IN THE SUPREME COURT OF FLORIDA

DANIEL BURNS,

Appellant,

vs. **CASE NO. SC01-166**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR MANATEE COUNTY, FLORIDA

SECOND SUPPLEMENTAL BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Daniel Burns was convicted of trafficking in cocaine and the first-degree murder of Florida Highway Patrol Trooper Jeffrey Young in 1988. During the penalty phase of the trial, Burns' attorneys presented the testimony of Dr. Robert Berland, a forensic psychologist (DA-R. V11/1785).[1] Berland testified that Burns demonstrated a full scale IQ of 67, below the cutoff for mental retardation (DA-R. V11/1791). The state countered with rebuttal testimony from Dr. Sidney Merin, a clinical neuropsychologist (DA-R. V12/1836). Merin criticized Berland's testing and conclusions (DA-R. V12/1845-50). Following the penalty phase, a sentence of death was recommended and imposed (DA-R. V12/1951; V15/2577; V16/2613-16).

On direct appeal, this Court affirmed the convictions, but struck the aggravating factor of heinous, atrocious or cruel, and remanded the case for a new sentencing proceeding before another jury due to the improper admission of victim impact evidence. Burns v. State, 609 So. 2d 600 (Fla. 1992). No mental health testimony was presented at the resentencing. Lay witnesses presented by the defense in mitigation described Burns

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[1] In this brief, the designation "DA-R." will be used to refer to the record on appeal in Florida Supreme Court Case Number 72,638 [direct appeal of convictions and sentences], and "RS-R." will be used to refer to Florida Supreme Court Case Number 84,299 [resentencing appeal]; references to the record in the instant postconviction appeal, Florida Supreme Court Case No. SC01-166, will be designated as "PC-R." followed by the appropriate volume and page number.

as an intelligent, hard working man, who had been steadily employed most of his life (RS-R. V15/1536; V16/1622-24; V17/1690-93). Burns had graduated from high school and at one time went into business with his sister (RS-R. V16/1585, 1624, 1648); he provided leadership for his family, organizing family cookouts, and consistently providing financial support (RS-R. V16/1560-61, 1567-68, 1573-79, 1585-86, 1651). He also helped his younger siblings with homework (RS-R. V17/1681-82). He had an extremely strong system of social support from family and friends (RS-R. V17/1764). Testimony was also presented that Burns' literacy skills had improved remarkably during the time he has been in prison, and that Burns continues to fulfill a leadership role in his large family (RS-R. V15/1454-55, 1511-13; V16/1586-87; V18/1832-33, 1845).

After the resentencing, a unanimous jury recommended that Burns be sentenced to death, and on July 6, 1994, the court filed its Order following that recommendation (RS-R. V2/220; 269-274). Three aggravating factors were found and merged: the victim was a law enforcement officer; the murder was committed to avoid arrest; and the murder was committed to disrupt law enforcement (RS-R. V2/270). Two statutory mitigating factors (age, no significant criminal history) and several nonstatutory mitigating factors were also found, including that Burns was born in a poor, rural environment to an honest, hard-working

family with little economic, educational, or social advantages; Burns was intelligent, had been continuously employed since high school, had contributed to society and supported his family, had a loving relationship with his family, had an honorable discharge from the military, had shown some remorse and spiritual growth, had a good prison record, and had behaved in court (RS-R. V2/272-274).

On appeal, this Court affirmed the death sentence. Burns v. State, 699 So. 2d 646 (Fla. 1997), cert. denied, 522 U.S. 1121 (1998). Burns filed an amended motion for postconviction relief, and an evidentiary hearing was held on the motion on November 20, 2000 (PC-R. V5). The primary issue asserted that Burns' attorney had provided ineffective assistance of counsel in failing to present Dr. Berland as a witness at the resentencing. The motion was denied, and Burns appealed. Briefs were filed and oral argument was held on February 5, 2002. The morning of oral argument, Burns' attorney filed a motion to permit supplemental briefing on the applicability of Section 921.137, Florida Statutes (2001). The motion was granted and supplemental briefs were filed.

On June 20, 2002, the United States Supreme Court decided Atkins v. Virginia, 122 S. Ct. 2242 (2002), holding that the Eighth Amendment prohibits the execution of mentally retarded defendants. On December 3, 2002, this Court requested additional

briefing with regard to seven questions involving Atkins' implications to the instant case. This brief is offered in response to that request.

SUMMARY OF THE ARGUMENT

Prior to the United States Supreme Court's opinion in Atkins v. Virginia, 122 S. Ct. 2242 (2002), the State of Florida adopted definitions and procedures to enforce legislative policy against the execution of mentally retarded capital defendants. Although Section 921.137, Florida Statutes (2001), as enacted, is only to be applied prospectively, it offers a legislative mandate as to these issues to the extent deemed necessary for the implementation of Atkins in cases of previously-sentenced death row inmates.

