IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 01-166

DANIEL BURNS,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

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

AMENDED SUPPLEMENTAL BRIEF

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SUMMARY OF THE ARGUMENT

The United States Supreme Court's in *Atkins v. Virginia,* 122 S.Ct. 2242 (2002) mandates that each State implement standards for the determination of mental retardation. Section 921.137, Florida Statute, although providing a valid general definition of mental retardation, fails in outlining standards because the statute leaves the adoption of testing procedures to the Department of Children and Family Services. To date, no such testing procedures have been implemented by the Department of Children and Family Services. This leaves the determination of mental retardation claims in a state of chaos and confusion. Accordingly, this Court should adopt the standards and test procedures presented in this brief, which are within the mainstream of use by psychologists and psychiatrists in the determination of mental retardation , and are recognized by both the American Psychiatric Association and the American Association of Mental Retardation. The proposed standards and procedures also comply with those standards referenced by the United States Supreme Court in *Atkins* and address the Sixth Amendment jury trial requirements of the *Ring* decision.

ARGUMENT

COMES NOW the Appellant, Daniel Burns, by and through the undersigned Collateral Counsel, hereby files this Supplemental Brief in response to this Court's order of December 3, 2002 which posed a series of issues related to the applicability of *Atkins v. Virginia*, 122 S.Ct. 2242 (2002) to the instant case. Mr. Burns will address each issue in the order presented by this Court.

1. **The definition of mental retardation that is to be applied**.

There is little disagreement as to the definition of mental retardation. The definition used by the American Association of Mental Retardation is as follows:

> 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.

American Association on Mental Retardation., Definitions, Classifications, and Systems of Support, (10th ed. 8 2002).

The definition used by the American Psychiatric Association is as follows:

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

> (Criterion B). The onset must occur before age 18 years (Criterion C).

American Psychiatric Association., Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1 2000).

The definitions of mental retardation all have the elements of (1)significant "limited" or "subaverage" intellectual functioning;(2)significant limitations in adaptive functioning and (3)originating/beginning before age 18.

SIGNIFICANT SUBAVERAGE INTELLECTUAL FUNCTIONING

There are numerous instruments currently utilized in determining general intellectual functioning. The DSM-IV-TR defines subaverage general intellectual functioning by assessment with one or more of the standardized, individually administered intelligence tests, such as the Wechsler Adult Intelligent Scale, or the Stanford-Binet (DSM-IV-TR at 42). A score of 70 or below, approximately two standard deviations below the mean, qualifies as subaverage intellectual functioning. Id. The DSM-IV-TR recognizes there is a measurement error of approximately 5 points, making it possible to diagnose Mental Retardation in individuals with IQ's between 70 and 75. Id. at 41-42. This is consistent with the Court's reference in *Atkins* to a cutoff IQ score of 75 for the intellectual functioning prong. *Atkins*, 122 S.Ct at 2245, fn. 5.

The use of rigid cutoff scores for determination of the intellectual functioning

prong of a mental retardation is highly problematic. The American Association on Mental Retardation recognizes this problem as follows:

> The assessment of intellectual functioning through the primary reliance on intellectual tests is fraught with the potential for misuse if consideration is not given to possible errors in measurement. An obtained IQ standard score must always be considered in terms of the accuracy of its measurement. Because all measurements, and particularly psychological measurement, has some potential for error, obtained scores may actually represent a range of several points. This variation around a hypothetical "true score" may actually represent a range of several points. This variation around a hypothetical "true score" may be hypothesized to be due to variations in test performance, examiners behavior, or other undetermined factors. Variance in scores may not represent changes in the individuals actual or true level of functioning. Errors of measurements as well as true changes in performance outcome must be must be considered in the interpretation of test results. This process is facilitated by considering the concept of the standard error of measurement (SEM), which has been estimated to be three to five points for all well-standardized measures of general intellectual functioning. This means that if an individual is retested with the same instrument, the second obtained score is best seen as bounded by a range that would be approximately three to four points above and below the obtained score. This range can be considered a "zone of uncertainty" (Reschly, 1987). Therefore, an IQ of 70 is most accurately understood not as a precise score, but as a range of confidence with parameters of at least on SEM(i.e. scores of about 66 to 74; 66% probability),

