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

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# REPLY BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

This brief is filed on behalf of the Appellant Paul Brown in reply to the Answer Brief of Appellee, the State of Florida. 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 numbers. The post-conviction record or supplemental record on appeal will be referred to as "S. ROA _____" or "Supp. ROA ____" followed by the appropriate page numbers. The Initial Brief of Appellant will be referred to as "IB ___" followed by the appropriate page numbers. The Answer Brief of Appellee will be referred to as "AB ___" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained.

## REPLY TO APPELLEE'S STATEMENT OF THE FACTS

The Appellee's answer brief states "Contrary to Dr. McClain's assessment, Drs. Prichard and Maher each tested the Defendant and found that the recent IQ scores suggesting a range of mildly mentally retarded were a result of malingering." (AB – p. 2.) Objective tests are available to test for malingering, however, Dr. Prichard only tested Mr. Brown's intelligence and adaptive functioning. Dr. Prichard did not conduct any additional neuropsychological tests or test Mr. Brown for malingering. Dr. Maher only tested Mr. Brown's intelligence and never tested Mr. Brown for adaptive functioning, other deficits or

malingering. Dr. Maher adopted Dr. Prichard's opinion without independent corroboration. Although objective tests can be used to determine if a test subject is malingering, and experts were aware that Dr. McClain had tested Mr. Brown no additional tests for malingering were administered. Dr. Prichard didn't bring one with him and opted not to return for a second visit. (S. ROA., V6. R. 958) Neither expert offered reasonable explanation for failing to do so.

Additional testing was done by Dr. Valerie McClain who administered a series of neuropsychological tests and formally tested Mr. Brown for malingering on a Rey-15 Item test. The test results indicate that Paul Brown's delayed responses (noted by Dr. Prichard during his testing) are caused by his neurological impairments and the Rey-15 Item Test confirmed objectively that there is no malingering. (S.ROA.V7, R. 864-867) Although the issue of malingering was a clear concern, Dr. Maher did not even recall reviewing Dr. McClain's Rey 15 Item Test results. (S.ROA. V7, R. 1080) No expert challenged the validity of Dr. McClain's neurological or malingering tests. In fact, Dr. Maher conceded that the data contained in his intelligence test does **not** directly support his conclusion that Paul Brown gave less than a full effort. (emphasis added) (S.ROA. V7, R. 1077)

Although it is true that both Dr. Prichard and Dr. McClain tested Mr. Brown's intelligence, it is incorrect to conclude from the quoted statement in Appellee's brief that the intelligence tests administered by any expert measured or

confirmed as fact that Mr. Brown was malingering. This is especially so in light of Dr. Maher's testimony, "I do not believe that he (Mr. Brown) specifically gave wrong answers when he knew correct answers. Nor do I have any evidence that he refused to give an answer when he had in mind an answer". (S.ROA.V7, R. 1090)

State expert, Dr. Prichard agreed that that the BETA score of 99 when compared with a WAIS typically underestimates true intelligence. (S.ROA.V3, R. 478-479 and Supp. ROA.V1, R. 72) and that the BETAs are not recognized in Florida Statute to test intelligence. (S. ROA. V3, R. 480) In spite of this fact, the Appellee still insists that the court consider BETA tests as instruments correlated with the Wechsler Scales and indicative of what the corresponding Wechsler Scale score would be. (S.ROA.V3, R. 479-480). There is no literature admitted to establish that BETA tests are substitutes for Wechsler Scales, that such a premise is acceptable in the psychological community, or that use of BETA tests are ever permissible for use in diagnosing mental retardation. Florida Statutes do not list the BETA as an acceptable standardized intelligence test for use in diagnosing mental retardation and or state that they are the equivalent of Wechsler Standardized Intelligence tests. (S.ROA. V6, R. 856, V7, R. 1057, 1106) Therefore, BETA tests results are not competent evidence for use in diagnosing mental retardation in Florida.

