IN THE

Supreme Court of Virginia

RECORD NO. 090863

WILLIAM JOSEPH BURNS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Circuit Court of Shenandoah County convicted Burns of capital murder, among other crimes, and sentenced him to death. This Court upheld Burns' conviction and sentence on direct appeal. *Burns v. Commonwealth*, 261 Va. 307, 541 S.E.2d 872 (2001).

Burns raised a claim of mental retardation in *habeas corpus* proceedings in this Court. While his petition was pending, the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), and the General Assembly enacted emergency legislation implementing procedures governing the determination of mental retardation. This Court determined that Burns' claim of mental retardation is not frivolous and, after two rehearings, remanded his case for a jury determination of his claim pursuant to Code §§ 19.2-264.3:1.1 and 264.3:1.2. *Burns v. Warden*, 269 Va. 351, 353, 609 S.E.2d 608, 610 (2005).

Initially, the parties both argued, and the trial court agreed, that the case was criminal in nature. J.A. 822K, 822N, 822S. As the case progressed, it soon became clear that Burns' active psychosis interfered with the ability of the court-appointed mental retardation expert, Dr. John Gregory Olley, to test Burns' intellectual functioning pursuant to Code § 19.2-364.3:1.1(B)(1). J.A. 339-45. Dr. Olley made clear that, were he to encounter psychosis like that exhibited by Burns in any other person he was attempting to evaluate, it would be his professional practice to treat the

psychosis before evaluating intellectual functioning. J.A. 344-45. When Burns' attorneys moved for adjudication and restoration of Burns' competency, *see* J.A. 469 (Motion to Declare Defendant Incompetent and for Appropriate Treatment), the Commonwealth (now represented by both the Commonwealth's Attorney and the Attorney General) switched positions, arguing that the case was analogous to a *habeas* referral, that Burns had no right to be competent for the proceedings, and, should Burns' incompetency interfere with his ability to carry his burden of proof, his case should be dismissed. *See* J.A. 533 (Motion to Correct Style of Case), 527 (Motion to Dismiss).

Also switching positions, the trial court held that the case "falls somewhere between criminal and civil." J.A. 1041. Following the Attorney General's lead, the trial court took the position that this proceeding was to be unique in the law, that there was no set of procedures for the court to follow, and that the court was "blazing trails here, and maybe without the benefit of a compass." J.A. 1051. In response to a series of motions in which Burns' counsel attempted to get the court to divulge fundamental information about the nature of the proceeding underway, the trial court determined that it would apply some criminal statutes, but that Burns had neither the right to be present nor to be competent. *See, e.g.*, J.A. 1108-10, 1131.

Burns filed a declaration from Dr. Olley explaining that Burns' severe psychosis interfered with the expert's ability to administer standardized measures of intellectual functioning in conformity with professionally accepted standards. J.A. 735-61. The Commonwealth seized on this opportunity to renew its motion to dismiss the case. J.A. 766-71. Recognizing that Burns' lack of expert testimony on mental retardation was driven by his incompetence, the trial court nevertheless granted what it "equate[d] to be a motion for summary judgment." J.A. 1266.

Burns appealed timely. Burns placed both captions, *Burns v. Commonwealth* and *In re Burns*, on his Petition for Appeal, because he did not know how this Court intended to caption the case. The Commonwealth filed its Brief in Opposition to Petition for Appeal under the caption *In re Burns*. This Court granted Burns' Petition for Appeal under the caption *Burns v. Commonwealth*. *See* Order of July 24, 2009. In responding to Burns' request for an extension of time to file this Opening Brief, the Commonwealth complained that Burns used the caption *Burns v. Commonwealth* and asserted that *In re Burns* is the proper style. *See* Opposition to Burns' Motion for Extension of Time at 1 n.1. This Court ruled on Burns' motion under the caption *Burns v. Commonwealth*. *See* Order of August 21, 2009. Accordingly, Burns proceeds here under the caption properly used by this Court.

ASSIGNMENTS OF ERROR

I. The trial court erred in granting summary judgment against Burns on the issue of whether he is mentally retarded within the meaning of Code § 19.2-264.3:1.1.

II. The trial court erred in granting summary judgment against Burns because the proceeding below was not a civil proceeding.

III. The trial court erred in granting summary judgment against Burns because the proceeding below was a criminal proceeding, or at least a quasi-criminal proceeding.

IV. The trial court erred in granting summary judgment against Burns because the summary judgment denied Burns his statutory right to a jury determination of his claim of mental retardation.

V. The trial court erred in granting summary judgment against Burns because the summary judgment denied Burns his Eighth and Fourteenth Amendment rights to a determination of his mental retardation in accordance with due process and equal protection.

VI. The trial court erred in granting summary judgment against Burns because the summary judgment denied Burns his Fourteenth Amendment right to a jury determination of his claim of mental retardation.

VII. The trial court erred in granting summary judgment against Burns because the summary judgment denied Burns his Eighth and

Fourteenth Amendment rights against execution of the mentally retarded.

VIII. The trial court erred in granting summary judgment against Burns because the proceedings below denied Burns his right to be present at critical phases of his trial.

IX. The trial court erred in granting summary judgment against Burns because Code § 19.2-264.3:1.1 does not require expert testimony at trial on the issue of intellectual functioning.

X. The trial court erred in granting summary judgment against Burns because the summary judgment violated the mandate of this Court requiring a jury determination of Burns' mental retardation claim.

XI. The trial court erred in granting summary judgment against Burns because the Commonwealth was improperly represented by both the Commonwealth's Attorney and the Attorney General.

XII. 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' constitutional and statutory rights to be competent during the proceedings.

XIII. 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' constitutional and statutory rights to a hearing on his competence.

XIV. 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' constitutional and statutory rights to competence to be tested in conformity with accepted professional practice pursuant to Code § 19.2-263.3:1.1(B)(1), including administration of a standardized measure of intellectual functioning in conformity with professional practice.

XV. 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' Eighth and Fourteenth Amendment right to a mechanism to assert his claim of mental retardation.

XVI. 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' due process right to the benefit of Virginia's statutory procedure for asserting a claim of mental retardation.

XVII. 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' right to rationally assist his counsel by participating in an intellectual functioning assessment.

XVIII. 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 the Commonwealth aggravated Burns' mental illness and denied him access to professional testing of his intellectual functioning by subjecting Burns to solitary confinement and inadequate medication.

QUESTIONS PRESENTED

I. Whether the trial court erred in granting summary judgment against Burns on the issue of whether he is mentally retarded within the meaning of Code § 19.2-264.3:1.1? This Question relates to Assignments of Error I-XI.

