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

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's denial of Rule 3.851 relief following a limited evidentiary hearing, as well as various rulings made during the course of Mr. Jones's request for post-conviction relief. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"T" -- transcript of original trial proceedings;

"PCR1" -- record on first postconviction appeal;

"PCT1" -- transcript of first postconviction proceedings;

"PCR2" -- record on second postconviction appeal (first successive postconviction motion);

"PCT2" -- transcript of second postconviction proceedings (first successive postconviction motion);

"SuppR" -- instant record on appeal (supplemental record for second successive postconviction motion);

"SuppT" -- transcript of second successive postconviction proceedings.

All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

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

opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the issues at stake. Mr. Jones, through counsel, accordingly urges that the Court permit oral argument.

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SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

Mr. Jones filed his Initial Brief on February 11, 2005. The Brief contained one argument, specifically that the lower court's summary denial was improper in that it denied Mr. Jones the right to prove his mental retardation at an evidentiary hearing. On March 3, 2005, this Court relinquished jurisdiction solely for an evidentiary hearing to make a determination of mental retardation as defined in Rule 3.203, Fla. R. Crim. P.[1]

The evidentiary hearing began on January 10, 2006.[2] Mr. Jones called Dr. Hyman Eisenstein as his only witness (SuppT. 181-249; 279-316; 320-394). The State called two witnesses; Lisa Wiley, a "psychological specialist" with the Department of Corrections, (SuppT. 249-279), and Dr. Enrique Suarez (SuppT. 394-474; 476-629).

During the hearing, Mr. Jones' counsel submitted several documents into evidence. Defense exhibit A is the evaluation report from Dr. Eisenstein (SuppR. 282-288). Exhibit B is Dr. Suarez's evaluation report (SuppR. 289-299). Exhibit

[1] The State, however, was still required to file its Answer Brief, which was done on May 10, 2005.

[2] During the entire proceedings in the circuit court, the parties were submitting the required status reports: 7/26/05 - State; 7/28/05 - Defense; 9/27/05 - State; 9/29/05 - Defense; 11/28/05 - State; 12/02/05 - Defense (with Motion to Accept as Timely Filed, granted 12/19/05). The relinquishment period was also extended, first on 11/10/05 upon motion of the defense, and later on 12/19/05 on motion of the circuit court judge.

C is technical assistance paper concerning nonverbal tests of intelligence (SuppR. 300-312). Exhibit D is the Adaptive Behavior Assessment System (ABAS) Technical Supplement (SuppR. 313-360). A copy of the Examiner's Manual of the Test of Nonverbal Intelligence (TONI) was admitted into evidence as Defense Exhibit E (SuppR. 396-444). Exhibit F is a copy of Florida Administrative Code 65B-4.032 concerning the determination of mental retardation in capital cases (SuppR. 465-466). A copy of the coversheet of the Stanford-Binet intelligence test was submitted as Exhibit F (SuppR. 447-448). Exhibit H is an excerpt from the Diagnostic and Statistical Manual of Mental Disorder from the DSM-IV-TR (SuppR. 449-463).

The State also submitted several items into evidence. The first three exhibits were inmate request forms filled out by or on behalf of Mr. Jones. State's Exhibit 1 is dated 6/17/04 (SuppR. 276-277), Exhibit 2 is dated 2/9/04 (SuppR. 278-279), and Exhibit 3 is dated 2/24/04 (SuppR. 280-281). State's Exhibit 4 is a composite exhibit of several invoices that had been prepared by Dr. Eisenstein when he was an expert for Mr. Jones' in 1991-1993 (SuppR. 263-378). A copy of the Test of Memory Malingering (TOMM) was submitted as State's Exhibit 5 (SuppR. 379-395). A copy of the cover and also two pages of Diagnostic and Statistical Manual of Mental Disorders from the DSM-IV-TR was Exhibit 6 (SuppR. 392-395).

After the conclusion of the evidentiary hearing, Mr. Jones submitted the Defendant's Post-Evidentiary Hearing Memorandum on January 25, 2006 (SuppR. 464-494). The circuit court then entered its Order Denying Defendant's Motion to Vacate Judgments and Sentences on February 28, 2006 (SuppR. 495-506), which was also filed with this Court on March 2, 2006 – the date that the relinquishment ended. Mr. Jones filed a Notice of Appeal with the lower court on March 27, 2000.

Mr. Jones' Motion for Permission to Submit Supplemental Briefing, filed with this Court on April 3, 2006, was granted on May 1, 2006.

SUMMARY OF ARGUMENT

1. The lower court's finding, following an evidentiary hearing, that a mental retardation evaluation in Florida in the context of capital postconviction requires an expert to determine the contemporary adaptive status of the person being evaluated for mental retardation rather than their adaptive status prior to the age of eighteen was erroneous and an abuse of discretion. This finding violated Mr. Jones's rights under the equal protection and due process clauses of the fourteenth amendment as well as the eight amendment's prohibition on cruel and unusual punishment.

