death penalty." 122 S. Ct. at 2251.

Briefing in other cases before this Court on the mental retardation issues implicated by section 921.137, Florida Statutes (2001), and Atkins, has concentrated on several discrete areas of inquiry. These areas include: (1) what is the definition of mental retardation to be used; (2) what procedures for determining mental retardation should be followed in Florida capital cases at various stages; (3) should section 921.137(1),(4), Florida Statutes apply retroactively or, subsequent to Atkins, is the statute inadequate and/or unconstitutional ; (4) whether the legal standard of clear and convincing evidence required by section 921.137 is applicable to

proving up a defendant's mental retardation; (5) whether mental retardation is a question for a jury or a judge; and, (6) other related issues. This supplemental briefing will apply these areas of inquiry to the facts in Mr. Phillips's case.

In Atkins, the United States Supreme Court held that the execution of the mentally retarded violated the Eighth Amendment's prohibition against excessive punishment. The Supreme Court found a "consensus [among the states which] reflects widespread judgement about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the pedological purposes served by the death penalty." Id. The Court concluded that the deficiencies of the mentally retarded "do not warrant an exemption from criminal sanctions, but they do diminish their personal responsibility." Id.

B. DEFINITIONS

Mr. Phillips's Initial Brief went into some detail about definitions of mental retardation and the relevance of those definitions to the course of his case. If the experts retained by the defense and the State fail to

follow the established definitions for mental retardation when opining about the presence or absence of the condition, their opinions and the findings of fact and conclusions of law by fact finders based on their opinions are flawed. The diagnostic criteria in both the American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision, Washington, DC, American Psychiatric Association, 2000, and the American Association on Mental Retardation *Mental Retardation*, Definition, Classification, and Systems of Support, Tenth Edition, Washington, DC, American Association on Mental Retardation, 2002, are more alike than different. Which diagnostic system is preferred often has more to do with the discipline of the particular examining expert (psychiatrist, clinical psychologist, educational psychologist, or mental retardation professional) than with the superiority of one over the other.[1] That said, the most recent revision is that of the

[1]In the March 4, 2003 oral argument before this Court in Demetris Omarr Thomas, et. al. v. State, wherein trial and direct appeal case issues concerning Atkins were argued, counsel for the defendants advised this Court as to a document that had been served on the State and that was to be provided to the Court. The document in question, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, was created by James W.Ellis, Esq., Regents Professor of Law at the University of New Mexico School of Law,

American Association on Mental Retardation (AAMR), which published the 10th Edition of their text, *Mental Retardation, Definition, Classification, and Systems of Support* in 2002. This text also advances a revised definition of mental retardation:

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

Id at 8. A useful addenda to this definition is the additional text that AAMR includes that is described as "assumptions" made when applying the definition:

> Assumption 1: "Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture." This means that the standards against which the individual's functioning must be measured are typical community-based environments, not environments that are isolated or segregated by ability. Typical community environments include homes, neighborhoods, schools, businesses, and other environments in which people of similar age ordinarily live, play, work and interact. The concept of age peers

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Counsel for the Petitioner at oral argument before the United States Supreme Court in Atkins. It is attached to this supplemental brief for the consideration of the Court as Attachment A.

should also include people of the same cultural or linguistic background.

Assumption 2: "Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor and behavioral factors." This means that in order for assessment to be meaningful, it must take into account the individual's diversity and unique response factors. The individual's culture or ethnicity, including language spoken at home, nonverbal communication, and customs that might influence assessment results, must be considered in making a valid assessment.

Assumption 3: "Within an individual, limitations often coexist with strengths." This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.

Assumption 4: "An important purpose of describing limitations is to develop a profile of needed supports." This means that merely analyzing someone's limitations is not enough, and that specifying limitations should be a team's first step in developing a description of the supports the

> individual needs in order to improve functioning. Labeling someone with the name mental retardation should lead to a benefit such as a profile of needed supports.
> Assumption 5: "With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation will generally improve." This means if appropriate personalized supports are provided to an individual with mental retardation, improved functioning should result. A lack of improvement in functioning can serve as a basis for reevaluating the profile of needed supports. In rare circumstances, however, even appropriate supports may merely maintain functioning or stop or limit regression. The important point is that the old stereotype that people with mental retardation never improve is incorrect. Improvement in functioning should be expected from appropriate supports, except in rare cases.

