

IN THE SUPREME COURT OF MISSISSIPPI

NO. _____

RON CHRIS FOSTER

PETITIONER

VERSUS

STATE OF MISSISSIPPI

RESPONDENT

EMERGENCY APPLICATION: EXECUTION SET FOR JANUARY 8, 2003

**MEMORANDUM IN SUPPORT OF SUCCESSIVE APPLICATION
FOR LEAVE TO FILE MOTION TO VACATE DEATH
SENTENCE AND MOTION FOR STAY OF EXECUTION**

I. INTRODUCTION

In the time since this Court last considered this case, the United States Supreme Court has clearly prohibited the execution of Ron Chris Foster. Foster, who was 17 at the time of the robbery in which George Shelton was shot to death, is mentally retarded, with a full-scale IQ of 62 (verbal IQ of 68, performance IQ 59) and significant deficits in adaptive functioning. His low intelligence manifested long before his 18th birthday, as evidenced by his placement in special or remedial education classes and his failure in those classes -- he dropped out of school in the eighth grade.

The imposition of capital punishment on a mentally retarded prisoner who was 17 at the time of the crime violates the Eighth Amendment as interpreted by the United States Supreme Court recently held in *Atkins v. Virginia*, ___ U.S. ___, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In *Atkins* the Court held that the execution of individuals with mental retardation violates the Eighth Amendment to the United States Constitution because "the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Atkins*, 122 S.Ct. at 2251.

According to the *Atkins* Court, defendants with mental retardation are not as culpable as fully functioning adult persons because they:

have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions but they do diminish their personal culpability.

Id. at 2250-51.

This rationale -- combined with the present state of both the consensus of opinion and scientific knowledge about child development, makes an irrefutable case that juvenile offenders -- persons who were under age 18 at the time the crime was committed -- also lack the personal culpability that is the *sine qua non* of a valid death sentence. Thus, *Atkins* provides two separate, but related, grounds to vacate Foster's death sentence.

Although Mississippi statutory law imposes formidable procedural barriers to the granting of successive applications for post-conviction relief, in this case those barriers are surmounted by *Atkins*. Thus, Foster's death sentence must be vacated. Furthermore, this Application is of such merit as to require the granting of a stay of execution to allow this Court to determine, without the pressure of an immanent execution date, how Mississippi will apply the *Atkins* decision.

II. PROCEDURAL HISTORY

The procedural history of this case is as follows. On September 8, 1989, Foster was indicted by the grand jury of Lowndes County, Mississippi for the crime of capital murder. The indictment charged that on June 10, 1989, Foster killed George Shelton during an armed robbery.

Venue was changed to Lauderdale County and trial was commenced January 14, 1991, in Meridian. On January 18, 1991, the jury returned a verdict that Foster was guilty of the crime of capital murder. Later that same day, the jury deliberated sentence and returned its verdict that Foster be sentenced to death.

On April 23, 1994, this Court affirmed Foster's conviction and death sentence. Chief Justice Hawkins and then Associate Justices Sullivan and Banks dissented. *Foster v. State*, 639 So. 2d 1263 (Miss. 1994). On August 18, 1994, a timely filed petition for rehearing was denied. *Id.* On March 20, 1995, the United States Supreme court denied Petitioner's timely filed petition for writ of certiorari. *Foster v. Mississippi*, 514 U.S. 1019, 115 S.Ct. 1365, 131 L.Ed.2d 221 (1995).

Thereafter, Foster filed his first petition for post conviction relief under the Act. Because this successive Application relies on new expert testimony, it is noteworthy that Foster's first post-conviction petition was filed long before this Court, in *(Henry Curtis) Jackson v. State*, 732 So. 2d 187 (Miss. 1999), held that death-sentenced prisoners were entitled to appointed counsel and payment of expert fees and expenses at state expense, in preparation of their first-time state post-conviction pleadings. As Andre deGruy testifies in his affidavit,

In April 1995 Foster's case became final on direct appeal when his petition for certiorari to the United States Supreme Court was denied. The Capital Defense Resource Center received no state cash funding and there was no state office to represent death row inmates in state post conviction at that time. I did not have the authority to expend federal grant money on a case in state court. I filed a motion with the state supreme court seeking appointment as counsel to represent Foster at this stage and for reasonable litigation expenses including investigation costs and expert fees.

This request was denied based on prior holdings of the state and federal Supreme Courts denying the right to state post-conviction counsel. I was unable to locate an

attorney willing to accept this case pro bono. . . . After compiling numerous affidavits from family and friends who had never been interviewed before, I contacted Dr. Marc Zimmerman. I explained to Dr. Zimmerman that we had been denied funding in state court and I would not be able to pay him for his services but he agreed to review the file and provide a preliminary affidavit at no cost. After reviewing the file he advised me that additional testing was necessary and further interviews by him or a trained mental health professional.

On July 21, 1995, I filed a petition for post conviction relief with the state supreme court supported by affidavits relied on by Dr. Zimmerman and his preliminary affidavit. That court denied the petition without granting a hearing in circuit court. Accordingly, Foster was never provided state funded counsel nor did he have any opportunity to seek funds for psychological testing.

Exhibit “A,” Affidavit of Andre deGruy at 1-2, ¶¶3-6.

Foster’s Application for Leave to File Motion to Vacate Conviction and Death Sentence was denied by this Court on May 16, 1996. Presiding Justice Sullivan and then Associate Justice Banks dissented. *Foster v. State*, 687 So. 2d 1124 (Miss. 1997). Foster’s petition for rehearing from this denial was also denied, by order of January 23, 1997. *Id.* His petition to the United States Supreme Court for certiorari review of this opinion was denied on June 23, 1997. *Foster v. Mississippi*, 521 U.S. 1108, 117 S.Ct. 2488, 138 L.Ed.2d 996 (1997).

Foster filed a petition for habeas corpus relief in the United States District Court for the Southern District of Mississippi on October 29, 1997. Again Foster’s counsel sought funds for expert assistance. The State again opposed the motion, this time on grounds that no new expert testimony could be used to support Foster’s federal petition. The district court, Chief District Judge Tom S. Lee, denied the motion for funds. On February 20, 2001, Chief Judge Lee denied Foster’s motion to reconsider this ruling. The district court did, however, grant a Certificate of Appealability on July 3, 2001.

The United States Court of Appeals affirmed the district court's denial of habeas corpus relief on June 6, 2002. *Foster v. Johnson*, 293 F.3d 766 (5th Cir. 2002). That court denied rehearing and rehearing *en banc* on July 2, 2002. The United States Supreme Court denied certiorari review of the Fifth Circuit's opinion on December 2, 2002. *Foster v. Johnson*, No. 02-6655.

III. NO PROCEDURAL BAR TO THE APPLICATION.

Foster's Motion to Vacate Judgment and Death Sentence presents factual, legal, and constitutional issues concerning the validity of Foster's death sentence. The claims presented in the Motion, both individually and collectively, warrant relief. In particular, the claims are not barred by: (1) the statute of limitations bar; (2) the successive petitions bar; or (3) the procedural default rule.

A. The Statute of Limitations and Successive Petition Bars Do Not Apply.

The exceptions to the statute of limitations bar of Miss. Code Ann. §99-39-5(2) and the bar against successive petitions found in Miss. Code Ann. §99-39-27(9) have similar language and can be discussed together. These bars do not prevent relief where "the prisoner can demonstrate that there has been an intervening decision of the Supreme Court . . . of the United States which would have actually adversely affected the outcome of his conviction or sentence." In *Gilliard v. State*, 614 So. 2d 370 (Miss. 1992), this Court held that the "intervening decision" exception applies, permitting the petition to be considered on the merits, where an intervening U.S. Supreme Court opinion is retroactively applicable to the prisoner's case under the doctrine of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Specifically, in *Gilliard* a successive petition based on the intervening U.S. Supreme Court ruling of *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) was held to be not barred by Miss. Code Ann. §§99-39-5(2) or 99-39-27(9) because, in *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130 (1992), *Clemons* was held retroactively

applicable to prisoners whose direct appeal cases were final before *Clemons* was decided. *Gilliard*, 614 So. 2d at 373-74.

As in *Gilliard*, Foster's successive petition is based on an intervening U.S. Supreme Court opinion that is clearly retroactively applicable to his case: *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). All three claims in the Motion are directly supported by *Atkins*: Claim I, (Death Sentence Against Mentally Retarded Prisoner is Barred by the Eighth Amendment), Claim II (Death Sentence Against Prisoner Who Was Juvenile At Time of Offense is Barred by the Eighth Amendment), and Claim III (Death Sentence Against Prisoner Who Was Juvenile At Time Of the Offense, And Who Has Significantly Subaverage Intellectual Capability, Is Barred By The Eighth Amendment).