or parameters of two SEMs (I.E., scores of 62 to 78; 95% probability)(Grossman, 1983). This is a critical consideration that must be part of any decision concerning a diagnosis of mental retardation. Both of the primary American mental retardation diagnosis schemes make reference to significantly subaverage intellectual functioning as a defining characteristic of mental retardation. The *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV)(American Psychiatric Association, 1994) defines significantly subaverage as an IQ score of about 70 or below and added a statement concerning measurement error and an example of a Weschsler IQ of 70 considered to represent a range of 65 to 75. The American Association on Mental Retardation (Luckasson et al., 1992) defined it as approximately 70 to 75, taking into account measurement error.

...

The 2002 AAMR System indicates that the SEM is considered in determining the existence of significant subaverage intellectual functioning. In effect, this expands the operational definition of mental retardation to 75, and that score of 75 may still contain measurement error. Any trained examiner is aware that all tests contain measurement error. Any trained examiner is aware that all tests contain measurement error: many present scores as confidence bands rather than finite scores. Incorporating measurement error in the definition of mental retardation serves to remind test administrators(who should understand the concept) and bureaucrats (who might not be familiar with the concept) that an achieved Wechsler IQ score of 65 means that one can be 96% sure that the true score is somewhere between 59 and 71.

American Association on Mental Retardation., Definitions, Classifications, and

Systems of Support (10th ed. 57-59).

The AAMR recognizes several instruments to measure intelligence; the Wechsler Intelligence Scale for Children- III, the Wechsler Adult Intelligence Scale-III, the Stanford-Binet-IV, the Cognitive Assessment System, the Kaufman Assessment Battery for Children, the Slosson Intelligence test, the Bayley Scales of Infant Development, the Comprehensive Test of Nonverbal Intelligence, the Leiter International Performance Scale-Revised (Leiter-R), and the Universal Nonverbal Intelligence Test (UNIT). Id. at 59-66.

In formulating a standard for establishing the "significantly subaverage general intellectual functioning" element of mental retardation, this Court should adopt the standard of a score of 75 or below (taking into account the standard error of measurement), on one or more of the standardized, individually administered intelligence test recognized by either the American Psychiatric Association (through the DSM-IV-TR) or the American Association of Mental Retardation(through the Definitions, Classifications, and Systems of Supports) . This is the same standard as two standard deviations below the mean (a score of 70), when taking into account the standard error of measurement of plus or minus 5. This would place the Florida standard as to the "significantly subaverage intellectual functioning" element of mental retardation in harmony with the current standard of assessment of mental retardation

by mental health professionals and would comply with the mandate of *Atkins*.

SIGNIFICANT LIMITATIONS IN ADAPTIVE FUNCTIONING

This element of mental retardation requires more clinical judgment than the "significantly below average intellectual functioning" element. Adaptive functioning is defined in the DSM-IV-TR as "how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting" (DSM-IV-TR at 42). Adaptive functioning is defined by the AARM as limitations in behavior as addressed in conceptual, social, and practical adaptive skills. (*AARM, Definitions, Classifications, and Systems of Support* at 73).

The assessment of adaptive functioning is problematic in death penalty cases, especially in the postconviction setting. Mr. Burns' case is typical in that he has been incarcerated on "death row" at Union Correctional Institute for a number of years since his conviction and sentence. His social and community status has changed dramatically since the time of the homicide which led to his current death sentence. This situation raises a very important question -- at what point in time in Mr. Burns' life is an assessment of adaptive functioning meaningful in terms of evaluation of the "significant limitation in adaptive functioning" element of mental retardation? Common sense, and the Court's opinion in *Atkins*, suggests that the point of focus of Mr.

Burns' adaptive functioning should be prior to his incarceration and at or near the time of the homicide.

