IN THE

Supreme Court of Virginia

RECORD NO. 090863

WILLIAM JOSEPH BURNS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT

The Commonwealth places almost all of its arguments under a single umbrella: that the General Assembly created a criminal procedure to govern almost all mental retardation determinations, but a different undefined, noncriminal procedure for Burns, because his case was on state *habeas* when the General Assembly acted. In fact, the General Assembly established a unitary criminal procedure for determination of mental retardation that applies to Burns in the same way it applied to Atkins. When the trial court abandoned established criminal procedure for an *ad hoc* approach not founded in civil or criminal law, it started down a path which led to egregious violations of Burns' most basic constitutional rights: the right to be present, the right to be competent, and the right to present a defense by obtaining a test of his intellectual functioning in a proceeding where his IQ will determine whether he lives or dies.

Tellingly, the Commonwealth cites no standard of review in its brief. If this actually were a civil case on review from a grant of summary judgment, as the Commonwealth claims, this court would review the relevant portions of the record in the light most favorable to the non-moving party, Burns. *Jackson v. Hartig*, 274 Va. 219, 229, 645 S.E.2d 303, 308 (2007). In a true civil appeal, the Commonwealth would have to admit for purposes of appeal that Burns is psychotic and incompetent rather than intimate that Burns is so skillful an actor that for years, he could fool the psychologist, neuropsychiatrist, and attorneys appointed to assist him. *See* Respondent-Appellee's Brief at 4, 5, 6, 34.[1] The Commonwealth fails to

[1] In fact, the record overwhelmingly establishes Burns' present mental illness and negates any possibility that he is feigning this mental illness.

cite the favorable standard of review it seeks to take advantage of because to do so would be to admit the obvious: that this is a criminal appeal from a criminal proceeding.

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 Commonwealth argues that Burns' case was civil in nature because it is essentially a *habeas corpus* proceeding by another name. This reasoning ignores the plain directives of both the General Assembly and this Court. The jury determination of Burns' mental retardation and the impact of the criminal judgment are criminal in nature; once that fact is established, the trial court's error is plain.

Code § 8.01-654.2

The General Assembly addressed the issue of mental retardation determinations after *Atkins* in a single act, which did not draw a distinction between a civil and criminal determination of mental retardation. 2003 Va. Acts ch. 1031 enacted Code § 8.01-654.2 as well as enacting or amending seven other statutes governing mental retardation determinations in criminal cases. *See* J.A. 567-71. These statutes govern Burns' jury determination of mental retardation in the same way they governed Atkins' or Prieto's—a unitary procedure regardless of whether the claim of mental retardation arises at trial, on direct appeal, or on remand to the Circuit Court from state *habeas corpus* proceedings.

Under the Commonwealth's approach, in contrast, each Circuit Court must establish a previously-unarticulated, hybrid legal process following

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See Opening Brief of Appellant at 29-32; J.A. 338-45, 543-50, 737-48.

remand under Code § 8.01-654.2. When the trial court accepted the Commonwealth's contention that Burns' case was "a different type of proceeding than a so-called criminal proceeding, although [with] certain criminal aspects to it," J.A. 987, it found itself "in a no-man's land," J.A. 1144, never envisioned by the General Assembly. When the General Assembly wishes to establish a separate civil procedure, as it did in Code § 37.2-901 for sexually violent predator trials, it knows how to both designate its procedure as civil and to provide guidelines to the Circuit Courts. The confusion over who can prosecute, J.A. 1144, who can defend, J.A. 1065-66, how they will be paid, J.A. 1109, what discovery procedures apply, J.A. 1084, and what rules and statutes govern, J.A. 1176-78, demonstrates the "muddy waters" for trial courts when they must decide "issue by issue" whether civil, criminal, or previously-unknown procedures apply to a case before them. J.A. 1084.

Code § 8.01-654.2 does not create a civil remedy at all, but rather provides a mechanism for a death-sentenced person still within the jurisdiction of the Virginia courts to obtain the jury determination they should have had prior to April 29, 2003 by demonstrating a non-frivolous claim of mental retardation. As effectively as possible, the General Assembly implemented the fully retroactive *Atkins* decision by giving capital litigants on appeal or in state *habeas corpus* proceedings the opportunity they should have had prior to the Supreme Court's decision in *Atkins*. *Cf. Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

The Commonwealth concedes that the *Atkins* remand was a criminal proceeding, but attempts to distinguish it on the basis that Atkins' case never reached the *habeas corpus* stage. Respondent-Appellee's Brief at 19-20. Code § 8.01-654.2 allows a person to present a claim of mental

retardation to the Supreme Court of Virginia if his case is still on direct appeal or if his *habeas* petition has not yet been decided; in other words, if the Supreme Court of Virginia still has jurisdiction over the case. The General Assembly did not see the appeal-*habeas* distinction as significant to its response to *Atkins*, as it explicitly provided the same procedures for a determination of mental retardation for claims presented in a direct appeal brief or supplement and a *habeas corpus* brief or supplement. *See Burns v. Warden*, 269 Va. 351, 353, 609 S.E.2d 608, 610 (2005).

The history of *Atkins* itself illustrates that Code § 8.01-654.2 does not create a collateral civil remedy. Atkins was convicted at trial and sentenced to death, but this Court ordered a "new penalty proceeding" because the trial court gave the jury a faulty verdict form. *Atkins v. Commonwealth*, 257 Va. 160, 179, 510 S.E.2d 445, 457 (1999). Atkins did not raise the claim that his mental retardation barred his execution at trial, but only on direct appeal from the re-sentencing hearing as part of this Court's proportionality review under Code § 17.1-313. *Atkins v. Commonwealth*, 260 Va. 375, 386, 534 S.E.2d 312, 318 (2000). After remand from the Supreme Court of the United States, this Court held that Code § 8.01-654.2 governed Atkins' case because he "first presented his claim to this Court on direct appeal from the re-sentencing hearing." *Atkins v. Commonwealth*, 266 Va. 73, 79-80, 581 S.E.2d 514, 517 (2003). This Court did not remand for a "new penalty proceeding" as it had done in Atkins' first remand. *Atkins*, 257 Va. at 179, 510 S.E.2d at 457. Instead, this Court ordered the trial court to "empanel a new jury for the sole purpose of making a determination of mental retardation" under Code § 8.01-654.2. *Atkins*, 266 Va. at 80, 581 S.E.2d at 517; *see also Atkins v. Commonwealth*, 272 Va. 144, 148-49, 631 S.E.2d 93, 94-95 (2006) (describing procedural history of the *Atkins*

litigation).

