IN THE SUPREME COURT OF FLORIDA

NO. SC68706

CLARENCE EDWARD HILL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

DEATH WARRANT SIGNED, EXECUTION SET FOR JANUARY 24, 2006 AT 6:00 P.M.

INITIAL BRIEF

D. Todd Doss
Florida Bar No. 0910384
725 Southeast Baya Drive
Suite 102
Lake City, FL 32025
(386) 755-9119

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of an summarily denying Mr. Hill=s successive Rule 3.850 motion. The following symbols will be used to designate references to the record in this appeal:

AR.@ B record on direct appeal to this Court;

ARS.@ - record on appeal after the second sentencing;

APCR.@ - record on appeal after postconviction summary denial in 1990.

AApp.@ -appendix to Mr. Hill=s present brief on appeal.

REQUEST FOR ORAL ARGUMENT

Mr. Hill is presently under a death warrant with an execution scheduled for January 24, 2006 at 6:00 p.m. This Court has not hesitated to allow oral argument in other warrant cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved, as well as Mr. Hill=s pending execution date. Mr. Hill, through counsel, urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND THE FACTS

The Circuit Court for the First Judicial Circuit, in and for Escambia County, Florida entered the judgment of convictions and death sentence at issue.

Mr. Hill was indicted by the grand jury in Escambia County, Florida on November 2, 1982. (R. 1440-41). He was charged with one count of first degree murder, one count of attempted first degree murder, three counts of armed robbery, and possession of a firearm during the commission of a felony. Following a trial which commenced on April 27, 1983, the jury found Mr. Hill guilty of all the crimes charged. (R. 1662). The penalty phase began on April 29, 1983, and the jury rendered an advisory sentence recommending death by a vote of ten to two. (R. 1665).

On May 27, 1983, the trial court sentenced Mr. Hill to death as to the first degree murder conviction and consecutive life sentences as to the attempted murder and armed robbery convictions. No sentence was imposed for the possession of a firearm conviction. (R. 1689-1690). The trial court entered its written findings at the sentencing hearing. (R. 1668-69).

Mr. Hill appealed his conviction to the Florida Supreme Court, which found that the trial court erred in denying Mr. Hill=s challenge of a juror who was not impartial in his state of mind. The Court remanded the case for a new penalty phase with a new jury. Hill v. State, 477 So. 2d 553 (Fla. 1985).

Mr. Hill=s new penalty phase was held on March 24, 1986. By a vote of eleven to one, the jury issued an advisory opinion for Mr. Hill=s death on March 27, 1986. The circuit court sentenced Mr. Hill to death on April 2, 1986. (RS. 835). Mr. Hill was also sentenced to life imprisonment for the attempted murder conviction, the armed robbery conviction, and for possessing a firearm during the commission of a felony.

Mr. Hill filed an appeal with the Florida Supreme Court, which upheld all of Mr. Hill=s sentences. Hill v. State, 515 So.2d 176 (Fla. 1987). Mr. Hill then filed a Petition for a Writ of Certiorari before the U.S. Supreme Court, which was denied. Hill v. State, 108 S.Ct. 1302 (1988).

On November 9, 1989, the Governor of Florida signed a death warrant scheduling Mr. Hill=s execution for January 25, 1990. Mr. Hill=s counsel filed an expedited Motion to Vacate Judgments of Convictions and Sentences with Special Emergency Request for Leave to Amend on December 11, 1989. (PCR. 1-128). On January 18, 1990, the circuit court refused to grant Mr. Hill an evidentiary hearing and summarily denied Mr. Hill=s Motion to Vacate Judgment of Conviction and Sentence with Special Emergency Request for Leave to Amend.

On January 22, 1990, Mr. Hill filed a notice of appeal of the order from the circuit court. (PCR. 387). Mr. Hill also filed a habeas corpus petition with the Florida Supreme Court.

On January 26, 1990, the Florida Supreme Court denied all relief. Hill v. State, 556 So. 2d 1385 (Fla. 1990).[1]

Mr. Hill subsequently filed a Motion to Stay Execution and a Petition for Writ of Habeas Corpus in the U.S. District Court for the Northern District of Florida on January 27, 1990. The U.S. District Court granted a stay on January 28, 1990. On August 31, 1992, the U.S. District Court granted relief to Mr. Hill on the grounds that the circuit court and the Florida Supreme Court failed to conduct a proper harmless error test when re-weighing the aggravating factors after eliminating the cold, calculating, and premeditating aggravator. Furthermore, the trial judge failed to find certain nonstatutory mitigating facts even though mitigation was established by the record. The U.S. District Court made no recommendation as to whether a new sentencing hearing had to be conducted. (Order p. 85).

Upon remand, Mr. Hill filed a motion to reopen his direct appeal to address the issues cited by the U.S. District Court. The Florida Supreme Court granted the motion, but upon re-weighing the four remaining aggravating factors against the one statutory mitigating circumstance of Mr. Hill=s age and several

[1]Mr. Hill=s execution was rescheduled for Monday, January 29, 1990 at 7:01 a.m.

non-statutory mitigating factors that were not previously considered, the Court resentenced Mr. Hill to death. Hill v. State, 643 So. 2d 1071 (Fla. 1995).

Mr. Hill then filed an amended habeas corpus petition before the U.S. District Court challenging the decision of the Florida Supreme Court. The U.S. District Court denied relief on the grounds that the Florida Supreme Court satisfied the dictates of Parker v. Dugger, 498 U.S. 308 (1991). Mr. Hill appealed this decision to the Eleventh Circuit Court of Appeals, which found that the U.S. District Court had correctly decided Mr. Hill=s claims. Hill v. Moore, 175 F.3d 915 (11th Cir. 1999). Mr. Hill subsequently filed a Petition for Writ of Certiorari before the U.S. Supreme Court, which was denied. See, 528 U.S. 1087 (2000).

Mr. Hill filed a successive Rule 3.850 motion on June 20, 2003 pursuant to Ring v. Arizona, 536 U.S. 584. The circuit court denied said motion on May 26, 2004, and denied the motion for rehearing on June 21, 2004. Mr. Hill timely filed his appeal to the Florida Supreme Court, which was denied on May 13, 2005.

On November 29, 2005, Governor Jeb Bush signed a death warrant setting an execution date of January 24, 2006 at 6:00 p.m. Mr. Hill filed a successive 3.850 motion on December 15, 2005. Following a case management conference on December 19, 2005, the lower court orally denied Mr. Hill an evidentiary hearing on his claims for relief. A written order was issued on

December 23, 2005.[2] Per this Court=s order designating the briefing schedule, Mr. Hill herein timely files his Initial Brief.

SUMMARY OF THE ARGUMENT

The lower court erred in denying an evidentiary hearing on Mr. Hill=s claim that, based on recent scientific evidence, the State will violate Mr. Hill=s right to be free of cruel and unusual punishments secured to him by the Eighth Amendment to the U.S. Constitution, by executing him using the sequence of three chemicals, which is unnecessary as a means of employing lethal injection, and which creates a foreseeable risk of inflicting unnecessary and wanton infliction of pain contrary to contemporary standards of decency.

The lower court erred in denying on Mr. Hill=s claim that he is in the same class of persons as contemplated in Atkins v. Virginia, 122 S. Ct. 2242 (2002), and therefore the State is barred from executing him. Specifically, Mr. Hill contends that the holding in Atkins applies not only to the mentally retarded, but also to brain damaged individuals. People with brain damage encompass the same class of people protected by Atkins and, as a result, any failure to include Mr. Hill within this class of

[2]Mr. Hill subsequently filed a motion for rehearing, which has yet to be ruled on by the lower court.

persons constitutionally exempt from execution would constitute a violation of his right to equal protection. Additionally, Mr. Hill argues that the standards relied upon by the State of Florida to determine mental retardation are arbitrary and result in bias to persons whose impairments render them the functional equivalent of a mentally retarded individual. Mr. Hill also contends that he is entitled to an evidentiary hearing in order to demonstrate that his significant intellectual and adaptive impairments render him incapable of execution under the standards outlined by Atkins. Finally, Mr. Hill argues that the lower court erred both in finding this claim procedurally barred, and in arbitrarily denying him an evidentiary hearing, in violation of the rules of criminal procedure and this Court=s well-established precedents regarding postconviction proceedings.

The execution of Clarence Hill, a brain damaged, mentally impaired individual, would constitute cruel and unusual punishment under the Constitutions of the State of Florida and the United States. Mr. Hill suffers from a low IQ, brain damage, and a mental and emotional age of less than eighteen years, which renders the application of the death penalty in his case cruel and unusual. His execution would therefore offend the evolving standards of decency of a civilized society, would serve no legitimate penological goal, and would violate the Eighth and Fourteenth Amendments.

Effective collateral representation has been denied Mr. Hill because the circuit court denied access to public records from several state agencies. In denying these public records requests, the lower court has essentially established standards not in conformity with Rule 3.852 (h)(3). Despite the fact that Mr. Hill=s requests for public records were narrowly tailored and fall squarely within the confines of Rule 3.852 (h)(3), the lower court erroneously denied his request. The lower court=s ad-hoc addendums to Rule 3.852 (h)(3), are not only improper, but also factually inaccurate. Contrary to the lower court=s order, Mr. Hill=s claim that the current method of lethal injection, in light of recent empirical evidence, constitutes cruel and unusual punishment, is a colorable claim for relief.

Mr. Hill and his, co-defendant, Clifford Jackson were shackled and handcuffed during his penalty phase testimony without any mention of such on the record and without objection by defense counsel. The trial court did not express any concern about Mr. Hill=s or Mr. Jackson=s Aconduct@ and Asecurity,@ in violation of Deck v. Missouri, 125 S.CT. 2007 (2005); nor did the court Aexplain why, if shackles were necessary, he chose not to provide for shackles that the jury could not see.@ Id. As in Deck, Aif there is an exceptional case where the record itself makes clear that there are indisputably good reasons for shackling, it is not this one.@ Id. The State cannot show

beyond a reasonable doubt that this error Adid not contribute to@ the jury=s death recommendation. Id.

In Mr. Hill=s case, during previous death warrant proceedings in 1989-1990, the circuit court summarily denied Mr. Hill=s claims without granting him an evidentiary hearing.[3] The court issued a cursory, two-page order which neither cited to the record nor attached specific portions of the record in support of its summary denial of Mr. Hill=s claims. This was in direct violation of the requirements of Fla. R. Crim. Pro. 3.850, as well as the caselaw of this Court. The files and records in this case did not conclusively rebut Mr. Hill=s 3.850 claims. Without any attached (and/or cited to) portions of the record demonstrating that Mr. Hill is not entitled to relief, and because Mr. Hill=s allegations in his 3.850 motion involved Adisputed issues of fact,@ the lower court erred in its summary denial of Mr. Hill=s motion, and an evidentiary hearing should have been granted in the previous death warrant proceedings. Though this issue was raised in the appeal from the denial of Rule 3.850 relief, this Court never addressed it in its opinion affirming the lower court=s ruling. See Hill v. Dugger, 556 So.2d 1385 (1990).

[3] In Mr. Hill=s 22 years on death row, he has never had an evidentiary hearing on his fact-based claims.

