IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-734

VICTOR TONY JONES,

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

REPLY BRIEF OF APPELLANT

WILLIAM M. HENNIS, III
Assistant CCRC
Florida Bar No. 0066850

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL-SOUTH

101 N.E. 3RD AVENUE, SUITE 400
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

STATUTES & RULES

ARGUMENT I - LACK OF GUILT PHASE ADVERSARIAL TESTING

A. VOLUNTARY INTOXICATION

This Court should carefully examine the cross-examination of Dr. William Hearn, a toxicologist from the medical examiner's office called as a witness by the State at Mr. Jones' evidentiary hearing. The order of the lower court and the State's Answer Brief relied on his testimony that "the level of intoxicants in the Defendant's system were insufficient to have caused him to be intoxicated at the time of the crime." (AB at 59). In denying relief to Mr. Jones, the lower court relied on Dr. Hearn's testimony in conjunction with the credibility findings made by the lower court against the testimony regarding Mr. Jones intoxication from both the experts presented by Mr. Jones and the family member witnesses presented by Mr. Jones.

Dr. Hearn testified as to his opinion regarding intoxication over defense objection (PCR. 1245). Dr. Hearn testified that his review of the bloodwork done on Mr. Jones indicated that Mr. Jones had used "more than a single dose" of cocaine within ten hours of the time his blood was taken (PCR. 1250). He also testified that the cocaine use by Mr. Jones could have been as recent as two

hours prior to 1:40 p.m., the time the blood was drawn on December 19, 1990, the day of the murders (PCR. 1251). He then opined that the Mr. Jones' level of cocaine intoxication at the time of the offenses (approximately 11:30 a.m. until noon) did not reach the threshold necessary for finding the presence the statutory mental health mitigating circumstances at the time of the offense (PCR. 1256-59).

On cross-examination Dr. Hearn stated that his office did not receive the sample of Mr. Jones' blood until January 16, 1991 (PCR. 1260). He then admitted that the blood sample drawn from Mr. Jones at 1:40 p.m. on December 19, 1990 was a "problem" and he further agreed that the blood sample that was tested in his laboratory and which formed the bases of his opinion about intoxication was from a blood draw that the hospital had indicated in December 1990 was contaminated and needed to be redrawn (PCR. 1271-72). Dr. Hearn also testified that he did not know what medications or dosages Mr. Jones was administered while he was hospitalized after his arrest with a gunshot wound to the head at the crime scene (PCR. 1276). After reviewing hospital records, Dr. Hearn

admitted that Mr. Jones was being treated on December 20, 24, and 27 with codeine (PCR. 1286-87). He opined that codeine would not mask the symptoms of heroin withdrawal (PCR. 1287).[1] Finally, in response to a question from the lower court, the witness speculated that the contamination of the blood sample "probably" was contaminated by something in the blood draw and if that were so, "it wouldn't make any difference" as to the validity of the readings concerning the presence of drugs (PCR. 1288). After the lower court had ruled that Dr. Hearn could only testify as an expert as to the physiological effects of drugs on the body, Mr. Jones objected to Dr. Hearn offering an opinion as to intoxication at the time of the offense, but his objection was overruled (PCR. 1245, 1255). Hearn testified that he had never testified at a capital penalty phase and did not know the legal definitions associated with statutory mitigation (PCR. 1279).

[1]Defense psychologist Merry Haber, who never testified at trial, was called as a defense witness at the evidentiary hearing. She testified that when she interviewed Mr. Jones pre-trial he reported "shooting cocaine intravenously and still had marks on him" at the time of her interview (PCR. 1017). Haber also testified that her case notes indicated that Nurse Erica Kimball at the jail told her that Mr. Jones exhibited "class[ic] signs of withdrawal" (PCR. 1019).