II. Whether 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, while Burns was incompetent to be tried or tested in conformity with accepted professional practice? This Question relates to Assignments of Error XII-XVIII.

STATEMENT OF FACTS

Although the fundamental nature of this case is contested, few of the facts are in dispute. The relevant facts of the case, presented in the light most favorable to the Commonwealth,[1] are as follows:

Burns maintains competency at trial only through treatment

Burns' mental health was an ever-present issue at the original trial of this case. On February 15, 1999, Dr. William J. Stejskal concluded that Burns was not competent to stand trial because of his mental illness, specifically, Major Depression, Recurrent, Severe, with Psychosis. J.A. 1274-75. Dr. Stejskal suggested that appropriate anti-depressive medication in an in-patient treatment setting might restore Burns to competency. J.A. 1275.

Dr. Stejskal was correct that medication and in-patient treatment could adequately treat Burns. The Circuit Court committed Burns to an in-patient therapeutic setting at Liberty Forensic Unit, which treated Burns with anti-depressive and anti-anxiety medication. J.A. 1283. In the Liberty Forensic Unit discharge report dated May 3, 1999, Dr. Dafferlin J. Barnard-

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[1]This well-established standard of review applies only in a criminal case. If this case were civil in nature, as the Commonwealth contends, the evidence on appeal from a grant of summary judgment must be viewed in the light most favorable to Burns, the non-moving party. *See, e.g.*, *Jackson v. Hartig*, 274 Va. 219, 229, 645 S.E.2d 303, 308 (2007).

Dupree noted that psychological testing suggested the possibility that Burns exaggerated his symptoms, but recommended continued treatment with anti-depressive and anti-anxiety medications. J.A. 1284. Dr. Barnard-Dupree explained that Burns "will be referred to the local community services board for medication management and supportive therapy." J.A. 1284.

Following his return to the jail, Burns continued to receive the medication recommended by Dr. Barnard-Dupree. J.A. 1287. At the direction of the court, Dr. Stejskal evaluated Burns again and determined on June 19, 1999, that Burns' "vulnerability to experience periods of withdrawal, regression, and intense emotionality is less pronounced than previously observed, owing in part to the administration of appropriate antidepressant and anti-anxiety medication. This vulnerability continues to be a significant factor, however, and stands to undermine his capacity to assist, depending on 1) the vicissitudes of his case and personal circumstances, and 2) the adequacy of continuing psychiatric care respecting the management of his medications." J.A. 1289.

During trial, the issue of Burns' mental health arose again. In response to a motion for another competency evaluation, the trial court explained that, "Dr. Stejskal suggested that, in order for him to be

competent to stand trial, he must be given medication, as needed and as prescribed." *Burns v. Commonwealth*, 261 Va. 307, 334, 541 S.E.2d 872, 890 (2001); *see also id.* at 347, 541 S.E.2d at 898 (Koontz, J., dissenting) (describing Dr. Stejskal's opinion that continuing psychiatric and medical care was critical to maintaining Burns' competency). The trial court determined that Burns was receiving his medication and that his competency remained intact, a determination this Court upheld on appeal. *Id.* at 334, 541 S.E.2d at 890.

Burns presses his mental illness and mental retardation claims in this Court

On May 12, 2000, the Circuit Court for Shenandoah County imposed a sentence of death, two life sentences, and a term of 18 years' incarceration on William Joseph Burns for the sexual assault and murder of his mother-in-law. On appeal, Burns argued that the trial court should have ordered another competency evaluation to address the problems caused by his mental illness. This Court affirmed Burns' convictions and death sentence on direct appeal, *Burns v. Commonwealth*, 261 Va. 307, 541 S.E.2d 872 (2001), prior to the decision of the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002).

In his Petition for Writ of Habeas Corpus filed in this Court, Burns argued, *inter alia*, that his attorney failed to present evidence of his mental

illness and mental retardation, and that his death sentence was unconstitutional because he is mentally retarded. *See generally* Initial Petition for a Writ of Habeas Corpus, Subject to Amendment, *Burns v. Warden*, Record No. 020971, filed April 22, 2002. Following the Supreme Court's decision in *Atkins* and the General Assembly's enactment of Code § 8.01-654.2, Burns filed a supplemental pleading arguing that his mental retardation rendered him ineligible for a death sentence. *See generally* Amended Petition for Writ of Habeas Corpus, *Burns v. Warden*, Record No. 020971, filed June 20, 2003. In an order dated October 28, 2003, this Court found that Burn's "claim of mental retardation is not frivolous. The Court remands the case to the Circuit Court of Shenandoah County where the sentence of death was imposed by a jury, for a hearing on the sole issue of whether petitioner is mentally retarded as defined in Code § 19.2-264.3:1.1." Order of October 28, 2003 at 2-3, *Burns v. Warden*, Record No. 020971, *on reh'g*, 268 Va. 1, 597 S.E.2d 195 (2004), *on further reh'g*, 269 Va. 351, 609 S.E.2d 608 (2005).

The Commonwealth attempts to stop the remand

The Commonwealth, in the person of the Warden, moved for rehearing on Burns' right to a jury determination of his mental retardation, arguing, "There is nothing in the new 2003 legislation to indicate that the

General Assembly blurred the long-settled distinction between appellate and habeas corpus remedies, much less created a hybrid mechanism without any corresponding procedure to govern it." Warden's Petition for Rehearing at 1, *Burns v. Warden*, Record No. 020971, filed Nov. 6, 2003. On rehearing, this Court rejected the Warden's position and noted that Code § 8.01-654.2 "alters the normal proceedings applicable both to direct appeals and to habeas corpus proceedings in a very limited number of cases." *Burns*, 268 Va. at 3, 597 S.E.2d at 197. This Court thus "reinstate[d] that portion of our October 28, 2003 order providing a limited grant of the petition for a writ of habeas corpus and remanding the case to the Circuit Court of Shenandoah County for a jury determination of Burns' claim of mental retardation." *Id.*

This Court granted the Warden's petition for further rehearing, which also opposed a jury determination of Burns' claim of mental retardation on the theory that Burns' hearing on remand would be in the nature of *habeas corpus*. This Court held that, although Code § 8.01-654.2 permits a person to raise a mental retardation claim in a habeas corpus petition, "adjudication of that issue does not occur as part of a habeas corpus proceeding but in the specific proceeding the General Assembly established in Code § 8.01-654.2." *Burns v. Warden*, 269 Va. 351, 353,

609 S.E.2d 608, 610 (2005). This Court remanded, rather than referred, the case to the Circuit Court, holding that the jury determination was not part of the habeas corpus proceeding. *Id.* at 353-54, 609 S.E.2d at 610.