In its opinion in *Atkins* the Court provided specific reasons as to why the execution of a mentally retarded person is cruel and unusual punishment. The Court stated that the execution of a mentally retarded person does not contribute to the goals of the death penalty -- retribution and deterrence of capital crimes by prospective offenders. *Atkins,* 122 S.Ct at 2250. The Court reasoned that a mentally retarded person is less culpable than an average murderer, and does not merit that form of retribution. Id. As to deterrence, the Court stated :

> The same cognitive and behavior impairments that make these defendants less morally culpable – for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses – that also make it less likely that they can process the information on the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.

Id.

The Court cited a third reason why mentally retarded persons should not be

executed:

> The risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty is enhanced not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance in mental retardation as a mitigating factor can be a two-edged sward that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.

Id. at 2250, 2251

The three reasons cited by the Court that execution of mentally retarded offenders is cruel and unusual punishment; lack of retribution and deterrence and, risk of wrongful conviction, all involve the reduced mental abilities of the offender at or near the time of the homicide. Therefore, in keeping with the spirit and intent of the *Atkins* opinion, the assessment of the "significant limitation in adaptive functioning" element of mental retardation should focus on conceptual, social, and adaptive skills at or near the time of the homicide. This may be fairly accomplished by gathering evidence for deficits in adaptive functioning from one or more reliable sources (e.g.

teacher evaluations and educational, developmental, and medical history) and through use of scales designed to measure adaptive functioning or behavior. The scales recognized by the American Psychiatric Association and the American Association of Mental Retardation are the Vineland Adaptive Behavior Scales(VABS), the American Association on Mental Retardation Adaptive Behavior Scale(ABS), the Scales of Independent behavior - Revised (SIB-R), the Comprehensive Test of Adaptive Behavior-Revised (CTAB-R), and the Adaptive behavior Assessment System (ABAS). *See* DSM-IV-TR at 42; AARM *Definitions, Classifications, and Systems of Support*, at 87-91.

As to the "significant limitations in adaptive functioning" element of mental retardation, Mr. Burns urges this Court to adopt the standards of measurement for adaptive functioning through the scales recognized by the American Psychiatric Association and the American Association of Mental Retardation and to further establish that the relevant point in evaluation of adaptive functioning is prior to incarceration, at or near the time of the homicide.

ORIGINATING/BEGINNING BEFORE AGE 18

The definitions of mental retardation all include the element that the retardation originated/began/manifested before age 18. This element requires an assessment of

the conceptual, social, and practical adaptive skills of the offender prior to age 18. Neither the American Psychiatric Association or the American Association of Mental Retardation requires the existence of a IQ score before age 18 in order to make a diagnosis of mental retardation. Instead, clinical data in the form of school records, information from family members or others who viewed the offenders intellectual development, juvenile records, or any other information relevant to a determination that the mental retardation began/originated/manifested before age 18. The basic purpose of this analysis is to distinguish mental retardation from significantly subaverage intellectual functioning due to other causes such as head injuries occurring in adult life.

Mr. Burns urges this Court to:

1. Adopt the definition of mental retardation of either the American Association on Mental Retardation or the American Psychiatric Association. Both of the definitions involve the common elements of (i) significantly subaverage intellectual functioning; (ii) significant limitations in adaptive functioning; and (iii) beginning/originating/manifesting before age 18.

2. As to the first element, this Court should adopt a score of 75 or below (taking into account the standard error of measurement of plus or minus five) on a standardized intelligence test recognized by the American Association of Mental

Retardation or the American Psychiatric Association.

3. As to the second element, this Court should adopt use of the measurement scales of adaptive functioning recognized by the American Association of Mental Retardation or the American Psychiatric Association. The primary focus of the assessment of adaptive functioning should be prior to incarceration, at or near the time of the homicide.

4. As to the third element, this Court should recognize that the mental retardation must originate/begin/manifest before age 18. However, proof of a score on an IQ test before age 18 should not be required to establish this element.

In Mr. Burns case, there is ample evidence in the record that he meets the elements of mental retardation. On March 3, 1988 Dr. Robert Berland administered a version of the WAIS test, and the result was a full scale IQ of 67. (R. 1791). Dr. Berland stated that this was " below the cut off score for mental retardation". Id. On February 25, 2000, Dr. Henry Dee administered the WAIS-III and found his full scale IQ to be 69. (PC-R 770). Dr. Dee testified that "here is a person who is retarded." Id. Since there is reasonable grounds to believe Mr. Burns meets the criterion for mental retardation, he should be permitted to litigate this issue in the circuit court under the standards and procedures which this Court promulgates for a determination of mental retardation.