The State makes much of their contention that Carl Leon Miller, Mr. Jones' cousin, was "the only witness who testified to Defendant's alleged use of intoxicants around the time of the crime" (AB at 64). The State also disputes the credibility of Mr. Miller's assertion that he was available to testify at the time of Mr. Jones' trial (AB at 67-68). Trial counsel Koch testified that Mr. Jones had given him Mr. Miller's name and identified him as a cousin who had been beaten in Aunt Laura Long's household (PCR. 525-27). Koch testified that his best recollection was that he never spoke to Mr. Miller in the process of preparing Mr. Jones' case (PCR. 533). Mr. Koch testified that he was aware that Mr. Jones had an extensive drug abuse history and a drug problem (PCR. 539). Mr. Miller testified at the evidentiary hearing that one day when he left school early he discovered that Mr. Jones had overdosed on pills he had taken and that subsequently Mr. Miller personally called an ambulance which then took Mr. Jones to Jackson Memorial Hospital to have his stomach pumped. Leon Miller said he later visited Mr. Jones, (PCR. 1006-1007). Mr. Miller's testimony provided independent corroboration of the entry

in the 1975 Jackson admission summary, Defense Exhibit H at the evidentiary hearing, which indicated that Mr. Jones was hospitalized in December 1974 as a juvenile for a drug overdose. The history section of the 1975 report also indicates that Mr. Jones was hospitalized in 1975 for 39 days after a psychiatric admission (PCR. 808-11, 888). Leon Miller testified that Mr. Jones' attorneys and investigators never talked with him in 1990-1992 although he was in the Miami area the entire time (PCR. 991). For a year during that period he was in the TGK county stockade serving time (PCR. 990). Until he went to TGK he lived at Aunt Bea's house on NW 51st Terrace, the same place Mr. Jones was living in November-December 1990 before he was arrested (PCR. 999, 1001).

Mr. Miller testified at the evidentiary hearing that the day or evening before the crime in December 1990, he was "smoking crack and getting high" at his Aunt Beatrice's house at 1934 NW 51st Terrace along with Victor Jones, Mr. Jones' siblings Michael and Val, and Howard Glenn (PCR. 988-89). On cross-examination Leon admitted to his own drug problems and a history of arrests, but he testified that if he had known about Mr. Jones' trial he

would have taken the witness stand and talked about his childhood and the last time he saw Mr. Jones (outside of prison or Jail) "in terms of ingesting drugs and drinking the day before this happened" (PCR. 999, 1002).

> Q Leon, if somebody from the public Defender's Office had come to you back in '90 or '91 or '92 and said "Leon, Victor's been charged with first degree murder. Will you come and tell what you know about Victor's life and about what happened the night before," would you have come and testified?
>
> A I would have came.

(PCR. 1004-1005). Mr. Miller further testified that except for a few weeks helping friends move to Miami from Louisiana and to Miami from Houston at the end of 1991, he has been continuously in the Miami area since 1990 (PCR. 1005, 1007).

The State also contends that there was insufficient evidence to have merited an instruction on voluntary intoxication at trial (AB at 65). This disingenuous position completely ignores the testimony of trial counsel Koch at the evidentiary hearing, wherein he explained that he simply failed to do any investigation into the possibility of an intoxication defense once Mr. Jones told

him that "I didn't do it; somebody else did it" (PCR. 616). He went even further during his testimony, indicating that even if someone had been available to corroborate Mr. Jones' drug use in the hours prior to the crime, "I probably would not have attempted to corroborate it because I have a dim view of intoxication, be it alcohol or illegal drugs" (PCR. 522).

Prior to Mr. Jones' trial, trial counsel Koch argued for his motion in limine regarding the toxicology results showing that Mr. Jones' blood some two hours after the offenses contained trace amount of benzoleconine and cocaine, saying, "[w]e are not presenting any type of intoxication defense or mental status defense and this evidence would be irrelevant" (R. 394). At the hearing, Koch said, "[t]he date of the homicide, December 19th, we are not alleging that the Defendant was, for example, incapable of forming specific intent because he was under the influence of any alcohol or drugs or anything of that sort" (R. 395). The court was well aware of the existence of the toxicology report because he granted Koch's motion (R. 396). Despite the lower court's knowledge based on the pre-trial hearing, the sentencing

order specifically found "[t]here is absolutely no evidence that the defendant was under the influence of drugs or alcohol on the date that these crimes were committed" (R. 473). This Court should recall that at Mr. Jones' later evidentiary hearing, the State's expert conceded that the toxicological results indicated that Mr. Jones was under the influence of cocaine at the time of the offense (PCR 1250-56; 1273; 1277-78).