Atkins is an intervening decision of the United States Supreme Court which actually adversely affects the validity of Foster's death sentence. *Atkins* overruled the prior substantive Eighth Amendment precedent of *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). However, in its procedural holding in *Penry*, the U.S. Supreme Court expressly held that if it had ruled the execution of mentally retarded prisoners unconstitutional, such a ruling would retroactively apply to bar the execution of all death-sentenced prisoners, regardless of the date on which their sentences became final:

the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. Thus, if we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review.

Penry v. Lynaugh, 492 U.S. 302, 330 (1989) (emphasis added).

Following the clear precedent of *Penry*, the United States Court of Appeals for the Fifth Circuit has already held that *Atkins* is retroactively applicable to all death-sentenced prisoners, regardless of the date on which their sentence becomes final. *Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002). Thus Claims I, II and III are exempt from the statute of limitations bar of Miss. Code Ann. §99-39-5(2) and the bar against successive petitions found in Miss. Code Ann. §99-39-27(9). *See Gillard*.

B. These Claims Are Not Procedurally Defaulted.

This petition cannot be dismissed under Miss. Code Ann. §99-39-21 (procedural bars of waiver, different theories, and res judicata), because Foster has cause and actual prejudice which excuses the waiver. Cause is defined as “those cases where the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of the trial or direct appeal.” Miss. Code Ann. §99-39-21(4). Actual prejudice is defined as “those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence.” Miss. Code Ann. §99-39-21(5).

Atkins, an intervening U.S. Supreme Court opinion that expressly overruled past U.S. Supreme Court precedent “could not have been discovered with reasonable diligence” and therefore could not have been raised before those cases were handed down by the U.S. Supreme Court. In *Gilliard*, this Court held that procedural bars were not applicable where the Court “has suddenly reversed itself on an issue previously thought settled.” *Gilliard*, 614 So. 2d at 376. The same is true here.

Also, under Federal law, where strict application of procedural default will result in a “miscarriage of justice,” the prisoner’s claims can be considered on their merits even if he cannot

prove cause and actual prejudice to excuse the default. *Kuhlmann v. Wilson*, 477 U.S. 436, 454, 106 S.Ct. 2616, 2627, 91 L.Ed.2d 364 (1986). Miscarriage of justice exists, *inter alia*, where the prisoner’s claim, if proved by clear and convincing evidence, would result in a finding that he is ineligible for the death sentence as a matter of law. *Sawyer v. Whitley*, 505 U.S. 333, 346-50, 112 S.Ct. 2514, 2523-25, 120 L.Ed.2d 269 (1992).

Atkins, which establishes a complete bar to the execution of prisoners with significantly subnormal intelligence and adaptive capacity, is exactly the type of claim which fits this “miscarriage of justice” or “ineligibility for/innocence of the punishment” exception.

Therefore, under either a cause-and-actual prejudice analysis, or a review under the concept of fundamental miscarriage of justice, Ron Chris Foster’s claims in this petition are not subject to dismissal for procedural default or res judicata.

IV. REASONS FOR GRANTING THE APPLICATION

A. Standard of Review: This Court, in *Neal v. State*, 525 So. 2d 1279, 1280 (Miss. 1987), characterized its review of an Application for Leave to File Motion to Vacate Sentence to the standard under Miss.R.Civ.P. 12(b)(6) for review of a complaint in a civil case. Thus, if the pleading is procedurally viable, substantially avers the denial of a right under state law or the United States Constitution, and there is any factual dispute about the underlying facts of the claim, the application should be granted and the case remanded to the Circuit Court for an evidentiary hearing. *Id.* at 1280. Indeed, if the record before this Court is such that there is no factual dispute as to the right to relief, no remand is necessary – this Court can grant relief immediately.

B: Introduction to Both Claims: The Death Sentence Imposed on Foster is Barred by the Eighth Amendment Because it Violates the National Consensus Against

the Execution of Persons Without Sufficient Personal Culpability For The Capital Offense.

The United States Supreme Court recently held in *Atkins v. Virginia*, ___ U.S. ___, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) that the execution of individuals with mental retardation violates the Eighth Amendment of the federal constitution because "the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Atkins*, 122 S.Ct. at 2251. According to the *Atkins* Court, defendants with mental retardation are not as culpable as fully functioning adult persons because they "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions but they do diminish their personal culpability." *Id.* at 2250-51.

Thus, in *Atkins*, the Supreme Court held that the Eighth Amendment's ban on excessive and cruel and unusual punishments prohibits the execution of individuals with mental retardation. Reversing its prior decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court concluded that the Constitution "places a substantive restriction on the State's power to take the life' of a mentally retarded offender." 122 S.Ct. at 2252.¹ The rationale of *Atkins* is important to understanding why all three claims in Foster's Application are independent, but related, grounds for vacating Foster's

¹Quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

death sentence. After discussing the Supreme Court’s decision in *Atkins*, petitioners will address the issues governing those claims in detail.

In *Atkins*, the Court began by establishing that a fundamental “precept of justice” is that “punishment for crime should be graduated and proportioned to the offense.” 122 S. Ct. at 2246 (internal citations omitted). The Court made clear that determining whether a punishment is constitutionally excessive or cruel and unusual² is judged by current norms, not by those which existed at the time the Eighth Amendment was ratified. *Id.* at 2247. The core Eighth Amendment concept is the “dignity of man” and thus its constitutional content must be informed by “the evolving standards of decency that mark the progress of a maturing society.” 122 S.Ct at 2247 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)). The evolving standard, the Court declared, should be informed by “objective factors” to the maximum extent possible, the most reliable evidence of which is found in state legislative enactments and jury verdicts. *Id.* However, the Court adhered to the constitutional principle that “in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

With these principles established, the Court first reviewed the legislative record. The Court was impressed with the fact that at the time of *Penry*, only two death penalty states and the federal government proscribed the death penalty for mentally retarded offenders. 122 S. Ct. at 2248. However, since *Penry*, an additional sixteen states had taken death off the punishment table for the mentally retarded. The Court noted that it “is not so much the number of States that is significant,

²The Court left no doubt that the Eighth Amendment prohibits “all excessive punishments as well as cruel and unusual punishments which may or may not be excessive.” *Id.*

but the consistency of the direction of change.” *Id.* at 2249. These enactments, “[g]iven the well-known popularity of anticrime legislation,” provided the Court with “powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.” *Id.* The Court relied also upon the fact that the legislatures passing the laws voted “overwhelmingly in favor of the prohibition.” *Id.* In its search for a national consensus, the Court also looked to the opinions of social and professional organizations with “germane expertise,” such as the American Psychological Association, *id.* at 2249, n. 21, the opposition to the practice by “widely diverse religious organizations,”³ international practice,⁴ and polling data.⁵ While “not dispositive,” these factors bolstered the Court’s opinion that there was a consensus opposing the practice “among those that have addressed the issue.” *Id.* Finally, the Court also noted that even in those states that retained the death penalty for the mentally retarded, only five had actually carried out the execution of a mentally retarded individual since *Penry*. *Id.* Since the practice had become “truly unusual,” it was “fair to say that a national consensus has developed against it.” *Id.*

The consensus reflected a judgment about the “relative culpability of mentally retarded offenders and the relationship between mental retardation and the penological purposes served by the death penalty.” 122 S. Ct. at 2250. The Court noted that, due to their impairments, defendants with mental retardation “have diminished capacities to understand and process information, to

³The Court noted that representatives of Christian, Jewish, Muslim and Buddhist organizations believed that the execution of persons with mental retardation could not be justified. *Id.*

⁴[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” *Id.*

⁵[P]olling data shows a widespread consensus among Americans, even those that support the death penalty, that executing the mentally retarded is wrong.” *Id.*

communicate, to abstract from mistakes and learn from experience, to control impulses and to understand the reactions of others.” *Id.*

These deficiencies, while not justifying an exemption from criminal liability, do diminish a mentally retarded person’s personal culpability to the extent that neither of the justifications advanced by states in support of the death penalty – retribution and deterrence – would be served by permitting a retarded person’s execution. *Id.* Retribution in the capital context had been limited to ensuring that “only the most deserving of execution are put to death.” 122 S. Ct. at 2252. Since “just desserts” necessarily depends on the culpability of the offender, the most extreme punishment was deemed excessive due to the “lesser culpability of the mentally retarded offender.” *Id.* And, because capital punishment can only serve as a deterrent when a crime is the result of premeditation and deliberation, i.e., when the threat of death will “inhibit criminal actors from carrying out murderous conduct,” no deterrence interests are served by imposing the death penalty on the mentally retarded. *Id.* This type of calculus, the Court noted, is at the “opposite end of the spectrum” from behavior of the mentally retarded due to their cognitive and behavioral impairments. *Id.*⁶