Appellee argues that the court should view a 1960 Report by the Hillsborough County School System documenting Mr. Brown's verbal score of 76 and performance score of 74 with FSIQ at 72 on a WISC Children verbal "as a completely nonvalid measure of his capacity (he was inattentive, exhibiting bizarre behavior in the classroom, not motivated) (S.ROA, V3, R. 481-82 and at Supp. V1, R. 76). There are no facts associated with the administration of this test to support Appellee's contention that this test should be dismissed as a nonvalid measure. To the contrary, it is undisputed that Mr. Brown's intelligence score in 1960 at FSIQ 72 is consistent with his most current intelligence test scores of 63 in 2001, 68 in 2003 and 68/69 in 2004 and that all of these scores are within the mentally retarded range.

Appellee states that "she (Dr. McClain) interviewed Appellant at or about the time of the decision in *Atkins v. Virginia*. (AB – p.12) and quotes Drs. Prichard and Maher's stating, "it is reasonable to believe that a person in defendant's situation has a strong motivation to perform poorly on the examinations in order to be declared mentally retarded." (AB-p.2) The facts in this case do support any inference that Mr. Brown's claim of mental retardation arose as a result of the U.S. Supreme Court's decision in *Atkins.* Dr. McClain testified that she was referred to Mr. Brown in May, 2001, interviewed him on July 2, 2001 and tested his intelligence on September 12, 2001. (Supp. ROA.V1, R.3). Mr. Brown's Weschler

Intelligence Scale, 3rd Ed. FSIQ of 63, verbal IQ at 61 and performance IQ score of 73 was obtained over nine months before the U.S. Supreme Court decided *Atkins* on June 20, 2002. (emphasis added) (S.ROA, V3, R. 407)

## ARGUMENT I

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

**A. Florida Statutes §921.137 (2006).** Imposition of the death sentence upon a defendant with mental retardation prohibited states as follows:

> (1) "As used in this section, the term "mental 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," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. 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 Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection."

**B. Standard Of Review.**

There are two questions before this court for resolution. The first is an interpretation of Florida Statute and purely a question of law.

1) Does Florida Statutes §921.137 (2006) specify that adaptive skills must be measured from conception to age 18?

The undersigned submits that this is a question of law raised in this appeal that must be reviewed by this court de novo. Looking at the plain meaning of the words "during the period from conception to age 18" used in the Statute, and giving the words a natural and ordinary meaning it appears that the age of eighteen would be the cutoff point for diagnosis. Therefore, significantly sub-average intelligence and adaptive deficits must be identified in existence for measurement prior to an individual reaching age 18. In *Foster v. State*, 929 So. 2d 524 (Fla. 2006), this Court communicated the importance of establishing onset prior to age 18. In denying relief the court noted that the "original trial does not support the allegation that Defendant evidenced significant limitations in adaptive skills before age 18. In school, Defendant was not placed in special education classes nor was there any indication from teachers that Defendant was possibly mentally retarded." *Foster* at 533. In Mr. Brown's case the opposite is true. His adaptive deficits were documented in school records prior to age 18, Mr. Brown tested in the sub-average intellectual range and he was placed in special education classes for slow learners.

The second question raised is a factual one.

2) Is Paul Brown mentally retarded as defined in Florida Statutes §921.137 (2006) and thereby ineligible for imposition of the death sentence?

A trial court finding of mental retardation is reviewed on the basis of there being competent, substantial evidence present to support the trial court's finding.

## C. Sub-Average Intellectual Functioning and Concurrent Adaptive Functioning Deficits Were Established Prior To Reaching Age 18.

Florida Rule of Criminal Procedure 3.203, provides the procedures for a determination of mental retardation in response to the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002). *Fla. R. Crim. Pro*. 3.203(b) defines mental retardation as performance that is two or more standard deviations from the mean score on a standardized test. *Fla. R. Crim*. *Pro*. 3.203(b) also specifies the tests that can be utilized to assess mental retardation as those "standardized intelligence tests authorized by the Department of Children and Family Services in rule 65 B-4.032 of the Florida Administrative Code". The only two standardized tests specified for use in the Florida Administrative Code rule, are the Stanford-*Binet Intelligence Scale* and the *Wechsler Intelligence Scale*. The rule defines Adaptive behavior as meaning 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. Finally, both *Fla. Stat.* § 921.137(1) and *Fla. R. Crim. Pro*. 3.203 require that the symptoms of mental retardation must manifest during the developmental period and specifically states that this period ends at age 18.

