IN THE SUPREME COURT OF FLORIDA

No. SC02–128

LINROY BOTTOSON,
Petitioner/Appellant,

versus,

STATE OF FLORIDA,
Respondent/Appellee.

On Appeal from the Denial of Post-conviction Relief
by the Circuit Court for the Ninth Judicial Circuit

Appellant's Initial Brief

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STATEMENT OF THE CASE

Linroy Bottoson was convicted on a single-count indictment charging the first-degree murder of Catherine Alexander, the post mistress of Eatonville, Florida. The evidence adduced by the State, and through Mr. Bottoson's testimony, is summarized in this Court's opinion affirming that conviction. *Bottoson v. State*, 443 So.2d 962 (Fla. 1984), *cert. denied*, 469 U.S. 873 (1984). On appeal, counsel asserted two assignments of error that were found to be either waived or harmless error. *Id.* Despite a jury instruction which precluded consideration of the mitigating evidence presented in the penalty trial, two jurors voted for a sentence less than death. Other pertinent facts are recited in Mr. Bottoson's petition for writ of habeas corpus which is currently pending before this Court. The arguments and allegations raised in that petition are hereby incorporated into this brief by specific reference as if fully set forth herein.

Mr. Bottoson timely filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. Following an evidentiary hearing, the trial court denied relief. Mr. Bottoson timely appealed to this Court which divided four to three, in favor of affirming the trial court's denial of relief. *Bottoson v. State*, 674 So.2d 621 (1996). Three Justices held that the credited evidence established that Mr. Bottoson's lawyer provided constitutionally deficient representation, and that a jury instruction which the majority and dissent agreed violated *Hitchcock v. Dugger*, 481 U.S. 393 (1987), required that Mr. Bottoson's death sentence be vacated. *Bottoson*, 675 So.2d at 625-29 (Kogan, J., dissenting). The majority opinion did not discuss or consider

the mitigating evidence presented at the penalty trial. At no time in its discussion of the *Hitchcock* error did the Florida Supreme Court majority consider the penalty phase evidence of Mr. Bottoson's non-violent character or the fact that three jurors did not believe the facts called for a death sentence, notwithstanding *Hitchcock* error. *Bottoson*, 674 So.2d at 623-25.

During the state post-conviction proceedings, Mr. Bottoson was represented by private pro bono counsel, James Russ. Mr. Russ continued to represent Mr. Bottoson in federal district court until he was allowed to withdraw by the United States Court of Appeals for the Eleventh Circuit, which appointed Mark E. Olive to represent Mr. Bottoson.

Mr. Bottoson also timely petitioned for a writ of habeas corpus alleging that his appellate counsel had been ineffective for failing to raise on appeal the racially discriminatory jury selection practices of Orange County at the time of trial. *Bottoson v. Singletary*, 685 So.2d 1302 (Fla. 1997). The sole issue discussed by this Court in its opinion was the State's removal of the only black venireperson. While denying his challenge because *State v. Neil*, 457 So.2d 481 (1984), was decided after Mr. Bottoson's appeal was denied, and because he was three months past the deadline for being able to recall the mandate, this Court did assume that "Bottoson would have been entitled to a new trial had *Neil* been decided at the time his appeal was before this Court." *Id.*

Mr. Bottoson timely sought federal habeas corpus relief which was denied. The United States Court of Appeals for the Eleventh Circuit granted Mr. Bottoson's

application for a certificate of appealability, and later denied relief. *Bottoson v. Moore*, 234 F.3d 526 (11th Cir. 2000). On February 28, 2001, the rehearing petition was denied. *Bottoson v. Moore*, 251 F.3d 165 (11th Cir. 2001) (mem.), *cert. denied Bottoson v. Moore*, 122 S. Ct. 357 (2001).

Some forty days later, the Governor signed a warrant for Mr. Bottoson's execution. On December 3, 2001, present counsel was appointed on December 3 by the Honorable Anthony Johnson. A *Huff* hearing was held on January 15, 2002, in which the trial court granted a hearing on two claims. An evidentiary hearing was held, over counsel's objection to the lack of notice of what law the court would apply, on the 16th and 17th. The next day, the trial court summarily denied all claims regarding Mr. Bottoson's brain damage and schizophrenia and denied the remaining claims concerning Mr. Bottoson's mental retardation and the challenge to section 921.137, Florida Statutes (2001). This appeal follows.

The evidence adduced at the evidentiary hearing will be discussed in greater detail in the argument section, *infra*.

SUMMARY OF ARGUMENT

The proceedings in the court below did not comport with due process. Mr. Bottoson's mental retardation was not assessed according the legal or psychological standards governing the issues he presented.

STANDARD OF REVIEW

The lower court's order is subject to de novo review in this Court. This Court reviews de novo questions of law and mixed questions of fact and law decided by trial

courts hearing motions brought pursuant to Florida Rule of Criminal Procedure 3.850. *Stephens v. State*, 748 So.2d 1028 (Fla. 1999). Mr. Bottoson's claims that (1) the execution of a person with mental retardation violates the Eighth Amendment and article 1, section 17 of the Florida Constitution, and (2) that a person raising such a claim must be afforded all the procedural safeguards required in a capital sentencing trial, are questions of law. Whether Mr. Bottoson's execution is prohibited because he has mental retardation depends upon what the legal definition of mental retardation is in this context. Determining what the correct rule of law is, and determine whether the lower court applied it, is the exclusive province of this Court. *See Rogers v. State*, 783 So.2d 980, 995 (Fla. 2001) ("whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court"). "When the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503 (1984).

This Court's cases hold that only if the trial court applied the correct rule of law are its factual determinations subject to competent, substantial evidence review. *Bowles v. State*, 26 Fla. L. Weekly S659, 2001 WL 11941 (Fla. 2001) ("this court reviews the record to determine whether the trial court applied the correct rule of law . . . and, **if so**, whether such finding is supported by competent, substantial evidence"); *Willacy v. State*, 696 So.2d 693, 695 (Fla. 1997) (same). *See also Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) ("if a [trial] court's findings rest on an erroneous

view of the law, they may be set aside on that basis"). "[W]here findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue. All this is elementary." *Pullman-Standard*, 456 U.S. at 291-92 (internal quotations and citations omitted). *See also Florida Power & Light Co. v. City of Dania*, 761 So.2d 1089, 1093 (Fla. 2000). Because the lower court in this case expressly refused to apply or be guided by any legally recognized standards, the only course is for this Court to say what the correct standards are and remand for further proceedings wherein they may be applied.

Similarly, this Court does not decide whether competent substantial evidence supports findings made following a hearing at which a petitioner's due process rights were violated. *Cherry Communications Inc., v. Deacon*, 652 So.2d 803 (Fla. 1995) (not reaching question whether competent substantial evidence supported commission's conclusion because hearing violated due process). In this case, the lower court violated Mr. Bottoson's due process rights by refusing to afford him the procedural safeguards that are required for a determination whether someone is constitutionally or statutorily ineligible for the death penalty, and by refusing to tell Mr. Bottoson's counsel what substantive and procedural rules the court would apply. Such a process is "not adequate for reaching reasonably correct results," so the results are due no deference. *Townsend v. Sain*, 372 U.S. 293, 316 (1963).

ARGUMENT

I. BECAUSE HE IS MENTALLY RETARDED, MR. BOTTOSON'S EXECUTION WOULD VIOLATE THE STATE AND FEDERAL CONSTITUTIONS; THE LOWER COURT HELD THAT

PETITIONER DID NOT STATE A CLAIM FOR RELIEF, BUT NEVERTHELESS HELD A GRATUITOUS HEARING AT WHICH

(1) AD HOC AND ERRONEOUS STANDARDS WERE APPLIED TO THE EVIDENCE, AND

(2) PETITIONER WAS NOT PROVIDED WITH THE PROCESS WHICH OTHER SIMILARLY SITUATED DEFENDANTS ARE GUARANTEED AT THIS CRITICAL STAGE OF THE PROCEEDING.

WHETHER SOME DEFENDANTS ARE EXECUTED AND OTHERS ARE NOT CANNOT CONSTITUTIONALLY TURN ON BEFORE WHOM THEIR CLAIMS ARE RAISED, WHEN (TRIAL OR POST-CONVICTION), AND WHAT STANDARDS THE JUDGE ARBITRARILY AND UNILATERALLY APPLIES

A. INTRODUCTION

Petitioner is 63 years old. He has severe brain damage–his brain cells are literally broken, absent, or malformed–which **prevents** him from thinking the way a person with a healthy, well, normal brain takes for granted. Mr. Bottoson also suffers from a major mental illness, schizophrenia, which severely warps the reality that his already broken brain experiences. Every day, Mr. Bottoson's senses incompletely and incorrectly absorb life in way that is profoundly and sadly different from the way you do, and he can do nothing about it.

