IN THE SUPREME COURT OF FLORIDA

No. SC 05-1018

PAUL ALFRED BROWN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

Carol C. Rodriguez
Assistant CCRC
Florida Bar No. 931720
Capital Collateral Regional
Counsel - Middle Region
3801 Corporex Park Dr. Ste. 210
Tampa, Florida 33619-1136
(813) 740-3544
Counsel for Appellant

PRELIMINARY STATEMENT

This is the appeal of the circuit court=s denial of Paul Alfred Brown=s motion for post-conviction relief which was brought pursuant to Florida Rule of Criminal Procedure 3.203 (Defendant=s/Prisoner=s Mental Retardation as a Bar To Imposition Of The Death Penalty).

Citations shall be as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "R ___" followed by the appropriate page number(s). The post-conviction record for purpose of this appeal will be referred to as AROA ____@ for post conviction record ROA followed by the appropriate Volume and Page Number(s). "S.ROA ____@ for Supplemental ROA for purposes of the record prepared for this appeal, followed by the appropriate Volume and Page Number(s). All other references will be self-explanatory or otherwise explained.

This appeal is being filed in order to address substantial claims of error as to the denial of Mr. Brown=s motion for post-conviction relief upon an abuse of discretion by the trial court and a lack of competent evidence to support the trial judge's conclusions.

REQUEST FOR ORAL ARGUMENT

Mr. Brown has been sentenced to death. The resolution of the issues involved

in this action will determine whether he lives or dies. Given the seriousness of the claims at issue and the stakes involved, Paul Alfred Brown, a death-sentenced inmate on Death Row at Union Correctional Institution, through counsel, urges this Court to permit oral argument on the issues raised in his appeal.

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STATEMENT OF THE CASE AND FACTS

On February 19, 1987, the jury recommended death by a vote of 7 to 5, the court accepted the recommendation and then imposed a death sentence. The Judgment and Sentence was entered in and for the Thirteenth Judicial Circuit in and for Hillsborough County on March 3, 1987.

Mr. Brown unsuccessfully took a direct appeal from the judgment of conviction and imposition of death sentence. Brown v. State, 565 So.2d 304 (Fla. 1990). Rehearing was denied on June 11, 1990. A petition for Writ of Certiorari was filed on November 26, 1990, and denied by the United States Supreme Court. Brown v. Florida, 111 S.Ct. 537, 498 U.S. 992 (1990).

Mr. Brown filed two rule 3.850 motions in 1992. Public records litigation pursuant to Chapter 119, Florida Statutes, was ongoing in this case. On October 12, 1994, the Circuit Court granted Brown=s motion to disqualify the Hillsborough County State Attorneys Office due to a potential conflict as Brown=s former defense counsel had become employed there as an Assistant State Attorney. The State appealed, and this Court quashed the order without opinion on January 31, 1995.

Mr. Brown filed his Third amended Rule 3.850 motion in 1996. The Circuit Court summarily denied twelve of Brown=s sixteen claim in order filed on November 12, 1996. (ROA.,Vol. III, pp. 298-355). An evidentiary hearing was held on March

3, 1997. The court issued an order on April 8, 1997 denying relief on all four claims taken up at the evidentiary hearing.(ROA.,Vol. III, pp.449-453) This Court affirmed the lower court ruling. State v. Brown, 755 So. 2d 616 (2000). Mr. Brown filed a post-conviction motion for relief and habeas petition. This court denied relief. State v. Brown, 848 So. 2d 1114 (2003).

On September 9, 2001, Mr. Brown filed a Successor Motion To Vacate Sentence and To Declare a Provision of Florida Statute 921.137 Unconstitutional as the Florida Statute did not apply retroactively to bar the execution of mentally retarded individuals. Circuit Judge Rex A. Barbas granted an Evidentiary Hearing. Mr. Brown filed supplemental authority citing Atkins v. Virginia, 122 S.Ct. 2242, 536 U.S. 304(2002) on the issue of his mental retardation. On December 12, 2001, a Federal Habeas '2254 Petition for Paul Alfred Brown was filed with the Federal District Court, Middle District of Florida in Case No. 8:01-cv-2374 and is pending final disposition of Mr. Brown=s state court claims.

While Mr. Brown=s Successor 3.850 Motion was pending, this Court, on its own motion, proposed Florida Rule of Criminal Procedure, 3.203 (Defendant=s/Prisoner/s Mental Retardation as Bar to Execution) and Florida Rule of Appellate Procedure Appellate Procedure 9.142 (c).(Appeal of Determination of Mental Retardation Claim) and it became effective on October 1, 2004.

At the time Florida Rule of Criminal Procedure 3.203 became effective on

October 1, 2004, Mr. Brown had a pending a Successor Motion To Vacate Sentence and To Declare a Provision of Florida Statute 921.137 Unconstitutional on the Statute=s failure to provide retroactive application to mentally retarded defendants at post-conviction. Mr. Brown requested that the trial Court accept his pending motion for review under the provisions of Florida Rule of Criminal Procedure 3.230(e) and rule based upon the provisions of the rule. Dr. Valerie McClain gave expert testimony in behalf of the Appellant/Defendant and Dr. Gregory Prichard testified for the Appellee/State of Florida on the issue of Paul Alfred Brown=s mental retardation. (S.ROA., Vol. 6, pp. 913-168) Mr. Brown=s Closing Arguments were filed on August 29, 2003 and a response to the State=s Addendum was expressly incorporated on October 3, 2003. (S. ROA., Vol. 1, pl. 169-209) The State also filed written closing. (S. ROA.,Vol. 3, pp. 376-517).

On October 20, 2004 the parties appeared before the court for a final ruling. Instead, the Court on its own motion decided to appoint a third expert, Dr. Michael Maher, to evaluate and report on the issue of the Defendant=s mental retardation. Further testimony was heard on January 7, 2005 and February 18, 2005. (S. ROA., Vol. 6, pp. 838-971, pp. 972-1041, Vol. 7, pp. 1042-1138)

On April 22, 2005, the Circuit Court issued an order Denying the Successor Motion to Vacate Sentence and to Declare a Provision of Florida Statute '921.137 Unconstitutional without any reference to Fla. R. Crim. P. 3.203. This matter is

properly before this Court on appeal. (S.ROA. Vol. V, pp. 778-782).

SUMMARY OF THE ARGUMENT

Mr. Brown asserts that his conviction and sentence of death are the result of violations of the Eighth Amendment to the United States Constitution and the corresponding provisions of the Florida Constitution for each of the following reasons: 1) The trial court=s finding that Paul Alfred Brown is not mentally retarded is not supported by competent and substantial evidence in the record. 2) Mr. Brown has established by clear and convincing evidence that prior to attaining age 18 his intellectual functioning was determined to be in the significantly sub-average range on recognized intelligence tests and that concurrent deficits in his adaptive functioning were manifest. 3) Mr. Brown produced evidence at the evidentiary hearing which established that he meets the legal criteria of mental retardation as set forth in Florida Statute '921.137, and Florida Rule of Criminal Procedure 3.203, when read along with the decision of the U.S. Supreme Court in Atkins v. Virginia, 122 S.Ct. 2242, 536 U.S. 304 (2002) 4) Mr. Brown has established beyond a reasonable doubt that mental retardation and mental illness can co-exist. He has established that he is mentally retarded and has superimposed mental illnesses. 5) Mr. Brown is entitled to relief under Atkins v. Virginia, supra. in which the Court held that the execution of the mentally retarded constitutes cruel and unusual punishment under the Eighth Amendment. Mr. Brown, like the defendant in Atkins, has been determined to be

Amildly mentally retarded.@ 6) Any requirement that Mr. Brown establish his mental retardation by a standard of clear and convincing evidence is unconstitutional.

ARGUMENT I

THE LOWER COURT ERRED IN FINDING BY CLEAR AND CONVINCING EVIDENCE THAT MR BROWN FAILED TO ESTABLISH MENTAL RETARDATION

The lower court=s denial of Mr. Brown=s mental retardation claim is not supported by substantial and competent evidence in the record and should not be affirmed by this Court=s de-novo review. Affirming the imposition of a death sentence in this case upon a man who is brain damaged, mentally ill, and mentally retarded violates Art. I Section 17 of Florida=s Constitution and corresponding provisions in the Eighth and Fourteenth Amendments to the U.S. Constitution that prohibits cruel and unusual punishment.

Dr. Valerie McClain, Ph.D., a neuropsychologist, testified at Evidentiary Hearing regarding Paul Brown=s mental capabilities. In defining mental retardation, she referenced statutory definitions and also definitions provided by the Office of Developmental Services. Dr. McClain testified that the criteria for being termed as AMentally Retarded@ requires a score that is two or more standard deviations from the mean on an individually administered intelligence assessment instrument and demonstrated significant deficits in adaptive behavior skills.

Associated with the intelligence testing is a margin of error plus or minus 5 points. Therefore, Dr. McClain explained that an individual scoring 70 to 75 points on the approved testing instruments can be diagnosed as mentally retarded. (S.ROA, Vol. 6, pp. 853,854) Dr. McClain also testified that adaptive behavior skills refer to socialization, communication, or the ability to manage their daily living skills and that deficits in these areas have to manifest prior to a person=s 18th birthday. (S.ROA, Vol. 6, p. 850) Florida=s statutory definition coincides with the diagnosis as described in the *Diagnostic and Statistical Manual Of Mental Disorders-Text Revision* (DSM-IV TR)(4th ed. 1994), published by the American Psychiatric Association that is a diagnostic and statistical manual used by psychiatrists and psychologists to diagnose mental retardation and that is also used by practitioners with regard to the selection of the instruments to measure specific ability, such as intelligence, adaptive functioning and academic performance. (S.ROA, Vol. 6, p. 850,851). Dr. McClain found Paul Brown to be mentally retarded. (S.ROA, Vol. 6, p. 908).

STANDARD OF REVIEW

The undersigned counsel is unaware that this Court previously addressed whether a mental retardation claim is subject to the substantial and competent evidence standard of review, or is a mixed question of law requiring de-novo review. Since appellate review of this claim requires application of standards set forth the Atkins case, as well as provisions of Florida Statute '921.137 and Florida Rule of

Criminal Procedure 3.203[1], Mr. Brown urges this Court to conduct a de-novo review. Mr. Brown was convicted of first degree murder and death was imposed. Therefore, Fla. Crim. Rule P. 3.203 applies to his case. The definition contained in the section (b) of the rule should be applied to Mr. Brown=s case to determine the issue of his mental retardation.

Circuit Court Determination Erroneous

The circuit court was requested to apply Fla. R. Crim. P. 3.203 to this case but did not do so or provide a reason for not applying this rule to the case. The order issued by the court did not fully address all the evidence presented at evidentiary hearing by Mr. Brown and the brevity of it precludes this court from meaningful appellate review.

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[1]**Rule 3.203. DEFENDANT=S MENTAL RETARDATION AS A BAR TO IMPOSITION OF THE DEATH PENALTY.**

3.203(a) Scope. This rule applies in all first-degree murder cases in which the state attorney has not waived the death penalty on the record and the defendant=s mental retardation becomes an issue.