In addition to concluding that retention of the death penalty for mentally retarded defendants would not further any legitimate interest in retribution or deterrence, the Court also opined that the reduced capacity of mentally retarded offenders provided a “second justification for a categorical rule making such offenders ineligible for the death penalty.” *Id.* at 2251. Due to their impairments, there were a host of factors – the increased risk of false confessions, difficulties in communicating with counsel, lesser ability to effectively testify on their own behalf or express remorse due to limited

⁶The Court also concluded that exempting the mentally retarded from capital punishment would not diminish any other deterrent interests associated with the death penalty because those without mental retardation are “not protected by exemption.” *Id.*

communication skill – that, “in the aggregate,” carried an unacceptable “risk of wrongful executions” for mentally retarded defendants.⁷

Thus, the Court concluded that its “independent evaluation of the issue reveals no reasons to disagree with the judgment of the legislature that have . . . concluded that death is not a suitable punishment for a mentally retarded criminal,” and thus the Constitution “places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender.” *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

This holding requires that the Application be granted and Foster’s death sentence be vacated.

C. Claim I: Death Sentence Against Mentally Retarded Prisoner is Barred by the Eighth Amendment

Since Mississippi was one of a dwindling number of states that permitted the execution of mentally retarded offenders, there was no mechanism in place at the time of *Atkins* for the adjudication of cases involving mental retardation. Therefore, it is now incumbent on this Court to establish procedures for cases where evidence of mental retardation is presented. The threshold question is obviously the definition of mental retardation.

a) What is Mental Retardation? Mental Retardation is a Clinical Diagnosis That Involves Sub-average Intellectual Functioning and Significant Limitations in Adaptive Skills That Manifest Before Age 18.

The U.S. Supreme Court in *Atkins* recognized that standardized clinical definitions of mental retardation exist. *Atkins* specifically referred to the definition published by the American Association of Mental Retardation (hereinafter AAMR), the nation’s oldest and largest professional organization

⁷The Court also noted the danger that a mentally retarded person’s demeanor “may create an unwarranted impression of lack of remorse for their crimes” which could enhance the likelihood that the jury will impose the death penalty due to a belief that they pose a future danger. *Id.*

in the field of mental retardation, and the adoption of that definition by the American Psychiatric Association (hereinafter APA). *Id.* at 2245 n. 3.

The 2002 AAMR definition of mental retardation provides:

Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical skills. This disability originates before age 18.

AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports 1* (10th ed. 2002).

This definition consists of **three primary diagnostic criteria**: limitations in intellectual functioning, limitations in adaptive behavior, and onset preceding age eighteen. This basic tripartite definition has been adopted by the AAMR, the APA, and the American Psychological Association, and is widely used and accepted amongst individual practicing professionals.

Mental retardation is assessed using well-established, valid and reliable tests and procedures. There are specific instruments that test for each of the three. Valid and reliable I.Q. tests normalized on the general population have been around for some time. The standard instrument for this determination is the *Wechsler Adult Intelligence Scales-III* (WAIS-III). *Atkins*, 122 S.Ct. at 2245n.5.

Within the past decade, similarly reliable and scientifically validated tests have been developed for the assessment of limitations in adaptive functioning. The most common are the *Vineland Adaptive Behavior Scales* and the *American Association on Mental Retardation Adaptive Behavior Scale*. As the APA stated in their amicus brief in the case that became *Atkins*:

Clinicians have at their disposal objective rating scales and assessment methods for the comprehensive evaluation of adaptive functioning skills. Such instruments were largely developed for the express purpose of testing adaptive functioning as it relates to mental retardation, and the tests accordingly have a high degree of validity in connection with this use. In addition to validity, the reliability of particular adaptive functioning tests has been determined through extensive and intensive analyses.

APA amicus brief in *McCarver v. North Carolina*, No. 00-8727, 2000 U.S. Briefs 8727, 16-17.

Not only are these tests available, but according to the most current definition of mental retardation these standardized measures must be used to assess adaptive deficits. The 2002 AAMR definition *requires* the use of “standardized measures normed on the general population” in all testing of adaptive behavior. AAMR, *supra*, at 76. Simply talking to the defendant, or gathering a limited amount of anecdotal information, is no longer an adequate means by which to assess adaptive functioning deficits. According to the AAMR,

[o]bservations, interviews, or other methods of assessment to gather information about adaptive behavior may complement, but should not replace, standardized measures.

Id. at 84. Adaptive behavior measurements must be taken as seriously and analyzed as thoroughly and scientifically as I.Q. measurements in order to ensure an accurate diagnosis with reference to mental retardation. Testing completed without such standardized testing is simply not adequate.

Significantly, in the tenth edition of the AAMR the definition states that no fixed cutoff score can be justified “psychometrically” in the diagnosis of individuals with mental retardation. *Id.* at 58.

The criterion for diagnosis of mental retardation is "approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations." *Id.* at 13. Notably, this definition features no specific I.Q. cutoff number. In other words, although I.Q. testing is a crucial part of evaluating potential mental retardation, a diagnosis of mental retardation cannot be defeated by a particular I.Q. score

alone. This is the case for a number of reasons, explained in detail in the AAMR publication accompanying its definition.⁸

Thus even after advising the tester to incorporate the standard measure of error, and an assessment of the reliability and general distinctiveness of the tests used, the measure is still labeled “approximate.” The ninth edition of the AAMR definition, cited by the Supreme Court in *Atkins*, also recognized the uncertainty in I.Q. measurement, defining “significantly subaverage intelligence” as an I.Q. of “*approximately 70 to 75*,” taking into account measurement error. *Atkins*, 122 S.Ct. at 2245n.3. The DSM-IV-TR requires an I.Q. score of “*about 70 or below*,” and adds a statement concerning measurement error, and an example of a Wechsler IQ of 70 as representing in actuality a range of 65 to 75. *DSM-IV-TR, supra*, at 41. The DSM-IV also notes that measurement error may vary from instrument to instrument. *See id.*

Consequently, courts have applied *Atkins* in cases where the Wechsler IQ scores were higher than the 70-75 range. In *Perkins v. Alabama*, 122 S.Ct. 2653 (2002), for example, the United States Supreme Court granted the writ of certiorari, vacated the judgment and mandate of the Alabama

⁸First, any obtained score on an I.Q. test represents a *range* of several points. Thus an I.Q. score of 70 is most accurately understood not as a precise score, but as, for example, a 95 % probability that the testee’s “true score” falls somewhere between 62 and 78. *Id.* at 57. Such a range is called a “confidence interval.” Mental retardation professionals agree that a “standard measure of error” of at least five points--equivalent to a confidence interval of ten points-- should be incorporated into any assessment of the results of an I.Q. test. *See DSM-IV-TR, supra*, at 41. All authorities agree, therefore, that an individual with an IQ of 75 may be diagnosed with mental retardation. *See American Psychological Association Editorial Board, supra*, at 15; AAMR, *supra*, at 14-15; *DSM-IV-TR, supra*, at 41-42. Variations in scores might also result from changes between different editions of the same scale and shifts to an alternative scale as an individual’s chronological age increases. Considering such factors, the AAMR has stated that “[g]iven that the diagnostic process involves drawing a line of inclusion/exclusion, there can be little rationale for anything other than a relativistic standard for significantly subaverage intellectual functioning.” AAMR, *supra*, at 58. Thus *none* of the currently accepted clinical definitions of mental retardation support a fixed cutoff or top score for I.Q. score.

Supreme Court, and remanded the case to that court for reconsideration in light of *Atkins*. Perkins, according to the reported Alabama Supreme Court opinion, had a full scale IQ score of 76. *Perkins v. State*, 808 So. 2d 1143, 1145 (Ala. 2001). Likewise, in *Blue v. Cockrell*, 298 F.3d 318, 319 (5th Cir. 2002), the prisoner had been tested numerous times and had IQ scores in a wide range from 64 through 90. The Fifth Circuit affirmed the district court, which had granted the writ of habeas corpus on the basis of constitutionally defective jury instructions. *Id.* at 322. The Court, however, suggested that the state courts take *Atkins* into consideration in their resentencing. *Id.* at 322n.2.

