IN THE
SUPREME COURT OF VIRGINIA

Record No. 090863

WILLIAM JOSEPH BURNS,
Appellant

v.

COMMONWEALTH OF VIRGINIA,
Respondent-Appellee

On Appeal from the Circuit Court of Shenandoah County
(CR98-317A)

RESPONDENT-APPELLEE'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

QUESTIONS PRESENTED 2

STATEMENT OF FACTS 3

ARGUMENT 12

I. The Circuit Court did not err in granting summary judgment to the respondent-appellee 12

A. The case below was not a criminal trial or criminal sentencing 12

B. The Circuit Court's judgment did not violate fundamental rights 19

C. The Circuit Court properly ruled that proof required presentation of expert opinion 28

D. The Circuit Court did not disobey this Court's mandate 32

II. The Circuit Court did not err in denying Burns' motion to declare him incompetent 33

CONCLUSION 41

CERTIFICATE OF SERVICE 41

TABLE OF AUTHORITIES

Page

Cases

Atkins v. Commonwealth, 266 Va. 73, 581 S.E.2d 514 (2003) 19

Atkins v. Commonwealth, 272 Va. 144,
631 S.E.2d 93 (2006) 19, 20

Atkins v. Virginia, 536 U.S. 304 (2002) 7, 31, 40

Brady v. Maryland, 373 U.S. 83 (1963) 23

Burns v. Commonwealth, 261 Va. 307, 541 S.E.2d 872 (2001) ... 1, 6

Burns v. Virginia, 534 U.S. 1043 (2001) 1

Burns v. Warden, 268 Va. 1, 597 S.E.2d 195 (2004) 20

Burns v. Warden, 269 Va. 351,
609 S.E.2d 608 (2005) 1, 12, 13, 20

Burns v. Warden, 020971 (Order dated 10/28/03) 2, 19

Commonwealth v. Southerly, 262 Va. 294,
551 S.E.2d 650 (2001) 21, 22

District Attorney's Office for the Third Judicial District, et. al., Petitioner's v. William G. Osborne, 129 S.Ct. 2308 (2009) 23

Ex parte Bollman & Swartwout, 4 Cranch,75-101 16

Ex parte Tom Tong, 108 U.S. 556 (1883) 16, 22

Ford v. Wainwright, 477 U.S. 399 (1986) 36

Giarratano v. Murray, 494 U.S. 1 (1989) 21

Green v. Johnson, 431 F. Supp. 2d 601 (E.D. Va. 2006) 28

Heller v. Doe, 509 U.S. 312 (1993) 21

Herrera v. Collins, 506 U.S. 390 (1993) 24

Hicks v. Feiock, 485 U.S. 624 (1988) 23

Illinois v. Allen, 397 U.D. 337 (1970) 26

In Re Commitment of Michael Fisher,
164 S.E.2d 637 (Tex. 2005) 14, 17, 36

In Re: Commonwealth of Virginia, 278 Va. 1,
677 S.E.2d 236 (2009) 20

Jernigan v. Commonwealth, 104 Va. 850, 52 S.E. 361 (1905) 15

Kansas v. Hendricks, 521 U.S. 346 (1997) 17, 18

Martinez v. Court of Appeal, 528 U.S. 152 (2000) 21

McCleskey v. Zant, 499 U.S. 467 (1991) 21

McCloud v. Commonwealth, 269 Va. 242, 609 S.E.2d 16 (2005) ... 17

Lewis v. Warden, 274 Va. 93, 645 S.E.2d 492 (2007) 28

Neely v. Johnson, 215 Va. 565, 211 S.E.2d 100 (1975) 38

Pennsylvania v. Finley, 481 U.S. 551 (1987) 24

Penry v. Lynaugh, 492 U.S. 302 (1989) 20

Rees v. Peyton, 384 U.S. 312 (1966) 36

Remington v. Commonwealth, 262 Va. 333, 551 S.E.2d 620 (2001),
cert. denied, 535 U.S. 1062 (2002) 26

Ring v. Arizona, 536 U.S. 584 (2002) 23

Schriro v. Summerlin, 542 U.S. 348 (2004) 23

Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974) 25

Smith v. Doe, 538 U.S. 84 (2003) 14

Smyth v. Godwin, 188 Va. 753, 51 S.E.2d 230,
cert. denied, 337 U.S. 946 (1949), ... 22

Stamper v. Commonwealth,
228 Va. 707, 324 S.E.2d 682 (1985)..... 31

Thompson v. McNeil, 129 S.Ct. 1299 (2009) 39

Thurmond v. Prince William Professional Baseball Club, Inc.,
265 Va. 59, 574 S.E.2d 246 (2003)..... 28

Tyson v. Hening, 205 Va. 389, 136 S.E.2d 832 (1964)..... 18

Vacco v. Quill, 521 U.S. 793 (1997)..... 21

Virginia Department of Corrections v. Crowley,
227 Va. 254, 316 S.E.2d 439 (1984)..... 22

Walker v. True, 399 F.3d 315 (4th Cir. 2005)..... 28

Winston v. Commonwealth, 268 Va. 564, 604 S.E.2d 21 (2004),
cert. denied, 546 U.S. 850 (2005) 23, 25

Winston v. Kelly, 600 F. Supp. 2d 717 (W.D. Va. 2009) 28

Other Authority

Va. Const. Art. I, § 8..... 18

Code of Virginia:
§ 2.2-501 27
§ 8.01-654.1 25
§ 8.01-654.2 .....*passim*

§ 17.1-313 19
§ 19.2-155 26
§ 19.2-169.1 33
§ 19.2-169.2 32
§ 19.2-176 33
§ 19.2-177.1 33
§ 19.2-264.3:1.1 ..... *passim*
§ 19.2-264.3:1.2 ..... *passim*
§ 19.2-264.5 19

Rules of the Supreme Court of Virginia

Rule 3:20 27
Rule 5:25 39

STATEMENT OF THE CASE

A jury in the Circuit Court of Shenandoah County found Burns guilty of, and sentenced him to death for, his September 20, 1998, capital murder of his mother-in-law, Tersey Cooley. The jury also convicted Burns of burglary, and the rape and two counts of forcible sodomy he also committed against Cooley. The Circuit Court entered its judgment of conviction and sentence of death against Burns on May 12, 2000.

This Court affirmed the criminal judgment of conviction of capital murder and sentence of death on March 2, 2001. *Burns v. Commonwealth*, 261 Va. 307, 541 S.E.2d 872 (2001). The Supreme Court of the United States denied Burns' petition for a writ of certiorari from that affirmance on November 20, 2001. *Burns v. Virginia*, 534 U.S. 1043 (2001).