Mr. Brown was tested at age 10 on a Wechsler Intelligence Scale for Children in 1961 and he scored 76 verbal, 74 performance and a full scale IQ score of 72. The test was administered by a psychologist with the Hillsborough County

Schools. (Supp. ROA, V1, R.76) *Fla. R. Crim. P.* 3.203(b) recognizes mental retardation when the individual's performance on a specified standardized test is two or more standard deviations from the mean score. Two standard deviations from the mean is a score of 70 or below for mental retardation. Experts testified that there is also a recognized margin of error associated with the testing so that an individual scoring within the range of 65 to 75 points can be diagnosed as mentally retarded if concurrent deficits in adaptive behavior are identified. (S.ROA. V6, R. 853,854, S.ROA. V7, R. 1046) Therefore, Paul Brown's 72 score on a Wechsler Intelligence Scale at age 10 demonstrates significantly sub-average general intellectual functioning in the mental retardation range.

Only one expert, Dr. McClain, evaluated Mr. Brown's adaptive functioning "**during the period from conception to age 18**" as required by Florida Statute. (emphasis added) Therefore, the only evidence in this record documenting Mr. Brown's adaptive deficits prior to his attaining age 18 was provided by Dr. McClain. At the evidentiary hearing, Dr. McClain testified that Mr. Brown tested in the significantly sub-average general intellectual functioning range on an approved standardized test in 1961, demonstrated concurrent deficits were identified in a least two areas of his adaptive behavior prior to reaching age 18, and she opined that Paul Brown is mildly mentally retarded. Since no other expert evaluated Mr. Brown's adaptive functioning during this time period, Dr. McClain's

test results clearly establish by clear and convincing evidence that Mr. Brown is mentally retarded.

Although *Fla. Stat.* §921.137(4) authorizes the court to consider other valid tests and evaluation material, in order to do so the rule requires that the published validity and reliability data for such examinations **shall** accompany the evaluations. (emphasis added) No expert in Mr. Brown's case submitted any published validity and reliability data for any other test instruments used to test Mr. Brown to establish a basis for the court to be able to recognize them. Therefore, the only two testing instruments that may be properly recognized by the lower court when assessing Paul Brown's intellectual functioning are either the Stanford-Binet Intelligence Scale or the Wechsler Intelligence Scale.

The Appellee relies upon *Johnston v. State,* 930 So. 2d 582 (Fla. 2006) in support of the trial court's finding that competent substantial evidence to support a finding that Mr. Brown is not retarded, however, the evaluators in *Johnston* took special steps to note on the assessment that it was inaccurate. In Mr. Brown's case evaluators did not do this and instead recommended his placement in special classes for slow learners "on the basis of his present functioning". (Supp. ROA. V1, R. 77)

Available records support Paul Brown's deficiencies recording that he entered school at age 7 and dropped out by age 15, grades that were mostly D's

and F's, that he was retained in the fifth grade three times, and then double promoted to the seventh grade before withdrawing prior to the end of the school year in March 1965. **(**S. ROA.V4, R.691) (Exhibits Referenced In Defendant's Closing Arguments, Pre-Sentence Investigation X(6) – Mental and Emotional Health Report – October, 10, 1967, p. 4.) Dr. Prichard testified that the maximum level that a mentally retarded individual who is in the mild range of mental retardation can usually achieve is the Sixth Grade level and not beyond that. (S.ROA., V6, R.931) This is entirely consistent with Mr. Brown's extremely poor academic performance and his inability to proceed further than Sixth Grade. Consequently, experts reviewing Mr. Brown's case cannot discount his poor IQ test score of 72 on a *Wechsler Intelligence Scale* consistent with his very low current test scores.

The second component for evaluating mental retardation is adaptive functioning. *Fla. R. Crim. P*. 3.203(b) adopted the definition in *Fla*. *Stat.*§921.137 (1) that describes adaptive behavior as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." The record also establishes that Paul Brown demonstrated deficits in at least two areas of adaptive functioning by age 10. A case summary report prepared on April 17, 1961 by Mr.

Vilchez, a teacher in the Hillsborough County Schools described Mr. Brown's behavior as follows:

> "banging his head on the desk", "making noises imitating a moving train", "crawl[ing] on the floor and lies on benches and tables in rear of the classroom", "wanders around aimlessly picking up books, plant, chalk, etc.", "occasionally speaking to his inanimate object", "sits facing open window for long periods of time pulling and playing with a Venetian blind cord and speaking to himself".