In other words, upon remand, Burns and Atkins were in identical procedural postures in their respective Circuit Courts. Like Burns', Atkins' mental retardation proceeding was a remand for the Circuit Court to conduct a mental retardation determination pursuant to Code §§ 19.2-264.3:1.1 and 19.2-264.3:1.2, and, based on that determination, for the court to make whatever changes were constitutionally required to the capital sentence. Burns' proceeding in Shenandoah County was in exactly the same procedural posture as Atkins' proceeding in York County.[2]

Once it is established that both Atkins' and Burns' proceedings were procedurally identical determinations of mental retardation pursuant to Code § 8.01-654.2, this Court's jurisprudence conclusively holds that Burns' Code § 8.01-654.2 proceeding was criminal in nature. On appeal from Atkins' Code § 8.01-654.2 mental retardation determination, this Court stressed that "the issue of mental retardation 'shall be determined by the jury as part of the *sentencing process*.'" *Atkins*, 272 Va. at 157, 631 S.E.2d at 100 (emphasis in original). This Court made completely clear that the trial court must put Atkins in as near as possible the position he would have been in at his original trial, including not informing the jury of the prior jury's death sentence. *Id.* at 158, 631 S.E.2d at 100. In an unpublished order dismissing an interlocutory appeal, this Court directed the Circuit Court for York County to consider Atkins' case to be criminal in nature. Order of September 20, 2007, *Atkins v. Commonwealth*, Record Nos. 071703 &

[2] Tellingly, when the Commonwealth sought an extraordinary writ in Atkins' case, it argued that Atkins was in the identical procedural posture to Burns. *See* Amended Memorandum in Support of Applications for Writs of Prohibition and Mandamus, *In re Commonwealth*, Record Nos. 080282 & 080283, at 15 (attached).

071750 (attached). Later, this Court specifically held that Atkins' second proceeding under Code § 8.01-654.2 was "a criminal proceeding" that is "one part of a capital murder case." *In re Commonwealth*, 278 Va. 1, 10, 11, 677 S.E.2d 236, 239, 240 (2009). These holdings that a remand under Code § 8.01-654.2 is criminal control the outcome of Burns' appeal.

Code § 19.2-264.3:1.1(D)

Following the chain of statutory references demonstrates the criminal nature of the mental retardation determination beyond a doubt. Code § 8.01-654.2 provides, "The provisions of §§ 19.2-264.3:1.1 and 19.2-264.3:1.2 shall govern a determination of mental retardation made pursuant to this section." *See also Burns v. Warden*, 269 Va. 351, 353, 609 S.E.2d 608, 610 (2005) (applying this language to Burns). Code § 19.2-264.3:1.1(C), enacted by the General Assembly in the same legislation, provides that "the issue of mental retardation . . . shall be determined by the jury as part of the sentencing proceeding required by § 19.2-264.4."

This Court recently emphasized the plain meaning of this statutory language. In *Prieto v. Commonwealth*, __ Va. __, __ S.E.2d __, 2009 Va. LEXIS 94, *34-*35 (Sept. 18, 2009), this Court explained:

> We agree with the Commonwealth's arguments concerning the application of Code § 19.2-264.3:1.1(C). The language in the statute directing that this issue of mental retardation "shall be determined by the jury as part of the sentencing proceeding required by § 19.2-264.4" clearly mandates that the issue of mental retardation be determined by the jury as part of the sentencing phase. . . . We hold that the issue of mental retardation is not to be separated from the issue of punishment, but is to be determined by the jury as part of the sentencing

phase of the bifurcated trial.

If it had addressed *Prieto* in its brief, the Commonwealth might seek to distinguish *Prieto* on the basis that this Court's holding arose in the context of an initial criminal prosecution. This attempt would fail, however, because this Court applied the same statutory language to Burns when it explained that "the jury shall determine the mental retardation issue as part of the sentencing phase." *Burns*, 269 Va. at 353, 609 S.E.2d at 610. As far as possible, the mental retardation jury determination in Burns' case replicates the same process in an initial criminal trial. *See Atkins*, 272 Va. at 158, 631 S.E.2d at 100.

The Commonwealth claims that the proceeding is civil because the jury in Burns' mental retardation proceeding would not actually sentence him. Respondent-Appellee's Brief at 13-18. The Commonwealth makes no attempt to explain why this same alleged limitation in Atkins' case did not make that proceeding civil. In fact, this Court has already recognized that, if the jury finds Burns to be mentally retarded, it will sentence him under the procedures for jury sentencing in Code § 19.2-264.3:1.1(D). In remanding Burns' case to the trial court, this Court directed, "Upon a finding that Burns is mentally retarded, the trial court shall enter an order vacating the sentence of death and *re-sentencing Burns in accordance with Code § 19.2-264.3:1.1(D)*." *Burns*, 269 Va. at 354, 609 S.E.2d at 611 (emphasis added).

As this Court has recognized, the General Assembly specifically provided for a jury to sentence Burns. If the trial court had permitted Burns a jury determination of his mental retardation claim, the jury's first option on the statutory verdict form provided by Code § 19.2-264.3:1.1(D) would indicate "that the defendant has proven by a preponderance of the

evidence that he is mentally retarded [and] *fix his punishment* at (i) imprisonment for life or (ii) imprisonment for life and a fine of $___." Code § 19.2-264.3:1.1(D)(1) (emphasis added); *see also Atkins*, 272 Va. at 157, 631 S.E.2d at 100. The two punishments, life imprisonment and life imprisonment plus a fine, are two of the three statutorily authorized punishments for capital murder. *See Powell v. Commonwealth*, 261 Va. 512, 544, 552 S.E.2d 344, 362-63 (2001). The jury's choice between these two punishment options, the second and third harshest penalties provided by Virginia law, is by definition sentencing.

The General Assembly obviously considered the choice between life imprisonment and life imprisonment and a fine to be a matter of jury sentencing. In 1991, the General Assembly amended Code § 18.2-10, governing "Punishment for conviction of felony; penalty," to permit the sentencer to impose a fine of up to $100,000 in addition to life imprisonment as punishment for a Class 1 felony. 1991 Va. Acts ch. 7; *Powell*, 261 Va. at 543, 552 S.E.2d at 362. Later, in the same emergency act which supplied Virginia's mental retardation procedures, the General Assembly amended Code § 19.2-264.4(D)(2) by adding "or (ii) imprisonment for life and a fine of $___" to the statutory verdict form. *See* 2003 Va. Acts ch. 1031; J.A. 571. The General Assembly intended a jury to impose sentence under Code § 19.2-264.3:1.1, and its plain language reflects that intent.

Without citing this Court's directive that the trial court re-sentence Burns if he is found to be mentally retarded, the Commonwealth relies on the other possibility this Court considered in *Burns*: "upon a finding that Burns is not mentally retarded, 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; *see* Respondent-Appellee's Brief at 13, 16-17. Rather than remove Burns' case from the scope of Code § 19.2-264.3:1.1(D), however, this directive implements the General Assembly's scheme provided in that subsection. Code § 19.2-264.3:1.1(D)(2) provides the jury a second option to "find that the defendant has not proven by a preponderance of the evidence that he is mentally retarded." In Burns' case, as in an initial trial, if the jury finds that he is not mentally retarded, the jury finds no bar to his death sentence. In an initial criminal trial, the jury would go on to issue one of the statutory verdicts found in Code § 19.2-264.4(D); in Burns' case, the previous death sentence would remain in effect because the jury will not issue a new verdict under Code § 19.2-264.4(D). Burns' jury would sentence him pursuant to Code § 19.2-264.3:1.1(D), either by imposing a new sentence of life imprisonment or life imprisonment plus a fine, or by defaulting to the previously entered-death sentence.