2. Other findings by the lower court were in error. The lower court's finding that Mr. Jones is not mentally retarded was in error because it relied in part on a standard of proof assigned to Mr. Jones to prove the three prongs of the mental retardation definition by clear and convincing evidence. This included the mental deficiency prong and the onset before the age of eighteen prong of the mental retardation definition.

ARGUMENT I

THE LOWER COURT ABUSED ITS DISCRETION IN FINDING THAT THE DETERMINATION OF MR. JONES'S ADAPTIVE FUNCTIONING, THE SECOND PRONG OF THE REQUIREMENTS FOR MENTAL RETARDATION, REQUIRES AN ASSESSMENT AND EVALUATION OF MR. JONES' CURRENT LEVEL OF FUNCTIONING RATHER THAT HIS ADAPTIVE FUNCTIONING PRIOR TO THE AGE OF EIGHTEEN OR PRIOR TO THE COMMISSION OF THE OFFENSE. THIS RESULTED IN A VIOLATION OF MR. JONES RIGHTS UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT AS WELL AS THE EIGHTH AMENDMENT'S PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT.

According to Fla. R. Crim. P. 3.203, the definition of mental retardation includes the requirement for finding deficits in adaptive behavior, and also defines adaptive behavior:

> (b) Definition of Mental Retardation. As used in this rule, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65B-4.032 of the Florida Administrative Code
>
> The term "adaptive behavior" for the purpose of this rule, means 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. (Emphasis added).

This language mirrors the definition of retardation found in Fla. Stat. § 916.106 (12) (2006), and also mirrors the language found in Fla. Stat. § 921.137 (1). Rule 65B-4.032 of the Florida Administrative Code, which implements §921.137(1), F.S., specifies the authorized standardized intelligence test to be used to determine "subaverage general intellectual functioning". However, there is no guidance for the type of testing or instruments to be used to determine deficits in adaptive behavior. Therefore, according to the statutory criteria, procedural rule and, in part, the administrative code, in order to determine whether a prisoner under sentence of death is not death-eligible due to mental retardation, there must be a finding that the person has (a) subaverage general intellectual functioning; (b) concurrent deficits in adaptive behavior, and (c) manifested during the period from conception to age 18.

The position of Dr. Suarez, apparently adopted by the lower court, is that adaptive deficits are deficits that are present now. This position is absurd in a case in the post-conviction procedural posture of Mr. Jones' case, where he has been in custody 1990.

Moreover the court's finding is directly contrary to the rationale of Atkins v. Virginia, 536 U.S. 304 (2002). 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 is no evidence that they are more likely to engage in criminal conduct 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, (emphasis added).

Clearly stated by Justice Stevens, 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. Mr. Jones' ability to adapt to prison life in 2005 is simply not relevant to his relative culpability for a crime committed in 1990 and tried in 1993.

Dr. Eisenstein testified that the diagnostic criteria for mental retardation as outlined in the DSM-IV-TR lists three criteria. The first is the significant sub-average intellectual functioning, an IQ of approximately 70 or below for an individually administered IQ test. The second is concurrent deficits of impairment

in present adaptive functioning; i.e., the person's effectiveness in meeting the standards expected for his or her cultural group in at least two of the following categories: communications, self-care, home living, social/interpersonal skills, use of community resources, self direction, functional academic skills, work, leisure, health and safety. The third criteria is onset before the age of eighteen (SuppR. 289).

Mr. Jones submits that these criteria are not disputed by the State or by the lower court. Rather, the debate centers around the meaning of the word "present" in the second prong of "concurrent deficits of impairment in present adaptive functioning".

To require a determination of the adaptive functioning prong for Mr. Jones by considering how he is presently adapting in prison is illogical as a matter of logistics and factual proof. First of all of, every one of the areas of adaptive functioning listed by the DSM-IV are severely restricted or curtailed in the case of a person incarcerated in a maximum security environment, such as Florida's death row. The close confinement conditions severely restrict an inmate's capacity for communication, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The ability of inmates to show functional self-care and home living is completely compromised. How an inmate copes with the highly restrictive environment of a

maximum security prison is simply not adequate in terms of addressing the way the same individual could cope with the challenges of daily living as a free person and the concomitant choices and decisions therein – and certainly is not adequate to address how that person was able to function prior to the age of eighteen.

Mr. Jones has demonstrated that he meets the second requirement of the definition of mental retardation and the lower court's contrary finding is an abuse of discretion. Dr. Eisenstein reported that he found that Mr. Jones met the criteria of having significant deficits in adaptive behavior in five of the ten designated areas pursuant to the definition of mental retardation found in DSM-IV-TR. (SuppR. 287-288). The areas found by Dr. Eisenstein include deficits in the sub-areas of Communication, Functional Academic Skills, Self Direction, Social and Interpersonal Skills, and Health/safety.