On April 22, 2002, Burns, by counsel, filed in this Court a petition for a writ of habeas corpus. In 2005, this Court ordered that one habeas claim would be remanded to the Circuit Court for a jury determination. *Burns v. Warden*, 269 Va. 351, 609 S.E.2d 608 (2005). The Court determined that, under Virginia Code § 8.01-654.2, Burns had made a non-frivolous habeas claim that his death sentence was prohibited because he is mentally

retarded.[1] The Court dismissed Burns' other habeas corpus claims in a separate unpublished decision. *Burns v. Warden*, No. 020971 (Order dated 10/28/03).

After remand proceedings resulted in Burns taking the position that he would not present any expert to prove his claim, the Circuit Court granted summary judgment to the respondent-appellee in an order dated January 30, 2009. (JA 814). On July 24, 2009, this Court awarded Burns an appeal from that final order of the Circuit Court.[2]

QUESTIONS PRESENTED

1. Did the Circuit Court err in granting summary judgment?
2. Did the Circuit Court err in denying the motion to declare Burns incompetent?

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[1] Section 8.01-654.2 was enacted to provide death-row inmates like Burns – whose criminal judgment had become final before the effective date of the statute, but who still had a habeas corpus case pending in state court at that time – with an opportunity to have a non-frivolous claim of retardation adjudicated without the usual rules of procedural default applying.

[2] Burns styled his petition for appeal in this Court as "William Joseph Burns v. Commonwealth" and, below that style, a second style, "In Re: William Joseph Burns." However, the Circuit Court's final order was styled only as "In Re: William Joseph Burns." (JA 814). Regardless, the respondent-appellee has styled the case as this Court styled it in its order granting the appeal.

STATEMENT OF FACTS

The case in the Circuit Court was presided over by the Honorable Dennis L. Hupp, the same Circuit Court Judge who had presided over Burns' capital murder trial. Upon remand in 2005, Judge Hupp appointed counsel to represent Burns and, upon Burns' request, appointed him the two psychological experts whom Burns expressly had requested. (JA 301, 468). During the course of the next four years in the Circuit Court, Burns claimed that he was "incompetent," that the Circuit Court could not proceed with his case unless it first declared him to be incompetent "to be tried" and ordered restoration of competency, and unless it ordered that he be "treated" in a hospital setting away from the Sussex I State Prison where he is held in custody on death-row pursuant to his capital murder judgment and sentence of death.

Burns is no stranger to claims of incompetency. Upon motion of his defense counsel before his capital murder trial in 1999, Judge Hupp ordered Burns to be evaluated for competency to be tried on an out-patient basis from the jail, and appointed forensic psychologist Dr. William Stejskal to perform the evaluation. (Dir. App. JA 163).[3] Dr. Stejskal concluded that

[3] References to the joint appendix filed on direct appeal, Record Numbers 001879 and 001880, will be denoted as "(Dir. App. JA __)."

Burns was not competent to be tried. (JA 1270). His conclusion was based on a two-hour interview in the jail during which he administered "a brief form of the Wechsler Adult Intelligence Scale, Revised (WAIS-R)." (JA 1270). On that abbreviated test, Burns achieved a score of 66 which, Dr. Stejskal explained, "reflects interference from his depressed psychological state," and that, "[i]t is likely, absent the interference of his depressed psychological state, that his performance on intelligence testing may improve to the level of Borderline Intellectual Functioning (IQ range 71 to 80)." (JA 1273) (parenthetical in original). Indeed, Dr. Stejskal later testified that, during his interview, Burns wept constantly. (Dir. App. JA 311).

Judge Hupp ordered that Burns be admitted to Central State Hospital (CSH) for further evaluation and treatment. (Dir. App. JA 185). Burns was evaluated by a team of professionals, and treated on an in-patient basis, over the course of six weeks. CSH concluded that Burns was malingering, had substance dependence (particularly alcohol), antisocial personality, and an IQ of 77 which he achieved on the full WAIS-R test, and which qualified him as having Borderline Intellectual Functioning, just as Dr. Stejskal had predicted. (JA 1276-85). He was treated for depression and anxiety and determined to be competent to stand trial. (*Id*.).

Again upon Burns' counsel's motion, Judge Hupp ordered a re-evaluation by Dr. Stejskal. (Dir. App. JA 264). Dr. Stejskal this time concluded that Burns was competent to stand trial. (JA 1286-89). Judge Hupp conducted a hearing at which Dr. Stejskal and the CSH psychiatrist testified. The experts agreed that Burns was competent, that he was being treated with medications for depression and anxiety, and that the dose of his anxiety medication had been reduced. (Dir. App. JA 301-17). Dr. Stejskal testified that Burns was remarkably improved. (Dir. App. JA 317). Judge Hupp found that Burns was competent to stand trial. (Dir. App. JA 319, 377).

On the second day of the guilt phase of trial, defense counsel moved the court for a continuance, and to order another evaluation for competency because Burns told his attorneys that he did not want to participate in the trial. (Dir. App. JA 1933). His behavior was prompted by the playing of a tape-recording of his confession to the jury. (Dir. App. JA 1934). The Commonwealth opposed the motions, pointing out that (1) Burns' decision not to cooperate was knowing, (2) he had been found to be a malingerer by CSH, and (3) evidence of his malingering was demonstrated by letters written by Burns expressing how difficult it was "to act crazy." (Dir. App. JA 1953).

Judge Hupp questioned Burns, who stated that he was dissatisfied with his counsel. (Dir. App. JA 1941). After a recess, Judge Hupp took testimony from the jail's nurse who testified that Burns understood what he was told, took his medication, played cards with other inmates, was being seen by two mental health experts, and had not changed in his demeanor and actions since he arrived at the jail. (Dir. App. JA 1961-63). Judge Hupp found Burns was not incompetent. (Dir. App. JA 1966-68). This Court found no error in that ruling on direct appeal. *Burns*, 261 Va. at 337, 541 S.E.2d at 891.

As part of the presentence investigation and assessment for the court, Burns was evaluated by yet another expert, forensic psychologist Dr. Mario Dennis. Dr. Dennis reviewed the previous evaluations and conducted his own independent testing which showed malingering, a 55% chance of a violent re-offense within the first five years of release, and an 80% chance of a sexual re-offense within ten years of release. (JA 1296-97).[4] Burns never claimed he was mentally retarded.

When new counsel filed a habeas corpus petition on Burns' behalf in this Court, they made no claim that Burns was retarded, but alleged that

[4] Dr. Dennis also testified during the post-verdict sentencing proceeding. (Dir. App. JA 3386-96).

trial counsel were ineffective because they had not argued at trial that Burns was retarded. This Court dismissed that claim for lack of merit in its October 28, 2003, unpublished order at page 19.

The United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), while Burns' habeas petition was pending, but his habeas counsel did not seek to amend their petition by adding a claim of retardation. The General Assembly enacted § 8.01-654.2 while Burns' petition was pending, but his habeas counsel still did not seek amendment.