The standard governing a defendant's right to a jury instruction in this regard is also settled: any evidence of voluntary intoxication at the time of the alleged offense is sufficient to support an instruction on the issue. Gardner v. State, 480 So. 2d 91 (Fla. 1985); Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA), review denied, 402 So. 2d 613 (Fla. 1981). In terms of voluntary intoxication, Florida's courts have consistently acknowledged that such a defense must be pursued by competent counsel if there is evidence of intoxication, even under circumstances where trial counsel explains that he or she "did not feel defendant's intoxication 'met the statutory criteria for a jury instruction.'" Bridges v. State, 466 So. 2d 348 (Fla. 4th DCA 1985).

Counsel also unreasonably failed to properly present Mr. Jones' mental condition to the jury to negate the specific intent element of premeditated first-degree murder. In Bunney v. State, 603 So. 2d 1270 (Fla. 1992), the defendant wanted to raise epilepsy as a defense to his ability to form the intent required to commit a first-degree felony murder and kidnapping outside the context of an insanity plea. This Court held that while "evidence of diminished capacity is too potentially misleading to be permitted routinely in the guilt phase of criminal trials, evidence of 'intoxication, medication, epilepsy, infancy, or senility' is not." Id. at 1273. The Court wrote:

> Although this Court did not expressly rule in Chestnut that evidence of any particular condition is admissible, it is beyond dispute that evidence of voluntary intoxication or use of medication is admissible to show lack of specific intent. See Gurganus v. State, 451 So.2d 817 (Fla. 1984). If evidence of these self-induced conditions is admissible, it stands to reason that evidence of certain commonly understood conditions that are beyond one's control, such as those noted in Chestnut (epilepsy, infancy, or senility), should also be admissible. In the present case, Bunney simply sought to show that he committed the crime during the course of a minor epileptic seizure. A jury is eminently qualified to consider this.

Id. at 1273. Here, evidence of Mr. Jones' mental deficiency, as identified by Dr. Eisenstein's objective psychological testing at the time of trial, and Mr. Jones' history of substance abuse would certainly fall within the class of impairments discussed by the Florida Supreme Court in Bunney which negate specific intent.

Counsel's failure to investigate and present an intoxication defense prevented the jury from considering a basis for guilt on a lesser included offense to first degree murder, thereby increasing the risk that Mr. Jones would face death in violation of the Eighth Amendment. See Beck v. Alabama, 477 U.S. 625 (1980). It also denied Mr. Jones a fair trial, in violation of the Sixth, Eighth and Fourteenth Amendments. Confidence is clearly undermined in the outcome by counsel's deficient performance.

B. GUNSHOT RESIDUE

The State contends that the gunshot residue test results were inconsistent with Mr. Jones' defense, and therefore trial counsel Koch cannot be deemed ineffective pursuant to Rivera v. State, 717 So. 2d 477, 485 (Fla. 1998). The State's explication of Mr. Jones's defense is

apparently based on the opening statement by trial counsel Koch (R. 1273-77). In that statement Koch says Mr. Jones was working for the Nestors. He related the following account of what Mr. Jones told him: On the day of the murders Mr. Jones was downstairs working. He then came upstairs and found the front door unlocked. Then he came upon someone assaulting Jack Nestor. Nestor called out to Mr. Jones for help, and Mr. Jones grabbed the assailant from behind, when a gunshot went off and he lost consciousness, and when he woke up, he found Jack Nestor dead on the floor and then crawled over to the couch and took a gun he found on the floor under his arm because he feared that the perpetrators were still in the building. He vaguely remembered the police coming (R. 1274-76).

Contrary to the characterization by the State, Koch specifically says in the opening statement that Mr. Jones did **not** see who had the gun, or who shot him, and that Mr. Jones never saw the gun in Mr. Nestor's hand (R. 1275). Koch says that the forensic evidence "in all probability" indicates that Mr. Nestor's gun was the source of the bullet that hit Mr. Jones in the forehead, but he never tells the jury that Mr. Nestor fired the shot (R. 1275).