Dr. Eisenstein explained that to determine Mr. Jones' adaptive functioning, he needed to conduct a 'retrospective diagnosis', stating,

> …The best was in my opinion was to assess through interviews, collateral information, whether it be through school records, hospital records, and in many collateral resources as possible to make this determination in a variety of different functions (SuppT. 291).

Therefore, Dr. Eisenstein did not feel it would be useful to talk to people at Union Correctional Institution where Mr. Jones has been since being convicted and sentenced to death. "The onset, the criteria is the onset before the age eighteen.

Mr. Jones went to Union after he was twenty-five years old approximately. I'm not sure what the usefulness of knowing his functioning from age 25 to 44 how that is relevant for his behavior and functioning prior to age eighteen" (SuppT. 292).

The lower court noted, "according to Dr. Eisenstein, adaptive functioning prior to age eighteen could be determined by interviews and collateral information including hospital and school records. He did not think it was useful to speak with people at the prison since only functioning prior to age eighteen was relevant. Dr. Eisenstein found deficits in communication, functional academic skills and self-direction" (SuppR. 499). The lower court also related that Dr. Eisenstein conducted clinical interviews of Jones at the Dade County Jail and spent a total of six or seven hours in order to evaluate Mr. Jones' complete circumstance and functioning from date of birth to the age of eighteen (SuppR. 497). The order denying Mr. Jones postconviction relief also notes that Dr. Eisenstein spoke with several relatives of Mr. Jones and/or relied on prior interviews with family members in reaching his opinion that he has deficits in adaptive functioning, then adds a footnote to say that the testimony of those family members who testified before at the last evidentiary hearing were specifically found not credible (SuppR.497-498).

During his testimony Dr. Eisenstein explained both the sources for his findings and his rationale for his findings. References to his testimony where he explained the basis of his findings of significant deficit in adaptive functioning in each of the areas is included herein: Communication (SuppT. 192-214, 215-225, 292), Functional Academic Skills (SuppT. 192-214, 215-225, 293), Self Direction (SuppT. 192-215, 293-300), Social and Interpersonal Skills, and Health/safety (SuppT. 192-215, 231-238). The court's credibility findings against Mr. Jones' family members ignored the new family members who were interviewed and re-interviewed by Dr. Eisenstein.

It becomes clear that the lower court relied on the methodology for determining adaptive functioning that was presented by Dr. Suarez, and which looks solely to Mr. Jones' current adaptive functioning on death row, a highly structured environment, with no regard to analyzing adaptive functioning prior to the age of eighteen, stating, "…Additionally, Dr. Suarez found Jones has **no present** adaptive impairment. Based upon Dr. Suarez (sic) review of Jones' experiences, including his relationships and employment[3], Jones has probably never had adaptive impairment. Given that Jones' current abilities do not indicate mental retardation and that all scores have been post gunshot injury, an assumption

[3] Dr. Suarez relied on Mr. Jones' answers to questions concerning his life experiences after becoming an adult.

can be made that his functioning was higher prior to the injury" (SuppR. 502-503) (Emphasis added).

Unlike Dr. Suarez, Dr. Eisenstein had the benefit of multiple present and past contacts with both Mr. Jones and Mr. Jones' immediate family members during the period 1991-2006. As he testified, these persons included Mr. Jones' aunt Laura Long, his sisters Pamela Mills and Valerie Mills Johnson, his brothers Michael Jones and Frank Mills, his cousin Carl Leon Miller, and his former girlfriend Shirley Anthony. (SuppT. 192-210). He spoke with Ms. Mills, Mr. Mills, Mr. Miller and Ms. Anthony in 2005-2006, Mr. Mills and Ms. Anthony for the first time. (SuppT. 202, 204, 208, 210).

In contrast, Dr. Suarez's efforts to determine Mr. Jones' adaptive functioning included him interviewing Lisa Wiley, a "psychological specialist" with the Department of Corrections, who also testified at the evidentiary hearing. The final order notes that Ms. Wiley "met Jones in 1993 and had contact with him until last year, when she left the prison system" (SuppR. 503). It further notes "Ms. Wiley spoke with Dr. Suarez about Jones' adaptive behavior. No one from the defense spoke to her about Jones' **functioning on death row**" (SuppR. 504) (Emphasis added).

Dr. Suarez chose to use the Adaptive Behavior Assessment System (ABAS) instrument for purposes of his adaptive functioning evaluation. The use of

instruments like the ABAS or the Vineland is not required either by DSM, the Florida Rules of Criminal Procedure, or Florida Statutes.[4] Rule 3.203(b) simply advises that adaptive behavior means "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." The decision as to how to undertake the adaptive functioning portion of a mental retardation evaluation is up to the expert.