The State of Florida has created a protected liberty interest under the Due Process Clause given the integral role that Rule 3.850 plays in its overall scheme of death penalty adjudication. Florida=s implementation of Rule 3.850 also gives rise to a protected liberty interest in fair proceedings to be conducted under the rule. Where, as here, the circuit court utterly failed in its duty to demonstrate specifically that a defendant is not entitled to a hearing on the merits of his claims, that court has denied the defendant his due process right to a fair post-conviction proceeding.

STANDARD OF REVIEW

The constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court. The legal conclusions of the lower court are to be reviewed independently. See Ornelas v. U.S., 517 U.S. 690 (1996); Stephens v. State, 748 So.2d 1028 (Fla. 1999).

The lower court denied an evidentiary hearing, and therefore the facts presented in this appeal must be taken as true. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999).

ARGUMENT I

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON MR. HILL=S CLAIM THAT THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATES THE EIGHTH

AMENDMENT TO THE UNITED STATES CONSTITUTION AS IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

In his 3.850 motion, Mr. Hill argued that in light of new scientific evidence that was not previously available to the Florida Supreme Court in Sims v. State, 754 So. 2d 657 (Fla. 2000), it is now clear that the existing procedure for lethal injection that the State of Florida uses in executions violates the Eighth Amendment to the United States Constitution, as it will inflict upon Mr. Hill cruel and unusual punishment.

In denying an evidentiary hearing on this issue, the lower court stated:

> The Court notes that this is the first time Defendant has raised the instant issue. Defendant has provided no convincing reason to the Court why this claim could not have been raised in Defendant=s previous successive motion filed in 2003. Although Defendant alleges that the instant information regarding lethal injection is Anew,@ this Court disagrees. As demonstrated by Attachment B to Defendant=s motion, the conclusion of the study in question was that anaesthesia methods in lethal injection are flawed, in that failures in protocol design, implementation, monitoring, and review might have led to the unnecessary suffering of Aat least some@ of the inmates executed. The study suggests that because doctors may not participate in protocol design or executions, the administration of adequate anaesthesia Acannot be certain.@ In the Sims case, the Court considered evidence detailing examples of what errors could occur during lethal injection and regarding the administration of lethal injection by personnel who were not physicians. See Sims, 754 So.2d at 668, n.19. This Court finds that Defendant=s Anew@ evidence is not so unique as to shed new light on the issue of lethal injection and overcome the procedural bar. Therefore, because the constitutionality of lethal injection has been fully litigated, and because Defendant has provided no convincing reason as to why this claim could not have been raised previously, the

instant claim is procedurally barred.

Order at 5-6.

The lower court=s order is erroneous. First, with regard to the procedural bar which the lower court imposes because Mr. Hill failed to raise this issue in 2003, it is clear that the study upon which Mr. Hill relies was conducted in 2005.[4] Mr. Hill did not raise this claim in 2003 precisely because, until now, there was no new evidence since the Sims opinion.[5]

Secondly, in finding that this Anew= evidence is not so unique as to shed new light on the issue of lethal injection and overcome the procedural bar,@ the lower court ignores the fact that, unlike Sims, this claim is no longer about the Aifs@ of what could go wrong, but rather what actually is going wrong during executions by lethal injection. This Court did not have the benefit of a comprehensive scientific study, or any study at all, when finding that the protocols used in 2000 were constitutional. Therefore, the reliance on Sims is misplaced.

As Mr. Hill argued in his 3.850 motion, in Sims, 754 So. 2d at 668, in denying a lethal injection challenge, this Court

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[4]Mr. Hill=s claim is no different than in cases where new scientific DNA techniques were developed after those cases had concluded. Just as in those cases where courts are reconsidering prior rulings in light of subsequent scientific research, so should Mr. Hill=s claim be considered in light of new scientific evidence.

[5]Surely, had Mr. Hill raised this claim in 2003, it would also have been found to be procedurally barred.

determined that the possibility of mishaps during the lethal injection process was insufficient to support a finding of cruel and unusual punishment:

> Sims= reliance on Professor Radelet and Dr. Lipman=s testimony concerning the list of horribles that could happen if a mishap occurs during the execution does not sufficiently demonstrate that the procedures currently in place are not adequate to accomplish the intended result in a painless manner. Other than demonstrating a failure to reduce every aspect of the procedure to writing, Sims has not shown that the DOC procedures will subject him to pain or degradation if carried out as planned. Sims= argument centers solely on what may happen if something goes wrong. From our review of the record, we find that the DOC has established procedures to be followed in administering the lethal injection and we rely on the accuracy of the testimony by the DOC personnel who explained such procedures at the hearing below. Thus, we conclude that the procedures for administering the lethal injection as attested do not violate the Eighth Amendment=s prohibition against cruel and unusual punishment. n20

(note omitted). Subsequent to this opinion, and contrary to the lower court=s order, recent empirical evidence has established that the infliction of cruel and unusual punishment and the wanton infliction of pain is no longer speculative.

A recent study published in the world-renowned medical journal THE LANCET by Dr. David A. Lubarsky (whose declaration was attached to Mr. Hills=s motion) and three co-authors detailed the results of their research on the effects of chemicals in lethal injections.[6] See Koniaris L.G., Zimmers T.A., Lubarski

[6]The study focused on several states which conducted autopsies and prepared toxicology reports, and which made such data available to these scholars. (Att. B).

D.A., Sheldon J.P., Inadequate anaesthesia in lethal injection for execution, Vol 365, THE LANCET 1412-14 (April 16, 2005). This study confirmed, through the analysis of empirical after-the-fact data, that the scientific critique of the use of sodium pentothal, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.[7] The authors found that in toxicology reports in the cases they studied, post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%). Moreover, 21 of the 49 executed inmates (43%) had concentrations consistent with awareness, as the inmates had an inadequate amount of sodium pentothal in their bloodstream to provide anesthesia. (Att. B). In other words, in close to half of the cases, the prisoner felt the suffering of suffocation from pancuronium bromide, and the burning through the veins followed by the heart attack caused by the potassium chloride.

The chemical process utilized in executions in Florida is identical to that identified in the study:

[7]Dr. Lubarski has noted that each of the opinions set forth in the Lancet study reflects his opinion to a reasonable degree of scientific certainty. (Att. B).

> In all, a total of eight syringes will be used, each of which will be injected in a consecutive order into the IV tube attached to the inmate. The first two syringes will contain Ano less than@ two grams of sodium pentothal,[8] an ultra-short-acting barbiturate which renders the inmate unconscious. The third syringe will contain a saline solution to act as a flushing agent. The fourth and fifth syringes will contain no less than fifty milligrams of pancuronium bromide, which paralyzes the muscles. The sixth syringe will contain saline, again as a flushing agent. Finally, the seventh and eighth syringes will contain no less than one-hundred-fifty milliequivalents of potassium chloride, which stops the heart from beating.

Sims, 754 So. 2d at 666 (footnote added).[9]

As set forth in greater detail in the declaration of anesthesiologist, David A. Lubarsky, M.D. (Att. B), the use of

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[8]The authors of the study note that it is simplistic to assume that 2 to 3 grams of sodium thiopental will assure loss of sensation, especially considering that personnel administering it are unskilled, that the execution could last up to 10 minutes, and that people on death row are extremely anxious and their bodies are flooded with adrenaline, thus necessitating more of the drug to render them unconscious. (Att. B).

[9]While Mr. Hill requested updated information from the Department of Corrections, the Court denied this request. Thus, at the present time, Mr. Hill can only assume that the Florida Department of Corrections has not changed this chemical process since the Sims opinion.

this succession of chemicals (sodium pentothal, pancuronium bromide, and potassium chloride) in judicial executions by lethal injection creates a foreseeable risk of the unnecessary infliction of pain and suffering.

Sodium pentothal, also known as thiopental, is an ultra-short acting substance which produces shallow anesthesia. (Att. B). Health-care professionals use it as an initial anesthetic in preparation for surgery while they set up a breathing tube in the patient and use different drugs to bring the to patient to a Asurgical plane@ of anesthesia that will last through the operation and will block the stimuli of surgery which would otherwise cause pain. Sodium pentothal is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the long-run, deep anesthesia; the patient is **supposed** to be able to wake up and signal the staff that something is wrong.[10]

The second chemical used in lethal injections in Florida is pancuronium bromide, sometimes referred to simply as pancuronium. It is not an anesthetic. It is a paralytic agent, which stops the breathing. It has two contradictory effects: first, it causes the person to whom it is applied to suffer suffocation when the lungs

[10]Sodium pentothal is unstable in liquid form, and must be mixed up and applied in a way that requires the expertise associated with licensed health-care professionals who cannot by law and professional ethics participate in executions.

stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech. (Att. B).

Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. (Att. B). Its only relevant function is to prevent the media and the Department of Corrections= staff from knowing when the sodium pentothal has worn off and the prisoner is suffering from suffocation or from the administration of the third chemical.

The third chemical is potassium chloride, which is the substance that causes the death of the prisoner. It burns intensely as it courses through the veins toward the heart. It also causes massive muscle cramping before causing cardiac arrest. (Att. B). When the potassium chloride reaches the heart, it causes a heart attack. If the anesthesia has worn off by that time, the condemned feels the pain of a heart attack. However, in this case, Mr. Hill will be unable to communicate his pain because the pancuronium bromide has paralyzed his face, his arms, and his entire body so that he cannot express himself either verbally or otherwise. (Att. B).

Significant is the fact that the American Veterinary Medical Association (AVMA) panel on euthanasia specifically prohibits the use of pentobarbital with a neuromuscular blocking agent to kill animals. (Att. B). Additionally, 19 states have expressly or

implicitly prohibited the use of neuromuscular blocking agents in animal euthanasia because of the risk of unrecognized consciousness. (Att. B).

Because Florida=s practices are substantially similar to those of the lethal-injection jurisdictions which conducted autopsies and toxicology reports, which kept records of them, and which disclosed them to the LANCET scholars, there is at least the same risk (43%) as in those jurisdictions that Mr. Hill will not be anesthetized at the time of his death. (Att. B).

It is no wonder that the chemicals used in lethal injection are inadequate and to a reasonable degree of medical certainty cause pain and torture to condemned inmates. When the chemicals were suggested it was merely a Arecommendation@ by a doctor in Oklahoma. (Att. D). There were no studies conducted on the use of the chemicals, the potential pain that an inmate might suffer or what alternative chemicals could be used. (Att. D). Likewise, no testing was conducted prior to the adoption of the chemicals used in Florida B two of which were specifically contained in the original Arecommendation@ in Oklahoma. (Att. D).

In denying an evidentiary hearing, the lower court inaccurately states that, APost-Sims, the issue of whether execution by lethal injection is constitutional has been fully litigated in postconviction proceedings in Florida and decided in the affirmative. See Elledge v. State, 911 So.2d 57, 78-79 (Fla.

2005); Johnson v. State, 904 So.2d 400, 412 (Fla. 2005); Parker v. State, 904 So.2d 370, 380 (Fla. 2005).@ (Order at 5).