In *State v. Lott*, 773 N.E.2d 551 (Ohio 2002), the Ohio Supreme Court remanded a post-conviction petitioner's case to the trial court for an evidentiary hearing on *Atkins* even though, as previously reported, the prisoner had taken several tests and had achieved widely varying scores: his full scale IQ as found by these instruments ranged from 72, 77-81, 83-91, and 87-97. *Id.* (Lundberg Stratton, J., dissenting), citing *State v. Lott*, 51 Ohio St. 160, 172, 555 N.E.2d 293 (1990).

b) Under the Standard and Accepted Scientific and Diagnostic Criteria, Ron Chris Foster is mentally retarded.

In any event, Ron Chris Foster meets the test for mental retardation under any standard. Dr. Mark Zimmermann, who was the original expert on Foster's first post-conviction petition, evaluated Foster for mental retardation for the first time on December 31, 2002.⁹ Zimmermann's affidavit

⁹Foster's first post-conviction petition was filed long before this Court held that capital post-conviction petitioners were entitled to funds for counsel and expert assistance. He was represented in those proceedings by the now-defunct Mississippi Capital Defense Resource Center ("the Center"), which had no funds to pay Dr. Zimmermann to provide expert services in the preparation and litigation of the petition. *See supra* at 3-4. At his own expense, Dr. Zimmermann gave an affidavit which repeated the test results previously reported by the Mississippi State Hospital pre-trial evaluation and outlined possible future lines of investigation. The State opposed the Center's motion for expert assistance, which was denied, consistent with the then-existing case law. *Id.* In Federal Court the State also opposed Foster's application for

reports that Ron Chris Foster is mildly mentally retarded with a full scale IQ of 62. Exhibit “B”, Zimmermann Affidavit at 1-2, ¶6. Foster’s performance IQ is 59; his verbal IQ is 68. *Id.* Tests of neuropsychological functioning are consistent with a diagnosis of mental retardation. *Id.* at 2 ¶7.

Additionally, Dr. Zimmermann’s administration of the Vineland test, the same one cited in *Atkins*, indicates that Foster is functioning and always has functioned at an adaptive level consistent with the IQ test scores. *Id.* at 2 ¶6.

It is clear that the onset of Foster’s intellectual and adaptive deficiencies predated his 18th birthday. As this Court held in its opinion on Foster’s first post-conviction petition, Foster’s intellectual life before that date included: “the failure to complete eighth grade, grades like C and D, yearly averages of 58 in English, 46 in math, 52 in history, 62 in industrial arts, 74 in science, and 40 days of missed school.” *Foster v. State*, 687 So.2d 1124, 1133 (Miss. 1996). The Court also noted “the educational environment of a defendant whose father cannot read or write, and parents who cannot understand or respond to simple questions. Foster’s father could not even read the letters on his son’s report card enough to determine whether his son was doing well or poorly in school.” *Id.*

Foster’s sister, Sandra Foster of Tupelo, underscores the early onset of Foster’s mental retardation. She testifies that “[w]hen Ron was in Vine Street Elementary School in Aberdeen, the school tested Ron to decide what level he should attend at the school. After the test, Ron was placed in classes in the Annex, which was for the remedial or special classes. This was when Ron was in the third and the fourth grades. Ron attended special classes from that time until he left school.”

Exhibit “C,” Sandra Foster Affidavit at ¶¶2-3.

funds, saying that no new facts could be validly injected into the case at that stage. District Judge Lee denied the motion, and again Foster was denied the services of an expert psychologist. *Id.*

Thus Foster meets all three of the criteria used in all of the tests cited by the Court in *Atkins*. Foster's expert psychologist even administered the same test instruments used in *Atkins*: the Wechsler Adult Intelligence scale III, Benton Visual Retention test, the screening test for the Luria-Nebraska Neuropsychological battery- Adult form, and the Vineland. Exhibit "B", Zimmermann Affidavit, at 1-2 ¶6. There is no doubt that Foster has met his burden of showing that his execution would violate the Eighth Amendment as interpreted in *Atkins*.

c) The Procedure for Determining Whether Defendants/Prisoners are Death-Eligible Under the Eighth Amendment as Interpreted By *Atkins*.

The *Atkins* Court suggested that the state courts should have the first opportunity to apply its ruling: "As was our approach in *Ford v. Wainwright*, with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Atkins*, 122 S.Ct. at 2250, citing *Ford v. Wainwright*, 477 U.S. 399, 405, 416-17, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The Fifth Circuit, following suit, held that "the state [courts] must be given the first opportunity to apply the Supreme Court's holding in order to ensure consistency among state institutions and procedures and to adjust its prosecutorial strategy to the hitherto unforeseen new rule." *Bell v. Cockrell*, *supra*, 310 F.3d at 333.

If *Ford v. Wainwright* is the right analogy, then this Court can take its guidance from *Billiot v. State*, 515 So. 2d 1234 (Miss. 1987), the leading case applying *Ford* to Mississippi. *Ford* federalized and expanded the principle that a death-sentenced prisoner who is insane cannot be executed. Billiot had already raised, in his first post-conviction petition, the claim that he was incompetent to be executed by reason of insanity. This Court rejected the claim, holding that a death-sentenced prisoner's post-conviction petition must prove "to a reasonable probability" that his insanity

arose after his trial in order to be granted an evidentiary hearing on the issue. *Billiot v. State*, 478 So. 2d 1043, 1045 (Miss. 1985).

After *Ford*, however, this Court recognized that it could not impose that burden on the prisoner. Thus this Court held that, in light of *Ford*, “the sole question [is] whether Billiot, within the pleading confines of the Uniform Post-Conviction Relief Act, has sufficiently posed allegations which, if proven, would entitle him to relief. In other words, has he alleged facts which require further inquiry in the expanded setting of an evidentiary hearing?” *Billiot v. State*, 515 So. 2d 1234, 1236 (Miss. 1987) (emphasis added). The *Billiot* Court then held:

Billiot has presented allegations under oath which, if true, bring into serious question the legality of execution under both state and federal law. In the face of this fact-backed pleading, we acknowledge Billiot’s claim procedurally alive substantially showing denial of a state or federal right and conclude that he is entitled to an in-court opportunity to prove his claims. Our function is not to resolve issues of contested fact by a process of trial by affidavit.

Id., 525 So. 2d at 1237. The Court granted an evidentiary hearing on the insanity issue. *Id.* at 1238.

Guided by this analogy, then, the only question is whether Foster has alleged facts which, if true, would require his death sentence to be vacated under *Atkins*. The answer, as set forth above, is clearly in the affirmative. Foster is entitled under *Billiot* to an in-court opportunity to prove his claim to be mentally retarded.

There is a further issue, however, about what type of hearing is required. Four days after *Atkins* was decided, the U.S. Supreme Court handed down an opinion in another case interpreting the Sixth Amendment right to a jury trial. That case, *Ring v. Arizona*, 122 S.Ct. 2428 (2002), read in conjunction with *Atkins*, requires that the evidentiary hearing on Foster’s mental retardation claim be submitted to a jury, not a judge sitting alone as finder of fact.

In *Ring* a Sixth Amendment challenge was brought to Arizona's capital punishment scheme requiring a judge to find the existence of at least one aggravating factor in order for a defendant convicted of capital murder to be sentenced to death. Relying on the constitutional principles established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that the Sixth Amendment does not permit a defendant to be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone), *Ring* argued that *Apprendi* was irreconcilable with the Court's prior decision in *Walton v. Arizona*, 497 U.S. 639 (1990), which upheld Arizona's judge-sentencing procedure.

The *Ring* Court agreed and held that the Sixth Amendment requires that any finding of fact that makes a defendant eligible for the death penalty must be made by the jury beyond a reasonable doubt. *Ring*, 122 S.Ct. at 2440. Justice Scalia's concurring opinion also states: "All facts essential to the imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be made by the jury beyond a reasonable doubt." *Ring*, 122 S.Ct. at 2444 (Scalia, J. concurring) (emphasis supplied). While *Ring* dealt specifically with statutory aggravating circumstances, it included "factfinding[s] necessary to . . . put [a defendant] to death." *Id.* at 2443.

As established above, *Atkins* held that the Eighth Amendment prohibits a mentally retarded defendant from being sentenced to death. Thus a mentally retarded defendant is constitutionally ineligible for the death penalty. *Atkins*, 122 S.Ct. at 2252. Since mental retardation is now a factual issue upon which a defendant's eligibility for death turns, "that fact. . . must be found by a jury beyond a reasonable doubt." *Ring*, 122 S.Ct. at 2439.