On remand, all agree Burns' case is criminal in nature

In the Circuit Court, Burns filed a Motion for Change of Caption, J.A. 17-23, and a Motion to Allocate Burden of Persuasion to the Commonwealth, J.A. 60-77. In these motions and at the subsequent hearing, Burns argued "that this is a criminal case to which all of the protections of criminal law . . . of the constitution, in criminal cases, apply. The Sixth Amendment applies. The Fourth Amendment applies. The Fifth Amendment applies, et cetera." J.A. 822K. As an alternative, Burns argued that the case was quasi-criminal in nature. J.A. 822M. Burns argued that if the court would not impose the burden of persuasion on the Commonwealth, however, the court should alter the caption to reflect that fact. J.A. 822Q. The Commonwealth opposed the motions, arguing that the proceeding was strictly criminal because it was part of the original sentencing proceeding which would have taken place at trial if the *Atkins* ruling had been in effect. J.A. 822N. The court ruled in favor of the Commonwealth, explaining that "regardless of the procedural route it took to get back here, *this is still part of the original case. It is part of a*

sentencing. And I am going to leave [it] as 'Commonwealth versus Burns.'" J.A. 822S.

Burns' mental illness interferes with the evaluation

After the court appointed Dr. John Gregory Olley, a psychologist specializing in mental retardation, to evaluate Burns, it became clear that Burns' mental illness posed a barrier to an assessment of his intellectual functioning in conformity with accepted professional practice. When Dr. Olley attempted to interview Burns, he "observed a number of behaviors that are characteristic of psychosis and that significantly interfered with effective communication." J.A. 339. Burns was delusional, paranoid, and could not separate his thoughts from reality. J.A. 339-40. Dr. Olley noted that Burns' solitary confinement at Sussex I State Prison and the ineffective treatment regimen aggravated Burns' mental illness. J.A. 341-43. Dr. Olley concluded that Burns' mental illness must be addressed before the professional evaluation mandated by Code § 19.2-264.3:1.1 could be carried out in conformity with accepted professional practice. J.A. 344. Dr. Olley testified that although Burns' mental illness interfered with his ability to test his intellectual functioning, he believed that the illness could be addressed through treatment. J.A. 921-924. The experience of court-

appointed psychologist Dr. William Stejskal with Burns prior to his criminal trial supported Dr. Olley's conclusions. J.A. 913-15.

Burns seeks restoration of competency

Faced with overwhelming evidence of Burns' mental illness, the court appointed neuropsychiatrist Dr. George W. Woods, Jr., M.D., to assist in the evaluation. J.A. 468. Dr. Woods 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." J.A. 544. Dr. Woods opined that Burns' psychosis rendered him "incompetent to rationally assist his attorneys." J.A. 550.

Given that all of the medical and psychological opinion mirrored their own experience of Burns' incompetence, Burns' attorneys filed a Motion to Declare Defendant Incompetent and For Appropriate Treatment, J.A. 469-526. In this motion, they argued both that Burns is incompetent to be tested in conformity with accepted professional practice as required by statute, J.A. 475-76, and that he is incompetent to stand trial, J.A. 471-74. The attorneys proffered that they could "present evidence from members of the defense team . . . that Mr. Burns' condition has declined to the point where he can no longer assist counsel in his defense. " J.A. 476.

The Commonwealth shifts position to take advantage of an opportunity

The Commonwealth responded by moving to immediately dismiss the proceeding, reasoning that Burns could not carry his burden of proving mental retardation if he is incompetent. J.A. 527. Burns pointed out that the novel proposition that the defendant in a criminal proceeding should be penalized for his incompetence would violate numerous constitutional rights. J.A. 530-31.

Faced with the fact that its proposed dismissal of the case would fly in the face of the Constitution, three days before the hearing, the Commonwealth performed an about-face and filed a motion arguing that the court should change the caption of the case to *In re Burns* or *Burns v. Warden*. J.A. 533-34. Without even acknowledging the previous, unanimous position of both the parties and the court that the case was criminal in nature, the Commonwealth pled that Burns' case was non-criminal because it "is in the same procedural posture as a habeas case." J.A. 534. Because the case was non-criminal, the Commonwealth reasoned, Burns had no right to be competent, no right to remain silent, no right to counsel, or any other constitutional rights. J.A. 537-39.

The Commonwealth's radical change of position became clearer at the hearing on these motions. The Commonwealth escalated the debate

over the nature of the case and surprised Burns by bringing in Senior Assistant Attorney General Katherine Burnett[2] to represent the Commonwealth. J.A. 980. The Commonwealth told the court that its previous position was "wrong," and that the case "is basically a different type of proceeding than a so-called criminal proceeding, although it does have certain criminal aspects to it." J.A. 987. The Commonwealth argued that if Burns was incompetent, the case should immediately be dismissed because he cannot carry his burden of persuasion. J.A. 994. Burns responded that the case was criminal in nature and filled the role a sentencing proceeding would have played if Burns' trial had taken place after the *Atkins* decision. J.A. 997-1001.

Burns tries to keep the case on track

Given that the Commonwealth had filed the motion to change the caption only three days before the hearing, the court granted additional time for briefing. J.A. 1019. In his brief, Burns argued that as a matter of statutory construction and equal protection, constitutional protections apply in the mental retardation proceeding whether it occurs in the sentencing phase, following a direct appeal, or following a *habeas* petition. J.A. 553-56.

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[2] Mrs. Burnett's surname was Baldwin at the time of the hearing. Mrs. Burnett argued in the trial court over Burns' objection. J.A. 1002.

Burns also moved to prohibit the involvement of the Attorney General in a criminal case as provided by Code § 2.2-511. J.A. 646. The Commonwealth responded that both the Commonwealth's Attorney and the Attorney General could represent the Commonwealth and that Burns did not have standing to object. J.A. 651-56. In a written ruling,[3] the trial court retroactively appointed Senior Assistant Attorney General Burnett as a Special Assistant Commonwealth's Attorney. J.A. 690.[4]

The trial court loses its way

The trial court held a hearing on the nature of the case and the Commonwealth's motion to dismiss on February 20, 2008. The trial court ruled, "that this is indeed a specific proceeding, or special proceeding, that falls somewhere between criminal and civil. It is neither wholly criminal nor wholly civil. And I think the style of the case should be changed to: *In re:* William Joseph Burns." J.A. 1041. While Burns himself was excluded from the courtroom for babbling the nonsense that mental health professionals described as characteristic of his psychosis, his attorneys argued that he had the right to be competent even if the case is quasi-criminal or civil in nature. J.A. 1049-55. Burns argued that the Commonwealth's motion

[3] Burns requested that the court rule expeditiously to allow Burns to seek review in this Court. J.A. 676-81.

