IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-726

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

INITIAL BRIEF OF APPELLANT

WILLIAM M. HENNIS III
Litigation Director
Florida Bar No. 0066850
CAPITAL COLLATERAL

REGIONAL COUNSEL
101 NE 3rd Avenue
Suite 400
Ft. Lauderdale, FL 33301

(954) 713-1284
COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This appeal involves the summary denial of Mr. Jones' Rule 3.850 motion. References in the Brief shall be as follows:

(R.) -- Record on Direct appeal;

(PCR.) -- Record on postconviction appeal;

(Supp. PCR.) -- Supplemental Record on postconviction appeal.

(R.2)- Instant Record on appeal

Other citations shall be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Jones requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

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STATEMENT OF THE CASE AND OF THE FACTS

The Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, entered the judgments of convictions and sentences under consideration. On direct appeal, this Court affirmed Mr. Jones's convictions and sentences. Jones v. State, 652 So. 2d 346 (Fla.), cert. denied, 116 S. Ct. 202 (1995). On March 24, 1997, Mr. Jones filed an initial Rule 3.850 motion (PCR. 38-77). An amended motion was subsequently filed (PCR. 93-202), along with a motion alleging that Mr. Jones was not competent.[1] Following an evidentiary hearing, the lower court found Mr. Jones competent, and an amended 3.850 was thereafter filed (PCR. 203-314). After a Huff[2] hearing, the court granted an evidentiary limited to the issue of ineffective assistance of counsel as to voluntary intoxication and mitigation (PCR. 365). An evidentiary hearing was conducted on various dates, and an order denying relief was entered (PCR. 379-96).

At the evidentiary hearing, the following evidence relevant to the instant appeal was adduced:[3]

Art Koch was trial counsel for Mr. Jones. He testified at the evidentiary hearing that because Mr. Jones was shot in the head before his arrest and hospitalized (PCR. 486), several mental health experts

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[1]See Carter v. State, 706 So. 2d 873 (Fla. 1997).

[2]See Huff v. State, 622 So. 2d 982 (Fla. 1993).

[3]Both the State's Response to Mr. Jones's successive motion and the lower court's orders summarily denying an evidentiary hearing on mental retardation included numerous references to the mental health evidence in the prior record on appeal and other evidence presented in the prior proceedings. (R.2 139-206; R.2 246-249; R.2 265-266)

were involved pre-trial in the case, including Dr. Hyman Eisenstein, a neuropsychologist, Dr. Steven Sevush, a neurologist, and psychologists Dr. Brad Fisher, Dr. Jethro Toomer, and Dr. Merry Haber (Id.). Regarding penalty phase, Koch testified that his goal was to establish statutory and nonstatutory mitigation (Id.).

Dr. Brad Fisher, a psychologist from North Carolina with extensive experience in the area of forensic psychology, testified that in 1992, Koch asked him evaluate Mr. Jones, and that he did so on July 13 and 22, 1992 (PCR. 632-635). He conducted a general preliminary evaluation to develop a "rough sense" of Mr. Jones' mental health situation (PCR. 657-38). He did not recall receiving materials from Koch and his file contained no records (PCR. 639). He did not recall speaking with Koch about why he was not going to be called as a witness (Id.). Fisher was later contacted by collateral counsel, after which time he saw Mr. Jones again in May and June of 2000 (PCR. 640-41). Collateral counsel also provided Fisher with a number of background materials, including prior testimony and mental health evaluations, school records, prison records, medical records, affidavits of family members and acquaintances, records from a Jackson Memorial Hospital hospitalization in 1975, and public defender social worker Marlene Schwartz's investigative notes (PCR. 641-43). He also reviewed records surrounding an arrest of Laura Long's son, Lawrence, for a 1984 murder in Georgia (PCR. 646). Fisher also personally interviewed members of Mr. Jones' family including his sister, Valerie, his Aunt Bea, his cousin Carl, his sister Pamela, and his brother Michael, who goes by the name of Michelle (PCR. 647). All of this material was necessary

for Fisher to form opinions and conclusions in Mr. Jones' case (PCR. 648).

Based on his evaluation, Fisher opined that there was mitigation that he could have testified to:

> It is my opinion that the disruptive, chaotic and troublesome in the extreme developmental background, such as, I believe he had included both his mother and Laura because he was raised by both at different times, was a significant mitigating factor. That's one.
>
> Secondly, it is my opinion that, again, with data that is, I believe, not controverted and coming from many sources, that his abuse of drugs, consistent abuse of alcohol and drugs from a very early age. I'm not talking about 15. I'm not really even talking about ten. I'm talking about younger than that, with the genetic background that includes a mother who is an alcoholic, was and is, whatever the word, a significant factor.
>
> Third, the prison records and my own interviews suggest some neurological problems. That's very hard to differentiate to what nature and extent they can be attributed specifically to the time that he was shot at the time of the crime versus existed there before.

(PCR. 649-50). Fisher also opined that, at the time of the crime, Mr. Jones' capacity to appreciate the criminality of his conduct to the requirements of the law was substantially impaired (PCR. 652). He was also under the influence of an extreme mental or emotional disturbance at the time of the crime (Id.).