Mr. Brown's teachers reported that he had a desire to learn but was in the fourth grade and demonstrating problems in reading a second grade reader. Wide range tests results indicated that he had a 1.8 grade reading placement level and did not know such elementary words as "was, "letter and "how".

Mr. Vilchez' report documents Mr. Brown as having learning problems and confirms a childhood history in an unsuitable home environment, abandonment, and temporary placement in foster care. Following a team conference, the consultant for slow learner classes, school psychologist from special education services, and the director of the pupil placement department recommended that Mr. Brown be placed in special education classes. This decision was based upon Mr. Brown's level of functioning. (Supp. ROA. V1, R. 77) Experts reviewing Mr. Brown's adaptive behavior cannot dismiss these school records that support serious adaptive deficits and placement in special education programs.

Although a formal diagnosis of mental retardation was not made in 1961, Mr. Brown was moved to the 5$^{th}$ grade in 1962 and then repeated that grade for the

next three years. In 1964, at age 14 he was double promoted from the 5th to the 7th grade and dropped out before finishing the year. Mr. Brown's score of 72[1] on a standardized *Wechsler Intelligence Scale* and the deficits noted in school records document deficits in his adaptive functioning and support Dr. McClain's diagnosis of mental retardation.

After dropping out of school, the record establishes that Mr. Brown only held menial employment. A Pre-Sentence Investigation report prepared in 1967 documented that Mr. Brown's only job lasted one day on an egg farm and that he quit because he felt unable to perform required tasks. **(**S. ROA.V4, R.693) (Exhibits Referenced In Defendant's Closing Arguments, Pre-Sentence Investigation X(6) – Mental and Emotional Health Report – October, 10, 1967, p. 6.) Clearly, by age 17 this Pre-Sentence investigation report confirms that Mr. Brown had made absolutely no progress and could not even keep a simple job. Mr. Brown's behavior showed deficits in communications, social/inter-personal skills, self-direction, home living and functional academic areas. There is no competent evidence in the record to dispute the deficits in his adaptive functioning identified as early as 1961.

[1] The Supreme Court in Atkins accepted the premise that an IQ between 70 and 75 or lower is typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation diagnosis. See: *Sadock & V. Sadock, Comprehensive Textbook of Psychiatry* 2952 (7th Ed. 2000), *Atkins*, 122 S. Ct. at 2245.

Mr. Brown was tested in 2001, 2003 and in 2004. Three mental health experts administering the Wechsler Adult Intelligence Test, 3d. Edition, as specified for use in Department of Children and Family Services Rule 65B-4.032 and required by Fla. Crim. P. 3.203 (b) recorded scores of 63, 68 and 68/69. This court found in *Zack v. State*, 911 So. 2d 1190,1201 (Fla. 2005) that in order to be exempt from execution under *Atkins* a Defendant must meet Florida's standard for mental retardation, which requires that he establish that he has an IQ of 70 or below. All three of Mr. Brown's IQ scores are under 70, two standard deviations below the mean as defined by Fla. Stat. 921.137(1) and establish the level of sub-average intellectual functioning required for diagnosing mental retardation.

**D. <u>No Competent Objective Data Supports A Conclusion Of Malingering</u>.**

Dr. McClain administered a Rey Complex Figure Test, Rey Auditory Verbal Learning Test, and the Rey -15 Item Test to determine malingering. This is the only objective test in the record below. The test results showed no evidence of malingering, and confirmed Mr. Brown's neuropsychological deficits (S. ROA., V6, R. 860). This finding is consistent with Dr. Henry L. Dee's report dated April 15, 1993 stating, "there was no evidence in that record that suggested malingering" and that "the projective test that was administered showed none of the evidence of bizarre or absurd responding that suggested malingering". (S.ROA, V2, R. 219) It

is consistent with Dr. Berland's administration of a third MMPI that "showed a profile substantially elevated but [that] fell well below the range which would **not** customarily be construed as malingering". (emphasis added) (Supp. ROA., V2, R. 74)