Here, the lower court=s order is erroneous for two reasons. First, in none of the cases which the lower court refers to was the issue of lethal injection fully litigated. Contrary to the lower court=s statement, the lethal injection issue in Elledge, Johnson, and Parker were summarily denied without evidentiary hearings. Further, in none of these cases did the appellant rely on the new scientific evidence presented by Mr. Hill.[11]

Additionally, contrary to the lower court=s ruling, Mr. Hill is not challenging the statutory provision which allows for lethal injection as a method of execution. Rather, he is challenging the use of specific chemicals and the quantity of chemicals used, based upon recent scientific evidence, that the Department of Corrections uses to carry out executions. Under the present circumstances, the State will violate Mr. Hill=s right to be free of cruel and unusual punishments secured to him by the Eighth Amendment to the U.S. Constitution, by executing him using the sequence of three chemicals (sodium pentothal a/k/a

[11]In fact, in another case in Florida where the defendant will be presenting this new scientific evidence, an evidentiary hearing has been ordered. See Knight v. State, Palm Beach County Case No. 97-05175.

thiopental, pancuronium bromide, and potassium chloride) which they have admitted to be their practice, which is unnecessary as a means of employing lethal injection, and which creates a foreseeable risk of inflicting unnecessary and wanton infliction of pain contrary to contemporary standards of decency.

The Eighth Amendment Aproscribes more than physically barbarous punishments.@ Estelle v. Gamble, 429 U.S. 97, 102 (1976). It prohibits the **risk** of punishments that Ainvolve the unnecessary and wanton infliction of pain,@ or Atorture or a lingering death,@ Gregg v. Georgia, 428 U.S. 153, 173 (1976); Louisiana ex. rel. Francis v. Resweber, 329 U.S. 459 (1947). AAmong the >unnecessary and wanton= inflictions of pain are those that are >totally without penological justification.=@ Rhodes v. Chapman, 452 U.S. 337, 346 (1981). The Eighth Amendment reaches Aexercises of cruelty by laws other than those which inflict bodily pain or mutilation.@ Weems v. United States, 217 U.S. 349, 373 (1909). It forbids laws subjecting a person to Acircumstance[s] of degradation,@ Id. at 366, or to Acircumstances of terror, pain, or disgrace@ Asuperadded@ to a sentence of death. Id. at 370 (emphasis added). Under the present circumstances, Mr. Hill will be unnecessarily subjected the wanton infliction of pain, in violation of the Eighth Amendment.

Here, the lower court erred in denying Mr. Hill an evidentiary hearing on this issue as he has presented facts that

were not known at the time the Florida Supreme Court decided Sims v. State, 754 So. 2d 657 (Fla. 2000), and the motion, files and records in this action fail to conclusively show that Mr. Hill is entitled to Ano relief.@ See Lemon v. State, 498 So. 2d 923 (Fla. 1986); Fl. R. Crim. P. 3.851(f)(5)(B). Accordingly, an evidentiary hearing is required.

ARGUMENT II

MR. HILL IS EXEMPT FROM EXECUTION UNDER THE EIGHTH AMENDMENT BECAUSE HE IS MENTALLY RETARDED AND/OR SUFFERING FROM SUCH SEVERE BRAIN DAMAGE AND OTHER MENTAL LIMITATIONS THAT DEATH COULD NEVER BE AN APPROPRIATE PUNISHMENT.

The lower court erred in denying this claim as it has been established that Mr. Hill is in the same class of persons as contemplated in Atkins v. Virginia, 122 S. Ct. 2242 (2002), and therefore the State is barred from executing him. Atkins established that executing the mentally retarded violates the Eighth and Fourteenth Amendments of the United States Constitution and bars states from executing the mentally retarded. See 122 S. Ct. 2242. Atkins overruled a 13 year-old United States Supreme Court case,[12] while refining the Constitutional parameters of mental retardation. See id. at 2244, 2252. For several reasons espoused in Mr. Hill=s 3.850 motion and reiterated in this brief, Atkins requires this Court=s

[12] Penry v. Lynaugh, 492 U.S. 302 (1989).

further consideration.

Specifically, Mr. Hill contends that the holding in Atkins applies not only to the mentally retarded, but also to brain damaged individuals. People with brain damage encompass the same class of people protected by Atkins and, as a result, any failure to include Mr. Hill within this class of persons constitutionally exempt from execution would constitute a violation of his right to equal protection. Additionally, Mr. Hill argues that the standards relied upon by the State of Florida to determine mental retardation are arbitrary and result in bias to persons whose impairments render them the functional equivalent of a mentally retarded individual. Mr. Hill also contends that he is entitled to an evidentiary hearing in order to demonstrate that his significant intellectual and adaptive impairments render him incapable of execution under the standards outlined by Atkins. Finally, Mr. Hill argues that the lower court erred both in finding this claim procedurally barred, and in arbitrarily denying him an evidentiary hearing, in violation of the rules of criminal procedure and this Court=s well-established precedents regarding postconviction proceedings.

A. Brain Damaged and Intellectually Impaired Persons Such as Mr. Hill Warrant the Same Protections as the Mentally Retarded, Based Upon the Logic of the Atkins Court.

The Atkins standard is based upon a particular mental condition of an individual which Acategorically excludes@ him

from being eligible for the death penalty. At the outset of the Atkins opinion, Justice Stevens stated:

> Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. **Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants.**

Id. at 306 (emphasis added). Due to his combination of low intelligence and brain damage, Mr. Hill has the same kinds of Adisabilities in areas of reasoning, judgment, and control of [his] impulses@ which characterize the mentally retarded and which exclude them from those groups of persons who can constitutionally be executed. Id.

The Eighth Amendment requires a meaningful basis for distinguishing Abetween those individuals for whom death is an appropriate sanction and those for whom it is not.@ Parker v. Dugger, 498 U.S. 308, 321 (1991). A sentence of death for a severely mentally limited individual is inconsistent with either of the Atwo principal social purposes [of punishment]: retribution and deterrence of capital crimes by prospective offenders.@ Thompson v. Oklahoma, 487 U.S. 815, 836 (1988) (internal quotations and citations omitted); see also Atkins at 349-350.

With respect to retribution, the Atkins Court found that Athe severity of the appropriate punishment necessarily depends on the culpability of the offender@ and concluded that the legislative trend against imposition of the death penalty on those suffering mental retardation means that society finds the mentally retarded less culpable. Atkins at 2250. Since Gregg v. Georgia, the Court has consistently narrowed the category of crimes to which the death penalty applies and sought to apply the death penalty only to those who most deserve the sentence. Id. at 2251. Therefore, imposition of the death penalty on a group that is considered categorically less culpable, like the mentally retarded and/or severely mentally impaired, is unconstitutional.

The Atkins Court also found that as a result of the limitations on the ability of a person with mental retardation to reason and control himself, the death penalty would have no deterrent effect on his actions. Id. at 2251. Specifically, the Court found that a mentally retarded individual=s Adiminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses@ makes it less likely that he will conform his conduct to avoid the possibility of execution. Id.

The Court in Atkins additionally found that the mentally retarded face an increased risk of being wrongfully sentenced to

death, due to a greater risk of false or coerced confessions, a lesser ability to put on an effective presentation of mitigating evidence, and a diminished ability to provide meaningful assistance to counsel. Id. In many cases the mentally retarded are poor witnesses and appear to the jury to feel no remorse for their crimes. Id. at 2252. Categorically, the mentally retarded face significant risks of wrongly being executed and the Court concluded that this risk justified exempting them from the death penalty. Id.

Certainly, based upon the logic applied by the United States Supreme Court in Atkins, there is no acceptable reason why the same analysis would not apply if one were to substitute Abrain damaged@ for Amentally retarded@ in the above discussion. Brain damaged individuals have similar disabilities in the areas of Areasoning, judgment, and control of their impulses.@ Id. at 2251. The discussion and explanation of Aretribution and deterrence@ applies equally to the brain damaged individual as it does to the mentally retarded individual. Hence, the application of Atkins must also be applied to persons whose brain damage renders them so impaired in intellectual and adaptive functioning that they are essentially in the same class of persons as the

mentally retarded. Relief is proper.[13]

B. The Standard Used by the State of Florida for Determining Mental Retardation is Arbitrary and Does Not Comport With Equal Protection and Due Process Guarantees.

The Atkins Court used clinical definitions of mental retardation to distinguish a group of individuals who are ineligible to be executed. *Mental retardation* refers to substantial limitation in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

[13] In his 3.850 motion, Mr. Hill alleged specific facts relating to this argument which deserve an evidentiary hearing. As expounded upon in Part II(D), *infra*, the lower court erred in its determination that Mr. Hill was not entitled to an evidentiary hearing on this fact-based, properly pled claim.

Id. at 2245, n.3 (quoting the definition of the American Association of Mental Retardation).[14] The American Psychiatric Association also defines mental retardation with three primary characteristics: significant subaverage general intellectual functioning, significant limitations in adaptive function (in at least two specified skill areas), and onset before age eighteen. See id. (quoting the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000).

Atkins mandated that States develop Aappropriate ways@ to determine the factual issue of mental retardation in order to properly identify those ineligible for the death penalty. Atkins at 2242 (quoting Ford v. Wainwright, 477 U.S. 399 (1986)). Currently, Florida=s procedure for determining mental retardation is governed by '921.137, Fla. Stat. (2001). This section provides that the A[i]mposition of [a] death sentence upon a mentally retarded defendant [is] prohibited@ and extends to

[14] The Court also states that Astatutory definitions of mental retardation are not identical but generally conform to th[is] clinical definition[].@ See Atkins, 122 S. Ct. at 2250, n.22.

mentally retarded individuals a substantive right not to be executed.[15] Therefore, this Court must consider whether Florida=s Amethod@ of addressing mental retardation is Aappropriate@ in enforcing the constitutional restrictions upon executing the mentally retarded. Atkins at 2249. As demonstrated by the following, it is not.

Of particular concern is the basis for an IQ level of below 70 as the defining cutoff score for mental retardation. As the research and history indicates, the American Association on Mental Deficiency established this arbitrary number (Retardation) in 1973. An instructive analysis of the arbitrary nature of the scoring boundaries for mental retardation can be found in the study AMental Retardation: A Symptom and Syndrome@ published by the Department of Psychology, University of Alabama at Birmingham (Complete article can be found at www.uab.edu/cogdev/mentreta. htm). A relevant portion of the article states as follows:

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[15] In Ford v. Wainwright, 477 U.S. 399 (1986), in considering a Florida statute precluding the execution of the incompetent, Justice O=Connor stated, Athe conclusion is for me inescapable that Florida positive law has created a protected liberty interest in avoiding execution while incompetent.@ See id. at 427 (O=Connor, J., concurring in result).

As a result of the conflicting views and definitions of mental retardation, a growing number of labels used to refer to individuals with mental retardation, and a change in emphasis from a genetic or constitutional focus to a desire for a function-based definition, the American Association on Mental Deficiency (Retardation) proposed and adopted a three-part definition in 1959. "Mental retardation refers to subaverage general intellectual functioning which originates in the developmental period and is associated with impairment in adaptive behavior" (Heber, 1961). Although this definition included the three components of low IQ (<85), impaired adaptive behavior, and origination before age 16, only IQ and age of onset were measurable with the existing psychometric techniques. Deficits in adaptive behavior were generally based on subjective interpretations by individual evaluators even though the Vineland Social Maturity Scale was available (Sheerenberger, 1983). In addition to the revised definition, a five level classification scheme was introduced replacing the previous three level system which had acquired a very negative connotation. The generic terms of borderline (IQ 67-83), mild (IQ 50-66), moderate (IQ 33-49), severe (16-32), and profound (IQ <16) were adopted.