ARGUMENT

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

This Court's directive for further briefing in this case presupposes the application of Atkins v. Virginia, 122 S. Ct. 2242 (2002), to the instant case. As this Court has acknowledged, Atkins deferred to the states for the development of appropriate procedures to enforce the constitutional restriction against execution of a mentally retarded defendant. In addition, Atkins identified Florida as having "joined the procession" of states to prohibit the execution of the mentally retarded. 122 S. Ct. at 2248. See § 921.137, Fla. Stat. (2001). In section 921.137, the Florida Legislature has addressed several of the issues identified in the questions propounded by this Court for consideration. This Court must respect this legislation and apply the will of the legislature to the extent that Atkins is deemed to require these issues to be addressed.

The questions propounded by this Court will each be addressed in turn. As will be seen, Burns is not entitled to any relief under Atkins.

1. The definition of mental retardation to be applied

Clearly, the legislature has already considered the

appropriate definition for "mental retardation" which precludes capital punishment, and it is codified in section 921.137(1). That section defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." "[S]ignificantly subaverage general intellectual functioning" is defined as "performance that is two or more standard deviations from the mean score on a standardized intelligence test." Section 921.137(1) also requires deficits in adaptive behavior, defined as "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."

The definition found in section 921.137(1) mirrors the established definition of mental retardation provided by the American Psychiatric Association and other leading organizations, as well as other provisions of Florida Statutes relating to mental retardation. The DSM-IV-TR provides that mental retardation is (a) significantly sub-average intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test, (b) concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her

age by cultural groups), in at least two of the following areas: communications, self care, home living, social/interpersonal skills, use of community resources, self direction, functional academic skills, work, leisure, health, and safety, and (c) the onset is before age eighteen years. American Psychiatric Association: Diagnostic and Statistical Manual of Mental Diseases, (4th ed. 1994), at 46; see also §§ 393.063(42), 916.106(12), Fla. Stat. (2000); 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).

The definition that has been adopted by the Florida Legislature is therefore consistent with relevant psychological and legal authorities. Accepting a definition that requires more than a low IQ score is necessary in order to restrict the mental retardation exemption to those defendants that are actually mentally retarded. It is well established that "[b]eing retarded means more than scoring low on an IQ test." Fairchild v. Lockhart, 900 F.2d 1292, 1295 (8th Cir. 1990). Reliance on low IQ scores alone is insufficient; such scores are

hardly dispositive as to showing mental retardation. See San Martin v. State, 705 So. 2d 1337, 1348 (Fla. 1997) (there was "competent substantial evidence to support the trial court's rejection of these mitigating circumstances," including "borderline range of intelligence," where the trial court noted that a performance on an IQ test "an individual's performance on such a test . . . may easily reflect less than his best efforts"); Miles v. Dorsey, 61 F.3d 1459, 1473 (10th Cir. 1995) ("on test designed to assess memory and information, petitioner scored so low as to indicate intentional malingering"); Goldberg v. National Life Insurance Company of Vermont, 774 F.2d 559, 563 (2d Cir. 1985) (inter alia, "his IQ scores were just too low considering that he was a high school graduate and had been involved in business with some success"); Blackwood v. State, 777 So. 2d 399, 404-05 (Fla. 2000) ("Dr. Garfield could not say with certainty that appellant is retarded because she did not run all of the appropriate tests and because she attributed his scores to the depression"); Walls v. State, 461 So. 2d 381 (Fla. 1994) ("low IQ; expert psychologist stated that Walls' IQ actually had declined substantially during the years prior to the trial").

To the extent that this Court determines that Atkins requires Florida courts to adopt a procedural rule incorporating

a specific definition of mental retardation, this Court need look no further than section 921.137(1) for such a definition.

2. The appropriate procedures for determining whether an offender is mentally retarded so as to prohibit their execution under Atkins

The appropriate procedures for a determination of mental retardation are similarly set forth in section 921.137. Under these procedures, the issue of mental retardation is to be raised by the defendant prior to trial and considered by a judge following a jury's recommendation for the death penalty. See § 921.137(3) - (7), Fla. Stat. (2001). Once again, there is no reason to ignore legislative direction when this issue has been specifically addressed by statute.

Of course, the statutory procedures are directed to determining mental retardation at the time of the initial penalty phase, and cannot be applied in cases such as the instant case, where the death sentence has been finalized on appeal. Should this Court determine that Atkins should be applied retroactively [see question 6, infra] and requires procedures for the determination of mental retardation for defendants previously sentenced to death, it is respectfully submitted that the current procedures for bringing claims for

postconviction relief can be used to bring this issue to the attention of the trial court.

3. Whether section 921.137(1), (4), Florida Statutes (2002), should be applied as the definition and procedure for the determination of mental retardation

As noted in the responses to Questions 1 and 2 above, section 921.137 provides the legislative definition and procedures for the determination of mental retardation as relevant for capital sentencing. To the extent that definitions and procedures are necessary under Atkins, this Court should utilize the consideration already provided to these issues and codified in section 921.137.

