IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 090863

WILLIAM JOSEPH BURNS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF *AMICI CURIAE*
NATIONAL ASSOCIATION FOR THE DUALLY DIAGNOSED
AND THE ARC OF VIRGINIA

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ASSIGNMENT OF ERROR

The trial court erred in refusing to adjudicate Burns incompetent, order a restoration of his competency, or halt the proceedings against him, and in granting summary judgment against Burns, because its actions violated Burns' statutory right to be competent during the proceedings.

QUESTION PRESENTED

Is it error, under Va. Code § 19.2-264.3:1.1, to hold that a prisoner held under a sentence of death has failed to prove that he is mentally retarded, where such failure of proof is the result of a mental illness, and the trial court and the Commonwealth have refused or failed to order or to provide appropriate therapeutic intervention to treat such illness and render the prisoner amenable to testing "in conformity with accepted professional practice" as required by that statute?

STATEMENT OF THE CASE

Appellant William J. Burns was convicted of capital murder and other crimes in the Circuit Court of Shenandoah County and sentenced to death. This Court affirmed, on direct appeal. *Burns v. Commonwealth*, 261 Va. 307, 541 S.E.2d 872 (2001).

Mr. Burns then sought habeas relief. While his petition was pending before this Court, the United States Supreme Court decided *Atkins v.*

Virginia, 536 U.S. 304 (2002), holding that executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment to the U.S. Constitution. The General Assembly responded by enacting emergency legislation implementing procedures governing the determination of mental retardation. 2003 Va. Acts, cc. 1031, 1040; Va. Code §§ 8.01-654.2, 19.2-264.3:1.1 through 19.2-264.3:1.3. This Court in turn determined that Burns' claim of mental retardation is not frivolous and, after twice rehearing the case at the Commonwealth's request, remanded for a jury determination of that claim. *Burns v. Warden*, 269 Va. 351, 609 S.E.2d 608 (2005).[1]

After extensive proceedings on the remand, which are described in part in the Statement of Facts, *infra*, the Circuit Court found "that the Petitioner cannot carry his burden on the issue at hand," JA 1266, and entered summary judgment, reaffirming Burns' sentence of death. JA 814. *See Burns v. Warden*, 269 Va. at 354, 609 S.E.2d at 611. This appeal followed.

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[1] In the professional community, "intellectual disability" is the preferred term applied to what formerly was known as "mental retardation." *See*, *e.g.*, National Association for the Dually Diagnosed, *Diagnostic Manual-Intellectual Disability* 6 (2007). *See also* n.3, *infra*. The Virginia statutes continue to use the terms "mental retardation" and "mentally retarded," however, and therefore those terms were employed in the evidence introduced in the court below and are used in this *amicus* brief.

INTEREST OF *AMICI*

The National Association for the Dually Diagnosed (NADD) is a not-for-profit membership association established for professionals, care providers and families to promote understanding of and services for individuals who have developmental disabilities and mental health needs. The mission of NADD is to advance mental wellness for persons with developmental disabilities through the promotion of excellence in mental health care. It is a national leading force in professional and scientific standards that relate to individuals who have both mental illness and mental retardation.

NADD was founded in 1983 and is now represented in every state in the United States, including the Commonwealth of Virginia, as well as in Canada, Australia, Japan, and Europe. NADD is recognized as the world's leading organization in providing educational services, training materials and conferences to professionals treating dually diagnosed individuals. NADD has been influential in the development of appropriate community based policies, programs and opportunities in addressing the mental health needs of persons with mental retardation.

NADD has been dedicated to, and especially successful in, promoting services that bridge the gap between the mental health and developmental

disabilities structures. More specifically, NADD is committed to professional development, education, training, and coordination of the division of responsibility between the mental health and mental retardation service systems, which historically has resulted all too often in denials of comprehensive care and treatment for individuals who have mental retardation concurrent with a serious mental health problem.