Due to concern about the over or misidentification of mental retardation, particularly in minority populations, the definition was revised in 1973 (Grossman, 1973) eliminating the borderline classification from the interpretation of significant, subaverage, general intellectual functioning. The upper IQ boundary changed from <85 to < 70. This change significantly reduced the number of individuals who were previously identified as mentally retarded impacting the eligibility criteria for special school services and governmental supports. Many children who might have benefitted from special assistance were now ineligible for such help. A 1977 revision (Grossman, 1977) modified the upper IQ limit to 70

> - 75 to account for measurement error. IQ performance resulting in scores of 71 through 75 were only consistent with mental retardation when significant deficits in adaptive behavior were present.
>
> The most recent change in the definition of mental retardation was adopted in 1992 by the American Association on Mental Retardation. "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18" (American Association on Mental Retardation, 1992). On the surface, this latest definition does not appear much different than its recent predecessors. However, the focus on the functional status of the individual with mental retardation is much more delineated and critical in this definition. There is also a focus on the impact of environmental influences on adaptive skills development that was absent in previous definitions. Finally, this revision eliminated the severity level classification scheme in favor of one that addresses the type and intensity of support needed: intermittent, limited, extensive, or pervasive. Practically, a child under age 18 must have an IQ < 75 and deficits in at least 2 of the adaptive behavior domains indicated in the definition to obtain a diagnosis of mental retardation.

Id. (emphasis added).

Assuming the authors of the article are correct as to why the definition changed in 1972, the implication is that social, racial, and financial motives were at play, rather than a

consideration of what is truly Asignificant sub-average general intellectual functioning@ denoted in Atkins. Mr. Hill acknowledges the State=s inherent right to make legislation in the interest of its citizens, and to define Asignificantly sub-average general intellectual functioning@ as part of its standards for determining mental retardation. However, it is also the State=s obligation to have a Arational@ basis for its legislation when affecting a Constitutional right. In Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981), the Florida Supreme Court stated:

> Since no suspect class or fundamental right expressly or impliedly protected by the constitution is implicated by section 768.50, we find that the rational basis test rather than the strict scrutiny test should be employed in evaluating this statute against plaintiffs' equal protection challenge. The rational basis test requires that a statute bear a reasonable relationship to a legitimate state interest, and the burden is on the challenger to prove that a statute does not rest on any reasonable basis or that it is arbitrary.

Assuming no suspect class is indicated, Mr. Hill contends that while the State has a right to establish mental retardation qualifications, the State must, at a minimum, establish a reasonable basis for such standards. This is especially critical in death penalty cases, as execution is a permanent result. National consensus within the mental health community should not be adopted as the standard, when that standard was created for

social, racial, and financial purposes. Courts, in general, have never bowed to the unquestioned experts= opinion. Courts and juries have inherently inquired into explanations for expert opinions and have frequently disregarded those opinions. Florida Rule of Criminal Procedure 3.203 and Section 921.137(1) of the Florida Statutes do not rest on any reasonable basis and are arbitrary. A Court should not blindly accept a Anational consensus@ to define Asignificant sub-average intellectual functioning@ without proper inquiry so that the psychological and medical reasoning behind those standards can be adequately determined.

Florida=s rules and statutes governing the classification and protection of mentally retarded persons do not adequately safeguard the constitutional rights of the protected class of individuals established by Atkins. For instance, Florida Rule of Criminal Procedure 3.203 defines mental retardation as follows:

> (b) Definition of Mental Retardation. As used in this rule, the term Amental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65B-4.032 of the Florida Administrative Code. The term "adaptive behavior," for the purpose of this rule, means the effectiveness or

> degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

While Fla. R. Crim. P. 3.203 and Sec. 921.137(1), Fla. Stat., refer to Atwo or more standard deviations,@ in IQ testing results, they fail to consider the fallibility of the tests, as expounded upon above. The Rule also fails to explain any rational basis for the establishment of Atwo or more standard deviations,@ or the interrelationship between IQ scores and adaptive behavior. However, as the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, (4th ed. 1994)(DSM-IV) explains, understanding this interrelationship is crucial:

> General intellectual functioning is defined by the intelligence quotient (IQ or equivalent) obtained by
> assessment with one or more of the standardized, individual administered intelligence tests (e.g. Wechsler Intelligence Scales for Children-Revised, Stanford-Binet, Kaufman Assessment Battery for Children). Significantly sub-average intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a score of 65-75). **Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficit in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than**

> **70 if there are no significant deficits or impairments in adaptive functioning.** The choice of testing instruments and interpretation of results should take into account factors that may limit test performance (e.g., the individual=s socio-cultural background, native language, and associated communicative, motor, and sensory handicaps). **[Additionally], when there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person=s learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading.**

DSM IV at 40-41 (emphasis added).

As is more fully expounded upon in Part II(C), *infra*, Mr. Hill=s impairments render him deficient to such a degree that Atkins protection is warranted. According to the DSM-IV, when scattered scores occur, the sub-test scores are more reliable than the full-scale score. Mr. Hill had significant scatter in his sub-test scores, which indicates substantial intellectual and functional difficulties. See Attachment AA at 5. Testing by two psychologists demonstrate that in some areas, Mr. Hill=s scores were **more than** two standard deviations below the mean. See Attachments C & AA.

Yet Florida=s current system of determining mental retardation does not adequately protect persons like Mr. Hill, whose most recent full-scale IQ score technically places him out

of the range of mental retardation under Rule 3.203.[16] Nevertheless, his significant sub-test scatter, low IQ, and brain damage are indicative of substantial mental and adaptive functioning impairments which render him the functional equivalent of a mentally retarded individual and therefore worthy of protection under Atkins. See Part II(C), *infra.*

C. Mr. Hill Should Be Permitted to Demonstrate at an Evidentiary Hearing That He Has Significant Intellectual and Adaptive Functioning Deficiencies Which Render Him Categorically Exempt From Execution, Per Atkins.

At the time of trial and at the original postconviction proceedings, Atkins had not been decided and there was no exemption from execution for mentally retarded individuals. However, some testimony was presented at trial and in documentary form at the original post-conviction proceedings which demonstrated Mr. Hill=s significant limitations in behavior and

[16] Mr. Hill=s most recent full-scale IQ score is 87. However, it should be noted that before Mr. Hill turned 18, he tested with a full-scale IQ score of 59 on the California Achievement Test B a score which clearly qualified Mr. Hill as mentally retarded under both the standards of that time, as well as under today=s definition of mental retardation. See Attachment Z.

adaptive skills during childhood and adolescence, as well as his low intelligence. According to the DSM-IV, the second prong in defining mental retardation - assessing an individual=s adaptive functioning - is more important than using IQ scores as a determination of mental status. An exposition of Mr. Hill=s significant adaptive functioning limitations will demonstrate even more fully that he is constitutionally exempt from execution per Atkins. Mr. Hill should be allowed to fully develop this part of his claim at an evidentiary hearing.

Mr. Hill is a mentally retarded, and/or brain-damaged, mentally disabled man who has significant limitations in adaptive skills such as communication, self care, and self-direction. His organic brain damage is so extensive that Mr. Hill=s normal processing and judgment are disrupted. Neuropsychologist Dr. Pat Fleming found that Mr. Hill=s brain damage rendered him mentally disabled, and his behavior at the time of the offense was marked by impulsivity, lack of judgment, inability to foresee consequences, and confusion. See Attachment C.[17] He lacked the ability to analyze situations and draw the proper conclusions.

Since early childhood, Mr. Hill has suffered from organic

[17] Undersigned counsel has attached numerous affidavits which attest to Mr. Hill=s significant deficits in mental and adaptive functioning. The facts as stated in these affidavits were fully incorporated as part of Mr. Hill=s motion to vacate

brain damage and mental deficiencies which have diminished his ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control his impulses. According to Dr. Fleming, AAt the time of the crimes, Mr. Hill was functioning under the combined effects of drugs, brain damage, impulsivity, dependency, and the need for approval.@ See Attachment C. Another psychologist, Dr. Hyman Eisenstein, recently evaluated Mr. Hill and had the following findings:

> Mr. Clarence Hill=s neuropsychological data and history of head trauma, are significant for brain damage. In all probability, his brain damage is left hemispheric, long standing, and developmental in nature. . . . Mr. Hill=s intelligence has remained consistent as evaluated over the years of his incarceration. **It is my clinical opinion that Mr. Hill was in the Educable or Mild Mental Retardation range of intellectual functioning**. He has benefitted from the structure, focus, and rehabilitative aspects of his imprisonment. This has given him the opportunity to acquire new knowledge and skills that otherwise would not have been available. As a result, his I.Q. scores have increased, however, his true pre-morbid level of intellectual functioning was in the Borderline to Mild Mental Retardation range. **Mr. Hill=s adaptive functioning, or degree to which he was able to maintain himself independently was consistent with mild mental retardation**. He is extremely concrete, slow and simplistic. He is unable to abstract and figure out alternative solutions to problems. **Mr. Hill=s level of understanding and maturity remains like a pre-**

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that is the subject of the instant appeal.

> **adolescent child**. His communication skills are limited, with social withdrawal and isolation. **His limited basic skill level would have made it difficult to function independently and effectively in society**.

Dr. Eisenstein Report (December 2005), Attachment AA at 13-14 (emphasis added).

Mr. Hill=s severe mental deficiencies rendered him being incapable of independent thought, and highly susceptible to the influence of others. His co-defendant, Clifford Jackson, was the leader and dominated the planning and the committing of the robbery. Dr. Fleming stated in her report that Mr. Hill=s combination of deficits, including drug abuse and brain damage, severely impaired Mr. Hill=s ability to function and rendered him incapable of appropriate or sensible behavior. See Attachment C. Dr. Fleming opined:

> The crime was not consistent with his previous behavior. Prior to his association with more aggressive friends, he was never described as violent, hostile, or aggressive. Clarence previously compensated for his deficits by withdrawing the (sic) playing with his toys, not in antisocial behavior. The drug and alcohol abuse and the leadership of friends . . . apparently led him to exhibit atypical behavior. . . . The combined effects of brain damage and drug abuse would severely impair Mr. Hill=s ability to function. It would affect his ability to think clearly, process information, and control behavior, and control impulses and emotions.

In Florida, the guideline IQ score sufficient for showing

subaverage intellectual functioning is 75 or below. Mr. Hill does not technically meet this requirement, as expert testimony indicates his IQ to be between 84 and 87. See Attachments C and AA. However, one must also take into account that these scores do not encompass the debilitating effects of Mr. Hill=s brain damage. Mr. Hill=s lack of functional academic skills are demonstrated by poor grades and significant academic underachievement throughout his classes. Mr. Hill was then, and continues to be to this day, an extremely slow learner. Dr. Fleming observed that Mr. Hill performed in a substandard manner in school and detailed his low IQ scores and performance difficulties. See Attachment C at 3. Clearly, he had a great deal of difficulty in acquiring and utilizing new information. Specifically, Mr. Hill had problems taking in information and applying it in problem-solving situations. Dr. Fleming also reported: AIn terms of his general ability, his reading ability was about the second grade level, spelling at about the third grade, simple arithmetic at about the fifth grade level. That=s actually a range in the .08 percentile. That means that roughly better than 99 out of 100 people are able to process this better than he.@ Id.; see also Dr. Eisenstein=s report at Attachment AA. Dr. Fleming also documented Mr. Hill=s serious academic and intellectual impairments as an adult: AHe still can=t read, can=t

do arithmetic, . . . he=s very slow.@ See id. Dr. Eisenstein also referenced Mr. Hill=s inability to process information. See Attachment AA.