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

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

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

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

Due to the overlap of the above four questions, Mr. Burns will provide a singular response which encompasses all the issues presented.

The procedural aspects of a determination of mental retardation in Mr. Burns case cannot be decided without addressing the applicability of *Ring v. Arizona*, 122 S.Ct. 2428 (2002) in this context. Under *Ring*, the Sixth Amendment requires that any finding of fact that makes a defendant eligible for the death penalty must be made by the jury beyond a reasonable doubt. 122 S.Ct. At 2440. While *Ring* dealt specifically with statutory aggravating circumstances, it included "factfinding[s] necessary to . . . put [a defendant] to death." Id. at 2443. The Court held in *Atkins* that the Eighth Amendment prohibits a mentally retarded defendant from being sentenced to death. Thus, a mentally retarded defendant is now constitutionally ineligible for the death penalty. *Atkins* at 2252. Since mental retardation is now a factual issue upon which a defendant's eligibility for death turns, "that fact . . . must be found by a jury beyond

a reasonable doubt." *Ring* S.Ct. At 2439.

Mr. Burns recognizes that this Court recently decided the *Bottoson* and *King* holding *Ring* did not apply in those two cases. *Bottoson v. Moore*, 2002 WL 31386790 at p. 2 (Fla. 2002); *King v. Moore*, 2002 WL 31386234 at p. 2 (Fla. 2002). However, those decisions are distinguishible from the application of *Ring* in the determination of mental retardation. This Court denied relief in the *Bottoson* and *King* cases because the Court had not explicitly overruled the previous Supreme Court precedent upholding Florida's sentencing scheme under the Sixth Amendment. In other words, because Florida's juries participate in the sentencing by the way of an advisory sentence, this scheme survived the *Ring* decision until specifically addressed by the United States Supreme Court.

In contrast, there has been no jury participation in the determination of Mr. Burns' mental retardation, advisory or otherwise. Furthermore, under Section 921.137(1), (4), Florida Statutes (2002), no jury participation is required as the judge, sitting alone, makes the decision on whether an offender is mentally retarded and, thus, eligible for the death penalty. This violates the mandates of *Ring* with no available "safe harbor" of an advisory sentence from the jury. Therefore, the appropriate procedure for a determination of mental retardation is a jury trial where the state has the burden of proving beyond a resonable doubt that the offender is not

mentally retarded.

To trigger this procedure, an offender, such as Mr. Burns would have to file a notice in the circuit court that originally imposed the death sentence that the retarded individual is mentally retarded under the standards proposed in this supplemental brief. Upon receipt of the notice by the circuit court, the court should be required to set the matter for a status hearing within a reasonable time. At the status hearing, the State should be required to state its position. If the State does not dispute the retardation the circuit court should vacate the death sentence and impose a life sentence. Based on the time of offense, this would either be life with 25 years before the possibility of parole or simply life without parole.

If the State disputes retardation, the circuit court should set a jury trial within a reasonable period of time that allows both parties to prepare. Full discovery, such as allowed during the pendency of a criminal case, should be allowed, along with compulsory process. At the trial, all the rights of the accused, such as the confrontation of witnesses, compulsory process, and counsel, should be honored by the court. This Court should also adopt jury instructions that encompass the relevant definitions of retardation. Such jury instructions should not refer to the jury verdict's effect on whether the retarded individual is executed because it is irrelevant to the factual determination of retardation and it may result in improper verdicts based on the

juror's concern about parole eligibility.