3.203(b) Definition of Mental Retardation. As used in this rule, the term Amental retardation@ means significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly sub-average general intellectual functioning, Afor the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of 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 definition, 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 trial court erred by stating that Florida Statute requires an IQ score of 70 or less for a finding of mental retardation. The trial court order states that Florida Statute, Section 921.137 Asuggests a three prong test to determine whether a defendant is mentally retarded. Prong one requires an IQ of 70 or less@. (S.ROA, Vol. 5, p. 778-782, Order Denying Relief, April 22, 2005, p. 779). The Statute does not require that an IQ must fall at 70 or below as stated by the court but requires Atwo or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services. Fla. Stat.' 921.137 (2003) The distinction is important because there is not a specified number. Experts at Paul Brown=s evidentiary hearing identified the DSM-IV-TR as the diagnostic manual used by experts in treating and diagnosing mental retardation and explained that while it adopts the two standard deviation cut off the manual also instructs that a standard error of measure plus or minus five (5) points applies. Therefore, an individual scoring between 70 and 75 can be diagnosed as mentally retarded. (EH. 16) In Atkins, the United States Supreme Court cited with approval an IQ range of 70 to 75 for the intellectual functioning prong in defining mental retardation excluding margin of error. Atkins, 122 S.Ct, at 2245. Paul Brown has scored two standard deviations below the mean on three Wechsler Intelligence Tests as defined in F.S. '921.137 in 2001, 2003, and 2004. Paul Brown also scored a 72 on a Wechsler Intelligence Test at age 10 in 1960. Mr. Brown=s score on the 1960

test is of great significance because it establishes the onset of significant sub average intellectual functioning prior to age 18. The court did not address the evidence presented relevant to this specific test arbitrarily dismissing Paul Brown=s initial IQ score of 72 and testimony from all experts that this score is within the accepted IQ range for diagnosing mental retardation.

The trial court erred when it stated that ADrs. Prichard and Maher each tested the Defendant and found that the recent IQ scores suggesting a range of mild mental retardation were a result of malingering." This conclusion is refuted by the record. (S.ROA, Vol. 5, p. 778-782, Circuit Court=s Order Denying Relief, April 22, 2005, p. 780). Dr. Prichard described Mr. Brown as anxious at the time of testing and testified that some responses given by Brown made him suspect malingering. Dr. Prichard=s testimony regarding malingering was based entirely upon Brown=s hesitancy in responding to questions and not upon the results of any testing. Although available, Dr. Prichard never administered objective tests to determine if Paul Brown was malingering or not. (S.ROA, Vol. 6, p. 988). Dr. Maher agreed that there are some tests that can pretty clearly establish the presence of malingering. (S.ROA, Vol. 6, p. 1076.) Neither expert, Prichard or Maher, ever tested Paul Brown to clinically assess malingering. Dr. Maher testified that the Adata in the test <u>does not</u> directly support the conclusion that (Paul Brown) gave less than full effort@. (S.ROA, Vol. 6, p. 1077).

The trial court=s finding that both experts Prichard and Maher tested Mr. Brown

and found the mild mental retardation scores are the result of malingering is clearly erroneous. Neither expert tested Mr. Brown for malingering and the single objective test given to Paul Brown by Dr. Valerie McClain directly refutes this conclusion.

Dr. McClain testified at evidentiary hearing that there are 16 indicators used to clinically assess for malingering, and that she did test Paul Brown. The objective test results she obtained do not support malingering. (S.ROA, Vol. 6, pp. 907,908). Dr. Maher confirmed that the result of the Rey 15 Test administered by Dr. McClain indicated that there was no malingering. (S.ROA, Vol. 6, p. 1080). Therefore, there is no evidence in the record to support the lower court=s erroneous conclusion. Fla. Stat. §921.137 and Fla. R. Crim. P. 3.203 refer to scores on standardized intelligence tests, not subjective recomputations by expert witnesses, which should not be considered by this Court in conducting the required de novo review. There is ample objective evidence in the record, of the type contemplated in Fla. Stat. § 921.137 and Fla. R. Crim. P. 3.203 to establish by a preponderance of the evidence that Mr. Brown has significant sub-average intellectual functioning.

The trial court erred in the order denying relief filed on April 22, 2005 by equating intellectual testing with adaptive functioning in terms of making reference to significant discrepancies between the two when evaluating evidence of Paul Brown=s mental retardation. The court stated ADr. McClain=s report of Defendant=s adaptive functioning indicates that the Defendant would be classified as mentally retarded@ and

cites this as an Ainconsistency@ with Dr. McClain=s final determination that Paul Brown is Amildly mentally retarded@. (S.ROA, Vol. 5, p. 778-782). Dr. McClain explained that adaptive functioning as opposed to intellectual functioning are two separable areas and testified that you (experts evaluating an individual for mental retardation) don=t equate intellectual testing with adaptive functioning in terms of making reference to significant discrepancies between the two. (S.ROA, Vol. 6, p. 806). While the adaptive functioning scores placed Paul Brown in the severely retarded range based upon the *Vineland*, his intelligence testing shows Paul Brown to be in the mildly retarded range. (S.ROA, Vol. 6, pp. 902,903). Paul Brown=s adaptive functioning level was based upon a clinical opinion when looking at his environment from conception to age 18. Review of academic records, interviews with teachers and relatives, his daily living activities during this period, and consideration of his severely abusive environment. (S.ROA, Vol. 6, pp. 907,908). Dr. McClain testified that a clinical decision was subsequently made based upon the criteria of mental retardation looking at adaptive functioning in conjunction with intellectual functioning. (S.ROA, Vol. 6, p. 908).

All experts testified that a diagnosis of mental retardation cannot be made based upon either intellectual or adaptive functioning alone as each is individually evaluated. The court overlooked or ignored expert testimony that psychologists don=t equate intellectual testing with adaptive functioning in terms of making reference to significant

discrepancies between the two for the purposes of making a diagnosis of mental retardation. Thus the lower court=s evaluation was flawed.

The trial court stated that ADr. McClain relies very heavily on the language of the rule regarding the onset of mental deficits prior to age 18, ignoring the fact that mental deficits must manifest by age 18 and exist presently@. (S.ROA, Vol. 5, p. 778-782, Order Denying Relief, April 22, 2005, pp. 779, 780). The definition of mental retardation in Fla. R. Crim. P. 3.203(b) is Asignificantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18@. It is identical to Fla. Stat.' 921.137 (1) that defines mental retardation as Asignificantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18@. Dr. McClain referred to Mr. Brown=s early history to establish that his mental retardation manifested prior to age 18 as required by rule and Florida Statute.

Intelligence tests administered in 2001, 2003 and 2004 by Drs. McClain, Prichard and Maher confirm significant sub-average intellectual functioning and deficits in adaptive functioning that were also noted by Dr. Berland, Dr. Afield and Dr. Prichard post age 18. This information was adopted by Dr. McClain in rendering a clinical opinion in this case. In order to establish that Paul Brown meets the criteria for a diagnosis of mental retardation, Dr. McClain properly evaluated the records for evidence of onset prior to

age 18.

In critiquing Dr. McClain=s opinion the court stated that her opinion was flawed as she reached it Aignoring the fact that mental deficits must manifest by age 18 and exist presently@. (S.ROA, Vol. 5, p. 778-782, Order Denying Relief, April 22, 2005, pp. 779,780). The wording Aexisting presently@ is not included in the statute or the rule, or in the Atkins opinion for the obvious reason that the relevant period is at or nea4r the time of the homicide and trial. The court=s adoption of this additional language demonstrates a misunderstanding of the dictates imposed by the statute regarding the onset period when concurrent deficits in adaptive skills and significantly sub-average intellectual functioning must manifest.

In denying relief the trial court stated, ADr. Prichard explained that due to the fact that Defendant=s present adaptive functioning did not meet the criteria for mental retardation, there was no need to address the third prong of the test for retardation.@ (the third prong referred to is that statutory requirement for the onset of deficits to be established prior to age 18). (S.ROA, Vol. 5, p. 778-782, Order Denying Relief, April 22, 2005, p. 780). The Circuit Court misunderstood Dr. Prichard=s testimony at evidentiary hearing. Dr. Prichard testified that in this case, it simply wasn=t necessary for him to conduct interviews with individuals that knew Mr. Brown prior to age 18, Abecause I had so much data when Mr. Brown was an adult that said intellectually he=s not below 70. So Yif that=s demonstrated there=s really no need to get the adaptive

behavior stuff prior to the age of 18@. (S.ROA, Vol. 6, pp. 954,955). As an example Dr. Prichard stated A[I]f I have enough information to say he=s not MR in terms of IQ, I have really no need to do anymore@. (S.ROA, Vol. 6, p. 958). Dr. Prichard never testified that lack of deficits in adaptive behavior kept him from going forward. He testified that he did not get to evaluate adaptive behavior data because Brown=s intellectual functioning as an adult suggested that he was not below 70.

Dr. Prichard=s reports actually establish sufficient deficits in Paul Brown=s adaptive functioning to support Dr. McClain=s diagnosis of mild mental retardation. Dr. Prichard scored Mr. Brown at 57 on the SIDR (78 in communication, 53 in personal living, 64 in community living, and 54 with a broad independent support score of 57) he determined Mr. Brown to have Aan overall measure of adaptive behavior, comparable to that of the average individual at age 10 year 11 months. His functional independence is limited to very limited @ and Alimitations in twelve adaptive skills areas: fine-motor skills, social interaction, language comprehension, language expression, eating and meal preparation, dressing, personal self-care, domestic skills, time and punctuality, money and value, work skills, and home/community orientation@ based on information received from Mr. Brown. Dr. Prichard scored Mr. Brown at 80 (Standard score of 87, communication of 77, personal living of 85 and community living of 81) Aan overall measure comparable to that of the average individual at age 15 years 10 months. His functional independence is limited to age-appropriate@ and he

found Alimitations in ten adaptive skills areas: fine-motor skills, social interaction, language comprehension, language expression, eating and meal preparation, dressing, domestic skills, time and punctuality, money and value, and home/community orientation@ based upon information received from Sgt. Young at Union Correctional. (S.ROA, Vol. 6, pp. 947,948)(S.ROA, Vol. 2, pp. 261,262, Report of Adaptive Behavior Testing, March 3, 2003, Gregory A. Prichard, Psy.D.).

Therefore, Dr. Prichard=s 2003 report includes sufficient deficits in Paul Brown=s current adaptive functioning to corroborate Dr. McClain=s mental retardation diagnosis. Dr. McClain testified that she based her opinion on all information normally relied upon by psychologists in making a diagnosis of mild mental retardation. Obviously, this includes all testing done by other psychologists on Mr. Brown. In determining whether Mr. Brown meets the statutory definition of mental retardation at the current time, the trial court stated that ADr. McClain failed to report on Defendant=s current adaptive functioning@. The court misunderstood Dr. Prichard=s testimony. Dr. Prichard did not retrospectively analyze Paul Brown=s adaptive functioning. In fact, Dr. Prichard=s Report document sufficient adaptive behavior deficits to support Dr. McClain=s diagnosis of mental retardation.

Expert testimony was provided at evidentiary hearing that Paul Brown=s hesitancy is characteristic of a person who has organic or neuropsychological impairment, who is slower in the processing at the cortical tone of the brain and with

mental retardation can be flat affect, meaning no real emotion involved so slower in general terms of responding to things. Paul Brown=s history of several head injuries, and delayed academic achievement are consistent with this finding. (S.ROA, Vol. 6, p. 909).

Dr. Maher testified that he felt that the testing resulted in a lower score than that representing his true intelligence **Y**Ain part because he didn=t make a full effort. I think there may have been other factors present also@. AI think it was a reasonably accurate reflection of his ability at the time of the testing, but I do not believe that it=s a reasonably accurate reflection of his fundamental intelligence because of other compounding factors@. (S.ROA, Vol. 7, p. 1077). He testified that the 14 point difference between the verbal and performance IQ scores recorded in Paul Brown=s test are consistent with some organic brain damage or developmental impairment. (S.ROA, Vol. 7, pp. 1081,82). Dr. Maher testified that Mr. Brown=s history of head injuries could cause brain damage and that he was aware that Dr. Berland testified at Brown=s trial that he suffered from brain damage. (S.ROA, Vol. 7, p. 1081). Dr. Maher and Dr. McClain agree that mentally retarded individuals have a prevalence of having a co-morbid mental disorder four to five times greater than the population and can have superimposed mental health problems, brain damage and still be diagnosed as mentally retarded. (S.ROA, Vol. 7, pp. 1083, 1084,1110). The court states that Ait is reasonable to believe that a person in Defendant=s situation has a strong motivation

to perform poorly on examinations to be declared mentally retarded@. The court ignores the fact that Paul Brown scored in the mental retardation range before this crime was committed, as well as, prior to the Atkins decision. In fact, Dr. Afield testified at trial that he believed Mr. Brown to be mentally retarded. (S.ROA, Vol. 5, p. 781). Dr. Prichard only interviewed one witness, Fannie Jones, mother of the victim using a Vineland. Dr. McClain testified as to the inconsistency in her responses and natural bias. The court=s acceptance of conflicting testimony from this sole witness to establish that Paul Brown is not mentally retarded in terms of adaptive functioning is unreasonable.