Fisher also discussed a report from Jackson Memorial Hospital about Mr. Jones' 1975 psychiatric admission, which indicated that an admitting diagnosis was chronic schizophrenia, borderline mental retardation and a discharge diagnosis of unsocialized aggressive reaction of adulthood (PCR. 655) (R.2 85-94). The report also provided a history of Mr. Jones' background, including a pediatric admission in

the intensive care unit for three months (PCR. 656). This information was significant: "I saw those factors as significant to the diagnosis that he got when he was admitted, the length of stay, the double stays, meaning he's going in at 14 three or four months and again for 39 days in 1975, they play a role in the different opinions that I have expressed today" (PCR. 657). This and other reports "give consistent information about some of the troubles in his development, both in the mother and her abuse of alcohol and in the strictness of Laura, his aunt, and the problems with some of the siblings and some of his own problems at school and with drugs" (Id.).

Dr. Fisher proffered additional information concerning "noteworthy items" in the records he reviewed, such as prior DOC records indicating that Mr. Jones had a history of car accidents and falls resulting in his being knocked unconscious, as well as use of all types of drugs (PCR. 689). The prior DOC records also indicate an IQ test revealing a full scale score of 76 (Id.). This places Mr. Jones in "the territory of borderline intelligence, close to retardation" (Id.). All these records predate the crime (PCR. 690). The 1975 JMH report also referred to borderline intelligence (Id.). In 2000, Fisher re-evaluated Mr. Jones, and spent several hours with him on two separate occasions (PCR. 735). He reached the conclusion that Mr. Jones had a horrible developmental background based on his interviews with Mr. Jones and his family (PCR. 738).

As for the 1975 JMH admission, Fisher did not know whether Mr. Jones ever received any treatment for schizophrenia, but the report suggested follow-up evaluations (PCR. 748). Fisher also was aware that

Mr. Jones had been in and out of several drug treatment facilities (PCR. 748). He did not know the source of the information reflected in the JMH report that Mr. Jones was in a pediatric intensive care unit for three months (PCR. 749).

Dr. Hyman Eisenstein, a forensic neuropsychologist with a diplomate from the American Board of Professional Neuropsychology, testified at the evidentiary hearing (PCR. 787). Back in the early 1990s, he was asked by Koch to evaluate Mr. Jones for purposes of conducting neuropsychological testing as to issues of competency and mitigation (PCR. 790). Koch had provided him with some background information, including medical records from when Mr. Jones was shot in the head, and police reports (PCR. 790). He testified at a competency hearing conducted between the guilt and penalty phases of trial, as well as at the sentencing before the judge (PCR. 791-92). He was retained by collateral counsel to further evaluate Mr. Jones, at which time he performed another IQ test and a brief interview (PCR. 793). When he worked with Koch prior to trial, Eisenstein saw Mr. Jones numerous times and conducted two comprehensive neuropsychological examinations, one in 1991 and the second in 1993 (PCR. 793). In terms of the collateral evaluation, Eisenstein was provided with and reviewed numerous background materials, which he identified (PCR. 795-96; 802-03). At the time of his original involvement, Eisenstein spoke with Mr. Jones's Aunt Laura, but no other family members (PCR. 797). He has since had the opportunity to do so, and those interviews further assisted him in arriving at conclusions (Id.).

Eisenstein testified that there was mitigation in Mr. Jones' case

to which he could have testified, if asked, at Mr. Jones' penalty phase, including past psychological and psychiatric problems, substance abuse problems, cognitive intellectual deficits, poor academic background, and family disfunction (PCR. 804).[4] To a reasonable degree of professional certainty, at the time of the crime, Mr. Jones' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, ever before he was shot in the head at the crime scene (PCR. 805). Moreover, at the time of the crime, Mr. Jones was under the influence of an extreme mental or emotional disturbance (Id.). Mr. Jones was also intoxicated at the time of the crime (Id.).

Regarding the 1975 JMH admission, Eisenstein explained that this was significant for several reasons. First, it was reported that he had been at different institutions and youth homes and had been labeled as borderline mentally retarded (PCR. 808). This means that his IQ level was in the 70 to 79 range, which is the lower end of the general population (Id.). The report also indicated that Mr. Jones was depressed, angry, exhibited looseness of talk, his affect and mood were indicative of schizophrenia (PCR. 809). The report also indicated that there were visual and auditory hallucinations that have content common to paranoid individuals, that the hospital recommended close observation and follow-up, and that Mr. Jones "does not remember any happy moment in his life" (PCR. 809-10). It also detailed Mr. Jones'

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[4]As Eisenstein explained, "[d]ysfunctional family would be mild terms in describing the environment that Victor Tony Jones grew up in" (PCR. 804).

troubles with drugs, difficulties in school, and his mother's alcoholism (PCR. 811). This information is consistent with what the family reported to him (Id.). It is also consistent with other records in terms of Mr. Jones' intellectual functioning, for example, testing done by DOC in 1988 revealed an IQ of 76 (PCR. 815). This DOC document was prepared prior to Mr. Jones' arrest (Id.). The subsequent testing conducted by Eisenstein in 1991, 1993, and 1999, was corroborative of the 1975 and 1988 testing insofar as Mr. Jones' intellectual functioning in the borderline range (PCR. 816). At the time of his evaluation when he was working with Koch, Eisenstein did not have the 1975 JMH report (PCR. 817).