[4] Burns sought a writ of prohibition in this Court, which was denied on October 31, 2007. J.A. 692.

would penalize Burns for his incompetence and was at best premature. J.A. 1053-60. The trial court denied the Commonwealth's motion to dismiss as premature. J.A. 1065. Because the trial court ruled that the case was no longer criminal, Capital Defender Joseph Flood indicated to the court that a prohibition on public defenders representing clients in non-criminal proceedings obliged him to withdraw from the case, and the court allowed him to do so. J.A. 1065-68.

Seeking some kind of guidance in a case which was now cut loose from the moorings of both civil and criminal law, Burns filed various motions, including a Motion to Establish Payment Authority, J.A. 693-94, a Motion to Establish Applicability of Virginia Civil and Criminal Statutes and Rules, J.A. 704-14, and a Motion to Exclude the Commonwealth's Attorney from Representing the Commonwealth in a Non-Criminal Matter, J.A. 698-703. The trial court ruled that the case was criminal for the purposes of Code § 19.2-163.7 because "the proceeding, itself, rises out of a criminal prosecution and the ultimate resolution of the case will affect a criminal sanction." J.A. 1109. The trial court also ruled that the case was sufficiently criminal to permit the Commonwealth's Attorney to appear, reasoning that "while I have already ruled that this is a special proceeding, neither criminal nor civil, it does arise within the context of a criminal

prosecution." J.A. 1144.[5] But the trial court held that the case was not criminal for the purposes of Code § 19.2-259, requiring the presence of the person on trial. J.A. 1176.

The Commonwealth's strategy bears fruit

At the time appointed for the filing of expert disclosures, Burns filed a notice that he did not intend to present expert testimony at trial. J.A. 735. Burns attached a declaration from Dr. Olley, who explained that available evidence suggests that Burns is mentally retarded, and that in his professional opinion, Burns satisfies the childhood and adult adaptive functioning criteria for mental retardation. J.A. 747. He explained, however, that Burns' psychosis interfered with his (Dr. Olley's) previous attempts to assess Burns' intellectual functioning in conformity with accepted professional practice and that professional practice obliged him to address Burns mental illness before administering a standardized intelligence test. J.A. 747-48. He also explained that Burns was not competent to stand trial, and excluded the possibility that malingering was the cause of Burns' psychotic symptoms. J.A. 743-44.

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[5] The Attorney General also appointed the Special Commonwealth's Attorneys (already specially appointed in lieu of the Shenandoah Commonwealth's Attorney) as Special Assistant Attorneys General. J.A. 1143-44. This action completed the circle of intertwined representation, as the trial court had already appointed Ms. Burnett as a third Special Assistant Commonwealth's Attorney. J.A. 690.

Seizing on the perceived advantage created by Burns' mental illness, the Commonwealth renewed its motion to immediately dismiss the proceeding under the caption "Respondent's Motion for Final Order," J.A. 766-71. The Commonwealth argued that Burns could not prove mental retardation without an expert assessment of his intellectual functioning, that Dr. Olley's present inability to assess Burns' intellectual functioning amounted to a failure of proof, and that Burns had waived his mental retardation claim by giving notice that he would not present expert testimony. J.A. 768-69. Burns responded that the statutory framework does not require expert testimony, that dismissing the case without a jury determination of Burns' mental retardation would be unconstitutional, and that the appropriate course of action was to restore Burns to competency, as it had done prior to trial. J.A. 776-97. Burns also represented to the trial court that, at trial, he intended to present evidence of IQ testing administered while Burns was in school to satisfy the intellectual functioning criterion of the statutory mental retardation definition. J.A. 1186-87.

After hearing testimony from Commonwealth's expert Dr. Hagan, the trial court explained its reasoning on the Commonwealth's motion orally. The trial court ruled that, "even if [Burns] 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." J.A. 1261. The trial court found as a fact that Burns' reliance on an old IQ test rather than recent testing "is done by necessity, not by choice." J.A. 1261. The trial court also rejected the Commonwealth's claim of waiver. J.A. 1261-62.

The trial court ultimately held:

> In the final analysis, it is my view at this time that while there may be situations where an old IQ test could be relied upon, this is not one of them, because I think the old test, or the new test, has to meet the criteria of the statute. And quite frankly, from my review now of the statute, and my consideration of Dr. Hagan's testimony, I think you have to have expert testimony, whether it be for the old test or the new test; that is, to talk about . . . certainly about the manner in which the new test was administered, whether it meets the criteria, and then for the interpretation of the test.
>
> Here, the petitioner has given notice that he is not going to call an expert witness. Counsel has proffered the intended evidence, in response to questions from the Court. And it appears to me that the petitioner cannot carry his burden on the issue at hand. And for that reason, I am going to grant what I equate to be a motion for summary judgment in this case. And we will let the Virginia Supreme Court address all of these issues.

J.A. 1266.

This Court granted Burns' Petition for Appeal under the caption *Burns v. Commonwealth*, and this Opening Brief of Appellant follows. Burns now turns to this Court to redress the serious errors of the trial court, and

provide him with a mental retardation determination that comports with Virginia and federal law.

ARGUMENT

After *Atkins,* the General Assembly provided, and this Court awarded, Burns the jury determination of his mental retardation which should have taken place at his sentencing hearing. Burns' treatable mental illness interfered with this evaluation and determination, but the trial court and Commonwealth steadfastly refused to provide treatment, or even to recognize that Burns' incompetency was a relevant issue in the case.

Instead, the Commonwealth divorced the proceeding below from its foundation in constitutional and statutory law, ultimately leading to the spectacle of summary judgment against an incompetent defendant in a criminal case. The terrible irony of this case is that the Commonwealth, not Burns or this Court, turned the proceedings below into the "hybrid mechanism without any corresponding procedure to govern it" the Commonwealth deplored in its previous pleadings in this Court. Warden's Petition for Rehearing at 1, *Burns v. Warden*, filed Nov. 6, 2003. This Court must intervene to protect Burns' constitutional rights and restore the mental retardation determination to its proper place in the capital sentencing scheme.

I. The trial court erred in granting summary judgment against Burns on the issue of whether he was mentally retarded within the meaning of Code § 19.2-264.3:1.1.

The trial court disposed of Burns' mental retardation proceeding by granting what it "equate[d] to be a motion for summary judgment." J.A. 1266. This ruling was entirely wrong, both in its substance and its procedure.

A. Summary judgment was not available in the proceeding below because it was not a civil proceeding.

The first reason the trial court erred is that summary judgment is only available in civil cases, and the proceeding below was criminal or quasi-criminal in nature. Summary judgment pursuant to Rule 3:20 is available only in cases within the scope defined by Rule 3:1, i.e., civil actions.