The court stated that Dr. Prichard=s examination reveals that the Defendant is clearly capable of caring for himself. The court=s determination is erroneous. Dr. Prichard reported Mr. Brown as having Aan overall measure of adaptive behavior, comparable to that of the average individual at age 10 year 11 months. His functional independence is limited to very limited@ and Alimitations in twelve adaptive skills areas: fine-motor skills, social interaction, language comprehension, language expression, eating and meal preparation, dressing, personal self-care, domestic skills, time and punctuality, money and value, work skills, and home/community orientation.@ or Aan overall measure comparable to that of the average individual at age 15 years 10 months. Dr. Prichard reported Mr. Brown=s functional independence as limited to age-appropriate@ and found Alimitations in ten adaptive skills areas: fine-motor skills,

social interaction, language comprehension, language expression, eating and meal preparation, dressing, domestic skills, time and punctuality, money and value, and home/community orientation.@ (S.ROA, Vol. 6, pp. 947,948) (S.ROA, Vol. 2, pp. 261,262, Report of Adaptive Behavior Testing, March 3, 2003, Gregory A. Prichard, Ph.D.).

Determination of Mental Retardation - U.S. Supreme Court.

In 2002, The United States Supreme Court decided Atkins v. Virginia, 122 S.Ct. 2242, 536 U.S. 304 (2002), in which the Court held that the execution of the mentally retarded constitutes excessive punishment under the Eighth Amendment. In Atkins a determination was made that the defendant was Amildly mentally retarded.@ Atkins, at 2245. This determination was based upon interviews conducted with people who knew Atkins, a review of school and court records, and the administration of a standard intelligence test which indicated that Atkins had a full scale IQ of 59. Atkins, at 2245.

The Supreme Court stated further that clinical definitions of mental retardation require not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care and self-direction that become manifest before age 18. Atkins, at 2250. In doing so, the court adopted the definitions of the American Association of Mental Retardation (AAMR) and a similar definition by the American Psychiatric Association (APA). Not only do both entities

state that the onset must manifest before age 18 but most importantly explain when the adaptive skills are to be measured. The AAMR states that related limitations in two or more adaptive skill areas must occur Aconcurrently@ with the significant sub-average intellectual functioning. The APA=s language makes no distinction as it describes significant sub-average general intellectual functioning that is Aaccompanied by@ significant limitations in adaptive functioning in at least two of the listed skills areas. Atkins, at 2245. Clearly, since the condition must manifest before the individual reaches the age of 18, there can be no question that adaptive functioning skills must also be measured during the relevant period - prior to age 18.

In Atkins, the court cited with approval an IQ range of 70 to 75 for the intellectual functioning prong in defining mental retardation excluding margin of error. Atkins, 122 S.Ct, at 2245. The Supreme Court stated that clinical definitions of mental retardation require not only sub-average intellectual functioning, but also require significant limitations in adaptive skills such as communication, self-care and self-direction that become manifest before age 18. Atkins, 122 S.Ct. at 2250. **Paul Brown=s Mental Retardation**

A school psychiatrist administered a Wechsler Intelligence Scale for Children to Paul Brown in September, 1960 and at age 10 he scored a full scale IQ of 72. Clearly, this score is within the range cited by the U.S. Supreme Court. Mr. Vilchez, Hillsborough County Schools Pupil Personnel Department, prepared a report

describing young Paul Brown as follows:

> Aan extremely nervous child. He bangs his head on the desk, makes noises imitating a moving train, crawls on the floor and lies on benches and tables in the rear of the classroom, wanders around aimlessly picking up books, plants, chalk, etc., occasionally speaking to this inanimate object, and sits facing open window for long period s of time pulling and playing with a venetian blind cord and speaking to himself@ (S.ROA, Vol. 2, State=s Exhibit 9, pp. 215,216)

These observations demonstrated deficits in at least two of the adaptive functioning skills in areas measured to diagnose mental retardation (ie.) communications, social/inter-personal skills, self-direction, and functional academic skills.

In his report Mr. Vilchez quoted Paul as saying AI want to learn what those words mean@. Paul Brown was in the 4th grade, but his academic skills in reading were reported to be at Aa second year reader with difficulty, adding simple number concentrations and learning the alphabet@ and Paul Brown=s deficient performance were described as Alearning problems@ not behavioral ones. Further deficits in his home living situation are documented in the Hillsborough County Schools Case Summary that describe his unstable living environment Aliving with an uncle in Georgia who did not provide a suitable home environment,@ temporary placement at a home ALee Haven,@ abandonment by his mother, and a succession of baby sitters. (S.ROA, Vol. 2, State=s Exhibit 9, pp. 215,216).

On April 12, 1961, Minnie Lee Powell, Coordinator, Mrs. Vivian Richmond, Consultant for slow Learner Classes, Mrs. Winona Malpass, School Psychologist from Special Educational Services, and Mrs. Providence Velasco, Director, Pupil Personnel Department, reviewed Paul Brown=s psychological, academic and social information and recommended his placement in a Aspecial class for slow learners on the basis of his present functioning@. (S.ROA, Vol. 2, State=s Exhibit 9, pp. 215,216)

All of this information supports by clear and convincing evidence that Mr. Brown met the definition for mental retardation in 1960-1961, prior to attaining age 18 as required by Florida Statutes, Florida Criminal Rule 3.203 and the U.S. Supreme Court=s requirements articulated in Atkins.

Mr. Brown scored a full scale IQ score of 72 on a Wechsler Standard Intelligence test, Children=s version in September, 1960 at age ten (10), teacher= reports document the presence of deficits in two or more areas of adaptive functions existing concurrently during this time period, and a conference held by specialists and Special Education Psychologist determined that his deficits warranted placement in special education classes for slow learners.

Fla.R.Crim.P. 3.203 does not specify what the burden of proof shall be for a capital defendant to establish his claim that he is mentally retarded as a bar to a death sentence. Florida Statute '921.137(4) requires that mental retardation be established by a Aclear and convincing standard@. Paul Brown argues that the statutory burden of

proving mental retardation by a clear and convincing is unconstitutional based upon Atkins v. Virginia, Supra., and Cooper v. Oklahoma, 116 S.Ct. 1373,517 U.S. 348 (1996). He urges this court to adopt a preponderance standard as a clear majority of States with statutes concerning mental retardation have done. There is sufficient evidence from early informants that document his intellectual and adaptive deficits to establish the existence of mental retardation (prior to his attaining age 18) in accordance with the Constitutional requirements set forth by the U.S. Supreme Court in Atkins, and corresponding Florida law contained in Fla. Stat.' 921.137, and Fla.R Crim.P. 3.203.

In 1986, (at age 37) Dr. Berland, a psychologist, gave Mr. Brown a Wechsler Adult Intelligence Test and recorded an IQ score of 81. (R. 541) the Verbal Intelligent Quotient therein was reported at 75 and the Performance Intelligence Quotient was reported at 84. (S.ROA, Vol. 2, State=s Exhibits 4, 5, 6, pp. 363-375) Experts at Brown=s evidentiary hearing testified that Dr. Berland did not administer the most current standardized test. Mr. Brown should have been given a WAISBR. If he had taken the WAIS-R, test results would have been 7 to 8 points lower (Mr. Brown would have scored a 73 or 74) according to the Wechsler Adult Intelligence Test Revised Test Manual, Psychological Corp., (January, 1981), p. 36, 47.

At the time of trial, Dr. Berland testified that Paul Brown was operating at a level of intellectual functioning below normal range. He testified concerning serious

deficits in Paul Brown=s adaptive functioning stating Amany people with the IQ score of Paul Brown Acannot get along on their own or earn a living or even take care of themselves. Some of them, apparently like him, can=t.@ (R. - 541) Clearly, Paul Brown=s IQ score at 73 or 74 on the correct IQ test coupled with deficits noted by Dr. Berland in his adaptive functioning are consistent with mild mental retardation.

Dr. Berland testified that objective tests (a Bender Gestalt and a Wechsler Adult Intelligence Test (WAIS) each documented that Paul Brown suffered from brain damage. (R. - 542) Dr. Berland also testified that Paul Brown is mentally ill. He testified that Mr. Brown was psychotic at the time that the offense and that he suffers from a bi-polar, manic or organic apathy syndrome. (R. -545, 546) In describing Mr. Brown as impaired in his ability to conform his conduct to the requirements of the law, Dr. Berland described the effects of his brain damage superimposed upon low intelligence and evidence of psychotic disturbance. At the time of the offense, Dr. Berland testified that Paul Brown was Aoperating marginally in the community@. (R. - 547)

Dr. Afield, a psychiatrist, confirmed that Mr. Brown is Amentally ill, psychotic and seriously disturbed@. (R- 578) In addition, he testified that Athere is brain damage or I think he is kind of retarded. I think these problems have been going on since early childhood for this young man@. (R. - 578) Dr. Afield discussed Mr. Brown=s adaptive deficits describing him as Aworking as a junk man, and always having kind of

a marginal existence@ and Anot too intelligent@ supporting a co-morbid diagnosis. He testified that Paul Brown=s Amental illness and his retardation, apparent brain damage has interfered in this man=s ability to think effectively@, and described him as Aa very marginal individual@, Adisturbed, marginal, retarded@. (R. - 579, 580) Dr. Afield testified that in his expert opinion, Paul Brown is Asubstantially impaired. [I think] he is retarded. I think he is mentally ill, and [I think] the evidence is clear@. (R. - 580)

There is no question that both experts Dr. Berland and Dr. Afield testified that Paul Brown suffered serious deficits in adaptive functioning within his community and that mental illness, brain damage and that mental retardation co-existed. This expert psychological testimony was supported by a Pre-Sentence Investigation Report documenting that Mr. Brown failed the fifth grade three times, a Psychological Screening Report dated November 1, 1967 recording Paul Brown with a 57 IQ score on a Kent test and noting Awith mental defective intelligence@ and AReading Level of 3.3 - relative grade of 2" at age 17; and a post sentence report dated September 4, 1987 reporting mental disturbance at a very young age, limited reading and writing skills along with comment that Asome of his teachers referred to him as retarded@. (S.ROA, Vol. 2, State=s Exhibit 9, pp. 534 - 537)

All of these foregoing references to Mr. Brown as Amentally retarded predate any U.S. Supreme Court ruling or the enactment of any Florida Statute prohibiting the execution of mentally retarded defendants.

At the time of Mr. Brown=s evidentiary hearing, in June, 2003 Chapter 393 of the Department of Children and Families, HRSM Regulations defined mental retardation and specified what instruments might be used to measure mental retardation for diagnosis and services in Florida. (S.ROA, Vol. 6, pp. 850, 851) The definition contained in this Chapter is the same used by the American Association of Mental Retardation (AAMR) and the American Psychiatric Association (APA). Florida Criminal Rule 3.203(b) enacted on October 1, 2004, adopted the same definition. (S.ROA, Vol. 6, pp. 850,851)

The guide book for developmental disability application eligibility detailed the standard intelligence tests to be administered within Regulation 162-D. Quoting from the Regulations, Dr. McClain testified that the tests recognized were: A1.Stanford-Binet Form LM; 2, Wechsler Adult Intelligence Scale; 3, Wechsler Intelligence Scale Children Revised; 4, Wechsler Preschool and Primary Intelligence Level; 5, Bailey Scales of Infant Development; 6, Gerontology Scales; 7, Colombia Mental Maturity Scale; 8, McCarthy Scale of Children=s Ability; 9, Leiter Internatioanal Performance Scale and 10, Hiskey -Nebraska Test of Learning Aptitude (for the deaf). A(S.ROA, Vol. 6, p. 855) Beta tests are not listed among the specified standardized tests for determining mental retardation. (S.ROA, Vol. 6, pp. 855,856)

Florida Criminal Rule 3.203 (b) specifies the intelligence tests to be considered when determining Mental Retardation in Florida. The distinction in testing instruments

is very important in this case. The tests for determining mental retardation are referred to as Astandardized intelligence tests authorized by the Department of Children and Family Services in rule 65 B-4.032 of the Florida Administrative Code.@

Florida Administrative Code Rule 65 B-4.032(1) states: AThe tests specified below shall be used.

