

**IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA**

STATE OF FLORIDA,

CASE NO. CR79-4512

Plaintiff,

v.

**WARRANT SIGNED
EXECUTION SET FOR FEBRUARY 5, 2001**

LINROY BOTTOSON,

Defendant.

_____ /

**MOTION TO VACATE JUDGEMENT
AND SENTENCE, AND REQUEST FOR EVIDENTIARY
HEARING AND STAY OF EXECUTION**

Comes now, **LINROY BOTTOSON**, Defendant in the above-captioned action, respectfully moves this Court for an Order, pursuant to Fla. R. Crim. P. 3.850, vacating and setting aside the judgements of conviction and sentence, including his sentence of death, imposed upon him by this Court. In support thereof, Mr. Bottoson, through counsel, respectfully submits as follows:

1. A death warrant has been signed scheduling Mr. Bottoson's execution for 6:00 p.m. on February 5, 2002.

2. Mr. Bottoson requests a stay of execution and an evidentiary hearing. As will be demonstrated below, such a hearing is more than warranted on this case on the basis of the claims presented in this action. A stay is necessary so that the evidence may be heard and deliberated upon with due regard for the life and death consequences of this Court's decision. The life of a 62-year-old man with a lifelong diagnosis of schizophrenia and mental retardation hangs in the balance.

3. All previous claims raised in post-conviction proceedings have been denied as of this date. Pursuant to Fla. R. Crim. Pro. 3.850(e)(2)(B), those claims are listed in Appendix A. Facts pled in this motion were unknown to previous counsel and therefore were unable to be pled in former

motions.

4. All prior pleadings are hereby incorporated by reference, Citations to the trial record shall be designated by (R. ___). Citations to a prior post conviction record shall be designated by (PCR. ____). Citations to attached exhibits shall be designated by (EX. ___)

5. Pursuant to Florida Rule of Criminal Procedure 3.851(f), Petitioner lists the following witnesses:

- a. Dr. Henry Dee, 5131 South Florida Avenue - Suite 1, Lakeland, FL 33813
(863) 646-3055
- b. Dr. Michael Foley, 1304 Desoto Avenue - Suite 400, Tampa, FL 33606
(813) 251-3530
- c. Dr. Robert Kirkland, 2309 Bedford Road, Orlando, FL 32803
(407) 897-3159
- d. Dr. Bill Mossman, 20 Island Avenue - Suite 1110, Miami Beach, FL 33119
(305) 532-9286
- e. Mark E. Olive, 320 W. Jefferson Street, Tallahassee, FL 32301
(850) 224-0004
- f. James Russ, P.A., 18 Pine Street, Orlando, FL 32801
(407) 849-6050

CLAIM I

BECAUSE HE IS MENTALLY RETARDED, MR. BOTTOSON'S EXECUTION WOULD VIOLATE THE STATE AND FEDERAL CONSTITUTIONS

This Claim is evidenced by the following facts:

1. All other allegations in this motion are incorporated into this Claim by specific reference as if fully set forth herein.

2. 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.

3. 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)(DSMIV); *see also* ss. 916.106(12) and 393.063(42), F.S.

4. Mr. Bottoson contends 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.

5. 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.”

6. 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, 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

7. Finally, it would be arbitrary, capricious, and a violation of due process and equal protection of the laws for one mentally retarded person to be executed while all others are saved. The death penalty may not strike like lightning. *Furman v. Georgia*, 408 U.S. 238 (1972).

A. The Florida Constitution

8. The execution of the mentally retarded is, and will be, unusual in Florida. Contrary to the assertions of some that there are no mentally retarded person on Florida's death row, there are in fact a few, and Petitioner is one. However, the fact that there are few means that execution of the mentally retarded is unusual in this state. It would be *even more* unusual from now on, since it is forbidden by statute. Thus, the Florida Constitution prohibits the practice. *Allen, supra*, 636 So.2d at 496 (Florida prohibition on cruel or unusual punishment; "[w]e cannot countenance a rule that would result in some [mentally retarded person] being executed while the vast majority of others are not, even where the crimes are similar").

9. The execution of the mentally retarded is also cruel. Floridians believe so today. The Governor has said that he will not execute retarded people. And the will of the people has been expressed in 921.137's ban on such executions. While the legislature made the proscription prospective only, the Florida Constitution is not so arbitrary. The Georgia Supreme Court faced the identical issue in 1989.

10. 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

¹Just 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 the Florida Supreme Court's decision in 1988 that execution of the mentally retarded does not violate the state constitution. *Woods v. State*, 531 So. 2d 79, 83-84 (Fla. 1988)(Justices Barkett, Kogan, and Shaw dissenting on whether execution of the mentally retarded violates article I, section 17 of the Florida Constitution).