Underlying (or overlaying) his every addled moment awake is his markedly blunted intellect. Mr. Bottoson intellectual functioning is significantly sub-average, and always has been. During his developmental years--before the age of 18–he experienced significant deficits in adaptive behavior, meaning he could not do what

others his age could do. Significantly sub-average intellectual functioning, when combined with deficits in adaptive behavior, with both manifesting before the age of 18, is diagnosed as mental retardation. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, p. 39. (4th ed., 1994)(DSM-IV); *see also* Fla. Stat., §§ 916.106(12) and 393.063(42) (2001).

Mr. Bottoson claimed below that his execution would violate the state and federal constitutions. First, the execution of the mentally retarded violates the Eighth Amendment. In *Atkins v. Virginia*, No 00-8452, the United States Supreme Court has granted certiorari to decide "whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment" today, when ten years ago it did not. *See Penry v. Lynaugh*, 492 U.S. 302 (1989) (hereinafter *Penry* I). If the Court rules that the execution of the mentally retarded violates the Eighth Amendment, then there could be no "default" of such a claim and it would have to be considered on collateral review. *See Penry I*, 492 U.S. at 331.

Second, the execution of the mentally retarded violates the state constitution. If Mr. Bottoson were being tried and sentenced today, he would be entitled to assert his mental retardation as a bar to a sentence of death.

> 921.137 Imposition of the death sentence upon a mentally retarded defendant prohibited.
>
> (1) As used in this section, the term "mental 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 section, means performance that is two or more standard deviations from the mean score

on a standardized intelligence test specified in the rules of the Department of Children and Family Services. The term "adaptive behavior," for the purpose of this definition, 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. The Department of Children and Family Services shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

(2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation.

(3) A defendant charged with a capital felony who intends to raise mental retardation as a bar to the death sentence must give notice of such intention in accordance with the rules of court governing notices of intent to offer expert testimony regarding mental health mitigation during the penalty phase of a capital trial.

(4) After a defendant who has given notice of his or her intention to raise mental retardation as a bar to the death sentence is convicted of a capital felony and an advisory jury has returned a recommended sentence of death, the defendant may file a motion to determine whether the defendant has mental retardation. Upon receipt of the motion, the court shall appoint two experts in the field of mental retardation who shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing. Notwithstanding s. 921.141 or s. 921.142, the final sentencing hearing shall be held without a jury. At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has mental retardation. If the court finds, by clear and convincing evidence, that the defendant has mental retardation as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.

However, this legislation also contains the following limitation: "(8) This section

does not apply to a defendant who was sentenced to death prior to the effective date of this act."

This statute reflects the evolved standard of decency in Florida not to execute persons who are mentally retarded. Thus, regardless of the United States Supreme Court's decision in *Atkins*, *supra*, and regardless of whether the statute is made retroactive, the Florida constitution now prohibits the cruel or unusual execution of a mentally retarded person. *Cf. Allen v. State*, 636 So.2d 494 (Fla. 1994)(analysis of punishment under the Florida constitution).[1] A process worthy of a life and death determination–the existence or absence of mental retardation–must be crafted by this Court, and the process cobbled together below will not do.

The lower court held that the execution of the mentally retarded did not violate the federal constitution solely because *Penry I* is the law and *Atkins* is undecided. The lower court did not decide whether, in light of the new statute, such an execution would violate the state constitution, but indicted that it would. Instead of assessing this claimed substantive right, the lower court held a hearing and entered an order finding Petitioner not retarded. As will be shown, this hearing was standard-less and provided none of the process contemplated by the statute at the critical stage of mental

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[1]Just as the United States Supreme Court today in *Atkins* is reconsidering–in light of evolving standards of decency--its 1989 decision in *Penry I* that execution of the mentally retarded is constitutional, this Court should reconsider its decision in 1988 that execution of the mentally retarded does not violate the state constitution. *Woods v. State*, 531 So.2d 79, 83-94 (Fla. 1988)(Justices Barkett, Kogan, and Shaw dissenting on whether execution of the mentally retarded violates article I, section 17 of the Florida Constitution).

retardation determination. Whether a substantive right exists (i.e., not to be executed if mentally retarded) will always inform how its violation is prevented.[2] If there is no right, then a hearing is a gratuity, like the one below. If a right exists, a *real* hearing is required, one with all the "critical stage" accouterments.[3]

B. THE FLORIDA CONSTITUTION

The lower court acknowledged the probably validity of Petitioner's argument that Florida's prospective ban on execution of the mentally retarded showed an evolved standard of decency in Florida that would prohibit, under the Florida constitution, the execution of **anyone** who satisfies a (for now, unclear, unannounced)

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[2]In *Atkins*, the state vigorously contests whether the Petitioner is mentally retarded, and there was expert testimony on both sides of the question in the trial court at sentencing. The Virginia Supreme Court discounted Atkins' testimony and credited the state's. Nevertheless, the Supreme Court granted certiorari to decide the substantive federal constitutional issue. *See* Attachment I hereto (portion of state's brief in opposition in *Atkins.)* If the right not to be executed exists, *then* the process that is to be provided to protect that right will be defined. This Court is in the same position with respect to Petitioner's claim under the Florida constitution–first define the right, then provide the process.

[3]This Court has identified "essential prerequisites if we are to ensure a fundamentally fair adversarial process in this most serious class of criminal cases," *In re Amendment to Florida Rules of Criminal Procedure – Rule 3.112 Minimum Standards for Attorneys in Capital Cases*, 759 So.2d 610, 616 (Fla. 1999) (Lewis, J., concurring). The minimum standards are "[b]ased on ... concerns as to the quality of the judicial process in capital cases," *id.* at 612, and "[b]ecause of concerns as to the competency of counsel appointed to represent defendants in capital cases." *In re Proposed Amendment to Florida Rules of Judicial Administration*, 22 Fla. L. Weekly S407, S408 (Fla. July 3, 1997). These standards–which apply to a defendant under the new statute--cannot arbitrarily be denied Petitioner, if there is a constitutional right in Florida not to be executed if mentally retarded.

definition of mental retardation:

> under the proper circumstances, that argument may have merit. *See, e.g., Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (Ga. 1989)(finding legislative decision to prospectively prohibit the execution of the mentally retarded reflected a decision by the people of Georgia that such executions make no measurable contribution to acceptable goals of punishment and holding that execution of mentally retarded therefore not permissible under the Georgia constitution)." Order at 6.[4]

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[4]A Georgia statute explicitly prohibited the execution of someone who was mentally retarded, and provided a procedure (as part of the guilt/innocence determination) for determining whether a capitally charged defendant is mentally retarded. O.C.G.A. § 17-7-131(j). The prohibition was not made retroactive by the legislature, but was made retroactive by the Georgia Supreme Court in *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989)(execution of mentally retarded persons *violated the Georgia prohibition against cruel and unusual punishment*), in which the Court promulgated a procedure whereby persons tried before the effective date of O.C.G.A. § 17-7-131(j) would be afforded the protection of the statute. The procedure promulgated by the *Fleming* court was intended "to give the defendant essentially the same opportunity as he would have had if the case were tried today, with the benefit of the O.C.G.A. 17-7-131(j) [mental retardation] death penalty exclusion." *Foster v. Zant*, 261 Ga. 450, 451 (1991).

The analysis followed by the Georgia Supreme Court is instructive. The Georgia Supreme Court held that "whether a particular punishment is cruel and unusual is not a static concept, but instead changes in recognition of the 'evolving standards of decency that mark the progress of the a maturing society.' 259 Ga. 687, 386 S.E.2d 339, 341 (1989)(quoting *Penry v. Lynaugh*, 109 S. Ct. 2934, 2953 (1989)).

> To ascertain how society currently views a particular punishment, this Court, like the U.S. Supreme Court, considers objective evidence. Such evidence may include information gathered from polls or studies, data concerning actions of sentencing juries, etc. See, [*Penry v. Lynaugh*,] 109 S. Ct. at 2953. However, **legislative enactments constitute the clearest and most objective evidence of how contemporary society views a particular punishment**. *Id.* Those enactments may change from time to time and as they do those

But the lower court did not decide whether a definition of mental retardation recognized in law applies to Mr. Bottoson "since the evidence clearly indicates that Mr. Bottoson is not mentally retarded." *Id*.