Other significant medical and legally recognized indicia of mental retardation is abundant in Mr. Hill=s history. Doctors who have tested and assessed Mr. Hill have noted over and over his substantial impairments in intellectual and adaptive functioning. As stated by Dr. Eisenstein, AMr. Hill=s adaptive functioning, or degree to which he was able to maintain himself independently, was consistent with mild mental retardation.@ Attachment AA at 13. In addition, Mr. Hill has had extremely poor communication skills throughout his life, as demonstrated by his speech problems as a child. Mr. Hill=s significant lack of communication skills is also exhibited by his low verbal IQ scores, which include a 71 on the test administered by Dr. Eisenstein in December 2005, and a 76 on the test administered by Dr. Fleming in December 1989. See Attachments AA & C. In addition to his difficulties communicating, Mr. Hill has always had poor social adaptation and life skills. Since childhood, Mr. Hill has had poor social, interpersonal, and self-care skills. Family members reported that Mr. Hill had a significant lack of maturity in his relationships with others. He was extraordinarily quiet and always wanted to be by himself. All of

these deficiencies in Mr. Hill=s adaptive functioning skills were present before the age of 18. See Attachments E-W.

Finally, it is crucial to note that before Mr. Hill turned 18 years of age, his IQ test scores qualified him as Amentally retarded@ according to existing standards that set out the definition of mentally retarded by the American Association on Mental Deficiency (Retardation). According to his Mobile County, Alabama school records, Mr. Hill attained a full-scale IQ score of 59 on the California Achievement Test while attending Gorgas Elementary School - a score which clearly qualified Mr. Hill as mentally retarded under both the standards of the time, as well as today=s definition of mental retardation. See Attachment Z.

Given his mental impairments and deficiencies,[18] Mr. Hill is constitutionally protected from execution because the death penalty is an unconstitutionally excessive punishment for Mr. Hill for all the reasons delineated in Atkins. First, with respect to retribution, imposing the death penalty on Mr. Hill is contrary to evolving standards of decency because those who are severely mentally limited are categorically less culpable. Second, because his mental retardation and/or severe brain damage and severe mental limitations have left Mr. Hill with a diminished ability to process information, to learn from

experience, to engage in logical reasoning, and particularly to control his impulses, imposition of the death penalty could not possibly have a deterrent effect on his actions. In addition, Mr. Hill=s serious mental deficiencies result in his being incapable of independent thought, and highly prone to fall under the influence of others. Finally, Mr. Hill has demonstrated that he only mimics what he hears from others, and is unable to contribute in any way to his own defense.

Accepting Mr. Hill=s factual allegations as true, an evidentiary hearing is required upon this claim. Thereafter, a stay and a bar of the execution should be entered.

D. The Lower Court Erred in Finding Mr. Hill=s Atkins Claim To Be Procedurally Barred, and in Denying Mr. Hill an Opportunity to Prove This Claim at an Evidentiary Hearing.

The lower court=s finding of a procedural bar in bringing this claim is erroneous. Mr. Hill=s mental status is an eligibility issue which absolutely precludes the application of the death penalty to anyone in the class protected by Atkins. It is impossible for an eligibility claim to be procedurally barred, as the issue of whether an individual is a member of a class constitutionally exempt from execution can never be waived.

The lower court also erred in summarily denying Mr. Hill the

[18] See Attachments E-W.

opportunity to prove this claim at an evidentiary hearing. The lower court=s ruling was seemingly premised on the erroneous belief that allegations pled in a Rule 3.850/3.851 motion to vacate must proven before an evidentiary hearing can be granted. Rather, the clearly established standard according to Rule 3.850 and this Court=s precedents is that a capital defendant is entitled to an evidentiary hearing Aunless the motion and record conclusively show that the defendant is entitled to no relief.@ Fla. R. Crim. Pro. 3.850(d). As this Court ruled in Gaskin v. State, 737 So.2d 509 (Fla. 1999),

> While the post-conviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief. In essence, the burden is upon the State to demonstrate that the motion is legally flawed or that the record conclusively demonstrates no entitlement to relief.
>
> * * *
>
> The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion.

Gaskin, 737 So.2d at 516.

Mr. Hill=s Motion to Vacate presented factually based claims, which are neither in dispute nor conclusively refuted by the records in this case. The lower court erred as a matter of law and fact in denying Mr. Hill an evidentiary hearing on his

claims, thereby precluding him from proving at an evidentiary hearing what he alleged in his post-conviction motion.

The lower court seemingly applied a stricter standard than required in assessing whether an evidentiary hearing was warranted, *i.e.*, by requiring Mr. Hill to prove his claims in the motion alone without hearing the evidence that would have proven the claims. At an evidentiary hearing Mr. Hill would certainly have the burden to prove his claims, but he is in no way required to meet that same burden in his pleadings alone. If this were the case, there would never be a need to have evidentiary hearings.

Interestingly, Rule 3.850 states that:

> . . . (C) Contents of Motion. The motion shall be under oath and include:
>
> * * *
>
> (6) **a brief statement of the facts** (and other conditions) relied on in support of the motion.

Fla. R. Crim. Pro. 3.850 (C)(6) (emphasis added). At the end of the Florida Rules of Criminal Procedure, the Court illustrates the intent of the rule by providing a form motion for filing a Rule 3.850 motion. See Fla. R. Crim. Pro. 3.987. In that form the following instructions are given:

> 14. State **concisely** every ground on which you claim that the judgment or sentence is unlawful. **Summarize briefly** the facts supporting each ground.

Fla. R. Crim Pro. 3.987 (emphasis added). The commentary then outlines a list of grounds that a movant may choose from that are properly raised in a Rule 3.850 motion. A form is offered for use:

A. Ground
1. _____
_____
_____

Supporting FACTS (tell your story briefly without citing cases or law):

_____
_____
_____.

Fla. R. Crim. Pro. 3.987.

In each instance, the Rules regarding postconviction motions highlight brevity in pleading the facts. Brevity is at a higher premium in a successive motion to vacate, as a page limitation is set at twenty-five pages. See Fla. R. Crim. Pro. 3.851. As a result, pleading more than one claim in a successive motion requires economy and conciseness of pleading. Therefore, as required by the rules, Mr. Hill provided a brief, concise pleading of this claim which entitles him to relief, as the facts alleged are not conclusively refuted by the record, nor is the issue procedurally barred.

This Court has specifically rejected the reasoning applied by the lower court in this case regarding the sufficiency of

3.850 pleadings. See e.g., Ventura v. State, 673 So.2d 479 (Fla. 1996); Mills v. Dugger, 559 So.2d 578, 578-579 (Fla. 1990); Harvey v. Dugger, 656 So.2d 1253, 1257 (Fla. 1995); Thompson v. State, 731 So.2d 1235, 1256 (Fla. 1999). Mr. Hill=s post-conviction motion met the required threshold of Atending to establish@ the claims alleged, and the facts and allegations contained in Mr. Hill=s 3.850 motion must be taken as true, as they are not conclusively refuted by the record. See Lemon v. State, 498 So.2d 923 (1986). Under Florida Law **an evidentiary hearing is required** where the postconviction motion is facially sufficient and not conclusively refuted by the record. See Hamilton v. State, 875 So.2d 586 (Fla. 2004); Freeman v. State, 761 So. 2d 1055 (Fla. 2000); and Peede v. State, 748 So. 2d 253 (Fla. 1999).[19] The lower court erred in denying Mr. Hill this

[19] Recently, in Jacobs v. State, 880 So.2d 548 (Fla. 2004), this Court once again gave a detailed description of what the trial court is required to perform under Fla. R. Crim. P. 3.850:

> Under these comprehensive provisions a trial court's consideration of a motion under *rule 3.850* involves a number of possible steps: First, a trial court must determine whether the motion is facially sufficient, i.e., whether it sets out a cognizable claim for relief based upon the legal and factual grounds asserted. It would logically follow that if no valid claim is alleged, the court may deny the motion outright, and the court need not examine the record. Second, if the court determines that the motion is facially sufficient, the court may then review the record. If the record conclusively refutes the alleged claim, the claim may be denied. In doing so, the court is required to attach

those portions of the record that conclusively refute the claim to its order of denial. Third, if the court determines that the motion is facially sufficient and that there are no files or records conclusively showing that the movant is not entitled to relief, the court may order the state attorney's office to file a response to the defendant's motion. The state attorney must respond to the allegations of the motion, state whether the movant has pursued any other available remedies (including any other postconviction motions), and state whether the defendant received an evidentiary hearing. Fourth, after the state attorney has filed the required response, the trial judge must determine whether the claims alleged in the motion have been denied at a previous stage in the proceedings. Finally, if the claims presented in the motion have not been denied previously, the judge shall then determine whether an evidentiary hearing is required in order to resolve the claims alleged in the motion. Thus, if the trial court

right.

E. Conclusion

Mr. Hill is entitled to an evidentiary hearing on whether he qualifies as mentally retarded and/or whether execution of brain damaged individuals such as he are functionally in the same class of persons protected by Atkins such that execution would violate his equal protection rights under the United States and Florida Constitutions.

Even if this Court determines that Mr. Hill does not meet the standards of mental retardation, the record is undisputed that he suffers from brain damage and that these deficits in adaptive functioning preceded his eighteenth birthday. Individuals who are brain damaged suffer many of the same deficits as mental retardation and should be treated similarly

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> finds that the motion is facially sufficient, that the claim is not conclusively refuted by the record, and that the claim is not otherwise procedurally barred, the trial court should hold an evidentiary hearing to resolve the claim.

Jacobs, 880 So.2d at 550-51.

under the law. The protections established in Atkins, and the reasoning behind it, support the exclusion of Mr. Hill, a brain-damaged, mentally impaired, low-functioning individual, from those class of persons who may constitutionally subjected to execution. The evidence in Mr. Hill=s case satisfies the language of "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18" provided in '921. 137 (1), Fla. Stat., and establishes the equivalence of mental retardation under the language of Atkins. Thus, it is clear that under the United States Constitution, the Florida Constitution, and under Florida Statutes, the State **cannot** legally execute Mr. Hill.

ARGUMENT III

THE EXECUTION OF CLARENCE HILL, A BRAIN DAMAGED, MENTALLY IMPAIRED INDIVIDUAL, WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE CONSTITUTIONS OF THE STATE OF FLORIDA AND THE UNITED STATES.