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).

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

Id. at 341 (emphasis added).

12. Because the people of Florida have determined that the execution of the retarded serves no valid penological objective, executing Mr. Bottoson would be “nothing more than the purposeless and needless imposition of pain and suffering.” *Coker v. Georgia*, 433 U.S. 584 (1977).

B. Disproportionate Punishment

13. Florida statute requires that this Court review death sentences to determine whether they are disproportionate. This Court must “review th[e] case in light of the other decisions and

determine whether or not the punishment is too great.” *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973). Since no-one will ever again be sentenced to death who is mentally retarded, the punishment would be too great.

C. Arbitrariness

14. If Petitioner is allowed to be executed, then Florida provides no meaningful way to distinguish those who receive the ultimate punishment from those who do not. This is what invalidated the Georgia death penalty statute in 1972, *see Furman v. Georgia*, 409 U.S. 902 (1972) and is what the Supreme Court hoped had been eliminated in 1976. *See Gregg v. Georgia*, 429 U.S. 1301 (1976). If this arbitrariness has not been eliminated, then Petitioner’s death sentence must be set aside.

D. The Eighth Amendment

15. Petitioner contends that the execution of persons with mental retardation is cruel and unusual punishment prohibited by the Eighth Amendment. Society’s standards of decency, as objectively evidenced in the laws passed by State legislatures, Congress and international norms, have evolved to the point where executing the mentally retarded is intolerable. Petitioner supports this contention further in his Memorandum of Points and Authorities.

E. Petitioner’s Motion to Determine Mental Retardation—he’s “mentally deficient” at age 12

16. Under 921.137 (3) and (4), a defendant must give notice of the intent to rely upon expert testimony, and must file a motion to determine mental retardation. *See also* Fla.R.Crim.P. 3.851(f). Petitioner hereby does these two things, and requests that the provisions of 921.137 be triggered in his case.

17. This is all that is required for persons being tried today, and Petitioner’s claim should be treated no differently. *Cf. Foster v. Zant*, 261 Ga. 450, 451 (1991)(objective is “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.”).

18. In order to make his showing of mental retardation at a hearing provided for under 921.137, Petitioner must be afforded all the protections any defendant at a critical stage of the proceedings receives. Petitioner's claim cannot be assessed in a post-conviction atmosphere where constitutional protections are nil. Rather, he is entitled to: appointed counsel who are appropriately funded and qualified to handle capital trial work in Florida; expert assistance; adequate time to prepare his defense; and the full compliment of trial rights any defendant is guaranteed. There cannot be one class of persons who receive the appropriate tools for a defense—those tried today—and one group that does not.

19. With these considerations in mind, Petitioner's following showing of mental retardation is intended solely to inform the court that this pleading is not frivolous or abusive. However, if the Court determines that Petitioner is entitled to the assistance afforded other similarly situated defendants, his showing would necessarily change.

20. Mental retardation is shown by significantly sub-average intellectual functioning and deficits in adaptive behavior manifesting before age 18. Dr. Mosman, a licensed psychologist, has reviewed records documenting Petitioner's life, including records generated before Petitioner was 18 years old. Dr. Mosman states the following:

At twelve years and six months of age, Linroy was given a test by the Cleveland school district. The results of that test are illegible in the records but were of such a nature that he was referred to the school psychologist. Twenty nine days later, 11/19/51, Linroy was given the "Terman" test and received an IQ of 77. This would indicate that under then prevailing diagnostic criteria, Linroy would have been diagnosed as "Mentally Deficient—Idiopathic 61.0" as mental retardation was not a recognized diagnostic category until 1968 at which time Linroy would have met the criteria for a mental retardation diagnosis, 310 Borderline Mental Retardation as per the DSM-II.

EX. 1. Dr. Mosman also refers to testing in 1971 from which, "under then prevailing standards of practice and diagnostic criteria, a clinical psychologist could have concluded from this Beta score and known deficits in adaptive functioning that Mr. Bottoson was in fact retarded." *Id.* Dr. Mosman further noted a "forty-nine year history of significantly sub-average intellectual functioning as found

on formal testing,” “significant intellectual deficits.” *Id.*

21. Dr. Henry L. Dee agrees. He reviewed the same records as Dr. Mosman, and concludes as follows:

1. My name is Henry L. Dee, Ph.D. I am a clinical psychologist licensed to practice in the State of Florida. I am over the age of eighteen and competent to make this affidavit. I received an undergraduate degree from the University of South Florida. I earned a masters and doctorate at the University of Iowa. I interned in psychology at the Psychiatric Institute at Connecticut Valley Hospital. Thereafter, I returned to the University of Iowa for a 5 year residency in the Department of Neurology and Neurosurgery. I have been practicing in Lakeland, Florida since 1973.