Eisenstein also opined that Mr. Jones had neuropsychological problems prior to sustaining the frontal lobe injury at the time of the offense (PCR. 857). For example, the prior records indicate that he was a slow learner, and his school records revealed that he obtained approximately 80% C's when he was seven and eight, and after that they were basically all F's (Id.). The prior records all consistently indicated borderline mental retardation (Id.). Mr. Jones also had car accidents, drug overdoses, all of which create neuropsychological impairment (PCR. 858). Based on this constellation of information, Eisenstein would certainly suspect that there "would be a considerable amount of deficits in other areas of brain behavior activity" (Id.). He reiterated that he had none of this information at the time he testified in 1993 (Id.).

Back in 1992, Eisenstein did have the chance to speak with Laura Long, but only briefly on the telephone (PCR. 877). At the time he

would have wanted to speak with other family members, but they were not made available to him by Koch (PCR. 877-78). He explained that "if resources are put into finding family members, often they can be found, but it's a very time consuming task" (PCR. 878).[5] Mr. Jones' performance in school was very poor (PCR. 880-83). The 1975 JMH report, along with other information, corroborated his conclusions about Mr. Jones' intellectual functioning (PCR. 884-85). It would not surprise Eisenstein to know that after being released from JMH, Mr. Jones committed additional crimes (PCR. 887). If JMH did not believe that Mr. Jones had some type of mental disorder, they would not have kept him for five weeks in the hospital (PCR. 888).

He looked into the possibility that Mr. Jones suffered from fetal alcohol syndrome: "I didn't discount it and I don't have confirmation for it. It's a possibility and it's unclear" (PCR. 909). Eisenstein reiterated that Mr. Jones "presents with severe neurological deficits," his intellectual level is in the "borderline" or "mild mental deficiency range," has "deficits in his thinking process, his abstraction, in his ability to formulate conceptual thinking" (PCR. 918). Mr. Jones was not of average intellectual functioning (Id.).

Pamela Mills, Mr. Jones' older sister, testified at the evidentiary hearing (PCR. 944). She identified her signature on Defense Exhibit A-15 for identification, which was an affidavit she executed (PCR. 945-46). In addition to Victor, she stated there was a

[5]He later explained that Koch did not ask him to interview anyone but Laura Long, and that if had asked him to interview others, he would have (PCR. 937).

brother, Lionel, who was killed in Miami, another brother named Frank, and one named Michael (PCR. 947). She stated that she had one sister, Valerie (Id.). Their mother's name was Constance Laverne Jones, who died in 1982 (PCR. 949). Mills stated that she was born on November 10, 1957, and when she was 6 or 7 went to live with her Aunt Laura (PCR. 949). Victor and their cousin Carl were also living with Laura, as was Laura's son, Lawrence (PCR. 950). Laura's boyfriend/husband, Reverend Long, was also in the house (Id.). Laura treated them like a stepchild "with all of this abuse going on in the household, both physical and sexually" (PCR. 951). Victor was also "very slow in school" and had learning disabilities; this was one of the things that Laura "would get on us about, especially him" (PCR. 959).

Dr. Jethro Toomer, a forensic and clinical psychologist, also testified at the evidentiary hearing (PCR. 1088). Back at the time of trial, Koch asked him to determine Mr. Jones' mental status functioning and issues related to mitigation (PCR. 1089). He saw Mr. Jones on three occasions (PCR. 1090). He recalled asking Koch for any documents relating to the 1975 JMH admission, but Koch told him no records existed (PCR. 1110). Toomer identified what was introduced into evidence as State Exhibit 4, which was a timeline that Toomer had prepared at the time of trial based on the information he had (PCR. 1114). Toomer acknowledged knowing that Mr. Jones had said he had been physically punished by his cousin, but not in any detail (PCR. 1116). He also knew that Mr. Jones had been in the JMH psychiatric ward, but did not have any records (PCR. 1118). The discharge diagnosis by JMH of undersocialized reaction means that Mr. Jones has not "been

indoctrinated into basic normal structured society" and "because of erratic nurturing and predispositional factors lives in an unpredictable or aggressive fashion" (PCR. 1126-27). The new data reinforced his opinions with respect to Mr. Jones' overall functioning (PCR. 1130).

Vera Edwards, a public school teacher in Dade County who taught Mr. Jones for one year when he was about 8, was called as a witness by the State at the evidentiary hearing (PCR. 1162). She knew who Mr. Jones' "guardian" was at the time (PCR. 1163). She stated that back in 1990-93, several doctors talked to her about Mr. Jones (PCR. 1165). Mr. Jones' guardian had contacted Edwards first, and gotten her phone number (Id.). As a student, Mr. Jones was alert, disciplined, and prepared for class (Id.). She never asked his guardian to come to the school for disciplinary or academic problems (PCR. 1166). He appeared to be of "a little above average" intelligence (Id.). Edwards would see Mr. Jones' guardian on a daily basis, as Edwards' daughter was at a day care center run by the guardian (Id.). Part of her job is to look for abuse of a child (PCR. 1167). She did not see signs that Mr. Jones was abused (PCR. 1168).