Mental Retardation at 8-9.

The Florida statute provides a vague definition of sorts for mental retardation, Section 921.137(4), but leaves it to the Department of Children and Family Services to specify the standardized intelligence tests necessary for the proper determination of mental retardation.[2] The Department **has not** yet specified tests

[2]"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

and the rule relating to mentally retarded defendants is still being developed. The new law also requires that the trial court appoint "[t]wo **experts in the field of mental retardation** who shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing." Id. Fla. Stat. §921.137 (5)(emphasis added). Mr. Phillips submits to this Court that the pool of "experts in the field of mental retardation" is quite limited and in any case is inadequately defined in the statute. "Standards which are not yet in place cannot be said to provide notice and an opportunity to be heard. Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 542 (1985)("essential principle of due process is that a deprivation of life...be preceded by notice and opportunity for hearing appropriate to the

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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 of her age, cultural group, and community. The Department of Children and Family Services shall adopt rules to specify the standardized intelligence tests as provided in this subsection."

Fla. Stat. §921.137(1)(2001).

nature of the case”).

That the present statute constitutes a due process violation is better understood when consideration is given to the purpose standardized tests serve. There are various standardized intelligence tests with different standardization samples. Different tests capture different abilities. See generally American Association on Mental Retardation, *Mental Retardation*: Definition, Classification, and Systems of Support (10th ed. 2002). Each test, therefore, can result in a different test score. Id. Because Section 921.137 requires a “mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services” in order to determine “significantly subaverage general intellectual functioning,” there is no definition of what mental retardation is in the statute. Thus, the absence of designated standardized testing and the failure to delineate a specific numerical score or range of scores as a cutoff provides no notice and opportunity to be meaningfully heard on the question of mentally retardation.

Along with the "assumptions" noted supra that are

embedded in the AAMR's 2002 definition of mental retardation, this Court should also take note of revisions in the AAMR approach to appropriate adaptive functioning determinations. The same sort of standardized testing instruments are required for this prong of the diagnostic process as are required for intellectual functioning. In light of the sentencing court in Mr. Phillips's case finding that the presence of so-called "street smarts", in part, negated testimony by defense experts supporting statutory mitigation, an examination by this Court as to the clinical relevance of such findings for the diagnosis of mental retardation is relevant. Are findings such as "street smarts" an adequate determination, for example, of social skills that undermine a diagnosis of mental retardation?

> OPERATIONAL DEFINITION OF LIMITATIONS IN ADAPTIVE BEHAVIOR
> For the diagnosis of mental retardation, significant limitations in adaptive behavior should be established through the use of standardized measures normed on the general population, including people with disabilities and people without disabilities. On these standardized measures, significant limitations in adaptive behavior are operationally defined as performance that is at least two standard deviations

> below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, or practical, or (b) an overall score on a standardized measure of conceptual, social, and practical skills.

Mental Retardation at 76. The primary point is that the process of evaluating adaptive behavior is not a "seat of the pants" type of lay or judicial determination, but according to what AAMR describes as the "emerging consensus in the field," the assessment of adaptive behavior "should relate to an individual's typical performance during daily routines and changing circumstances, not to maximum performance." Id. at 17. The immense difficulty that this Court faces in applying Atkins to capital jurisprudence in Florida is reflected in the AAMR summary to Part I of their 2002 volume:

> In summary, mental retardation is not something that you have, like blue eyes or a bad heart. Nor is it something that you are, like being short or thin. It is not a medical disorder, although it may be coded in a medical classification of diseases; nor is it a mental disorder, although it may be coded in a classification of psychiatric disorders. *Mental retardation* refers to a particular state of functioning that begins in childhood, is multidimensional, and is affected positively by individualized supports.