This gratuitous "finding" that Mr. Bottoson is not mentally retarded begs the question–to what process is he entitled if the substantive ban on execution is retroactive? If the Florida or United States Constitution prohibits the execution of the mentally retarded, then at a minimum, persons subject to that rule must have notice of what the rule means, and a process for determining that "fact" must then be announced. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("essential principle of due process is that a deprivation of life . . . be preceded by notice and opportunity for hearing appropriate to the nature of the case") (internal quotation marks omitted). "[T]he procedures by which the facts of the case are determined assume an importance as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be

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> changes amount to evidence of the shifting or evolution of the societal consensus.

Id. t 341 (emphasis added).

In *Van Tran v. State*, No. W2000-00739-SC-R11-P1 (Tenn. S. Ct 12/4/01)(www.tscaoc.tsc.state.tn.us), the Tennessee Supreme Court found that Tennessee's prospective ban on the execution of the mentally retarded resulted in an evolved standard of decency in Tennessee against executing any retarded person, following *Fleming, supra*. The *Van Tran* court also found that the Eighth Amendment prohibits the execution of the mentally retarded.

the procedural safeguards surrounding those rights." *Speiser v. Randall*, 357 U.S. 513, 520 (1958).

In this case the decision-maker kept to himself what standards he would apply, and then applied the standards that he alone deemed appropriate. That is not what process was due:

> Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. *Lankford v. Idaho*, 500 U.S. 110, 121 (1991).

Mr. Bottoson was denied due process of law.

Petitioner contends that he would be, and is, entitled to substantially more process than the lower court provided, i.e., the same process that is provided prospectively by the Florida statute. *See Eddings v. Oklahoma*, 102 S.Ct. 869, 878 (1982) ("[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.") (O'Connor, J., concurring). *See also Burger v. Kemp*, 107 S.Ct. 3114 (1987); *Strickland v. Washington*, 466 U.S. 668 (1984) (right to effective assistance of counsel at capital sentencing proceeding); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (right to accurate sentencing instructions at capital sentencing proceeding). Some individuals will have life and death facts determined in a hurried habeas court in a successor setting under warrant, and others will have the fact determined during

a critical stage in a criminal/capital proceeding?[5] This is utterly arbitrary, and risks incorrect decisions, as the record produced below vividly illustrates.

Such a procedures create "a substantial risk that [death] will be inflicted in an arbitrary and capricious manner," and therefore, violate the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). *See also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion); *Beck v. Alabama*, 447 U.S. 625, 637 (1980).

1. No standards --**"We all know that there aren't any rules, okay?"**[6]

Under the prospective statute, mental retardation is defined as follows:

> 1) As used in this section, the term "mental 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 section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services. The term "adaptive

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[5]*See Ake v. Oklahoma*, 105 S.Ct at 1094-95, 1097 (1985) ("[t]he State . . . has a *profound* interest in assuring that its ultimate sanction is not erroneously imposed")(emphasis added); *Gardner v. Florida*, 430 U.S. 349, 360 (1978)("the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death"); *Ross v. Moffitt*, 417 U.S. 600, 612 (1974) ("[F]undamental fairness" requires that indigents be provided "an adequate opportunity to present their claims fully within the adversary system.").

The degree of process that is provided is especially important in a setting where, as the state explained below,"[t]he Court is really aware that mental state experts disagree early and often in the court." T. 70 (*Huff* hearing). *See Ake, supra.*

[6]September 16, 2002 hearing, at 142 (judge's comment).

> behavior," for the purpose of this definition, 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. **The Department of Children and Family Services shall adopt rules to specify the standardized intelligence tests as provided in this subsection**.

The Department has not developed such rules.

In the lower court, counsel asked that the rules be known before any determination of mental retardation was attempted:

> So, if we do go forward with a hearing, I don't know what standard the court is going to be able to apply to determine if Mr. Bottoson meets the criteria of mental retardation or not. We're also placing him in an entirely different position than someone who would be notifying the court, after having received the sentence of death, to have a full adversarial hearing, to have effective trial counsel, to be able to count on the rules of criminal procedure and the right to confront witnesses, and the discovery aspects of it, and to have appropriate experts. So he's in an entirely different position, if we go forward on an evidentiary hearing in that context.

T. at 36 (*Huff* hearing).

> I specifically ask for the court to give us guidance as to what standards will be utilized and what standards will be utilized during that hearing, because Mr. Bottoson is entitled to notice of that, so I know what questions to ask my experts, **so I know what I'm supposed to prove and what–by what legal criteria**.

Id. at 90 (emphasis added).

The State's expert, Dr. McClaren, testified that the statute provided little notice:

> I believe I saw the statute yesterday, and there was some discussion about it being – a little vaguer (sic) than my understanding of mental retardation

January 16, 2002, hearing, at 141.

Even the lower court agreed: "we don't yet know exactly what mental retardation means." Huff hearing at 21.

Nevertheless, the state argued that no guidelines were necessary because "[w]e are certainly not under the statute in the first place." January 16 hearing, at 10. The court then proceeded to conduct a hearing on mental retardation.

2. Improper standards

Mental retardation by definition must arise before the age of 18. That is, both the substandard IQ and the deficits in adaptive behavior must have occurred before the age of 18. *See* Fla. Stat. § 921.137(1) (2001); *see also* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 39 (4th ed., 1994)("DSM-IV"); American Association on Mental Retardation, *Mental Retardation: Definition, Classification, & Systems of Supports* (9th Ed.) ("AAMR").

The state's experts, who were relied upon by the lower court, did not believe that what occurred before age 18 was important.

"Mental retardation has to do with current functioning."

> "**Because the question is what is his functioning today, and not what it may have been thought to be in 1951, 50 years ago."**

T. at 179, 181 (McClaren)

> **"His current intellect is not in the mentally retarded range, and *it makes no sense* to go back 50 years and establish mental retardation, that's not the point, *to establish it under the age of 18, that part of the criteria*.**"

Id. at 201 (Pritchard).

> **" Q. You testified that it was not relevant what happened back then compared to what you have now?**
>
> **A. I agree.**"

Id. at 219 (Pritchard).

> **"you're assessing current adaptive behavior, not assessing past adaptive behavior"**

Id. at 225 (Pritchard).

The statute and diagnostic treatises require that one look at the developmental years, past behavior, whether it makes sense to the state's experts or not. However, the lower court looked exclusively at current IQ scores and current adaptive functioning in rejecting Petitioner's claim. Order at 7-8.[7]

Indeed, the lower court did not even consider what occurred before age 18 because the judge wrongly concluded that *today* Mr. Bottoson's IQ is not in the mentally retarded range, and that he *now* has no deficits in adaptive behavior. Order at 9, n.2. This was error. A person is mentally retarded if they were mentally retarded before age 18, even if they subsequently test or adapt better, as the lower court judge found to be the case here.

3. The evidence of retardation

Petitioner has presented substantial, credible evidence that he is mentally

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[7]The lower court refused to consider a score of 77 in 1951 achieved on a test designated as a "Terman" This error will be discussed in section 3, *infra*, as will the lower court's assessment of current IQ and adaptive behavior .

retarded. He ought to be provided the same due process protections to prove his ineligibility for death as other similarly situated defendants.

a. *Significantly sub-average intellectual functioning*

With respect to intellectual functioning, Dr. Dee testified that Mr. Bottoson was two standard deviations from the mean before the age of 18.

> Part of the definition of retardation, of course, is that it needs to be identified before age 18, and I think it was, in Mr. Bottoson's case, when he was twelve years old. He was tested in the school system, and the scores–the scores that were reported says his Terman IQ–that must have been the Stanford-Binet ....is a Terman IQ of 77...So it was identified before age 18.

T. at 29-30. As he stated in his affidavit,[8] as he testified below,[9] and as is recognized by all professionals in the field,[10] a score of 70 -75 satisfies the two standard

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[8]"Based on the materials which I have reviewed and have detailed in an earlier affidavit, Mr. Bottoson has a life-long history of significantly sub-average intellectual functioning. Of note is the results of an IQ test reflected in school records when Linroy was twelve years old. The report is that he received a 77 score on a "Terman." This score is essentially two standard deviations from the mean of 100, and I so interpret it. The difference between a score of 77 and a score of 75 is so minimal as to be insignificant. A score of 75 at age 12 would qualify Linroy Bottoson as mentally retarded, even under currently prevailing diagnostic criteria." See Exhibit 2, Rule 3.850 motion.

[9]"Well, 70 and 75 are not statistically different, there's no significant difference there." T. at 32.

