In The

Supreme Court of Virginia

RECORD NOS. 082464, 082465

ALFREDO R. PRIETO,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

Jonathan Shapiro (VSB No. 13953)
GREENSPUN, SHAPIRO, DAVIS & LEARY P.C.
3955 Chain Bridge Road, 2nd Floor
Fairfax, Virginia 22030
(703) 352-0100 (Telephone)
(703) 591-7268 (Facsimile)
jshapiro@greenspunlaw.com

Counsel for Appellant

Michael A. Siem (*Pro Hac Vice*)
FISH & RICHARDSON P.C.
Citigroup Center, 52nd Floor
153 East 53rd Street
New York, New York 10022
(212) 756-5070 (Telephone)
(212) 258-2291 (Facsimile)
siem@fr.com

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. Verdict Form Nos. 2 And 3 Were Defective And Violated The United States Constitution 1

A. Verdict Form Nos. 2 And 3 Plainly Violate This Court's Holdings In *Powell* And *Morrisette* 1

B. The Sixth Amendment Requires the Jury to Find at Least One of the Aggravating Factors *Unanimously* 4

II. The Circuit Court In *Prieto* I Erred In Failing To Declare The Jury Deadlocked And In Delivering An Unduly Coercive *Allen* Charge 5

III. The Commonwealth Violated Mr. Prieto's Due Process Rights By Losing Exculpatory Evidence 8

A. Bad Faith Is Not Required to Demonstrate a Due Process Violation 8

B. The Lost Hairs Were "Apparently Exculpatory" 9

IV. The Commonwealth Failed To Prove That Mr. Prieto Was The "Triggerman" 12

V. The Circuit Court Erred In Admitting Mr. Prieto's Records Of Conviction In California 13

VI. VA. CODE § 19.2-264.3 Does Not Bar A Bifurcated Sentencing Proceeding 14

CONCLUSION 15

CERTIFICATE..... 17

TABLE OF AUTHORITIES

Page(s)

CASES

Abdul-Kabir v. Quarterman,
550 U.S. 233 (2007) 15

Allen v. United States,
164 U.S. 492 (1896) 5, 6, 7

Arizona v. Youngblood,
488 U.S. 51 (1988) 8

Atkins v. Commonwealth,
272 Va. 144, 631 S.E.2d 93 (2006) 13, 14

Bassett v. Commonwealth,
222 Va. 844, 284 S.E.2d 844 (1981) 13, 14

Booth-el v. Nuth,
288 F.3d 571 (4th Cir. 2002) 7

California v. Trombetta,
467 U.S. 479 (1984) 8, 10

Crawford v. Head,
311 F.3d 1288 (11th Cir. 2002) 11

Grayson v. Thompson,
257 F.3d 1194 (11th Cir. 2001) 11

Hoke v. Commonwealth,
237 Va. 303, 377 S.E.2d 595, *cert. denied*,
491 U.S. 910 (1989) 5

Illinois v. Fisher,
540 U.S. 544 (2004) 8

Lockhart v. Fretwell,
506 U.S. 364 (1993) 3

Louisiana v. Williams,
831 So. 2d 835 (2002) 15

Lovitt v. Warden,
266 Va. 216, 585 S.E.2d 801 (2003) 9

Lowenfield v. Phelps,
484 U.S. 231 (1988) 7

Morrisette v. Warden,
270 Va. 188, 613 S.E.2d 551 (2005) 1, 2, 3, 4

Mueller v. Commonwealth,
244 Va. 386, 422 S.E.2d 380 (1992), *cert. denied*,
507 U.S. 1043 (1993) 2

Powell v. Commonwealth,
261 Va. 512, 552 S.E.2d 344 (2001) 1, 2, 3, 4

Ring v. Arizona,
536 U.S. 584 (2002) 4, 5

Roach v. Commonwealth,
251 Va. 324, 468 S.E.2d 98, *cert. denied*,
519 U.S. 951 (1996) 1, 2

Rogers v. Commonwealth,
242 Va. 307, 410 S.E.2d 621 (1991) 12, 13

Tucker v. Catoe,
221 F.3d 600 (4th Cir. 2000) 7

United States v. Burgos,
55 F.3d 933 (4th Cir. 1995) 7

Wilson v. Parker,
515 F.3d 682 (6th Cir. 2008) 11

Youngblood v. Arizona,
488 U.S. 51 (1988) 12

CONSTITUTIONAL PROVISION

U.S. CONST. amend. VI 3, 4

STATUTES

VA. CODE § 19.2-264.3 ..... 14, 15

VA. CODE § 19.2-264.3:1.1(C) 14

VA. CODE § 19.2-264.4 2

VA. CODE § 19.2-264.4(D) 2

ARGUMENT

I. Verdict Form Nos. 2 And 3 Were Defective And Violated The United States Constitution.

A. Verdict Form Nos. 2 And 3 Plainly Violate This Court's Holdings In *Powell* And *Morrisette*. (AOE Nos. 17, 41-43, 60, 61, 67-69, 75 and 78).