> As a model of functioning, it includes the structure and expectations of the systems within which the person functions and interacts: micro-, meso-, and macrosystems. Thus a comprehensive and correct understanding of the condition of mental retardation requires a multidimensional and ecological approach that reflects the interaction of the individual and his or her environment, and the person-referenced outcomes of that interaction related to independence, relationships, contributions, school and community participation, and personal well-being.

Mental Retardation at 48. Current Florida law fails to meet the challenge of serving her mentally retarded citizens, including those who are tried and sentenced for capital murder. Fla. Stat. §921.137 should be discarded and replaced with an appropriate procedure that is applicable to the postconviction context, a context to which it was never intended to apply.

C. PROCEDURES

The Atkins Court held that the States were to develop the "appropriate ways to enforce the constitutional restrictions upon its execution of sentences." Atkins, 122 S Ct. at 2250, citing Ford v. Wainwright, 477 U.S. 399 (1986). At the time counsel filed his briefs and argued his case before this Court, he argued that Mr. Phillips

was entitled to benefit from Florida's prospective only ban on the execution of the mentally retarded. Atkins ratifies Mr. Phillips's position.

In Atkins, the Court addressed the issue of the standards for the factual determination of mental retardation:

> To the extent there are serious disagreements about the execution of mentally retarded offenders, it is determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins sufferers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. "As with our approach in Ford v, Wainwright, with regard to insanity, we leave to the State[s] the task of developing appropriate restrictions upon the execution of sentence.

Atkins 122 S. Ct. at 2249. (Citations omitted)

In Ford, as in Atkins, the United States Supreme Court recognized a substantive right under the Eighth Amendment, the right not to be executed while insane. 477 U.S. at 410. Having recognized a new substantive right under the Eighth Amendment, the Supreme Court explained:

> Once a substantive right or restriction is recognized in the Constitution, therefore, its enforcement is in no way confined to the rudimentary process deemed adequate in ages past.

Ford, 477 U.S. at 410. In capital proceedings, the Supreme Court held, "this Court has demanded that fact finding procedures aspire to a heightened standard of reliability." Id. at 411. In Ford, the Supreme Court reviewed the procedures employed by Florida to resolve claims of incompetency to be executed and concluded that the procedures did not comport with due process. Id. at 416.

As the United States Supreme Court has explained:

> the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those right.

Speiser v. Randall, 357 U.S. 513, 520-21 (1958). The United States Supreme Court has recognized the critical need for procedural rules to govern the process by which substantive rights are vindicated:

> [T]he lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination. The stakes are high,

> and the "evidence" will always be imprecise. It is all the more important that the adversary presentation of relevant information be as unrestricted as possible. Also essential is that the manner of selecting and using experts responsible for producing that "evidence" be conducive to the formulation of neutral, sound, and professional judgments as to the prisoner's ability to comprehend the nature of the penalty. Fidelity to these principles is the solemn obligation of a civilized society.

Ford v. Wainwright, 477 U.S. at 417.

Following the decision in Ford, Governor Graham asked this Court to promulgate rules of procedure governing competency to be executed proceedings. In re: Emergency Amendment to Florida Rules of Criminal Procedure, 497 So.2d 643 (Fla. 1986). This Court then adopted an emergency rule and requested the Criminal Law Section of the Florida Bar to formulate a permanent rule.

Since the decision in Atkins, Governor Bush has not requested the promulgation of a rule of procedure to govern resolution of mental retardation claims. Nor has this Court issued an emergency rule. Thus, Florida has yet to develop a procedure for enforcing Atkins. Mr. Phillips is no longer in the position of seeking the opportunity to be covered by the Florida statute barring the execution of the retarded. If he is mentally retarded

there is now a prophylactic prohibition of a death sentence being maintained or carried out by the State of Florida pursuant to the holding of Atkins.