The Commonwealth's sexually violent predator ("SVP") analogy demonstrates the distinction between a proceeding like Burns', in which a case is remanded to the jurisdiction of the Circuit Court empowered to impose criminal punishment, and a civil commitment. *See* Respondent-Appellee's Brief at 17-18, 36. Virginia's SVP statutes subject dangerous persons with a mental abnormality or personality disorder to "involuntary secure inpatient treatment" "until such time as the respondent's mental abnormality or personality disorder has so changed that the respondent will not present an undue risk to public safety." Code §§ 37.2-908(D) & -909(A), respectively. The stark difference between the minimum penalty of life imprisonment under § 19.2-264.3:1.1 and the indefinite, remedial treatment under Code §§ 37.2-909 illustrates the classic distinction between criminal and civil confinement. *See Kansas v. Hendricks*, 521

U.S. 346, 368-69 (1997).

Reduced to its essence, the Commonwealth's argument is that the General Assembly created *sub silentio* not one but two procedures for a jury determination of mental retardation: for inmates like Burns, an unspecified and unregulated "no-man's land, between the two lines between civil and criminal" in which judges must "chart their own course" as to which laws apply, and an orderly criminal proceeding for every other capital inmate or defendant. J.A. 1144. This state of affairs cannot possibly be the law, but the trial court here followed the Commonwealth away from the well-established criminal law into the "muddy waters" of *ad hoc* procedures that were "not criminal and not civil." J.A. 1084. This Court must reverse the judgment of the trial court and remand for the jury determination Burns should have received in the first instance.

Code § 19.2-264.3:1.1(A) & (B)

The trial court granted summary judgment on the basis that the historical IQ test Burns intended to rely upon at trial could not meet the requirements of Code § 19.2-264.3:1.1(B) without expert testimony. J.A. 1265-66. Subsection (B) did not apply to Burns because his mental illness made it impossible for him to present an expert assessment at trial, and subsection (B) only governs expert "assessments."

The Commonwealth responds that the requirements of subsection (B) govern all proof of IQ because both subsections (A) and (B) contain the phrase "in conformity with accepted professional practice." Respondent-Appellee's Brief at 30. In the trial court, all of the evidence indicated that the "accepted professional practice" would be to restore Burns to competency and administer a contemporary IQ test. J.A. 334, 549-50, 747-48, 991-92, 1220. This uncontroverted evidence forms the basis for Burns'

argument that he has a due process right to be competent to be tested under Virginia's statutory scheme. *See* Opening Brief of Appellant at 37-39.

Code § 19.2-264.3:1.1(B)(1) provides in part that, "Assessment of intellectual functioning shall include administration of at least one standardized measure generally accepted by the field of psychological testing . . . . The Commissioner of Behavioral Health and Developmental Services shall maintain an exclusive list of standardized measures of intellectual functioning generally accepted by the field of psychological testing." The List of Standardized Measures of Intellectual Functioning (October 31, 2005) (attached) applicable at the time of summary judgment listed only current versions of prominent IQ tests, and indicated that older versions of tests could be used only "for purposes of verification of the developmental origin of an individual's mental retardation." Viewed in conjunction with the Commissioner's list, subsection (B)(1) thus imposes a requirement that an "assessment" of intellectual functioning use a current test because only current tests are on the list.

Subsection (A), however, does not require proof of an "assessment" as regulated by subsection (B). If the General Assembly had meant to require a defendant to prove his or her mental retardation using an assessment under subsection (B), it would have included that requirement in the definition of mental retardation in subsection (A). Similarly, if the phrase "administered in conformity with professional standards" meant the same thing as the requirements for assessments under subsection (B)(1), the General Assembly would have either left the phrase out of subsection (B)(1), or included the requirements in subsection (A).

Recent changes to the subsection (B)(1) list confirm Burns' view of

the distinction between the elements of proof in subsection (A) and the requirements of an assessment in subsection (B). Shortly after the grant of summary judgment, the Commissioner issued a new List of Standardized Measures of Intellectual Functioning (November 10, 2008) (attached). The new list removed all the IQ tests appropriate for administration to children, such as the Wechsler Intelligence Scale for Children. This change makes sense only if the (B)(1) list is intended to govern new assessments of adults after the abolition of the juvenile death penalty. After 2005, psychologists stopped assessing the intellectual functioning of children in death penalty cases, and thus had no more need for measures of children's IQ on the (B)(1) List. But psychologists for the foreseeable future will need to rely on now-outdated tests of children's intellectual functioning, both to confirm current IQ scores and to establish the developmental origin of the intellectual disability. These tests cannot serve as a (B)(1) assessment because they are not on the list, but they can be used to prove significantly subaverage intellectual functioning under subsection (A).

This Court has parsed the same statutes in an analogous way. In the last *Atkins* direct appeal, this Court noted that the requirements for an expert to testify on the issue of mental retardation under Code § 19.2-264.3:1.2(A) are different from the requirements for an assessment under Code § 19.2-264.3:1.1(B). *Atkins*, 272 Va. at 155, 631 S.E.2d at 98. On the issue of intellectual functioning, this Court explained, "the mere fact that Dr. Samenow did not administer the WAIS-III to Atkins in accordance with accepted professional practice would not render his opinion inadmissible." *Id.* at 155 n.6, 631 S.E.2d at 99 n.6. In other words, the failure of an assessment to satisfy subsection (B)(1) does not prevent a litigant from presenting other evidence of mental retardation or the lack thereof. In

Atkins, the Commonwealth could present opinion testimony from Dr. Samenow on Atkin's mental retardation even though he did not perform a subsection (B)(1) assessment; below, Burns should have been allowed to present other evidence of Burns' mental retardation even though he could not produce a subsection (B)(1) assessment.

As a matter of statutory construction, the elements of proof under subsection (A) are distinct from the requirements for an assessment under subsection (B). The trial court clearly erred in granted summary judgment on the basis that Burns' proffered proof did not meet the requirements of Code § 19.2-264.3:1.1(B)(1).

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.

The evidence below overwhelmingly established that Burns was incompetent to be tried or to be tested for intellectual functioning in conformity with accepted professional standards. Neither the Commonwealth nor the trial court disagreed, but simply maintained that Burns' mental state was as irrelevant as his other constitutional rights.