Accordingly, the only constitutional remedy which will permit a death sentence for Ron Chris

Foster is a new proceeding where a new jury makes the determination, beyond a reasonable doubt, that he is not mentally retarded. In the absence of such a finding, Foster cannot be subject to the death penalty. As a result the evidentiary hearing on Foster's *Atkins* claim must be one tried to a jury.

This is not a strange procedure to Mississippi capital jurisprudence. This Court already has held that where an invalid aggravating circumstance is used to secure a death sentence, the case must be remanded to a new jury for a re-sentencing proceeding. *Clemons v. State*, 593 So.2d 1004, 1006 (Miss. 1992) (“[f]inding aggravating and mitigating circumstances, weighing them, and ultimately imposing a death sentence are, by statute, left to a properly instructed jury”). This principle has also been applied to post-conviction proceedings. See *Booker v. State*, 699 So.2d 132 (Miss. 1997); *Cole v. State*, 666 So.2d 767 (Miss. 1995); *King v. State*, 656 So.2d 1168 (Miss. 1995); *Stringer v. State*, 638 So.2d 1285 (Miss. 1994); *Dufour v. State*, 1994 WL 872420 (Miss. 1994); *Davis v. State*, 655 So.2d 864 (Miss. 1995); *Hill v. State*, 659 So.2d 546 (Miss. 1994); *Smith v. State*, 648 So.2d 63 (Miss. 1994); *Irving v. State*, 618 So.2d 58 (Miss. 1992); *Gilliard v. State*, 614 So.2d 370 (Miss. 1992).

Following these principles, this Court should grant the Application on this claim, and remand the case to the Circuit Court of Lauderdale County for an evidentiary hearing before a jury on Foster's claim that his death sentence is unconstitutional under *Atkins*.

D. CLAIM II: Death Sentence Against Prisoner Who Was Juvenile At Time of Offense is Barred by the Eighth Amendment

In their dissenting opinions in a recent case, three of the Justices of the United States Supreme Court expressed their opinions that it would be appropriate to revisit the rule in *Stanford v. Kentucky*,

492 U.S. 361 (1989) in light of the Court's opinion in *Atkins v. Virginia*, 536 U.S. ___ (2002). Justice Stevens opined that

[g]iven the apparent consensus that exists among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender, I think it would be appropriate for the Court to revisit the issue at the earliest opportunity.

Patterson v. Texas, ___ U.S. ___, 2002 WL 1986618, order denying application for stay of execution and denying petition for writ of habeas corpus (August 28, 2002) Stevens, J., dissenting. Justices Ginsburg and Breyer agreed:

This Court's decision in *Atkins v. Virginia*, 536 U.S. ___ (2002), made it tenable for a petitioner to urge reconsideration of *Stanford v. Kentucky*, 492 U.S. 361 (1989) For the reasons stated by Justice Stevens, I think it appropriate to revisit the issue at this time.

Id., Ginsburg and Breyer, JJ., dissenting. Petitioner, Ron Chris Foster, was seventeen years of age at the time that he committed the subject crime. More recently, four justices of the Court expressed unequivocal agreement with Foster's claim that the Eighth Amendment bars execution of juveniles. In *In Re Stanford*, 537 U.S. _____ (2002), Justice Stevens again makes his position and that of Justices Souter, Ginsburg and Breyer clear that the Eighth Amendment bars the execution of juvenile offenders:

The practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society. We should put an end to this shameful practice.

a) A National Consensus Now Exists to Not Execute Juvenile Offenders

In 1989, the Court held in *Stanford v. Kentucky* that because no national consensus existed in opposition to the execution of sixteen and seventeen year old offenders, the execution of juveniles for offenses committed at those ages did not offend the Eighth Amendment. 492 U.S. at 373. In

arriving at this conclusion, the Court rejected the concept that non-death penalty states could be included in the calculus determining whether a consensus exists. 492 U.S. at 371 n.2.

In *Atkins v. Virginia*, the Court adopted just this approach in determining whether a national consensus exists against the execution of the mentally retarded. 122 S. Ct. 2242, 2249. Applying the *Atkins* approach of counting the jurisdictions that do not permit any capital punishment with the jurisdictions that have capital punishment statutes, it is clear that a national consensus exists against the execution of juvenile offenders.

At the heart of the prohibition against cruel and unusual punishment is the idea that the punishment must be proportional to the crime. *See Atkins*, at 2246-47. The definition of proportionality is found in the standards that currently prevail, not those in force at the time the Eighth Amendment took effect. *Id.* at 2247. Exactly what standards prevail should be determined by “objective factors to the maximum possible extent.” *Id.* (citation omitted).

In applying this proportionality review to determine the unconstitutionality of executing the mentally retarded, this Court considered legislation as the “most reliable objective evidence of contemporary values.” *Id.* (citation omitted). In addition to reviewing the legislative trends, this Court considered the positions of organizations with germane expertise, of religious communities, of the world community, and of the American public. *Id.* at 2249, n. 21. Finally, this Court considered its own judgment on the issue. *Id.* at 2247-48. In the end, this Court concluded that the practice of executing the mentally retarded “has become truly unusual, and it is fair to say that a national consensus has developed against it.” *Id.* at 2249.

Using all of the same objective standards employed in *Atkins*, it is evident that a national consensus has likewise developed against the execution of juveniles. A comparison of the prevailing

views on the issue of executing the mentally retarded with those on the issue of executing juveniles shows that the consensus against the execution of juveniles is equal to if not greater than that against execution of the mentally retarded.

1. Legislation on the Issue of the Juvenile Death Penalty

At the time of *Stanford v. Kentucky*, eleven states established eighteen as the minimum age of eligibility for the death penalty, four states established seventeen as the minimum age, and twenty-two states established age sixteen as the cutoff. *Id.* at 371. One state, New Hampshire, had conflicting statutes at the time, with one statute setting eligibility at age seventeen and one at age eighteen. In *Stanford*, the Court concluded the legislation did not establish a degree of national consensus sufficient to declare the execution of a 16 or 17 year old to be cruel and unusual punishment.

In comparison, today sixteen states have established eighteen as the minimum age of death eligibility, five states have established seventeen as the minimum age, and seventeen states have established sixteen as the minimum age.¹⁰ Not one state has lowered the age of eligibility to either 16 or 17, despite the green light to do so in *Stanford*. Instead, state legislatures have moved in precisely the opposite direction.¹¹

Since *Stanford*, five states have created new law forbidding the juvenile death penalty. Most recently, Indiana raised its statutory minimum age from 16 to 18 years old.¹² The Montana

¹⁰ Streib, Victor L., *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-June 30, 2002* (July 15, 2002) (unpublished manuscript available at <http://www.law.onu.edu/faculty/streib/juvdeath.pdf>).

¹¹ Id.

¹² S.426, 112th Leg., Reg. Sess., 2002 In. Laws.

Legislature did the same thing in 1999.¹³ When New York reinstated the death penalty in 1995, its statute set the minimum age at eighteen for eligibility of the death penalty.¹⁴ The State of Kansas' 1994 reenactment of the death penalty likewise set the minimum age for death penalty eligibility at eighteen.¹⁵ Finally, the State of Washington abolished the juvenile death penalty in a Washington Supreme Court ruling. *State v. Furman*, 858 P.2d 1092, 1103 (Wash. 1993). The Washington legislature has done nothing to overturn the court's decision. Furthermore, the District of Columbia, the military courts, and the federal government all proscribe the death penalty for those under age eighteen.

In addition to the definitive action taken by these five states, all legislative efforts in other states show a trend towards abolition of the juvenile death penalty. In *Brennan v. State*, 754 So. 2d 1, 7 (Fla. 1999), Florida raised its minimum age for eligibility for the death penalty from 16 to 17 years of age. Ten states that currently use the death penalty are considering legislation to raise the minimum age for eligibility to eighteen: Arizona, Arkansas, Florida, Kentucky, Mississippi, Missouri, Nevada, Pennsylvania, South Carolina, and Texas. This is the most legislative attention the issue has been given in twenty years.¹⁶

Paired with the twelve states that do not permit capital punishment for persons of any age, a total of twenty-eight states currently prohibit the execution of juvenile offenders, while twenty-two states seem to allow such executions. This closely parallels the numbers on the mental retardation

¹³ H.B. 374, 1999 Leg., Reg. Sess., 1999 Mt. Laws.

¹⁴ N.Y. Crim. Proc. Law §400.27 (McKinney 2002).

¹⁵ Kan. Crime. Code Ann. §21-4622 (Vernon 2001).