Contrary to the Commonwealth's argument, Verdict Form Nos. 2 and 3 are plainly defective. There is no disagreement that Verdict Form Nos. 2 and 3 failed to expressly provide the jury with the option of imposing a life sentence and a fine of not more than $100,000 if the jury finds that the Commonwealth has proven one or both aggravating factors beyond a reasonable doubt. This failure renders Verdict Form Nos. 2 and 3 defective under this Court's holdings in *Morrisette v. Warden*, 270 Va. 188, 613 S.E.2d 551 (2005) and *Powell v. Commonwealth*, 261 Va. 512, 552 S.E.2d 344 (2001).

Despite these clear holdings, the Commonwealth argues that this Court's verdict-form holding in *Powell* was dicta, an argument this Court rejected in *Morrisette*. In *Morrisette*, the Commonwealth characterized this Court's verdict-form holding in *Powell* as "advisory" and "dicta," emphasized that the trial court had used the verdict forms "mandated by statute," and declared *Powell* could not be reconciled with this Court's prior holdings in *Roach v. Commonwealth*, 251 Va. 324, 336, 468 S.E.2d 98,

105, *cert. denied*, 519 U.S. 951 (1996), *Mueller v. Commonwealth*, 244 Va. 386, 412-13, 422 S.E.2d 380, 396-97 (1992), *cert. denied*, 507 U.S. 1043 (1993), and other prior cases. In rejecting the Commonwealth's argument in *Morrisette*, this Court explained:

> We concluded [in *Powell*] that a defendant is entitled to a verdict form that accurately and expressly corresponds to the trial court's sentencing instruction and that in the penalty phase of a capital murder trial, the trial court must give the jury a verdict form that expressly includes the option for imposing a life sentence and a fine of not more than $100,000 when the jury finds that the Commonwealth has proven one or both aggravating factors beyond a reasonable doubt.
>
> * * *
>
> While the verdict forms used in *Powell*, *Mueller*, and *Roach* followed the statutory form set out in VA. CODE ANN. § 19.2-264.4(D), the challenges to the verdict forms in *Mueller* and *Roach* did not include an express argument premised on the notion that the sentencing options set forth in a verdict form must explicitly correspond to the trial court's sentencing instructions. That rationale, which we utilized in *Atkins* and *Powell*, flows from the principle that it ***is materially vital to the defendant in a criminal case that the jury have a proper verdict form***. Thus, we were addressing a new issue in *Powell*. We take this opportunity to reaffirm our holding in *Powell* and, to the extent, if any, that our holdings in *Mueller* and *Roach* are inconsistent with *Powell*, we overrule those decisions.

Morrisette, 270 Va. at 199-202, 613 S.E.2d 560-62 (internal citations and quotations omitted) (emphasis added).[1] Accordingly, the Commonwealth's argument that the verdict-form holding in *Powell* is dicta fails.

---

[1] Indeed, in *Powell*, this Court resolved a fully-argued and live controversy about the sufficiency and accuracy of the verdict forms provided in VA. CODE ANN. § 19.2-264.4.

The Commonwealth makes two additional arguments that are equally unavailing. First, the Commonwealth argues that *Morrisette* is limited to its facts and applies only to habeas petitions involving ineffective assistance of counsel claims. However, nothing in *Morrisette* suggests that the case has such limited applicability. Second, the Commonwealth argues that since the General Assembly amended the statutory verdict forms in 2003, but failed to cure all the verdict-form defects this Court identified in *Powell*, the General Assembly must have overruled this Court's holding in *Powell*. If this were true, then by the time of this Court's ineffective-assistance holding in *Morrisette* (2005), trial counsel's 2001 failure to object to the verdict forms had, in effect, been vindicated by the General Assembly's intervening legislation in 2003. But to have granted habeas relief based on such an "error" would run afoul of the U.S. Supreme Court's holding in *Lockhart v. Fretwell*, 506 U.S. 364 (1993) (stating that Sixth Amendment ineffective-assistance finding cannot rest on attorney's trial "error" that ultimately proved to have been correct in light of post-trial developments). If the Commonwealth's view of the effect of the 2003 amendment were correct, then, under *Lockhart*, this Court would not have granted the defendant in *Morrisette* a "windfall" grant of relief on his ineffective assistance of counsel claim.