The Arc of Virginia advocates for individuals with developmental disabilities and their families, so they may all lead productive and fulfilling lives. The Arc of Virginia works for the creation of individualized and self-determined community based supports through leadership, advocacy, and education. The organization consists of 21 local chapters with approximately 1,800 members throughout the Commonwealth of Virginia. The Arc of Virginia also is affiliated with The Arc, a national organization consisting of 140,000 members in 1,000 local chapters, which is dedicated to developing and improving services for persons with intellectual and developmental disabilities and their families as well as fostering research and education regarding the prevention of intellectual and developmental disabilities in infants and young children.

The Arc of Virginia monitored closely the development of legislation in the Virginia General Assembly in the aftermath of the *Atkins* decision. The

Arc of Virginia also provided testimony, analyses, and other information to legislators and others involved in developing the legislation. The Arc of Virginia has a special interest in ensuring professional and accurate evaluations and assessments of intellectual and developmental disabilities of all people in the Commonwealth, including those who may have dual diagnoses of mental retardation and mental illness.

Amici are profoundly interested in this case because it presents the types of dilemma so often confronted by persons suffering from both mental illness and mental retardation, in its starkest form – where a man's life depends on the outcome of the case, and where his mental illness has made it impossible to determine, through competent medical or other expert testimony, in accordance with Va. Code § 19.2-264.3:1.1, whether he also is mentally retarded.

STATEMENT OF FACTS

Mr. Burns has a well demonstrated history of mental illness. He was initially found to be incompetent to stand trial on the charges of which he now stands convicted, by reason of mental illness. *See Burns v. Commonwealth*, *supra*, 261 Va. at 334 n.13, 541 S.E.2d at 890 n.13. After a period of intensive inpatient treatment at Central State Hospital, however, Burns' condition was markedly improved and he was found competent to

stand trial, without objection by his counsel. This restoration to competency, while fragile, was sufficient for this Court to uphold his conviction on appeal. *See id.* at 334-36, 541 S.E.2d at 890-91.

Upon conviction Burns was confined on "Death Row" at the Sussex I State Prison. Confinement on Death Row means incarceration "among the strictest forms of solitary confinement." JA 343; *see also* JA 928. It has long been recognized and is well documented that solitary confinement frequently if not invariably causes mental deterioration, particularly in individuals such as Burns who are susceptible or predisposed to such impairment due to a prior history of mental illness. Stuart Grassian, M.D., a psychiatrist and former faculty member of the Harvard Medical School (for more than 25 years), has studied and written extensively on the subject. *See* S. Grassian, Psychopathological Effects of Solitary Confinement, 140 Am. J. Psychiatry 11 (1983) (JA 386); S. Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash. U. J. Law & Policy 325 (2006) (JA 392). Dr. Grassian "observed that, for many of the inmates so housed, incarceration in solitary caused either severe exacerbation or recurrence of preexisting illness, or the appearance of an acute mental illness in individuals who had previously been free of any such illness." *Id.* at 333 (JA 396). Dr. Grassian's conclusions include the following:

> The restriction of environmental stimulation and social isolation associated with confinement in solitary are strikingly toxic to mental functioning, producing a stuporous condition associated with perceptual and cognitive impairment and affective disturbances. In more severe cases, inmates so confined have developed florid delirium – a confusional psychosis with intense agitation, fearfulness, and disorganization. But even those inmate[s] who are more psychologically resilient inevitably suffer severe psychological pain as a result of such confinement, especially when the confinement is prolonged ….

Id. at 354 (JA 404).

Indeed, the U.S. Supreme Court observed as far back as 1890 that "experience demonstrated that there were serious objections" to solitary confinement. *In re Medley*, 134 U.S. 160, 168 (1890).

> A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

Id. The Court concluded in *Medley* that a change in state law which required that a prisoner condemned to die be held in solitary confinement, instead of a county jail as provided under the prior law, was "not … a mere unimportant regulation as to the safe-keeping of a prisoner," *id.* at 167, but a law which imposed "an additional punishment of the most important and painful character" and

therefore was forbidden by the *ex post facto* clause of the U.S. Constitution, *id.* at 171. Even more remarkably, the Court reached that conclusion even though the result was that the defendant, convicted of first degree murder, must be set free – the prior law which authorized confinement in the county jail having been repealed, leaving no valid law under which he could be held pending his execution. *Id.* at 173-75.