¹⁶ Streib, Victor L., *The Juvenile Death Penalty Today*, p. 7.

issue at the time of *Atkins*, with thirty states prohibiting the execution of the mentally retarded compared to twenty jurisdictions permitting such executions. In *Atkins*, these numbers prompted this Court to conclude:

The large number of states prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.

Id. at 2249.

2. Consistency of the Trend Away From Executing Juveniles

In considering the importance of the legislative movement, this Court commented in *Atkins* that “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.” *Id.* at 2249. The large number of states banning executions of the mentally retarded “carries even greater force” when the overwhelming support such legislation received is considered. *Id.*

A similarly large amount of support is seen in recent legislative efforts to abolish the juvenile death penalty. The Indiana legislation was passed by a vote of 44-3 in the Senate and 83-10 in the Assembly.¹⁷ The Montana legislation passed by a margin of 44-5 in the Senate and 85-15 in the Assembly.¹⁸ Even in Washington, where the action was accomplished by the Washington Supreme Court, all Justices of the Court concurred in the decision abolishing the juvenile death penalty. *State v. Furman*, 858 P.2d 1092 (Wash. 1993).

¹⁷ Indiana State Legislature Archive (2002), 7/16/2002 SB 0426.

¹⁸ Montana Legislative Archive (1999) Detailed Bill Information HB 374.

In Florida, the bill¹⁹ passed the Senate 34-0, but the House of Representatives did not vote on the measure by the end of the session. Even in Texas, the only state that executes juvenile offenders with any regularity, the bill²⁰ passed the House 72-42 before becoming stalled in the Senate without a vote. In New Hampshire, the legislature voted to abolish the death penalty completely in 2000, thereby necessarily including juveniles.²¹

Like the trend away from executing the mentally retarded, the efforts to end the executions of juveniles are receiving near unanimous support. This fact strengthens the impact of the position already taken by over half of the states outlawing the juvenile death penalty.

3. The Practice of Executing Juveniles Has Become “Unusual”

The second factor used by this Court in *Atkins* to bolster the strong legislative stance against executing the mentally retarded was the fact that the practice of carrying out such executions is uncommon. *Id.* at 2249. This factor also bolsters the case against executing juvenile offenders. Of the twenty-two states that retain the death penalty for juvenile offenders, only two have used this punishment with any frequency – Texas and Virginia. They have carried out 14 of the 19 juvenile executions in the United States since 1976. Texas is responsible for eleven of the executions, and Virginia for three.²²

Five other states have carried out only one execution each – Georgia, Louisiana, Missouri,

¹⁹ SB 1212 (2002).

²⁰ H.J. of Tex., 77th Leg., R.S. page 3098 (2001).

²¹ HB 1548.

²² Streib, Victor L., *The Juvenile Death Penalty Today*, pp. 4-5 (Table 1).

Oklahoma, and South Carolina.²³ Clearly, these states are not closely tied to the punishment. Before these modern day singular executions, Louisiana last executed a juvenile in 1948, Georgia in 1957, Missouri in 1921, and South Carolina in 1948. Oklahoma had never executed a juvenile offender prior to 1999.²⁴ Mississippi last executed a juvenile in 1950.

This leaves fifteen “death states” that have not carried out a single juvenile execution, although permitted by law. Of these states, eight of them have no juvenile offenders on their death row, two states have one such offender, and four states have two each.²⁵ As evidence of the continuing trend away from juvenile executions, in the last year, Virginia overturned the death sentence of its only juvenile on death row.²⁶ Furthermore, the reversal rate for death sentences imposed on juvenile offenders is 86%,²⁷ and juvenile death sentences have dropped in 2001 to only 1.8% of the total number of death sentences imposed in the United States since 1973.²⁸

What these statistics show is that in most of the states that do retain the juvenile death penalty, there is no perceived need to pursue legislation barring such executions because it is not an issue. This Court recognized this fact in *Atkins*, and after noting that the execution of the mentally retarded is uncommon, recognized that “there is little need to pursue legislation barring

²³ Streib, Victor L., *The Juvenile Death Penalty Today*, pp. 4-5 (Table 1).

²⁴ Streib, Victor L., *Death Penalty for Juveniles* (Indiana University Press 1987).

²⁵ Fact Sheet: The Juvenile Death Penalty in the United States (The American Bar Association 2002).

²⁶ Washington Post, 9/25/01. From the Death Penalty Information Center at www.deathpenaltyinfo.org.

²⁷ Streib, Victor L., *The Juvenile Death Penalty Today*, p. 9.

²⁸ *Id.*, p. 14.

the execution of the mentally retarded in those States [that do allow such executions].” *Atkins*, 122 S. Ct. at 2249. Likewise, there is little need for concerned organizations and members of the public to demand change, although support for such change may be high, and public opposition to executing the mentally retarded and juveniles may be high.

4. Other Objective Factors Support the Legislative Trends Away From Sanctioning Use of the Juvenile Death Penalty

In *Atkins*, after considering legislative support for abolishing the death penalty for mentally retarded offenders, the Court looked at “[a]dditional evidence [that] makes it clear that this legislative judgment reflects a much broader social and professional consensus.” *Atkins*, 122 S. Ct. at 2249, n.21. Examining the same additional evidence as it relates to the juvenile death penalty reveals a similar consensus against the use of this punishment.

- a. Organizations With Germane Expertise Have Adopted Official Positions Opposing the Imposition of the Death Penalty Upon a Juvenile Offender.

Opposition to the juvenile death penalty by expert organizations has been longstanding. In his *Stanford* dissent, Justice Brennan cited the following organizations, among others, that filed amicus briefs urging an end to juvenile executions:

American Bar Association, Child Welfare League of America, National Parents and Teachers Association, National Council on Crime and Delinquency, Children’s Defense Fund, National Association of Social Workers, National Black Child Development Institute, National Network of Runaway and Youth Services, National Youth Advocate Program, American Youth Work Center, American Society for Adolescent Psychiatry, American Orthopsychiatric Association, Defense for Children International - USA, National Legal Aid and Defender Association, National Association of Criminal Defense Lawyers, Office of Capital Collateral Representation for the State of Florida, International Human Rights Law Group, and Amnesty International.

Stanford, 492 U.S. at 389, n.4.

Since *Stanford*, the list of such organizations has grown. The Constitution Project, a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues, established a blue-ribbon committee to develop reforms to address wrongful convictions in death penalty cases.²⁹ In its publication *Mandatory Justice, Eighteen Reforms to the Death Penalty*, the group explicitly recommended barring the death penalty for persons under the age of 18 at the time of the crime to reduce the risk of wrongful execution, ensure that the death penalty is reserved for the most culpable offenders, and to effectuate the deterrent and retributive purposes of the death penalty.³⁰ The American Psychiatric Association, The American Academy of Child and Adolescent Psychiatry, The National Mental Health Association, The National Center For Youth Law, The Coalition for Juvenile Justice, and The American Humane Association have all joined this position and support the abolition of the juvenile death penalty.

b. Widely Diverse Religious Communities Oppose the Juvenile Death Penalty

This Court commented on the number of different religions that filed amicus briefs in support of stopping executions of the mentally retarded. *Atkins*, 122 S. Ct. at 2249, n.21. Religious opposition to the juvenile death penalty dates back at least to the time of *Stanford*, where the following groups filed amicus briefs advocating an end to executing juveniles:

²⁹ The 30-member Death Penalty Initiative committee describes itself in its mission statement: “We are supporters and opponents of the death penalty, Democrats and Republicans, conservatives and liberals. We are former judges, prosecutors, and other public officials, as well as journalists, scholars, and other concerned Americans. We may disagree on much. However, we are united in our profound concern that, in recent years, and around the country, procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment have been significantly diminished.”

³⁰ The Constitution Project, *Mandatory Justice, Eighteen Reforms to the Death Penalty*, p.11(2001). Can be accessed on line at www.ConstitutionProject.org.

American Baptist Church, American Friends Service Committee, American Jewish Committee, American Jewish Congress, Christian Church (Disciples of Christ), Mennonite Central Committee, General Conference Mennonite Church, National Council of Churches, General Assembly of the Presbyterian Church, Southern Christian Leadership Conference, Union of American Hebrew Congregations, United Church of Christ Commission for Racial Justice, United Methodist Church General Board of Church and Society, United States Catholic Conference, and West Virginia Council of Churches.