Koch's opening statement negligently failed to include the results of gunshot residue particle tests that excluded Nestor and Mr. Jones as the shooter. Thus he failed to preview and to ultimately introduce significant evidence to the jury, namely forensic support for his actual theory of the case: that Mr. Jones was shot while the unknown assailant and Mr. Nestor struggled, perhaps over the gun. An obvious inference would be that the unknown assailant obtained the weapon during the fracas and shot Mr. Jones during the struggle.

Only in his closing argument at the guilt phase did Koch suggest that Mr. Nestor was the person who fired the gun four times at an unknown assailant, hitting Mr. Jones once in the head (R. 2112). What possible strategic reason could Mr. Koch have had for not using forensic evidence that bolstered his defense of Mr. Jones? In his closing he did point out two unidentified latent prints found on the door knob of the bathroom where Mrs. Nestor was killed (R. 2103). His failure to use the gunshot residue tests for the same purpose, the inference that there was a fourth person present at the crime scene other than the Nestors and Mr. Jones, was deficient performance.

This claim was very fact specific and should not have been summarily denied below.

C. VOIR DIRE

Mr. Jones will rely on the arguments in his initial brief.

D. PRESENCE OF MR. JONES AT CRITICAL STAGES

Mr. Jones will rely on the arguments in his initial brief.

ARGUMENT II - ERROR IN SUMMARY DENIAL OF CONFLICT CLAIM

Mr. Jones sought an opportunity to present credible testimony in support of the existence of an actual conflict of interest at an evidentiary hearing. The Eleventh Circuit has set forth the test for distinguishing between actual from potential conflicts of interest:

> We will not find an actual conflict of interest unless appellants can point to specific instances in the record to suggest an actual conflict or impairment of their interests...Appellants must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative causes of action ... If he did not made such a choice, the conflict remain(s) hypothetical.

Reynolds v. Chapman, 253 F. 3d 1337, 1343 (11th Cir. 2001), citing Smith v. White, 815 F. 2d 1401, 1404 (11

Cir. 1987).

Mr. Jones' initial brief cited those sections of the record that supported the injuries to Mr. Jones' case that resulted from the conflict laid out in his 3.850 motion. He was prepared to present testimony about these matters at a hearing in support of a finding that Koch's actions concerned with his attempted withdrawal from the case due to a conflict of interest resulted in a complete denial of counsel at a critical stage of Mr. Jones' trial pursuant to United States v. Chronic, 466 U.S. 648 (1984) and Strickland v. Washington, 466 U.S. 668 (1984).

See Mickens v. Taylor, 122 S. Ct. 1237 (2002) (It is an open question whether the presumption of prejudice standard enunciated in Cuyler v. Sullivan, 446 U.S. 335 (1980), should be applied in a variety of ethical conflict of interest situations or limited to multiple concurrent representation conflicts of interest).

ARGUMENT III - LACK OF PENALTY PHASE ADVERSARIAL TESTING

The State's brief implies that somehow the trial file of Mr. Jones' case is incomplete, citing testimony by Mr. Koch and his investigator, Mr. Sastre to that effect (AB

at 83). Mr. Sastre actually testified that "knowing Mr. Koch, I know that everything that I return back to him it's somewhere in the file" (R. 779). Koch never testified that the trial file, a copy of which was provided by CCRC to the State, was incomplete, only that he never reviewed the trial file that was in the possession of CCRC, but rather had "met with Mr. Scher about a week before the deposition...and I reviewed what he brought with him" (R. 548). The State deposed Mr. Koch prior to the evidentiary hearing and cross-examined both him and Mr. Sastre at the hearing. The State's position in the answer brief that "[n]o one told Koch anything about the sexual relationship between Ms. Mills (Mr. Jones' sister) and Ms. Long's son (Lawrence), despite numerous interviews" carefully ignores the fact that the public defenders' office never interviewed Pamela Mills or Lawrence. (AB at 83). The lower court's finding that Pamela Mills could not have been located in 1990-1993 hardly passes the laugh test. The State and the lower court expect this court to accept that a professional investigative agency, if they had bothered to search, would have been unable to find Ms. Mills in New York where

she testified that she rented an apartment under her own name with the public utilities under her own name (R. PCR. 972). The State is silent as to Lawrence because they are well aware that he was incarcerated in Florida and would have been easy to locate.