Following the remand from this Court described in the Statement of the Case, *supra*, the circuit court appointed John Gregory Olley, Ph.D., a psychologist with 35 years' experience focusing on mental retardation including significant experience with the diagnosis of mental retardation in the presence of mental illness (JA 737), to evaluate Burns. At the time of his first interview, in January 2007, Mr. Burns had been incarcerated on Death Row for more than 6-1/2 years. During the course of several interviews, Dr. Olley determined that Burns was suffering from mental illness which rendered it impossible to administer a standardized measure of intellectual functioning in conformity with accepted professional practice.

In an Affidavit dated February 28, 2007,[2] Dr. Olley stated that when he attempted to interview Burns, he "observed a number of behaviors that are characteristic of psychosis and that significantly interfered with effective communication." JA 339. Burns was delusional, paranoid, and could not separate his thoughts from reality. JA 39-40. "Mr. Burns lacked the ability and focus [necessary] to complete full administrations of standardized measures of intellectual or adaptive skills functioning," and he was found to be "untestable at the present time." JA 340-41. Dr. Olley noted further that Burns' solitary confinement at Sussex I State Prison and ineffective treatment regimen had aggravated his mental illness. JA 341-43. Dr. Olley concluded that it was not possible at that time to conduct the testing required by Va. Code § 19.2-264.3:1.1.B.1. JA 344. He also stated, however, that in his opinion, "to a reasonable degree of psychological certainty, … with appropriate intervention … most people with Mr. Burns' symptoms of mental illness can be treated and brought into sufficient control to allow them [to] be tested as indicated in Va. Code § 19.2-264.3:1.1.B.1…. In my clinical judgment, it is necessary that such

[2] Dr. Olley also testified in open court in a subsequent hearing, on March 14, 2007, as discussed below. The court made clear, however, that there was no "need to rehash what is in the affidavit." JA 920. The Commonwealth made no objection.

measures be undertaken in this case in order to optimize the likelihood of successful testing." JA 344-45.

Dr. Olley testified on March 14, 2007, based on his interviews with Mr. Burns in January and February of that year, that Mr. Burns was not "amenable to the testing that is required under the Virginia statute." JA 921-22. Dr. Olley was "unable to make a diagnosis of mental retardation at [that] time, because [he did] not have sufficient information …. [A] critical part of that information is the administration of an intelligence test. And that is not possible, or was not possible on the days that [he] attempted that." JA 922. Dr. Olley testified further that in his opinion, Burns was likely to respond favorably to a change in his medications, to the extent that he would be amenable to testing. JA 922-24.

Dr. Olley also testified, however, that "under the conditions of the current severity of Mr. Burns' impairment, and the current solitary confinement in which he lives, [he] would not predict any spontaneous improvement." JA 928. To the contrary, "it is much more likely that [Burns] would deteriorate, particularly if he continues in solitary confinement, and he has inadequate medication treatment." JA 928. He also emphasized that the goal should be to

remove any “artificial impairment in his functioning, such that we would diagnose mental retardation mistakenly” and that “ethically, we would want to take [every] step to have Mr. Burns functioning as well as he possibly can, when making that determination.” JA 926.