4. The standard (i.e., clear and convincing, preponderance of the evidence) by which an offender must prove that the offender is mentally retarded

The standard of proof which must be met in order to establish mental retardation is clear and convincing evidence. This standard is included in the procedures outlined in section 921.137. See § 921.137(4). This standard is consistent with that required for other mental health issues which may be presented in a criminal action. See Fla.R.Crim.P. 3.812(e) (competency to be executed); § 775.027(2), Fla. Stat. (insanity as affirmative defense); Walker v. State, 707 So. 2d 300, 317 (Fla. 1997) (establishment of mental mitigation); see also §§

394.467(1), 394.917(1), 916.13, Fla. Stat. (civil commitment proceedings).

Any suggestion that due process requires a standard no greater than preponderance of the evidence in accordance with Cooper v. Oklahoma, 517 U.S. 348 (1996), is not well taken. 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.

5. Whether the determination of whether an offender is mentally retarded is a question for the judge or the jury

This Court has already rejected the claim that a determination of mental retardation must be made by a jury. See Bottoson v. Moore, 27 Fla.L.Weekly S891 (Fla. Oct. 24, 2002),

cert. denied, 122 S. Ct. ____, 2002 WL 31748799 (Dec. 9, 2002). Bottoson had presented a mental retardation issue in litigation during an active death warrant, and the trial court held an evidentiary hearing, ultimately ruling that Bottoson had failed to establish retardation. Bottoson's later plea that he was entitled to a jury determination on this issue under Ring v. Arizona, 122 S. Ct. 2428 (2002), was rejected by this Court.

The ruling in Bottoson is correct. A finding as to mental retardation does not "increase" the maximum sentence for first degree capital murder. Nothing in Ring or Atkins supports the suggestion that a determination of mental retardation must be made by a jury. Criminal defendants are presumed to be competent and to have the mental agility to proceed to trial; a defendant's mental state is not an aggravating factor that makes a defendant death eligible, rather it is only a mitigating factor which may or may not rise to the level of mitigation in a given case. Analytically it is no different than a pretrial determination of competency to proceed under Florida Rules of Criminal Procedure 3.210-3.212. The law is well settled that a determination of competence to proceed is made by the trial judge, and is subject to review on appeal. See Hunter v. State, 660 So. 2d 244 (Fla. 1995). There is no arguable basis upon which to suggest a defendant claiming incompetency is entitled

to a jury resolution of the issue, and there is no "right" to a jury's determination of mental retardation in the context of a capital trial.[2] As there is no right to a jury trial as to the issue of retardation, the legislative decision to place this determination in the hands of a trial judge in section 921.137 must be respected.

6. Whether an offender must prove that mental retardation manifested during the period from conception to age eighteen

All relevant authorities agree that a diagnosis of mental retardation requires a finding of onset prior to age eighteen. See American Psychiatric Association: Diagnostic and Statistical Manual of Mental Diseases (4th ed. 1994), at 46; Mental Retardation: Definition, Classification, and Systems of Supports, American Association of Mental Retardation (9th ed. 1992), at 5 (both discussed in Atkins, 122 S. Ct. at 2245 n.3); see also http://www.thearc.org/faqs/mrqa.html (The Arc website, using AAMR definition); Merriam Webster Medical Dictionary (1997); MedlinePlus Medical Encyclopedia, at http://www.nlm.nih.gov/ medlineplus/ency/article/001523.htm. It is apparent from the consistency with which authorities

[2] It is axiomatic that the right not to be tried while incompetent is firmly ingrained in the law. See Dusky v. United States, 362 U.S. 402 (1960). The principle announced in Atkins is not superior to Dusky and its progeny, and it makes no sense to suggest the contrary.

acknowledge the required finding of onset prior to age eighteen in the diagnosis of mental retardation that this is a critical element of any appropriate definition. Therefore, a defendant must be required to prove this element in order to satisfy his burden of establishing mental retardation as a bar to execution.

7. Any other issues relating to the substantive restriction on the State's power to execute a mentally retarded offender

The only other issue relevant to the application of Atkins in Florida is whether Atkins may be applied retroactively to invalidate death sentences obtained prior to the date of the Atkins decision. It is noteworthy that none of the discussion by the United States Supreme Court in the opinion suggests that Atkins is to be applied retroactively.[3] See Bottoson v. Moore, 27 Fla. L. Weekly S891 (Fla. Oct. 24, 2002), and Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989), cited in Bottoson,

> . . . in a comparable situation, the United States Supreme Court held:
>
> If a precedent of this Court has

[3] 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.

> 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.[4] 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 that retroactive application of Atkins is required.

In addition, on the facts presented in the instant case, any claim of mental retardation under Atkins should be held to be 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

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[4] 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.

barred); Woods v. State, 531 So. 2d 79 (Fla. 1988). Burns' initial penalty phase provided the factual basis for presentation of this claim, and it is an issue which was commonly raised on direct appeal under similar circumstances. See Thompson v. State, 648 So. 2d 692 (Fla. 1994); Taylor v. State, 630 So. 2d 1038 (Fla. 1993); Bryant v. State, 601 So. 2d 529 (Fla. 1992). As the facts were available for presentation of this claim on direct appeal, any claim of potential cruel and/or unusual punishment must be rejected as procedurally barred in this case.

CONCLUSION

For all the reasons stated above, this Court should deny Burns' supplemental request for relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Eric Pinkard, Assistant CCRC, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this _____ day of December, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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