Dr. Suarez chose to use prison personnel who did not know Mr. Jones prior to his incarceration in the above-styled cause as his source of information concerning Mr. Jones' adaptive functioning. He did not speak to anyone who knew Mr. Jones prior to the crime. His logic is flawed for several reasons. Atkins

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[4]"It is useful to gather evidence for deficits in adaptive functioning from one or more reliable independent sources (e.g., teacher evaluation and educational, developmental, and medical history). Several scales have also been designed to measure adaptive functioning or behavior e.g., the Vineland Adaptive Behavior Scales and the American Association on Mental Retardation Adaptive Behavior Scale). These scales generally provide a clinical cutoff score that is a composite of performance in a number of adaptive skill domains. It should be noted that scores for certain individual domains are not included in some of these instruments and that individual domains scores may vary considerably in reliability. As in the assessment of intellectual functioning, consideration should be given to the suitability of the instrument to the person's sociocultural background, education, associated handicaps, motivation, and cooperation. For instance, the presence of significant handicaps invalidates many adaptive scale norms. In addition, behaviors that would normally be considered maladaptive (e.g., dependency, passivity) may be evidence of good adaption in the context of a particular individual's life (e.g., in some institutional settings)." DSM-IV-TR at 42.

is predicated on the lesser culpability of the mentally retarded. Culpability relates to the time of the crime. In post conviction circumstances therefore, where evaluations take place many years after the crime, it is crucial to ideally use people who knew the defendant prior to age 18, or those who knew the defendant at or before the time of the crime to assess adaptive functioning. All that happens afterwards is quite simply irrelevant.

DOC staffer Lisa Wiley indicated during her testimony that she agreed to participate in the ABAS process with Dr. Suarez only because of a court order: "I do know I contacted the Department of Corrections Tallahassee legal to let them know and do I have to do this. The answer was yes." (SuppT. 271). Mr. Jones submits that requiring DOC personnel to take part in this process is coercive and contrary to any search for objective parties and prone to result in bias. It is important to note that Mr. Jones, through counsel, strenuously objected to this practice (SuppR. 245-248; SuppT. 142-162).

Dr. Suarez testified that only three of the five DOC personnel to whom he wanted to administer the ABAS felt they had enough contact with Mr. Jones to participate. (SuppT. 443). Dr Suarez testified that from the three participants, he obtained General Adaptive Composite scores of 99, 102 and 108, which he

described as basically in the average range. (SuppT. 444).[5] He also noted that he had made an error in his report when he failed to include these scores. (SuppT. 444). When Dr. Suarez was asked during his testimony to plug his GAC scores of 99, 102 and 108 into the interpretive chart on page 40 of Defense Exhibit D, the ABAS Technical Supplement (SuppR. 353), he agreed that those scores were listed at the 47th percentile, the 55th percentile and the 70th percentile. (SuppT. 609-610). These charted results do not coincide with either his report or his testimony that Mr. Jones' level of adaptive functioning pursuant to the ABAS results was "essentially in the average range for an individual in his age range." (SuppR. 298).

Dr. Suarez also noted in his report that Ms. Wiley, Officer Snow, and Sgt. Salle all rated Mr. Jones' social skills as being borderline or below average and

[5]The AAMR (2002) recently revised its definition of mental retardation to state: "Mental retardation is a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18. Under these new guidelines, a significant limitation in adaptive behavior is operationally defined as performance that is at least two standard deviations below the mean of any one of the three broad adaptive skill areas, or of an overall score on a standardized measure. Thus, the AAMR reaffirms the importance of examining the ten adaptive skill areas measured by the ABS, and groups them into three broad domains: conceptual, social and practical...In light of the AAMR's 2002 definition, professionals who use the ABAS to assess mental retardation are likely to rely on three levels of scores: the General Adaptive Composite; the three newly established composite scores for the conceptual, social and practical adaptive domains; and the scaled scores for the ten skill areas. The scores provide three different perspectives of behavior important to diagnosis and intervention." ABAS Technical Supplement, 2003, at 2 (SuppR. 315).

one, Robert Snow, rated his self-direction skills as borderline. (SuppR. 298; SuppT. 439). These are two of the ten areas that both Dr. Suarez and Dr. Eisenstein considered as part of their adaptive functioning evaluation. Dr. Eisenstein testified that these results supported his own findings of significant adaptive deficits in the areas of social skills and self-direction. (SuppT. 291, 294-295).

On cross, Dr. Suarez testified in more detail about his scoring of the ABAS, specifically in the areas where his respondents found Mr. Jones to be deficient: social skills and self-direction. (SuppT. 452-457). He stated that the scaled scores from Wiley, Salle and Snow in the social skills area were 7, 7 and 5 on a 13-point scale. (SuppT. 454). He further testified that these results were "not necessarily" two standard deviations below the mean because the scores were borderline and below average but not in the "extremely low area." (SuppT. 455). For that reason he denied that any one area of adaptive deficit was met.