In 2001, before the Supreme Court decided Atkins, the Legislature adopted Section 921.137, Fla. Stat., which prohibits imposing a death sentence on a mentally retarded person. The statute attempted to set forth a procedure for raising and resolving a mental retardation issue. However, this Court should not adopt the procedures contained in the statute because those procedures violate due process and the Eighth Amendment.

Atkins clearly mandates that states develop "appropriate ways" to determine the factual issue of mental retardation in order to identify those ineligible for the death penalty. This cannot exclude mentally retarded persons who happen to be in postconviction. Mr. Phillips is entitled to a jury trial on the issue of mental retardation, and the only mechanism for properly determining the claim is either a Florida statute or a Rule of Criminal Procedure which outlines the specific standards for a determination of mental retardation in the postconviction setting by a jury with a properly drafted

jury instruction.[3] There has been no jury participation in Mr. Phillips's case on the issue of his mental retardation.

Florida Statute 921.137 simply fails to meet the requirements of either Atkins or Ring v. Arizona, 122 S. Ct. 2428 (2002) in the postconviction context. However, the due process requirements adopted by the Georgia Supreme Court in Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339 (1989) provide an apposite model for a scheme that may comply with Atkins and Ring in regard to the determination of mental retardation in post conviction proceedings.[4]

In Fleming, the Georgia Supreme Court was presented with a Georgia legislative enactment precluding the execution of one found to be mentally retarded. However, the statute was only to apply capital proceedings that began after July 1, 1988. As the Georgia Supreme Court noted, "On its face the statute does not apply to Son

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[3]Section 921.137(1)(4), Florida Statutes, (2002), provides for judicial determination of mental retardation without jury participation.

[4]Fleming v. Zant was cited in Mr. Phillips' initial brief at page 66.

Fleming, who was tried more than ten years ago." 386 S.E. 2d at 341. After full briefing and oral argument, the Georgia Supreme Court held that "although there may be no 'national consensus' against executing the mentally retarded, this state's consensus is clear." 386 S.E. 2d at 342. Thus, the execution of the mentally retarded sentenced to death before the statute's effective date violated the Georgia Constitution's prohibition against cruel and unusual punishments. Surely this Court will hold in the post-Atkins era that anyone in Florida who is mentally retarded is not eligible for the death penalty. Thus, Fleming provides a roadmap to this Court for addressing the procedural problems arising in the wake of Atkins.

The Georgia Supreme Court was called upon to address the procedure to be used in those cases that predated the statute in which there was evidence that the death-sentenced defendant was mentally retarded. The Georgia Supreme Court set forth the procedure as follows:

> When a defendant who was tried before the effective date of the OCGA § 17-7-13(j) alleges in a petition for habeas corpus that he or she is mentally retarded, the habeas corpus court must first determine whether the petitioner has presented sufficient credible

> evidence, which must include at least one expert diagnosis of mental retardation, to create a genuine issue regarding petitioner's retardation. The court, in its discretion, may hold a hearing on the issue, or may make the determination based on affidavits, depositions, documents, etc. If, after examining the evidence, the habeas corpus court finds that there is a genuine issue, a writ shall be granted for the limited purpose of conducting a trial on the issue of the retardation only. This trial shall be held in the court in which the original trial was conducted. Petitioner shall be entitled to a full evidentiary hearing on the issue of retardation. The determination shall be made by a jury using the definition of retardation enunciated in the statute. **The petitioner will bear the burden of proving retardation by a preponderance of the evidence**. The jury shall not be bound by the results, but may weigh and consider all evidence bearing on the issue of mental retardation. If the jury returns a verdict that the petitioner is mentally retarded, the petitioner's sentence shall be vacated and he shall be sentenced to life imprisonment.

Fleming at 342-43 (footnote omitted)(emphasis added).

The procedure outlined by the Georgia Supreme Court predated the United States Supreme Court's decision in Ring v. Arizona, thus it fails to anticipate the provisions in Ring regarding the State's burden to prove facts necessary to establish death eligibility beyond a reasonable doubt. Nevertheless, the procedure does otherwise in many address the dilemma now faced in Florida following Atkins, including whether this Court should uphold the clear and convincing evidence standard required

under the 2001 Florida statute.