The Commonwealth's central position is that Burns has no right to competence because his trial is not criminal. Respondent-Appellee's Brief at 33-36. The General Assembly in fact established a unitary criminal procedure for jury determination of mental retardation, as explained above. For many years, federal constitutional law has provided the standard for competency the Commonwealth requests at page 34 n.6: whether Burns

has the present ability to consult with his lawyer with a reasonable degree of rational understand and a rational as well as factual understanding of the proceedings against him. *See, e.g.*, *Dusky v. United States*, 362 U.S. 402, 402 (1960). Code § 19.2-169.1 and others cited at Respondent-Appellee's Brief at 33 n.14 outline Virginia's procedures for assessing competency, but the procedural and substantive rights to be competent at trial spring from the Constitution, not the statutes. *See, e.g.*, *Medina v. California*, 505 U.S. 437, 439 (1992).

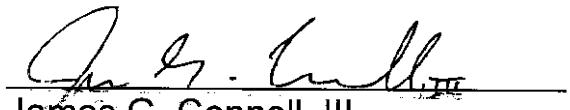
The Commonwealth argues that Burns does not have a right to be competent to be tested because Code § 19.2-264.3:1.1 does not require a current IQ test. Brief of Respondent-Appellee at 36-38. Given that all the IQ tests on the (B)(1) list are current tests, the Commonwealth's argument faces significant tension with its argument that Burns must satisfy Code § 19.2-264.3:1.1(B)(1). In fact, Code §§ 19.2-264.3:1.1 and -264.3:1.2 entitle Burns to testing of his current IQ performed in conformity with accepted professional standards, including the standard of testing a competent subject, but also permit him to prove that he is mentally retarded within the definition of Code § 19.2-264.3:1.1(A) by older IQ scores. The trial court erred by refusing to order Burns' restoration to competency so that he might be properly tested, and then it erred again by granting summary judgment once Burns tried to exercise the only option left to him.

Finally, the Commonwealth argues that Burns did not raise below his argument that the Commonwealth denied him due process by aggravating his mental illness and denying him adequate treatment. Respondent-Appellee's Brief at 39. In fact, Burns briefed this argument in his Motion to Declare Defendant Incompetent and For Appropriate Treatment; the relevant portion of the motion is found at J.A. 478-80.

CONCLUSION

There is a reason that this Court's decision in *Burns v. Warden*, 269 Va. 351, 609 S.E.2d 608 (2005), earns only a few citations in the Commonwealth's brief, and no discussion of its reasoning. *See* Respondent-Appellee's Brief at ii. Having lost the civil-criminal distinction it pressed in *Burns v. Warden*, the Commonwealth seeks to convince this Court to decide the issue anew and adopt a position which denies Burns the orderly criminal process established by the General Assembly. This Court's precedents, and a capital defendant's constitutional rights, are not set aside so lightly. This Court must reverse the decision of the court below and remand for a determination of Burns' mental retardation which provides him the protections due to a criminal defendant.

Respectfully submitted,
WILLIAM JOSEPH BURNS
By Counsel



James G. Connell, III
Jonathan P. Sheldon

CERTIFICATE

I, James G. Connell, III, hereby certify that on the 13th day of October, 2009, fifteen copies of this brief, and an electronic copy by email in PDF format, 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 the 13th day of October, 2009.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 20th *day of* September, 2007.

Daryl Renard Atkins, Appellant,

against Record No. 071703
Circuit Court No. CR03R2-8229-01

Commonwealth of Virginia, Appellee.

In Re: Daryl Renard Atkins, Petitioner

Record No. 071750

Upon a Petition for an Interlocutory Appeal
Upon a Petition for a Writ of Mandamus

Upon review of the record, the Court refuses the "Amended Petition for Interlocutory Appeal" in Record No. 071703. This is a criminal proceeding and Code § 8.01-670.1 is not applicable. Upon consideration of the pleadings filed in Record No. 071750, the Court dismisses the petition for a writ of mandamus.

The circuit court is directed to proceed with this criminal case. Such proceeding is confined to the terms of the mandate issued by the Court on October 18, 2006 remanding this case to the circuit court for a jury determination of whether Atkins is mentally retarded.

This order shall be certified to the Circuit Court of York County.

A Copy,

Teste: Pat L Harrington

Clerk

COMMONWEALTH of VIRGINIA

DEPARTMENT OF
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List of Standardized Measures of Intellectual Functioning

This "exclusive" list of intellectual assessment measures has been compiled in accordance with § 19.2-264.3:1.1 of the ***Code of Virginia***. Inclusion of an assessment measure on this list does not imply any form of endorsement of the general validity of the measure, or the applicability of that measure to a specific case. It should also be noted that the publishing of this list should not preclude the introduction of specialized measures of neuropsychological or cognitive functioning that may be of relevance to a particular case. Recent research findings regarding the reportedly dynamic nature of measured intelligence, such as those related to the so-called "Flynn effect", may augur the development of approaches to retrospective diagnosis of mental retardation in adults that require the use of more complex methods for the assessment of intelligence in capital sentencing matters than has been previously been considered necessary.

Previous versions of this list have included comprehensive intelligence batteries, along with several tests that are more limited in scope, such as measures of nonverbal intelligence, or abbreviated tests that may be of value in certain circumstances. The current version of the list includes only those comprehensive intelligence test batteries that measure both verbal and nonverbal reasoning ability, and which require that there be some individual administration of test items by the evaluator. ***It is urged that evaluators directly contact the Office of Forensic Services of this department (804- 786-8548; 804-786-9044), if you wish to have additional measures of intellectual functioning considered for inclusion on this list.***

Please also note that § 19.2-264.3:1.1(B), paragraph 2 provides that: "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." For the purposes of this list, § 19.2-264.3:1.1(B), paragraph 2 indicates that a measure of intellectual functioning does not need to be included on the following list, for purposes of verification of the developmental origin of an individual's mental retardation.

DMHMRSAS List of Standardized Measures of Intellectual Functioning: October 31, 2005*		
Name of Test	**Publisher**	**Age Range**
Wechsler Adult Intelligence Scale-Third Edition (WAIS-III) (Includes Spanish language versions, if available) (Previous editions of this measure applicable for historical verification of IQ)	Harcourt Assessment (The Psychological Corporation) 19500 Bulverde Rd. San Antonio, TX 788259-3701	16-89 years
Stanford-Binet Intelligence Test, Fifth Edition (SB5) (Previous editions of this measure applicable for historical verification of IQ)	Riverside Publishing 425 Spring Lake Drive Itasca, IL 60143-2079	2-90+ years
Kaufman Adolescent and Adult Intelligence Test (KAIT) (Includes Spanish language versions, if available)	Psychological Assessment Resources, Inc. 16204 N. Florida Ave. Lutz, FL 33549	11-85 years
Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV); (Includes Spanish language versions, if available) (Previous editions of this measure applicable for historical verification of IQ)	Harcourt Assessment (The Psychological Corporation) 19500 Bulverde Rd. San Antonio, TX 788259-3701	6-16.11 years
Wechsler Intelligence Scale for Children-Third Edition (WISC-III). This measure has been recently replaced with the publication of the WISC-IV; the 3rd edition is likely to have continuing use in the near future, however, until the WISC-IV has been fully established in the field. (Includes Spanish language versions, if available) (Previous editions of this measure applicable for historical verification of IQ)	Harcourt Assessment (The Psychological Corporation) 19500 Bulverde Rd. San Antonio, TX 788259-3701	6-16.11 years
Leiter International Performance Scale-Revised (Leiter-R) (Previous editions of this measure applicable for historical verification of IQ)	Psychological Assessment Resources, Inc. 16204 N. Florida Ave. Lutz, FL 33549	2-20.11 years
Reynolds Intellectual Assessment Scales (RIAS)	Psychological Assessment Resources, Inc. 16204 N. Florida Ave. Lutz, FL 33549	3-94 years
Multidimensional Aptitude Battery-II	Psychological Assessment Resources, Inc. 16204 N. Florida Ave. Lutz, FL 33549	16-74 years