[10]The senate Staff analysis of the mental retardation bill, now 921.137, makes the same point that Dr. Dee makes here:

> The American Association of Mental Retardation defines mental retardation as significantly sub-average general intellectual

deviations requirement, and two points over 75 is "insignificant." *See* Testimony of

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> functioning existing concurrently with deficits in adaptive functioning and manifest before age 18. *See also* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, p. 39. (4th ed., 1994)(DSMIV). Florida has adopted this definition in ss. 916.106(12) and 393.063(42), F.S.
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> .....
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> Florida currently defines mental retardation in chapters 916 and 393, F.S. The Florida definition specifies that 'significantly sub-average general intellectual functioning' means 'performance which is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the department." Ss. 916.106(12) and 393.063(42), F.S. The Department of Children and Family Services does not currently have a rule. Instead, the Department established criteria favoring the nationally recognized Stanford-Binet and Wechsler Series tests. **In practice, two or more standard deviations from these tests means that the person has an IQ of 70 or less, although it can be extended up to 75.** Id.; DSM IV.

This is stressed again in the "Effect of proposed changes" section of the Senate Analysis:

> The bill does not contain a set IQ level, but rather it provides that low intellectual functioning "means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the department of Children and Family Services." Although the Department does not currently have a rule specifying the intelligence test, it is anticipated that the department will adopt the nationally recognized tests. Two standard deviations from these tests is approximately a 70 IQ, although **it can be extended up to 75. The effect in practical terms will be that a person that has an IQ of around 70** or less will likely establish an exception from the death penalty.

App. 2 (emphasis added). *See also* testimony of state expert McClaren, T. 179 (agrees that IQ must be 70 "plus or minus five").

state expert Pritchard at T. 229 (two points is "not significant").

The lower court said a couple of things about this Terman score from childhood, one knowably wrong and the other unknowably (so far) wrong. First, the judge wrote that "no expert could testify with certainty what that test was, or the significance of it." Order at 8. If the lower court believes that, this Court need not. The Terman was the standard in the field in 1951.

The Stanford-Binet is an individually administered test of general intellectual functioning. The "refined Stanford-Binet [was] developed by L.M. Terman and his associates at Stanford University (Terman 1916). It was in this test that the inteligence quotient (IQ), or ratio between mental age and chronological age, was first used." Anastasi, Anne, & Urbina, Susana, *Psychological Testing –Seventh Edition* at 38 (New Jersey Prentice Hall 1997). The first Stanford-Binet was published in 1916. *Id*. at 205.

The test was revised in 1937, and then "consisted of two equivalent forms, L and M (Terman & Merrill, 1937)." *Id*. at 206. That is, one could take either the Terman or the Merrill; either was considered a "Stanford-Binet." *Id*. The next revision was in 1960, and this time "provided a *single* form (L-M) incorporating the best items from the two 1937 forms (Terman & Merrill 1960)." *Id.*

Thus, the word "Terman" in a test administered in 1951 simply indicated that the examinee had taken the Terman form of the Stanford-Binet, which was "equivalent" to the Merrill form of the Stanford-Binet. "Terman," far from being unclear, was a term of art in 1951, and related something very specific–that the

Stanford Binet had been administered.[11]

This is what Dr. Dee said below-"that must have been the Stanford-Binet"-- and he was right. On this, the lower court was knowably wrong.

With respect to the lower court's statement that "the score of 77 is still above the mental retardation range," Order at 8, we are back to standardless decision-making. If the Department of Child and Family Services says that a Stanford Binet score which is two standard deviations form the mean indicates mental retardation, if there is no difference between a 77 and 75, and if up to a 75 is mental retardation, then the lower court is wrong. This is presently unknowable–as the judge also said, **"We all know that there aren't any rules, okay?"**[12]

Finally, other scores from tests administered recently support the substantially sub-average intellectual functioning that Dr. Dee found had manifested before age 18. First, an IQ of 76 was obtained in testing performed by Dr. Mossman on a standardized intelligence test in December 2001. T. at 112-113. Second, the testing

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[11]Psychologists have relied upon Terman's forms and work for over eighty years. *See* Terman, L.M., The Measure of Intelligence, (Boston: Houghton Mifflin 1916); Terman, L.M. & Merrill, M.A., Measuring Intelligence (Boston: Houghton Mifflin 1937); Terman, L.M. & Merrill, M.A., Stanford-Binet Intelligence Scale: Manual for the Third Revision, Form L-M (Boston: Houghton Mifflin 1960); Terman, L.M., & Merrill, M.A., Stanford-Binet Intelligence Scale: 1972 Norms Edition (Boston: Houghton Mifflin 1972). The Terman test is referred to as a "Terman" in textbooks written for people studying special education. *See* D.D. Smith and R. Luckasson, INTRODUCTION TO SPECIAL EDUCATION: TEACHING IN AN AGE OF CHALLENGE at 135 (2nd Ed. 1995) (referring to "Binet (in Terman, 1916)" and citing older texts referring to same).

[12]September 16, 2002 hearing, at 142 (judge's comment).

by Dee and McClaren, while giving a full scale IQ in the low 80's, was a.) in the mentally retarded range on some tests and sub-tests, and b.) inflated artificially in the verbal scoring. The mentally retarded results were in McClaren's testing on "comprehension," T. at 150,[13] and in Dee's administration of the Denman Neurological Memory Scale which "has the same mean standard deviation as the Wechsler Memory Scale" and "his IQ is 73, substantially way below the full scale IQ." T. at 44.

With respect to full scale IQ's on recent testing, both Dee and McClaren scored Mr. Bottoson at around an 84. This does not mean that Mr. Bottoson is not mentally retarded. Again, retardation must manifest before age 18, and these two scores were in 2002 when Mr. Bottoson is 62 years old. These full scale IQ scores involve a verbal IQ score and a performance IQ score–two separate scores–which are then combined for a full scale IQ. According to Dr. Dee, there is a wide discrepency between Bottoson's performance IQ, which is significantly sub-average, and his current verbal IQ, which is in the borderline range. This discrepency is readily explained.

> "The performance IQ, which I tend to think of as less affected by cultural factors and anything else, hasn't changed. He was less affected by cultural factors, like simulation activities, learning, and so forth. *Verbal IQ tends to grow throughout the life span*."

T at 47.

> "Well, as I said, performance IQ is the same. It's what we'd expect.

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[13]Pritchard testified that this score was "right around retarded." T. at 229.

> He's been in a situation – abnormal situation of the last 20 years and the only activities available to him, basically, are reading and writing. And so you could reasonably assume that the verbal skills and vocabulary, and so forth, would increase and improve during that lengthy period of time."

T. at 50.

> "And he spent a lot of time reading and writing, probably. It's thought that retarded people can't, but they can read and write, and some even write books, as a mater of fact. But that's about the only thing I can offer, that it has increased, because I think it has. And what I would attribute it to is probably a lot of practice, you know, increase in vocabulary, because of substantial use because of his circumstances."

Id. at 74.

The higher verbal IQ is "probably an artifact of the strange social situation of living on death row for 20 years." T. at 51. Under the circumstances of being in prison a long time, "you probably want to look at the performance IQ, because it seems to be less affected by cultural factors and environmental factors." T. at 49. "Certainly the performance IQ and picture completion scales were extraordinarily low. Picture completion, he had a scale score of two, which is about the third or fourth percentile of the population." T. at 54. And the Leiter IQ test, with a score of 76 or 77 in 2001, "places more emphasis on nonverbal things than does the Wechsler." T. at 115.

b. Deficits in Adaptive Behavior

"The second consideration within the definition of mental retardation is the existence of limitations in adaptive skills." AAMR at 38. "Adaptive functioning

refers to how effectively individuals cope with **common life demands** and how well they meet the standards of **personal independence** expected of someone in their particular age group, sociocultural background, and community setting." DSM-IV at 40 (emphasis added). The AAMR separates adaptive skills into ten categories, and for mental retardation requires evidence of deficits in at least two: communication, self-care, home-living, social, community use, self-direction, health and safety, functional academics, leisure, and work. AAMR at 41. These categories incorporate both "practical intelligence," the ability **independently** to maintain ordinary daily activities and to use one's physical abilities to achieve the greatest degree of independence possible, and "social **independence**," which includes the ability fully to comprehend social cues and behavior and formulate appropriate responses. AAMR at 15 (emphasis added). When determining whether someone has limited adaptive skills, DSM encourages mental retardation professionals to "gather evidence for deficits . . . from one or more reliable **independent** sources (e.g., teacher evaluation and educational, developmental, and medical history.)" DSM-IV at 40 (emphasis added).