He then testified that the scaled scores from Wiley, Salle and Snow in the self-direction area on ABAS were 9, 10 and 6, with 6 being a below average score on a 13 point scale. (SuppT. 455-456). He testified that the self-direction area included 25 items that each respondent had to answer. He reported that Ms. Wiley guessed on 13 of the 25 and Sgt. Salle guessed on 18 of 25, and that according to the scoring system in the ABAS he was allowed to count 0 to 3 points, and that

"you can guess on any of them." (SuppT. 456-457). However, mere conjecture by people who knew Mr. Jones only years after his incarceration in limited prison circumstances is clearly much less accurate than first hand information from people who had observed Mr. Jones' daily life prior to his incarceration.

Mr. Jones submits that given the protocol of the ABAS and the persons selected to take part, that this level of guessing is tantamount to random answering. Other than lending some modest support for Dr. Eisenstein's findings in two of the relevant areas of adaptive deficit, administering the ABAS in the prison setting to persons who have functioned as part of the security and control apparatus for different periods of time since Mr. Jones' admission to death row serves no useful purpose in the context of the instant mental retardation determination.

When Dr. Eisenstein was asked what his perspective was when interviewing the family members and the time period that he was looking at for adaptive functioning – and how that differed from what Dr. Suarez did, he responded:

> "Again, the issue as outlined for the third prong of the criteria was onset before age eighteen. At the present time Mr. Jones is forty-four years old. One could argue that at the age of forty-four one cannot made a determination as to whether he meets the criteria or does not meet the criteria by administering inventory at this point. The usefulness of those inventories obviously has to be prior to age eighteen. In order to have knowledge of the individual prior to age eighteen and to have the knowledge of what the individual was like during the developmental period, the onset during before age eighteen and during one's developmental life"

(SuppT. 290-291).

Clearly, the United States Supreme Court has determined that a finding of mental retardation as a bar to execution, relates to the offender's lesser culpability for the crime and inability to assist trial counsel and is not about competency to be executed. Atkins v. Virginia, 122 S. Ct. 2242 (2002). If Atkins had been decided prior to Mr. Jones' capital trial, the evaluation of adaptive functioning could not have been conducted by use of prison personnel. If Atkins had been decided prior to Mr. Jones' trial, Dr. Suarez could not justify his determination of adaptive functioning by ignoring Mr. Jones' family, friends and collateral sources and seeking only the opinion of others who never knew Mr. Jones prior to the crime.

Mr. Jones submits that if Atkins were decided prior to Mr. Jones' trial, he would never have been sentenced to death in this case. To judge Mr. Jones' adaptive functioning by the way he has adjusted to prison in 2005, rather than his adaptive functioning in the outside world prior to age 18 or at least at the time of the crime, as would have been done at trial, violates the Equal Protection and Due Process clauses of the Fourteenth Amendment as well as the Eighth Amendment's prohibition on cruel and unusual punishment.

This Court's holding in Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980), suggests that there are limits on the lower court's discretionary power when different results emerge out of similar factual circumstances:

> The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial court's discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness.

Id. at 1203.

Dr. Suarez's approach to determining Mr. Jones's adaptive functioning was objectively unreasonable and the lower court's reliance on his data and testimony to the exclusion of Dr. Eisenstein's investigation and conclusions was an abuse of discretion. Logic was turned on its head by the lower court's failure to acknowledge the necessity for retrospective examination of Mr. Jones's status prior to the age of eighteen. With the exception of Mr. Jones himself, Dr. Suarez failed to speak with a single individual who knew Mr. Jones in his formative years prior to the age of eighteen. He chose to interview prison employees who by their own admission were reduced to guessing about what Mr. Jones could and could not do in the present.

ARGUMENT II

OTHER FINDINGS BY THE LOWER COURT, INCLUDING THE LOWER COURT'S FINDING THAT MR JONES IS NOT MENTALLY RETARDED BECAUSE THE THREE PRONGS OF THE MENTAL RETARDATION DEFINITION WERE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE, WERE IN ERROR. THE LOWER COURT'S FINDINGS RESULTED IN A VIOLATION OF MR. JONES RIGHTS UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT AS WELL AS THE EIGHTH AMENDMENT'S PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT.

A. TESTIMONY BY THE EXPERTS AND FINDINGS BELOW

The first prong of the definition of mental retardation is significantly subaverage intellectual functioning. The lower court's order denying relief takes the position that this Court has held that to meet this prong, "a defendant must show that he has an IQ score less than 70." SuppR 561. Pursuant to the "Florida definition" previously cited, this means an intelligence quotient (IQ) that is two or more standard deviations below the mean, often represented by a IQ score of 70 or below. However, even persons scoring above 70 may be considered mentally retarded given impaired adaptive functioning and onset before age 18. 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.