*Please contact the DMHMRSAS Office of Forensic Services of the DMHMRSAS (804-786-2615; 804-786-9044), for any questions regarding this list.

List of Standardized Measures of Intellectual Functioning

This "exclusive" list of intellectual assessment measures has been compiled in accordance with § 19.2-264.3:1.1(B)1 of the ***Code of Virginia***. Please note that any new editions, revisions, updates or corrections to the measures that are currently in effect for the purposes established in ***Code of Virginia*** § 19.2-264.3:1.1 (B)1 will be considered as included on this list, unless otherwise specified, from the date of publication of the new edition, revision update or correction.

Use of a test on this list does not preclude use of other psychological measures when conditions exist that make the use of these tests invalid or incomplete, such as language incompatibility or severe disabling conditions.

DMHMRSAS List of Standardized Measures of Intellectual Functioning: Effective November 10, 2008

Name of Test	Publisher	Status
Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV) (Includes non-English language versions, if available)(Previously published editions of this measure applicable for historical verification of IQ.)	Harcourt Assessment (The Psychological Corporation) 19500 Bulverde Rd. San Antonio, TX 788259-3701	Included as a **current measure.**
Wechsler Adult Intelligence Scale-Third Edition (WAIS-III) (Includes non-English language versions, if available. Previous editions of this measure applicable for historical verification of IQ.)	Harcourt Assessment (The Psychological Corporation) 19500 Bulverde Rd. San Antonio, TX 788259-3701	Included as a **current measure.** Will be **retired** on August 29, 2009.
Stanford-Binet Intelligence Test, Fifth Edition (SB5) (Includes non-English language versions, if available. Previous editions of this measure applicable for historical verification of IQ.)	Riverside Publishing 425 Spring Lake Drive Itasca, IL 60143-2079	Included as a **current measure.**
Kaufman Adolescent and Adult Intelligence Test (KAIT) (Includes non-English language versions, if available. Previous editions of this measure applicable for historical verification of IQ.)	Psychological Assessment Resources, Inc. 16204 N. Florida Ave. Lutz, FL 33549	Included as a **current measure.**
Reynolds Intellectual Assessment Scales (RIAS)	Psychological Assessment Resources, Inc. 16204 N. Florida Ave. Lutz, FL 33549	Included as a **current measure.**

VIRGINIA:

IN THE SUPREME COURT

IN RE: COMMONWEALTH OF VIRGINIA, Petitioner

Record No. 080282
080283

AMENDED MEMORANDUM IN SUPPORT OF APPLICATIONS FOR WRITS OF PROHIBITION AND MANDAMUS

Introduction

For the second time *in this very case*, the same Virginia circuit court has failed to follow the clear mandate of this Court. This Court twice now has returned the case under Virginia Code § 8.01-654.2 to the circuit court for a narrow, specific purpose: to determine whether the defendant fits the definition for mental retardation. (App. 137 and 173).[1] Twice, the circuit court has failed to comply.

The first time the case was remanded, the circuit court did not conduct the retardation trial this Court had ordered; rather, it permitted Atkins to come back to this Court seeking authority to have the circuit court

[1] Atkins made the mental retardation claim during his direct appeal from a resentencing proceeding which occurred in 1999. Atkins' guilt previously conclusively had been determined when this Court affirmed that guilt judgment in 1999. Atkins v. Commonwealth, 257 Va. 160, 510 S.E.2d 445 (1999).

consider granting him a new trial or reduced sentence on newly-made Brady and perjury claims instead of conducting the retardation trial. This Court promptly denied such authority and expressly and clearly directed the circuit court to follow this Court's original mandate. In Re: Daryl Renard Atkins, Record No. 071750. (App. 173).

For the second time now in only a few months, the circuit court again has failed to follow this Court's explicit mandate. However, this time, not only did the court fail to follow the mandate, but it unquestionably strayed far outside any authority granted to it by this Court's mandate to conduct a retardation trial. This time, instead of proceeding with the mental retardation trial, the circuit court held a hearing on Atkins' Brady and perjury claims and then *ordered the defendant's death sentence be commuted to life.* (App. 825). This pre-trial action of the circuit court is unprecedented in Virginia, exceeds the authority granted by this Court's mandates and is without any authority under the law.

The Commonwealth thus seeks writs of prohibition and mandamus directed to the Circuit Court of York County, (1) ordering the Honorable William H. Shaw, III to vacate the January 24, 2008, pre-trial order of the Honorable N. Prentis Smiley, Jr. reducing Atkins sentence to life; (2) prohibiting the Honorable William H. Shaw, III from entering any such

orders in the future; and (3) again ordering the Honorable William H. Shaw, III to conduct the hearing mandated by this Court's two prior orders without any further delay.

Statement Of The Case

On February 13, 1998, a jury in the Circuit Court of York County convicted Atkins of the capital murder of United States Airman Eric Nesbitt and of the use of a firearm in the commission of murder and sentenced him to death. On direct appeal, this Court affirmed Atkins' convictions but reversed his death sentence, concluding that an improper sentencing verdict form required resentencing. Atkins v. Commonwealth, 257 Va. 160, 510 S.E.2d 445 (1999). A second jury resentenced Atkins to death, Atkins v. Commonwealth, 260 Va. 375, 534 S.E.2d 312 (2000), but the Supreme Court of the United States vacated the judgment, Atkins v. Virginia, 536 U.S. 304 (2002), and this Court thereafter remanded the case under § 8.01-654.2 to the circuit court to conduct a jury trial on Atkins' claim of mental retardation. Atkins v. Commonwealth, 266 Va. 73, 581 S.E.2d 514 (2002).[2]

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[2] Section 8.01-654.2 was enacted after the decision in Atkins v. Virginia, 536 U.S. 304 (2002). As pertinent here, it provides, as a matter of Virginia policy, that defendants like Atkins (whose convictions became final before the enactment of Virginia's retardation statutes governing capital murder cases) could have their Atkins claims of retardation decided on the merits.