On cross, Edwards did not recall what year she taught Mr. Jones because "[i]t's been a long time" (PCR. 1168). She was "positive" that it was third grade (Id.). There were 33 or 34 other students in the class (Id.). She did not remember any of the other students (PCR. 1169). Mr. Jones' guardian was a Mrs. Wright, but she never knew her first name, nor did she know if Mrs. Wright was married "because that didn't concern me" (Id.). Edwards had no records of Mr. Jones'

performance in school (PCR. 1170). She knew that there were other siblings, and she recalled Virgil living with the family at the time she taught Mr. Jones (Id.). Edwards was never inside Mr. Jones' house (PCR. 1171). Edwards has taught children who although looked all right, were in fact abused at home (PCR. 1172). If a child had bruises on his body under his clothes, she would have no way of knowing that (Id.). She did not know if Mrs. Wright's day care was registered (Id.). Once Mr. Jones left her class, she did not know what happened to him (Id.). She is relying on her memory that Mr. Jones was a good student, and agreed that her memory can fade over time (PCR. 1173).

On redirect, Edwards explained that there were other signs of abuse besides bruises, such as isolation, withdrawal, and these things can be detected in their art work (PCR. 1174). On recross, Edwards testified that she did not teach art or music at the school (PCR. 1174). She would not have been aware of any of the art that he did (PCR. 1175). She did not remember any of Mr. Jones' friends in third grade, but he was "well liked" (PCR. 1175). The art teacher would have told her if Mr. Jones had drawn something in art class (PCR. 1176).

A timely notice of appeal was filed following the lower court's denial of Mr. Jones's initial Rule 3.850 motion (PCR. 397). On May 8, 2003, Mr. Jones's appeal from the denial of postconviction relief following the evidentiary hearing pursuant to Fla. R. Crim. P. 3.850 was denied. Jones v. State, 2003 Fla. LEXIS 781 (Fla. May 8, 2003).

Mr. Jones's motion for re-hearing before this Court on appeal from the denial of postconviction relief was filed on May 22, 2003.

On June 17, 2003, Mr. Jones filed his first successive motion pursuant to Fla. Rule Crim. P. 3.851, based on Atkins v. Virginia, 122 S. Ct. 2242 (2002). (R2. 28-102).

On July 3, 2003 the State filed a Motion to Dismiss Mr. Jones's pending Rule 3.851 motion. (R.2 107-109) On July 15, 2003, counsel for Mr. Jones filed a Response to the State's Motion to Dismiss. (R.2 110-127).

Mr. Jones's motion for re-hearing before this Court was denied on September 11, 2003, at the same time a revised opinion was issued. Jones v. State, 855 So.2d 611 (Fla. 2003).

The lower court then dismissed Mr. Jones's first successive Rule 3.851 motion in an order rendered on October 9, 2003. (R.2 138). The mandate issued from this Court on October 13, 2003.

Thereafter, on October 14, 2003, Mr. Jones filed his second successive motion for postconviction relief.[6] The State filed a response on November 3, 2003. (R.2 139-206) Mr. Jones filed a reply to that response on November 24, 2003. (R.2 207-245). The lower court entered an order summarily denying Mr. Jones's motion without an evidentiary hearing on January 14, 2004. (R2 246-249). Mr. Jones filed a timely motion for rehearing on January 28, 2004 (R2 250-264). The lower court entered an order denying rehearing on February 10, 2004.

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[6]It appears that the clerk of the lower court has failed to include a copy of this motion in the instant record on appeal. Simultaneously with this Initial Brief, undersigned counsel is submitting a Motion to Supplement the Record with a copy of that pleading and attachments. For purposes of clarity, citations to the October 14, 2003 Rule 3.851 motion are noted by page number and the motion is included as Attachment A to this Initial Brief.

(R2 263-266). This appeal follows.

SUMMARY OF THE ARGUMENTS

1. The lower court's failure to appoint mental retardation experts followed by the lower court's summary denial of Mr. Jones's successive Rule 3.851 motion claiming that he was mentally retarded pursuant to Atkins v. Virginia, was a violation of Mr. Jones's right not to be subjected to cruel and unusual punishment. Mr. Jones should have been granted an evidentiary hearing pursuant to Fla. R. Crim. P. 3.851 because his mental retardation was an issue of fact that could not be conclusively resolved by the record in his case.

ARGUMENT I

THE LOWER COURT'S SUMMARY DENIAL OF MR. JONES'S SUCCESSIVE POSTCONVICTION MOTION BELOW WAS IMPROPER. THE LOWER COURT'S FAILURE TO EITHER APPOINT EXPERTS OR TO GRANT AN EVIDENTIARY HEARING ALLOWING MR. JONES TO PROVE HE IS MENTALLY RETARDED, PURSUANT TO THE HOLDING OF ATKINS V. VIRGINIA, 122 S. Ct. 2242 (2002), AND FLA. R. CRIM. P 3.203, WAS A VIOLATION OF MR. JONES' RIGHT TO NOT BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS.