**E. <u>Expert Opinion Based Upon Prohibited Practice Is Not Competent Evidence</u>.**

Dr. Maher did not cite any research data or professional literature to support a practice of averaging of intelligence scores on varied tests to come up with an average full scale IQ score. (S.ROA., V7, R. 1048) Expert testimony that this practice is prohibited was provided and not disputed at Mr. Brown's evidentiary hearing. (S. ROA., V6, R. 776) Dr. Maher's "educated guess" of Paul Brown's IQ based upon averaging intelligence scores on all of Brown's tests is not acceptable practice in the Scientific community. (S. ROA., V7, R. 1048) Therefore, Dr. Maher's testimony as to Paul Brown's intelligence based upon unacceptable techniques is not competent evidence for the court to use in determining if Mr. Brown is mentally retarded.

No expert in Mr. Brown's case submitted any published validity and reliability data for any of the other test instruments (ie.) Beta's used to test Mr. Brown in order to properly establish a basis for recognizing any of them. Therefore, the only two testing instruments that may be properly recognized by the circuit court judge to assess Paul Brown's intellectual functioning are the *Wechsler*

*Intelligence Scale* Children or Adult versions. No published data was submitted to the court for other tests given to Mr. Brown to establish them as valid and reliable testing instruments, as required. Without such support, such tests are not competent evidence for the court to consider in determining Paul Brown's mental retardation status.

**F. Lower Court's Decision Is Not Supported by Competent Evidence.**

Dr. Maher was appointed to do a complete evaluation of Paul Brown, requiring testing of his intelligence, testing of his adaptive functioning, and evaluation of onset prior to age 18 to determine if he is mentally retarded. While Dr. Maher tested Mr. Brown's intelligence, he did not do any testing of Mr. Brown's adaptive functioning as required and the lower court erred in relying upon this partial assessment. The State argues that this case is like *Johnston* challenging an expert evaluation that only construed the first prong of rule 3.203(b). While *Johnston* scored in the mentally retarded range on tests taken early in life, all tests given to him from age thirteen on recorded scores in the upper borderline intellectual to low average functioning range, well above the determinative line for mental retardation. Mr. Brown's case is distinguishable. Mr. Brown's test scores in 1986 and 1993 were inflated as a result of testing on outdated 1955 tests (Flynn

Effect).[2] When Dr. Maher was appointed by the court, Mr. Brown had been tested twice (in 2001 and 2004) and had received a full scale intelligence score below 70 on two current and properly administered *Wechsler Intelligence Scales* tests.

The court appointed Dr. Maher to conduct a full evaluation of Mr. Brown's intellectual functioning and Dr. Maher was aware that he had tested below 70 on two prior *Wechsler Intelligence Scales*. Dr. Maher tested Mr. Brown a third time in 2005 on a *Wechsler Intelligence Scales* test and Mr. Brown again scored below 70. In *Johnston*, Dr. Prichard testified that the "acceptable, standard manner of proceeding in an assessment within the profession of psychology" is to stop at the first prong if the IQ score assessed there is too high to constitute mental retardation. *Johnston* at 585.

That was not the case in Mr. Brown's case. In spite of testing below 70 on three individually administered *Wechsler Intelligence Scales, (*including one administered by Dr. Maher himself) Dr. Maher did not proceed with tests to assess Mr. Brown's adaptive behavior. Instead, he opted to base his opinion of Mr.

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[2] The standard of care in the community is to give the test that is relevant today, expert testimony established that the intelligence tests given by Dr. Berland in 1986 and Dr. Dee in 1993 were outdated (S. ROA., Vol. 7, p. 1062-1063). Research done by Dr. Flynn has shown that for every three years after norms are collected for an intelligence test, the I.Q. is inflated by one point. Applying this theory Dr. McClain opined that Dr. Berland's score should be adjusted from 81 to 70 and Dr. Dee's Score should be adjusted from 83 to 72 (S.ROA., VO. 7, p. 1109) Both the American Association of Mental Retardation ("AAMR") and the Diagnostic Statistical Manual for Psychiatry ("DSM") also account for a standard error of measurement ("SEM") in intelligence testing.