Section 8.01-654.2 provides that this Court may remand such claims to the trial court for determination if they are found to be non-frivolous.

On remand, a third jury was empanelled and found that Atkins was not retarded; however, this Court reversed that judgment in Atkins v. Commonwealth, 272 Va. 144, 631 S.E.2d 93 (2006), on June 8, 2006, based upon evidentiary and jury-selection errors. The Court again remanded Atkins' case under § 8.01-654.2 to the circuit court "for a new proceeding, consistent with this opinion, to determine whether Atkins is mentally retarded." Id.

On November 16, 2006, the circuit court scheduled the re-trial on retardation to begin on August 13, 2007. Atkins' legal team filed a motion in the circuit court on May 18, 2007, to impose a life sentence pursuant to Code § 19.2-264.5, or a new trial, based upon claims that the prosecutor withheld exculpatory evidence and suborned perjury at his 1998 trial. (App. 138-56). Atkins also took the position that the Commonwealth's Attorney should be disqualified from representing the Commonwealth at the mental retardation re-trial. (App. 161-165).

The Commonwealth opposed Atkins' motion on the grounds that the circuit court lacked jurisdiction to alter the sentence of death absent a finding by a jury that Atkins is retarded (App. 157-160), but urged the court to resolve the factual allegations which might affect the Commonwealth's Attorney's qualification to represent the Commonwealth at the trial and the evidence

which would be presented by both parties. (App. 166-168 and 191-192). The court obtained from the parties further briefing on the jurisdictional issue.

On July 23, 2007, the circuit court entered orders staying the proceedings to allow Atkins to petition this Court for an interlocutory appeal and a writ of mandamus. His petitions sought an order from this Court to permit the circuit court to consider granting a life sentence or new trial based on Atkins' new Brady and perjury claims. By Order dated September 20, 2007, this Court dismissed both petitions in one order. The Order stated as follows:

> Upon review of the record, the Court refuses the "Amended Petition of Interlocutory Appeal" in record No. 071703. This is a criminal proceeding and Code § 8.01-670.1 is not applicable. Upon consideration of the pleadings filed in Record No. 071750, the Court dismisses the petition for a writ of mandamus.
>
> The circuit court is directed to proceed with this criminal case. Such proceeding is confined to the terms of the mandate issued by the Court on October 18, 2006 remanding this case to the circuit court for a jury determination of whether Atkins is mentally retarded.
>
> This order shall be certified to the Circuit Court of York County.

(App. 173).

Subsequently, the circuit court scheduled Atkins' motion to disqualify the Commonwealth's Attorney and appointed a Special Prosecutor to represent the Commonwealth in the hearing. (App. 212). The hearing

occurred on December 13, 2007, and January 17, 2008. (App. 213-522 and 523-826). At the conclusion of the January 17 hearing, the circuit court ruled that it had found a violation of Brady v. Maryland, 373 U.S. 83 (1963), and "commute[d] the imposition of death to life." (App. 825). It made no ruling on the motion to disqualify the Commonwealth's Attorney of York County.

The circuit court entered an order on January 23, 2008, memorializing its oral rulings. (App. 827-828). Then, on January 24, 2008, the court entered two other orders. First, it ordered, "for good cause shown," that its January 23, 2008, order would be vacated. (App. 829).[3] Second, it ordered Atkins' death sentence "set aside" and imposed "a sentence of imprisonment for life without the possibility of parole." (App. 831).

Applicable Standards

This Court recently granted mandamus relief to the Commonwealth's Attorney in Fairfax County under circumstances strikingly similar to Atkins'

[3] The Clerk's office of the circuit court telephoned undersigned counsel on January 24 and informed him of this order. The Clerk's deputy stated that the court had vacated the order upon request by Atkins' counsel and his counsel's desire to change the wording of the order. The Commonwealth was not a party to any communications which may have occurred between the court and Atkins' counsel, much less even aware of Atkins' counsel's request or any hearing the court may have held on the matter.

case. In re: Robert F. Horan, 271 Va. 258, 634 S.E.2d 675 (2006). There, the circuit court entered an order after a pre-trial hearing which forbade the Commonwealth from seeking a death sentence. After reviewing its own precedents, this Court held that the Fairfax judge "did not have the authority to make a sentencing decision when ruling on a pre-trial motion. . . .No statute . . . authorizes [the judge] to exercise such sentencing discretion in a pre-trial context. In other words, the action taken . . . was not within her discretion." Id. at 263, 634 S.E.2d at 678-79.[4]

> "Mandamus is an extraordinary remedy employed to compel a public official to perform a purely ministerial duty imposed upon him by law." *Richlands Med. Ass'n v. Commonwealth*, 230 Va. 384, 386, 337 S.E.2d 737, 739 (1985); *accord In re Commonwealth's Attorney for the City of Roanoke*, 265 Va. 313, 317, 576 S.E.2d 458, 461 (2003). "A ministerial act is 'one which a person performs in a given state of facts and prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done.'" *Richlands Med. Ass'n*, 230 Va. at 386, 337 S.E.2d at 739 (quoting *Dovel v. Bertram*, 184 Va. 19, 22, 34 S.E.2d 369, 370 (1945)). "However, when the act to be performed involves the exercise of judgment or discretion on the part of the court or judge, it becomes a judicial act and mandamus will not lie." *In re Commonwealth's Attorney for the City of Roanoke*, 265 Va. at 318, 567 S.E.2d at 461.

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[4] The capital murder case in Fairfax involved a capital murder defendant who had not yet been tried for his offense. This Court granted the petition for a writ for mandamus and thus found the request for prohibition relief moot. 271 Va. at 265, 634 S.E.2d at 680.

In Re: Horan, 271 Va. at 258-59, 634 S.E.2d at 676.

The principles governing the writ of prohibition are equally well-settled. The remedy lies not only where the lower court has no jurisdiction, but also where the inferior court has some jurisdiction but not of the type or to the extent exercised. A writ of prohibition lies "to restrain an inferior court from acting in a manner of which it has no jurisdiction, or in which it is transcending the bounds of its jurisdiction." In re: Gordon E. Hannett, 270 Va. 223, 238, 619 S.E.2d 465, 471-72 (2005).

"Prohibition lies in all cases of usurpation and abuse of power when the inferior court has no jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers." 15 M.J., "Prohibition," § 9, p. 17; Helms v. Vaughan, 84 Va. 696, 698, 5 S.E. 704, 705 (1888) ("The writ of prohibition may also be issued when, having jurisdiction, the court has attempted to proceed by rules differing from those that ought to have been observed"); Burch v. Hardwicke, 64 Va. (23 Gratt.) 51, 59 (1873) ("A prohibition is a proper remedy to restrain an inferior court from acting in a matter of which it has no jurisdiction, or from exceeding the bounds of its jurisdiction.").