Should this Court find that *Ring* does not require a jury determination of mental retardation, then the issue becomes whether the standard of proof for an offender claiming mental retardation should be by clear and convincing evidence, or by a preponderence of the evidence. The Supreme Court's decision in *Cooper v. Oklahoma*, 517 U.S. 348 (1997) provides guidance as to this issue. In *Cooper*, the Supreme Court held that no standard of proof greater than a preponderance of the evidence could be placed on a capital murder defendant challenging his competency to stand trial. The Court's examination of both English common law and contemporary law revealed that the burden of proof for a competency determination has long been a preponderance of the evidence. *Cooper* at 356-361 ; *accord State v. Lee*, 274 S.Ct. 372, 264 S.E.2d 418 (1980). Historically, mentally retarded persons, formerly referred to as idiots or imbeciles, have been viewed and treated similarly to incompetent persons by courts under the law. *See. E.g., Penry v. Lynaugh*, 492 U.S. 302, 332 (1989), rev'd on other grounds (citing Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash.L.Rev. 414, 432 March/May 1985); *accord State v. Wilson*, 306 S.Ct. 498, 509, 413 S.E.2d 19, 25 (1992). The *Cooper* Court found that the procedural consequences to a defendant of an erroneous determination of competency were dire, and outweigh any interest the state had in creating

procedural rules or standards, especially those with little or no historical roots or modern acceptance. *Cooper* at 364-369. Given the historical legal parrallel between competency to be executed and mental retardation, Mr. Burns asserts the appropriate standard, contrary to Section 921.137(4), should be a preponderance of the evidence, not clear and convincing evidence.

As to the definitional aspects of Section 921.137, Mr. Burns has no dispute with the definition of mental retardation set forth in the statute as it basically mirrors the definitions of the American Psychiatric Association and the American Association of Mental Retardation. However, the statute is deficient in setting forth the instuments for measuring mental retardation, but instead simply states "the Department of Children and Family Services shall adopt the rules to specify the standardized intelligence tests as provided in this subsection." Since no rules have been adopted by the Department of Children and Family Services for the instruments and procedures for determining mental retardation, Mr. Burns urges this Court, under the authority of *Atkins* to adopt the definition and standards previously proposed in this supplemental brief. This will remedy the chaos and inconsistency associated with determinations of mental retardation in the current standardless environment.

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

Mr. Burns concedes that the "manifested during the period from conception to age 18" is a recognized element of mental retardation. However, the offender should not have to prove this element. As previously argued, *Ring* mandates that the State has the burden to prove beyond a reasonable doubt to a jury that an offender is not mentally retarded in order for he/she to be death eligible.

Should this Court find that the offender has the burden to prove this element of mental retardation, the existence of a standardized intelligence test during the period from conception to age 18 should **not** be required.

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

RETROACTIVITY

That the *Atkins* decision is retroactive to defendants on collateral review is clear. The Supreme Court already addressed this issue in a prospective fashion in *Penry v. Lynaugh* , 492 U.S. 302 (1989) as follows:

> This Court subsequently held that the Eighth Amendment, as a substantive matter, prohibits imposing the death penalty on a certain class of defendants because of their status, *Ford v. Wainwright*, supra, 477 U.S., at 410 (insanity), or because of the nature of their offense, *Coker v. Georgia*, 433 U.S. 584 (1977)(rape)(plurality opinion). In our view, a new rule placing a certain class of individuals beyond the state's power to

> punish by death is analogous to anew rule placing certain conduct beyond the state's power to punish at all. In both cases, the Constitution itself deprives the state of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity have little force. As Justice Harlan wrote: "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey*, supra, at 693. Therefore, the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct, but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense, Thus, if we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review.

Penry 492 U.S. at 330.

Other Courts have found *Atkins* to be retroactive. *See Bell v. Cockrell*, WL 31320536 *5th Cir. Oct. 17, 2002); *Murphy v. State*, 54 F.3d 556 (Okla.Cr. App. 2002**).** Therefore, Section 921.137(8), Florida Statutes, is unconstitutional.

CONCLUSION

For all the above stated reasons, this Court should adopt the standards and

procedures for determination of mental retardation proposed in this brief, find *Atkins* is retroactive, and allow Mr. Burns the opportunity to litigate the issue of his mental retardation in the Circuit Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Supplemental Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 2nd 2003.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing for Amended Supplemental Brief of Appellant ,was generated in a Times New Roman non-proportional, 14 point font, pursuant to Fla. R. App. P. 9.210**.** this 2nd day of January, 2003.

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