Mr. Hill suffers from a low IQ, brain damage, and a mental and emotional age of less than eighteen years, which renders the application of the death penalty in his case cruel and unusual. His execution would therefore offend the evolving standards of decency of a civilized society, See Trop v. Dulles, 356 U.S. 86 (1958), would serve no legitimate penological goal, See Gregg v. Georgia, 428 U.S. 153, 183 (1976), and would violate the Eighth and Fourteenth Amendments to the United States Constitution. See Roper v. Simmons, 125 S.Ct. 1183 (March 1, 2005). As the Supreme Court recently held in Simmons,

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, . . . A[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.@ * * * The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. * * * The third broad difference is that the character of a juvenile is not as well formed as that of an adult. * * * These differences render suspect any conclusion that a juvenile falls among the worst offenders. * * * **From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor=s character deficiencies will be reformed.**

Slip Op. at 15-16 (citations omitted; emphasis added).

Mr. Hill was over 18 years old chronologically, **but not mentally and emotionally**, when the homicide in the above-styled cause occurred. The aforementioned abuse, brain damage, and life history resulted in Mr. Hill operating at a mental and emotional age significantly below his chronological age at the time of the homicide. In 1989, Dr. Fleming rendered a report that stated Mr. Hill=s mental age **was approximately ten years old and he functioned as such**. See Attachment C. In the proceedings below, expert psychological testimony was available to establish that

Mr. Hill fell within the three general differences the U.S. Supreme Court outlined between juveniles and adults: (1) A[A] lack of maturity and an underdeveloped sense of responsibility; (2) Amore vulnerab[ility] or susceptib[ility] to negative influences and outside pressures, including peer pressure; and (3) a character which was not as well formed as that of an adult, and was more transitory and less fixed. See Simmons at 15-16.

In this case, it is mental and emotional age that warrants Eighth Amendment relief. "There is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of Lockett and Eddings." Johnson v. Texas, 113 S. Ct. 2658, 2668 (1993) (citations omitted). The kinds of characteristics attributed to youthful offenders, "a lack of maturity and an underdeveloped sense of responsibility" Id. at 2668-2669, are precisely those characteristics attributable to Mr. Hill. And it is these very same traits that "often result in impetuous and ill-considered actions and decisions." Id. at 2669.

The lower court denied Mr. Hill=s claim as procedurally barred by stating,

> Other than Defendant=s reliance on Roper, Defendant has presented no reason why he could not have raised the instant claim in an earlier motion. Indeed, Defendant

> points in the instant motion to the 1989 report of Dr. Fleming, which Astated Mr. Hill=s mental age was approximately ten years old and he functioned as such.@ [footnote omitted]. Assuming this fact to be true, Defendant could have raised the same claim under Thompson v. Oklahoma, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988), which rendered unconstitutional, for many of the same reasons expressed in Roper, the execution of any offender who was under the age of 16 at the time of his offense. Since Defendant has not demonstrated why the instant claim could not have been raised previously, the Court holds that Defendant=s third claim is procedurally barred.

Order at 8-9.

The lower court=s finding of a procedural bar is erroneous. Mr. Hill submits that his Eighth Amendment right to be free from cruel and unusual punishment cannot be subject to a procedural bar, as this is an eligibility issue which precludes the death penalty for anyone under eighteen years of age.

Capital punishment should not be imposed where a defendant lacks the requisite "highly culpable mental state." Tison, 107 S. Ct. at 1684. Mr. Hill lacked such a mental state. The background of the defendant reflects "factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605 (1978). An individual with neurological handicaps, such as Mr. Hill, is the very opposite of the kind of offender whose "highly culpable mental state" has been held to warrant imposition of the death penalty. Simmons & Tison.

The Eighth Amendment prohibits "all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged." Weems v. United States, 217 U.S. 349, 371 (1910) (citation omitted). In furtherance of this principle, the Supreme Court's Eighth Amendment decisions have made clear that "a criminal sentence must relate directly to the personal culpability of the criminal offender." Tison v. Arizona, 107 U.S. 1676, 1685 (1987). These decisions have also considered "a defendant's intention -- and therefore his moral guilt -- to be critical to the degree of criminal culpability." Enmund v. Florida, 458 U.S. 782, 800 (1982); accord Tison, 107 S. Ct. at 1687("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished").

Because capital punishment is our society's ultimate sanction, "unique in its severity and irrevocability," Gregg, 428 U.S. at 187, it may be imposed only when a defendant is found to have "a highly culpable mental state." Tison, 107 S. Ct. at 1684; see also id. at 1687 ("A critical facet of the individualized determination of culpability required in a capital case is the mental state with which the defendant commits the crime"); Godfrey v. Georgia, 446 U.S. 420, 443 (holding capital punishment

is inappropriate unless the crime "reflected a consciousness materially more depraved than that of any person guilty of murder").

Because Eighth Amendment proportionality principles forbid the imposition of capital punishment where a defendant lacks the requisite "highly culpable mental state," the Constitution requires an individualized inquiry into the defendant=s background and character combined with the circumstances of the offense to determine whether there exist "factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). As Justice O'Connor explained:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

California v. Brown, 107 S. Ct. 837, 841 (1987)(O'Connor, J., concurring)(emphasis added).

Generally, the proportionality required by the Eighth Amendment has been understood to require individualized, case-by-case assessment of the factors that may diminish culpability. See Eddings; Lockett. The Supreme Court has, however, made several categorical Eighth Amendment judgments about situations in which culpability is automatically insufficient to justify

imposition of the death penalty. Some of these judgments have turned on finding categories of criminal acts insufficiently blameworthy to justify a death sentence. See, e.g., Coker v. Georgia, 433 U.S. 584 (1977)(rape); Eberheart v. Georgia, 433 U.S. 917 (1977)(armed robbery). In other instances the judgment has turned on the level of the defendant's mental state as it relates to the crime: Tison and Enmund, for example, make clear that a defendant may not be sentenced to death unless he has at least been shown to have "a reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death." Tison, 107 S. Ct. at 1688. Further, judgments have turned on the defendant's mental capacity. See Ford v. Wainwright, 106 S. Ct. 2595 (1987)(execution of the insane violates the Eighth Amendment).

When one considers Mr. Hill=s mental capacity and level of functioning, there is no sustainable rationale for imposing the death penalty upon him and not upon the class of individuals outlined in Simmons. Here, the lower court erred in denying Mr. Hill an evidentiary hearing on this issue as the motion, files and records in this action fail to conclusively show that Mr. Hill is entitled to Ano relief.@ See Lemon v. State, 498 So. 2d 923 (Fla. 1986); Fl. R. Crim. P. 3.851(f)(5)(B). Accordingly, an evidentiary hearing is required.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. HILL=S REQUEST FOR PUBLIC RECORDS PURSUANT TO CHAPTER 119, FLORIDA STATUTES, FLA. R. CRIM. P. 3.852, THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, '' 9 AND 17 OF THE FLORIDA CONSTITUTION.

During the warrant proceedings, Mr. Hill sought public records pursuant to Fla. Stat. Ch. 119 and Fla. R. Crim. P. 3.852 (h)(3). On December 7, 2005, Mr. Hill sent public records requests to a total of seven agencies.[20] These records were requested pursuant to Rule 3.852 (h)(3).[21] Subsequently, written objections were filed by the Department of Corrections and the Office of the Attorney General. Following a hearing on December 19, 2005, the lower court issued orders denying Mr. Hill=s public

[20]Mr. Hill requested records from the Office of the State Attorney for the First Judicial Circuit, the Escambia County Sheriff=s Office, the Pensacola Police Department, the Florida Department of Law Enforcement, the Medical Examiner=s Office, First and Eighth District of Florida, the Office of the Attorney General and the Florida Department of Corrections.

[21]Mr. Hill had made previous requests to these agencies, and now requested updated documents that were not produced in previous requests.

records requests as to several agencies.

On December 23, 2005, the lower court issued its order denying Mr. Hill=s 3.850 motion. With regard to the denial of public records, the court stated:

> As to the Office of the Attorney General, the Office of the Medical Examiner, District Eight, and the Florida Department of Corrections, the Court denied access to these records based on the overbreadth of the requests, and in the case of the Office of the Medical Examiner, District Eight, also because of the lack of a previous request as required under Fla.R.Crim.P. 3.852 (h)(3). Defendant has made no representation regarding what records he believes are in the possession of these agencies which could support a colorable claim for postconviction relief, nor has he demonstrated that these records could not have been requested at an earlier date. Defendant has further failed to establish that he could not have timely sought production of the documents, or that the documents were previously requested but unlawfully withheld. See Buenano v. State 708 So. 2d 941, 953 (Fla. 1998). Accordingly, Defendant is not entitled to relief on this basis.

Order at 5-6.

Effective collateral representation has been denied Mr. Hill because the circuit court denied access to public records from the aforementioned agencies. In denying these public records requests, the lower court has essentially established standards not in conformity with Rule 3.852 (h)(3). In accordance with this provision, Mr. Hill must show: 1) that a death warrant has

been signed; 2) that he has filed his requests within ten days of the date of the warrant; and 3) that he has previously Arequested public records from a person or agency@ to which he is currently requesting records. Mr. Hill previously requested records from the Department of Corrections, the Office of the Attorney General, and the Office of the Medical Examiner.[22] Thus, the requirements of this provision have been fulfilled.[23]

[22]Mr. Hill maintains that while his most recent request is to a different district of the Medical Examiner=s Office, it is still the same agency and thus the request was properly filed under 3.852(h)(3). However, in light of the lower court=s opinion to the contrary, Mr. Hill resubmitted his request under Rule 3.852 (I). Nevertheless, even under this provision, the lower court denied Mr. Hill=s request for public records.

[23]The first two requirements have also been met.

Despite the fact that Mr. Hill=s requests for public records were in fact narrowly tailored[24] and fall squarely within the confines of Rule 3.852 (h)(3), the lower court erroneously denied his request. The lower court=s ad-hoc addendums to Rule 3.852 (h)(3), are not only improper, but also factually inaccurate. Contrary to the lower court=s order, Mr. Hill=s claim that the current method of lethal injection, in light of recent empirical evidence, constitutes cruel and unusual punishment, is a colorable claim for relief. As is clear from Mr. Hill=s pleadings, he is not challenging the statutory provision which allows for lethal injection as a method of execution. Rather, he is challenging the use of specific chemicals, based upon recent scientific evidence, that he believes the Department of Corrections uses to carry out executions.[25]

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[24]Here, Mr. Hill filed a limited number of requests to agencies that were subject to previous requests. This is unlike the situation in several other previous warrant cases. See, e.g., Glock v. Moore, 776 So. 2d 243, 253-4 (Fla. 2001) (defendant made at least 20 records requests of various persons or agencies. The Court stated, AIt is clear from a review of the record and the hearing that most of the records are not simply an update of information previously requested but entirely new requests.@). See also Sims v. State, 753 So. 2d 66 (Fla. 2000), (the Court affirmed the denial of public records requests of twenty-three agencies or persons, most of whom had not been the recipients of prior requests for public records).

[25]As Mr. Hill has been denied access to records from the Department of Corrections, he is unable to verify that they are still utilizing these chemicals.

Additionally, with regard to timeliness, the lower court=s order overlooks the fact that the study upon which Mr. Hill relies was conducted in 2005. Any request made prior to the study would surely have been denied by the lower court in a similar fashion as here, as not establishing a colorable claim of relief. In essence, the effect of the lower court=s order would be to permanently prevent any defendant from ever challenging a method of execution, even when there is a change in circumstances.[26]

[26]For example, despite repeated opinions of the Florida Supreme Court that the electric chair did not constitute cruel and unusual punishment, the Florida Supreme Court subsequently ordered an evidentiary hearing on the issue in the case of Thomas Provenzano. See Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999). During these proceedings, public records were disclosed by the Department of Corrections regarding the electric chair. And the proceedings in that case led to the Florida Legislature=s adoption of lethal injection as the method of execution in Florida.