Dr. William Stejskal, a clinical and forensic psychologist who was appointed to examine Burns’ competence in 2000, also testified on March 14, 2007. Based on his review of applicable literature and evaluations of approximately three dozen individuals held on 23 hour a day lockdown, Dr. Stejskal testified that the psychological impacts of extended periods of solitary confinement include cognitive and emotional depression (and in some cases severe depression, sometimes with psychosis, “particularly in vulnerable individuals who have a history of that kind of disorder”), self-mutilation, and obsessive-compulsive behaviors. JA 913-14. Those are “fairly generic effects of solitary confinement on an otherwise normal-adjusting person. When you add in elements of preexisting mental illness and psychopathology, when you add in elements of impaired cognitive functioning, or intellectual limitations, you increase the risk of that person having very maladaptive psychological and behavioral adjustment to those conditions of confinement.” JA 915. According to Dr. Stejskal, Mr. Burns

suffers from “cognitive impairment, irrational thought, thought disorder, [and] a tendency toward psychotic features.” JA 914.

The court also appointed George W. Woods, Jr., M.D., a neuropsychiatrist, to assist in Burns’ evaluation. In a letter report dated August 27, 2007, Dr. Woods stated that he had determined to a reasonable degree of medical certainty that Burns “suffers from psychosis, impairment of autobiographical memory, derailment of language and thought, and significant social deterioration.” JA 544. Dr. Woods concluded that “[q]uestions of possible neurological deficits and mental retardation must be left until effective intervention against his psychosis has been made. It’s impossible for me to determine whether he is mentally retarded until his psychosis is adequately addressed.” JA 549-50.

Dr. Olley attempted to interview Burns again in June 2008 and found that Burns’ condition had deteriorated significantly since their previous encounters in early 2007. In a declaration under penalty of perjury, dated July 15, 2008, Dr. Olley reported that “Mr. Burns presented as quite psychotic with very overt paranoia, and he was generally unresponsive to questioning” and “considerably less successful than earlier in his ability to engage in either conversation or formal testing.” JA 742, 743. Mr. Burns’ “previously tenuous grasp on reality shown in my earlier visits had virtually

disappeared." JA 741-42. Dr. Olley's "professional expert opinion [was] that, in light of Mr. Burns' current state of mental health, testing him 'in conformity with accepted professional practice' would require the examiner first to adjust and improve Mr. Burns' mental state." JA 746 (quoting Va. Code § 19.2-264.3:1.1.A, B.1). He continued as follows:

> Given Mr. Burns' current mental state, it is not possible to resolve questions about the scope and severity of his intellectual disability in conformity with professional practice. Mr. Burns' present psychological state, including his active psychotic thought processes, prevent him from meaningfully participating in psychological testing administered in conformity with professional practice and apparently required by Virginia law in the expert assessment of mental retardation…. In my experienced clinical judgment, providing an assessment of Mr. Burns' intellectual functioning in conformity with professional practice would first address Mr. Burns' patent and severe mental health issues and restore him to competent mental health status. In my professional opinion, once Mr. Burns has achieved a reasonably normal mental health status, further assessment of intellectual functioning in conformity with professional practice can be completed.

JA 747-48. Dr. Olley also considered the possibility that Burns was malingering, as had been suggested in the past. He rejected that risk, stating, "I believe that the likelihood of his malingering his current condition is negligible." JA 744; *see also* JA 743.

Burns filed a Motion to Declare Defendant Incompetent and for Appropriate Treatment in August 2007, asking the court to declare Mr. Burns incompetent to stand trial and to order appropriate treatment to

restore him to sanity pursuant to Va. Code § 19.2-169.2. JA. 469. Burns argued in support of that motion that he was not competent to assist his counsel and, more pertinent to *amici*'s argument in this appeal, that he was not sufficiently competent to be tested for mental retardation. The court denied Burns' motion, finding "that even if he is incompetent, the case can still proceed, because this is not a criminal case, it is a special proceeding, and he [is] represented by competent counsel." JA 1260-61. The court concluded that absent expert testimony establishing that Burns is mentally retarded, Burns could not carry his burden of proving mental retardation and therefore that the Commonwealth was entitled to summary judgment. JA 1266, 814.