(a) The Stanford-Binet Intelligence Scale.

(b) Wechsler Intelligence Scale.@

(2) The court pursuant to 921.137(4) is authorized to consider the findings of the court appointed experts or any other expert provided that:

A) The expert uses 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. [Emphasis Added] (S.ROA, Vol. 4, p. 547, Motion for Judicial Notice filed Jan. 7, 2005)

Dr. Michael Maher testified at the evidentiary hearing that he was familiar with the provisions of Florida Administrative Code Rule 65 B-4.032. (S.ROA, Vol. 6, p. 1019). He testified that he took all of Paul Brown=s test scores and averaged them. The highest score of 99 and the lowest score of 57 were taken off and he computed

an average of 77.6. (S.ROA, Vol. 6, p. 1004) Dr. Maher admitted that he had included a score of 94 for a test even though he did not know the source of the test. (S.ROA, Vol. 6, p. 1004) He stated that the 77.6 average score he obtained was consistent with the score of 69 that he obtained from his own testing of Paul Brown. (S.ROA, Vol. 6, p. 1009). He testified that based upon his averaging of scores 77.6 must be considered the most reliable and accurate IQ score for Paul Brown, even though Mr. Brown has never tested at 77.6 on a current version of any IQ test administered to him during his lifetime. (S.ROA, Vol. 6, pp. 1024, 1025). Dr. Maher testified that he had no information as to which edition of the California Achievement Test was given to Paul Brown, whether it was administered individually or even scored correctly. (S.ROA, Vol. 6, pp. 1026, 1027). Similarly, Dr. Maher had no information to identify the tests, how they were administered, or raw material relating to tests identified in his report - Kent (score 57), Department of Corrections (score 94), Fl. Dept Corrections/Beta (score 97), DOC (test type not reported) (score 99). (S.ROA, Vol. 26, pp 1027-1030).

In order to establish that tests other than those specified in the rule (Stanford-Binet Intelligence Scale or Wechsler Intelligence Scale) can be considered by the court as valid and reliable measures of intelligence, the rule clearly states that when such evaluations are to be submitted to the court they **shall** be accompanied by the published validity and reliability data for the examination. Dr. Maher did not provide

any information relative to several tests that he used or literature to support his averaging of Paul Brown=s various test scores. As a result, it was improper for the trial court to rely upon any tests not listed in the rule to evaluate Mr. Brown=s mental retardation claim. It was error for the trial court to accept Dr. Maher=s opinions without documentation to support the validity of his assertions as required by the rule.

Dr. Prichard testified that Beta=s are comparable to recognized intellectual assessment instruments but he offered no published validity and reliability data, required by the rules before the court can consider them. Dr. McClain testified that Beta=s are not substitutes for intellectual instruments that are specifically identified in Statutes and Guidelines. She explained that Beta=s were developed for military service qualifying and Amore loaded for performance tasks as opposed to verbal skills@ and that it is not standard practice to use the Beta instead of other intellectual instruments. Beta tests are not synonymous with intellectual assessment instruments, as they are primarily non-verbal and that is only one part of the full scale IQ. Therefore, they are a general screening measure and not a full scale intellectual measure. (S.ROA, Vol. 6, pp. 856,857) Beta=s are short in comparison to Wechsler instruments and do not appropriately assess a comprehensive range of different intellectual skills and abilities. Dr. McClain testified that while it can be useful as a gross screening instrument for intellect and identify limitations in verbal skills and abilities, Ait (Beta) is not used by Developmental Services in establishing mental retardation@ (S.ROA, Vol. 7, p. 1106).

She stated that Beta tests should not be accorded the same weight as a Wechsler or Stanford Benet Intelligence tests with respect to establishing mental retardation because Beta tests can give the impression of greater ability than actually possessed by the individual. Furthermore, it is not permissible to use a Beta to test for mental retardation because it is not one of the specified tests allowed for diagnosis by developmental disability for diagnosing mental retardation requiring both verbal and non verbal ability assessment.
(S.ROA, Vol. 7, 1105,1106).

Dr. McClain testified that not only is it is inappropriate to consider a Beta test the equivalent of an intellectual assessment instrument it is also inappropriate to average these scores to reach a conclusion for the purpose of diagnosing mental retardation. (S.ROA, Vol. 6. pp. 856,857). In support of her testimony, Dr. McClain referenced literature in the psychological community that questions the use of Beta tests as intelligence tests. Specifically, an article by Dr. George Barroff, A*Establishing Mental Retardation In Capital Cases: A Potential of Life and Death*,@ AAMR Vol. 29, No. 6 (1991), that notes a common discrepancy of 20 to 30 points with respect to revised Beta measure as compared to either the Stanford Benet, version IV, Wechsler Intelligence Scale, version III . (S.ROA, Vol.7, p. 1105). Dr. Michael Maher corroborated Dr. McClain=s testimony regarding the Beta as a limited non-verbal test and offered no testimony that Betas and Wais are comparable. (S.ROA, Vol. 7, pp.

1049, 1050), Dr. Prichard agreed in cross examination that Beta tests are not a specified test listed for use in measuring intellectual abilities but suggested reliance on them because the Department of Corrections has used them for many years. (S.ROA, Vol. 6, p. 934).

Classification tools used by the Department of Corrections are irrelevant in determining mental retardation based upon specific Statutory requirements in Florida. Dr. Prichard=s assertion that the psychological community has accepted Beta test scores as the equivalent of Wechslers was not supported by any expert and was refuted by the testimony of Dr. McClain and published research AAMR literature. (S.ROA, Vol. 4, pp. 538-546)

Comparison to Department of Correction Beta tests is inappropriate as such tests are not equivalent to, or recognized by, Statute or the psychological community as acceptable substitutes for Wechsler Intelligence measuring instruments. In fact, Dr. Prichard testified that Betas are not an instrument approved by the Department of Corrections for administration in diagnosing mental retardation. (S.ROA, Vol. 6, p. 184) Beta tests are not specified for use as required by the rule to establish mental retardation and cannot be considered by the court determining Mr. Brown=s mental retardation claim. Dr. Prichard offered no published validity and reliability data, as required by the rules before the court can consider tests that are not specified in the rule. Therefore, the court=s reliance on Dr. Prichard=s evaluation was error.

Mr. Brown has significant sub average intellectual functioning as reflected on Intelligence Tests that are specified as instruments for use in Florida Administrative Code Rule 65 B-4.032(1) for determining mental retardation pursuant to Fla.R.Crim.P. 3.203 in Florida. A school psychiatrist gave ten-year-old Paul Brown a Wechsler Intelligence Scale in September, 1960 and recorded his full scale IQ in the mentally retarded range at 72. Paul Brown=s testing near the time of the crime continued to reflect sub average intellectual functioning. A Wechsler Adult Intelligence Scale (3rd Ed) given by Dr. Valerie McClain, Ph.D., on July 2, 2001 recorded Mr. Brown as having a verbal IQ performance at 61 and a performance IQ at 73 with full scale IQ at 63. (S.ROA, Vol. 6, p. 863). Dr. Gregory Prichard administered the same test on March 3, 2003, recording Paul Brown=s verbal IQ performance at 69, performance IQ at 73 and full scale IQ score at 68.

Dr. McClain explained that the results in both tests are very consistent in result and cited a Apractice effect@ (recognized by psychologists when a subject is repeatedly tested on the same instrument) as the basis for a difference of five to six points noted on the verbal portion of the test. (S.ROA, Vol. 6, p. 867). When tested a third time on the same testing instrument, the Wechsler Adult Intelligence Scale (3rd Ed.), Dr. Michael Maher also reported Paul Brown=s full scale IQ score at 68 or 69. (S.ROA, Vol. 7, p. 1071). Mr. Brown has tested in the mentally deficient range on four occasions establishing the fact that his IQ range is within the mentally deficient range

beyond a reasonable doubt.

Paul Brown tested in the mentally retarded range and his learning disabilities were identified at age ten. In 1962, he was recommended for special placement with slow learners and the severity of his problems was documented in psychological reports and records that reveal that he repeated the fifth grade three times before quitting school in the sixth grade at age 14. (S.ROA, Vol. 2, p. 223). In 1987, Dr. Berland, Ph.d. characterized him as Aslow cognitively@ (S.ROA, Vol. 2, p. 294) and Dr. Dee, Ph.d. noted Abilateral cerebral involvement or brain damage@. (S.ROA, Vol. 2, State=s Exhibit 3, p, 219). Dr. Berland and Dr. Dee reported that Mr. Brown was functioning at a low intellectual level and both documented adaptive behavior deficits within their respective reports. There can be no question when reviewing the entire record of psychological tests and accompanying reports of Mr. Brown=s disabilities.

The court relied upon Dr. Prichard=s opinion that the appropriate range for Mr. Brown=s IQ is between 80 and 95. Doing so was error, as there was no data or literature offered by Dr. Prichard to support his conclusion. Mr. Brown has never scored in this range when given a current version of a statutorily specified intelligence test. As such, acceptance of Dr. Prichard=s opinion without foundation or support in the record was error.

Dr. Maher decided to add several IQ test results and divide them to come up with an average full scale IQ score for Paul Brown. Dr. Maher did not offer any research data or professional literature to support this procedure. Dr. Maher testified that in using this process he was Amaking a strongly and statistically validated educational guess@. (S.ROA, Vol. 7, p. 1047). Although Dr. Maher testified that it is the standard of care in his profession when looking at IQ scores on various tests to factor in a standard error measurement for each test, he did not take this factor into consideration when he averaged each of Paul Brown=s test scores (S.ROA, Vol. 7, pp. 1047, 1048). Dr. Maher also testified that he had no literature discussing the practice of averaging pre and post 1973 test scores and that to his knowledge there is no such literature available. (S.ROA, Vol. 7, p. 1048). Dr. Maher was unable to reference or to provide any literature supporting the acceptability in the scientific community of averaging intelligence test scores over a person=s lifetime to determine actual full scale IQ. (S.ROA, Vol. 7, p. 1048). There was no dispute among the experts that Paul Brown was given outdated intelligence tests when tested by Dr. Berland and Dr. Dee. Dr. Maher used these outdated tests in his averaging of Paul Brown=s test scores without any literature whatsoever to support the acceptance of averaging intelligence test scores in the scientific community. (S.ROA, Vol. 7, p. 1948, 1049).

Dr. McClain testified that Dr. Maher=s process of averaging IQ test scores with other colleagues and Florida forensic experts is not common practice. She testified

that it is not allowed because the varied IQ tests have different reliability and validity levels and are not equivalent. Dr. McClain stated that it is not even possible to average different versions of the same testing instrument. For example, a Wechsler Intelligence Scale Adult Scale (WAIS) cannot be averaged with a Wechsler Intelligence Scale Adult, Revised (WAIS-R) or a WAIS-R cannot be averaged with a Wechsler Intelligence Scale Adult (WAIS III), because each is a different version. (S.ROA, Vol. 6, p. 776). Averaging of an individual=s various intelligence and screening tests is not recognized by forensic experts or in literature as appropriate process to obtain a full scale intelligence score. Therefore, it was totally improper for the trial court to rely upon any testimony offered by Dr. Maher regarding Mr. Brown=s intelligence score based upon his Aeducated guess@ and some unrecognized process of averaging scores from various intelligence tests

Outdated test versions skewed some of Mr. Brown=s test results. The testing results obtained by Dr. Berland and Dr. Dee on Wechsler Adult Intelligence tests (WAIS) appeared inconsistent with Paul Brown=s early IQ scores and with subsequent tests administered in 2001,2003, and 2004. The WAIS that Dr. Berland and Dr. Dee gave Paul Brown was the 1955 version. Experts explained that this test was outdated because a new version the Wechsler Adult Intelligence Test Revised (WAIS-R) was approved on January, 1981 to replace it. Dr. McClain explained that when an outdated version of an intelligence test is given instead of a more current version, the

clinician has made a mistake that is going to artificially over estimate the skill and the abilities of the person tested and is referred to as the Flynn effect. (S.ROA, Vol. 7, p. 1108). Dr. Michael Maher agreed with Dr. McClain testifying that when an outdated or obsolete test version is given the results should be adjusted by 7 or 8 points to give a reasonable estimate of what result might be achieved. (S.ROA, Vol. 7, p. 1062). The point difference adjustments significantly affect Paul Brown=s test scores and must be made to accurately interpret his intelligence scores.