On June 6, 2003, this Court invited submissions pertaining to mental retardation. Pursuant to that invitation, Burns' habeas counsel filed an amended petition alleging for the first time that he was mentally retarded. Burns relied upon the initial report of Dr. Stejskal and his administration of the abbreviated WAIS-R test and resulting score of 66, and an affidavit from Dr. Stejskal.

On remand in 2005, Judge Hupp appointed Dr. Olley, a North Carolina psychologist requested by Burns, to assist Burns under § 19.2-264.3:1.2. (JA 301). On March 2, 2007, Burns filed a motion for the appointment of a "co-morbidity" expert and Judge Hupp conducted a hearing to determine the need for such an expert. At the hearing, Burns presented an affidavit from Dr. Olley, and the testimonies of Drs. Stejskal

and Olley.[5] (JA 888 *et seq*.). Dr. Olley testified that Burns' behavior made it difficult to determine whether Burns was mentally retarded or mentally ill and that another expert could sort out that issue. (JA 922-26). During the hearing, Burns interrupted the proceedings by asking, "[h]ow many more times do you want them to kick me in the teeth?" When Judge Hupp asked Burns about the comment, Burns stated,

> " [w]ell, I'm getting tired of people stalking me and trying to kill me. All because I found some damn movies. And them was all Eddie Murphy and them stealing some stuff. Then they *(unintelligible)* my brother in the bathroom, by sticking a gun up his ass."

(JA 943-44). After a recess, Burns apologized, "Your Honor. Your Honor, I wish to apologize for my outburst." (JA 944). Following the hearing, Judge Hupp appointed Dr. Ditter, one of the "co-morbidity" experts requested by Burns. (JA 468). On July 6, 2007, pursuant to Burns' further request, the court substituted Dr. Woods, a psychiatrist, for Dr. Ditter. (*Id*.).

Burns subsequently filed a motion to declare him "incompetent" because, according to the motion, Burns' behavior made it impossible to determine the issue of retardation. (JA 469). The respondent-appellee filed a motion to dismiss the case based on Burns' representation in his

[5] The court forbade the Commonwealth from cross-examining the witnesses or objecting to their testimony. (JA 899-901).

motion that he could not prove his claim. (JA 527). Shortly before a hearing on the motions, Burns filed a letter from Dr. Woods opining that Burns suffered from psychosis, memory loss, language "derailment" and social deterioration. (JA 544). He stated that any assessment of Burns' retardation claim must be put aside until his alleged mental illnesses were addressed. He opined that Burns was "incompetent to rationally assist his attorneys." (JA 550).

At the conclusion of the hearing, Judge Hupp took the issues under advisement. He permitted further briefing on the issue of whether the case before him was a criminal case, and whether Burns thus was to be accorded the rights of a defendant not be tried while incompetent, or whether the case was a civil matter, and thus Burns was not entitled to an evaluation for competence "to be tried." (JA 1017-18).

The case then was stayed for a time pursuant to Burns' petition filed in this Court for a writ of prohibition and mandamus to prohibit the Attorney General's office from joint representation of the respondent-appellee with the Commonwealth's Attorney. After this Court denied Burns' petition[6], Judge Hupp reconvened the case in a hearing for the purpose of

[6] *See In Re: Burns*, Record No. 072063.

considering the motion to declare Burns incompetent, the motion to dismiss the case, and the issue regarding the nature of the case. During that hearing, Judge Hupp had to order Burns forcibly removed from the hearing after he continually disrupted the proceedings. (JA 1038).[7]

Judge Hupp ruled that: (1) the case was neither criminal nor civil, but rather the special proceeding described by this Court in its 2005 decision (JA 1041); (2) the style of the case would be changed from *Commonwealth v. Burns* to *In Re: William Joseph Burns* (*id*.); (3) the Attorney General's office could continue to participate (*id*.); (4) § 19.2-264.3:1.1 did not require a new IQ test score to prove a claim of retardation (JA 1064-65); and (5) the motion to declare Burns incompetent would be denied. (JA 1099). Based on Burns' representation that he had other evidence with which to prove his claim, the court denied the respondent-appellee's motion to dismiss. (JA 1065). Judge Hupp ordered the special jury proceeding to commence on October 20, 2008, with the experts' reports from Burns and the respondent-appellee to be filed and exchanged 90 and 30 days before,

[7] Burns' counsel represented that Burns' mental health had deteriorated and he smelled bad. (JA 1039-40). The Commonwealth's Attorney represented that he did not detect any odor about Burns, Burns did not look bad, and he had a history of malingering. (JA 1040). Judge Hupp stated that he detected "some deterioration," but did not have "to cross that bridge at this point." (JA 1041).

respectively. (JA 1102-04).

On July 21, 2008, instead of disclosing his expert's reports as ordered, Burns filed a "Notice" that he did "not intend to present testimony of an expert witness to support his claim." (JA 735). He attached a declaration from Dr. Olley that the evidence was "too limited and contradictory to allow a firm conclusion" that Burns meets § 19.2-264.3:1.1(B)(1)'s requirements for significantly subaverage intellectual functioning (JA 746), and that § 19.2-264.3:1.1(B)(2) "might indicate" that he could not conclude that Burns has significant limitations in adaptive behavior. (JA 747).

Based on that notice, the respondent-appellee filed a motion for a final order in its favor due to a lack of proof. The court held a hearing on September 17, 2008. Burns argued that he could go forward without any expert and prove his claim with an undisclosed document containing an older IQ test report. (JA 1186-88). Forensic psychologist Dr. Leigh Hagan, Ph.D., testified without contradiction that any reported IQ score constitutes an expert psychological opinion. (JA 1195-1238).

At the conclusion of the hearing, the court made extensive findings: Burns decided not to go forward with expert testimony because his expert determined that he could not perform a current IQ test, not because he was

waiving any right to present a current IQ test; Burns admitted he would be relying, not on Burns' IQ testing from 1999, but on undisclosed, older tests which he admitted did not qualify under § 19.2-264.3:1.1; and, pursuant to Dr. Hagan's uncontradicted testimony, expert testimony was necessary to interpret any IQ test, old or new. The court ordered that summary judgment be entered in favor of the respondent-appellee. (JA 1260-67).

ARGUMENT

I. The Circuit Court did not err in granting summary judgment to the respondent-appellee.

A. The case below was not a criminal trial or criminal sentencing.

Burns first argues that summary judgment was not available because the proceeding was criminal or quasi-criminal, and was not civil. Burns' argument fails for want of proof of its predicate.

First, Judge Hupp faithfully followed this Court's March 11, 2005, decision which, after two rehearing proceedings to clarify the issue, *see Burns*, 269 Va. at 351, 609 S.E.2d at 609, expressly ruled that the case was a "specific" and "separate" proceeding created by the General Assembly to permit a jury to determine the claim even if raised in a habeas petition. (JA 1041). *See Burns*, 269 Va. at 353 & 354, 609 S.E.2d at 610 & 611. This Court thus was clear on the issue: the nature of the case was a newly-

created action by the General Assembly. It was parallel to, but yet separate from, the collateral habeas action from which it arose.