Subsequent to Fleming, the Georgia Supreme Court had occasion to further explain the procedure to be followed:

> The procedure we established for the post-conviction address of claims relating to mental retardation provided for remand to the habeas corpus court to determine whether the petitioner has presented sufficient credible evidence, which must include at least one expert diagnosis of mental retardation, to create a genuine issue regarding the petitioner's retardation. Upon such a finding, the case then would be transferred to the trial court for a jury determination of the issue of mental retardation *vel non*.

Zant v. Beck, 386 S.E.2d 349, 351 (Ga. 1989).

> However, we conclude, contrary to the trial court, that the mental-retardation trial jury should be selected in the same manner as a death-penalty criminal trial, including sequestration, and that while the state may cross-examine Foster if he testifies, the state may not call Foster for cross-examination in the first instance.

Zant v. Foster, 406 S.E.2d 74, 76 (Ga. 1991).

> We note that in trials under OCGA § 17-7-131(j), the issue of mental retardation is decided at the guilt phase of the trial. * * * The jury is *not* instructed, however, that a verdict of guilty but mentally retarded will preclude a death sentence. Such an instruction could divert the jury's attention and inject considerations inappropriate at the guilt phase of the trial.
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> * * *
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> [A]bsent exceptional circumstances not present here, witnesses in a Fleming trial should not be examined or

> cross-examined in such a manner as to inject sentencing issues into the case, and the jury should not be informed that if it finds the defendant mentally retarded, his death sentence will be vacated.

State v. Patillo, 417 S.E.2d 139, 140-41 (Ga. 1992).

Mr. Phillips's 3.850 motion cited Penry v. Lynaugh, 492 U.S. 302 (1989), for the proposition that because the jury in his resentencing was unaware that he suffered from organic brain damage and mental retardation, his constitutional rights were violated (PCR. 64)("[c]ontemporary society's attitude toward a particular punishment should be measured by as much objective evidence as possible").[5]

With Atkins overturning the rationale of Penry and creating an Eighth Amendment claim for all mentally retarded capital offenders, this Court must provide Mr. Phillips with a full and fair forum to present his claim. Given the summary denial of his 3.850 on all counts by the lower court and the claims made to date regarding judicial bias there, Mr. Phillips is unlikely to get a fair hearing

[5]All the arguments in Mr. Phillips's supplemental brief concerning Atkins should be considered by this Court to apply to his state habeas petition in Phillips v. Crosby, Case No. SC 01-1460. That petition, in Claim II, cites appellate counsel's failure to raise the constitutionality of executing the mentally retarded as ineffective assistance of appellate counsel in light of Penry and Thompson v. Oklahoma, 487 U.S. 815 (1988).

in an evidentiary hearing before the same judge who summarily denied him a hearing.

If this Court chooses to remand Mr. Phillips's case for an evidentiary hearing, he can show that he meets the generalized definition for mental retardation outlined in Fla. Stat. §921.137(1)(2001), prohibiting the imposition of the death penalty on mentally retarded persons. Mr. Phillips can present his expert neurologist and mental retardation expert at an evidentiary hearing. Given the unresolved allegations of Mr. Phillips's mental retardation made in his summarily denied 3.850 motion and in light of the language of Fla. Stat. §921.137, which provides that"[i]mposition of [a] death sentence upon a mentally retarded defendant [is] prohibited," an evidentiary hearing alone is likely inadequate relief in the post-Atkins era.

The different status of Mr. Phillips's case from the cases that the Florida statute was intended to cover only highlights the need for guidance from this Court regarding the procedure to be adopted for death sentenced postconviction defendants with mental retardation claims in Florida pursuant to Atkins. Mr. Phillips urges this

Court to adopt a scheme similar to Georgia's in Florida.