In sum, in *Powell* and *Morrisette*, this Court held that verdict forms must expressly provide the jury with the option of imposing a life sentence and a fine of not more than $100,000 if the jury finds that the Commonwealth has proven one or both aggravating factors beyond a reasonable doubt. Here, Verdict Forms Nos. 2 and 3 did not expressly provide the jury with this option. Accordingly, the Court should reverse Mr. Prieto's sentence of death.

B. The Sixth Amendment Requires the Jury to Find at Least One of the Aggravating Factors *Unanimously*. (AOE Nos. 42, 60, and 68)

The Commonwealth argues that the jury need not reach unanimity on either of the possible aggravating factors (future dangerousness or vileness) so long as the jury is unanimous in finding one of the factors. This argument cannot be squared with *Ring v. Arizona*, 536 U.S. 584 (2002). In *Ring*, the U.S. Supreme Court held that a statutory aggravating factor operates as "the functional equivalent of an element of a greater offense," and, therefore, must be found by a jury. *Id.* at 609. Since *Ring* was decided, this Court never has addressed its effect on the requirement of jury unanimity with respect to each aggravating factor on which a defendant's eligibility for the death penalty is based. Were a jury permitted to find a defendant eligible for the death penalty based on a cumulation of

differing factual bases, as few as 6 votes could support a finding of any given aggravating factor – a notion that is obviously inconsistent with *Ring's* jury verdict requirement.

Although the Commonwealth contends that "this Court consistently has held that such unanimity is not required," the most recent case the Commonwealth cites, *Hoke v. Commonwealth*, was decided in 1989, some thirteen years before the U.S. Supreme Court's decision in *Ring*. 237 Va. 303, 315, *cert. denied*, 491 U.S. 910 (1989). *Ring* is controlling in this case and requires that the jury's finding of aggravating factors, including vileness and future dangerousness, must be unanimous. Since neither Verdict Forms Nos. 2 and 3 required the jury to find either factor unanimously, they were constitutionally defective, and require that Mr. Prieto's death sentence be reversed.

II. The Circuit Court In *Prieto* I Erred In Failing To Declare The Jury Deadlocked And In Delivering An Unduly Coercive *Allen* Charge. (AOE NO. 6).

The Commonwealth's argument that Juror Davico's alleged misconduct created a manifest necessity for a mistrial is misplaced. In fact, if any manifest necessity existed in *Prieto* I to declare a mistrial, it resulted from the Circuit Court's own error in failing to declare the jury deadlocked on July 2, 2007, and in delivering an unduly coercive *Allen* charge.

The jury in *Prieto* I deadlocked on July 2, 2007, when the foreman of the jury, Juror Clements, informed the Circuit Court that the jury was "unable to [reach] a unanimous decision" and when Juror Davico unequivocally informed the Circuit Court that "[m]y decision . . . is firm and final, and the deliberation has crossed the line into peer pressure." (JA 7528). At that point, the Circuit Court should have declared the jury deadlocked and sentenced Mr. Prieto to life in prison without the possibility of parole.

Instead, the Circuit Court delivered a modified and coercive *Allen* charge to the jury which disregarded the severe pressure Juror Davico already faced from his fellow jurors. (JA 7550-7552). The Circuit Court delivered the modified *Allen* charge to the jury in an effort to "make" the jury conclude the matter. (JA 7549).[2] In effect, *the Allen* charge did nothing except put further pressure on Juror Davico to change his mind. Significantly, the Circuit Court ignored the fact that it could have concluded the matter on July 2, 2007. Since the jury deadlocked that day, the Circuit Court should have sentenced Mr. Prieto to life in prison without the possibility of parole.

---

[2] The Circuit Court also sympathized with "the families and friends of the victims who also need closure after all this time." (JA 7554).