According to the Wechsler Adult Intelligence Test Revised Manual, (WAIS-R) at page 47, a practitioner who administers an old version (WAIS) of the test after January 1981 must subtract 7 points from the verbal score (VIQ), subtract 8 from the performance score (PIQ) and subtract 8 from the full scale score (FSIQ) to correlate scores to the current test (WAIS-R). The American Educational Research Association and the National Counsel on Measurements in Education, 1990 Standard for Educational and Psychological Testing states that it is inappropriate to use dated tests and norms.

In order to compare the Wechsler Adult Intelligence Tests (WAIS) given by Dr. Berland in 1986 and Dr. Dee in 1993 to the Wechsler Adult Intelligence Test 3rd. Ed. (WAIS-III) to the tests administered by Dr. McClain, Dr. Prichard, and Dr. Maher the Wechsler Adult Intelligence Test Revised Manual, (WAIS-R), Psychological Corp. (1981) the scores must be adjusted for each test update. The WAIS scores must first

be compared adjusted to compare to the WAIS-R. The Wechsler Adult Intelligence Test Revised Manual, (WAIS-R), Psychological Corp. (1997) updated its norms and the Wechsler Adult Intelligence Test 3rd Edition (WAIS-III) became the standard test for administration in January, 1997. Therefore, a second adjustment is required to quantitatively compare the test scores obtained in outdated tests administered by Drs. Berland and Dee with the current Wechsler Adult Intelligence Test 3rd Edition (WAIS-III) as follows:

WAIS-R to WAIS-III			WAIS - III		
1986		1993	2001	2003	2004
Berland		Dr. Dee	Dr. McClain	Dr. Prichard	Dr. Maher
VIQ	65	67	61	67	66
PIQ	72	81	73	73	77
FSIQ	70	72	63	68	69

All Of Mr. Brown's test scores consistently measure sub-average intellectual functioning.

After the various tests are correlated, it is clear that Mr. Brown's test scores consistently measure sub-average intellectual functioning. All of Paul Brown's scores below within the range of (65-75) and demonstrate that his intellectual functioning has always been within the mentally retarded range. Following appropriate adjustments

for comparison, Dr. McClain testified that all of Mr. Brown=s IQ scores (Dr. Berland (FSIQ 70), Dr. Dee (FSIQ 72), Dr. Prichard (FSIQ 68), Dr. Maher (FSIQ 68-69) and Dr. McClain (FSIQ 63) illustrate that he functions within the mentally deficient range of 65 to 75. In Atkins, the Supreme Court accepted the premise that an IQ between 70 and 75 or lower, is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition. *See*: Sadock & V. Sadock, *Comprehensive Textbook of Psychiatry* 2952 (7th ed. 2000), Atkins 122 S.Ct.at 2245.

All of Mr. Brown=s test scores on Wechsler tests today are consistent with the original test score of 72 that was recorded on the Wechsler Intelligence Scale, Children=s version in 1960, thereby establishing the onset of significant sub average intellectual functioning consistent with mental retardation exiting prior to age 18 . (S.ROA, Vol. 7, pp. 1108, 1110). Once outdated tests are adjusted, all tests administered throughout Paul Brown=s lifetime document significant sub average intellectual functioning. The trial court abused its= discretion by totally ignoring tests, evaluations and testimony in the record from Drs. Berland, Dee, Afield supporting Paul Brown=s claim of mental retardation.

Fla. Stat. 921.137 (1) and Fla.R.Crim.P. 3.203(b) define adaptive behavior as Athe 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.@ F.S.' 921.137(1) and Fla.R. Crim.P. 3.203 (b) both state Asignificantly sub average intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18@. The language is clear that mental retardation must manifest from conception to age 18. Deficits in adaptive behavior must concurrently exist with significant sub average intellectual functioning. Therefore, like intelligence an individual=s adaptive behavior must be accessed from conception to age 18. Fla.R. Crim.P. 3.203 (b) and F.S. ' 921.137 do not specify tests to be used and defer to the Department of Children and Families Rule 65 B-4.032 of the Florida Administrative Code for standardized test to be used.

Fla. Admin. Code Ann. R. 65b-4.032 (2) still allows the court to consider 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 and evaluation materials. With the caveat that, the results of such evaluations submitted to the court shall be accompanied by the published validity and reliability data for the examination.

Fla. R.Crim.P. 3.203 specifies that the intelligence tests must be the ones authorized by the Department of Children and Families Rule 65-B-4.032. While this rule specifies two tests that shall be used for the purpose of determining intelligence, it does not specify a test(s) to be used in order to assess an individual=s adaptive behavior. Florida Statutes authorize the Department of Children and Family Services

to adopt rules specifying the tests to be used in determining mental retardation. The Department of Children and Families, Chapter 160-2D - Chapter 3 does list specific tests for use in evaluating adaptive behavior as: *Vineland, Social Maturity Scale*, AAMD Adaptive Behavior Scales, California Preschool Social Competency Scale, Denver Developmental Screening Test, Callier Azusa Scale (for deaf and blind children), Balthazar Scales of Adaptive Behavior, Neonatal Behavior Assessment Scale and the Camelot Behavioral Checklist. [emphasis added] (S.ROA, Vol. 6, pp. 857,858).

The test used by Dr. Prichard to evaluate Paul Brown=s adaptive behavior is called A*Scales of Independent Behavior*@ and is <u>not</u> one of the tests that is specified for use by the Department of Children and Families in Florida. Dr. McClain testified that the A*Scales of Independent Behavior*@ is based upon a person=s opinion of what they believe that a person could do as opposed to actually being based upon what the person has observed and seen the person do. The test used by Dr. McClain, the A*Vineland, Social Maturity Scale*@ is based upon actual observation as opposed to a person=s belief of what a person can do. The distinction is important because it is the difference between <u>actually observing</u> a person engaging in a particular behavior,(i.e.) balancing a checkbook, eating with fork and knife, dressing themselves regularly, being on a budget, doing to work regularly, versus a belief of capability. (S.ROA, Vol.

6, pp. 858-859). One opinion is based upon subjective rationale (belief) while the other is based upon objective criteria (observed behavior).

The Vineland Social Maturity Test is one of the specified tests in Chapter 393, of The Department of Children and Family Regulations for accessing Adaptive Behavior. When using the Vineland Social Maturity Test, the evaluator interviews respondents about the social skills, communication skills, etc. of the person being evaluated (i.e. Paul Brown), conducts a structured interview and then completes the form. The informants must have sufficient information to obtain a valid result. (S.ROA, Vol. 2, p. 239, HRSM Regs, 160-2D, Chpt.3, October, 1985).

In describing suitable respondents, Dr. McClain testified that the person must have day in, day out contacts with the individual (being evaluated) during the relevant period of time (age 18 and below). A preferred respondent is someone who has known the individual (being evaluated) for several years or over several developmental periods. Someone related to the victim, might obviously provide an inaccurate and biased response. (S.ROA, Vol. 6, p. 869). The Vineland solicits information regarding activities that the respondents have actually observed the person (Paul Brown) doing as opposed to what the respondent just believes that the person (Paul Brown) can do. The distinction is important from the standpoint of Areliability of the information@ as the respondent has actually seen the person doing a particular action and the frequency of the actual act performed. (S.ROA, Vol. 6, pp. 870, 871).

Dr. McClain used the A*Vineland, Social Maturity Scale*@ to document deficits in adaptive areas of AFunctional Academic Skills@, Communications@ and ASocial/Interpersonal Skills@. Mr. Brown=s upbringing is also a significant factor in assessing his adaptive skills. As an individual who was in and out of a boy=s home, orphanage and the beneficiary of physical abuse and head trauma inflicted by several family members, living in such circumstances would have significantly impaired other adaptive areas for measurement specifically his AHome Living@ and AHealth and Safety@ environment. (S.ROA, Vol. 6, pp. 861, 862). Dr. McClain confirmed Paul Brown=s excessive use of alcohol and regular use of amphetamines, resulting in deficiencies in his AHealth and Safety@ environment. Dr. McClain confirmed deficiencies in Paul Brown=s AWork@ environment based upon the menial jobs held as an aluminum can collector, nurseryman and tree cutter. She documented Paul Brown=s AHome Living@ limitations based upon evidence of his inability to budget this income without the assistance of others. (S.ROA, Vol. 6, pp. 862, 863).

Dr. Prichard used the Vineland to assess Paul Brown=s adaptive behavior skills via information received from Fannie Jones (victim=s mother) but abandoned this test when conducting further interviews. He used a different form, the AScales of Independent Behavior@ to ask questions of a security guard that works at Union Correctional Institute where Mr. Brown is housed. (S.ROA, Vol. 6, p. 877).

Dr. McClain testified that an individual=s adaptive behavior is affected within a

structured environment where they are directed into a daily routine. Such an environment will help them optimize the abilities they do have, and thus, these individuals will perform better. (S.ROA, Vol. 6, p. 879). While the psychiatric community has not reached a consensus on how adaptive skills should be measured for incarcerated individuals, Dr. McClain stated that information from guards may be helpful, collateral informants for behavior Awhen they weren=t incarcerated@ are sought out because the relevant period for assessment according to the Statute is Aprior to age 18" for determination mental retardation. (S.ROA, Vol. 6, p. 880).

Dr. McClain testified that Mr. Brown=s adaptive behavior scores from the Vineland places him in the severely mentally retarded range based upon the information obtained covering the relevant time period (conception to age 18) but that is not her final diagnosis. (S.ROA, Vol. 6, p. 906). In reaching a final diagnosis she concludes that he suffers from mild mental retardation, looking at his academic records, his progression, evidence of a learning disability, his school behavior and adaptive deficits. Using the DSM-IV and having reviewed all of Mr. Brown=s testing, Dr. McClain testified that in her opinion Paul Brown has mild mental retardation based upon her assessment of his intelligence testing and adaptive testing results. (S.ROA, Vol. 6, p. 881). Dr. McClain based her opinion is on objective pieces of data within Paul Brown=s academic records and determinations about some adaptive behavior can be made from these academic records. Dr. McClain=s opinion is not based upon a

subjective basis but a clinical decision based upon the criteria of mental retardation in looking at the adaptive behavior in conjunction with intellectual functioning. (S.ROA, Vol. 6, p. 910).

Dr. McClain assessed Paul Brown=s capacity for adaptive behavior at age 18 years or below as required by statute for onset. (S.ROA, Vol. 6, pp. 868,869). Dr. McClain reached an opinion regarding Paul Brown=s mental health status by reviewing his I.Q. testing coupled with the Vineland Adaptive Behavior Skills from information given by, Jimmy Brown, Mr. Brown=s biological brother, a review of academic records in terms of school functioning and information provided by Ms. McDonald (Paul Brown=s 5th grade teacher) during interview on May 12, 2003. All of this information resulted in Dr. McClain=s clinical opinion that Paul Brown is functioning in the mild mental retardation range. (S.ROA, Vol. 6, pp. 876-877).