The credibility findings made by the lower court against the lay family witnesses and the experts in the case were discussed at some length in the Initial Brief in footnote 39. The evidence summarized in the Statement of the Case and of the Facts and in the claims in the initial brief provide suitable rebuttal to most if not all of the State's positions. For example, the State's brief indicates that Mr. Miller's testimony about the use of drugs in Aunt Laura's household contradicts Ms. Mills' testimony about not using drugs while living there. An examination of Mr. Miller's testimony will reveal that he stated that he was using drugs with Mr. Jones, not with Pamela (PCR. 984-85). He also testified that Pamela was the first to move from Aunt Laura's house to New York (PCR. 983). The fact that all the testimony does not fit together perfectly is suggestive not of deception but of its credibility. Pamela Mills testified, for example,

that prior to the evidentiary hearing she had not seen her brother Victor for twenty years (PCR. 944-46, 949).

State attorney Kastrenakes noted prior to the penalty phase that defense counsel Koch had indicated in a conversation in chambers that he would not argue the mitigating circumstance of the substantial impairment of the Defendant by the use of narcotics or drugs or alcohol. The state attorney also noted that Dr. Hearn, who was never deposed by the defense, in his report indicated that Mr. Jones had used cocaine about **eight hours prior** to the offense based on presence of BE, a breakdown product of using cocaine (R. 2241)(emphasis added). However, at the evidentiary hearing Dr. Hearn testified that Mr. Jones could have used the cocaine as little as two hours prior to the blood draw, around the time of the offense (PCR. 1251).

The State's brief indicates that Dr. Eisenstein's "opinion" that Mr. Jones was "borderline retarded" was contradicted by alleged conclusions by Dr. Toomer and Dr. Mutter that Mr. Jones was of average intelligence (AB. 90). This is a misrepresentation on several counts. Dr. Toomer testified at the hearing that he had concerns about

Mr. Jones "adaptive functioning" based on the 1975 Jackson Memorial Hospital report (PCR. 1098-99). He also testified that he had changed the opinion he had at the time of trial about Mr. Jones' intellectual abilities after being provided with additional materials by postconviction counsel and had revised his opinion downwards towards borderline intellectual functioning (PCR. 1156). Dr. Mutter, a psychiatrist, testified that he had evaluated Mr. Jones for competency between the guilt phase and the penalty phase (PCR. 1190). He diagnosed Mr. Jones as suffering from no major mental illness, but exhibiting antisocial personality disorder and substance abuse by history (PCR. 1201-02, 1205).

The State's brief says that if trial counsel had obtained and presented the 1975 JMH discharge summary, such action would have permitted the State to present additional evidence that Mr. Jones was a "violent criminal" (AB at 93). The State's interpretation of this report is their own. Mr. Jones was only fourteen (14) years old at the time of his admission on May 7, 1975. Nothing in the report is indicative of a "violent criminal record" at that tender age. The report also indicated he

had previously been hospitalized for a drug overdose in late 1974.[2] The possibility of mental retardation and/or schizophrenia are red flagged in the 1975 JMH report.[3] Counsel cannot be absolved for failure to obtain this critically important material by self-serving descriptions of what the State might have done in 1993 if the defense had bothered to obtain the report, as did post-conviction counsel ten years later. Experts Dr. Brad Fisher, Dr. Hyman Eisenstein, Dr. Merry Haber, Dr. Jethro Toomer, and Dr. Charles Mutter all testified that access to the JMH summary at the postconviction hearing was important for their respective findings (PCR. 655-57, 748, 808-17, 884-85, 1030-39, 1092--93, 1097-99, 1198-1203).