Second, Burns' capital murder conviction and death sentence was, and is, a final matter, as expressly found by this Court when it held that, if Burns failed to prove his claim, "the sentence of death entered on May 12, 2000 *remains* in full force and effect." *Burns*, 269 Va. at 354, 609 S.E.2d at 611 (emphasis added). Clearly, nothing in this Court's remand mandated the Circuit Court to conduct a criminal, or even criminal-like, sentencing or re-sentencing proceeding. Again, as the case went back to Judge Hupp, it expressly was for a "specific" and "separate" proceeding to determine factually whether Burns could prove his post-conviction retardation claim.

Burns' sentence of death was a final matter, already validly determined pursuant to the concluded direct appellate review conducted by this Court and the Supreme Court of the United States. It was, and is, a *fait accompli* unless and until a jury were to find that Burns' had proven his post-conviction claim in the new civil action created by the General Assembly specifically for that purpose. In that regard, the § 8.01-654.2 claim and its possible remedies were no different from the claims and remedies provided in the civil, habeas case. Nothing in this Court's mandate, or in the posture of the case, signaled a return to, or revisiting of, the criminal trial. Nothing

about Burns' status - a duly convicted and sentenced felon in the custody of the Department of Corrections - signaled a change in that status that could revert back to, or reinstitute, his status as a criminal defendant.

Indeed, "[w]hether a statutory scheme is civil or criminal 'is first of all a question of statutory construction.'" *Smith v. Doe*, 538 U.S. 84, 93 (2003). Courts "consider the statute's text and its structure to determine the legislative objective." *Id*. In *In Re Commitment of Michael Fisher*, 164 S.E.3d 637, 646-47 (Tex. 2005), the Texas Supreme Court, quoting United States Supreme Court precedent, observed that "[d]etermining the civil or punitive nature of an Act must begin with reference to its text and legislative history" and "[a] court must first ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.'" *Fisher* held further that "[a] court will reject the legislature's manifest intent only where a party challenging the Act provides 'the clearest proof' that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention" and that, "[b]ecause a court first examines legislative intent [and] then proceeds to review the statutory effects, this process has become known as the 'intent-effects test'" by which "[t]he categorization 'is first of all a question of

statutory construction,' and if the Legislature meant to establish civil proceedings, we generally defer to the legislature's stated intent."

With respect to Virginia Code § 8.01-654.2, the statute which created the new action for Burns' claim, all the hallmarks of a criminal proceeding are missing. The provision appears in the Code under Civil Remedies and Procedures. It appears within the provisions for civil, habeas corpus actions. It requires the inmate to "allege the factual basis for his claim" which can pass the frivolous test.

This Court has held that " 'the distinction' (between a civil and a criminal proceeding) 'taken in the most ancient and approved authorities, is not whether the crown is a party (for so it is in *mandamus* and *quo warranto*), but whether the real end or object of the proceeding is punishment or reparation.'" *Jernigan v. Commonwealth*, 104 Va. 850, 853, 52 S.E. 361, 362 (1905) (parentheticals in original). Just as in habeas corpus cases in which a Commonwealth's representative is a named party, and in which the underlying matter involved a prior criminal action, a § 8.01-654.2 proceeding initiated by a convicted inmate during his habeas corpus case is one brought by the inmate to enforce his civil rights and thus is governed by the civil law:

> The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. … The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime. … Such a proceeding … is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution. It was said by Chief Justice Marshall, speaking for the court, as long ago as *Ex parte Bollman & Swartwout*, 4 Cranch,75-101:
>
>> "The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts."

Ex parte Tom Tong, 108 U.S. 556, 559-60 (1883).

A distinguishing factor between a criminal and a civil matter is identity of the moving party. In Burns' § 8.01-654.2 proceeding, it is Burns who is suing for vacatur of his criminal judgment which is an established legal matter, just as in a habeas corpus case. The Commonwealth is not

prosecuting or sentencing him for a crime. The Commonwealth, to the extent it is the proper party to a § 8.01-654.2 proceeding, is defending against Burns' suit brought to enforce his civil right not to have the Department of Corrections carry out the valid sentencing judgment of the trial court. Nothing about the legislature's creation of that proceeding made it a criminal case.

Even in the context of the Sexually Violent Predators Act (SVPA), in which a proceeding is instituted by the state for the purpose of removing a person's liberty, the fact that it is a civil proceeding and not a criminal one has been upheld because it was so intended by the legislature. *See Kansas v. Hendricks*, 521 U.S. 346, 356 (1997); *Fisher*, 164 S.W.3d at 653 (reversing court of appeals which had held that SVPA is punitive and not civil in nature); *McCloud v. Commonwealth*, 269 Va. 242, 254, 609 S.E.2d 16, 21 (2005) (upholding Virginia SVPA as a civil proceeding while observing that, although "[t]he SVPA involves the potential involuntary loss of a prisoner's liberty", the SVPA expressly provides certain rights generally

applicable to criminal proceedings such as a jury).[8]

In Virginia, the General Assembly has specified *procedures* to be applied in a § 8.01-654.2 proceeding involving a convicted and sentenced inmate which are the same as utilized in a criminal trial where the retardation issue is litigated during the sentencing hearing, but those procedures, just as in habitual offender or SVP proceedings, do not make it a criminal case. The General Assembly very explicitly provided that, in a § 8.01-654.2 proceeding, §§ 19.2-264.3:1.1 and .2 would apply. Those statutes provide: the tripartite definition of retardation; how the expert is to assess the three parts of the definition; the burden of proof; the right to appointment of an expert and what qualifications for appointment are required; the right of the Commonwealth to the appointment of an expert; and the penalty for non-compliance with the Commonwealth's expert. Nothing in those procedures in any manner indicates, and certainly not by "the clearest proof," *see Hendricks*, 521 U.S. at 361, that the General

[8] In *Tyson v. Hening*, 205 Va. 389, 394, 136 S.E.2d 832, 836 (1964), this Court found that, despite a constitutional right to counsel in a recidivist proceeding in which an additional sentence was imposed, that right did not "transform the nature of [the] proceeding into a criminal trial" in which the inmate was entitled to the criminal defense protections of Article I, § 8 of the Virginia Constitution.

Assembly meant by them to turn the proceeding brought by a death-row inmate into a criminal trial.

B. The Circuit Court's Judgment Did Not Violate Burns' Fundamental Rights.

Contrary to Burns' argument, his case is not in the same posture as Daryl Atkins' *criminal* case. This Court's decision in *Atkins v. Commonwealth*, 272 Va. 144, 631 S.E.2d 93 (2006), was made upon direct appeal from a criminal judgment. This Court's decision to remand in Burns' case was made in a post-conviction, collateral, civil, habeas corpus proceeding.