"In reviewing the propriety of an *Allen* charge, the issue is . . . whether the instruction given by the trial court in its context and under all the circumstances was coercive." *Booth-el v. Nuth*, 288 F.3d 571, 581 (4th Cir. 2002), *citing Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988). All the circumstances in *Prieto* I impel the conclusion that the Circuit Court's modified *Allen* charge was coercive.[3] The jury already had deadlocked, Juror Davico asked the Circuit Court to "end the deliberation," and the other jurors never asked the Circuit Court to instruct them further. When it delivered the modified *Allen* charge, the Circuit Court and jurors knew that the jury had deadlocked 11-1, with Juror Davico as the sole "hold-out" juror. Notably, courts have declared *Allen* charges coercive under similar circumstances. *See*, *e.g.*, *Tucker v. Catoe*, 221 F.3d 600, 610-11 (4th Cir. 2000); *United States v. Burgos*, 55 F.3d 933, 937-41 (4th Cir. 1995).

The Circuit Court attempted to force Juror Davico to deliberate further, and then declared a mistrial when Juror Davico declined to further deliberate. Plainly, this was the Circuit Court's error, not Juror Davico's misconduct. As a result, this Court should commute Mr. Prieto's death sentence to life in prison without the possibility of parole.

---

[3] Notably, later in the proceeding, the Circuit Court admitted that providing a second *Allen* charge would be coercive because Juror Davico had informed the Court that he would not change his mind. (JA 7609). A second *Allen* charge would not have been any more coercive than the first.

III. The Commonwealth Violated Mr. Prieto's Due Process Rights By Losing Exculpatory Evidence. (AOE Nos. 22, 25, 27, 30-32, 34, 36-38, and 79-82).

A. Bad Faith Is Not Required to Demonstrate a Due Process Violation.

The Commonwealth incorrectly asserts that Mr. Prieto must demonstrate bad faith to establish a due process violation stemming from the Commonwealth's loss of exculpatory evidence. (Comm. Br. 21-23). However, this is contrary to established precedent. "The Due Process Clause . . . makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence." *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). The U.S. Supreme Court has established two categories of evidence, which, if lost, can serve as the basis for a due process violation: (a) "material exculpatory evidence"; and (b) "potentially useful evidence." *Illinois v. Fisher*, 540 U.S. 544, 547-48 (2004). As the Commonwealth concedes, *California v. Trombetta* defined "material exculpatory evidence" as that which had "apparent exculpatory" value before it was lost and that the defendant cannot replace by other reasonable means. (Comm. Br. 22 (relying on *California v. Trombetta*, 467 U.S. 479, 488 (1984)).

While the loss of evidence that is merely potentially exculpatory (or "potentially useful") requires a showing of bad faith to establish a

constitutional violation, the loss of "apparently exculpatory" evidence violates due process, even in the absence of bad faith. *Lovitt v. Warden*, 266 Va. 216, 239, 585 S.E.2d 801, 814 (2003) ("[T]he [U.S.] Supreme Court drew a distinction between the government's failure to disclose material exculpatory evidence and the failure to preserve potentially exculpatory evidence.").

B. The Lost Hairs Were "Apparently Exculpatory."

Although the Commonwealth downplays the significance of the lost hairs, the Commonwealth's own arguments in support of its "triggerman" theory demonstrate the material exculpatory value of the lost hairs. Among the evidence the Commonwealth claims "negat[es] any inference of another assailant," the Commonwealth highlights that (1) Mr. Prieto's was the only foreign DNA presented at trial; (2) the lost hairs could have innocently transferred to Ms. Raver; (3) the lost hairs could have come from Mr. Prieto, despite their "Negroid characteristics"; and (4) no other evidence suggested the presence of a second assailant. (Comm. Br. 26).

However, Mr. Prieto would have refuted each of these arguments had the Commonwealth not lost the exculpatory hairs. First, at least one of the lost hairs was a full-length head hair, with a root attached, from which Mr. Prieto would have extracted DNA samples. (JA 11795, 11906-10, 11916-

18). Second, the Commonwealth demonstrates the hairs' exculpatory value with its need to "explain away" the lost hairs in order to support its "triggerman" theory, claiming the hairs transferred innocently to Ms. Raver. Third, had the Commonwealth properly preserved the hairs, Mr. Prieto could have squarely refuted the Commonwealth's speculation that the lost hairs could have been Mr. Prieto's. Fourth, the lost hairs themselves represent the very evidence of a second assailant that the Commonwealth claims was lacking.

Mr. Prieto suffered additional prejudice because he could not replace the lost hairs with "comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 489. For example, the Commonwealth's hair examiner, Charles Linch, challenged the accuracy of Myron Scholberg's 1988 conclusion that the hairs had "negroid" characteristics, speculating that Mr. Scholberg could easily have been mistaken.[4] Without the lost hairs, Mr. Prieto was completely unable to counter the Commonwealth's challenge to Mr. Scholberg's analysis.