Argument

1. The circuit court clearly exceeded its authority when it disobeyed this Court's mandates.

This Court now has made clear at least twice that the lower court is mandated to conduct a jury trial on Atkins' claim of retardation. The lower court's written order of January 24, 2008, however, is a pre-trial judicial determination of sentence based on an entirely different matter: an assertion that Atkins' guilt determination was prejudiced by an alleged Brady violation.[5]

The order thus squarely exceeds the jurisdictional limits of this Court's mandates and is subject to the same mandamus action taken in In Re: Horan. Just as in In Re: Horan, in Atkins' case, the circuit court had a clear, unequivocal duty under the law. It was mandated by this Court *twice* to conduct the mental retardation trial. Just as in In re: Horan, it had no authority to make a sentencing decision pre-trial. The circuit court

[5] The circuit court denied Atkins' claim that the Commonwealth knowingly presented perjured testimony from Atkins' accomplice, William Jones. (App. 824, 828, 831).

exceeded its authority; thus mandamus must issue.[6]

The January 24 order recites that the lower court acted "pursuant to Section 19.2-264.5 of the Code of Virginia, and pursuant to ... authority as a court of general jurisdiction, and for good cause shown." (App. 831). However, these are the same inapplicable authorities pressed by Atkins upon this Court in the Fall of 2007 in In Re: Atkins, and the same authorities rejected by this Court in September of 2007 as a basis for the circuit court to grant relief on the irrelevant, untimely (and baseless) Brady claim. The circuit court's inexplicable reliance on those same rejected, meritless arguments in the face of this Court's express mandate to do otherwise demonstrates an unmistakable decision to ignore this Court's mandates handed down in 2006 and 2007 which ordered the circuit court to conduct a retardation trial.[7]

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[6] Furthermore, as this Court has noted in other such petitions concerning criminal matters, the Commonwealth has no adequate remedy at law. See In re: Horan, 271 Va. at 265, 634 S.E.2d at 680 ("In this instance, the Commonwealth's Attorney cannot, however, appeal [the judge's] decision refusing to conduct a penalty phase hearing upon proper evidence in accordance with Code §§ 19.2-264.3(C) and -264.4. Thus, the Commonwealth's Attorney clearly has no adequate remedy at law.").

[7] There can be no doubt that the circuit court understood the limits of this Court's mandates. After receiving this Court's 2007 mandate, but before conducting the hearing on Atkins' motion to disqualify the Commonwealth's Attorney, the circuit court acknowledged as follows:

The circuit court had a clear, unequivocal duty to conduct the trial required by this Court's orders, yet it refused to do so. The remanded § 8.01-654.2 proceeding is neither a trial on guilt and sentencing nor a habeas corpus proceeding. It is a post-sentencing, § 8.01-654.2 limited proceeding for the purpose of determining the factual issue of whether Atkins is retarded and thus whether his death sentence may stand under the Eighth Amendment.

This Court's September 20, 2006, mandate remanding the case to the circuit court for a re-determination of retardation did not grant additional authority to the circuit court to reduce Atkins' sentence on grounds other than retardation, much less grant a new trial. See Sprague v. Ticonic National Bank, 307 U.S. 161, 168 (1939) (lower court "bound to carry the mandate of the upper court into execution and [may] not consider the questions which the mandate laid to rest"); Briggs v. Pa. R.R. Co., 334 U.S. 304, 306 (1948) ("In its earliest days, [the Supreme Court] consistently held that an inferior court has no power or authority to deviate from the mandate issued

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> [The Commonwealth] objected that the Court did not have jurisdiction because of the remand on the issue of mental retardation, and the Supreme Court agreed. They didn't say I had jurisdiction to hear your issues. They said I have jurisdiction to hear the mental retardation case and that's what I'm directed to hear."

(App. 185).

by an appellate court. . . . The rule of these cases has been uniformly followed in later days.").

This Court's 2006 mandate could not have been clearer, or more specific:

> [T]he case is remanded to the said circuit court for a new proceeding, consistent with the views expressed in the written opinion of this Court, to determine whether appellant is mentally retarded.

Commonwealth v. Atkins, Record No. 052348 (Order, Oct. 18, 2006) (App. 137).[8]

This mandate did not remand for a new trial or even a resentencing. It remanded for one purpose: to determine retardation. It did not bestow upon the lower court jurisdiction to entertain claims of newly-discovered evidence relating back to the guilt phase of trial. See Johnson v. Commonwealth, 267 Va. 53, 71, 591 S.E.2d 47, 57 (2004) (even in the context of a remanded re-sentencing proceeding, a defendant is not permitted to reopen guilt phase issues), vacated on other grounds, 544 U.S. 902 (2005).

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[8] Indeed, the Court's 1999 mandate affirmed Atkins' convictions of guilt. Yet Atkins' new Brady allegation goes to that guilt determination alone, not to any sentencing issue and certainly not to the issue of retardation.

The circuit court's assertion of its authority as a "court of general jurisdiction" does not, and cannot, relieve an inferior court from its ministerial, absolute duty to follow the orders of a superior court. That § 17.1-513 provides that such courts of general jurisdiction may hear any matter "made cognizable therein by law" simply begs the question of what matters are "cognizable" on a remand pursuant to § 8.01-654.2.[9] That remand specifically delimited the circuit court's power. The circuit court's January 24 order expressly exceeds this Court's mandates and thus also is properly the subject of a writ of prohibition. See In re: Hannett, 270 Va. at 238, 619 S.E.2d at 471-72; Burch, 64 Va. (23 Gratt.) at 59.

2. The circuit court clearly had no authority to reduce Atkins' death sentence in the absence of a jury finding of retardation.

a. Section 19.2-264.5 is inapplicable.

The lower court "commuted" and "set aside" Atkins' death sentence under § 19.2-264.5. (App. 824, 828, 831). Section 19.2-264.5 requires a trial judge to review a defendant's motion to set aside a jury's death sentence for "good cause shown." However, that post-verdict proceeding

[9] "Cognizable ordinarily means '[c]apable of being tried or examined before a designated tribunal; within [the] jurisdiction of [a] court or power given to [a] court to adjudicate [a] controversy.' Black's Law Dictionary 259 (6th ed. 1990)." FDIC v. Meyer, 510 U.S. 471, 476 (1994).

is required to take place *before imposition of sentence*. Atkins already has had the post-verdict proceeding allowed by § 19.2-264.5. His sentence has been imposed and affirmed by this Court in 2000, and may be reduced now only upon a jury determination that he is retarded. Atkins, 272 Va. at 161, 631 S.E.2d at 102. This Court did not vacate his sentence or reconstitute the sentencing phase of his trial; it simply required an additional factual determination under § 8.01-654.2 of whether Atkins is retarded.