A trial court has only two options when presented with a Rule 3.850 motion: "either grant an evidentiary hearing or

alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted", Witherspoon v. State 590 So.2d 1138 (4th DCA 1992). A trial court may not summarily deny without "attach[ing] portions of the files and records conclusively showing the appellant is entitled to no relief", Rodriguez v. State, 592 So.2d 1261 (2nd DCA 1992). See also Brown v. State, 596 So.2d 1025, 1028 (Fla.1992).

The law strongly favors full evidentiary hearings in capital post conviction cases, especially where a claim is grounded in factual as opposed to legal matters. "Because the trial court denied the motion without an evidentiary hearing and without attaching any portion of the record to the order of denial, our review is limited to determining whether the motion conclusively shows whether [Mr. Jones] is entitled to no relief." Gorham v. State, 521 So.2d 1067, 1069 (Fla; 1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982).[7]

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7 Furthermore, under the latest version of Fla. R. Crim. P. 3.851 evidentiary hearings are mandated for all factually based claims. Fla. R.Crim. P. 3.851(f)(5) mandates that evidentiary hearings shall be scheduled by the lower court "on claims listed by the defendant as requiring a factual determination" on initial motions and on successive motions unless "the motion, files, and records in the case conclusively show that the movant is entitled to no relief." See also Fla. R. Crim. P. 3.203(e)("The circuit court shall conduct an evidentiary hearing on the motion for a determination of mental retardation. At the hearing, the court shall consider the findings of the experts and all other evidence on the issue of whether the defendant is mentally retarded").

The issue of mental retardation as a bar to execution has never been addressed in Mr. Jones postconviction proceedings. All definitions of mental retardation require three prongs; impaired intellectual functioning, impaired adaptive functioning, and onset before age 18.

Adaptive functioning deficits, an important aspect of the definition of mental retardation, have never been properly explored before the lower court in Mr. Jones's case. The testimony at the evidentiary hearing associated with his initial postconviction motion was directed to the issues of statutory mitigation, ineffective assistance of counsel, and voluntary intoxication, not mental retardation. Mr. Jones is entitled to merits consideration of his mental retardation claim because "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) [of Rule 3.851] and has been held to apply retroactively." Rule 3.851(d)(2)(B).

Some fact based claims in post conviction litigation can only be considered after an evidentiary hearing, Heiney v. State, 558 So.2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. Where a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So.2d 1250, 1252-3)

Fla. 1987). Accepting the allegations . . .at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing", Lightbourne v. Dugger, 549 So.2d 1364, 1365 (Fla 1989).

The record of this case fails to refute the claim of Mr. Jones' mental retardation, and further evidentiary development is required pursuant to Gaskin v. State, 737 So. 2d 509 (Fla. 1999). In addition Fla. R. Crim. P. 3.851 anticipates that evidentiary hearings should be held where facts are in dispute.

A full presentation as to all three prongs of the definition of mental retardation at a future evidentiary proceeding is necessary. The lower court's order denying rehearing acknowledges that Dr. Caddy found that Mr. Jones met the diminished intellectual functioning aspect of the mental retardation definition as well as the one area of adaptive functioning malfunction that his testing explored (R2 265-266). The lower court attempted to clean up the misstatements in the initial order after Mr. Jones filed a motion for rehearing pointing out the court's failure to include Dr. Caddy's findings and renewing the request that the court appoint mental retardation experts (R2 250-251,258). It is clear that the lower court's initial summary denial order failed to take any account of Dr. Caddy's report and findings (R2 246-249). The lower court's findings are not conclusive refutation of mental retardation.

Mr. Jones was required to file a Rule 3.851 motion on or before the June 20, 2003 one year anniversary of the United States Supreme Court's opinion in Atkins v. Virginia in order to preserve his

rights. This he did. After the lower court's action on October 1, 2003, dismissing his previous motion, Mr. Jones filed his second motion concerning his mental retardation on October 14, 2003, the first day on which this Court no longer had jurisdiction over Mr. Jones's case.

During the November 24, 2003 case management hearing, the State argued that the issue of Mr. Jones' mental retardation was procedurally barred and facially insufficient because it had been addressed by the lower court's orders on the prior Rule 3.850 proceedings (R2 320-326).

Mr. Jones's November 21, 2003 *Reply to State's Response and Motion To Strike Exhibit B of State's Response and Associated Materials*, was filed before the November 24 hearing. (R.2 207-245). The lower court never entered an order on either the motion to strike or the request for appointment of mental retardation experts despite hearing argument (R2 294-299) Mr. Jones referenced the then-proposed Fla. R. Crim. P. 3.203, and requested that the lower court appoint two mental retardation experts to examine Mr. Jones in light of Fla. Stat. Sect 921.137. This request was repeated at the November 24 hearing, but the lower court failed to appoint any mental retardation experts or to enter an order denying the request (R.2 214, 313, 315, 319).