2. I have qualified as an expert witness in clinical psychology, child psychology, and neuropsychology and have testified in numerous civil and criminal proceedings in Florida, Georgia, Missouri, Iowa and the Province of Ontario, Canada. A copy of my curriculum vitae is attached hereto as Exhibit "A."

3. I have been asked to provide an opinion with respect to whether in addition to his other serious mental problems Linroy Bottoson is mentally retarded. According to all of the classification manuals, mental retardation is defined by the coexistence of three features: (1) significantly subaverage intelligence and (2) significant limitations in adaptive functioning, (3) both manifesting by age 18.

4. Appropriate classification requires that intelligence tests be administered or reviewed by an examiner experienced in the field of mental retardation and qualified by psychological association, state regulatory and publisher guidelines to perform such an evaluation. This examiner is appropriately experienced, accredited and qualified to evaluate intellectual functioning.

5. 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.²

²The 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 functioning existing concurrently with

6. The importance of this score is the age at which it was determined. Mental retardation must manifest before age 18. After 18 a person may improve markedly in IQ scores as, over the course of their life, developmental milestones are belatedly reached and constant focus on various skills may occur. This age 12 score is valuable precisely because it was obtained during the developmental period.

7. In addition, Mr. Bottoson had serious deficits in adaptive functioning during the developmental period. 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, socio-cultural background, and community setting. There is ample evidence in Linroy's background to allow this examiner to conclude that he suffers significant adaptive behavior deficits. For example, his family members report that Linroy has never been able to keep a job (and this is consistent with the large number of jobs he has had), he could

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.

.....

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.**

EX. 3 (emphasis added).

not balance a checkbook or keep a household running, and others have always had to take care of his day to day functioning since they soon perceived he was not up to the task. In addition, there are comments in the many affidavits of old friends and associates that he was ineffective in school, that he was encouraged to attend vocational school because of poor school performance, that his so-called sermons made little sense, etc.

8. It is my professional opinion, based on a reasonable degree of psychological certainty, that Mr. Bottoson suffers from significantly sub-average intellectual functioning with significant impairments in adaptive behavior which manifested prior to the age of eighteen. Thus, Mr. Bottoson is mentally retarded.

EX. 2.

22. Petitioner should be granted relief.

CLAIM II

EXECUTION OF THE MENTALLY ILL VIOLATES THE FEDERAL AND STATE PROHIBITION ON CRUEL AND/OR UNUSUAL PUNISHMENT, JUS COGENS, AND ARTICLES 6 & 7 OF THE ICCPR

This claim is evidenced by the following facts:

23. All other allegations in this petition are incorporated into this claim by specific reference as if fully set forth herein.

24. The Eighth Amendment draws its meaning from “the evolving standards of decency that mark the progress of a maturing society.” *Furman v. Georgia*, 408 U.S. 238, 269 (1972), citing *Trop v. Dulles*, 356 U.S. 86 (1958). It upholds the “broad and idealistic concepts of dignity, civilized standards, humanity and decency” by which a society measures itself. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976), citing *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968). The evolving standards of decency that inform the Eighth Amendment are evidenced in many ways. Public opinion, *Weems v. United States*, 217 U.S. 349, 378 (1910), contemporary human knowledge, *Robinson v. California*, 370 U.S. 660, 666 (1962), jury verdicts, *McGautha v. California*, 402 U.S. 183, 199 (1971), and legislation, *Penry v. Lynaugh*, 492 U.S. 302 (1989), can all reflect the evolving standards of a maturing society.

25. It is stipulated that Petitioner is mentally ill with Schizophrenia. Mental retardation

is diagnosed in 2.5% of the population, whereas schizophrenia is present in 1% of the general population. Mental retardation is defined as “significantly subaverage intellectual functioning” as measured in significant part by a person’s relative ability to adapt to the world around him. Measures of retardation include the ability to live independently, the level of self-motivation and direction, and the individual’s academic abilities. MENTAL RETARDATION, DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT, American Association on Mental Retardation (1992). By contrast, schizophrenia is defined by the presence or absence of numerous discrete symptoms that are present irrespective of one’s environment and is the most serious of mental illnesses. DSM-IV, p. 275-81. Having both defects is unusual, and makes Petitioner particularly and singularly vulnerable.