---

[2]"In December 1974 he OD'd himself on different drugs, accidentally, as he mentions because he was confused and mixed up from smoking, in order to get more and more high, so he opened the drug cabinet and took an unknown amount of different medications that belonged to his aunt and he didn't remember what happened afterward. Apparently had very ___ condition and was placed in Pediatric ICU for three months" Defense Exhibit H, Jackson Memorial Hospital Discharge Summary of 6/15/75.

[3]"This is the first psychiatric hospitalization for this 14 year old black male who was admitted to the court at the recommendation of Juvenile Court because of the frequency he ran away from home and difficulty getting along with his guardian. Patient has been evaluated in different institutions and structured environment-like youth homes and has been labeled as borderline mental retardation, very depressed, angry, looseness of talk. His affect and his mood are all indicative of schizophrenia" Defendant's Exhibit H, Jackson Memorial Hospital discharge summary of 6/15/75.

Since Mr. Jones' Initial Brief was filed, the United States Supreme Court held in Atkins v. Virginia, 122 S. Ct. 2242 (2002), 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.

The 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). Mr. Jones must be provided notice of and access to whatever procedures Florida adopts in response to Atkins. Mr. Jones further submits that the limited evidentiary hearing and lower court's finding in Mr. Jones' Rule 3.850 proceedings do not affect his right to

any Florida Atkins process.

Mr. Jones filed his amended Rule 3.850 motion and Initial Brief before Atkins was decided. In his Rule 3.850 motion, Mr. Jones alleged violations of 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. Jones' mental status to his trial jury. While a limited evidentiary hearing was granted and conducted on this claim the hearing was conducted within the strictures of Mr. Jones' right to effective assistance of counsel and mental health professionals rather than his right not to be executed due to his mental retardation. Furthermore, no notice was provided of any rules or procedures for determining mental retardation under an Atkins scenario, nor was any definition of mental retardation, compliance with which would preclude Mr. Jones' execution under the Eighth Amendment and Atkins. Under Atkins, such procedures and definitions must be provided.

Mr. Jones has already presented sufficient evidence of mental retardation to be entitled to an such a hearing. Evidence was presented that Mr. Jones was tested by Dr.

Eisenstein in March 1999 with a full scale WAIS III IQ of 67 and in April 1991 with a full scale WAIS-R IQ score of 72. (Initial Brief at 86). There is also a low IQ score in Mr. Jones' 1988 prison records years before the gunshot wound to his head in December 1990. There was also evidence presented below that Mr. Jones had significantly impaired adaptive functioning the onset of which was apparent before age 18. (Initial Brief at 86) (1975 Jackson Memorial Hospital admission diagnosis of borderline mental retardation). However neither at his capital trial, nor during post conviction proceedings has he had the opportunity to have the question of his mental retardation heard by a jury. If Mr. Jones suffers from mental retardation, he cannot be sentenced to death or executed in the State of Florida based on the holding in Atkins. At the evidentiary hearing, there was testimony from Dr. Toomer, who opined that Mr. Jones had borderline intelligence (PCR. 1156) and Dr. Mutter, who believed that Mr. Jones did not suffer from major mental illness, but these opinions were not based on the administration of any standardized intelligence tests, but rather on their own subjective opinions. (PCR. 1201). Mr. Jones' low IQ,

cognitive impairments identified by neuropsychological testing, and early onset remain unrebutted. Furthermore, even if the differing experts' opinions were based on recognized testing, Mr. Jones would be in no different position than Mr. Atkins, whom Virginia claimed was not retarded.

Ring v. Arizona, 122 S.Ct. 2428, 2002 U.S. LEXIS 4651 (June 24, 2002), held unconstitutional a capital sentencing scheme that makes imposing a death sentence contingent upon the finding of aggravating circumstances and that assigns responsibility for finding that circumstance to the judge. The United States Supreme Court based its holding and analysis in Ring on its earlier decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), in which it held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-253 (1999) (Stevens, J., concurring)).

Capital sentencing schemes such as Florida's and Arizona's violate the notice and jury trial rights

guaranteed by the Sixth and Fourteenth Amendments because they do not allow the jury to reach a verdict with respect to an "aggravating fact [that] is an element of the aggravated crime" punishable by death. Ring, 2002 U.S. LEXIS 4651 at *39 (quoting Apprendi, 530 U.S. at 501 (Thomas., J., concurring)).