Thus, the essential question regarding adaptive functioning concerns the effectiveness with which a person can live **independently**. Dr. Dee addressed this during the proper time frame, the developmental period before age 18.

> And I saw several things in the histories that I read that would indicate to me that there were substantial areas of adaptive dysfunction. He didn't do well in school, which is probably why they gave him the

> [Terman] test to begin with. He had few friends. He was uncoordinated. ...He couldn't play sports, like basketball [or]... baseball. So he couldn't play sports. And he had a very solitary life, didn't have any social skills..

T. at 44. His few good grades were in "elective subjects, like Glee Club," *id.* at 35. A school counselor "advised him to go to vocational school. It was clear to him that he wasn't doing well academically in regular school. And he did...but didn't finish it." *Id.* at 36. Honor roll at vocational school is not inconsistent with retardation. T. at 102-103.

He "couldn't keep a checkbook very well, turned over the responsibility to his wife." Id. at 45.

> he had very poor vocational assessment, had man, many jobs, couldnt keep a job. And all of the jobs that he did succeed at for the longest period of time - - and they weren't very long - - were things like custodial jobs, very simple. Couldn't keep a checkbook very well, turned over responsibilities to his wife - - that's what they said, anyway, in their affidavits. Always lived on the margins of society, sort of. I - - don't mean that critically, he just didn't have many friends, sometimes acted socially inappropriate. Okay. all those things point to mild mental retardation.

Id. at 36.[14]

The state's expert Dr. McClaren agreed--"This man has some deficits in his

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[14]"Mild" misleads somewhat, but it is intended to differentiate from persons with a 50 IQ. Persons with mild mental retardation have a substantial disability, and "all mentally retarded individuals bear substantial limitations in both intelligence and functioning." *Van Tran v. State*, No. W2000-00739-SC-R11-P1 (Tenn. S. Ct 12/4/01)(www.tscaoc.tsc.state.tn.us).

adaptive behavior." *Id.* at 158.

The state also used Dr. Pritchard, however. This is the same Dr. Pritchard who could not understand why it was necessary to look before age 18, a criteria for mental retardation. According to him, ***"that part of the criteria***" simply ***"makes no sense."*** *Id*. at 201 (Pritchard). So he asked a prison guard to take a test about Mr. Bottoson's life in prison.

Dr. Pritchard used the Vineland Adaptive Behavior Scales test (hereinafter Vineland)(Def. Ex. 1), a series of questions normally asked of caretakers like parents to determine how a child is developing. Dr. Pritchard asked his series of questions to Sargent Young, an employee of the Department of Corrections. (Tr. 206). Sargent Young was asked to comment on Mr. Bottoson's adaptive behavior skills while on death row. Sargent Young, in response to the questions asked by Dr. Pritchard, was asked if Mr. Bottoson "usually" performed a behavior, "sometimes or partially" or, "no never". (See Def. Ex. 1) If Sargent Young had "no opportunity" to view the adaptive behavior or did not know, he was asked to respond as such. (Tr. 207-09). The adaptive behaviors were contained in three separate scoring areas called domains. (Tr. 210) A score is given to each question ranging from 2 to 0. (Def. Ex. 1). The higher the score, or rather, the closer the score is to the mean, the closer the individual's adaptive behavior skills are to the general population.(Tr. 209-10). Scoring each individual question is important to the administration of the Vineland,

especially since many of the adaptive behaviors are presumed. (See def. Ex. 1).

In denying the Appellant's claim, the trial court stated in its order that "Mr. Bottoson fails to demonstrate the deficiencies in adaptive behavior necessary to qualify as mentally retarded." Order at 9. This was based on Dr. Pritchard's use of the Vineland. *Id.* A review of Pritchard's testimony shows how absurd drawing any conclusions from the prison guard is.[15]

Here are some samples:

Q Take you back to yesterday, you said an institutional setting is not the ideal place for this test at all.

A That's right. True.

Q Okay. Question number 79, performs routine household repairs and maintenance tasks without being asked; is that correct?

A Yes.

Q And you scored a two?

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[15]As Dr. Dee testified, the Vineland cannot show anything from being administered to a guard–on death row no adaptive functioning is required because "he isn't responsible for anything in particular." Tr. at 103. Pritchard admitted that the prison is not an ideal setting or environment for administering the Vineland. (Tr. 224), that the test was not standardized for anyone in prison or on death row, (Tr. 282), and that prison and death row is a highly structured environment.

Perhaps the Department of Child and Family services will adopt a rule that says prison guards are not caretakers to whom questions about adaptive behavior should be put, and that the Vineland is inappropriate for the screening of death row inmates for adaptive functioning. For now, and for Mr. Bottoson, the process provided is the silly questions asked by Pritchard.

A Correct.

Q Do you have your protocol book in front of you --

A Yes.

Q -- For question 79?

A Yes, I do.

Q And examples are, would you agree, changing light bulbs, replacing batteries, replacing fuses, and unclogging drains?

A Yes, those are examples.

Q Does Mr. Bottoson change any light bulbs on death row?

A No. Again, that's -- you have to consider the environment he's in. The comment by Sergeant Young that he keeps a meticulous cell, takes care of it very well, in the context of his cell, which is -- the overarching (ph) principle is, is he able to perform skills and take care of his living area without help. And Sergeant Young indicated that he was very capable of that.

(Tr. 254-55). How hard is that? How smart do you have to be, how developed, to clean your cell?

Q Number 73, straightens own room without being reminded, right? You scored a two on that, correct?

A Yes, I did.

(Tr. 268). Again, absurd.

Dr. Pritchard did not follow any examples listed in the protocols for giving the Vineland.

Q So in example 79 -- question 79, you didn't follow any of those examples; is that correct?

A Not those specific examples, that's just a guiding principle.

* * *

Q But he doesn't change his light bulbs, don't unclog his drains?

A No. Obviously, that's not something he does. He doesn't change his light bulb.

(Tr. 256, 257).

Now for budgeting:

Q Okay. Let's go to 81, budgets for weekly expenses. You score a two?

A Correct.

Q And examples for that is the individual must set aside from his own income -- correct?

A Um-hmm.

Q -- Money for such things as groceries, entertainment, and laundry, correct?

A Correct.

Q If the individual has insufficient income to budget, or if all expenses are paid by someone else, score zero.

A That's correct.

Q What job does Mr. Bottoson have on death row? He's in his cell 23 and a half hours a day?

A He doesn't have a job. He budgets through the canteen.

Q What income does he have?

A He gets income, I assume, from relatives who send him money.

Q So if all expenses are paid by someone else, that should have been scored zero?

A No. You're missing the point. The point is, if somebody's in a house, and living with mom, for example, mom goes out and buys all the groceries, buys all his clothes, buys all his toiletries, and the child has no involvement in that, that's a zero. If the person has a trade card and manages money in his account, that is budgeting money.

Q Okay. Here, perhaps, I would agree with you. The last question said -- for example, this one says the individual must set aside -- doesn't give an example, doesn't say exception for children; would you agree to that? The protocol from your book --

A Um-hmm.

Q -- Does not indicate that?

A I see what you're saying, yes.

Q Okay. Score zero, you scored two?

A It should be a two. It should be a two. He gets money and he budgets that money. That's a skill we're looking at.

Q But not according to this protocol?

A Not according to your interpretation of that protocol. My interpretation of the protocol, I'm looking at the skill, can he budget some money if he gets it? Yes, he can.

(Tr. 256-58). So, Mr. Bottoson knows how to get chips and soda from the canteen.[16]

Now for the job that Mr. Bottoson does not have:

Q Right. Eighty-four, arrives at work on time; you scored what?

A Two.

Q Mr. Bottoson arrives at work on time and how? The job may be part time, according to the protocol, or full time, but must be regular. If the individual does not work, score zero. You scored a two?

A Again, it's the context in which they're in. In most prisons, or jails, or institutions, there isn't a regular job that the individual holds.

* * *

Q If the individual does not work, score zero; is that what the protocol says?

A That's what the protocol says. But again, the overarching principle is get at the skill.

Q Let me ask you this: My point, with regards to the protocols, not one protocol that we listed you were able to follow, correct?

A The ones that we mentioned I was not able to literally follow them, and it isn't necessary.

(Tr. 261-62)

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[16]There was no evidence that Mr. Bottoson actually budgeted his money. For all Dr. Pritchard knew, Mr. Bottoson spent every cent in his inmate account, the day he received it. For Dr. Pritchard, if a death-sentenced person can survive while 99.9 percent of his needs are met by the prison, and he can decide things although he lacks the opportunity to make 99.9 percent of the life choices available to a person who is not in close confinement 23 hours a day, that person cannot be said to have deficits in adaptive functioning. Put differently, if a death-sentenced person has little difficulty functioning in an environment in which the most minimal independent functioning is **allowed**, he has no deficits.