Stanford, 492 U.S. at 389, n.4.

c. The World Community Overwhelmingly Opposes the Execution of Juveniles

The execution of juvenile offenders has all but ended in every nation but the United States.³¹ Although domestic differences are small between the statutory bars on executing mentally retarded and juvenile offenders, the juvenile bar has so much more universal, codified support that it has achieved customary international law and, indeed, *jus cogens* status. The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights, and the U.N. Convention on the Rights of the Child (CRC) expressly prohibit the death penalty for juvenile offenders. The United States soon will be the only country in the world that has not ratified the CRC, as Somalia, the only other holdout, recently signed the CRC and announced its intention to quickly ratify the treaty. One hundred and ninety-one nations have adopted the fundamental standards articulated in this treaty.³²

In the last decade, the United States has executed more juvenile offenders than all other nations combined. Since 1990, only seven countries are reported to have executed persons who were

³¹ Amnesty International, “Fact Sheet” (2002).

³² Amnesty International, *The Death Penalty Worldwide* (2002).

under 18 years of age at the time of the crime – The Democratic Republic of Congo, Iran, Nigeria, Pakistan, Yemen, Saudi Arabia, and the United States. The nations of Pakistan and Yemen have since abolished the juvenile death penalty, while Saudi Arabia and Nigeria deny that they have executed juvenile offenders.

In the last three years, the number of nations to execute juvenile offenders has dropped significantly, to a mere three: Iran, the Democratic Republic of Congo, and the United States. Moreover, just this past year, Iran stated that it no longer executes juvenile offenders, and the leader of the Democratic Republic of Congo commuted the death sentences of four juvenile offenders.

Continued juvenile executions violate international law, thus isolating the United States from the international community. The near unanimous position of the world community supports the legislative and other trends in this country showing an overwhelming consensus against the execution of juveniles.

d. Public Opinion Shows a Consensus Among Americans that We Should Not Be Executing Juvenile Offenders.

Scientific studies confirm that the majority of Americans believe that the death penalty should not apply to juveniles.³³ In one study, only 35% of death-qualified mock jurors were willing to sentence 17-year-old defendants with the death penalty.³⁴ More recent studies substantiate this trend. A 2001 study showed that “while 62% back the death penalty in general, just 34% favor it for those

³³ See, e.g., Skovron, Sandra Evans, Joseph E. Scott, and Francis T. Cullen. *Crime and Delinquency*, October 1989 v.35 n.4 pp.546-561.

³⁴ Finkel, N.J., Hughes, K.C., Smith, S.F., & Hurabiell, M.L., “Killing kids: The juvenile death penalty and community sentiment.” *Behavioral Sciences and the Law*, 12, 5-20 (1994).

committing murder when under the age of 18.”³⁵ The same study cites a 2001 survey by the Princeton Survey Research Associates, which showed that 72% favored the death penalty for at least the most serious murders, but only 38% wanted it applied to offenders under eighteen.³⁶ Similarly, a May 2002 Gallup poll showed that more than two-thirds of Americans, 69%, oppose the practice of executing juveniles.³⁷

Public opinion is also revealed in the actions of juries. The rate of juvenile death sentencing fluctuated greatly in the years following the reinstatement of the death penalty, and slowed to an average of approximately 2% of the total number of death sentences in the mid-1980s. In the mid to late 1990s, the rate ranged from approximately 2% to 6%. In the last few years, however, the juvenile death penalty sentencing rate has declined significantly to an average of 1.7% per year. Thus far in 2002, no juvenile death sentences have been verified.³⁸ These statistics demonstrate that not only is the public opposed in theory to the execution of juveniles, but in fact, they often in practice refuse to execute a juvenile offender.

It is clear, through the number of states that do not have the death penalty, the number of states who have the death penalty but who do not allow its imposition on juveniles, the number of states who have not conducted a juvenile execution, the number of states who have no juveniles on

³⁵ Smith, Tom W., “Public Opinion of the Death Penalty for Youths.” National Opinion Research Center, University of Chicago, prepared for the Joyce Foundation, p. 2 (December 2001).

³⁶ *Id.*

³⁷ Gallup News Service, “Slim Majority of Americans Say Death Penalty Applied Fairly,” (May 20, 2002).

³⁸ Streib, Victor L., *The Juvenile Death Penalty Today*, p. 14.

their death rows, the number of states to have legislatively or judicially raised the death penalty minimum age (despite the invitation in *Stanford* to raise it), and consistent public polls that there is a national consensus in this country against the execution of juvenile offenders. Therefore, the execution of juvenile offenders violates evolving standards of decency, and thus the Eighth Amendment. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (“evolving standards of decency . . . mark the progress of a maturing society”).

b) Well-Established Research on Adolescent Brain Development Reinforces the Eighth Amendment’s Evolving Standards of Decency Which Now Forbid the Death Penalty for 17-Year-Olds.

1. The Human Brain Continues to Evolve into the Early Twenties With the Mental Ability to Control Impulses Developing Last.

Scientific research was relied upon by the Court in *Thompson v. Oklahoma*, 487 U.S. 815, 833-838 (1988) (Stevens, J., plurality opinion). During the ensuing years since *Thompson* and *Stanford*, this research has continued and has reinforced the earlier findings.

The new research findings come chiefly from magnetic resonance imaging (MRI) of both the structural and functional varieties. Numerous news articles describe recent MRI studies comparing adolescent brains to adult brains and which suggest a connection between teen behavior and brain development. *See e.g.*, Matt Crenson, *Brain Changes Shed Light on Teen Behavior*, The Times-Picayune, December 31, 2000, p. A-18; Daniel R. Weinberger, *Teen Brain Lacks Impulse Control*, Seattle Post-Intelligencer, March 13, 2001, ed.; Shankar Vedantam, *Are Teens Just Wired That Way?*, The Washington Post, June 3, 2001, sec. A.

Structural MRI has revealed that the brain changes as one matures, that different parts change

at different times, and that the frontal lobes (and more particularly the pre-frontal lobes) along with a subcortical area, the striatum, change most dramatically between an sample of youths ages 12 to 16 and a sample of adult ages 22 to 30. *See, e.g.,* E.R. Sowell, P.M. Thompson, C.J. Holmes, T.L. Jernigen, & A.W. Toga, *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neuroscience 859 (1999). Functional MRI uses similar techniques to observe changes in brain activity and has found that changes in those areas indicative of maturation continue to take place during late adolescence and into early adulthood.

A copy of an affidavit from Dr. Ruben C. Gur, Professor and Director of Neuropsychology in the Department of Psychiatry of the University of Pennsylvania Health System is attached to Foster's Application for Leave to File Motion to Vacate Death Sentence. Dr. Gur's summary of the evidence from the recent MRI research reveals:

Increase in white matter continues well into late adolescence, and the frontal lobes are the last to myelinate. The behavioral significance of this neuroanatomical finding is that the very brain system necessary for inhibition and goal-directed behavior comes "on board" last and is not fully operational until early adulthood (about 18-22 years).

Affidavit of Dr. Ruben C. Gur.

We know that the prefrontal cortex is most important for "executive functioning" including planning, and using judgment, controlling impulsiveness, etc. Now we see that there is an objective basis for the common knowledge that teenagers tend to have a lot less of these qualities than adults, both in terms of the structure of the brain (which is manifestly more immature in the prefrontal area in adolescents than adults) and function of the brain.

Confirming what every parent of a teenager knows, the scientific research has concluded that

adolescents actually think differently from adults. D. Keating, *Adolescent Thinking*, in “At the Threshold,” 54-89 (S. Feldman et al. Eds., 1990); W. Overton, *Competence and Procedures*, in “Reasoning, Necessity and Logic,” 1-32 (W. Overton ed. 1990). These recent neurological studies conclude that the adolescent brain is not fully developed and, among other things, undergoes major reorganization in the area associated with social behavior and impulse control. *See Physical Changes in Adolescent Brains May Account for Turbulent Teen Years*, McClean Hospital Study Reveals, <http://www.mclean.harvard.edu/PublicAffairs/TurbulentTeens.htm>; National Institute of Mental Health, *Teenage Brain: A Work in Progress*, 2/6/01, <http://www.nimh.nih.gov/publicat/teenbrain.cfm>.

To a certain degree, this latest research simply confirms what we have always known or suspected about the brain development of 17-year-olds. While they often appear to be “fully-grown” physically and may seem to be functioning as adults, their judgment and impulse-control are simply not that of adults. Granted, they may know “right from wrong” under an infancy defense or an insanity test, but they nonetheless are lacking in fully adult-level functioning of their brains. They may make horrible decisions, and they act on impulse, without thinking clearly about the consequences.

Justice James W. Smith, Jr., stated recently:

You know, teenagers are a unique group of people. They view themselves as absolutely invincible. They don't think they can die. I know I'm blunt but they absolutely think nothing could ever happen to them, so they will risk practically anything. We expect kids to think like adults, but they don't. They never have and they never will.