Mr. Jones also addressed the issue of IQ scores that the State raised in its response:

> 17. The State Response claims that the IQ scores of Mr. Jones that were offered in his 3.851 motion fail to meet the definition for mental deficiency required for an

Atkins determination. The same claim is made by the State as to the information that Mr. Jones has today moved to strike [the postconviction competency evaluations]. This court should be aware that Florida does not have a bright line IQ cut-off score for mental retardation. There is a margin of error for IQ testing that must be taken into account when evaluating test results. Dr. Caddy's testing and report reflect that fact. Both of the most widely used definitions of mental retardation take this statistical reality into account:

> It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. The choice of testing instruments and interpretation of results should take into account factors that may limit test performance (e.g., the individual's sociocultural background, native language, and associated communicative, motor, and sensory handicaps). When there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person's learning abilities.

Diagnostic and Statistical Manual of Mental Disorders-IV, American Psychiatric Association, 1994, at 39-40. DSM-IV also notes that the American Association on Mental Retardation (AAMR) has a classification system that uses the same three general criteria as does the American Psychiatric Association: significantly subaverage intellectual functioning, limitations in adaptive skills, and onset prior to age 18 years; and further notes that in the AAMR classification, "the criterion of significantly

subaverage intellectual functioning refers to a standard score of approximately 70-75 or below (which takes into account the potential measurement error of plus or minus 5 points in IQ testing)." DSM-IV at 45.

18. If this court appoints two "mental retardation experts" to evaluate Mr. Jones, that evaluation will not be limited to IQ testing. The experts will also be required to do adaptive functioning testing and to reach a conclusion about onset of mental retardation before the age of eighteen based on all the evidence presented to them. Counsel believes that the record provides a good faith basis to make the claim that Mr. Jones is mentally retarded and that the American Bar Association **Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases**, Revised Edition, February 2003, Guidelines 10-8, 10.15.1, require him to make the claim. See Wiggins v. Smith 123 S. Ct. 2257 (2003). Counsel anticipates that this court will appoint mental retardation experts either after the Florida Supreme Court publishes a final rule concerning adjudication of mental retardation in postconviction, or in reliance on the trial rule noted **supra**.

19. Any additional comments will be reserved until whatever opportunity that is provided by the court for legal or other argument.

(R.2 217-219).

Mr. Jones has sought and continues to seek two court appointed mental retardation experts and a full and fair evidentiary hearing below with supporting testimony from expert and lay witnesses in order to resolve the issue of his mental retardation. Mr. Jones should only be required to meet the same standards as any other person, those standards forth by this court in Fla. R. Crim, P. 3.203, to show he is ineligible for the death penalty due to his mental retardation. For a constitutionally adequate evaluation under Atkins, expert evaluation of Mr. Jones's adaptive functioning and the age of the onset of his disability needs to be presented before the trier of fact.

Dr. Caddy's June 13, 2003 report provided a good faith basis

for counsel to believe that Mr. Jones is mentally retarded. (R.2 261-264). In the report, Dr. Caddy explained how Mr. Jones IQ score is within the retardation range and that he also found significant adaptive impairment based on severe limitations in educational functioning. The United States Supreme Court in Atkins stated clearly that "an IQ between 70 and 75 is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition" Atkins, 122 S.Ct. at 2245 n.5. Dr. Caddy's report indicated only that he lacked sufficient data about any one of the other areas of potential adaptive impairment: communication, self care, home living, social/interpersonal skills, use of community resources, self-direction, work, leisure, health or safety, to be able to specifically opine about the presence or absence of mental retardation. It was in light of Dr. Caddy's report that counsel requested that the lower court appoint two mental retardation experts. Dr. Caddy's evaluation was based solely on his testing of and contact with Mr Jones. (R.2 261). Because no evidentiary hearing was held, Dr. Caddy never testified. Prior to any deposition or testimony, Dr. Caddy would have been provided with background material and been directed to do whatever additional work he deemed necessary within the budget constraints of CCRC South, so as to supplement the findings of the court appointed mental retardation experts.

At the time the lower court entered its summary denial,

Fla. R. Crim. P. 3.203 was only a proposed rule. It did not go into effect until October 1, 2004. See Amendments to Fla. Rules of Criminal Procedure & Fla. Rules of Appellate Procedure, 875 So.2d 563 (Fla. 2004);Phillips v. State, No. SC00-2248 at 27, revised slip opinion January 27, 2005).("Rule 3.203(d)(4) creates a procedure for raising mental retardation as a bar to execution in pending cases, in future cases, and in cases that are already final")

Mr. Jones is mentally retarded and, therefore, his death sentence violates the Eighth Amendment to the United States Constitution. Atkins. In Atkins, the Supreme Court held that the execution of a mentally retarded person "is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." 122 S. Ct. at 2252 (citation omitted). Atkins describes this holding as "a categorical rule making [mentally retarded] offenders ineligible for the death penalty." 122 S. Ct. at 2251. In his Rule 3.851 motion, Mr. Jones claimed that his death sentence violated the Eighth Amendment because he is mentally retarded. Mr. Jones has never had a hearing on the issue of his mental retardation. At trial, mental health testimony was presented on the issue of mitigation; in the Rule 3.850 proceeding, mental health testimony was presented on the issue of ineffective assistance of counsel. Mr. Jones is now entitled to a factual determination as to mental retardation based on the new constitutional right enunciated in Atkins v. Virginia, a fundamental constitutional right which meets the standard of Fla. R.