ARGUMENT

Va. Code § 19.2-264.3:1.1, enacted in the wake of *Atkins v. Virginia*, 536 U.S. 304 (2002), adopts the universally-recognized definition of mental retardation established by the American Association on Mental Retardation (AAMR).[3] The definition has three components. With regard to the

[3] On January 1, 2007, the AAMR changed its name to the American Association for Intellectual and Developmental Disabilities (AAIDD). The change was made to address the unfortunate but historically persistent stigmatizing phenomenon associated with terminology describing people with intellectual disabilities. *See* Robert L. Schalock, *et al.*, The Renaming of "Mental Retardation:" Understanding the Change to the Term

(footnote continued)

"intellectual functioning" component, the definition requires that a person score at least two standard deviations below the mean "on a standardized measure of intellectual functioning administered in conformity with accepted professional practice." Va. Code § 19.2-264.3:1.1(A); *see also* AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 1 (10th ed. 2002)[4] ("Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18"); *id.* at 14 ("[t]he criterion for diagnosis is approximately two standard deviations below the mean"); *id.* at 66 ("Testing [of intellectual functioning] should be conducted on an individual basis and be carried out in strict guidance of accepted professional practice"). Subsection B.1 of the Virginia statute likewise

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"Intellectual Disability," 45 Intellectual & Developmental Disabilities 116 (2007) (explaining that the change in terminology within the Association involves no change in the definition). Nothing about the function or significance of the organization changes.

[4] Efforts in the legislature to make the definition somewhat more restrictive than the AAMR definition ultimately were rejected at the insistence of Governor Warner. *See* R. Bonnie & K. Gustafson, The Challenge of Implementing *Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases, 41 U. Richmond L. Rev. 811, 853-54 (2007). *See also Report of the Virginia State Crime Commission: Atkins v. Virginia: A Study to the General Assembly of Virginia* 3 (Jan. 2003) (Recommendation 4).

reiterates that “[t]esting of intellectual functioning shall be carried out in conformity with accepted professional practice.”

NADD and The Arc of Virginia have extensive and intimate familiarity with, and expertise in, the standards of professional practice imposed on the administration of standardized measures of intellectual functioning. “Standardized testing” is dependent upon uniform adherence to fundamental, specific and consistent protocols in testing. Much of the test administration protocols for particular standardized measures of intellectual functioning are proprietary and maintained in confidence by test administration professionals in order to protect the integrity of the tests, but some aspects are general knowledge. For example, intelligence testing should be administered individually; administration should account for “standard errors of measure” in the testing instrument; and an individual’s social, linguistic, and cultural background may make some tests more appropriate measures of intellectual functioning for that individual. Some elements of the test administration protocol are specific and detailed. Certain portions of tests, for example, impose strict time constraints. Questions or hesitations by the person taking the test may allow for scripted responses or prompts, but these are designed to remain common to all test administrations. Some protocols are simply common sense. If

the room in which the test is administered is unusually cold or loud, for example, appropriate adjustments should be made.

The uniformity in test administration is paramount in obtaining intelligence quotient (IQ) scores because they are measures of an individual's functioning in comparison to the general population. Significant variations in test administration would make this comparison meaningless.

As would be expected, professional practice demands intimate familiarity with, and strict adherence to, test protocols for standardized measures of intellectual functioning in order to scrupulously guard the "standardized" nature of the instrument. In the circumstances in which Dr. Olley found himself – with Mr. Burns' apparent significant mental illness interfering with the ability to administer a standardized measure of intellectual functioning in conformity with professional practice – *professional practice requires* that the administration of the test be suspended and the interfering component (in this instance, Mr. Burns' mental illness) be addressed and, if possible, resolved. In cases involving dual diagnoses and mental health issues, this is a common concern and practice. When a test administrator like Dr. Olley concludes that flaws in the "standardized" quality of test administration will taint results, the test should not be administered. Forging ahead in less than optimal conditions

raises additional concerns that later testing, even if administered in a more "standardized" format, will be improperly influence by the "practice effect," a phenomenon created by the test taker's repeated exposure to the test materials in a relatively short period of time.

