IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-128

LINROY BOTTOSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY TO STATE'S ANSWER TO APPELLANT'S INITIAL BRIEF

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CLAIM I

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

In its response to Claim I of Mr. Bottoson's Initial Brief, Appellee states that relief on this claim should be denied for the following reasons:

- "[the Circuit Court's finding that Mr. Bottoson is not mentally retarded] is supported by competent substantial evidence, and should not be disturbed."[1]; therefore,

- "there is no factual basis for this claim";[2] and finally

- "mental retardation as a bar to execution . . . is procedurally barred because it could have been raised on direct appeal but was not."[3]

None of these reasons for denial are supported by the record or current law.

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[1] Answer Brief of Appellee, p. 12.

[2] Id.

[3] Id.; but see Penry v. Lynaugh, 492 U.S. 302,331 (1989) (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.). This claim is based in part on the existence of a new statute barring the execution of the mentally retarded which did not exist during prior actions herein. Son Fleming had also never raised mental retardation before Georgia enacted such a statute. See 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).

The Appellee argues that the trial court's finding that Mr. Bottoson is not mentally retarded is supported by competent substantial evidence and, therefore, should not be subject to de novo review by this Court. However, the record that was produced without providing Mr. Bottoson "critical stage" protections cannot suffice to deny this claim.[4] Furthermore, this Court has repeatedly held that only when the trial court applies the correct rule of law will this Court conduct competent, substantial evidence review.[5] In Mr. Bottoson's present case, the trial court first acknowledged that the "rules" for determining mental retardation had not been established as required by law[6] and then proceeded to issue a ruling about Mr. Bottoson's status as a mentally retarded individual. Finally, the testimony credited by the lower court addressed current functioning only, contrary to the Florida statute. In the face of the above noted admission by the trial court, Mr. Bottoson contends that it is inconceivable that Appellee

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[4] Appellee did not reply to Mr. Bottoson's argument that it would violate the Eighth and Fourteenth Amendments to have some defendants' claims assessed in a critical stage, trial setting, and others in a constitutional-rights bereft post-conviction setting. see Appellant's Initial Brief, at 13-14.

[5] Bowles v. State, 26 Fla. L Weekly S659, 2002 WL 11941 (Fla. 2001); Willacy v. State, 696 So.2d 693 (Fla. 1997).

[6] January 16, 2002 hearing, at 142. ("We all know that there aren't any rules, okay?"). Even the State's expert, Dr. McClaren, stated that the Florida mental retardation statute was "a little vaguer(sic) than my understanding of mental retardation." Id., at 141.

now asserts that the correct rule of law was applied which precludes de novo review.

A. The focus of the Florida Statute: "conception to age 18"

The primary difference between Appellee's and Mr. Bottoson's position is where the expert should focus, time-wise, to determine mental retardation. Appellee asserts that the focus must be **today**; Mr. Bottoson asserts that the focus should be on the developmental years, before age 18. Focusing on today, like the lower court did, favors Appellee because Mr. Bottoson's full scale IQ scores are higher today than they were during the developmental period.[7]

But the Florida statute rejects Appellee's and the lower court's legal position. The Florida statute *could have* required an examination of only current functioning. *Some statutes that bar the execution of mentally retarded persons do focus on current functioning*. That is the way the law was written in Nebraska (R.R.S. Neb. Section 28-105.01(3) (1998) and in New Mexico. N.M. Stat. Ann. Section 31-20A-2.1(A) (1991).[8]

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[7] Appellee does not contest Appellant's position that Mr. Bottoson's verbal IQ scores have slightly risen over a fifty year period, while his performance IQ scores have remained dreadful, because of years and years of practice with writing and reading. see Appellant's Initial Brief, at 22-24.

[8] This distinction in statutes–some requiring that mental retardation manifest before age 18, and some looking only at current functioning–was noted in the Brief of the States of Alabama, Mississippi, Nevada, South carolina, and Utah as *Amici Curiae* in Support of Respondent in Atkins v. Virginia, United States Supreme Court Case No. 00-8452. These statutes require a showing that **today** or **now** the person suffers from "significantly

But Florida (and other states) say that for sub-standard IQ and adaptive behavior deficits to equal mental retardation and bar execution the two must have "manifested during the period from conception to age 18." Thus, that is where to look, the lower court did not do so, and Appellee's position must be rejected.

B. The relevant evidence

1. Intellectual functioning

Dr. Dee is the only witness below who focused on the developmental years before age 18. Thus his is the only relevant testimony. Appellee's uncharitable comments about Dr. Dee in his Brief are perplexing inasmuch as Appellee's counsel stated below that he was well acquainted with this expert's credentials and in fact *stipulated* that Dr. Dee was an expert in the diagnosis of mental retardation.[9]

Dr. Dee's testimony is set out in Appellant's brief and will not be repeated here, but a couple of responses to the State's discussion of IQ scores are required. Appellee incorrectly asserts that the Terman score of 77 when Petitioner was 12 years old is insignificant. First, Appellee says that Dr. Dee did not know what the Terman was; second, Appellee says that we do not know what it

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sub-average intellectual functioning existing concurrently with deficits in adaptive behavior." Id. at 7. This is Appellee's and the lower court's focus in this case, but the Florida statute is different from New Mexico's and Nebraska's statute.

[9] January 16, 2002 hearing, at 16.

is. Dr. Dee knew well enough, and we know absolutely–the Terman was the state of the art intelligence test in 1951.