Q I'm gonna skip down. 91, holds full-time job responsibly. There you have an "n," right?

A Right.

Q However, you know he doesn't work, correct?

A Right.

Q But you said his environment, what he does in death row, you would qualify as work?

A I don't understand -- I don't think I said that it would qualify as work. I said --

Q So you should score zero, then, on that one, instead of a two?

A No, it's an "N."

Q No, the prior one, arrives at work on time. Are you changing the definition of work?

A No, not at all. Again, you're looking at adaptive skill. You're looking at whether he manages time responsibly. He doesn't do anything full time. If that happened to be that -- if he happened to have the ability to do something else on a full-time basis where he is -- but it's not called Work -- I would have scored him a two if he does that responsibly.

Q But you scored that he did work, and you scored it as a two on number 84, where it says arrives at work on time. Let me move on. Eighty-six, notifies supervisor if arrival at work will be delayed. You scored a two?

A Yes.

Q Eighty-six, under the protocol, the job may be part time or full time, but must be regular. If the individual does not work, score zero. You scored a two, correct --

A Yes.

Q -- for the record?

A Yes. Same argument.

Q Notify supervisor when absent because of illness; what did you score?

A Two.

Q Job may be part time or full time, must be regular; if the individual does not work, score zero?

A Same argument. You're looking at adaptive skill.

(Tr. 263-64). So, Mr. Bottoson is very good at arriving on time for a job he does not have, and notifying a supervisor of his illness when he has no supervisor.

Such testimony was clearly beyond the standardization of the Vineland and not once could Dr. Pritchard meet or come close to any of the protocols. Dr. Pritchard's questions and answers continued in this same vein regarding expenses paid by someone else (Tr. 258-59), the use of a checking account (Tr. 259 and def. Ex. 1, question 92, in daily living domain), and double scoring. (Tr.267-69).

As laid out in the quotations from the two leading diagnostic treatises on mental retardation, the AAMR and the DSM-IV, the question in adaptive functioning is not, as Dr. Pritchard claims, whether someone behaves "responsibly" with respect to keeping a small cell neat. Rather, it is their ability to function **independently**. AAMR at 15, 38, 41, 45; DSM-IV at 40. Dr. Pritchard's testimony is clearly refuted by the prevailing standards, and the thoughtful and analytical testimony of Dr. Dee

concerning the Vineland. (Tr. 58-60). His singular adherence to his own theories in contravention of what is accepted in the scientific community is materially indistinguishable from the testimony recently rejected by this Court in *Ramirez v. State*, No. SC92975 (Fla. Dec. 20, 2001), and it should be discredited as such.

C. The Eighth Amendment

In *Atkins v. Virginia*, No 00-8452, the Supreme Court has granted certiorari to decide "whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment." Petitioner contends that the answer is "yes." Regardless of how this Court determines the state constitutional issue, the Supreme Court will announce–on questions of substance (i.e., what proof of mental retardation is required?) as well as process (i.e., what protections are necessary retroactively)–the controlling federal law.[17]

The Eighth Amendment serves as a bulwark against the imposition of punishments that offend "the dignity of man" and exceed "civilized standards." *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion); *see also Woodson v. North Carolina*, 428 U.S. 280, 288 (1976). To avoid "excessive" punishments, *see Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality), the Eighth Amendment requires that the "extreme sanction" be reserved not only for "the most extreme of crimes," *id.* at 187 -- "the types of murders ... which are particularly serious or for which the death penalty is peculiarly appropriate," *id*. at 222 (White, J., concurring) -- but also for the most personally culpable defendants. The Eighth Amendment forbids capital

[17]This sketch is taken in large measure from the Brief of Petitioner in *Atkins*.

punishment against persons whose "crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980).

As the Supreme Court has repeatedly held, the Eighth Amendment therefore requires a meaningful basis for distinguishing "between 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). To this end, the Court's capital jurisprudence seeks to "direct and limit" who is sentenced to death, so as to "minimize the risk of wholly arbitrary and capricious action." *Arave v. Creech*, 507 U.S. 463, 470 (1993) (internal citation and quotation omitted); *see also Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (discussing need to narrow class of death-eligible defendants). To be constitutional, a capital-sentencing scheme must "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 875 (1983).

With respect to certain categories of defendants, the death penalty may violate "evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. *See Enmund v. Florida*, 458 U.S. 782, 797 (1982). This is decided by determining whether a sentence of death is "disproportionate" in light of the defendant's personal culpability, *Coker v. Georgia*, 433 U.S.584, 592 (1977); whether it comports with "acceptable goals of punishment," *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989)(opinion of O'Connor, J.) (citation omitted) (hereinafter *Penry I*); and whether juries can adequately perform the narrowing role on a case-by-case basis, *see*

Penry I, 492 U.S. at 316. Because executing persons with mental retardation fails these criteria, it "is nothing more than the purposeless and needless imposition of pain and suffering," *see Penry I*, 492 U.S. at 335 (O'Connor, J., concurring) (citations omitted), and, therefore, is excessive and unconstitutional.

Developments since *Penry I* confirm that persons with mental retardation lack the personal culpability requisite for the death penalty, in a way that the record before the Court in *Penry I* did not. In *Penry I*, the Court recognized that the Eighth Amendment places some restrictions on the execution of individuals with mental retardation by noting that the Eighth Amendment likely forbids executing "profoundly or severely retarded" persons. *Penry I*, 492 U.S. at 333. *Cf. Ford*, 477 U.S. at 400-01. Based on the "record before the Court," *Penry I*, 492 U.S. at 338 (O'Connor, J.), however, the Court held that all other mentally retarded individuals (i.e., those not profoundly or severely retarded) could be sentenced using the same procedures as for other defendants. *See id.* at 319-40.

But since *Penry I*, not a single state legislature or foreign jurisdiction considering the appropriateness of executing persons with mental retardation has identified a line that would treat "profoundly" or "severely" retarded individuals differently from others with mental retardation. Indeed, the AAMR has since changed the definition of mental retardation to eliminate such categorization. AAMR, Mental Retardation at 34 ("[T]he use of a single diagnostic code of mental retardation removes the previous, largely IQ-based labels of mild, moderate, severe, and profound. The person either is diagnosed as having or not having mental retardation

based upon meeting the three criteria ....”). This is objective evidence demonstrates that individuals with mental retardation should be treated as a unified group for Eighth Amendment purposes.

Death for such an offender does not--and cannot--comport with the “two 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 citation omitted). As the Court has recognized, the death penalty cannot serve the goals of deterrence if a person cannot appreciate the consequences of his actions or understand the link between his actions and the punishment. *See*, *e.g.*, *id.* at 837. The intellectual impairments suffered by mentally retarded persons dramatically reduce their ability to engage in the sort of reasoning process that is a necessary precondition of being deterred from engaging in criminal acts. Indeed, the inability to imagine and assess competing courses of action is a core aspect of mental retardation. Nor can removing persons with mental retardation from the universe of those who are subject to execution possibly reduce any deterrent effect the death penalty may have on the rest of the population. *See Ford v. Wainwright*, 477 U.S. 399, 407 (1986) (“[I]t provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment.”).

Similarly, “[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.” *Tison v. Arizona*, 481 U.S. 137, 149 (1987); *see also Ford*, 477 U.S. at 409 (“[W]e may seriously question the retributive value of executing a person who has no

comprehension of why he has been singled out and stripped of his fundamental right to life."). Given their diminished level of personal culpability, executing defendants with mental retardation cannot fulfill this goal of retribution. As such, it "is nothing more than the purposeless and needless imposition of pain and suffering," *Penry I*, 492 U.S. at 335 (O'Connor, J.), and, therefore, violates the Eighth Amendment.

The Court's Eighth Amendment cases recognize that "the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 100-01. To discern those "evolving standards," the Supreme Court has evaluated such objective evidence as legislative action, jury behavior, and international opinion to determine how our society views a particular punishment at a particular point in time. *See Penry I*, 492 U.S. at 335; *Thompson*, 487 U.S. at 831-33; *Coker*, 433 U.S. at 592-97.

When the Supreme Court first considered the constitutionality of executing the mentally retarded in 1989, it concluded that, as of that time, there was "insufficient evidence" of a national consensus against the execution of persons with mental retardation to justify a constitutional prohibition. S*ee Penry I*, 492 U.S. at 335. Justice O'Connor recognized, however, that "a national consensus against the execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency ....'" *Id.* at 340.