In his report, Dr. Eisenstein found that Mr. Jones met the significantly sub-

average general intellectual functioning prong of the mental retardation definition. SuppR 287. Specifically, his report noted five different full scale Wechsler IQ scores ranging from 67 to 75 on tests administered from 1991-2005. Three of the WAIS tests were administered by Dr. Eisenstein: in 1991, 1993 and in 1999. He testified that his review of Dr. Prichard's raw data concerning his 2005 WAIS III was indicative of a valid performance by Mr. Jones and that the data and subtest performances compared favorably with the other WAIS tests he reviewed from 1991-2005. (SuppT. 241-43, 245-46).

Mr. Jones has likewise shown that the onset of his low IQ and adaptive deficits occurred before age 18. It is entirely appropriate to diagnose mental retardation in an adult where there is no definitive diagnosis of mental retardation before age 18, through the technique of retrospective diagnosis.

Atkins was predicated in large part on the lesser culpability of people with mental retardation as against people who are not mentally retarded. Given that the low IQ and impaired adaptive functioning were present before the commission of the crime, such a disability would involve a comparable reduction in culpability. Thus, under the Equal Protection clause of the United States Constitution and the comparable Florida provision, Mr. Jones would be entitled to a comparable exemption from the death penalty.

Dr. Eisenstein's report indicates that he was well aware of the necessity of

onset before age 18 for a diagnosis of mental retardation. (SuppR .287.)

Unlike Dr. Suarez, Dr. Eisenstein had the benefit of multiple present and past contacts with both Mr. Jones and Mr. Jones' immediate family members during the period 1991-2006. (SuppT. 192-210).

As Dr. Eisenstein testified:

> [Mr. Jones] is forty-four years old. So one needs to go back in time many years in order to establish whether or not he meets the criteria. Onset before age eighteen doesn't mean – it means during developmental years there has to be this phenomenon already existed. In order to establish whether or not he would meet the criteria the interview process was the purpose to try to establish all different areas of his functioning as it related again to his early developmental years. Of course that would include his education, that would include his adaptive living skills, his ability to function independently, where he was living, with who he was living at the time, what occurred to him, a review of his medical records that were related to his history during that time, a complete analysis of his emotional and psychological functioning and as best as he could relate in terms of a time line as to where he was, what he was doing to get a sense of how he was functioning.

(SuppT 191-92). Dr. Eisenstein found onset prior to age 18.

B. THE LOWER COURT'S FINDINGS IGNORED THE FACTS AND THE EVIDENCE PRESENTED BELOW

The two experts, Dr. Suarez and Dr. Eisenstein, who were appointed by the lower Court to evaluate Mr. Jones for mental retardation pursuant to Rule 3.203 at the recommendation of the State and the defendant could hardly have arrived at

more different conclusions. Their respective methodologies, reports and testimonies are in stark contrast as to one another. Dr. Eisenstein's opinion is that Mr. Jones is mentally retarded and Dr. Suarez's opinion is that Mr. Jones is not mentally retarded.

Dr. Suarez testified on direct that the tests that he administered to Mr. Jones were "specifically listed" "in the suggested method of testing for mental retardation" without identifying any source of that "method". The reality is that there is no recommended "method" of determining mental retardation in Florida. The only "tests" administered to Mr. Jones by Dr. Suarez were the TONI III, the WRAT-3, the MMPI-2 and two short validity tests the MFIT and the VIP. (SuppR. 296). While Dr. Suarez testified about these instruments and reported about them in his report, his explanation of why he chose to do what he did simply makes no sense. Nowhere in the Florida Administrative Code, the Florida Statutes or in the Rules of Criminal Procedure is there support for using the TONI III intelligence test, the MMPI-2, or for that matter, the WRAT as part of a mental retardation evaluation.

Dr. Suarez was in error when he chose to attempt to use the TONI III as an intelligence test to determine intellectual functioning as part of a mental retardation evaluation. Section 65-B4.032, F.A.C. is unambiguous:

(1) When a defendant convicted of a capital felony is suspected of having

or determined to have mental retardation, intelligence tests to determine intellectual functioning as specified below shall be administered by a qualified professional who is authorized in accordance with Florida Statutes to perform evaluations in Florida. The test shall consist of an individually administered evaluation, which is valid and reliable for the purpose of determining intelligence. The tests specified below shall be used.