26. Current knowledge about schizophrenia and other mental illnesses counsel against the execution of severely mentally ill individuals like Petitioner. Recent advances in science and medicine make it clear that those who are ultimately diagnosed with schizophrenia have suffered from its ravages long before the florid symptoms that lead to diagnosis appear. Schizophrenia effects behavior, decision making, and social abilities from early childhood. It is cyclical in nature. Frequently its sufferers have periods of active psychosis followed by periods of lesser symptomology.

27. It is now known that signs and symptoms of schizophrenia manifest themselves in early childhood even though most schizophrenics are not diagnosed until early adulthood. Walker & Lewine, “Prediction of Adult-Onset Schizophrenia from Childhood Home Movies of Patients,” Vol. 147, No.8, AMERICAN JOURNAL OF PSYCHIATRY, p. 1052-1956 (1990); Lester Grinspoon, M.D., Editor, “Schizophrenia: The Present State of Understanding, Part II,” Vol. 8, No. 12, THE HARVARD MENTAL HEALTH LETTER, p. 1 (June 1992). It is also now known that there is a genetic component to schizophrenia, where once this was merely an anecdotally-based hypothesis. Kendler & Diehl, “The Genetics of Schizophrenia,” Vol. 19, No. 2, SCHIZOPHRENIA BULLETIN, p. 261 (1993); Malaspina, Harlap, Fennig, Heiman, Nahon, Feldman, and Susser, “Advancing Paternal Age and the Risk of Schizophrenia,” Vol. 58, No. 4, ARCHIVES OF GEN. PSYCHIATRY, p. 361 (2001).

28. It is also known that the psychotic episodes popularly associated with schizophrenia

comprise only a part of this progressive disease. D. Mathalon, “Progressive Brain Volume Changes and the Clinical Course of Schizophrenia in Men,” Vol. 58, ARCHIVES OF GENERAL PSYCHIATRY, p. 148 (2001). Finally, schizophrenia is linked to a chemical imbalance and resulting dysfunction in the brain. National Institute of Mental Health, “What Causes Schizophrenia?” (pamphlet) Sept. 22, 2000.

29. With modern imaging techniques, it is now possible to see physical differences in the brains of schizophrenics. R. Gur & G. Pearlson, “Neuroimaging in Schizophrenia Research,” Vol. 19, No. 2, SCHIZOPHRENIA BULLETIN p. 337 (1993), National Institute of Mental Health, United States Dept. of Health and Human Services, *The Neuroscience of Mental Health*, Chapter 9, “Neural Basis of Psychopathology, Major Psychiatric Disorders: Schizophrenia,” p. 160 (1995); B. Kaplan & H. Sadock, SYNOPSIS OF PSYCHIATRY: BEHAVIORAL SCIENCES, CLINICAL PSYCHIATRY, Williams & Wilkins p. 123 (8th Ed. 1997). This Court has refused to allow neuroimaging of Mr. Bottoson.

30. Among the States, there is wide ranging recognition that those suffering from severe mental illness must be given sentencing consideration that includes an understanding of their lessened abilities. The states have adopted varying approaches to address this matter. Some have adopted diminished capacity as a defense or partial defense. Lewine, “Psychiatric Evidence in Criminal Cases for Purposes Other than the Defense of Insanity,” 26 *Syrac. L. Rev.* 1051, 1055 (1975); American Law Institute, Model Penal Code Sec. 4.01 (1962); Ark. Code Ann. §5-2-312(a), N.J. Stat. Ann. §2C:4-2; N.Y. Crim. Proc. Law §400.27, Utah Code Ann. §76-2-305(2).

31. Among those, many allow the defense to be used only with regard to specific intent crimes.³

³See, e.g., *State v. Jacobs*, 607 N.W.2d 679 (Iowa 2000); *People v. Mette*, 621 N.W.2d 713 (Mich. App. 2000); *State v. Page*, 488 S.E.2d 225 (N.C. 1997), *cert. denied*, 118 S. Ct. 710 (1998); *Waye v. Commonwealth*, 219 Va. 683, 251 S.E.2d 202 (Va. 1979); Wash. Rev. Code Ann. §10.77.010. Other states have adopted broader definitions of insanity that include the concept of uncontrollable impulse. Georgia Code Ann. §16-3-3.

10. A number of others have developed the verdict of guilty but mentally ill. Alaska - Alaska Stat. 12.47.030 (1992); Arizona - Ariz. Rev. Stat. Ann. §13-502; Delaware - Del. Code Ann. Tit.