Further, in concluding that Mr. Hill=s requests were overbroad, the lower court determined that Mr. Hill could not properly make requests relating to lethal injection under Rule 3.853 (h)(3), because his Aprevious request for production of public records made to the DOC did not include any request for materials related to lethal injection.@[27] See Order Sustaining the Objection to Defendant=s Demand and Denying Defendant=s Demand for Production of Additional Public Records from the Department of Corrections at 2.

The lower court=s position is simply untenable, as it would require Mr. Hill to have known in 1997 that lethal injection would be adopted as the method of execution in Florida in 2000. Nowhere in Rule 3.852 (h)(3) does it contemplate that Mr. Hill should be faulted for not requesting records that did not exist about a method of execution that did not exist. Clearly, any request about the method of execution in 1997 would no longer be germane to whether or not the current method of execution in Florida is constitutional because, not only has the method changed, but information about recent executions, the protocol

[27] As the lower court noted, Mr. Hill=s original request to DOC was in 1997. Also, the lower court used the same rationale in denying Mr. Hill=s request to the Office of the Attorney General.

and related matters are constantly changing.

Here, the lower court failed to apply the dictates of Rule 3.853(h)(3). The denial of access to records precludes the full and fair development of Mr. Hill=s Rule 3.851 motion. Mr. Hill asks this Court to remand the case to the circuit court for full public records disclosure and to permit amendment of this motion based upon future records received.

ARGUMENT V

THE TRIAL COURT=S DECISION TO PLACE MR. HILL AND HIS CO-DEFENDANT, CLIFFORD JACKSON IN SHACKLES DURING THE PENALTY PHASE VIOLATED THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION UNDER DECK V. MISSOURI, 125 S.CT. 2007 (2005).

In Deck v. Missouri, the Supreme Court held that Athe Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, *unless* that use is >justified by an essential state interest=--such as the interest in courtroom security--specific to the defendant on trial.@ 125 S. Ct. 2007 at 2009 (2005) (quoting Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986)). The Court based its ruling on prior cases which dealt with the constitutionality of security measures used in the guilt phase of criminal trials. "[C]ourts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Estelle v. Williams, 425 U.S. 501, 503

(1976). Procedures or practices which are not "probative evidence" but which create "the probability of deleterious effects" on fundamental rights and the judgment of the jury thus must be carefully scrutinized and guarded against. Id. at 504.

The Supreme Court had previously analyzed the effect of security measures in Holbrook v. Flynn, 475 U.S. 560, 567 (1986), noting that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on the grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.@ In Deck, the Supreme Court=s review of precedent regarding the use of shackles showed that A[t]he law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need.@ 125 S. Ct. at 2010. The Court then extended this prohibition to the penalty phase:

> [C]ourts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding. . . . [A]ny such determination must be case specific [and] should reflect particular concerns, say special security needs or escape risks, related to the defendant on trial.

Deck, 125 S. Ct. at 2014-15.

Because shackling is Ainherently prejudicial@ and will often

have negative effects which Acannot be shown from a trial transcript,@ the defendant is not required to show actual prejudice. Deck, 125 S. Ct. at 2015. The Supreme Court held:

> [W]here a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove Abeyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.@ Chapman v. California, 386 U.S. 18, 24 (1967).

Id.

At an evidentiary hearing, testimony would show that Mr. Hill and Clifford Jackson were shackled and handcuffed during his penalty phase testimony without any mention of such on the record and without objection by defense counsel. The trial court did not express any concern about Mr. Hill=s or Mr. Jackson=s Aconduct@ and Asecurity,@ in violation of Deck; nor did the court Aexplain why, if shackles were necessary, he chose not to provide for shackles that the jury could not see.@ Id. As in Deck, Aif there is an exceptional case where the record itself makes clear that there are indisputably good reasons for shackling, it is not this one.@ Id. The State cannot show beyond a reasonable doubt that this error Adid not contribute to@ the jury=s death recommendation. Id.

Deck meets the criteria for retroactive application set

forth in Witt v. State, 387 So. 2d 922 (Fla. 1980), as it issued from the U.S. Supreme Court, and its rule is unquestionably Aconstitutional in nature@ and a Adevelopment of fundamental significance.@ Witt at 930-31. An evidentiary hearing is warranted on this issue, and relief is proper.

The lower court, in denying Mr. Hill=s claim without first granting an evidentiary, stated:

> In his fifth claim, Defendant alleges that he is entitled to postconviction relief under the holding of Deck v. Missouri, 125 S. Ct. 2007, 2009, 161 L. Ed. 2d 953 (2005) (AWe hold that the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, *unless* that use is >justified by an essential state interest= B such as the interest in courtroom security B specific to the defendant on trial.@) Defendant alleges that A[a]t an evidentiary hearing, testimony will show that Mr. Hill and Clifford Jackson were shackled and handcuffed during his penalty phase testimony without any mention of such on the record and without objection by defense counsel.@ [footnote omitted]
> The instant claim is procedurally barred. Defendant has presented no reason or reasons why this claim was not raised in his previous motions. Indeed the constitutional issue of shackling (including shackling during the penalty phase of capital proceedings) was litigated long before the filing of Defendant=s 2003 postconviction motion. See Finney v. State, 660 So.2d 674, 682-83 (Fla. 1995); Bello v. State, 547 So.2d 914, 918 (Fla. 1989); Elledge v. State, 408 So.2d 1021, 1022 (Fla. 1981). However, assuming Defendant was shackled in the instant case, no objection was raised at the trial court level, the issue was not raised on direct appeal, and it has never been raised in any of the postconviction proceedings in the instant case. See Gudinas v. State, 879 So.2d 616, 618 (Fla. 2004) (holding that a postconviction claim raised Afor the very first time@ in a successive 3.851 motion without

> proper explanation of the failure to previously raise the claim, was procedurally barred). Further, Deck has been held not to have retroactive application, as announced in Marquard v. Fla. Dept. of Corr., 429 F.3d 1278 (11th Cir. Fla. 2005). Therefore, Defendant is not entitled to relief on this basis.

Order at 10.

The lower court=s order is erroneous regarding the facts and law surrounding this claim. In Deck v. Missouri, 125 S.CT. 2007 (2005), the U.S. Supreme Court held it unconstitutional to visibly shackle defendants in front of a jury during the penalty phase. To determine whether this rule applies during a capital penalty phase, the Supreme Court examined the reasons for the guilt phase rule. The guilt phase rule is based upon three concerns: (1) AVisible shackling undermines the presumption of innocence and the related fairness of the factfinding process@; (2) shackling interferes with the defendant=s right to counsel by interfering with the defendant=s ability to communicate with counsel and to participate in his defense; (3) shackling undermines the dignity of the courtroom process. Deck, 125 S. Ct. at 2013. The Supreme Court concluded that these reasons support applying a penalty phase rule regarding shackling similar to the guilt phase rule:

> The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases. This is obviously so in

> respect to the latter two considerations mentioned, securing a meaningful defense and maintaining dignified proceedings. It is less obviously so in respect to the first consideration mentioned, for the defendant=s conviction means that the presumption of innocence no longer applies. Hence shackles to not undermine the jury=s effort to apply that presumption.
>
> Nonetheless, shackles at the penalty phase threaten related concerns. Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the A>severity=@ and A>finality=@ of the sanction, is no less important that the decision about guilt. . . .
>
> Neither is accuracy in making that decision any less critical. The Court has stressed the Aacute need@ for reliable decisionmaking when the death penalty is at issue. . . . The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community--often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point. . . . It also almost inevitably affects adversely the jury=s perception of the character of the defendant. . . . And it thereby inevitably undermines the jury=s ability to weigh accurately all relevant considerations--considerations that are often unquantifiable and elusive--when it determines whether a defendant deserves death. In these ways, the use of shackles can be a Athumb [on] death=s side of the scale.@ . . . .

Deck, 125 S. Ct. at 2014 (citations omitted).

Therefore, it is clear that the shackling of Mr. Hill during his penalty phase proceedings was an unconstitutional Athumb [on] death=s side of the scale.@ Id. Additionally, the shackling of Mr. Hill=s co-defendant, Clifford Jackson, during Mr. Hill=s penalty

phase also seriously undermined the fairness of Mr. Hill=s sentencing proceedings. This Court must consider the observation made in Deck that visible shackling undermines the presumption of innocence and the related fairness of the factfinding process, while also undermining the dignity of the courtroom process. See id. at 2013. The jury=s observation of Mr. Jackson in shackles seriously undermined Mr. Hill=s penalty phase because it inappropriately impugned Mr. Jackson=s testimony and credibility. The close relationship and logical connection between the two men meant that the shackling of Mr. Jackson improperly affected the fairness of the penalty phase proceedings. As the Deck Court observed, AAlthough the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the Aseverity@ and Afinality@ of the sanction, is no less important that the decision about guilt . . . A Deck at 2014. Just as the appearance of the offender during the penalty phase in shackles inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community, the appearance of the co-defendant in shackles impugned the character and credibility of both Mr. Jackson and Mr. Hill. Surely the visible shackling of Mr. Jackson inevitably affected the jury=s perception of the character of Mr. Hill and Mr. Jackson adversely, thereby undermining the jury=s

ability to weigh accurately all relevant considerations. As with the unconstitutional shackling of Mr. Hill during the penalty phase, the use of shackles on Mr. Jackson during his penalty phase testimony became an impermissible Athumb@ [on] death=s side of the scale.@ Deck, at 2014.

Additionally, the lower court was in error in finding that Deck is not retroactive based upon Marquard v. Sec=y for the Dept. of Corr., 2005 U.S. App. LEXIS 24333 (11th Cir. Fla. 2005). The federal standard governing retroactivity is controlled by Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L. Ed. 2d 334 (1989), unlike Florida which is controlled by Witt v. State, 387 So. 2d 922 (Fla. 1980). The lower court=s reliance on Marquard is gravely mistaken and misapplies the law regarding retroactivity. This Court is not constrained by the federal court=s decision in Marquard:

> We start by noting that we are not obligated to construe our rule concerning post-conviction relief in the same manner as its federal counterpart . . . . [T]he concept of federalism clearly dictates that we retain the authority to determine which Achanges of lawA will be cognizable under this state=s post-conviction relief machinery.

Witt v. State, 387 So. 2d at 928. Recently, in Johnson v. State, 904 So. 2d 400, 408-9 (Fla. 2005), this Court reiterated that:

> As courts in other states have noted, state courts are not bound by Teague in determining the retroactivity of decisions. See *California v. Ramos, 463 U.S. 992, 1014,*

> *77 L. Ed. 2d 1171, 103 S. Ct. 3446 (1983)* (acknowledging that "states are free to provide greater protections in their criminal justice system than the Federal Constitution requires"); *Colwell v. State, 118 Nev. 807, 59 P.3d 463, 470 (Nev. 2002)* (noting that "we may choose to provide broader retroactive application of new constitutional rules of criminal procedure than Teague and its progeny require"); *Cowell v. Leapley, 458 N.W.2d 514, 517 (S.D. 1990)* (noting that states may decide how to provide access to state postconviction relief). We continue to apply our longstanding Witt analysis, which provides more expansive retroactivity standards than those adopted in Teague.