Dr. Olley's behavior and his recommendations to Mr. Burns' counsel and to the court were in conformity with professional practice for the administration of a standardized measure of intellectual functioning in the circumstances. In fact, from a professional practice perspective, the mental health treatment proposed by Dr. Olley was an integral part of the test administration.

In fairness to the Circuit Court, it is not an uncommon lay reaction in dual diagnosis circumstances to focus on only one diagnosis. As in Mr. Burns' case, it is not unusual for the more florid diagnosis to draw attention. But mental illness is as prevalent in the population of people with intellectual disabilities as it is in the general population, and professional practice has learned how to successfully assess deficits in intellectual functioning even if accompanied by significant mental illness. Dr. Olley's suspension of testing and proposed course of mental health treatment was in conformity with professional practice in these circumstances. It is the common experience of the mental health and intellectual disabilities

communities that adherence to this practice is the most appropriate, and likely, manner in which to produce an accurate assessment of a person's intellectual functioning. In these circumstances, it is contrary to professional practice to end efforts to administer a standardized measure of intellectual functioning.

The record of this case demonstrates beyond credible argument that to test Mr. Burns' intellectual functioning in conformity with accepted professional practice, it is necessary first to treat his manifest mental illness. The record further demonstrates that when assessing intellectual disabilities of people with dual diagnoses, including significant mental illness that interferes with the ability to administer standardized tests, it is accepted professional practice to treat the person's mental illness at least to the point when it no longer appears to interfere with standardized testing. As Dr. Olley repeatedly advised the Circuit Court, "providing an assessment of Mr. Burns' intellectual functioning in conformity with professional practice would first address Mr. Burns' patent and severe mental health issues and restore him to competent mental health status," JA 748; and "in light of Mr. Burns' current state of mental health, testing him 'in conformity with accepted professional practice' would require the

examiner first to adjust and improve Mr. Burns' mental state." JA 746. *See also*, *e.g.*, JA 344-45, quoted *supra* at 9-10; JA 926, quoted *supra* at 10-11.

Best practices in the diagnosis of mental retardation are "embedded in research-based knowledge combined with professional ethics, professional standards, and clinical judgment." American Association on Intellectual and Developmental Disabilities, *User's Guide: Mental Retardation* at 8 (10th Ed. 2002). The use of clinical judgment is required in a number of specific situations, including when attempting to diagnose an intellectual disability in a subject with co-existing mental illness symptoms in a prison setting. The use of clinical judgment in this typical less-than-optimal setting is critical to best practices in diagnosing mental retardation. *Id.* Based on Dr. Greg Olley's training and experience, *amici* fully support his decisions and use of his clinical judgment in this case.

The Commonwealth's handling and treatment of Mr. Burns, subsequent to his conviction, raises additional concerns for *amici* about why his mental health has interfered with the ability to administer him a standardized measure of intellectual functioning in conformity with professional practice. This is not to cast aspersions on the Commonwealth's or its agents' and officials' good faith in the performance of their official duties. The Commonwealth understandably confines Death

Row inmates under demonstrably secure conditions. The unfortunate fact, however, is that at least with regard to Mr. Burns, prolonged confinement under those conditions has so gravely exacerbated his pre-existing mental illness as to render him incapable of being tested as required by § 19.2-264.3:1.1. As both Dr. Olley and Dr. Woods found, in the present circumstances, it is "not possible," due to Burns' severe mental infirmities, to administer an intelligence test and obtain reliable results at this time. JA 549-50, 747, 922.

Mr. Burns' history, however, provides reason to be optimistic that he can be sufficiently restored to mental competence to allow for testing in compliance with applicable standards of professional practice. He was initially found incompetent to stand trial, as discussed above; but after four months' inpatient treatment, his mental faculties were sufficiently restored to enable him to assist counsel in his defense, and the trial was able to proceed. *See Burns v. Commonwealth*, 261 Va. at 334 n.13, 541 S.E.2d at 890 n.13. This suggests that similar treatment will provide sufficiently positive results. Burns' mental condition may well be worse now than at the beginning of the criminal prosecution, due to his prolonged confinement under unremittingly harsh conditions, but that does not excuse compliance

with the statute enacted by the General Assembly in response to the *Atkins* decision.