---

[4] Contrary to the Commonwealth's assertion, Mr. Prieto specifically objected to this aspect of Mr. Linch's testimony during his direct examination, necessitating a lengthy bench conference on the issue. (JA 11955-11991). Although the Commonwealth also identifies JA 11966A to 11966B as testimony to which Mr. Prieto did not object, no objection was necessary as that questioning was outside of the presence of the jury. (JA 11956).

Further, the exculpatory nature of the hairs the Commonwealth lost was apparent well before their loss. Contrary to the Commonwealth's assertion, the police believed the hairs might exculpate Mr. Prieto, not inculpate him. (Comm. Br. 22 n.10). Detective Murphy testified that the police searched in vain for evidence that the hairs innocently transferred to Ms. Raver, in order overcome the obvious and exculpatory inference that Ms. Raver was attacked by an African-American assailant. (JA 11881). Indeed, the police initially focused its investigation on African-American suspects. (JA 2814-17, 11172). Once the police identified Mr. Prieto as a suspect, the police chose to have the hairs re-examined because they thought Mr. Prieto would want the hairs examined. (JA 2821-23). These actions further underscore the exculpatory import of the hairs.[5]

---

[5] Contrary to the Commonwealth's suggestion (Comm. Br. 23 n.11), courts consistently recognize that foreign head hairs are every bit as material to rape cases as foreign pubic hairs. *See*, *e.g.*, *Wilson v. Parker*, 515 F.3d 682, 689 (6th Cir. 2008) (including "head hairs similar to those belonging to [the defendant] were also found inside the victim's car" as evidence supporting a rape conviction); *Crawford v. Head*, 311 F.3d 1288, 1294 (11th Cir. 2002) (citing "three hairs on the victim's pajama top that were consistent with [the defendant's] head hair" as evidence supporting a rape conviction); *Grayson v. Thompson*, 257 F.3d 1194, 1202 (11th Cir. 2001) (citing expert testimony "that several hairs recovered from the scene had 'negroid' characteristics consistent with the head hair of [the defendants] and inconsistent with the victim's hair" as supporting a rape conviction).

Accordingly, the Circuit Court erred in not addressing the Commonwealth's violation of Mr. Prieto's due process rights by, at a minimum, giving an adverse inference instruction to the jury, as proposed by *Youngblood v. Arizona.* 488 U.S. at 59-60 (Stevens, J., concurring).[6]

IV. The Commonwealth Failed To Prove That Mr. Prieto Was The "Triggerman." (AOE Nos. 26, 28-29, 33, 35, and 38-39).

The Commonwealth's "triggerman" theory rests primarily on arguments that highlight the exculpatory value of the lost hairs. Mr. Prieto would have refuted these arguments had the Commonwealth preserved the hairs. *See* Section III.B., *supra*.

However, even in the absence of the hairs, Mr. Scholberg's 1988 report, categorizing the hairs found in Ms. Raver's pubic combing as "negroid," strongly evidences the involvement of a perpetrator other than Mr. Prieto, thereby precluding the Commonwealth from imposing the death penalty. In *Rogers v. Commonwealth*, this Court explained that, in order to support the Commonwealth's "triggerman" theory and allow the death penalty, "all necessary circumstances must be consistent with guilt, must be inconsistent with innocence, and must exclude every reasonable

---

[6] The Commonwealth also incorrectly asserts that Mr. Prieto "did not rely on *Youngblood*, or *Trombetta*, to argue that the jury be instructed for adverse inference . . . ." (Comm. Br. 21 n.9). Mr. Prieto specifically cited *Youngblood* in support of his request for the instruction. (JA 8424).

hypothesis of innocence." 242 Va. 307, 319, 410 S.E.2d 621, 628 (1991). Because the evidence in this case, coupled with the evidence the Commonwealth lost, casts grave doubt on the Commonwealth's assertion that Mr. Prieto was the "triggerman," Mr. Prieto's conviction as a principal in the first degree was unsupported by the evidence, and the Circuit Court erred in allowing the Commonwealth to seek the death penalty.

V. The Circuit Court Erred In Admitting Mr. Prieto's Records Of Conviction In California. (AOE No. 43).

The Commonwealth tries to justify the Circuit Court's decision to admit the California sentencing records by (a) distinguishing *Atkins v. Commonwealth*, 272 Va. 144, 157-58, 631 S.E.2d 93, 100 (2006) and (b) repeating its reliance on *Bassett v. Commonwealth*, 222 Va. 844, 284 S.E.2d 844 (1981). These arguments are unsupported.