This Court is mandated by § 17.1-313 to review on direct appeal every death sentence. No death sentence is final until this Court has affirmed on direct appeal. Atkins' judgment of sentence was before this Court for that very determination and this Court found that his criminal case, still unresolved as to final validity, should be remanded to the trial court for a determination of Atkins' claim of retardation. *Atkins v. Commonwealth*, 266 Va. 73, 581 S.E.2d 514 (2003); *Atkins v. Commonwealth*, 272 Va. 144, 631 S.E.2d 93 (2006). Indeed, when the criminal trial court heard Atkins' case on remand, it *reduced* the sentence of death to a sentence of life pursuant to § 19.2-264.5, a statute specifically bestowing power upon a criminal trial court

to reduce a death sentence for good cause shown. This Court's subsequent decision in *In Re: Commonwealth of Virginia*, 278 Va. 1, 677 S.E.2d 236 (2009), only confirmed the criminal nature of Atkins' case, holding that the trial court on remand in that criminal appeal enjoyed broad authority over the criminal case.

Burns' sentence, however, already had been affirmed by this Court on direct appeal before the remand in his habeas case, and further review had been denied by the Supreme Court of the United States on direct appeal certiorari application. Burns became a convicted felon at that point, losing his defendant status. His sentence became final, in every sense of the word. *See*, *e.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 315 (1989) (state criminal judgments become final for constitutional purposes when the Supreme Court of the United States denies certiorari review on direct appeal).

Burns' briefly mentions (Burns' Brief at 23) that equal protection requires that he should be accorded the same rights as Atkins was accorded, under the reasoning of this Court's now-vacated judgment in *Burns v. Warden*, 268 Va. 1, 597 S.E.2d 195 (2004). *See Burns*, 269 Va. at 351, 609 S.E.2d at 609. His contention must be rejected because that decision has no precedential value.

His argument also is groundless for the reasons set forth at pages 11 *et seq.* of the Warden's Brief On Rehearing in *Burns v. Warden*, No. 020971, dated October 22, 2004, which brief is incorporated herein by this reference. In brief, a State is permitted to treat persons differently who are not similarly-situated. *Vacco v. Quill*, 521 U.S. 793, 799 (1997). The Supreme Court long has recognized that defendants at trial, defendants on appeal, and convicted felons are not similarly-situated. *Martinez v. Court of Appeal*, 528 U.S. 152, 162 (2000); *Giarratano v. Murray*, 494 U.S. 1, 9 (1989). And, even if similarly-situated, the courts look at statutes treating persons differently with deference to the legislature if there is any rational relation to a legitimate purpose. *Vacco*, 521 U.S. at 799; *Heller v. Doe*, 509 U.S. 312, 320 (1993). Providing felons with civil remedies for claims attacking their sentence instead of the full panoply of rights accorded criminal defendants obviously furthers the State's strong interest in finality and in streamlining collateral review; such procedures do not violate the Equal Protection Clause and Burns provides no argument how they do. *See McCleskey v. Zant*, 499 U.S. 467, 490-93 (1991).

Longstanding, established precedent makes clear that prisoners who have completed the direct appeal process, but who continue to attack their criminal judgment, do so as a civil litigant engaged in a collateral, civil

proceeding, without the statutory or constitutional protections which apply at a criminal trial or on a direct appeal. *Tom Tong*, 108 U.S. at 559-60. After direct appeal, a collateral attack on a criminal judgment is a civil matter, not criminal. *Commonwealth v. Southerly*, 262 Va. 294, 297, 551 S.E.2d 650, 652 (2001); *Virginia Department of Corrections v. Crowley*, 227 Va. 254, 262, 316 S.E.2d 439, 443 (1984); *Smyth v. Godwin*, 188 Va. 753, 760, 51 S.E.2d 230, 233, *cert. denied*, 337 U.S. 946 (1949). Thus, because § 8.01-654.2 permitted Burns' claim to be decided after, or contemporaneously with, his other post-conviction, civil litigation, the nature of that proceeding must be civil.

Regardless of the fact, as established by this Court in its 2005 decision, that the remand proceeding was "special" and not a habeas proceeding, Burns' claim was a habeas claim raised in a habeas petition. The remand proceeding thus was a post-appeal, post-habeas, collateral claim which was "in no sense a continuation of the criminal proceeding." *See Southerly*, 262

Va. at 297, 551 S.E.2d at 652.[9] Again, this Court did not remand for a retrial or resentencing. It simply would be contrary to the intent of the General Assembly to redefine Burns' post-habeas, "specific" proceeding as a *criminal trial,* or to convert the status of a duly convicted inmate, whose criminal judgment has become final by virtue of it having been upheld on direct appeal by this Court and by the Supreme Court of the United States, into a criminal defendant whom the Commonwealth is prosecuting.

The Supreme Court of the United States recently made this same point in a different context. In *District Attorney's Office For The Third Judicial District, et al., Petitioners v. William G. Osborne*, 129 S. Ct. 2308 (2009), the United States Court of Appeals for the Ninth Circuit had decided that a state prosecutor had a constitutional duty under *Brady v. Maryland*, 373

[9] Burns' reliance on *Hicks v. Feiock*, 485 U.S. 624 (1988), for the general proposition that he retains federal constitutional rights regardless of whether the proceeding is civil or criminal begs the question of what rights he is due. His reliance on *Ring v. Arizona*, 536 U.S. 584 (2002), is inapposite. Although Virginia always has complied with *Ring* by requiring jury determinations of aggravating factors in capital criminal trials, nothing in that case could apply to Burns' case because the United States Supreme Court determined in *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004), that *Ring* was a "new rule" which would not apply to inmates whose cases, like Burns' case, became final on direct appeal before *Ring* was decided. His argument that *Ring* requires a finding of non-retardation as a precondition to death penalty eligibility was rejected by this Court in *Winston v. Commonwealth*, 268 Va. 564, 616, 604 S.E.2d 21, 50 (2004), *cert. denied*, 546 U.S. 850 (2005).

U.S. 83 (1963), as a matter of due process, to provide a convicted state inmate with DNA testing of evidence to prove his innocence. The Supreme Court reversed, finding that the inmate had no constitutional entitlement and no due process right which extended to his post-conviction attempt to prove his innocence:

> A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man. At trial, the defendant is presumed innocent and may demand that the government prove its case beyond reasonable doubt. But "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrera* v. *Collins*, 506 U.S. 390, 399 (1993). "Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." *Dumschat*, *supra*, [452 U.S.] at 464 (internal quotation marks and alterations omitted).