Crim. P. 3.851 (d)(2)(B).

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

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

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

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

The State has since abandoned its argument below that Atkins is not retroactive, and this Court has now explicitly held that Atkins is indeed retroactive. See Phillips. The Florida standards for retroactive application of changes in the law are set forth in Witt

v. State, 387 So.2d 922 (Fla. 1980).[8]

In 2001, before the Supreme Court decided Atkins, the Florida Legislature adopted Section 921.137, Fla. Stat., which prospectively prohibited imposing a death sentence on a mentally retarded person. The statute attempted to set forth a procedure for raising and resolving a mental retardation issue. Mr. Jones June 17, 2003 Rule 3.851 motion specifically referenced the existing Florida statute and the requirement that the lower court appoint two experts (R2 37-38). The first successive motion also noted that "[a] full presentation as to all three prongs of the definition of mental retardation at a future proceeding is necessary." (R2 44).

This Court subsequently published proposed Fla. R. Crim. P. 3.203 for comments, and oral argument on the new rule was heard on August 25, 2003, shortly before Mr. Jones filed his second successive motion for consideration of his mental retardation. The outlined a process "for determining mental retardation in "final" cases." The proposed rule anticipated that "[a] prisoner may file a motion for collateral relief seeking a determination of mental retardation. . . in conformity with Florida Rule of Criminal Procedure 3.851." The proposal also provides for the appointment of two court experts in the field of mental retardation.

Atkins clearly mandated that states develop "appropriate ways"

8Atkins itself does not address the question of retroactivity. The United States Supreme Court did address the issue in Penry v.. Lynaugh, 492 U.S. 302 (1989), noting that although Teague v. Lane, 489 U.S. 288 (1989) placed obstacles to the consideration of "new rules" of constitutional law in habeas corpus actions, "the rule Penry seeks is not a 'new rule' under Teague." 492 U.S. at 315.

to determine the factual issue of mental retardation in order to identify those ineligible for the death penalty. The then proposed rule anticipated that Florida courts cannot exclude mentally retarded persons who happen to be in postconviction.

The prospective only Florida statute required that the trial court appoint "[t]wo **experts in the field of mental retardation** who shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing." Id. Fla. Stat. §921.137 (5)(emphasis added). The proposed rule tracked this language and Mr. Jones's second successive motion tracked the proposal's language concerning appointment of experts. Counsel for Mr. Jones argued below that the case be held in abeyance pending the publication of a final Rule 3.203 (R2 312, 211-214; 218) & (10/14/03 Motion at 10, 12).[9]

The claim that Mr. Jones is mentally retarded is made in good faith and on reasonable grounds to believe that he is mentally retarded. These grounds were detailed in Mr. Jones's 10/14/03 motion.

The motion explained that at the evidentiary hearing ordered on Mr. Jones's initial Rule 3.850 motion, there had been relevant and material evidence introduced and testimony heard that had to be

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9Mr. Jones filed a Motion To Temporarily Relinquish Jurisdiction To The Circuit Court For A Determination of Mental Retardation in this Court on November 30, 2004. To date there has been no action taken. Attachment A of that motion was the prospective Rule 3.851 motion that would be filed upon relinquishment. Mr. Jones does not waive the argument contained therein concerning the constitutionality of Fla. R. Crim. P. 3.203 or the argument memorialized in the 10/14/03 Motion.

considered in the context of a mental retardation determination. Dr. Hyman Eisenstein, a neuropsychologist, had testified for the defense that he found indicia of pre-morbid brain damage in the universe of background materials, interviews and other sources that he relied on to form his opinions. These indicia included a thirty-nine (39) day 1975 Jackson Memorial Hospital (JMH) juvenile psychiatric admission that included a mention of Mr. Jones's possible borderline mental retardation (10/14/03 Motion, Attachment C.).

Dr. Eisenstein testified that a Beta screening IQ score of 76 in Mr. Jones' Department of Corrections records was significant. (PCR. 815). Dr. Eisenstein testified that Mr. Jones' mental status, as reflected in the 1988 prison records and the 1975 hospital records, was consistent with his own findings: an April 1991 of a full scale WAIS-R IQ score of 72 and a March 1999 full scale WAIS III IQ score of 67. (PCR 816). He testified that this low level of mental ability is found in only about 1% of the population. (PCR 918).

Pamela Mills, Mr. Jones' older sister, testified at the evidentiary hearing, describing Mr. Jones as "very slow in school" and with learning disabilities (PCR. 959). She further testified that their Aunt Laura would "get on" Victor about his performance in school (Id). Her testimony was supported by Dr. Eisenstein's July 19, 2000 interview with the now deceased Aunt Laura Long, in which she confirmed to Dr. Eisenstein that Victor was slow in learning and had attended special classes in school. (Affidavit of Hyman Eisenstein, August 23, 2000)(10/14/03 Motion, Attachment D)(R2 96-

102).