Although the nature of the case below was disputed, neither the parties nor the court ever articulated the position that the case was governed by Part Three of the Supreme Court Rules. At the hearing on the first (Burns') motion for change of caption, the Commonwealth argued that the case was criminal in nature, Burns argued that the case was criminal or quasi-criminal, and the trial court ruled that it was criminal in nature. J.A. 822K, 822N, 882S. At the hearing on the second (Commonwealth's) motion for change of caption, the Commonwealth argued that the case "is basically a different type of proceeding than a so-called criminal

proceeding, although it does have certain criminal aspects to it." J.A. 987; *see also* J.A. 1010. Burns maintained that the trial was criminal or at least quasi-criminal. J.A. 997-1001.

The closest the Commonwealth came to arguing that the case was truly civil in nature was in analogizing it to a *habeas corpus* case. In its Motion to Correct Style of Case, the Commonwealth argued that the proceeding "is in the same procedural posture as a habeas case." J.A. 534. This Court rejected that view in *Burns v. Warden*, 269 Va. 351, 353, 609 S.E.2d 608, 610 (2005). But even if it were true, Rule 3:1 specifically excludes habeas corpus cases from the scope of Part Three, including Rule 3:20.

In fact, the Commonwealth specifically conceded Burn's argument that Part Three of the Rules was inapplicable to his case. In his Motion to Establish Applicability of Virginia Civil and Criminal Statutes and Rules, Burns argued that the rules in Part Three "are not appropriate for application to Burns' case." J.A. 706. The Commonwealth agreed on the papers that "this Part [Three] should not apply to Burns' case." J.A. 726. Neither party considered the application of Part Three contested at the hearing. J.A. 1152, 1154, 1164. And the trial court indicated that it was "willing to go along with the agreement." J.A. 1154.

Even the trial court's ultimate ruling on the nature of the case placed it outside the scope of Part Three. In revisiting its previous ruling that the case was criminal, the trial court held, "this is indeed a specific proceeding, or special proceeding, that falls somewhere between criminal and civil. It is neither wholly criminal nor wholly civil." J.A. 1041. Whatever the true nature of the case, it was not civil within the meaning of Rule 3:1, and summary judgment as provided by Rule 3:20 was certainly inapplicable.

B. The grant of summary judgment in this criminal case violated Burns' fundamental trial rights.

As the Commonwealth initially argued and the trial court initially ruled, the proceeding below was criminal in nature because, in a sense, it was part of the sentencing proceeding. The General Assembly's creation of a unitary mental retardation proceeding regardless of the defendant's procedural posture in April 2003 demonstrates that the proceeding is criminal in nature. The trial court's grant of summary judgment in a criminal case was a serious breach of the Fifth, Sixth, Eighth, and Fourteenth Amendment rights surrounding a criminal trial.[6]

The Commonwealth argued below, and the trial court agreed, that that the proceeding was criminal because it was part of the original

[6] Burns retains his federal constitutional rights regardless of Virginia's characterization of the case as civil or criminal. *See, e.g.*, *Hicks v. Feiock*, 485 U.S. 624, 630-31 (1988).

sentencing proceeding which would have taken place at trial if the *Atkins* ruling had been in effect. J.A. 822N, 822S. The Commonwealth, and the trial court, later shifted position, and decided that the case was neither criminal nor civil because it came to the Circuit Court after state *habeas*. J.A. 534, 987, 994, 1041. The trial court and Commonwealth were right the first time.

Section 8.01-654.2 draws no distinction between claimants whose case was on appeal or in *habeas* on the date of its passage. As this Court made clear in *Burns v. Warden*, 269 Va. 351, 354, 609 S.E.2d 608, 610 (2005), the same procedure, set forth in §§ 19.2-264.3:1.1 and -264.3:1.2, applies regardless of the proceedings in which the claimant's right to a mental retardation determination arose.

This unitary procedure is designed to determine the constitutional sufficiency of Burns' capital sentence and is part of the sentencing phase of a capital murder trial. "Code § 19.2-264.3:1.1(C) provides that if the guilt phase of the capital murder trial was tried by a jury, the jury shall determine the mental retardation issue *as part of the sentencing phase;* if the guilt phase was tried by a judge, the judge makes the determination *as part of the sentencing proceeding.* The General Assembly has directed these provisions apply *whether the claim is raised in a direct appeal or as a*

habeas corpus petition." *Burns,* 269 Va. at 353, 609 S.E.2d at 610 (emphasis added). Code § 19.2-264.3:1.1(C) specifically refers to this determination as "part of the sentencing proceeding required by § 19.2-264.4"—the classic capital murder sentencing phase. By granting summary judgment, the trial court severed the mental retardation determination from its statutory context, and denied Burns the right to the jury trial required by Code § 19.2-264.3:1.1(C).

This Court has characterized the only similar case, *Atkins v. Commonwealth*, as "a criminal proceeding." *In re Commonwealth*, 278 Va. 1, 10, 677 S.E.2d 236, 239 (2009). The Commonwealth's position that Burns' case is simply a "specific" or "separate" proceeding divorced from the capital murder case makes the same mistake it made in the mandamus proceeding about Atkins' case. This Court explained that, "upon remand of Atkins' criminal proceeding from this Court to the circuit court, that court had subject matter jurisdiction over the entire capital murder case. Subject matter jurisdiction is conferred by statute according to the subject of the case, in this instance capital murder, rather than according to a particular proceeding that may be one part of a capital murder case." *In re Commonwealth*, 278 Va. at 11, 677 S.E.2d at 240. In the same way, the

particular proceeding governing Burns' mental retardation determination remains one part of a capital murder case, undoubtedly criminal in nature.

The Commonwealth will note that Atkins' mental retardation determination followed a direct appeal, but this Court has already held that fact is a distinction without a difference: the origin of the case does not change the application of Code § 19.2-264.3:1.1 and related statutes, which apply "whether the claim is raised in a direct appeal or as a habeas corpus petition." *Burns,* 269 Va. at 353, 609 S.E.2d at 610.[7] Under this Court's persuasive reasoning in its vacated second *Burns* opinion, the trial court's treatment of Burns in a different manner from other similarly situated defendants violated Burns' rights under the Equal Protection Clause. *See Burns*, 268 Va. at 3, 597 S.E.2d at 196.