Much has changed since the Court decided *Penry I*. The great weight of evidence now suggests that the American people overwhelmingly oppose the

execution of persons with mental retardation, and that this national consensus is shared by nearly every other society in the world.

The emergent national consensus is most immediately evident in the actions of state legislatures, which, the Court has said, provide[t]he clearest and most reliable objective evidence of contemporary values." *Penry I*, 492 U.S. at 331. At the time *Penry I* was decided, only two states -- Georgia and Maryland -- and the federal government had enacted legislation outlawing the imposition of the death penalty on defendants with mental retardation. In less than 12 years, that number of states has grown nine-fold to 18, not counting Texas, where a bill was passed by the legislature but vetoed by the governor.

Signs of change appeared in legislative sessions immediately after the Court's decision in *Penry I* called attention to the practice. In 1990, Tennessee and Kentucky implemented legislation banning the execution of persons with mental retardation. *See* Tenn. Code Ann. § 39-13-203; Ky. Rev. Stat. § 532.130- 140. New Mexico followed in early 1991. *See* N.M. Stat. Ann. § 31-20A-2.1. Between March and May 1993, three more states -- Arkansas, Colorado, and Washington -- joined the growing number of states prohibiting the practice. *See* Ark. Code Ann. § 5-4-618; Colo. Rev. Stat. § 16-9-401-03; Wash. Rev. Code Ann. § 10.95.030. Indiana became the ninth state to outlaw the imposition of the death penalty on persons suffering from mental retardation in 1994. *See* Ind. Code § 35-36-9-1.

In 1994 and in 1995, Kansas and New York respectively reinstated capital punishment, but explicitly exempted persons with mental retardation from the class

of death-eligible defendants. *See* Kan. Stat. Ann. § 21-4623; N.Y. Crim. Proc. § 400.27(12). The consensus against executing persons with mental retardation continued to grow through the late 1990s and in 2000, when Nebraska and South Dakota enacted prohibitory legislation. *See* Neb. Rev. Stat. § 28- 105.1; S.D. Codified Laws § 23A-27A-26.1. Last spring, Arizona also passed similar legislation.[18] *See* Ariz. Rev. Stat. § 13-3982 (2001). And even more recently, the legislatures and governors in Florida, Missouri, Connecticut, enacted laws banning the execution of persons with mental retardation. Fla. Stat. § 921.137 (2001); R.S.Mo. 565.030; Conn. Gen. Stat. § 1-1(g) (2001). The Texas legislature, too, overwhelmingly passed a bill to ban executions of people with mental retardation, but it was allowed to die without the governor's signature. Tex. H.B. 236, 77th Sess. (2001).

This tally of states represents a clear consensus.[19] These 18 state jurisdictions

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[18]Although the legislative process has inevitably resulted in some minor variations among these statutes, all jurisdictions have in common a similar definition of mental retardation. All recognize two key components -- that an individual have significant subaverage intellectual function (in many instances measured by an IQ score) and that an individual suffer a substantial impairment in adaptive behavior.

[19]Closer examination of the states that impose the death penalty but that have not yet explicitly prohibited its imposition on persons with mental retardation demonstrates an even broader consensus. In two states -- Illinois and Oregon -- both houses of the legislatures have passed legislation to ban the execution of persons with mental retardation, only to have this legislation vetoed by the governor. The Court has made clear that it is legislative action -- not the actions of one individual, even a chief executive -- that is the most reliable indicator of public opinion. *See Penry*, 492 U.S. at 331; *Enmund*, 458 U.S. at 801. Thus, 21 legislatures, counting Texas, have in fact passed bills that explicitly bar the execution of persons with mental retardation. Illinois has since imposed a

and the federal government, when added -- as the Court did in *Thompson*, 487 U.S. at 826 (plurality), 849 (O'Connor, J., concurring) -- to the 12 states (and the District of Columbia), which have rejected capital punishment entirely, form a majority of jurisdictions that now prohibits the execution of persons with mental retardation. The Court has recognized that legislative judgments need not be "wholly unanimous" to show a consensus. *Enmund*, 458 U.S. at 793. Rather, it is sufficient if -- as here -- legislative judgment "weighs on the side of rejecting capital punishment" for the category of defendants at issue. *Enmund*, 458 U.S. at 793; *see Coker*, 433 U.S. at 596.

The practices of foreign nations likewise confirm the inappropriateness of executing persons with mental retardation. The Court has recognized that the practices of other nations are relevant in determining the "evolving standards of decency" that help define the contours of the Eighth Amendment. The *Thompson* Court, for example, looked to "the views that have been expressed by ... other nations that share our Anglo-American heritage, and by the leading members of the Western European community," 487 U.S. at 830 (footnote omitted), and observed that the Court had previously recognized the relevance of the views of the international community in

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moratorium on the death penalty, *see* Steve Mills & Kevin Armstrong, Governor to Halt Executions, Chi. Trib. Jan. 20, 2000 at 1, and a renewed effort to pass legislation that would ban the execution of persons with mental retardation has been postponed pending a report from the Governor's Study Commission on the Death Penalty. Notably, a Draft Report of the Legislative Task Force on the Death Penalty recommends that, if and when the penalty were reinstated in Illinois, the death penalty should not be reinstated for persons with mental retardation. *See* Death Penalty Task Force, Report to the House of Representatives (Draft) (Feb. 10, 2000).

determining whether a punishment is cruel and unusual." See *id.* citing *Trop*, 356 U.S. at 102-03 n.35); *see also Coker*, 433 U.S. at 596 n.10. *Enmund*, 458 U.S. at 796-97 n.22.

In this context, the practices of foreign countries and statements of international bodies are particularly instructive: International sentiment is nearly unanimous in its opposition to executing persons with mental retardation. At least 108 countries prohibit the death penalty either by law or in practice.[20] *See* Amnesty International, Facts and Figures on the Death Penalty, available at www.amnesty.org (updated April 26, 2001). Of those countries that still retain and employ the death penalty, almost none executes people with mental retardation. The United States is one of only two countries in the world in which executions of people with mental retardation are

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[20]Also indicative of the consensus against executing persons with mental retardation shared by civilized nations are the actions of international organizations. *See Thompson*, 487 U.S. at 831. Since the Court's decision in *Penry I,* international bodies and human rights organizations have increasingly called for an end to executions of mentally retarded persons. In 1989, the United Nations Economic and Social Council, on the advice of the United Nations Committee on Crime Prevention and Control, recommended that all nations "[e]liminat[e] the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution." Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty, ECOSOC Res. 1989/64, UN ESCOR, 1989, Supp. No. 1, § 1(d), at 51, UN Doc. E/1989/91 (1989). Numerous other international bodies, including the European Union and the Organization for Security and Co- operation in Europe, have voiced strong opposition to executing persons with mental retardation. *See* Organization for Security and Co-operation in Europe, Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the OSCE (1990); European Union Demarche on the Death Penalty, forwarded to the United States with a European Union Memorandum on the Death Penalty on February 25, 2000.

known to occur regularly; the other is Kyrgyzstan.[21]

The execution of mentally retarded individuals violates the evolved standard of decency in this civilized society. Petitioner is mentally retarded, and his sentence must be vacated.

II. NEWLY DISCOVERED EVIDENCE OF MR. BOTTOSON'S BRAIN DAMAGE MAKES HIS SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND ARTICLES 6 & 7 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Newly discovered evidence may be grounds for relief in a proceeding on a motion to vacate a sentence where the facts on which the claim is based were unknown to the trial court and the moving party or counsel at the time of trial, and the evidence could not have been ascertained by the party or his counsel in the exercise of due diligence. *Jones v. State*, 591 So.2d 911 (Fla. 1991); 28A Fla. Jur 2d Habeas Corpus and Postconviction Remedies § 169 (1998). In order to obtain relief on such newly discovered evidence the evidence must be of such a nature that it would

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[21]*See* U.N. Commission on Human Rights, Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur, E/CN.4/1997/60, § 90 (1996); U.N. Commission on Crime Prevention and Criminal Justice, Capital punishment and implementation of the safeguards guaranteeing the protection of the rights of those facing the death penalty: Report of the Secretary-General, E/CN.15/1996/19, § 74 (1996). On a single occasion in 1994, the U.N. Special Rapporteur charged with monitoring the death penalty also expressed concern about an execution in Japan that may have involved a mentally retarded person. See U.N. Commission on Human Rights, Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur, E/CN.4/1995/61, § 380 (1994).

probably produce an acquittal on retrial, *Jones*, or result in a life sentence rather than the death penalty. *Scott v. Dugger*, 604 So.2d 465 (Fla. 1992).