Dr. McClain interviewed Fannie Jones (the victim=s mother and Paul Brown=s girlfriend at time of the crime). During this interview in 2002, Ms. Jones described Paul Brown as not having a hand in the paying of any household bills, and engaging in only menial type of employment as collecting aluminum cans. This description of Mr. Brown was supported by the record. Paul Brown Sr. testified at the penalty phase proceeding that his son made his living collecting aluminum cans and had been so employed for close to five years prior to the crime. (R. - 530) In 2003, Ms. Jones was interviewed by the State=s expert who was using the same test as used by Dr.

McClain, the *Vineland*, to gather information to assess Paul Brown=s adaptive behavior. Ms. Jones responses were very different than that originally provided. In fact, the discrepancies were so significant that they were sufficient for Dr. McClain to question the reliability all information provided by this informant during 2003 interview. (S.ROA, Vol. 6, pp. 876-877).

Dr. Prichard used the Vineland during his interview with Ms. Jones but used a different testing instrument, the AScales of Independent Behavior@ when interviewing Sgt. Young. This test is not one on the list of approved and accepted instruments for assessing adaptive behavior by the American Psychiatric Association or the American Association on Mental Retardation guidebooks for determining developmental disabilities or the statutory guidelines. (S.ROA, Vol. 6, pp. 877, 878). Dr. McClain testified that she was unfamiliar with it. Dr. Prichard did not provide information to support the validity of this test, any information regarding instructions provided by the producer of the test, and no information regarding the published validity and reliability data for this adaptive behavior test was ever presented as mandated by the rule. Any reliance by the trial court on this test and biased opinion of Ms. Jones was error.

Dr. Prichard administered the Vineland to Fannie Jones, the victim=s mother and obtained a composite score of 93, that is outside of the category of mild mental retardation. (S.ROA, Vol. 6, p. 946). Dr. McClain explained that the victim=s mother has an inherent bias affecting the reliability of the information she communicated and

identified specific discrepancies refuted by the record. Any reliance by the court upon expert opinions rendered as a result of bias information is erroneous,

Dr. Prichard stated that it is his practice to interview reliable sources that know the individual prior to age 18 when assessing adaptive behavior, but he did not do so because Mr. Brown=s intelligence test scores were not below 70. As a result of this IQ information, he felt there was Areally no need to get the adaptive behavior stuff prior to the age of 18". (S.ROA, Vol. 6, p. 955). Dr. Prichard did not review the intelligence tests given by Dr. Berland and Dr. Dee. If he had examined this information closely he would have determined that an outdated version was given and made appropriate adjustments in the scores. Dr. Prichard determined that Paul Brown was not mentally retarded based upon adult IQ scores alone, and did nothing more. (S.ROA, Vol. 6, p. 958). Therefore, Dr. Prichard=s evaluation is flawed.

Mr. Brown=s interview with Dr. Prichard corroborated the information provided by Sgt. Young and revealed deficiencies in twelve adaptive skills areas. Instead of retrospectively assessing Paul Brown=s adaptive functioning prior to age 18, Dr. Prichard concluded that Mr. Brown was malingering, and ignored objective tests that disputed that fact. (S.ROA, Vol. 6, p. 958). Although the information provided by Sgt. Young=s documented deficits Mr. Brown=s adaptive behavior in ten skill areas, Dr. Prichard disregarded this information entirely relied only upon the information provided by a biased respondent, Fannie Jones. Dr. Prichard=s evaluation of Paul

Brown was incomplete and therefore flawed.

Dr. Prichard testified that the assessment of retardation consists of the administration of an intellectual test and determination of A*present* adaptive behavior@. (S.ROA, Vol. 6, p. 919). On cross examination, Dr. Prichard admitted that the assessment of retardation consists of the administration of an intellectual test, assessment of adaptive behavior skills and that the Florida Statute does not state Apresent adaptive functioning@. (S.ROA, Vol. 6, p. 956). This distinction is important. Dr. Prichard agreed that the onset prior to age 18 requirement refers to both intellectual and adaptive functioning@. (S.ROA, Vol. 6, pp. 954, 955). Dr. Prichard=s focus on present adaptive functioning and limited evaluation prevented him from addressing Paul Brown=s history of adaptive behavior deficits (prior to age 18) that support a diagnosis of mental retardation.

Dr. Prichard opted to use the SIDR to estimate adaptive skill functioning based on perceived ability and not actual observations. (S.ROA, Vol. 6, p. 941). The information gathered from Mr. Brown, Dr. Prichard resulted in a score of 57 on the SIDR (78 in communication, 53 in personal living, 64 in community living, and 54 with a broad independent support score of 57). Dr. Prichard determined Mr. Brown to have Aan overall measure of adaptive behavior, comparable to that of the average individual at age 10 year 11 months. His functional independence is limited to very limited @ and Alimitations in twelve adaptive skills areas: fine-motor skills, social

interaction, language comprehension, language expression, eating and meal preparation, dressing, personal self-care, domestic skills, time and punctuality, money and value, work skills, and home/community orientation@. The information received from Sgt. Young, resulted in Mr. Brown scoring at 80 (Standard score of 87, communication of 77, personal living of 85 and community living of 81). Dr. Prichard summarized this as Aan overall measure comparable to that of the average individual at age 15 years 10 months. He concluded that Mr. Brown=s functional independence is limited to age-appropriate@ and found Alimitations in ten adaptive skills areas: fine-motor skills, social interaction, language comprehension, language expression, eating and meal preparation, dressing, domestic skills, time and punctuality, money and value, and home/community orientation.@ (S.ROA, Vol. 6, p. 947, 948) (S, ROA, Vol. 2, Report of Adaptive Behavior Testing, March 3, 2003, Gregory A. Prichard, Psy.D., pp. 261, 262). The trial court ignored testimony of confirmed deficits in adaptive behavior in support of Dr. McClain=s diagnosis of mental retardation.

Dr. Maher was appointed by the court to evaluate Paul Brown for mental retardation. He administered an individual standardized intelligence test to assess his intelligence and testified that his corrected results would place Mr. Brown=s full scale IQ at 68-69. (S.ROA, Vol. 7, pp. 1070,1071). This score demonstrates evidence of mental deficiency. The next step in performing a complete evaluation required Dr. Maher to evaluate Paul Brown=s adaptive behavior. Dr. Maher described the

Vineland Adaptive Scales as the primary test related to Mr. Brown=s adaptive behavior skills. (S.ROA, Vol. 6, p. 1010, 1111). Dr. Maher testified at evidentiary hearing that he is familiar with the *Vineland*, which he described as a specific questionnaire administered by a professional who compiles information from individuals familiar with daily life circumstances and the functioning of the person in question regarding their behavior and their patterns of behavior in daily life. However, he failed to use any instruments to assess Paul Brown=s adaptive behavior and testified that he merely relied upon his interview with Mr. Brown, and tests done by other individuals. (S.ROA, Vol. 7, pp. 1071,1072).

Dr. Maher was appointed by the court in this case was to conduct an independent and full evaluation of Paul Brown. (S.ROA. Vol. 6, p. 984,985). Dr. Maher failed to do this, although aware of the importance of using reliable informants when trying to evaluate adaptive behavior. (S.ROA, Vol. 7, p. 1072). Dr. Maher stated that there were significant periods of time where Paul Brown=s adaptive functioning was at a low level, a level that would be consistent with mental retardation. He also stated that during significant periods of time, Mr. Brown=s level of adaptive functioning was above that expected of an individual who is mentally retarded. (S.ROA, Vol. 6, p. 1011). Dr. Maher concluded that Paul Brown=s other psychiatric problems, a mood disorder, psychotic symptoms and a substance abuse disorder affected his level of adaptive functioning. (S.ROA, Vol. 6, p. 1011). He concluded

that Paul Brown has a relatively normal IQ. (S.ROA, Vol. 6, p. 1012). Dr. Maher found that Mr. Brown demonstrated significant deficits that were apparent prior to age 18 but concluded that those deficits were caused Aby something other than mental retardation." (S.ROA, Vol. 6, p. 1013). Dr. Maher testified that Paul Brown was diagnosed as a psychotic boy and that would be a very clear cause of limited educational achievement and apparent intellectual impairment. (S.ROA, Vol. 6, p. 1013).

Although reliable informants and contact information was provided, Dr. Maher chose not to formally assess Paul Brown=s adaptive behavior. No interviews were conducted with individuals familiar with his Paul Brown=s daily life circumstances his behavior and patterns of his behavior. (S.ROA, Vol. 7, p. 1072).

In reaching his conclusion that Paul Brown functioned inadequately at times and adequately at other times during his life, Dr. Maher merely relied upon Dr. Prichard=s interview of Fannie Jones. (S.ROA, Vol. 7, p. 1073). Dr. Maher ignored the fact that Ms. Jones is the mother of the victim in this case and was considered a bias and unreliable source by Dr. Valerie McClain.

In 2002 Ms. Jones described Paul Brown as not having a hand in the paying of any household bills, and engaging in only the most menial type of employment as collecting aluminum cans. In 2003, Ms. Jones advised Dr. Prichard that Paul Brown was able to balance a check book, pay bills regularly, working regularly, and call in if

absent from work. Dr. McClain testified that Ms. Jones= current statements just Adidn=t make sense based upon [my] her original interview with [Fannie] her@. (S.ROA, Vol. 6, pp. 877, 878). The original statements description of Paul Brown as an aluminum can collector are supported by the record. Mr. Paul Brown Sr. testified at the penalty phase proceeding that his son made a living collecting aluminum cans and had been so employed for close to five years prior to the crime. (R. B p. 530). Serious discrepancies in Fannie Jones= statements were prompted Dr. McClain to question the reliability of her responses to Dr. Prichard for assessing Mr. Brown=s adaptive behavior via *Vineland* test. (S.ROA, Vol. 6, pp. 877,878). Dr. Maher testified that he was aware of special precautions that should be taken when evaluating information provided by informants that have a negative outlook on the person being evaluated (S.ROA, Vol. 7, p, 1073), was aware of discrepancies noted by Dr. McClain and her concerns regarding the reliability of Ms. Jones= information. However, he did not take any measure to ensure the reliability of Ms. Jones= information or contact Dr. McClain to discuss this case. (S.ROA, Vol. 7, p. 1074). Dr. Maher was aware that Paul Brown had recorded low scores on adaptive behavior tests given by Dr. Prichard and Dr. McClain, but never consulted with either expert to discuss these findings. (S.ROA, Vol. 7, p. 1074).

Dr. Maher did not independently evaluate Paul Brown=s adaptive behavior as he was hired to do. He failed to consult with any of the various experts that had

examined Mr. Brown and described him as mentally retarded, mentally ill, and brain damaged. Although Dr. Maher agrees that the difference between Mr. Brown=s verbal and performance scores is consistent with brain damage and that psychotic people can have mental retardation, he did not consult with anyone else. (S.ROA, Vol.6, p. 1013).

In reaching a final diagnosis that he suffers from mild mental retardation, Dr. McClain explained that you may not base an opinion on adaptive behavior skills alone but to render a clinical opinion must look from birth to age 18, his academic records, his progression, evidence of a learning disability, and his school behavior. Dr. Maher did not do this. (S.ROA, Vol. 6, pp. 907,908) Dr. McClain used the DSM-IV-TR, and reviewed all of Mr. Brown=s test history and evaluations. She concluded that Paul Brown has mild mental retardation based upon her assessment of his intelligence testing and adaptive testing results. (S.ROA, Vol. 6, p. 910). This opinion is based upon objective pieces of data within Paul Brown=s academic records and references documenting his behavior deficits. (S.ROA, Vol. 6, p. 909). Dr. McClain=s clinical decision is based upon the criteria of mental retardation in looking at the adaptive behavior in conjunction with intellectual functioning. (S.ROA, Vol. 6, p. 910). Her opinion supports Dr. Afield=s clinical assessment that Paul Brown is a mentally retarded man. (S.ROA, Vol. 6, p. 910).