More fundamentally, the trial court's characterization of the proceedings as non-criminal and its grant of summary judgment destroyed the ordinary structure and protections of a Virginia criminal case. The trial court excluded Burns from one hearing, J.A. 1034-41, and directed that he

[7] This view is confirmed by the Supreme Court's holding that the Eighth Amendment prohibition on the execution of persons with mental retardation applies retroactively, thereby providing *habeas* petitioners like Burns with precisely the same protection as appellants like Atkins. *See Penry v. Lynaugh*, 492 U.S. 302, 315 (1989).

not be transported for another. J.A. 1109-10.[8] Burns' exclusion violated his due process right to presence at critical phases of his trial proceedings. *See Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934); *see also* Code § 19.2-259; *Jones v. Commonwealth*, 227 Va. 425, 428, 317 S.E.2d 482, 483 (1984).

Even the structure of the prosecution team reflected the trial court's distorted view of the nature of the proceedings. After Burns raised the issue of his competency, the Commonwealth brought the Office of the Attorney General into the case to represent the Commonwealth. J.A. 979-80. Virginia law prohibits the Attorney General from representing the Commonwealth in most criminal cases, including this one.[9] Code § 2.2-511. The Commonwealth's "double-teaming" strategy shifted the structural basis of the trial in a manner which violated Burns' trial rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The trial court's denial of a jury determination of Burns' mental retardation denied him other constitutional rights as well. The trial court

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[8] Burns was also not present at the first hearing on March 29, 2006 because the Department of Corrections refused to transport him. Burns' attorney did not object to this absence. J.A. 822B.

[9] If Burns' case were not criminal, the Commonwealth's Attorney would not have authority to represent the Commonwealth in the case. Code § 15.2-1627; *Falwell v. City of Lynchburg*, 198 F. Supp. 2d 765, 776-77 (W.D. Va. 2002).

denied Burns his Eighth and Fourteenth Amendment right to a determination of his mental retardation in accordance with due process. *See Atkins*, 536 U.S. at 317; *Bell v. Burson*, 402 U.S. 535, 541 (1971). The trial court denied Burns his Fourteenth Amendment right to a jury determination of his mental retardation, a necessary precondition to eligibility for the death penalty under Virginia law. *See* Code § 18.2-10(a); *Ring v. Arizona*, 536 U.S. 584, 609 (2002). And the trial court denied Burns his basic Eighth and Fourteenth Amendment right against capital punishment of the mentally retarded. *See Atkins*, 536 U.S. at 321.

Code § 19.2-264.3:1.1 gave Burns a right to have a jury determine his mental retardation claim, and the trial court violated both Burns' constitutional rights and the terms of the statute by granting summary judgment in this criminal case.

C. Code § 19.2-264.3:1.1 does not require expert testimony at trial on the issue of intellectual functioning.

The trial court erred in ruling that the definition of mental retardation in Code § 19.2-264.3:1.1(A) requires "expert testimony, whether it be for the old test or the new test; that is, to talk about . . . certainly about the manner in which the new test was administered, whether it meets the criteria, and then for the interpretation of the test." J.A. 1266. This ruling,

and the resulting summary judgment, misread the provisions of the statute and the ruling in *Atkins*.

Code § 19.2-264.3:1.1(B) sets out requirements for "[a]ssessments of mental retardation." Any assessment of intellectual functioning must include administration of a standardized measure on the Commissioner's "exclusive list" "carried out in conformity with accepted professional practice." Code § 19.2-264.3:1.1(B)(1). Dr. Olley could not administer a standardized measure of intellectual functioning in conformity with professional practice until Burns' interfering mental illness was addressed. Indeed, this is what professional practice requires in the circumstances confronted by Dr. Olley. J.A. 344, 747-48.

Burns' primary position in the trial court was that before he was required to prove that he is mentally retarded, he had a right under the Due Process Clause, the Equal Protection Clause, and Code § 19.2-264.3:1.1 to an assessment of his intellectual function carried out in conformity with accepted professional practice, that is, on a competent individual. J.A. 1055-56, 1063-64, 1248. But if denied such an assessment, Burns indicated that he could rely on historical IQ testing to prove the intellectual functioning criterion. J.A. 1063-64, 1186-94, 1247-53.

The trial court granted summary judgment because Burns' historical IQ testing, as described by counsel, purportedly failed the criteria for assessment as set out in subsection(B)(1). J.A. 1265. This reasoning was erroneous because the definition of mental retardation in Code § 19.2-264.3:1.1(A)—what Burns had to prove at trial—does not require an "assessment" pursuant to subsection (B). Nothing in Subsection (A) subjects Burns' evidence of historical testing to the rigorous requirements of Subsection (B). The trial court should not have granted summary judgment on the basis that Burns' historical testing failed the criteria of Subsection (B), because Subsection (B) governs statutory assessments rather than proof at trial.

The distinction Burns draws here between his right to assessment under Subsection (B) and the requirements of proof under Subsection (A) is the precise differentiation made by the Commonwealth in opposing Burns' primary claim that he is entitled to be competent to be tested under Subsection (B). When the trial court asked the Commonwealth whether Burns had "to rely on expert testimony to prove the retardation," the Commonwealth responded, "I don't think he does. I think the statute allows him the right to an expert, to evaluate him. But the definition of mental retardation talks about that he has to have evidence, as demonstrated on

an IQ test; he has to have evidence, as demonstrated in these three areas of adaptive functioning; and then evidence that it existed before the age of eighteen." J.A. 1046-47.

In other words, Subsection (A) describes the elements of proof, while Subsection (B) sets standards for expert assessments. The trial court granted summary judgment because it improperly applied Subsection (B)(1) to impose additional evidentiary requirements on Burns' proffered proof of historical IQ testing, and this Court should correct the lower court's error.

D. The trial court's grant of summary judgment violated the mandate of this Court.

The trial court's denial of a jury determination of Burn's mental retardation also violated the mandate of this Court. This Court's mandate was clear. "Because Burns was originally tried by a jury, Code § 8.01-654.2 requires that, on remand, Burns is entitled to have his claim of mental retardation determined by a jury." *Burns v. Warden*, 269 Va. 351, 354, 609 S.E.2d 608, 611 (2005).

"'When a case is remanded to a trial court from an appellate court, the refusal of the trial court to follow the appellate court mandate constitutes reversible error.'" *Powell v. Commonwealth*, 267 Va. 107, 127, 590 S.E.2d 537, 550 (2004) (quoting *Rowe v. Rowe*, 33 Va. App. 250, 257-

58, 532 S.E.2d 908, 912 (2000)). The Circuit Court violated the mandate of this Court by its summary judgment order, which had the effect of denying Burns a determination of his mental retardation claim by a jury.

II. The trial court erred in refusing to adjudicate Burns incompetent, order an attempt to restore his competency, or halt the proceeding against him, and in granting summary judgment against Burns, while Burns was incompetent to be tried or tested in conformity with accepted professional standards.