Applying the Apprendi test in Ring, the Court said "[t]he dispositive question....'is not one of form but of effect.'" Ring, 2002 U.S. LEXIS 4651 at *34 (quoting Apprendi, 530 U.S. at 494). The question is not whether death is an authorized punishment in first-degree murder cases,[4] but whether the "facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone," Ring, 2002 U.S. LEXIS 4651 at *40, are found by the judge or jury. "If a state makes an increase in a defendant's authorized punishment contingent on the

[4]See Ring, 2002 U.S. LEXIS 4651 at *37-39 (rejecting argument that finding of aggravating circumstances did not increase statutory maximum because "Arizona's first-degree murder statute 'authorizes a maximum penalty of death only in a formal sense'" (quoting Apprendi, 530 U.S. at 541 (O'Connor, J., concurring)). Both the Florida and Arizona statutes provide for a range of punishments, the most severe of which is death. Compare Fla. Stat. § 775.082(1)(1979) with Arizona Rev. stat. Ann. § 13-1105(C).

finding of a fact, that fact... must be found by a jury beyond a reasonable doubt." Ring, 2002 U.S. LEXIS 4651 at *34. "All the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." Ring, 2002 U.S. LEXIS 4651 at *35 (quoting Apprendi, 530 U.S. at 499 (Scalia, J., concurring)).

The Court in Ring held that Arizona's sentencing statute could not survive Apprendi because "[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." Ring, 2002 U.S. LEXIS 4651 at *23-24 (internal quotation marks and citations omitted). In so holding, the Court overruled Walton v. Arizona, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring, 2002 U.S. LEXIS 4651 at *44.

A jury trial on the issue of mental retardation is

necessary in Mr. Jones' case pursuant to Ring. 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.

Under the Court's decision in Atkins, the factual finding concerning mental retardation is a condition precedent to Mr. Jones' eligibility to be executed. Absent finding that Mr. Jones is not mentally retarded, the death penalty cannot be imposed. The factual determination of mental retardation, or its absence, is no

less a condition for imposition of the death penalty than the aggravating circumstances in the Ring case.

Fla. Stat. 921.137 is not 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. Jones 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 made solely by a judge. Under the authority of Ring and the Sixth Amendment, Mr. Jones is now entitled to a jury determination on the issue of his mental retardation.

Furthermore, Mr. Jones is entitled to more than the mere presence of a jury to determine whether or not he is mentally retarded. He is now entitled to all the benefit

of the jury trial process. These include the opportunity to select a fair and impartial jury through voir dire, use of peremptory and other challenges, discovery depositions, appointment of competent capital counsel, a unanimous jury verdict and properly drafted jury instructions to guide the jury on the determination of mental retardation.

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. (Citation s omitted)

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. Because Mr. Jones is entitled to a jury trial on the issue of mental retardation, the only mechanism for properly determining the claim is a statute which outlines the specific standards for a determination of mental retardation by he jury and a properly drafted jury instruction.

Florida Statute 921.137 does not meet the requirements of Atkins or Ring. 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 would comply with Atkins and Ring in regard to the determination of mental retardation in post conviction proceedings. In Fleming the court held that on a prima facie showing of mental retardation (based as in Mr. Jones' 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. Mr. Jones urges this Court to adopt a similar scheme in Florida. This Court must return Mr. Jones' case to circuit court for a determination as to Mr. Jones' mental retardation by a jury.

ARGUMENT IV - PUBLIC RECORDS

Mr. Jones reiterates the request in his Initial Brief that this Court review the hundreds of pages of records from the Office of the State Attorney found to be exempt after in camera inspection below (Supp. PCR 3-7). As to the requests directed to FDLE for juror information, the records available to counsel did not include any identification information for the jurors except their names, race and sex. The social security numbers and date of birth of the members of the jury in Mr. Jones' case were not and are not in the possession of Mr. Jones' counsel. Without the capability of obtaining criminal history information concerning the jurors, how is investigation into whether the jurors in Mr. Jones' case lied about their criminal records to be obtained? The request at issue is as follows:

> **DEFENDANT'S WRITTEN DEMAND FOR ADDITIONAL PUBLIC RECORDS PURSUANT TO EMERGENCY FLORIDA RULE OF CRIMINAL PROCEDURE 3.852 (h) (2)**
>
> Defendant, **VICTOR TONY JONES**, by and through undersigned counsel, hereby

makes this written demand for public records of Florida Department of Law Enforcement, pursuant to emergency Florida Rule of Criminal Procedure 3.852 (h) (2), Article I, Section 24 of the Florida Constitution; chapter 119 of the Florida Statutes; and **Brady v. Maryland**, 373 U.S. 83 (1963) and states:

1. On October 1, 1998, Defendant was represented by undersigned collateral counsel.

2. On October 1, 1998, Defendant had initiated the public records process.

3. The instant request is timely filed and served.

4. The records requested herein have not previously been the subject of a public records request.

5. The public records requested are as follows:

We ask that you produce all records regarding the following individual(s):

Judy Ann Worthington
Nancy Lu Carpenter
Michael Finley Dicus
Nelson Gonzalez
Adria Garcia-Cheng
Sergio Luis Fenandez
Gabriel Fernandez
Mattie Bell Spann
Susana Ruiz
Roberto Jose Wallo
Magadmi Hernandez
Antonio Vega or Antonio Vera
Richard Casellas (alternate)
Ana M. Cortes (alternate)

We seek any and all records (regardless of form and including photographs, sound or video recordings, physical evidence,

and electronic mail and/or files) related to any cases in which the above mentioned individual(s) was a defendant, witness, suspect and/or victim.

Our interest is in, but not limited to, the following:

a. Any and all files, records, reports, rap sheets, letters, memoranda, notes, drafts, electronic mail and/or files, and all other records (regardless of form) in the possession or control of your agency relating to the above mentioned individual(s), regardless of facility, office, unit or branch of your agency where records may be housed.

6. Pursuant to emergency Florida Rules of Criminal Procedure 3.852, you shall, upon receipt of this written demand:

(a) copy, seal, index and deliver the requested records to the records repository of the Secretary of State; and

(b) certify that, to the best of your knowledge and belief, that the requested records have been delivered to the records repository of the Secretary of State.

7. Emergency Florida Rules of Criminal Procedure 3.852 (f) and chapter 119.07 (2) of the Florida Statutes provide procedures you must follow should you claim any requested records to be exempt or confidential. It is requested that you state with particularity the reasons for your conclusion that the record is exempt or

> otherwise being withheld from disclosure.

(Supp. PCR. 105-107).

REMAINING ARGUMENTS

Mr. Jones relies on his Initial Brief to address the remaining arguments of the State, except to note that the State argues that Mr. Jones has not established prejudice because Koch or his investigator contacted Aunt Laura Long, Beatrice Brown, Greg Whitney and Vera Edwards as part of his investigation. This Court should recall that the jury heard testimony at the penalty phase from only from Drs. Toomer and Mutter, and not from a single family member or friend. The State's circular analysis again ignores the fact that these experts provided materially contradictory diagnoses of Mr. Jones, and the State urged the jury to completely reject Dr. Toomer's limited testimony in support of mitigation. The trial court found no statutory or non-statutory mitigation. The nature and quality of the evidence presented at the evidentiary hearing that trial counsel unreasonably failed to investigate or present, alone and in conjunction with the other errors asserted by Mr. Jones would have completely

changed the evidentiary picture, and prejudice is clear.

Mr. Jones relies on his Initial Brief as rebuttal to the remaining arguments advanced by the State.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to Sandra Jaggard, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131, on September 17, 2002.

WILLIAM M. HENNIS, III
Florida Bar No. 0066850
Capital Collateral Regional Counsel-South
101 N.E. 3rd Ave., Ste. 400
Fort Lauderdale, FL 33301
(954) 713-1284
Attorney for Mr. Jones

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.

WILLIAM M. HENNIS, III
Florida Bar No. 0066850
Assistant CCRC
CCRC-South
101 NE 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284
Attorney for Mr. Jones