Brown's adaptive functioning entirely upon a review of the tests done by Dr. Prichard. (S. ROA., V7, R. 1071). Dr. Maher's opinion was not based on a full evaluation of Mr. Brown's intelligence and adaptive functioning as required by *Fla. R. Crim. P. 3.203* for diagnosing mental retardation. As a result, Dr. Maher's opinion and testimony cannot be considered competent evidence for the court to rely upon in determining the issue of Mr. Brown's mental retardation. In spite of his deficient evaluation, it is important to note that Dr. Maher still reported that Mr. Brown was in the low range for adaptive functioning for significant periods of his life. (S. ROA., V7, p. 1071)

Dr. Prichard spoke to the mother of the victim in this case, Fannie Jones. Dr. Prichard was aware that this informant gave him information that conflicted with prior statements that she had given to Dr. McClain regarding Mr. Brown's adaptive functioning. Due to the relationship of this informant to the victim and serious discrepancy in her statements, Ms. Jones' input cannot be considered competent evidence for purposes of evaluating Mr. Brown's mental retardation. Although Dr. Prichard testified that it was not necessary for him to conduct interviews with individuals that knew Mr. Brown prior to age 18, he did not explain how else the onset prior to age 18 can be established by an expert. In *Johnston*, Dr. Prichard stated that the three prongs are not independent elements and must all be present in order for mental retardation to be present. He testified

that the "acceptable, standard manner of proceeding in an assessment within the profession of psychology" is to stop at the first prong if the IQ score assessed there is too high to continue mental retardation. *Johnston* at 585. This was not the case for Mr. Brown. Mr. Brown scored a 63 and 68 on two independently administered standardized *Wechslers* and scored 72 on a test prior to age 18. Therefore, Dr. Prichard proceeded forward to assess Mr. Brown's adaptive functioning as clinically required. Dr. Prichard's testimony in *Johnston* regarding acceptable standard practice and his efforts to assess Mr. Brown's adaptive functioning by some measurement supports Appellant's contention that Dr. Maher's had an obligation to conduct a complete evaluation and was deficient in failing to do so.

*The American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 4th edition 1994*, discusses that a mentally retarded person will have significant limitation in at least two of the following basic skills: "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction functional academic skills, work, leisure, health, and safety." *Id*. at 39.

Although Dr. Prichard did not find Mr. Brown mentally retarded, he reported that Mr. Brown scored at 57 on the SIDR and found an overall measure of adaptive behavior comparable to that of an average individual at age 10 years 11 months, with limitations in ten to twelve adaptive skill areas based upon

information provided by Mr. Brown and informant, Sgt. Young at Union Correctional Institution. (S. ROA, V2, R. 261-262, Report of Adaptive Behavior Testing, March 3, 2003, Gregory A. Prichard, Psy.D.)

In order to properly assess adaptive functioning and establish onset prior to the age of 18, however, Dr. Prichard was obligated to gather information from interviews of informants that knew Mr. Brown prior to age 18. It is the absence of such interviews from individuals that could describe Mr. Brown's functioning (during this relevant time period) that renders Dr. Prichard's evaluation deficient for use in determining the issue of Paul Brown's mental retardation.

Dr. Prichard's opinion that Mr. Brown is not retarded is based upon contradictory statements provided by the victim's mother and on no interviews that may establish onset. As such, Dr. Prichard's opinion cannot be considered competent evidence. Dr. Maher's opinion was based upon even less. Although retained by the Court to conduct a full evaluation of both intelligence and adaptive functioning, Dr. Maher did absolutely no independent evaluation of Paul Brown's adaptive functioning at any stage of his life. Dr. Maher's failure to assess Mr. Brown's adaptive functioning after testing reflected a score below 70 is not a practice supported by any psychological data.

Appellee states that the trial court was correct in discrediting Dr. McClain's testimony and mischaracterizes her testimony arguing that she "opined that in her

limited adaptive functioning testing Mr. Brown was severely retarded and functioning at the level of an infant." (AB- p. 14)

This conclusion is not supported by the record. Dr. McClain testified that in her opinion Mr. Brown was mildly mentally retarded. While Mr. Brown's raw scores in adaptive functioning were within the severely retarded range, Dr. McClain explained that individuals can score very low at adaptive functioning and learn to adapt to deficits where they have some structure or supervision. (S. ROA, V3, R. 452) Dr. McClain never testified that Mr. Brown was severely retarded or functioning at the level of an infant. She testified that the record supports deficits in at least two areas of adaptive functioning as supported by Dr. Prichard's report: "Paul's functional independence is limited to age-appropriate; his performance is comparable to that of the average individual at age 15 years 10 months (15-10)." (S.ROA. V2, R.265) Dr. Prichard's report is part of the record and suggests that Mr. Brown's adaptive functioning level is comparable to that of a 15 year old.