Overwhelming evidence established that Burns is presently incompetent to be tested or to be tried, but the trial court pressed ahead, ultimately granting summary judgment on the theory that "even if [Burns] 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." J.A. 1261. These proceedings, conducted while Burns was incompetent, violated his Fourteenth Amendment right to due process.

A. The evidence of Burns' incompetence was overwhelming and uncontroverted.

In 1999, prior to his original trial, the trial court found Burns incompetent to stand trial on the basis of Dr. Stejskal's diagnosis that he was irrational, paranoid, depressed, and psychotic. J.A. 351-52, 354-55. Dr. Barnard-Dupree at the Liberty Forensic Unit treated Burns with

medication, and his mental health improved. J.A. 367-69, 1283-84.[10] Three months after he was found incompetent, Dr. Stejskal found that medical treatment had rendered Burns marginally competent, and the trial court agreed. J.A. 378-80, 384, 1288-89.[11] At the time, Dr. Stejskal noted that Burns was vulnerable to future deteriorations. J.A. 912-13.

Eight years later, after years of Burns' solitary confinement on death row, Dr. Olley met with Burns on three occasions in 2007 and observed that he was delusional, paranoid, incoherent, and actively psychotic. J.A. 339-44. Dr. Olley concluded that, in order to carry out an assessment of intellectual functioning in conformity with accepted professional practice, Burns' mental illness must be addressed and he should be restored to competence. J.A. 344. In Dr. Olley's opinion, this could be accomplished with appropriate medication and therapy. J.A. 344-45, 921-28.

The Commonwealth continued to keep Burns in solitary confinement without adequate treatment, and his mental health continued to decline. Burns' counsel, with the most frequent contact and in the best position to

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[10] A psychologist colleague of Dr. Barnard-Dupree suggested Burns was malingering on the basis of a SIRS test. J.A. 1282 Dr. Barnard-Dupree did not administer the test or endorse its results in her testimony, and in fact treated Burns with anti-depressive and anti-anxiety medication after learning the results of the SIRS. J.A. 368-72.

[11] This Court held on direct appeal that no probable cause existed for an additional competence evaluation during the trial. *Burns*, 261 Va. at 336, 541 S.E.2d at 891.

know,[12] explained that his "mental health has declined to the point that he has no capacity to rationally assist his counsel, either in preparation or participation in his defense or in being assessed for his intellectual functioning as required by statute." J.A. 469.

Neuropsychiatrist Dr. George Woods also examined Burns in 2007. Dr. Woods 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." J.A. 544. Burns' psychosis included specific psychotic phenomena like Capgras Syndrome and hypergraphia which are not widely known, indicating that Burns was not malingering these symptoms. J.A. 545-46. Dr. Woods opined that Burns' psychosis rendered him "incompetent to rationally assist his attorneys." J.A. 550.

Dr. Olley interviewed numerous collateral witnesses and evaluated Burns again in 2008. In the declaration filed with Burns' Notice, Dr. Olley described at length how Burns' mental illness rendered him incompetent to stand trial and interfered with the ability to administer a standardized measure of intellectual functioning in conformity with accepted standards of

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[12] *See, e.g.*, *Medina v. California*, 505 U.S. 437, 450 (1992); *Smith v. Commonwealth*, 48 Va. App. 521, 536, 633 S.E.2d 188, 195 (2006).

professional conduct. Like Dr. Woods, Dr. Olley ruled out the possibility of malingering. J.A. 743-44.

Nor did the trial court need to rely exclusively on the representations of counsel or the unanimous opinion of experts on Burns' psychosis; it could see Burns' disabling mental illness for itself. Burns repeatedly broke into the courtroom proceedings with the sort of paranoid delusional comments counsel and the experts described. J.A. 943-44, 1034-41, 1190, 1231-32, 1243, 1254, 1259. The trial court admonished Burns, recessed the proceedings, and excluded him from the courtroom when he could not control his outbursts. J.A. 944, 1037-38. The trial court on one occasion even noted its own observations of Burns' deterioration. J.A. 1040-41.

The Commonwealth neither presented any evidence that Burns was competent nor requested an additional evaluation. Instead, the Commonwealth sought to exploit Burns' incompetence in its repeated motions to dismiss, citing Burns' incompetence as a reason he could not carry his burden of proof.

B. Burns possessed a constitutional right to be competent during the proceedings below.

Regardless of the nature of the proceedings below, Burns possessed a constitutional right to be competent during them. This right springs from the Fifth, Sixth, Eighth, and Fourteenth Amendments as well as Virginia statutes. The existence of this right, rather than the state of Burns' mental health, formed the basis of Burns' disagreement with the trial court. *See* J.A. 1261.

If the case below was criminal in nature, as Burns has maintained, he clearly had a right to be competent during the proceedings. *See, e.g.*, *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996); *Medina v. California*, 505 U.S. 437, 453 (1992); *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975). A capital sentencing, of which Burns' proceeding was a part, is criminal in nature. *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981). The constitutional right to competence in a criminal proceeding "is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." *Riggins v. Nevada*, 504 U.S. 127, 139-140 (1992) (Kennedy, J., concurring).

If the case below was quasi-criminal in nature,[13] constitutional rights also clearly attach. Courts have applied numerous constitutional rights in quasi-criminal proceedings.[14] This Court has explained that the rules applicable in criminal cases prevail in quasi-criminal proceedings. *See, e.g.*, *Kidd v. Virginia Safe Deposit & Trust Corp.*, 113 Va. 612, 613, 75 S.E. 145, 145 (1912). Although research has not disclosed any exactly similar case, courts have held that juveniles have a right to be competent in quasi-criminal delinquency proceedings.[15] If this Court concludes that the proceeding below was quasi-criminal, it should apply the same rule as in a

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[13] This Court has found numerous non-criminal Virginia proceedings which affect punishment to be quasi-criminal. *See, e.g.*, *Fedele v. Commonwealth*, 205 Va. 551, 555, 138 S.E.2d 256, 259 (1964) ("peace bond" proceeding is quasi-criminal); *Branch v. Branch*, 144 Va. 244, 249, 132 S.E. 303, 305 (1926) (civil contempt proceeding is quasi-criminal); *Warren v. Commonwealth*, 136 Va. 573, 594, 118 S.E.2d 125, 131 (1923) (action to remove public official is quasi-criminal).

[14] *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 123 (1996) (indigent right to appeal applicable to quasi-criminal termination of parental rights); *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969) (indigent right to trial transcript applicable to quasi-criminal city ordinance proceeding); *In re Ruffalo*, 390 U.S. 544, 551 (1968) (Due Process Clause applicable to quasi-criminal disbarment proceeding); *In re Gault*, 387 U.S. 1, 50, 55 (1967) (Self-Incrimination Clause applies in quasi-criminal juvenile proceeding); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 163-64 (1963) (Constitution applicable to quasi-criminal denaturalization proceeding); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 697-98 (1965) (Fourth Amendment applicable to quasi-criminal forfeiture proceeding).