The Commonwealth attempts to distinguish *Atkins* on the grounds that the *Atkins* jury was faced with the possibility of potentially nullifying the previous jury's sentence of death. Although this Court was concerned that the possibility of nullification might inappropriately influence a jury, the Court's reasoning was not limited in the manner the Commonwealth suggests. *Atkins*, 272 Va. at 157-58, 631 S.E.2d at 100. Rather, the Court made clear that a sentencing jury considering the issue of mental retardation was simply not entitled to know whether a previous jury had

decided to impose death. *Id.* at 158, 631 S.E.2d at 100. This information is not relevant to the sentencing determination, and as this Court recognized, is highly prejudicial. *Id.* ("The fact that the jury knew a prior jury had sentenced Atkins to death prejudiced his right to a fair trial on the issue of his mental retardation."). Although *Atkins* involved the same crime, the Court's rationale applies with equal force here.

The Commonwealth's reliance on *Bassett* is similarly misplaced. *Bassett*'s holding was limited to cases where the prior sentence occurred before the act for which the defendant is being sentenced occurred, and after he was released from custody. *Id.* at 852, 284 S.E.2d at 849 ("The record reveals a predisposition to commit another crime upon release from custody."). Neither situation applies here, and thus *Bassett*, and the Commonwealth's cited cases interpreting *Bassett,* do not control.

VI. VA. CODE § 19.2-264.3 Does Not Bar A Bifurcated Sentencing Proceeding. (AOE Nos. 4, 13-14, 45, 50, and 66).

The Commonwealth argues that the bifurcation of the sentencing phase, which occurred in *Prieto* I, is barred by Virginia statute.[7] (Comm. Br. 17-18) (*citing* VA. CODE ANN. § 19.2-264.3:1.1(C)). In an attempt to support its argument, the Commonwealth overstates the statutory language and

[7] By failing to argue that the issue of mental retardation is not a sentencing phase issue, the Commonwealth appears to concede this point and withdraw this inconsistent argument.

ignores the Court's responsibility to protect Mr. Prieto's constitutional rights. VA. CODE § 19.2-264.3 provides that after a jury has determined the question of guilt, then mental retardation "shall be determined by the jury as part of the sentencing proceeding." This provision does not, as the Commonwealth argues, bar the bifurcation of these two issues.

To the extent the statute is read to bar such a bifurcation, it is unconstitutional, as applied. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 252 (2007) (mandating that the criminal defendant has the "right to have the sentencer consider and weigh relevant mitigating evidence"); *cf. Louisiana v. Williams*, 831 So. 2d 835, 860 (2002) ("The better practice under *Atkins* is . . . where the court makes a pre-trial determination of whether the defendant is mentally retarded."). Mr. Prieto should have been afforded the opportunity to have the mental retardation issue heard prior to the other sentencing phase issues. As such, Mr. Prieto should receive a new hearing regarding this issue.

CONCLUSION

For the foregoing reasons, and those stated in Mr. Prieto's Opening Brief, Mr. Prieto respectfully requests that this Court reverse his convictions and dismiss the case, or, set aside his death sentence, or in the alternative, grant him a new trial.

Respectfully submitted,

ALFREDO R. PRIETO

By Counsel

Greenspun, Shapiro, Davis & Leary P.C.

By: _____
Jonathan Shapiro, Esq.
Attorney of Record
State Bar I.D. #13953
3955 Chain Bridge Road
Second Floor
Fairfax, Virginia 22030
Tel: (703) 352-0100
Fax: (703) 591-7268
E-mail: jshapiro@greenspunlaw.com

Fish & Richardson P.C.

By: _____
Michael A. Siem, Esq.
Of Counsel
Pro Hac Vice
Citigroup Center
52nd Floor
153 East 53rd Street
New York, New York 10022
Tel.: (212) 765-5070
Fax.: (212) 258-2291
E-mail: siem@fr.com

CERTIFICATE

I hereby certify that Rule 5:26(d) of the Supreme Court of Virginia has been complied with, and that pursuant to the Rule, on this 6th day of March, 2009, twelve (12) paper copies and one (1) electronic copy of the Reply Brief of Appellant have been filed with the Clerk of the Supreme Court of Virginia by hand-delivery, and that three (3) paper copies of the same have been hand delivered to Counsel for Appellee:

Matthew P. Dullaghan
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

FISH & RICHARDSON P.C.

By: _____
Michael A. Siem, Esq.