32. Still other states have fashioned unique accommodations for the criminally responsible but mentally ill through legislation and case law. Idaho Code §19-2523, Mass. Gen Laws Ann. Ch. 279, §69, Minn. Stat. Ann. §611.026, Miss. Code Ann. §99-13-9, Mont. Code Ann. §46-14-101, *People v. Williams*, 941 P.2d 752 (Cal. 1997); *State v. Borman*, 956 P.2d 1325 (1998); *State v. Galloway*, 628 A.2d 753 (N.J. 1993). For example, in at least five additional states--Arizona, Florida, Mississippi, Ohio and Nevada--proportionality review has served to remove many mentally ill offenders from the ranks of the condemned despite the apparent availability of capital punishment in such cases.⁴ Many states use a combination of procedures, pleadings, defenses, and mitigation to address this issue.

33. The fact that the states still struggle with this accommodation underlies an evolving

11,401(b) (1987); Georgia - GA. Code Ann 17-7-131(b)(1)(D); Illinois - Ill. Comp. Stat. Ann, ch.720, para 5/6-2© (Smith-Hurd 1993); Indiana - Ind. Code Ann. 35-35-1-1 West 1986; Kentucky- Ky. Rev. State. Ann. 504.130 Baldwin 1984; Michigan- Mich. Comp. Laws Ann. 768.38 West 1982; Nevada- Nev. Rev. Stat. Ann. §174.041; New Mexico - N.M. Stat. Ann 31-9-3(A) Michie 1984; Pennsylvania PA. Stat. Ann. Tit. 18, §314 (1983); South Carolina - S.C. Code Ann. 17-24-20 (Law Co-op Supp. 1992); South Dakota- S.D. Codified Laws Ann. 23A-26-14 (1988); Utah - Utah Code Ann. 77-13-1 (1990).

⁴See, e.g., *State v. Jimenez*, 799 P.2d 785, 797-801 (Ariz. 1990) (reducing death sentence to life imprisonment based on defendant's mental incapacity); *State v. Fierro*, 804 P.2d 90 (Ariz. 1990) (death penalty held disproportionate due in part to defendant's "history of psychological illness"); *State v. Doss*, 568 P.2d 1054, 1061 (Ariz. 1977), *Jones v. State*, 332 So.2d 615, 619 (Fla. 1976) (reducing death sentence to life based on evidence of defendant's mental illness); *Burch v. State*, 343 So.2d 831 (Fla. 1977) (same); *Huckaby v. State*, 343 So.2d 29 (Fla. 1977) (evidence of mental illness outweighed evidence in aggravation and required reduction of sentence from death to life imprisonment; while defendant "may have comprehended the difference between right and wrong his capacity to appreciate the criminality of his conduct and to conform it to the law was substantially impaired"); *Knowles v. State*, 632 So. 2d 62 (Fla. 1993)(mitigating factors of defendant's mental illness, including his impaired capacity to control his conduct outweighed aggravating factors); *Besaraba v. State*, 656 So 2d 441 (Fla. 1995)(death sentence overturned where defendant was under the influence of great emotional disturbance); *State v. Claytor*, 61 Ohio St. 3d 234 (1991)(where defendant produced un rebutted evidence that he lacked substantial capacity to conform, impact of that mitigating factor should have been given more weight and a life sentence imposed); *Edwards v. State*, 441 So.2d 84, 92-94 (Miss. 1983) (plurality opinion) (vacating death sentence based on offender's mental illness); *Haynes v. State*, 103 Nev. 309, 739 P.2d 497 (1987) (vacating as disproportionate death sentence imposed on mentally ill offender).

standard of decency that recognizes the special needs and disabilities of those with severe mental illness. That they have not reached agreement on how to make that accommodation does not alter the fact that their efforts document an evolving standard of decency that prohibits treating those disabled by severe mental illness with the same severity as those who make criminal choices in the absence of such a burden.

34. The National Alliance for the Mentally Ill (“NAMI”) has called for an end to the execution of those suffering from severe mental illnesses. See, Statement By Laurie M. Flynn, Executive Director National Alliance for the Mentally Ill (January 12, 1998); NAMI Policy Platform, *The Criminalization of People with Mental Illness*, Section 9.4.3, “NAMI opposes the death penalty for persons with brain disorders.” Execution of the mentally ill is also condemned by the international community. Last year the United Nations Commission on Human Rights adopted a resolution urging all states that retain the death penalty to stop the execution of the mentally ill. U.N. Commission on Human Rights Doc. No. E/CN.4/RES/2000/65. The World Health Organization devoted World Health Day, April 7, 2001, to mental health as part of a comprehensive plan to increase the availability of treatment and reduce “social exclusion resulting from stigma and discrimination.”

35. Execution of the mentally ill violates the evolving standards of decency in this civilized society. Petitioner is severely mentally ill and his sentence should be vacated.

Claim III

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.