First, Dr. Dee relates his understanding of what the Terman was:

> Dr. Binet put together a very large number of tests, standardized them on various people. People that had been identified as feeble-minded and other people that head been identified as clever or average or whatever, okay. This was the beginning of the intelligence testing.
>
> In this country, it was already underway and Dr. Terman, at Stanford University, translated the Binet scales and re-standardized them on the American population. And since the professor was at Stanford, it was called the Stanford-Binet IQ test, and that was the first one in common use.
>
> .....
>
> The scores that were reported says his Terman – **that must have been the Stanford-Binet** because there is no Terman test, but since Mr. Terman re-standardized it ..... What is reported in the school records is a Terman IQ of 77; **Lewis Terman was the man who re-standardized the Stanford-Binet IQ, so it has to be the Stanford-Binet IQ.**[10]

This shows a very sophisticated knowledge and understanding of the history and function of IQ testing, which neither of Appellee's expert's possessed. See Appellant's Initial Brief, at 20-21.[11]

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[10] January 16, 2002 hearing, at 24-30 (emphasis added).

[11] Appellee also writes that Dr. Dee relied upon a Leiter test of intelligence but "knows little about it. (R417)." The Leiter test performed in 2001 resulted in a 76 IQ, which was brought out by Appellee during cross-examination. Dr. Dee stated that while he did not "know an awful lot about it," id. at 113, he knew that it was a "standardized intelligence test," id. 113, which "places more emphasis on nonverbal things than does the

2. Adaptive Functioning

The record also indicates that Mr. Bottoson displayed significant deficits in adaptive behavior during his developmental years and the years prior to his incarceration. The State's own expert, Dr. Harry McClaren, acknowledged these deficits.[12] However, the State's other expert, Dr. Greg Prichard, insisted that the deficits displayed before age 18 were not relevant to determining Mr. Bottoson's mental retardation. Instead, Dr. Prichard was intent on assessing Mr. Bottoson's ability to adapt his behavior to the requirements of life on death row. To accomplish this assessment, Dr. Prichard conducted a phone interview with a prison guard. The instrument he used, the Vineland Adaptive Behavior Scale, has been standardized for children ages 0 to 18 years 11 months. Appellee would now have this Court find that such an assessment is dispositive as to Mr. Bottoson's adaptive behavior. Clearly, the legislature did not intend for such a result.

When the legislature enacted and the governor signed Fla. Stat. § 921.137 to protect mentally retarded individuals, they included an evidentiary requirement that these individuals shoudl

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Wechsler." Id. at 115. Appellee also complains that Dr. Dee cannot possibly diagnose mental retardation when other currently administered tests show an IQ of 84, but this totally ignores Dr. Dee's testimony which appropriately focused on the developmental years and explained how Mr. Bottoson's verbal IQ rose slowly while in prison but his performance IQ has remained static.

[12] January 16, 2002 hearing, at 157-160.

manifest signs of mental retardation prior to the age of 18. Clearly that same developmental time period should be the focus of the Court's de novo review in this case.

CLAIM II

NEWLY DISCOVERED EVIDENCE OF MR. BOTTOSON'S BRAIN DAMAGE MAKES HIS SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

In the answer brief, Appellee asserts that Mr. Bottoson is not entitled to an evidentiary on his claim of newly discovered evidence of brain damage. However, the answer brief merely states the opinion of the Appellee concerning the newly discovered aspect of the Jones standard.[13] Appellee's opinion about whether Mr. Bottoson's uncontroverted brain damage is newly discovered is not dispositive of the issue. The only means to a proper determination of this claim is through an evidentiary hearing. Only then can the due diligence of counsel be properly assessed. Furthermore, the issue is not whether the uncontroverted evidence of brain damage "Existed", but rather whether counsel exercised due diligence. Since due diligence is a matter of factual dispute, it must be decided at an evidentiary hearing.

CLAIM III

[13] Jones v. State, 709 So. 2d 512, (Fla. 1998).

NEWLY DISCOVERED EVIDENCE OF A SPECT OR PET SCAN ON MR. BOTTOSON WOULD MAKE HIS SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

Appellee states that this claim is procedurally barred because the PET/SPECT scans have been in existence since 1992 and "could have been discovered through due diligence." This assertion misstates the correct law in the determination of "due diligence." The question is not whether the PET/SPECT scan existed, but rather whether, through due diligence, counsel should have recognized the applicability of a PET/SPECT scan in Mr. Bottoson's case. In order to assess the "due diligence" requirement of Jones, it is necessary to conduct an evidentiary to determine what notice counsel had of the viability of a PET/SPECT.

CLAIM IV

MR. BOTTOSON WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING IN VIOLATION OF DUE PROCESS AND THE STATE AND FEDERAL CONSTITUTIONS WHEN THE STATE POSTCONVICTION TRIAL COURT PREVENTED MR. BOTTOSON FROM OBTAINING A SPECT AND PET SCAN TO OBJECTIVELY DETERMINE THE EXISTENCE OF BRAIN DAMAGE.

In reply to the State's Answer, Mr. Bottoson relies on the argument set forth in his Initial Brief.

CLAIM V

NEWLY DISCOVERED EVIDENCE OF DR. KIRKLAND'S CLARIFICATION OF HIS ORIGINAL EVIDENTIARY TESTIMONY MAKES MR. BOTTOSON'S SENTENCE OF

DEATH FUNDAMENTALLY UNRELIABLE IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

In reply to the State's Answer, Mr. Bottoson relies on the argument set forth in his Initial Brief.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Bottoson respectfully urges this Honorable Court to grant relief.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing **Reply to State's Answer to Appellant's Initial Brief**, has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on January_____, 2002.

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I hereby certify that a true copy of the foregoing was generated in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.

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