Dr. Prichard and Dr. Maher did not render a clinical decision based upon the

criteria of mental retardation using Paul Brown=s adaptive behavior in conjunction with his intellectual functioning. Dr. Prichard relied upon one biased informant for his opinion and ignored adaptive deficits documented in responses given to him by Sgt. Young. Dr. Maher only performed the intelligence test and failed to independently assess Mr. Brown=s adaptive functioning. The court=s reliance on Dr. Prichard and Dr. Maher=s opinion is erroneous.

Experts agree that the *Diagnostic and Statistical Manual Of Mental Disorders-Text Revision* (DSM IV-TR) is the tool used to diagnose mental retardation. (S.ROA, Vol. 7, p. 1110). Dr. Maher testified that the DSM IV-TR states that an individual can be diagnosed as mentally retarded regardless of any other disorder. In fact, individuals with mental retardation have a prevalence of co-morbid mental disorder four or five times greater than the population. (S.ROA, Vol. 7, p. 1083). Individuals who are mentally retarded can have superimposed mental health problems and brain damage and still be diagnosed with mental retardation. (S.ROA, Vol. 7, p. 1083). Dr. Maher stated that it can be possible to be born both psychotic and mentally retarded. (S.ROA, Vol. 7, pp. 1083,1084). A diagnosis of mental illness does not preclude a concurrent diagnosis of mental retardation and is, in fact, commonly seen with co-morbid mental illness. (S.ROA, Vol. 7, p. 1110).

Dr. McClain testified that Mr. Brown=s delayed responses during testing is attributable to his neurological impairments. She reached this conclusion based upon

the results of additional neuropsychological timed tests that she gave Paul Brown to look at his visual scanning, and speed of processing abilities. (S.ROA, Vol. 6, pp. 861-867). Dr. Robert Berland, examined Paul Brown and testified at penalty phase that Mr. Brown is Aslow cognitively@ and brain damaged. (R. - 545-546). Dr. Henry L. Dee, reported that Ataken as a whole, these results suggest bilateral cerebral involvement or brain damage.@ (S.ROA, Vol. 2, p. 228, State=s Exhibit 3). Dr. McClain testified that Awith mental retardation the person can be flat affect, meaning that there=s no real emotion involved, that they=re slower in general terms responding to things. So they may not respond as quickly or pick up on some of the nuances of encouragement, that it takes them a little longer@. (S.ROA, Vol. 7, p. 1112).

Dr. McClain testified that she reviewed Paul Brown=s history, and there is a history of several head injuries. There is also a history of delayed academic achievement, suggesting a history of Paul Brown being slower than other people when he was in school. (S.ROA, Vol. 7, p. 1112). Although there is some depression all experts agree that Paul Brown=s mental health issues or overt psychoses or depression did not invalidate tests. Paul Brown=s brain damage and mental illness did not interfere with the validity of the testing for mental retardation. (S.ROA, Vol. 7, p. 1113).

Dr. McClain assessed Paul Brown using the Wechsler Adult Intelligence Scale, 3d. Edition. She conducted some neuropsychological screening and administered the

Halsted Reitan Trail Making A and Trail Making, the Rey Complex Figure Test, the Rey Auditory Verbal Learning Test, and the Rey -15 Item Test (a brief test for determining malingering). The intellectual testing was designed to determine Mr. Brown=s full scale IQ functioning and the remaining tests were to look at his neuropsychological functioning and to assess whether there might be any component of organic dysfunction. (S.ROA, Vol. 6, p.860). In relying on statements, facts and all data reasonably relied upon by psychologists to support her opinion, Dr. McClain concluded that Mr. Brown=s IQ was 63 with a verbal IQ performance at 61 and a performance IQ at 73. (S.ROA, Vol. 6, p. 861).

Dr. Prichard was appointed as the State=s expert and administered the Wechsler Adult Intelligence Scale, 3d Edition. The results of his testing were verbal score of 67, performance IQ score of 73 and full scale IQ score of 68.
(S.ROA, Vol. 6, pp. 921,922). This testing is absolutely consistent with the test results obtained by Dr. Valerie McClain in 2001. The score of 68 clearly places Paul Brown in the mentally deficient category. Dr. Prichard testified that his assessment is not a valid measure of Paul Brown=s intellect due to Amalingering@. (S.ROA, Vol. 6, pp. 922-924). In support of his opinion, Dr. Prichard testified that he did not Afeel that Mr. Brown was working as quickly as he could@ and Atook a long time to respond@. (S.ROA, Vol. 6, p. 923). Dr. Prichard did not administer any objective tests to identify malingering or refute Dr. McClain=s testimony that Mr. Brown=s

delayed responses are attributable to his neurological impairments. Dr. Prichard did not conduct additional neuropsychological timed tests to look at visual scanning, and speed of processing to determine reasons for Mr. Brown=s delayed responses. (S.ROA, Vol. 6, p. 865). Dr. Berland testified at penalty phase that Paul Brown is brain damaged. (R. **B** p. 545-546) Dr. Henry L. Dee=s report dated April 15, 1993 states, Athere was no evidence in that record that suggested malingering@ and that Athe projective test that was administered showed none of the evidence of bizarre or absurd responding that suggested malingering@. (S.ROA, Vol. 2, p. 219, State=s Exhibit 3)

Dr. McClain administered a Rey Complex Figure Test, the Rey Auditory Verbal Learning Test, and the Rey -15 Item Test (a brief test for determining malingering). The results revealed no evidence of malingering, and confirmed neuropsychological deficits, deficiencies in his full scale memory quotient and Avery low@ scores on Digit Span. (S.ROA, Vol. 6, p. 860).

Dr. Pritchard testified that Paul Brown=s IQ test of 72 does not likely represent his capacity as to IQ because Ahe (Paul Brown) wasn=t motivated to do his work, so he was referred to the school psychologist@. (S.ROA, Vol. 6, p. 936). Dr. Prichard=s assertion that Paul Brown did not give full effort when tested at age 10 is refuted by documents that describe a young boy anxious to learn quoting Paul Brown=s own words **Y** AI want to learn what those words mean@. (S.ROA, Vol. 2, p. 215, State=s Exhibit 9). Paul=s words are inconsistent with Dr. Prichard=s characterization of him

as a child that lacked motivation to learn.

On January 7, 2005, Dr. Maher testified that AIt was my conclusion that he [Paul Brown] made an acceptable effort on testing and that it was a reasonably accurate reflection of his ability on the test data@. (S.ROA, Vol. 6, p. 1009). This testimony contradicts his subsequent report that states there might be a lack of full effort on behalf of Mr. Brown in testing. (S.ROA, Vol. 6, p. 1076). Dr. Maher acknowledged that the data in the test does not directly support a conclusion that Paul Brown gave less than a full effort. (S.ROA, Vol. 6, p. 1077). Dr. Maher did not analyze intra subtest patterns for scatter or administer tests that identify that malingering is present. He did not administer a Rey Test (test used by practitioners to identify malingering). Dr. Maher could not recall reviewing the Rey test administered by Dr. McClain documenting no malingering. (S.ROA, Vol. 7, pp. 1079, 1080).

Dr. Maher testified that information that Paul Brown=s reactions were delayed during his testing and he did not answer quickly, did not repeat back things that should have been memorized in a quick time frame as reported by Dr. Prichard during his testing had led him to conclude that Mr. Brown was not performing at his best. (S.ROA, Vol. 7, p. 1092). As a result of this reported behavior, Dr. Maher testified that he concluded that there was a lack of effort on Paul Brown=s part demonstrated during testing. (S.ROA, Vol. 7, p. 1093). Clearly, Dr. Maher merely adopted Dr. Prichard=s evaluations without conducting any independent testing of his own as he

was retained by the court to do.

Dr. McClain testified that there are 16 different indicators that would be typically used clinically to assess for malingering. Not a gut level but an actual checklist that is gone through to determine its presence. Paul Brown was tested based upon that criteria and found the objective findings did not support a conclusion that he was malingering. (S.ROA, Vol. 7, pp. 907,908). Dr. McClain explained several factors relevant to consider in Paul Brown=s hesitant responses noting that a person like Paul Brown that has organic or neuropsychological impairment are just slower in their processing. The cortical tone of the brain causes them to be slower and there is delayed processing. Dr. McClain described the situation as AIt=s on the conveyor belt, but it doesn=t come up as quickly.@ (S.ROA, Vol. 7, pp. 907,908). In addition, she testified that Awith mental retardation the person can be flat affect, meaning that there=s no real emotion involved, that they=re slower in general terms responding to things. So they may not respond as quickly or pick up on some of the nuances of encouragement, that it takes them a little longer." (S.ROA, Vol. 7, p. 1112).

Dr. McClain testified that there is no objective evidence to support malingering. (S.ROA, Vol. 7, p. 1112). All appointed experts had an opportunity to conduct additional tests to confirm the neurological impairments and rule out malingering. Only Dr. McClain chose to do so. Objective test results confirm the presence of neurological deficits and refutes any assertion of malingering or lack of full effort by

Paul Brown.

Fla.R.Crim.P. 3.203 (b) details the requirements for diagnosing Mental Retardation in Florida in all first degree murder cases in which the state attorney has not waived the death penalty as follows:

> Significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. Significantly sub-average intellectual functioning is defined as performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services, Fla. Admin. Code Ann .r. 65B-4.032.

A. Intellectual Functioning

Paul Brown=s Intellectual Test Results Establish That He Functions At Significantly Sub-Average Intellectual Functioning Range

Wechsler Intelligence Test, Children=s			**Defendant=s Age**
1960	FSIQ 72	Dr. Robinson	10
Wechsler Adult Intelligence Test, 3d. Edition			
2001	FSIQ 63	Dr. McClain	51
2003	FSIQ 68	Dr. Prichard	53
2004	FSIQ 68-69	Dr. Maher	54
Wechsler Adult Intelligence Test			
(Outdated versions updated to correlate to Wechsler Adult Intelligence Test, 3d. Edition adjusted per Dr. McClain=s expert testimony)			
1986	FSIQ 70	Dr. Berland	36
1993	FSIQ 72	Dr. Dee	43

Listed above are all tests administered to Paul Brown. After the proper adjustments are made as suggested by experts, Dr. Berland and Dr. Dee=s test scores are consistent with all other intelligence tests taken throughout his lifetime. Paul Brown=s scores on all standardized intelligence test authorized by the Department of Children and Family Services in Rule 65B-4.032 to determine mental retardation in Florida are within the mentally retarded range.

Most recently, Mr. Brown was tested in 2001, 2003 and 2004 on the Wechsler Adult Intelligence Test, 3d. Edition, that is specified for use by the Department of

Children and Family Services in Rule 65B-4.032 as required by Fla. R.Crim.P. 3.203. He has scored two or more standard deviations from the mean on each testing scoring 63,68,69 as defined in F.S. '921.137(1). Mr. Brown=s score below 70 on three identical intelligence testing instruments specified for use in the rule, establishes evidence beyond a reasonable doubt of sub-average general intellectual functioning. These results are consistent with his score on a Wechsler Intelligence Test, Children=s version in 1960 at the age of ten (10).

Although not specified in Fla. Admin. Code Ann .r. 65B-4.032 as required by Fla. R.Crim. P. 3.203, Paul Brown was tested by the Department of Corrections on a Kent IQ test on November 1, 1967 at age 17 registered an IQ score of 57, was listed as AMental Defective@ and assigned a 3.3 grade equivalent rating. In Atkins, the court cited with approval an IQ range of 70 to 75 for the intellectual functioning prong in defining mental retardation excluding margin of error. Atkins, 122 S.Ct, at 2245.

Paul Brown=s test history and school records establish evidence beyond a reasonable doubt that he is functions in the sub average intelligence range and that he was functioning at this level prior to the age of 18.