Osborne, 129 S.Ct. at 2320. *See Pennsylvania v. Finley*, 481 U.S. 551, 557-59 (1987) (no extension of the Constitution to collateral, post-conviction proceedings and due process in a post-conviction proceeding is dictated by what process the state decides to extend).

Indeed, the General Assembly, with no constitutional impediment, could have elected to leave in place the normal procedural bars which would have barred Burns' retardation claim from review in his habeas petition, just as it expressly did - in the concluding paragraph of § 8.01-654.2 - for the retardation claims of all death-sentenced habeas petitioners who already

have completed state court review before the statute's effective date. *See*, *e.g.*, Va. Code § 8.01-654.2 (prohibiting consideration of new habeas claims the facts of which were known when a prior petition was filed); Va. Code § 8.01-654.1 (time limitation on considering any new claims not contained in the initial habeas petition); *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974) (prohibiting consideration of any habeas claim which could have been made at trial and on appeal).

After all, there is nothing constitutionally offensive about finding that a death-row inmate has defaulted his retardation claim. *See Winston*, 268 Va. at 617, 604 S.E.2d at 51 (barring claim of retardation on direct appeal due to default). The General Assembly, as a policy matter, chose in § 8.01-654.2 to forgive these defaults for petitioners like Burns whose cases still were in the breast of the state court. But it did not choose to convert his status into a criminal defendant with all the rights attendant to such status.

Burns' makes mention of two objections which he interprets as violating his rights as a criminal defendant. He says that Judge Hupp excluded him from the courtroom and refused to have him transported to one hearing. But Burns fails to mention that Judge Hupp ruled properly that even if this were a criminal trial, the court could have exercised its discretion not to have Burns present for the motion to get additional counsel appointed and paid because

the proceeding was not material and his presence not crucial. (JA 1110); *see Remington v. Commonwealth*, 262 Va. 333, 361, 551 S.E.2d 620, 637 (2001), *cert. denied*, 535 U.S. 1062 (2002).

Burns fails to mention that the court removed Burns from the courtroom one time when he refused to behave in an orderly manner (JA 1038) or the fact that that would have been proper even in a criminal trial. *See Illinois v. Allen*, 397 U.S. 337, 343 (1970). And Burns fails to mention that Judge Hupp ruled that, even though Burns did not have the right of a criminal defendant to be present, the court nevertheless was ordering that he would be present ("I can assure you that we will have him here…."). (JA 1176).

Burns further mentions that representation of the respondent-appellee by both the Commonwealth's Attorney and the Attorney General "shifted the structural basis" of the case, and "reflected the trial court's distorted view of the nature of the proceedings." (Burns' Brief at 24). However, Burns provides no reasons for these baseless accusations. Burns complained, without any standing, that the respondent-appellee should not be represented by the Attorney General if the case was criminal. The Commonwealth's Attorney rectified the complaint by appointing the Senior Assistant Attorney General as a special prosecutor under his unchallenged power to do so. *See* Va. Code § 19.2-155. Burns

complained, again without standing, that the respondent-appellee should not be represented by the Commonwealth's Attorney if the case was civil. The Attorney General rectified that complaint by appointing the Commonwealth's Attorney as a special assistant attorney general under his unchallenged power to do so. *See* Va. Code § 2.2-501. Given these unchallenged facts, Burns can have no further complaint.

Finally, because § 8.01-654.2 establishes an entirely new, original proceeding, civil in nature, the Circuit Court necessarily had considerable discretion in determining which rules would apply. Judge Hupp's decision to treat the Commonwealth's motion for a final order as a motion for summary judgment was eminently reasonable and not error.[10]

The Circuit Court had before it §§ 19.2-264.3:1.1 and .2, the governing statutes, which required proof of significantly subaverage intellectual functioning as demonstrated on an IQ test administered in conformity with

[10] Burns contends that the Commonwealth agreed below that summary judgment under Rule 3:20 of *The Rules of the Supreme Court of Virginia* would not apply. He is mistaken. The Commonwealth agreed that Part 3 of the Rules governing civil suits would not apply generally. But it specifically argued that the court enjoyed broad discretion as to which rules would apply, and that the usual rules governing civil proceedings *would apply*. (JA 724-26).

accepted professional practice.[11] It had Dr. Hagan's unrebutted testimony that the report of an IQ test score is an expert opinion (JA 1195-1238), and Burns' notice that he intended not to present any expert witness to prove his claim (JA 735). Given these undisputed facts, the court had before it a movant who could not prove his claim as a matter of law. Just as in *Thurmond v. Prince William Professional Baseball Club, Inc.*, 265 Va. 59, 574 S.E.2d 246 (2003), summary judgment was the proper disposition here.

C. The Circuit Court Properly Ruled That Proof Required Presentation Of Expert Opinion.

Burns argues that § 19.2-264.3:1.1 does not require testimony from an expert to prove his claim, and that Judge Hupp got subsections (A) and (B) mixed up because supposedly Judge Hupp relied only on subsection B and that subsection supposedly does not require any form of proof. Sections 19.2-264.3:1.1 (A) & (B) provide as follows:

[11] Contrary to Burns' contention, the statute does not require a current, post-death-sentence, IQ test. Such claims under § 19.2-264.3:1.1 in Virginia often are, and certainly may be, litigated on the basis of expert interpretation of older IQ tests. *See, e.g., Winston v. Kelly*, 600 F. Supp. 2d 717 (W.D. Va. 2009); *Lewis v. Warden*, 274 Va. 93, 645 S.E.2d 492 (2007); *Green v. Johnson*, 431 F.Supp.2d 601 (E.D. Va. 2006); *Walker v. True*, 399 F.3d 315 (4th Cir. 2005).

A. As used in this section and *§ 19.2-264.3:1.2*, the following definition applies:

"Mentally retarded" means a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.

B. Assessments of mental retardation under this section and *§ 19.2-264.3:1.2* shall conform to the following requirements:

1. Assessment of intellectual functioning shall include administration of at least one standardized measure generally accepted by the field of psychological testing and appropriate for administration to the particular defendant being assessed, taking into account cultural, linguistic, sensory, motor, behavioral and other individual factors. Testing of intellectual functioning shall be carried out in conformity with accepted professional practice, and whenever indicated, the assessment shall include information from multiple sources. The Commissioner of Mental Health, Mental Retardation and Substance Abuse Services shall maintain an exclusive list of standardized measures of intellectual functioning generally accepted by the field of psychological testing.

2. Assessment of adaptive behavior shall be based on multiple sources of information, including clinical interview, psychological testing and educational, correctional and vocational records. The assessment shall include at least one standardized measure generally accepted by the field of psychological testing for assessing adaptive behavior and appropriate for administration to the particular defendant being assessed, unless not feasible. In reaching a clinical judgment regarding whether the defendant exhibits significant limitations in adaptive behavior, the examiner shall give performance on standardized measures whatever weight is clinically appropriate

> in light of the defendant's history and characteristics and the context of the assessment.
>
> 3. Assessment of developmental origin shall be based on multiple sources of information generally accepted by the field of psychological testing and appropriate for the particular defendant being assessed, including, whenever available, educational, social service, medical records, prior disability assessments, parental or caregiver reports, and other collateral data, recognizing that valid clinical assessment conducted during the defendant's childhood may not have conformed to current practice standards.