36. On 12/17/2001, Bill E. Mosman, Ph.D., J.D., a psychologist licensed in the State of Florida, tested and evaluated Mr. Bottoson executing an affidavit outlining his preliminary findings.

(EX. 1)

37. Dr. Mosman’s testing shows “definitive indicators of neuro organic damage that

cannot be explained by chance.” (EX. 1, pg.15)

38. Dr. Mosman further claims that “additional testing and possible neuro imaging were and are critical for a proper understanding” of Mr. Bottoson’s mental impairments. (EX. 1, pg. 15)(See Claim II infra)

39. Dr. Mosman’s findings, as described in his affidavit, suggest that Mr. Bottoson operates at a significantly below normal intellectual level; exhibits wide variations in test scores that are beyond the .05 level of significance; possible schizophrenic traits and, possible brain damage. (EX. 1, pg.15-16)

40. Henry L. Dee, Ph.D., a licensed psychologist in the State of Florida, conducted a comprehensive neuropsychological and psychological evaluation on 12/14/01 and 12/20/01, and reduced his findings to an affidavit. (EX. 2)

41. Dr. Dee’s findings “indicated a marked discrepancy between verbal and nonverbal abilities.” Further, “there was significant discrepancy between general mental functioning and memory.” (EX. 2)

42. Based on these findings, Dr. Dee concluded that “[d]iscrepancies of the type and magnitude of those cited in Linroy Bottoson’s test findings are typical in patients with cerebral disease and not found in any other condition.” (EX. 1)

43. 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.

44. Prior to the evaluations conducted by Dr. Mosman and Dr. Dee, no medical personnel conducted the necessary tests that would have diagnosed Mr. Bottoson with having any form of brain damage.

45. On January 8th, 2002, Mr. James Russ executed an affidavit. (EX. 4) Mr. Russ became involved in Mr. Bottoson’s case in 1985. Relying on the reports of the experts, Mr. Russ did not

have any reason to believe that any further testing was necessary on Mr. Bottoson. (EX. 4) Mr. Russ was not on notice as to any other mental 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 this Court.

46. 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. (EX. 5) 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." (EX. 6) 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.

47. 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.

Claim IV

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.

48. All facts stated above in Claim I are hereby incorporated by reference into Claim II.

49. Dr. Mosman states in his affidavit that "additional testing and possible neuro imaging were and are critical for a proper understanding of, once again, tested intellectual levels significantly below normal". Further, Dr. Mosman states that "Because of the seriousness of the matter and the potential consequences of a case of this type, an appropriate and comprehensive examination of the defendant's mental functioning is necessary and essential. Because of the above data, that

examination has to include neuro imaging studies.” (EX. 1)

50. Dr. Dee states, that based on his evaluation of Mr. Bottoson that he “would recommend that further study be carried out, specifically, electroradiographic studies to determine the nature and cause of the cerebral insult, injury or disease he has sustained. The particular radiographic techniques I would leave up to the neuroradiologist, but the appropriate categories would appear to be PET scanning or SPECT scanning.”(EX. 2)

51. Mr. James Russ, as stated above in claim I was not aware of “the necessity of having any further evaluations of Mr. Bottoson’s mental condition for the following reasons: as none of the expert reports I had received concerning Mr. Bottoson placed me on notice of the need to seek out new diagnostic testing; and b0 I had no specialized knowledge as to the viability of uses of SPECT or PET scanning that led me to believe that any such testing would have been beneficial to Mr. Bottoson’s case.” (EX. 4)

Claim V

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.

52. 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.

53. 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.

54. 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.

55. The SPECT/PET scan results are necessary to comply with the above stated rule.

56. 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.

57. The trial court's denial of Mr. Bottoson's request for a transport order, therefore, does not conform to the essential requirements of law requiring 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 is a denial of due process.

58. Furthermore, as Mr. Bottoson is presently scheduled to be executed on February 5, 2002 at 6:00 PM, the trial court's denial of the request for a transport order will cause "irreparable injury for which appellate review will be inadequate." Trepal v. State, 754 So.2d 702, 707 (Fla. 2000).

CLAIM VI

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.

59. On March 19, 1981, Dr. Kirkland was appointed by the trial court to evaluate Mr. Bottoson for competency. On March 20, 1981, Dr. Kirkland examined Mr. Bottoson relating to his competency to stand trial. Dr. Kirkland found Mr. Bottoson competent to stand trial.

60. At the time of trial, Dr. Kirkland was not asked to evaluate the Defendant and consider the existence of any mental mitigators. (EX. 7)

61. Mr. Bottoson was convicted and sentenced to death. His conviction and sentence were upheld on appeal by the Florida Supreme Court. *Bottoson v. State*, 443 So.2d 962 (Fla. 1984).