Immediately prior to the filing the successive Rule 3.851 motion as the one year anniversary of the Atkins decision approached, Mr. Jones was evaluated on June 4, 2003 by Dr. Glenn Caddy, a psychologist, who administered an authorized intelligence test and an educational screening device. His results indicated that Mr Jones functions at an educational level between grades two and three, and presents a full scale IQ score in the same range as Dr. Eisenstein's independent findings in 1991 and 1999. (10/14/03 Motion, Attachment E)(R2 261-264).

The motion noted that the diagnostic criteria for determining mental retardation in both the American Association on Mental Retardation *Mental Retardation*, Definition, Classification, and Systems of Support, Tenth Edition, Washington, DC, American Association on Mental Retardation, 2002, were more alike than different. (10/14/03 Motion at 15).[10]

The factual basis laid out in Mr. Jones's 10/14/03 Rule 3.851 motion requiring an evidentiary hearing to determine Mr. Jones'

10The 10th Edition of their text, *Mental Retardation, Definition, Classification, and Systems of Support* in 2002, advances a revised definition of mental retardation:

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

Id at 8.

mental retardation included: his documented limited intellectual functioning based on numerous standardized tests from 1988 until the present and his adaptive behavior problems with onset before age eighteen that were noted not only in the accounts from his sister and his aunt of him being a "slow learner" but also in the 1975 hospital diagnosis of "borderline mental retardation" at age fourteen, and Dr. Caddy's specific finding of "severe limitations in educational functioning". (R.2 264).

The motion also included citation to the additional text that AAMR included that is described as "assumptions" made when applying the definition of mental retardation in respect to adaptive functioning:

> Assumption 1: "Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture." This means that the standards against which the individual's functioning must be measured are typical community-based environments, not environments that are isolated or segregated by ability. Typical community environments include homes, neighborhoods, schools, businesses, and other environments in which people of similar age ordinarily live, play, work and interact. The concept of age peers should also include people of the same cultural or linguistic background.
>
> Assumption 2: "Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor and behavioral factors." This means that in order for assessment to be meaningful, it must take into account the individual's diversity and unique response factors. The individual's culture or ethnicity, including language spoken at home, nonverbal communication, and customs that might influence assessment results, must be considered in making a valid assessment.

> Assumption 3: "Within an individual, limitations often coexist with strengths." This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.
>
> Assumption 4: "An important purpose of describing limitations is to develop a profile of needed supports." This means that merely analyzing someone's limitations is not enough, and that specifying limitations should be a team's first step in developing a description of the supports the individual needs in order to improve functioning. Labeling someone with the name mental retardation should lead to a benefit such as a profile of needed supports.
> Assumption 5: "With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation will generally improve." This means if appropriate personalized supports are provided to an individual with mental retardation, improved functioning should result. A lack of improvement in functioning can serve as a basis for reevaluating the profile of needed supports. In rare circumstances, however, even appropriate supports may merely maintain functioning or stop or limit regression. The important point is that the old stereotype that people with mental retardation never improve is incorrect. Improvement in functioning should be expected from appropriate supports, except in rare cases.

Mental Retardation at 8-9. (Cited in 10/14/03 Motion at 16-18).

In the instant case, expert Caddy never opined that Mr. Jones was not mentally retarded. His report states that he does not have enough information on the various other areas of adaptive

functioning, other than educational dysfunction, to reach the necessary threshold that would allow him to opine on the presence or more than one of the two necessary areas of adaptive behavior deficits, defined in the new rule 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." (10/14/03 Motion, Attachment E)(Fla. R. Crim. P. 3.203(b)).

As Justice Stevens made plain in the Atkins opinion, the execution of mentally retarded offenders serves neither the purposes of retribution nor deterrence and thus violates the Eighth Amendment's prohibition against cruel and unusual punishment. As Justice Stevens notes:

> Because of [mentally retarded persons']impairments, however, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions but they do diminish their personal culpability
>
> Atkins 122 S.Ct 2251(emphasis added)

As Justice Stevens makes plain, it is the lesser culpability of mentally retarded offenders that reduces the need for retribution to a sentence less than death and makes it less likely that they would be deterred from committing such a crime. Thus, the primary reason

for excluding persons with mental retardation from execution is their lesser culpability. Justice Stevens also notes that mentally retarded people are at a disadvantage in the criminal justice system, because of "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty" and thus violate Lockett v. Ohio, 498 U.S. 586, 605 (1978). Justice Stevens noted that this risk 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 their counsel and are typically poor witnesses and their demeanor may create an unwarranted impression of lack of remorse for their crime

Atkins, 122 S. Ct. At 2252.

CONCLUSION

Mr. Jones submits that relief is warranted, at a minimum, in the form of an evidentiary hearing in circuit court on the question of Mr. Jones's mental retardation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial 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 February 9, 2005.

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