D. RETROACTIVITY AND CONSTITUTIONALITY

The Florida standards for retroactive application of changes in the law are set forth in Witt v. State, 387 So.2d 922 (Fla. 1980).[6] Witt explains that changes in constitutional law can be divided into two categories:

> We emphasize at this point that only major constitutional changes of law will be cognizable in capital cases under Rule 3.850. Although specific determinations regarding the significance of various legal developments must be made on a case-by-case basis, history shows that *most major constitutional changes are likely to fall within two broad categories.* The first are those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties. This category is exemplified by *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L.Ed.2d 982 (1977), which held that the imposition of the death penalty for the crime of rape of an adult woman is forbidden by the eighth amendment as cruel and unusual punishment. The second are those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* [*v. Denno*, 388 U.S. 293 (1967)]and *Linkletter* [*v. Walker*, 381 U.S. 618 (1965)]. *Gideon v. Wainwright*[, 372 U.S. 335 (1963)], of course, is the prime example of a law change included within

[6]Atkins itself does not address the question of retroactivity. The United States Supreme Court did address the issue in Penry v.. Lynaugh, 492 U.S. 302 (1989), noting that although Teague v. Lane, 489 U.S. 288 (1989) placed obstacles to the consideration of "new rules" of constitutional law in habeas corpus actions, "the rule Penry seeks is not a 'new rule' under Teague." 492 U.S. at 315.

this category.

Witt, 387 So. 2d at 929 (footnotes omitted) (emphasis added). See also State v. Glenn, 558 So. 2d 4, 6 (Fla. 1990) (discussing Witt's "two broad categories" of constitutional changes).

Atkins falls into the category of constitutional changes which "place[s] beyond the authority of the state the power to regulate certain conduct or impose certain penalties." Witt, 387 So. 2d at 929. Atkins describes its holding as "a categorical rule making [mentally retarded] offenders ineligible for the death penalty." 122 S. Ct. at 2251. In Penry, the United States Supreme Court explained that a holding forbidding the execution of a mentally retarded person under the Eighth Amendment would "place[] a certain class of individuals beyond the State's power to punish by death." Penry v. Lynaugh, 492 U.S. at 330. Atkins' rule is a substantive limitation on the State's power to impose a death sentence and therefore is retroactive under Witt.[7]

[7]Other state and federal courts have held that Atkins applies retroactively to those already under a final sentence of death. Bell v. Cockrell, 310 F.3d 330, 332 (5th Cir. 2002); Hill v. Anderson, 300 F.3d 679, 681 (6th Cir. 2002); Pulliam v. People, -- N.E.2d -- , 2002 WL 31341298 (Ill. 2002); Murphy v. State, 54 P.3d 556, 566 (Okla. Cr.

Florida law is clear that Florida courts decide questions of retroactivity under Florida's standards, not federal standards.

> We start by noting that we are not obligated to construe our rule concerning post-conviction relief in the same manner as its federal counterpart . . . . [T]he concept of federalism clearly dictates that we retain the authority to determine which "changes of law" will be cognizable under this state's post-conviction relief machinery.

Witt v. State, 387 So. 2d at 928. After the United States Supreme Court decided Teague v. Lane, 489 U.S. 288 (1989), Florida courts have continued to follow state retroactivity standards. See House v. State, 696 So. 2d 515, 518 n.8 (Fla. 4th DCA 1997); Gantorius v. State, 693 So. 2d 1040, 1042 n.2 (Fla. 3d DCA 1997), *approved in* State v. Gantorius, 708 So. 2d 276 (Fla. 1998).

Since Atkins applies retroactively, Mr. Phillips's claim is not procedurally barred. Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987); Teffeteller v. Dugger, 734 So. 2d 1009, 1025 (Fla. 1999).

App. 2002).

In Bottoson, this Court denied Mr. Bottoson's claim under Atkins, saying:

> We also reject Bottoson's claim that his rights under *Atkins v. Virginia*, 536 U.S. 304 . . . (2002), were violated. We find *Atkins* inapplicable in light of the fact that Bottoson already was afforded a hearing on the issue of mental retardation and was permitted to introduce expert testimony on the issue. The evidence did not support his claim. *See Bottoson v. State*, 813 So. 2d 31, 33-34 (Fla. (2002)].

Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002). In Bottoson v. State, Mr. Bottoson claimed that because he was mentally retarded, his death sentence violated the Eighth Amendment. 813 So. 2d at 33. The circuit court held a hearing on this issue and found that Mr. Bottoson was not mentally retarded. Id.

Mr. Phillips presented his claim that his death sentence violated the Eighth Amendment because he is mentally retarded in the Rule 3.850 motion at issue here. Mr. Phillips has never had a hearing on the issue of his mental retardation. At trial, mental health testimony was presented on the issue of mitigation; in the prior Rule 3.850 proceeding, mental health testimony was presented on the issue of ineffective assistance of counsel. Mr. Phillips's case is distinguishable from Bottoson

E. LEGAL STANDARDS

Under Ring and Atkins, the State is required to prove beyond a reasonable doubt to a unanimous jury that Mr. Phillips is not mentally retarded. Mr. Phillips's 3.850 motion presented allegations sufficient to raise a genuine issue regarding his mental retardation and therefore to require a jury decision on the issue. If this Court should determine that Ring does not require jury participation in the determination of mental retardation in the postconviction stage, the issue then becomes whether the standard of proof for an offender with a claim of mental retardation should be governed by a requirement of clear and convincing evidence as in the current prospective only Florida statute, or rather by a preponderance of the evidence standard or some lesser standard. In Cooper v. Oklahoma, 517 U.S. 348 (1997), the United States Supreme Court held that no greater standard of proof than preponderance of the evidence could be placed on a capital murder defendant challenging his competency to stand trial. The procedural consequences of an erroneous determination as to mental retardation in the Eighth Amendment context is self-evident. The defendant's

interests clearly outweigh the State's rule-making interests.

F. JUDGE OR JURY?

Although supplemental briefing was not ordered in this case on the applicability of Ring to this case or to the Atkins procedures which are in play, Mr. Phillips submits that in his case a jury trial is necessary pursuant to Ring supra. In Ring, the Supreme Court held that capital defendants are entitled to a jury determination of any factor on which the legislature conditions any increase in their maximum punishment. Under the reasoning of the Court's decision in Ring, facts that are merely circumstances for consideration by the trial judge in exercising sentencing discretion within a statutory range of penalties do not have to be found by the jury under the Sixth Amendment. However, factors included in a state statute which determines eligibility for the death penalty, such as the aggravating circumstances of the Arizona statute, are required to be found by a jury beyond a reasonable doubt. In other words, all factual matters which are a condition precedent to the imposition of the death penalty must be decided by a jury. Thus, the

evidentiary hearing that Mr. Phillips has been summarily denied should, in relation to Atkins, resolve only whether or not Mr. Phillips has raised a genuine issue of mental retardation. See Fleming v. Zant, 386 S.E.2d 339 (Ga. 1989).

In Fleming the court held that on a prima facie showing of mental retardation (based as in Mr. Phillips's case on the finding by at least one expert) in post conviction proceedings, the case must be determined by a jury trial on the issue.

Fla. Stat. 921.137 is no longer relevant for purposes of a Ring analysis. As Ring made clear, the relevant inquiry is not one of form but of effect. In essence, the finding that Mr. Phillips is not retarded exposes him to a greater punishment than that authorized by the jury verdict. "The fundamental meaning of the jury trial guarantee of the Sixth Amendment is that all facts relevant to the imposition of the level of punishment that the defendant receives whether the State calls them elements of the offense or Mary Jane must be found by a jury beyond a reasonable doubt." Id, Scalia concurring. Florida Statute 921.137 violates the mandate of Ring as

the factual determination of mental retardation, or its absence is to be made solely by a judge. Under the authority of Ring and the Sixth Amendment, Mr. Phillips is entitled to a jury determination on the issue of his mental retardation, including all the benefit of the jury trial process.