(a) The Stanford-Binet Intelligence Scale

(b) Wechsler Intelligence Scale

(2) Notwithstanding this rule, the court, pursuant to subsection 921.137(4), Florida Statutes, is authorized to consider the findings of the court appointed experts or any other expert utilizing individually administered evaluation procedures which provide for the use of valid tests and evaluation materials, administered and interpreted by trained personnel;, in conformance with instructions provided by the producer of the tests or evaluation materials. The results of the evaluations submitted to the court shall be accompanied by the published validity and reliability data for the examination.

The only offer by the State of "published validity and reliability data" was the submission of the Examiner's Manual for the Test of Non-Verbal Intelligence by Dr. Suarez during cross-examination, which Mr. Jones asked to be admitted into evidence. (SuppT. 536-37). Evidence of peer review and studies showing that the TONI is appropriate for a mental retardation evaluation were never provided. The TONI III should have been used only as a gross screening tool. Even with these reservations, the full scale IQ Suarez obtained was 76, with a 95% confidence range that Mr. Jones's "true" IQ is between 68 and 84. SuppR 296. This wide margin of error is facial evidence that the TONI-III is a screening instrument.

Dr. Suarez had every opportunity to administer an approved IQ test, namely

the Stanford-Binet. He simply chose not to do so. "I used the TONI because we had six administration of the [WAIS] that I didn't want to make it seven or eight." (SuppT. 585). Dr. Suarez failed to test properly by using an approved Stanford-Binet comprehensive IQ test instead of the TONI. (SuppT. 620).

Dr. Suarez was simply wrong when he testified that an IQ of below 70 is required for a diagnosis of mental retardation. (SuppT. 411-12). He acknowledged as much on cross examination. (SuppT. 587-88). The State may argue that in Florida an IQ of 70 or below is required to meet the intellectual functioning prong of the mental retardation definition, relying on Hill v. State, 921 So.2d 579 (Fla. 2006); Zack v. State, 911 So. 2d 1190, 1201-02 (Fla. 2005). As a starting point, Mr. Jones did have a full scale WAIS IQ score of 70 or below in testing in 1993 and 1999. (SuppR. 287, 497.) However, neither the American Association on Mental Retardation nor the American Psychiatric Association ever intended a fixed cutoff point for making the diagnosis of mental retardation and such a cutoff score cannot be justified psychometrically.

Dr. Suarez administered an MMPI to Mr. Jones as part of his mental retardation evaluation. Dr. Suarez agreed that the MMPI-2 handbook cautions about using this "test of psychopathology, emotional functioning and personality functioning" with populations with an IQ lower than 80. (SuppT. 546). He noted that it is not a test to establish mental retardation or a test of intelligence. He

agreed that he knew going into his only direct contact and testing of Mr. Jones that his tested IQ was, at best, in the borderline range where use of the MMPI was not recommended. (SuppT. 548). Suarez also testified that he agreed that the MMPI manual also cautions about giving the test in a stressed or distressed situation, including during incarceration in a correctional facility. (SuppT. 560). He agreed that Mr. Jones may have believed, correctly, that his performance on Dr. Suarez's test might determine whether he lived or died. (SuppT. 561).

Although Dr. Eisenstein did not administer an MMPI during his most recent evaluation and work on Mr. Jones's case in 2005-2006, he did administer the MMPI or the MMPI-2 three times in the period 1991-1993 while retained by trial counsel. (SuppT. 280-88). Two of the full scale WAIS IQ scores he obtained during his course on Mr. Jones's case, including a full scale WAIS-R IQ of 70, were obtained in conjunction with his administrations of the MMPI. (SuppR 287). Dr. Eisenstein's opinion was all the MMPI evaluations over the years "basically were all the same in terms of how both the validity and the clinical scales looked. The "F" scale in all administrations was elevated." (SuppT. 283-84). He testified that "[t]he truth is the MMPI that Dr. Suarez administered in many ways is similar to the MMPIs that were previously administered. The computer printout goes through a number of different factors that [are] trying to explain the reason why the "F" scale may be elevated." (SuppT. 287). He did not interpret the results of his

administrations of the MMPI to be evidence that Mr. Jones was malingering. He testified that he chose not to give an MMPI as part of his 2005-2006 mental retardation evaluation because:

> The issue of personality of psychological and emotional functioning, although it is certainly an important factor, but again is not relevant for the question at hand. The issue at hand is the criteria, the three criteria set out for the diagnosis of mental retardation. That includes the onset before age eighteen, an IQ below 70, and adaptive functioning in two areas that is deficient. The definition [does not] include issues of emotional adjustment or psychopathology.

(SuppT. 287). Dr. Eisenstein's opinion was that his 1991-1993 MMPI results were not an invalid profile even though his results had the same elevated "F" scale found in Dr. Suarez's results. (SuppT. 284).