62. Mr. Bottoson filed a motion requesting relief under FL.R.Crim.P. 3.850. That motion was denied and affirmed by the Florida Supreme Court. *Bottoson v. State*, 674 So.2d 621 (Fla. 1996).

63. Much of the hearing was focused on Mr. Bottoson's claim that his trial counsel, William J. Sheaffer, was ineffective at the penalty phase for failing to introduce any evidence of mental mitigation on Mr. Bottoson's behalf. The record is clear that in the 1981 trial no mental mitigation evidence was presented.

64. At the evidentiary hearing, Dr. Kirkland was called as a state witness and testified as to the evaluation he conducted on Mr. Bottoson. (PCR384-451) The defense called Dr. Phillips who testified that both statutory mental health mitigators existed regarding Mr. Bottoson at the time of the homicide. The lower court denied Mr. Bottoson any relief on his claim of ineffective assistance of counsel for failing to put forth any evidence of mental mitigation at Mr. Bottoson's trial. In the order denying relief, this Court alluded to the testimony of Drs. Phillips and Kirkland, saying "the most troubling claim for this Court was Mr. Bottoson's assertion that counsel failed to present any mental disturbance evidence and certain other mitigating evidence during the penalty phase."

65. On appeal of this Court's denial of the 3.850 motion, the Florida Supreme Court held that there was "competent, substantial evidence to support the judge's findings and conclusions" *Bottoson v. State*, 674 So.2d at 625. As will be demonstrated below, the finding by the Florida Supreme Court that the lower court's findings and conclusions were supported by substantial competent evidence set into motion a federal review of Mr. Bottoson's conviction and sentence which was based upon unfair and unsubstantiated inferences regarding Dr. Kirkland's testimony which were never testified to by Dr. Kirkland at the 3.850 hearing, and which he never intended to convey to the

courts.

66. On November 29, 2000, the United States Circuit Court of Appeals for the 11th Circuit issued its opinion denying Mr. Bottoson relief. Bottoson v. Moore, 234 F.3d 526 (11th Cir. 2000). The 11th Circuit decided the case under the AEDPA requiring, among other things, that the petitioner rebut the presumption of correctness given to the state court determination of the facts by clear and convincing evidence. Id.

67. The facts relied upon in denying Mr. Bottoson's claim were those established in the evidentiary hearing and determined by the Florida Supreme Court. Specifically, the 11th Circuit found that the "Florida Supreme Court in the instant case determined that the 3.850 court discounted Dr. Phillips's opinion, and that it was appropriate to do so under the circumstances." Id. at 534.

68. The 11th Circuit continues by correctly stating that "the 3.850 judge had discounted Dr. Phillips's opinion, notwithstanding the fact that the 3.850 judge did not do so explicitly." Id. (Emphasis added). From there, the 11th Circuit states that "In light of the fact that Dr. Phillips's testimony was in conflict with the testimony of Dr. Kirkland, and in light of the fact that the 3.850 judge explicitly stated that he had considered 'the entire record', the only reasonable inference is that the 3.850 judge did in fact discount the testimony of Dr. Phillips, as the Florida Supreme Court found that he did." Id. At 535 (emphasis added). In doing so, the Court drew a series of inferences concerning Dr. Kirkland's testimony. The most damning inferences made by the 11th Circuit was that Dr. Kirkland had disagreed with Dr. Phillips concerning whether Mr. Bottoson was having a schizophrenic episode at the time of the homicide and that Dr. Kirkland had formulated an opinion that no mental mitigators were present regarding Mr. Bottoson at the time of the homicide. The reason the Court labeled the findings of Dr. Kirkland as "inferences" was that Dr. Kirkland never actually testified, and expressed no opinion at the 3.850 hearing, concerning the issue of the existence of the existence of mental health mitigators at the time of the homicide or on the issue of the existence of schizophrenia in Mr. Bottoson at the time of the homicide. Dr. Kirkland only offered testimony as to Mr. Bottoson's competency to stand trial at the time of his examination on March 21, 1981.