Appellee states that "it matters not what other problems may exist since he is not mentally retarded". (AB- p. 41) The *Diagnostic and Statistical Manual Of Mental Disorder – Text Revision (DSM IV-Tr)* is the tool used by experts to diagnose mental retardation and states that a diagnosis of mental retardation should be made whenever the criteria are met, regardless and in addition to the presence of other mental disorders. (S. ROA., V7, R. 1110, S. ROA., V6, R. 964) Experts

agree that mental retardation is commonly seen with co-morbid mental illness. Individuals with mental retardation have a prevalence of co-morbid disorder four or five times greater than the general population, and individuals like Paul Brown suffering with mental health problems and brain damage can still be diagnosed as mentally retarded. (S. ROA, V7, R. 1083).

Dr. McClain testified that Mr. Brown is suffers mild mental retardation and has concurrent mental illness. The trial record supports her conclusions as Mr. Brown has been diagnosed as psychotic, bipolar, manic or suffering from organic apathy syndrome and substantial brain damage (R. – p. 543-546). Dr. Berland explained at trial that Mr. Brown suffers from brain damage that is superimposed upon low intelligence and there is evidence of psychotic disturbance present. (R. – p. 545,546) Dr. Afield testified that both mental retardation and mental illness is involved in Mr. Brown's case and that the brain damage interferes with his ability to think effectively (R. – p. 548). Mental health experts must diagnose mental retardation whenever the criteria are met, regardless and in addition to the presence of other mental disorders.

Contrary to Appellee's assertion, a proper evaluation of Mr. Brown's cannot be undertaken without a full understanding of the mental illness and neurological deficits involved and their affects on his testing. Dr. McClain conducted additional tests and explained how neurological deficits and mental deficiencies affected the

manner in which Mr. Brown tested and delayed his response times. No competent evidence was presented by any other expert challenging the validity of the neurological battery or malingering test results. The basis for the trial court's rejection of this competent evidence is not supported by the record.

## ARGUMENT II

### MR. BROWN'S CHALLENGE TO THE CONSTITUTIONALITY OF THE BURDEN REQUIRING HIM TO ESTABLISH MENTAL RETARDATION BY CLEAR AND CONVINCING EVIDENCE IS TIMELY.

The State argues that Mr. Brown is procedurally barred in raising the claim that the burden to establish mental retardation by clear and convincing evidence is unconstitutional because it was not raised until his Final Closing Argument in March 2005. This argument is flawed as Mr. Brown could not have raised this claim at any earlier point in time.

Mr. Brown filed a Successor Motion To Vacate Sentence and To Declare a Provision of Florida Statute §921.137 Unconstitutional on September 9, 2001 due to the fact that the Florida Statute did not apply retroactively to bar the execution of mentally retarded individuals. While this Motion was pending before the Circuit Court, the United States Supreme Court ruled in *Atkins v. Virginia*, 122 S.Ct. 2242, 536 U.S. 304 (2002) that execution of the mentally retarded was constitutionally prohibited and the Appellant filed this case as supplementary

authority in support of his challenge to Florida's Statute. The Florida Supreme 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 9.142(c) (Appeal of Determination of Mental Retardation Claim). The trial court continued Mr. Brown's case pending finalization of the rules that became final on October 1, 2004. Mr. Brown requested that the court accept his pending Motion for review under the provisions of Florida Rule of Criminal Procedure 3.230 (e). (S. ROA., V6, R. 913-968). The court initially directed the parties to file respective closing documents simultaneously on August 29, 2003. The State filed an Addendum without leave of court and the Appellant filed a response. (S. ROA., V1, R. 169-209). When the parties arrived on October 20, 2004 to hear the court's ruling, the judge announced *sua sponte* that further expert testimony would be taken in this case and appointed a third expert, Dr. Michael Maher to evaluate and report on the issue of Mr. Brown's mental retardation. The evidentiary hearing was continued and additional testimony was heard on January 7, 2005 and February 18, 2005. The Appellant's evidentiary hearing was finally concluded on February 18, 2005. (S. ROA., V6, R. 838-971, 972-1041, V7, R. 1042-1138) Both parties were directed by the court to file Final Arguments at the conclusion of all proceedings and without prohibition. A Final Closing Argument was filed by Appellant on March 21, 2005 that raised all factual