Subsections (A) and (B) thus both expressly require that IQ testing be administered "in conformity with accepted professional practice." Yet Burns' argument would have the Court ignore that requirement, and relegate it instead to some sort of meaningless pre-trial requirement that does not affect proof at trial. This Court should reject Burns' tortured parsing of the clear language of the statute: the statute provides the elements which must be proven, and how those elements must be assessed by an expert.

Dr. Hagan, a specialist in forensic psychology and specifically in the identification of mental retardation under the Virginia capital murder statute (JA 1195-99), testified below without contradiction that "accepted professional practice" includes, among other things: an expert's selection and administration of an IQ test instrument; his scoring of that test; and his interpretation of the resulting IQ score. (JA 1201-13). He testified that all

reports of such testing are a matter of expert opinion. (JA 1202, 1208). Indeed, Burns' *Amici* National Association For The Dually Diagnosed And The ARC Of Virginia appear to agree completely with Dr. Hagan's assessment. Brief of *Amici* at 20 (use of clinical judgment required).[12] That being the accepted professional practice, no IQ test results are competent evidence under the statute without an expert's testimony because such results constitute expert opinion.

Burns told Judge Hupp that he had an older written report of an IQ test score that he planned on submitting without any expert witness. (JA 1186). Burns also had Dr. Stejskal's 1999 report of a score of 66, yet he expressly stated he would rely only on older school records. (JA 1186-87). Whatever his tactical reasons for his decision were – for example, to prevent the

[12] Burns' *amici*, as stated in their brief, speak for associations who advocate for persons with "developmental and intellectual disabilities," and which no longer recognize the term, "mental retardation." As such, their advocacy is out of place in this case which is governed not by ephemeral, sliding scales of intellectual ability and description, but rather with the legal definition of "mental retardation" mandated by the General Assembly under the authority of *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), which prohibits execution not of all retarded persons, but only those capital murderers about whom there is a national consensus should not be executed due to their "retardation." *See Stamper v. Commonwealth*, 228 Va. 707, 716-17, 324 S.E.2d 682, 688 (1985) (there is no "sliding scale of insanity"). *Amici's* advocacy for persons who have been "dually diagnosed" likewise is inapposite in this case because Burns has not been so diagnosed.

respondent-appellee from cross-examining his experts, or to avoid having to disclose the data underlying his experts' opinions - Burns clearly was without proof under the statute as a matter of law.

Judge Hupp ruled as follows:

> 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 test was administered, whether it meets the criteria, and then for the interpretation of the test.

(JA 1266) (ellipses in original). Judge Hupp simply had no option in the face of Burns' decision *not* to present an expert but to dismiss the case.

D. <u>The Circuit Court Did Not Disobey This Court's Mandate</u>.

Burns briefly argues that Judge Hupp erred by disobeying the mandate of this Court. But this Court's mandate merely afforded Burns the opportunity to prove his claim under the governance of §§ 19.2-264.3:1.1 and .2. Judge Hupp fulfilled that mandate when he appointed Burns two experts and gave him four years to prove his case. This Court's mandate cannot have included a directive to go forward with a proceeding despite the petitioner's express

notice that he would present no competent evidence to prove his claim.[13] Such would have been a useless exercise, and one involving considerable expenditure of judicial resources in a jury proceeding.

II. The Circuit Court did not err in denying Burn's motion to declare him incompetent.

In the court below, Burns argued that he was entitled to a finding of incompetency to be tried, primarily under § 19.2-169.2. Judge Hupp properly found that, because the proceeding before him was not a criminal trial, that statute did not apply, and the case could go forward with Burns represented by counsel. (JA 1049).[14] It is that ruling which is before this Court on appeal. Burns' brief seems to argue that, because he presented his appointed experts' opinions about Burns' behavior without counter-evidence from the

[13] Section 19.2-264.3:1.1 requires proof of a significantly subaverage IQ score *and* significant limitations of adaptive behavior. Even if Burns could prove the latter requirement by lay evidence, and the respondent does not concede that he could, without competent, admissible evidence from an expert regarding the former requirement, Burns' claim would have to be dismissed as a matter of law.

[14] In fact, none of the statutes cited below by the petitioner provided any support for his claim. *See* Va. Code § 19.2-169.1 (permitting competency inquiry during a criminal trial "and before the end of trial"); § 19.2-176 (permitting competency evaluation of a criminal defendant "after conviction and before sentence" has been imposed); § 19.2-177.1 (permitting competency evaluation of a person who has been sentenced but who is still held in a local jail, *but only upon the petition of the custodian*).

respondent-appellee, that the Circuit Court's ruling was in error. But the respondent-appellee took no position on Burns' behavior in the court below because that behavior was legally irrelevant to the proceeding. The respondent-appellee always has contended that Burns, as a petitioner in a civil proceeding, had no right to use his behavior, whether feigned or real, to stay the proceedings, and the Circuit Court agreed. Neither the respondent-appellee nor Judge Hupp were "exploiting" Burns for some sort of personal gain, as improperly alleged by Burns. (Burns' Brief at 32).

Burns also argues that the constitutional provisions prohibiting the trial of an incompetent defendant apply to him. But, as discussed above, Burns is not a criminal defendant whom the Commonwealth is prosecuting. He is the petitioner in a "specific" civil action in which he must prove his claim.[15]

Competence is a legal, not a medical, concept. It has a very specific meaning in a criminal trial, but outside of the trial, it has only very limited recognition. (See footnote 17 below). What Burns attempted to do below

[15] Of course, Burns never has articulated what standard of "competency" would apply to a death-row petitioner whose habeas claim of mental retardation has been remanded for a jury trial in a "special" proceeding created for that factual determination. Burns cites no authority for such a standard as, indeed, there is none.

was to blur the line between the concept of trial incompetence and the potential medical need for treatment of a mental illness.

Burns is a ward of the Commonwealth of Virginia. His health, including mental health, is entrusted to the Department of Corrections (DOC) who are obligated under law to assess and treat any illnesses. But instead of pursuing his administrative remedies if he believed he was not being treated properly for an alleged illness, he used his psychologists - whom Judge Hupp had appointed to assist him in proving his claim of retardation – to chart a different course. He enlisted them in his attempt to delay his case by diagnosing him with illnesses which DOC had neither recognized nor treated. He used them to divert his claim of retardation into a legally irrelevant issue of competency to be tried for a crime. He argued to the Circuit Court that the Constitution required that his civil action be put on hold. He failed, however, to establish a connection between his alleged mental illness and a right to stop the proceedings.