The likely impact of conditions of confinement on Mr. Burns' deteriorating mental illness and its interference, in turn, with Dr. Olley's ability to administer a standardized measure of intellectual functioning in conformity with professional practice has created a cruel "Catch-22": If Mr. Burns cannot *prove* that he *is* mentally retarded, he will die either by lethal injection or in the electric chair; but by holding him in solitary confinement and denying appropriate medication for his manifest psychiatric disorders, the Commonwealth appears to have interfered with and substantially diminished the ability of Mr. Burns' medical and psychological experts to determine whether he is mentally retarded or not.

The Circuit Court in this case held in effect that not only the burden of proof but also the burden of mustering the resources required to comply with the statute lies with a petitioner who claims mental retardation. Whatever may be the case with respect to a petitioner who is free to avail himself of the mental health resources available to the community at large – an issue not presented in this case, and indeed one that in the nature of things may rarely or never arise – that cannot be the rule under the circumstances of this case. Mr. Burns has absolutely no ability or

opportunity to take advantage of the numerous mental health resources available to free men; and the application of such resources would be of doubtful efficacy in any event, as long as he remains confined under the conditions that appear likely to have caused his present, severely deteriorated mental condition.[5] Returning the case to the circuit court in order for Dr. Olley to arrange and monitor proposed interim mental health treatment also will enable him to complete the administration of the standardized test in conformity with professional practice.

The language of the statute does not permit the interpretation given it by the court below. Va. Code § 19.2-264.3:1.1.B provides that assessments of mental retardation "*shall* conform" to stated requirements, and subsection B.1 commands that "[t]esting of intellectual functioning *shall* be carried out in conformity with accepted professional practice." (Emphases added.) The evidence in this case leads inexorably to the conclusion that in order to comply with the statutory mandates, Mr. Burns'

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[5] The experts agree that Burns' present medications are not likely to be effective. That implies, of course, that a different medication regime may be required to restore Burns' mental faculties. That does not imply, however, that his condition can be treated successfully with medication alone, while he remains confined under rigid isolation conditions. As Dr. Woods reported, "[e]ffective treatment [of Burns' psychosis] must include aggressive pharmacological treatment in an inpatient psychiatric setting with the tools to monitor and adjust his medications as necessary." JA 550.

mental illness must be treated sufficiently to render him amenable to testing.

In short, the Commonwealth cannot be allowed to confine a mentally ill prisoner under conditions – including both the physical conditions of incarceration and the denial of effective medications – which make it impossible for him to be tested for mental retardation in conformity with accepted professional practice, and then to take advantage of the mental disabilities caused by those very conditions by obtaining reinstatement of a sentence of death on the ground that the prisoner cannot carry his burden of proving mental retardation. That, however, is precisely what the Commonwealth has done in this case.

To affirm the judgment below would be to fly in the face of the Supreme Court's *Atkins* decision; to render nugatory the emergency legislation enacted by the General Assembly in response to *Atkins*, in cases of the nature of this one; and, indeed, to push aside rudimentary concepts of due process, fairness and simple justice.

CONCLUSION

The judgment should be reversed and the case remanded with instructions to grant Burns' Motion to Declare Defendant Incompetent and for Appropriate Treatment and to provide additional appropriate measures

to allow completion of the administration of a standardized measure of intellectual functioning in conformity with professional practice.

Respectfully submitted,

The National Association for the
Dually Diagnosed

The Arc of Virginia

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CERTIFICATE

Pursuant to Va. Sup. Ct. Rule 5:26(d), I hereby certify that on this 2d day of September, 2009:

Fifteen copies of this brief are being transmitted by hand for filing in the office of the Clerk of this Court.

An electronic copy of this brief, in Word format, has been filed with the Clerk of this Court by e-mail to scvbriefs@courts.state.va.us.

Three copies of this brief are being mailed to each of the following counsel:

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