G. RELATED ISSUES

When Mr. Phillips was sentenced to death, Judge Snyder made no findings one way or the other about the presence or absence of mental retardation in his resentencing order, yet even in the face of a narrow seven (7) to five (5) jury recommendation of death, the lower court indicated his eagerness to re-sentence Mr. Phillips to death during the April 20, 1994 hearing before he read the written order he had already prepared into the record:

> It's interesting in this case that the jury verdict was 7 [to] 5 in both cases. I don't know why that is. I don't know. I guess sympathy is not suppose to enter into the deliberations. I guess they do. And I guess that's the benefit of our jury system. I don't know that I would even accept the jury verdict of 12 to nothing for life imprisonment. I really don't. I had a fellow by the name of famous Stacy Weinstein case. Bosco. Jury voted 12 to nothing give him life imprisonment, and I gave him the death penalty. It was reversed. Not on the case, but that he was given

> life. There are certain crimes that you must send a message to the community. I hate to bore you, but I must read you, I haven't cited it yet, but I will after I read it to you. I have prepared an order on this case. I haven't heard anything this morning to change my mind.

(R. 825-26). Judge Snyder's findings as to mitigation concentrated on his rationale for rejecting both the statutory mental health mitigating factors (R. 835-44). The lower court relied on testimony by state experts Miller and Haber that acknowledged that while Mr. Phillips had a low or borderline IQ, "his ability to learn was better than . . . the intelligence background" and his "mental abilities exceeded that which one would expect from someone with an IQ in the 72-76 range" (R. 836-37). The lower court's resentencing order also noted Mr. Phillips's "low IQ" in the context of denying that his age, 37 at the time of the offense, was mitigating because the court found, "he is street smart" (R. 843). The lower court's order did reluctantly find that "the defendant's low intelligence, his poor family background, [and] his abusive childhood" constituted nonstatutory mitigation (R. 843). The order concluded, however, that the nonstatutory mitigating circumstances "do not apply in

this case to a degree which would cause them to mitigate the crime of the sentence" (R. 844). Mr. Phillips has never had a hearing on the question of whether he is mentally retarded and exempt from execution in Florida pursuant to Atkins. As has been explicated in some detail in prior briefing, there was contradictory and incomplete testimony at the resentencing hearing about retardation by the two defense experts, only one of whom, Dr. Toomer, had any recent contact with Mr. Phillips. And as noted above, the trial court's order did not make any findings as to the presence or absence of mental retardation. Mr. Phillips filed his amended Rule 3.850 motion and briefs before Atkins was decided. In his Rule 3.850 motion, Mr. Phillips alleged violations of both Strickland v. Washington 466 U.S. 668 (1984), and Ake v. Oklahoma, 470 U.S. 68 (1985), based on the failure of trial counsel to investigate and present evidence of Mr. Phillips's mental retardation and brain damage to his trial jury. Mr. Phillips also alleged that execution of the mentally retarded was unconstitutional. Mr. Phillips's 3.850 motion was summarily denied without a hearing by Judge Ferrer, relying on the findings of the

resentencing judge. As noted **supra**, those findings make no specific findings as to mental retardation.

Mr. Phillips was prepared to present at an evidentiary hearing below, sufficient evidence of his mental retardation as to support the Strickland and Ake claims as well as to now show that he is entitled to an Atkins hearing. Neither at his resentencing, nor during post conviction proceedings has he had the opportunity to have the question of his mental retardation heard by a judge or jury in a position to make a finding that he was or was not mentally retarded, pursuant to Atkins. He continues to seek that opportunity.

H. CONCLUSION

Mr. Phillips submits that on the basis of the briefs and oral argument presented to this Court, as well as on the basis of his Rule 3.850 motion, he is entitled to relief, and respectfully urges that at a minimum, this Honorable Court remand his case back to circuit court so that full consideration can be given to all his claims, including his claims related to Atkins.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing supplemental brief has been furnished by United States Mail, first-class postage prepaid, to Sandra S. Jaggard, Office of Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131-2407, on April 1, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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