In a remand under § 8.01-654.2 made during a habeas corpus case for a similar determination of retardation, this Court ordered:

> Furthermore, although the statute is silent regarding the procedure to be followed once the mental retardation issue is resolved on remand, we conclude that, upon a finding that [the defendant] is not mentally retarded, the sentence of death entered on May 12, 2000 *remains in full force and effect*. Upon a finding that [the defendant] is mentally retarded, the trial court shall enter an order vacating the sentence of death and re-sentencing [the defendant] in accordance with Code § 19.2-264.3:1.1(D).

Burns v. Warden, 269 Va. 351, 354, 609 S.E.2d 608, 611 (2005) (emphasis added). Section 8.01-654.2 requires the same result in Atkins' case: if the jury determines he is not retarded, his death sentence remains in full force and effect; if the jury determines he is retarded, the circuit court must vacate the death sentence and proceed to sentence him to life. However,

there is no longer any authority vested in the circuit court under § 19.2-264.5.

b. The circuit court had no authority to reduce sentence as a remedy for a Brady violation.

Inexplicably, the circuit court not only exceeded this Court's mandates, failed even to rule on the pre-trial motion for disqualification which was at issue and exceeded its own statutory authority, but then created an unprecedented remedy for an alleged Brady violation: a reduced sentence. There is no authority in Virginia, or elsewhere to the Commonwealth's knowledge, which would permit a court to reduce a lawfully-imposed sentence as a remedy for a proven Brady claim involving impeachment of a testifying accomplice[10], even if the claim, *unlike* here, had been proven under the applicable constitutional standards.[11]

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[10] In Teleguz v. Commonwealth, 273 Va. 458, 490, 643 S.E.2d 708, 728 (2007), the trial court was able to consider a sentence reduction for an alleged Brady claim during the sentencing phase under § 19.2-264.5's "good cause" provision because Teleguz's death sentence had not yet been imposed and was still before the trial court for that post-verdict review. The trial court found no materiality to the Brady claims and thus no "good cause" to reduce the sentence and this Court affirmed those rulings on direct appeal.

[11] Atkins failed to establish that the disputed information was material: that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). The circuit court rejected Atkins' claim of a knowing use of perjury under Napue v. Illinois,

360 U.S. 264 (1959). (App. 824, 828, 831). It thereby rejected any allegation that the Commonwealth manufactured or presented false evidence.

Taking the evidence in its best light for Atkins, the disputed information which is claimed to have been withheld was that the prosecutor, in an unrecorded portion of a recorded interview with Jones and Jones' counsel, told Jones' counsel that Jones' testimony differed from the physical evidence and that inconsistent testimony would not do either of them any good, and that Jones' later description of events was different. However, it is undisputed that the prosecutor provided to Atkins a full transcript of the recorded interview with Jones and his attorney which *revealed all of Jones' inconsistent statements.* It was also clear that Jones gave differing descriptions of the events during the disclosed recording before any unrecorded exchange. (cf. App. 705, 712). After providing the transcript, the Commonwealth's Attorney then discussed the inconsistencies with Atkins' counsel. (App. 603). Atkins therefore had a complete record of Jones' inconsistencies and in fact extensively cross-examined Jones on those inconsistencies at trial, including numerous instances where his testimony *still* differed from his prior statements and from the physical evidence. (App. 779; App. 57- 213).

Significantly, Atkins chose to testify in his own defense, disputing Jones' testimony. As a matter of law, the jury rejected Atkins' trial testimony. "[A] fact-finder, having rejected a defendant's attempted explanation as untrue, may draw the reasonable inference that his explanation was made falsely in an effort to conceal his guilt." Covil v. Commonwealth, 268 Va. 692, 696, 604 S.E.2d 79, 82 (2004) (citing cases); Wright v. West, 505 U.S. 277, 296 (1992) ("if the jury did disbelieve West, it was further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt"). In this case, it is beyond question that there is no "reasonable probability" that a jury would have acquitted Atkins of capital murder had the prosecutor's allegedly undisclosed statements been revealed before trial.

The circuit court, moreover, did not make findings to support its conclusions. To the contrary, it admitted that it "ha[d] not reviewed the transcript of the direct and cross-examination of Jones." (App. 822). The judge also admitted that, after ten years, his personal recollection of the trial testimony was flawed. (App. 581, 815). The circuit court thus had no basis to determine whether the cross-examination could have been more thorough, much less whether Jones would have been more effectively

Atkins cited no precedent below permitting such an extraordinary remedy in his § 8.01-654.2 case. The circuit court relied on no such authority in its ruling commuting Atkins' sentence. The remedy for a Brady violation in a case involving an imposed sentence of death, where the violation has been found to be material under United States v. Bagley, 473 U.S. 667 (1985), see Muhammad v. Warden, 274 Va. 3, 4, 646 S.E.2d 182, 186 (2007), is a new trial, not commutation of sentence. The circuit court's action was without authority and thus is appropriately addressed by a writ of mandamus to vacate its order and of prohibition to prevent similar future action.[12]

Conclusion

Atkins' newly-minted Brady claim, his urging of the circuit court to ignore this Court's 2007 specific order which expressly limited the judge's action to conducting a retardation trial, his request of the circuit court that

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impeached. Indeed, in announcing its ruling, the circuit court found that "*a new trial would be a waste of everybody's time, because there's no question that Jones and Atkins murdered Nesbitt.*" (App. 824-825) (emphasis added). That factual observation cannot be reconciled with the court's finding of a Brady violation.

[12] The circuit court originally asserted that it had "commuted" Atkins death sentence. (App. 825, 828). Its later order, purporting instead to "set aside" the death sentence, was entered without any notice to the Commonwealth. However, there is, without question, absolutely no statutory, constitutional or other authority for a circuit court ever to commute a death sentence.

his retardation claim *not be presented to a jury* and, instead, that the court substitute its own personal determination of sentence, *all had absolutely no jurisdictional basis for adjudication by the circuit court.*

This Court should grant the application for a writ of mandamus directing the respondent circuit court judge to vacate its order of January 24, 2008. The Court should grant the application for a writ of prohibition directing the respondent circuit court judge that he may not order a new trial or reduce Atkins' sentence on the basis of Atkins' Brady claim. The Court should again direct the circuit court to conduct the mental retardation trial pursuant to the Court's previous mandates.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Petitioner

By: _____
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Certificate Of Service

On February 2, 2009, a copy of the foregoing document was served by mail upon the Honorable William H. Shaw, III, Judge of the Circuit Court of York County and City of Poquoson, at Gloucester County Circuit Court, 7400 Justice Drive, P.O. Box 576, Gloucester, Virginia 23061, and was and served by mail upon Joseph A. Migliozzi, Jr., Esquire, Regional Capital Defender, 207 Granby Street, Suite 200, Norfolk, Virginia 23510, counsel for Daryl Atkins and was served by mail upon John A. Gibney, Jr., ThompsonMcmullen, P.C., 100 Shockoe Slip, Third Floor, Richmond, Virginia 23219, counsel for the Honorable N. Prentis Smiley, Jr.

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