Clearly, any reliance on Teague was misplaced at best.

Deck meets the criteria for retroactive application set forth in Witt v. State, 387 So. 2d 922 (Fla. 1980), as it issued from the U.S. Supreme Court and its rule is unquestionably Aconstitutional in nature@ and a Adevelopment of fundamental significance.@ Witt at 930-31. As to what Aconstitutes a development of fundamental significance,@ Witt explains that this category includes Achanges of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall [v. Denno, 388 U.S. 293 (1967),] and Linkletter [v. Walker, 381 U.S. 618 (1965)].@ Witt, 387 So. 2d at 929. This test considers: A(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (C) the effect on the administration of justice of a retroactive application of the new rule.@ Id. at 926. Resolution of the issue ordinarily depends mostly upon the first

prong--the purpose to be served by the new rule--and whether an analysis of that purpose reflects that the new rule is a Afundamental and constitutional law change[] which cast[s] serious doubt on the veracity or integrity of the original trial proceeding.@ Id. at 929.

In Witt, this Court explained that the doctrine of finality must give way when fairness requires retroactive application:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very Adifficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.@

Witt, 387 So. 2d at 925 (footnote omitted). The Court has reaffirmed the Witt fairness test in State v. Callaway, 658 So. 2d 983, 987 (Fla. 1995).

This fairness test is in keeping with the United States Supreme Court=s interpretation of the test espoused in Stovall v. Denno. The Court has said that the first prong of this test--the purpose to be served by the new rule--is the most important prong:

[O]ur decisions establish that A[f]oremost among these

> factors is the purpose to be served by the new constitutional rule,@ Desist v. United States, 394 U.S. 244, 249 . . . (1969), and that we will give controlling significance to the measure of reliance and the impact on the administration of justice Aonly when the purpose of the rule in question [does] not clearly favor either retroactivity or prospectivity.@ Id., at 251. . . . [citations omitted]. AWhere the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.@ Williams v. United States, 401 U.S. 646, 653 . . . (1971) (plurality opinion of WHITE, J.).

Brown v. Louisiana, 447 U.S. 323, 328 (1980) (plurality opinion).

Deck is such a fundamental constitutional change. Shackling is Ainherently prejudicial.@ Deck, 125 S. Ct. at 2015. Such inherent prejudice necessarily Acast[s] serious doubt on the veracity or integrity of the . . . trial proceeding.@ Witt, 387 So. 2d at 929. When subjected to such an Ainherently prejudicial@ practice, jurors cannot perform their constitutionally-required function of determining the facts based solely on the evidence presented. Under Witt, Mr. Hill is entitled to rely upon Deck.

ARGUMENT VI

THE CIRCUIT COURT WHICH REVIEWED MR. HILL=S 3.850 MOTION FOR POSTCONVICTION RELIEF ERRED BY DENYING THE MOTION WITHOUT GRANTING AN EVIDENTIARY HEARING, AND WITHOUT ATTACHING AND/OR CITING TO SPECIFIC PORTIONS OF THE RECORD WHICH CONCLUSIVELY DEMONSTRATED THAT HE WAS ENTITLED TO NO RELIEF, THUS DENYING MR. HILL=S RIGHT TO A MEANINGFUL 3.850 PROCEDURE AND HIS RIGHT TO DUE PROCESS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS.

In Claim VI of Mr. Hill=s successive motion for post-conviction relief, Mr. Hill alleged that his due process rights under the United States and Florida Constitutions, and his procedural due process rights as granted to him in Fla. R. Crim. Pro. 3.850, had been violated because he was improperly denied an evidentiary hearing without the circuit court citing to portions of the record as required by law. The lower court erred in denying relief on this claim. In its Order, the lower court asserted:

> This claim is procedurally barred. Defendant has already raised the lack of an evidentiary hearing in the appeal pertaining to his initial postconviction motion in the Florida Supreme Court. The Supreme Court of Florida found, as stated in Defendant=s motion, that the trial court properly determined an evidentiary hearing was not justified . . . Additionally, Defendant=s claim regarding the Court=s failure to attach portions of, or cite to, the record in support of its findings is also procedurally barred, as this claim should have been raised on direct appeal of this Court=s order.

Order at 11-12 (citations and footnotes omitted).

The lower court=s erroneous denial of Mr. Hill=s claim completely misapprehended the record and procedural history of

Mr. Hill=s case. In fact, as Mr. Hill pointed out in his successive motion for post-conviction relief, he **did raise the lower court=s failure to follow the procedures of 3.850 by citing to or attaching portions of the record** in his initial brief to this Court on appeal. Therefore, the lower court=s finding that the claim is procedurally barred because it Ashould have been raised on direct appeal,@ id. at 12, is clearly erroneous.

In addition, the lower court=s statement that the Florida Supreme Court Aproperly determined an evidentiary was not justified,@ id. at 11, is also incorrect. While this Court ruled that the summary denial of Mr. Hill=s other 3.850 claims was not in error, this Court **never addressed Mr. Hill=s properly and timely raised claim** that the circuit court erred in failing to follow the procedures of 3.850 in summarily denying him an evidentiary hearing. See Hill v. Dugger, 556 So.2d 1385 (1990). As this issue was properly raised by Mr. Hill, but never resolved by this Court, it is not now procedurally barred and is deserving of consideration and relief.

A Rule 3.850 litigant is entitled to an evidentiary hearing unless Athe motion and the files and records in the case conclusively show that the prisoner is entitled to no relief.@ Fla. R. Crim. P. 3.850; Lemon v. State, 498 So.2d 923 (Fla.

1986). A circuit court may not summarily deny a 3.850 motion without Aattach[ing] to its order the portion or portions of the record conclusively showing that relief is not required.@ Hoffman v. State, 571 So.2d 449, 450 (Fla. 1990). Alternatively, a court may state its rationale for summary denial by specifically citing to portions of the record which substantiate its decision. See id.

In Mr. Hill=s case, the circuit court summarily denied Mr. Hill=s claims without granting him an evidentiary hearing.[28] The court issued a cursory, two-page order which neither cited to the record nor attached specific portions of the record in support of its summary denial of Mr. Hill=s claims. See Attachment W. This was in direct violation of the requirements of Fla. R. Crim. Pro. 3.850, as well as the caselaw of this Court. See Hoffman, 571 So.2d at 450. The files and records in this case did **not** conclusively rebut Mr. Hill=s 3.850 claims. Without any attached (and/or cited to) portions of the record demonstrating that Mr. Hill is not entitled to relief, and because Mr. Hill=s allegations in his 3.850 motion involved Adisputed issues of fact,@ the lower court erred in its summary denial of Mr. Hill=s motion, and an evidentiary hearing should have been granted.

[28] In Mr. Hill=s 22 years on death row, he has never had an evidentiary hearing on his fact-based claims.

Maharaj v. State, 684 So.2d 726, 728.

Additionally, the circuit court=s abnegation of its responsibilities deprived Mr. Hill of his due process rights under both the United States Constitution and Florida law. A Fourteenth Amendment liberty interest can be derived from either state law or the Due Process Clause itself. See Sandin v. Conner, 515 U.S. 472, 132 L.Ed. 2d 418, 115 S. Ct. 2293, 2297-2302 (1995). In addition, state procedures may create liberty interests that are deprived when a state actor deviates from these procedures. Sandin, 115 S. Ct. at 2299-2301. The State of Florida has created a protected liberty interest under the Due Process Clause given the integral role that Rule 3.850 plays in its overall scheme of death penalty adjudication. Florida=s implementation of Rule 3.850 also gives rise to a protected liberty interest in fair proceedings to be conducted under the rule. Where, as here, the lower court failed in its duty to demonstrate that a defendant is not entitled to a hearing on the merits of his claims, that court has denied the defendant his due process right to a fair post-conviction proceeding.

An analogous protection of due process rights can be found in Florida=s approach to a court=s failure to abide by Fla. R. Crim. Pro. 3.830, which addresses criminal contempt proceedings. In Hutcheson v. State, 903 So.2d 1060 (5th DCA 2005), it was

held that a trial court=s failure to issue a Asigned, written order containing a recital of facts upon which the adjudication of guilt is based@ was fundamental error requiring reversal. The court in Hutcheson held that the provisions of F.R.C.P. 3.830 **Adefine the essence of due process and must be scrupulously followed.@** Id. (emphasis added). Similarly, the lower court=s failure to follow the requirements of Rule 3.850 in this case must also be considered fundamental error necessitating relief. Defendants subject to the ultimate penalty of death deserve no less than a person subject to a criminal contempt proceeding. The United States Supreme Court has held that capital proceedings are governed by a heightened standard of procedural due process. See Beck v. Alabama, 447 U.S. 625 (1980)(holding that the Due Process Clause gives heightened procedural protections to capital defendants because of the greater need for reliability).

The requirement that a circuit court attach portions of the record before summarily denying a 3.850 claim is not mere procedure devoid of due process guarantees. A circuit court does not have unfettered discretion to deny a 3.850 claim. See, e.g., Hamilton v. State, 875 So.2d 586 (Fla. 2004); Jacobs v. State, 880 So.2d 548 (Fla. 2004). Florida's rules, statutes, and decisions impose mandatory requirements upon the courts to follow the procedures of Rule 3.850. See, e.g., Hoffman; see also

Lemon; Jacobs; Hamilton; Diaz v. Dugger, 719 So.2d 865 (1998). Thus, under Florida law, Mr. Hill had a legitimate expectation that he would be afforded a reasonable opportunity to participate in the 3.850 process before being executed, and that the circuit court would conduct a mandatory, meaningful review of his 3.850 motion for postconviction relief. The lower court in this case clearly abdicated its responsibilities and in doing so denied Mr. Hill his due process rights.

Importantly, though this issue was raised in the appeal from the denial of Rule 3.850 relief, this Court **never addressed it** in its opinion affirming the lower court=s ruling. See Hill v. Dugger, 556 So.2d 1385 (1990). It is an unconstitutional abandonment of Mr. Hill=s due process rights for Florida courts to continue to deny him the procedures and access which have been afforded other capital defendants in this state. Florida may not arbitrarily deprive Mr. Hill of his state law and federal constitutional rights in this manner. Relief is proper.

CONCLUSION

Mr. Hill submits that this case should be remanded for an evidentiary hearing on each of his issues, and that he should receive full public records disclosure and be permitted to amend his Rule 3.850 motion based upon future records received. Based on his claims for relief, Mr. Hill is entitled to a new

sentencing proceeding and/or the imposition of a life sentence. Finally, Mr. Hill submits that he should not be executed in a manner that constitutes cruel and unusual punishment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished to Carolyn Snurkowski, Assistant Attorney General, Office of the Attorney General, Plaza Level 1, The Capitol, Tallahassee, FL 32399, this 3rd day of January 2006.

CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

D. TODD DOSS
Florida Bar No. 0910384
725 Southeast Baya Drive
Suite 102
Lake City, FL 32025-6092
Telephone (386) 755-9119
Facsimile (386) 755-3181