B. Adaptive Behavior

Testing for Adaptive Deficits And Record Establishes That Paul Brown Suffers Deficits In Adaptive Behavior Concurrent With Sub-Average Intellectual Functioning

The term adaptive behavior is defined in the rule means the effectiveness or degree with which an individual meets he standards of personal independence and social responsibility expected of his or her age, cultural group, and community. Adaptive Behavior Deficits must occur concurrent with sub average intellectual functioning and manifest during the relevant period from conception to age 18. Dr. McClain explained that in order to render a clinical opinion on adaptive behavior we must look to the period in Paul Brown=s life from age 0 to 18, academic records, progression, identification of a learning disability, school behavior. Interviews with teacher (i.e.) Ms. McDonald and stepbrother, Daniel provided relevant data supporting early deficits in socialization and basic communications. Academic records show Mr. Brown=s progress as slow or none, establish that he was Afour grade levels behind@, failed fourth grade three times, and that basic communication skills were very poor. (S.ROA, Vol. 6, pp. 907,908).

Dr. McClain=s clinical interview with Mr. Brown, interviews with teachers and siblings documented concurrent adaptive function deficits with significantly sub-average intellect in existence prior to Mr. Brown reaching the age of 18. Dr. McClain has diagnosed Mr. Brown with Mild Mental Retardation. A co-morbid diagnosis with

existing mental illness and brain damage.

In Atkins a determination was made that the defendant was >mildly mentally retarded: Atkins, at 2245. This determination was based upon interviews conducted with people who knew Atkins, a review of school and court records, and the administration of a standard intelligence test. Atkins, at 2245. In this case similar interviews were also conducted with Mr. Brown=s teacher (Ms. McDonald) confirming serious learning problems, detachment and withdrawn behavior. Paul Brown was described as a Ashy lonely boy@. (S.ROA, Vol. 6, p. 865). All of this information from his teacher and records support Dr. McClain=s finding of significant limitations in Mr. Brown=s AFunctional Academic Skills@, his ACommunications@ and ASocial/Interpersonal Skills@. Consequently, Dr. McClain concluded that Mr. Brown=s adaptive skills were Ain the low range or low adaptive level for communication, daily living skills and socialization@.

Mr. Brown=s upbringing is also significant in evaluating his adaptive behavior. Paul Brown was an individual who was in and out of a boy=s home, orphanage and the beneficiary of physical abuse and head trauma inflicted by several family members. (S.ROA, Vol. 6, p. 864). As a result, such living circumstances significantly impaired his AHome Living@ and the AHealth and Safety@ of his environment. (S.ROA, Vol. 6, pp. 875, 898).

Dr. McClain reported that Mr. Brown=s use of alcohol and regular use of

amphetamines are evidence of deficiencies she noted in AHealth and Safety@ areas of his environment. Deficiencies in Paul Brown=s AWork@ environment were also established by his history of working in menial employment. Paul Brown worked jobs as a trash collector and can collector trading aluminum cans to make money. He held a part-time position in a garden shop. AHome Living@ limitations were evidenced by Mr. Brown=s inability to budget his income without the assistance of others. There was no evidence that Mr. Brown ever held a bank account or was able to pay any of his bills with checks. (S.ROA, Vol. 6, pp. 864,866).

Dr. McClain described the educable mentally handicapped as people who can receive assistance and be functional. A mentally retarded individual can score on objective testing at very low functioning levels for adaptive behavior but that person can learn and adapt to deficits where they have some structure or supervision. (S.ROA, Vol. 6, p. 882). Some mentally retarded individuals drive cars, but they are still mentally retarded. Dr. McClain described Paul Brown as such an individual who was trying to do what he could do. She testified that she would classify Mr. Brown in the mild to moderate mental retardation range. (S.ROA, Vol. 6, p. 881).

Dr. Prichard, determined Paul Brown to have Aan overall measure of adaptive behavior, comparable to that of the average individual at age 10 year 11_months. His functional independence is limited to very limited@ and Alimitations in twelve adaptive skills areas: fine-motor skills, social interaction, language comprehension, language

expression, eating and meal preparation, dressing, personal self-care, domestic skills, time and punctuality, money and value, work skills, and home/community orientation@ and Aan overall measure comparable to that of the average individual at age 15 years 10 months. His functional independence is limited to age-appropriate@ and he found Alimitations in ten adaptive skills areas: fine-motor skills, social interaction, language comprehension, language expression, eating and meal preparation, dressing, domestic skills, time and punctuality, money and value, and home/community orientation@ based upon information reported by Paul Brown and Sgt. Young, respectively. (S.ROA, Vol. 2, pp. 252, 261, 262, Report of Adaptive Behavior Testing, March 3, 2003, Gregory A. Prichard, Psy.D.)

Drs. Prichard and McClain are in agreement that a deficit in only two areas of adaptive skills are required to satisfy the DSM or AMA requirements for a diagnosis of mental retardation to be made. (S.ROA, Vol. 6, p. 944). Dr. McClain testified that Paul Brown suffers sufficient deficits in adaptive behavior areas to meet the statutory requirements in diagnosing mental retardation. Dr. Prichard=s Reports also document serious deficits in excess of two areas.

C. Paul Brown Suffers Co-Morbid Diagnosis Of Mental Retardation, Mental Illness, And Brain Damage

Dr. McClain is a qualified professional who is authorized in accordance with Florida Statutes to perform evaluations in Florida. She administered a Wechsler

Intelligence Scale, Adult version test as specified by Fla. Admin. Code. Ann.r.65B-4.032 and required by Fla.R.Crim.P. 3.203. Mr. Brown=s test results of 63 FSIQ is two or more standard deviations from the mean as defined by FS. '921.137 for determining mental retardation.

Dr. McClain has formally accessed Paul Brown=s adaptive behavior using a Vineland Behavior Scales test, one of the enumerated tests specified for use in Chapter 393, Department of Children and Family regulations for accessing Adaptive Behavior in Florida. (S.ROA, Vol. 2, p. 238, HRSM Regs, 160-2D, Chpt.3, October, 1985). Dr. McClain relied upon her testing, interviews, statements, facts and all data that is reasonably relied upon by psychologists to support this opinion. (S.ROA, Vol. 6, p. 910). Including penalty phase testimony from Dr. Berland that Paul Brown cannot get along on his own, has difficulty earning a living and taking care of himself, operated marginally in his community (R.- pp.541, 547) and from Dr. Afield who described him as a junk man with a marginal existence. (R-p.578) Following review of all of Mr. Brown=s test results, and in accordance with the DSM-IV, Dr. McClain clinically opined that Paul Brown has mild mental retardation based upon the criteria of mental retardation in looking at the adaptive behavior in conjunction with Mr. Brown=s intellectual functioning. (S.ROA, Vol. 6, p. 910). Dr. McClain=s opinion is supported by Dr. Afield=s clinical assessment describing Paul Brown as mentally retarded since early childhood during penalty phase. (R. p.-547) (S.ROA, Vol. 6, p.

910).

Mr. Brown has presented clear and convincing evidence to the trial court of deficits in his adaptive behavior that exist concurrently with his sub-average general intellectual functioning and manifested during the period from conception to age 18. In addition to mental retardation, experts testified that Mr. Brown has also been diagnosed as psychotic, bipolar, manic or suffering from organic apathy syndrome and with substantial brain damage. (R.- p. 543-546) Dr. Berland testified that Paul Brown has brain damage that is superimposed upon low intelligence and that there is evidence of a psychotic disturbance present. (R. - p. 545,546) Dr. Afield testified that both mental retardation and mental illness is involved and that his apparent brain damage interferes with Mr. Brown=s ability to think effectively. (R. - p. 578) The DSM-IV at page 47 states Athat the diagnostic criteria for mental retardation do not include an exclusive criteria. Basically the diagnosis of mental retardation should be made whenever the diagnostic criteria are met, regardless and in addition to the presence of other mental disorders@. (S.ROA, Vol. 6, p. 964). Mr. Brown=s mental illnesses and his mental retardation co-exist.

Paul Brown has presented evidence beyond a reasonable doubt as to his sub-average intellectual functioning. The assessment of adaptive functioning is problematic in death penalty cases. Mr. Brown=s case is typical in that he has been incarcerated on Adeath row@ for a number of years. His social and community status

has changed dramatically since the time of the homicide which led to his current death sentence. Common sense and the Court=s opinion in Atkins suggests that the point of focus of Mr. Brown=s adaptive functioning should be prior to incarceration and at or near the time of the homicide.

The American Association of Mental Retardation, 10th edition, recognized by the Atkins opinion, states the following pertinent information concerning the information gathering process in assessing the adaptive functioning prong:

> Those who use most current adaptive behavior scales to gather information about typical behavior, rely primarily on the recording of information obtained from a third person who is familiar with the individual being assessed. Thus, assessment typically takes the form of an interview process, with the respondent being a parent, teacher, or direct-service provider rather than from direct observation of adaptive behavior from self-report of typical behavior. It is critical that the interviewer and informant or rater fully understand the meaning of each question and response category in order to provide valid and reliable information to the clinician. It is also essential that people being interviewed about someone=s adaptive behavior be well-acquainted with the typical behavior of the person over an extended period of time, preferably in multiple settings. In some cases, it may be necessary to obtain information from more than one informant. The consequences of scores to the rater, informant, or individual being rated, should also be taken into consideration, as well as the positive or negative nature of the relationship between the rater or informant and the person being assessed. Observations outside the context of community environments typical of the individuals= age, peers, and culture warrant severely reduced weight. P. 85

This provision of the AAMR Manual demonstrates that Dr. McClain made a

meaningful attempt to assess the Adaptive Functioning prong of Mental Retardation. She spoke to many family members and lay-witnesses. She made a fair assessment of Mr. Brown=s school, and work history records. Dr. Prichard, in contrast, relied almost exclusively on talking to Mr. Brown and Sgt. Young at death row, Dr. Maher made no independent attempt to assess adaptive functioning. This is contrary to the stated procedure in the above quoted passage from the AAMR.

CONCLUSION AND RELIEF SOUGHT

Paul Brown scored within the mentally retarded range on four tests administered to him between 1960 and 2003. The four tests were the Wechsler Intelligence Scale - the testing instrument specified for use in Florida Administrative Code Rule 65 B-4.032(1) to determine mental retardation as defined by Florida Criminal Rule 3.203 (b). All of the mental health experts agree that his score is in the mentally retarded range on the Children=s version at the age of ten, and on three Wechsler Intelligence Scale Adult versions administered in 2001, 2003 and 2004. (S.ROA., Vol. 6, pp.838- 1041, S.ROA., Vol. 7, pp.1042-1138)

In denying relief the lower court referenced Fla. Stat. '921.137 that requires a proof by clear and convincing evidence. Mr. Brown asserts that he has established significantly sub- average intellectual functioning, concurrent deficits in his adaptive behavior, and onset prior to age 18 by clear and convincing evidence in the record. Alternatively, Mr. Brown argues that he has met this burden by a preponderance of evidence and that the application of a clear and convincing standard to establish mental retardation imposes an unconstitutional burden upon him. Cooper v. Oklahoma, 517 U.S. 348 (1966). Mr. Brown asks this Honorable Court to find that the lower court=s findings are not supported by substantial and competent evidence in the record, grant relief upon de-novo review in accordance with Fla. Stat. '921.137, Fla. R. Crim. P. 3.203(b), vacate the death penalty and impose a life sentence in his case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **Initial Brief of Appellant** has been furnished by United States Mail, first Class postage prepaid, Robert Landry, Assistant Attorney General, Office of the Attorney General, Westwood Building, Seventh Floor, 2002 North Lois Avenue, Tampa, Florida 33607 on this ____ day of January, 2006.

_____

Carol C. Rodriguez
Florida Bar No. 0931720
Assistant CCRC
CAPITAL COLLATERAL
REGIONAL COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
Telephone 813-740-3544
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY pursuant to Fla. R.App. P. 9.210 that the foregoing Initial Brief of Appellant, was generated in Times New Roman, 14 point font.

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Carol C. Rodriguez
Assistant CCRC
Florida Bar No. 0931720
CAPITAL COLLATERAL REGIONAL COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
(813)740-3544
Counsel for Appellant