Smith, *Ethics and Child Advocacy*, *The Mississippi Lawyer* 24, at 26 (July/August 1994).

2. Legitimate Objectives of Punishment Are Not Served by Imposing Adult Capital Punishment Upon Offenders Who Do Not Have Adult Mental Abilities.

Deterrence and retribution are the generally accepted objectives of capital punishment. However, these objectives do not apply to 17-year-olds whose brains are not fully developed, particularly as to judgment and impulse control. Elkhonon Goldberg's *The Executive Brain: Frontal Lobes and the Civilized Mind* (Oxford University Press 2001) describes the frontal lobes as "the CEO of the brain" and concludes that those lobes "cannot fully assume their leadership role" until they are mature. *Id.* at 144-145.

It further appears that adolescents such as Chris Foster typically do not come up even to the standards of their 17-year-old peers. Other factors in their lives often hold back their mental development even further, making them even less culpable mentally than others their age. *See, e.g.,* ABA Task Force on Youth in the Criminal Justice System, *Youth in the Criminal Justice System* 39-46 (Chicago: American Bar Association) (2001). Chris Foster had the mental age of a 13 year old when George Shelton was shot and killed.

If the objective is general deterrence of similar homicidal behavior by other 17-year-olds in the future, executing Ron Chris Foster simply will not have that effect. The delayed brain development described above negatively impacts impulse control. The theory of deterrence, in direct contrast, assumes a person's ability to conduct an on-the-spot cost/benefit analysis and to control or redirect impulses. Not surprisingly, *Thompson* rejected the deterrence rationale as simply unacceptable for young offenders. *Thompson v. Oklahoma*, 487 U.S. 815, 837-838 (Stevens, J., plurality opinion).

The other prong of the general deterrence theory is that the execution of any one offender deters the behavior of all other potential offenders, including those older than age seventeen.

However, if the execution of all juvenile offenders were abolished, this would reduce executions nationally by about 2%. See Streib, *The Juvenile Death Penalty Today*, p. 4. That is, 98% of executions would continue to occur and would continue to have whatever impact they might have on these older potential offenders. A 2% reduction would have no significant impact on whatever deterrent effect might arguably exist.

Given the extensive research findings on capital punishment during the past several decades, the only legitimate objective that retains any credibility is retribution. However, the Court also has noted that “less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.” *Thompson v. Oklahoma*, 487 U.S. at 835 (footnote omitted). Given what we have learned since 1989 about adolescent brain development, this conclusion from *Thompson* is even more persuasive. Retribution is to be commensurate with the offender’s personal culpability. *Enmund v. Florida*, 458 U.S. 782, 798-800 (1982). Seventeen-year-olds simply do not and can not have a sufficient level of personal culpability to fully deserve the maximum adult punishment known to our legal system.

It is worth noting that in Mississippi, the only area where 17 year old children are treated as adults is in their eligibility to be tried as an adult for capital murder and to receive a death sentence.

For example:

if they are under eighteen, they cannot legally enter into contracts, buy or sell property, vote, maintain a residence or even choose the parent with whom they wish to live when their parents divorce. Under the age of twenty-one, a person cannot drink alcohol, purchase tobacco, or enter a casino.

McGilberry v. State, 741 So.2d 894 (Miss. 1999) (McRae, J. dissenting). Furthermore, no one under

eighteen in Mississippi may serve on a jury or purchase pornographic material. Miss. Code Ann. § 13-5-1 (1972); Miss. Code Ann. § 97-5-27 (Supp. 1987). A marriage certificate cannot issue to a couple if the male to be married is under 17 years of age without parental consent before a court of proper jurisdiction. Miss. Code Ann. § 93-1-5(d) (Sup. 1987). A person under the age of 17 may not obtain a drivers license without the approval of both parents. Miss. Code Ann. § 63-1-23 (Supp. 1987). Indeed, these legislative determinations regarding Mississippi's treatment of persons under the age of eighteen demonstrate that this Court should attach less culpability to 17 year old defendants.

3. Informed by the Recent Research on Adolescent Brain Development, the Death Penalty for 17-Year-Old Offenders is Contrary to Contemporary Standards of Decency.

This Court should also take into consideration the parallel issue of mental retardation and the international law setting. When added to the above-discussed concerns about adolescent brain development, these issues argue strongly that the juvenile death penalty is not in accord with contemporary standards of decency in this country or literally anywhere in the world.

It is impossible to separate the legal analysis of the death penalty for the mentally retarded, *see Atkins, supra*, from the death penalty for juveniles. Both are physically able to commit terrible crimes, but neither has the level of mental development to be held fully responsible and to receive the maximum punishment for those crimes. Both juvenile and mentally retarded offenders have “the mind of a child,” albeit often in the body of an adult. A national consensus opposing the death penalty for each group has become manifest, as recognized for the mentally retarded in *Atkins*, and recognizing that neither children nor those with the minds of children should receive the maximum

adult punishment.

This United States Supreme Court has been split in the past over the importance of comparative and international law in examining our national consensus concerning the death penalty. In *Atkins*, the views of the international community were taken into account. *Atkins*, 122 S. Ct. at 2249 n.21. The United States, represented in the juvenile execution issue almost exclusively by Texas, and to a lesser degree by Virginia, is essentially alone in the world in imposing the death penalty upon juvenile offenders. We feebly respond to the resulting international criticism by trying to explain that juvenile executions are only 2% of all American executions, that only one or two states actually engage in this practice, and that the vast majority of Americans do not allow their state or federal governments to engage in such un-American acts. Now is the time for Mississippi to acknowledge that our national standards of decency no longer permit the execution of juvenile offenders. It is an odious practice that has essentially ended throughout American except for a pair of holdout states. Should Mississippi be added to the list of “hold out” states? No, Mississippi can now show the world that it is in line with American values and standards by not executing Ron Chris Foster.

In summary, brain development continues typically through the teenage years and into the early twenties, with impulse control commonly developing last. General deterrence theories are simply inapplicable to 17-year-olds, since their stage of brain development does not lend itself to rational, cost/benefit analyses. American standards of decency, informed by the international community, now reject the imposition of the death penalty upon those with such immature brain development.

E. Claim III: Death Sentence Against Prisoner Who Was Juvenile At Time Of the Offense, And Who Has Significantly Subaverage Intellectual Capability, Is Barred By The Eighth Amendment

Taking the two previous claims together, it is clear that the execution of Ron Chris Foster violates *Atkins*. Assuming, for the sake of argument, that this Court finds the two claims in this Application sufficient, standing alone, to grant the relief requested, it should also consider them together. Both Claim I (mental retardation) and Claim II (youth at time of offense) go to the intellectual functioning and emotional control of the defendant – which bears directly on his personal culpability. Thus if both aspects of Foster’s case are considered together – that he was under 18 at the time of the offense and has clear indications of subaverage intellectual functioning and adaptive behaviors – it is even more clear that, under *Atkins*, he does not have the personal culpability that is the constitutionally required prerequisite to a valid sentence of death.

V. STAY OF EXECUTION IS REQUIRED

Because of the pendency of the January 8, 2003, execution date, this Court should issue an immediate stay of execution to consider the claims raised in the Motion to Vacate. Two prisoners, Tracy Alan Hansen and Jessie Darrell Williams, neither of whom claimed to be protected by the decision in *Atkins*, have been executed since *Atkins* was decided. Thus, this is the first post-*Atkins* successive petition to be presented to this Court, in which the *Atkins* question has been raised. *Atkins* is a precedent-setting decision which is expressly retroactively applicable to death-sentenced prisoners. Its application to Mississippi prisoners should be given more than cursory treatment.

VI. CONCLUSION

Because of the validity of the claims raised in this Motion, Petitioner asks this Court to grant the following relief:

- A) Issue its order immediately staying the pending January 8, 2003, execution;
- B) Pursuant to Miss. Code Ann. §99-39-27, issue the Order and Mandate of this Court vacating the death sentence based upon those claims the validity of which are apparent from the face of the Motion;
- C) Alternatively, grant Petitioner leave to file the Motion to Vacate Judgment and Death Sentence in the Circuit Court of Lauderdale County, Mississippi; and
- D) Grant such other relief as is just and proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the above and foregoing pleading to be hand-delivered to Marvin L. White, Jr., Assistant Attorney General, at the Office of the Attorney General, Carroll Gartin Justice Building, Jackson, Mississippi.

This the _____ day of January, 2003.

JAMES W. CRAIG