Burns cites numerous rights attendant to other non-criminal proceedings, such as contempt, disbarment and forfeiture, but they are

irrelevant to Burns' case.[16] And, even in those proceedings, Burns identifies no right to stop the case due to the incompetence of the petitioner.[17] In fact, in the similar arena of civil trials for sexually violent predators, the Texas Supreme Court has held that even the proven incompetence of the prisoner is no impediment to proceeding with the trial precisely because it is a civil proceeding and the prisoner is represented by counsel. *Fisher*, 164 S.W.3d at 656. This is the same ruling made by Judge Hupp in Burns' case.

Finally, Burns argues that he had a statutory right under § 19.2-264.3:1.1 to be "competent to be tested" for a current[18] IQ score. As an initial matter, the statute contains no requirement for a current test or score,

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[16] Burns cites *Ford v. Wainwright*, 477 U.S. 399 (1986), but that case governs a claim Burns never has made in this case, and which is not the subject covered by this Court's remand: competence to be executed. He cites to *Rees v. Peyton*, 384 U.S. 312 (1966), but that case dealt with the different issue of competence to *waive* federal habeas review, not competence to be tried or even to *continue* to litigate a post-conviction action.

[17] The only right to competency in such cases he cites is a Texas case which held that juveniles have a right to be competent in delinquency proceedings. Burns is not a juvenile facing punishment of a criminal nature; rather, he is a convicted murderer, whose sentence is final, attempting to overturn that presumptively valid judgment.

[18] By "current," the respondent-appellee means any IQ testing under § 19.2-264.3:1.1 administered contemporaneously with a claim of retardation.

much less a mixed law-clinical requirement for "competency to be tested," whatever that means. Burns does not even try to find such authority in the statute. As discussed above, Judge Hupp properly determined that § 19.2-264.3:1.1 simply does not require current testing. As shown above, most Virginia *Atkins* claims have been litigated based upon historical IQ testing, or a combination of historical and current tests, not upon post-claim testing.

Indeed, it is understandable even to lay persons that the General Assembly would not have enacted such a policy as Burns says is required. A low IQ score obtained from the testing of a person who is either facing a death sentence, or who, like Burns, has been sentenced to death, obviously will be less reliable than historical IQ test scores obtained at a time when the person had no incentive to under-perform. Additionally, where the person, like Burns, has a history of malingering, common sense dictates that current IQ testing would be all the more unreliable. There is simply nothing in the statute, expressly or by implication, that requires, or bestows a right to, current IQ testing: the statute clearly requires proof of some test but gives no right of current testing.

Burns' case is a good example of what the General Assembly intended. He made his claim accompanied by a sub-70 IQ score obtained at the time of trial. This Court found that allegation to be non-frivolous and

so provided him with the opportunity, including counsel and experts at the Commonwealth's expense, to explain to a jury how that score (or any other sub-70 scores) proved the first element of the retardation definition. But Burns expressly and deliberately decided that he would not present that evidence to a jury and, in fact, would not present any IQ evidence through an expert. He contended that he had the right to go fishing for other, as yet undeveloped, evidence in the form of a current IQ test, but that he could not pursue that new testing until his behavior or competence had improved. Nothing in the statutory framework of the "specific" civil action created or contemplated by the General Assembly permitted such obstruction and delay.

Burns' argument might be accurate that, in the non-forensic world, it is acceptable clinical practice to optimize a test-taker's mental state before IQ testing. But it ignores the fact that Burns had at his disposal prior IQ tests results and experts who could testify about them, and yet he simply elected not to rely on either.[19] Burns chose to insist to Judge Hupp that the

[19] Burns' insistence below that he could submit the IQ test results to the jury without an expert under a business records exception to the hearsay rule is without merit because the exception does not permit records containing expert opinion. *See Neely v. Johnson*, 215 Va. 565, 571, 211 S.E.2d 100,106 (1975).

court either must stop the case for an evaluation of his "competence to be tested," or it must allow him to proceed to trial and prove his case with only hearsay opinions contained in documents the respondent-appellee could not cross-examine. Burns surely was not entitled to blackmail the Circuit Court without consequences.

Burns' argument that the prison's alleged mistreatment of him (by keeping him on death-row[20]) constitutes a separate due process violation does not appear to have been made below, and therefore may not be considered on appeal under Rule 5:25, *Rules of the Supreme Court of Virginia*. It would be groundless in any event as there is no authority for such extension of the Constitution. *See Thompson v. McNeil*, 129 S.Ct. 1299, 1301 (2009) (Thomas, J., concurring in denial of certiorari) (discussing the lack of merit to claim that the Constitution forbids execution as cruel and unusual punishment where the inmate has been subjected to death-row for a

[20] Burns argues that being held on death row like other death-row inmates constitutes "solitary confinement." He asserts that he must be transferred somewhere else less confining in order to regain his competency. His *amici* actually argue that he must be returned to the Circuit Court so that Dr. Olley can "arrange and monitor proposed interim mental health treatment." Brief of *Amici* at 23. His contentions only highlight the lack of merit in, and impracticability of crediting, any claim that a convicted felon who is challenging a valid criminal judgment in a post-conviction proceeding has a right to assessment for "competency" to prosecute his attack on that judgment.

number of years: "the issue … is whether the death-row inmate's litigation strategy, which delays his execution, provides a justification for the Court to invent a new Eighth Amendment right. It does not.")

His assertion that *Atkins v. Virginia*, 536 U.S. 304 (2002), required States to adopt any particular procedure for determining retardation claims is wholly unsupported by anything in the decision. *See* 536 U.S. at 317 ("Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. … [W]e leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."). Virginia accorded Burns, as a matter of legislative policy, a pass on the usual procedural default rules. It provided him with counsel, experts, and a jury proceeding in which to prove his claim. Its procedures more than fully complied with *Atkins*.

Finally, Burns' argument that Judge Hupp's decision denied him due process is untenable. Judge Hupp bent over backwards to afford Burns every opportunity to prove his claim. Despite having at least three experts who could testify about Burns' intellectual functioning, and numerous prior IQ tests, Burns refused to prosecute his case and sought delay to investigate the irrelevant issue of his "competency" to proceed.

CONCLUSION

The Court should affirm the judgment of the Circuit Court.

Respectfully submitted,
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Certificate Of Service

On September 28, 2009, the required copies of this brief were hand delivered to the Clerk's Office for filing and a copy was e-mailed to the Clerk at scvbriefs@courts.state.va.us. The required copies of the brief were mailed to James G. Connell, III and Jonathan P. Sheldon, Devine, Connell & Sheldon PLC, 10621 Jones Street, Suite 301-A, Fairfax, Virginia 22030, counsel for appellant.

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