[15] *See, e.g.*, *State v. Juan L.*, 969 A.2d 698, 703 & n.11 (Conn. 2009); *In re J.K.N.*, 115 S.W.3d 166, 169 (Tex. App. 2003).

criminal case: a person has the right to be competent in a quasi-criminal proceeding against him or her.

Finally, even if the case below was purely civil in nature, Burns had a right to be competent during the proceedings. *See generally Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003) (explaining in extraordinary depth the historical and modern basis for the right to competence in post-conviction proceedings). Even in purely civil post-conviction proceedings, Burns has a right to rational communication with his counsel during that process demonstrated by the competence-to-be-executed cases. *See, e.g.*, *Ford v. Wainwright*, 477 U.S. 399, 419-20 (1986) (Powell, J., concurring). The Supreme Court's stay of a post-conviction *certiorari* proceeding based on the incompetence of the petitioner supports not only the view that a post-conviction right to competency exists, but also the appropriateness of deferring any adjudication until the petitioner has been restored to competency. *Rees v. Peyton*, 384 U.S. 312 (1966) (per curiam) (deferring adjudication of Virginia habeas applicant's petition for certiorari to permit determination of competence); *Rees v. Peyton,*386 U.S. 989 (1967) (holding Rees' case in abeyance until further order of the Court, apparently because he was not yet restored to competence). And Code § 19.2-163.7 establishes a

statutory right to counsel in Virginia capital post-conviction which would be meaningless without the petitioner's ability to rationally communicate with counsel. *See Calderon v. U.S. Dist. Court*, 163 F.3d 530, 541 (9th Cir. 1998) (*en banc*), *abrogated on other grounds by Woodford v. Garceau*, 538 U.S. 202 (2003); *Carter v. State*, 706 So. 2d 873, 875 (Fla. 1998).

At the very least, Burns had a right to a hearing on his claim of incompetency. *See Pate v. Robinson*, 383 U.S. 375, 384-86 (1966). The trial court clearly ignored facts raising a *bona fide* doubt as to Burns' competency, and violated Burns procedural right to a competency hearing. *See, e.g.*, *Burket v. Angelone*, 208 F.3d 172, 192 (4th Cir. 2000) (distinguishing procedural and substantive competency claims).

Whether the case below was criminal, quasi-criminal, or civil, Burns had a right to be competent during the proceedings, or at least to a hearing on his claim of incompetency. The trial court violated those rights by pushing ahead with the case without regard to Burns' active psychosis, and ultimately granting summary judgment against him on the basis that his incompetence made it impossible for him to produce an assessment of his intellectual functioning.

C. Even if Burns did not have a general right to competence to stand trial, he had a specific right to competence to be tested in this proceeding.

When this Court remanded the case for a jury determination of Burns' claim of mental retardation, it specifically directed that the provisions of, *inter alia*, Code § 19.2-264.3:1.1 govern the trial on remand. *Burns*, 269 Va. at 353-54, 609 S.E.2d at 610-11. Even if the principles of competence to stand trial are inapplicable, Burns had a statutory and due process right to competence to be tested in conformity with accepted professional practice.

Code § 19.2-264.3:1.1(B)(1) requires that the administration of standardized tests of intellectual functioning "shall be carried out in conformity with accepted professional practice." Dr. Olley, a specialist in mental retardation, and Dr. Woods, a neuropsychiatrist, repeatedly explained to the trial court that Burns' mental illness prohibited them from carrying out the assessment prescribed by the statute.

Dr. Olley explained in both his testimony and affidavit that testing in conformity with accepted professional practice cannot be done while Burns remains psychotic. J.A. 334, 991-92. In his Declaration, he directly addressed the question of accepted professional practice:

> 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, prevents 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. It is clear, however, that Mr. Burns' low intellectual functioning interacts with his mental illness, resulting in his current severe symptoms. 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.

J.A. 747-48. Dr. Woods reached the same conclusion. J.A. 549-50.

The fact that evidence suggests that conditions of confinement imposed by the Commonwealth played a significant role in the decline of Burns' mental health not only aggravates the constitutional violation, but is in itself a violation of Burns' constitutional rights. The solitary confinement in which the Commonwealth held Burns and the inadequate medication regimen it provided combined to aggravate Burns' preexisting cognitive impairments. J.A. 342-43, 385-454, 549-50, 901-06, 910-12, 913-15, 917-18, 928. The Commonwealth's steadfast refusal to treat Burns adequately or place him in a psychiatric treatment environment outside the solitary confinement of death row denied Burns the benefit of intellectual functioning testing. The Commonwealth treated Burns in a psychiatric treatment environment prior to trial, J.A. 1283, and there is no reason it could not do the same now.

This specific form of incompetence to be tested implicates Burns' constitutional rights in several ways. First, because the Eighth Amendment is a limitation on the *state's* power to carry out an execution, *Atkins* requires states to provide a mechanism that enables a reliable determination that a death-sentenced inmate is not mentally retarded. The trial court's refusal to order treatment or to halt proceedings to address Burns' incompetence, and indeed its denial of a jury determination *because* of his incompetence,

denied Burns the benefit of a safeguard required by the Eighth Amendment. Second, the trial court's actions denied Burns the benefit of the statutory process Virginia has provided in violation of federal due process and equal protection. *See Bell v. Burson*, 402 U.S. 535, 541 (1971). Finally, in this unique context, the incompetence to be tested is a subset of traditional incompetence because Burns cannot rationally assist his counsel by participating in the intellectual functioning testing envisioned in Code § 19.2-264.3:1.1(B)(1).

CONCLUSION

When this Court remanded for a jury determination of Burns' mental retardation claim, it could never have expected the tangle of legal errors the Commonwealth's Attorney and Attorney General, working together, led the trial court to commit. Despite Burns' active psychosis, the trial court circumvented Burns' constitutional rights and ultimately granted summary judgment against him, punishing him for his incompetence. This Court must reverse the judgment of the trial court and remand this case again for determination of Burns' mental retardation claim in accord with the law of Virginia and the Constitution instead of an improvised scheme disconnected from both.

Respectfully submitted,

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CERTIFICATE

I, James G. Connell, III, hereby certify that fifteen copies of this brief, and a CD containing an electronic copy, shall be filed in the office of the Clerk of this Court. I further certify that three copies of this brief shall be mailed or delivered to opposing counsel on this 2nd day of September, 2009.

James G. Connell, III