and legal arguments associated with Mr. Brown's mental retardation claim heard in trifurcated hearings. Mr. Brown's first opportunity to challenge the constitutionality of the burden required of him to establish his mental retardation was timely raised at the conclusion of evidentiary hearing proceedings and in Final Closing Arguments timely filed with the Circuit Court. Therefore, Mr. Brown is not procedurally barred in raising a claim that holding him to a burden of proving mental retardation by clear and convincing is unconstitutional.

## ARGUMENT AS TO REMAINING CLAIMS

The court stated "Drs. Prichard and Maher determined Defendant to be mentally competent, but Dr. McClain found Defendant to be mildly mentally retarded." (S. ROA.V5, R. 779) Mr. Brown was not tested for mental competency. The evaluations administered were limited to test for mental retardation. The court stated that "mental deficits must manifest by age 18 and exist presently." (S. ROA.V5, R.780) Florida's statute does not require that the mental deficits exist presently and imposing this additional burden upon Mr. Brown is error.

Although the court accepted that Mr. Brown demonstrated adaptive deficits at an early age the court's order states that "this does not mean that he [Mr. Brown] satisfies the statutory definition of mentally retardation if he is currently able to socialize and adapt at an acceptable level." (S.ROA.V5, R.780) This statement by the court demonstrates a lack of understanding regarding a mental retardation

diagnosis. The DSM-IV-TR provides in its commentary: Mental Retardation is not necessarily a lifelong disorder. Individuals who had mild mental retardation earlier in their lives manifested by failure in academic learning tasks may, with appropriate training and opportunities, develop good adaptive skills in other domains and may no longer have the level of impairment required for a diagnosis of mental retardation. The fact that a mildly retarded individual incarcerated in a structured death row environment for twenty years may adapt to this environment does not mean that he was not mentally retarded prior to reaching 18 or at the time the crime was committed. Mr. Brown relies upon arguments raised in his Initial Appeal Brief on all other issues.

## CONCLUSION

Assessment of an individual's adaptive functioning prior to age 18 is required to diagnose mental retardation in Florida. It is sufficient to measure adaptive functioning during this period in an individual's life in order to establish the onset of mental retardation in accordance with Florida Statutes. The trial court's failure to understand this premise resulted in error when evaluating expert testimony at Mr. Brown's evidentiary hearing. Dr. McClain testified that Mr. Brown is mentally ill and has a co-morbid diagnosis of mild mental retardation. Dr. McClain is the only expert who based an opinion upon first hand interviews

with sources who knew Mr. Brown's early behavior along with a fair analysis of his early school records.

Mr. Brown urges this court to find that the record establishes that he has met the three prongs of mental retardation. Dr. McClain tested Mr. Brown's intelligence in 2001 and his score was below 70. When requested to ascertain if Mr. Brown is mentally retarded Dr. McClain undertook the type of analysis and evaluation that the AAMR, DSM-IV-Tr, and the *Atkins* Court contemplated. Although two other experts evaluated Mr. Brown, the deficiencies noted in their evaluative process negates the competency of these opinions and the Court's reliance on them cannot be sustained.

Based upon the foregoing, Mr. Brown requests that this Court order that his conviction and sentences be vacated and a sentence of life be imposed or remand of this case for such relief as this Court deems proper.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first Class postage prepaid, to Mark Ober, State Attorney, Office of the State Attorney, 800 East Kennedy Boulevard, Tampa, FL 33602, Paul Landry, Assistant Attorney General, Office of the Attorney General, Westwood Building, Seventh Floor, 2002 North Lois Avenue, Tampa, Florida 33607 on this ____ day of August, 2006.


_____
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## CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Brief of Appellant, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.


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