Mr. James Russ became involved in Mr. Bottoson's case in 1985. Relying on the mental health expert's reports, Mr. Russ did not have any reasonable belief that any further testing was necessary on Mr. Bottoson. Mr. Russ was not on notice as to any other mental health condition other than those he presented in Mr. Bottoson's 3.850 evidentiary hearing. If Mr. Russ had notice of such condition, he would have investigated it and presented evidence to the trial court.

Additionally, Mark Olive, an attorney in Florida, was appointed to handle Mr. Bottoson's appeal to the United States Court of Appeals for the 11th Circuit. Mr. Olive asserts that "[i]nvestigation of facts outside the appellate record while the case was before the federal circuit court was not within the scope of the appointment order." As such, Mr. Olive was precluded by court order from having any further evaluations done on Mr. Bottoson. Further, based on Mr. Olive's extensive experience in federal practice, he was precluded by *In Re Lindsey*, 875 F.3d 1502 (11th Cir. 1989), from obtaining the appointment of a psychiatrist for further evaluations.

Thus, prior to the evaluations conducted on Mr. Bottoson in 2001, no medical personnel conducted the necessary tests that would have diagnosed any form of brain damage. Furthermore, the existence of brain damage in Mr. Bottoson's case has the potential to change the evidentiary picture concerning penalty phase. Insertion of evidence of brain damage would probably have resulted in a life sentence as no mental mitigation evidence whatsoever was introduced at Mr. Bottoson's 1981 trial.

The trial court in the instant case ruled that Mr. Bottoson's brain damage was not newly discovered and Mr. Bottoson was, therefore, procedurally barred from presenting this evidence. Citing *Booker v. State*, 413 So.2d 756 (Fla. 1982), the trial court analogized Mr. Bottoson's newly discovered fact of brain damage to the *Booker* defendant's revised mental disease diagnosis. This is an erroneous comparison. The Court in *Booker* emphasized that a new interpretation of the "same information" failed to qualify as newly discovered evidence. *Id.* at 757. Mr. Bottoson would assert that the fact of his brain damage in no manner arose out of a new interpretation of the mental evaluation relied upon by former counsel, but is in fact newly discovered evidence.

Mr. Bottoson has been denied a fair opportunity to establish the extent of his neurological impairments and demonstrate their effects on his behavior at the time of the crime. Executing him under these circumstances is arbitrary and capricious in violation of the Eighth and Fourteenth Amendments, Art. I, section 17, Florida Constitution, and Articles 6 and 7 of the ICCPR.

III. NEWLY DISCOVERED EVIDENCE OF A SPECT OR PET SCAN ON MR. BOTTOSON WOULD MAKE HIS SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

As argued previously in Claim III, due diligence in evaluating new evidence under Jones does not imply perfect diligence. *See Williams v. Taylor*,529 U.S. 420 (2000)(counsel duly diligent where not on notice of need for particular investigation).

Further, it is entirely reasonable for an attorney to rely on the training and opinions of his experts in deciding to pursue a particular medical investigation. Several medical experts evaluated Mr. Bottoson, but for various reasons outlined in the affidavit of Dr. Mosman, no brain damage was detected. Clearly, under Strickland, counsel would generally not be deemed to be ineffective for relying on the advice of his experts in not ordering a particular test. Mr. Russ, was not on notice that any new mental health radiographic investigation was necessary. Therefore, he should be deemed to have exercised due diligence in his evaluations of Mr. Bottoson.

IV. MR. BOTTOSON WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING IN VIOLATION OF DUE PROCESS AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WHEN THE STATE POSTCONVICTION TRIAL COURT PREVENTED MR. BOTTOSON FROM OBTAINING A SPECT AND A PET SCAN TO OBJECTIVELY DETERMINE THE EXISTENCE OF BRAIN DAMAGE.

On January 7, 2002, Mr. Bottoson filed a Motion to Transport to a medical facility to allow for neurological testing, specifically SPECT and PET scans. Counsel for Mr. Bottoson proceeded on good faith to assert that SPECT/PET scan results evidencing brain damage would,in Mr. Bottoson's case, constitute "newly discovered evidence" within the meaning of Fl.R.Crim.P. 3.851 (2001). This good faith assertion is based upon both the history of this case, and the recent acceptance of SPECT/PET scans in the practice of brain damage evaluation.

The Florida Rules of Criminal Procedure provide for the assertion of newly

discovered evidence claims. Such claims must be presented in accordance with Rule 3.851(e)(2)(C). This rule requires that all motions include a detailed allegation of the factual basis for any claim. The SPECT/PET scan results are necessary to comply with the above stated rule.

This Court denied the Motion to Transport Defendant on January 7, 2002. Mr. Bottoson filed an Emergency Motion for Re-hearing on January 8, 2002. This Court denied the emergency motion without a hearing on January 9, 2002.

The trial court's denial of Mr. Bottoson's request for a transport order, therefore, did not allow Mr. Bottoson to particularly plead such a claim of newly discovered evidence. A claimant need not demonstrate that the evidence proffered is newly discovered. All that is necessary is that the claimant establish a prime facie case of newly discovered evidence to be proven at an evidentiary hearing. *Swafford v. State*, 679 So.2d 736 (Fla. 1996). To deny Mr. Bottoson the opportunity to establish a prima facie case as required by the appropriate Florida Rule of Criminal Procedure and to fully present newly discovered evidence in an evidentiary hearing is a denial of due process.

V. NEWLY DISCOVERED EVIDENCE OF DR. KIRKLAND'S CLARIFICATION OF HIS ORIGINAL EVIDENTIARY HEARING TESTIMONY MAKES ME. BOTTOSON'S SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The erred in concluding that Dr.Kirkland's affidavit is not "newly discovered"

within the meaning of *Jones*. In his affidavit, Dr. Kirkland explains that the inferences and implications that the Eleventh Circuit drew from his testimony at Mr. Bottoson's post-conviction evidentiary hearing were wrong and unjustified.

Mr. Bottoson did not know and could not have known about these inferences until the Eleventh Circuit issued its opinion containing them. Due diligence does not require clairvoyance. As the Supreme Court held in *Michael Williams*, a habeas corpus petitioner has no duty to investigate misconduct that may provide a basis for relief until he has notice that the misconduct occurred. *Williams*, *supra.*

The Eleventh Circuit's opinion was issued on November 20, 2000. Mr. Bottoson timely sought rehearing on grounds that the court had wrongly stacked inference upon inference to reach "findings" that were not supported by the record. On February 28, 2001, the rehearing petition was denied. *Bottoson v. Moore*, 251 F.3d 165 (11th Cir. 2001) (mem.). Mr. Bottoson's timely petition for writ of certiorari was denied on October 9, 2001. *Bottoson v. Moore*, 122 S. Ct. 357 (2001).

Under Rule 3.851, Mr. Bottoson's presentation of Dr. Kirkland's affidavit is timely if it occurred within one year of the denial of rehearing, i.e., within one year of the Eleventh Circuit's refusal to revise its opinion. Mr. Bottoson did so by filing Dr. Kirkland's affidavit on January 11, 2002.

Dr. Kirkland's affidavit confirms that but for Mr. Bottoson's trial counsel's unreasonable failure to conduct any preparation for the penalty phase until after the guilty verdict was announced, and his failure to conduct any investigation in mental

health mitigation at all, the jury would have heard unrebutted expert testimony that Mr. Bottoson was actively psychotic, suffering from the effects of schizophrenia, at the time of the crime.

Mr. Bottoson's right to effective assistance of counsel and his right to meaningful review of his Sixth Amendment claims were violated. The death sentence must be vacated.

CONCLUSION

For the foregoing reasons, LINROY BOTTOSON respectfully requests that this Court enter a stay of execution so that it may deliberate upon the merits of his case in a manner commensurate with the consequences of this Court's decision. Thereafter, Mr. Bottoson respectfully requests that this Court reverse and vacate the judgment of the lower court, vacate the sentence of death imposed upon Mr. Bottoson, and remand the case for such further proceedings as the Court deems just and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief is being furnished by facsimile transmission to counsel for Respondent, Assistant Attorney General Kenneth Sloane Nunnelley, Office of the Attorney General 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32818, this 22nd day of January, 2002.

CERTIFICATE OF COMPLIANCE

This petition was prepared using Times New Roman 14 point font.

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Mark E. Olive