The results of all the validity testing in the record as to potential malingering are inconsistent and equivocal at best. This is demonstrated by the Test of Memory Malingering (TOMM) raw data supplied by Dr. Prichard which was interpreted differently by Drs. Eisenstein and Suarez. (SuppT. 243-47)(SuppT. 451-56). The VIP and MFIT validity tests administered by Dr. Suarez and noted in his report, serve only to call into question his decision to use a non-verbal and unapproved intelligence test. "On the MFIT, Mr. Jones' score was within expected limits, suggesting that he was not motivated to appear deficient in terms of memory." On the Validity Indicator Profile (VIP), "Mr Jones' performance on the Verbal was

considered to be "Valid" and his response style was classified as "Compliant." However, "Mr. Jones' performance on the Nonverbal subtest was considered to be "Invalid" and his response style was classified as "Inconsistent." (SuppR. 297). Dr. Suarez chose to administer a fifteen to twenty minute TONI-III, a screening test, that tested only non-verbal intelligence. He obtained an IQ score of 76 that his own data indicated had an error range from 68-84. (SuppR. 296). He then used the non-verbal results of his validity testing to impeach his own non-verbal intelligence test results. Dr. Suarez's use of the MMPI-2 as part of his mental retardation evaluation appears to have been solely for purposes of shoring up his opinion that Mr. Jones is malingering.

The DSM-IV-TR section on mental retardation was introduced into evidence at the hearing as Defense Exhibit H. The Diagnostic Features section states in pertinent part:

> Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from 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.

Florida law cannot trump mathematical reality. The standard of error of measurement has to be taken into account when evaluating test results and

determining standard deviations.

Dr. Suarez testified that the results he obtained in the reading, arithmetic and spelling portions of the WRAT-3 achievement test were consistent with the results obtained by Dr. Glenn Caddy. (SuppT. 576).[6] On the Validity Indicator Profile (VIP) Dr. Suarez found that Mr. Jones's verbal subtest indicated that he was not suppressing his responses or malingering. He testified that this indicator of compliance related to his WRAT results as well. (SuppT. 577-82). The areas tested on the WRAT tested Mr. Jones' verbal competency. Dr. Eisenstein testified that his separate scoring of the raw data on Dr. Suarez's two different and unreported administrations of the WRAT-3 yielded different grade level results than the single result reported by Dr. Suarez in his report. He noted that both Suarez and Caddy obtained a raw score of 38 on reading on a WRAT-3, which if correctly scored would have resulted in a 6th grade reading level, as opposed to the grade level of 8.2 reported in Dr. Suarez's report. (SuppT. 221-22). Dr. Eisenstein also re-scored Dr. Caddy's raw data and testified that the Grade levels that Caddy mis-scored should have been reported as 6th grade for reading, 5th grade for spelling and 3rd grade for arithmetic. (SuppT. 221).

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[6]Suarez's November 10, 2005 report notes his (combined)WRAT-3 grade scores as grade 8.2 for Reading, 4.5 for spelling and 3.6 for arithmetic. SuppR 296.

When this Court first published proposed Fla. R. Crim. P. 3.203 for comments, one of the issues up for comment and argument was whether the legal standard of "clear and convincing evidence" that was noted as the standard of proof in the prospective-only Fla. State. Section 921.137, should be applicable to proving up a defendant's mental retardation in postconviction. Florida's use of the "clear and convincing" standard places it in the minority of the 18 states with pre-Atkins statutes that prohibited the death penalty for the mentally retarded in some form. Most of the states with these statutes required the defense to demonstrate retardation by a "preponderance of the evidence."[7]

With the new rule in place, the question of the proper standard of proof necessary for a judicial or jury determination of mental retardation in the capital trial and postconviction context remains unanswered. The order of the lower court denying relief relies on the higher burden of proof standard for the defendant/appellant to prove up his or her mental retardation. The prejudice to Mr. Jones where he is required to meet this standard in the circumstances described **supra** regarding age of onset, intellectual functioning and adaptive function is clear.

[7] Among the pre-Atkins "preponderance" States were Tennessee, Nebraska, Ohio, Arkansas, Maryland, New Mexico, New York, and Washington. Since Atkins the list also includes Kansas, Oklahoma, Missouri and Illinois. Counsel can provide direct citations in his reply.

CONCLUSION

Mr. Jones submits that relief is warranted. Based on the evidence presented below Mr. Jones should be granted relief from his sentence of death due to his mental retardation pursuant to the Eighth Amendment of the Constitution of the United States and Atkins.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Initial Brief has been furnished by first-class postage prepaid to Ms. Sandra Jaggard, Asst. Attorney General, Office of the Attorney General, Capital Appeals Division, Rivergate Plaza, Suite 650, 444 Brickell Avenue, Miami, Florida 33131-2407 on August 7, 2006.

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CERTIFICATE OF COMPLIANCE

I hereby affirm that this Supplemental Initial Brief satisfies Fla. R. App. P. 9.100 (1) and 9.210(a)(2).

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