69. On January 10, 2002, Dr. Kirkland executed an affidavit regarding his evaluation and diagnosis of Mr. Bottoson, and what inferences one could draw from them. (EX. 7)

70. Dr. Kirkland's affidavit undermines the "inferences" drawn by the Florida Supreme Court and 11th Circuit Court of Appeals: "One could not infer from my report or testimony anything about Mr. Bottoson's psychiatric condition at the time of the offense. It would be wrong to infer from my testimony that I believed that a psychiatrist could not conclude to a reasonable degree of psychiatric certainty that Mr. Bottoson's schizophrenia was in an acute phase in 1979 when the crime occurred." (EX. 7)

71. Dr. Kirkland explains: "My evaluation was strictly limited to a determination of whether Mr. Bottoson was, at the time of the evaluation, competent to stand trial and sane. Therefore, as stated in my report, the evaluation and written conclusions were tailored to the criteria for determining competence under Florida legal standards as I understood them at the time. I did not attempt to assess sanity at the time of offense." (EX. 7)

72. Further Dr. Kirkland states that he "was not asked to and did not attempt to evaluate Mr. Bottoson for the purpose of determining whether any statutory or non-statutory mental health mitigating circumstances were present at the time of the homicide. I did not conduct any testing or an evaluation of the facts surrounding the homicide which would have allowed me to formulate an opinion concerning the existence of mental health mitigating circumstances." (EX. 7)

73. Concluding, Dr. Kirkland states explicitly that he did not attempt to evaluate Mr. Bottoson and form an opinion as to whether he was experiencing any psychiatric impairment or schizophrenic episode at the time of the offense. (EX. 7, ¶¶4-7) As such, Dr. Kirkland concludes that in his opinion "Mr. Bottoson's schizophrenia was latent when I saw him in 1981 did not imply that his schizophrenia was inactive at the time of the crime in 1979." (EX. 7, ¶8).

CLAIM VII

NEWLY DISCOVERED EVIDENCE OF MR. BOTTOSON'S POTENTIAL BRAIN DAMAGE MAKES HIS CONVICTION FUNDAMENTALLY UNRELIABLE IN

VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

74. On 12/17/2001, Bill E. Mosman, Ph.D., J.D., a psychologist licensed in the State of Florida, tested and evaluated Mr. Bottoson executing an affidavit outlining his preliminary findings. (EX. 1)

75. Dr. Mosman's testing shows "definitive indicators of neuro organic damage that cannot be explained by chance." (EX. 1, pg.15)

76. Dr. Mosman further claims that "additional testing and possible neuro imaging were and are critical for a proper understanding" of Mr. Bottoson's mental impairments. (EX. 1, pg. 15)(See Claim II infra)

77. Dr. Mosman's findings, as outlined briefly in his affidavit, suggest that Mr. Bottoson operates at a significantly below normal intellectual level; exhibits wide variations in test scores that are beyond the .05 level of significance; possible schizophrenic traits and, possible brain damage. (EX. 1, pg.15-16)

78. Henry L. Dee, Ph.D., a licensed psychologist in the State of Florida, conducted a comprehensive neuropsychological and psychological evaluation on 12/14/01 and 12/20/01 reducing his findings to an affidavit. (EX. 2)

79. Dr. Dee's findings "indicated a marked discrepancy between verbal and nonverbal abilities." Further, "there was significant discrepancy between general mental functioning and memory." (EX. 2)

80. Based on these findings, Dr. Dee concluded that "[discrepancies of the type and magnitude of those cited in Linroy Bottoson's test findings are typical in patients with cerebral disease and not found in any other condition." (EX. 2)

81. Dr. Mosman further states in his affidavit that the brain damage described above "would have direct implications for, e.g., planning and organization, abstract reasoning and

judgement, and executive functions which were and are directly related to legal issues in the case.” (EX. 1, pg. 16) Further, Dr. Mosman opines that “[i]n view of the history, data, records reviewed, and the summaries and the current testing and test scores provided and reviewed above, several possible and competing clinical explanations exist to account for the defendant’s mental, emotional, and behavioral functioning which at the time of the incident itself would implicate defense strategies and presentations”. (EX. 1, pg.16)

82. Dr. Dee in his affidavit concludes that the “differential diagnosis for the explanation of the defects in cerebral integrity are numerous, and only further exploration can settle this and therefore give a true and accurate understanding of his mental state at the time of the crime. (EX. 2, ¶11)

83. The insertion of evidence of brain damage in Mr. Bottoson at the time of the homicide would probably have produce a different outcome at the guilt phase of a conviction of a lesser offense or a verdict of Not Guilty.

CONCLUSION

For the foregoing reasons as well as those raised in Petitioner’s initial motion to vacate, this Court should grant the following relief:

1. Enter a stay of execution so that these claims may be addressed with all the care that a decision regarding a human life demands;
2. Conduct a *Huff* hearing on Petitioner’s claims;
3. Grant Petitioner’s motions regarding neuroimaging;
4. Grant an evidentiary hearing;
5. Vacate Petitioner’s conviction and sentence of death;
6. Grant such other relief as the Court deems appropriate and as law and justice require.

Respectfully submitted,