IN THE SUPREME COURT OF FLORIDA

No. SC02-1455

LINROY BOTTOSON,
Petitioner

versus,

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,
Respondent/Appellee.

ON PETITION FOR WRIT OF HABEAS CORPUS

PETITIONER'S OPENING BRIEF
(CORRECTED)

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I. STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to Rule 9.030(a)(3), Florida Rules of Appellate Procedure, and article V of the Florida Constitution, sections b(1), b(7), and b(9). This brief is properly filed under Rule 9.100(a).

II. NATURE OF RELIEF SOUGHT

Mr. Bottoson seeks a stay of execution and writ of habeas corpus addressed to Respondent.

III. STATEMENT OF THE CASE

The procedural and factual history of the case is set forth in the Petition for Writ of Habeas Corpus. Other factual and procedural issues are detailed as they become relevant in the arguments that follow.

IV. ARGUMENT

I. PETITIONER'S DEATH SENTENCE MUST BE VACATED UNDER *RING V. ARIZONA*

To understand the implications of *Ring v. Arizona*, 2002 WL 1357257 (U.S., June 24, 2002), for petitioner Bottoson's death sentence, it is necessary to consider (A) the design of Florida's capital-sentencing procedure, (B) the way in which that procedure operates with respect to the all-important findings of fact that expose a defendant to a death sentence, (C) how the procedure worked in Linroy Bottoson's case, (D) what *Ring* subsequently held about the constitutional necessity for jury fact-finding with respect to facts that expose a defendant to a death sentence; and (E) the nature of the constitutional rule announced in *Ring*, as bearing on *Ring*'s

retroactivity. We take up these subjects in order:

A. The Florida capital-sentencing statute was designed to deny the jury a role in making the findings of fact on which eligibility for a death sentence depends.

Furman v. Georgia, 408 U.S. 238 (1972), was a confusing decision that led many legislatures and courts astray. See *Lockett v. Ohio*, 438 U.S. 586, 599-600 & nn. 7 & 8 (1978) (plurality opinion). The Florida Legislature believed that *Furman* had been aimed primarily at ending death-sentencing regimes in which "the inflamed emotions of jurors can . . . sentence a man to die." *State v. Dixon*, 283 So.2d 1, 8 (Fla. 1973). Thus, the statute which it enacted in 1972 "in response to *Furman*"[1] severely limited the jury's role in the capital sentencing process. The Legislature relied on Florida's trial judges not only to make the ultimate sentencing decision,[2] but also to make the specific factual findings that brought the "issue of life or death within the framework of rules provided by the statute." *Ibid*. The statutory aggravating circumstances necessary to support a death sentence were required to be found by the trial judge and set forth in writing, see Fla. Stat. § 921.141(3), on the theory that, when "the trial judge justifies his sentence of death in writing, . . . [that will] provide the

[1] *Proffitt v. Florida*, 428 U.S. 242, 247 (1976).

[2] "The Florida procedure does not empower the jury with the final sentencing decision; rather, the trial judge imposes the sentence." *Combs v. State*, 525 So.2d 853, 856 (Fla. 1988). Accord: *e.g.*, *Spencer v. State*, 615 So.2d 688, 691 (1993) ("It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed.").

opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required . . . ." *Dixon*, 283 So.2d at 8.[3] As the Court has frequently described the "procedure [to] be used in sentencing phase proceedings":

> "First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order."[4]

Conversely, the jury's role in capital sentencing was restricted to informing the court of "the judgment of the community as to whether the death penalty is appropriate." *Odom v. State*, 403 So.2d 936, 942 (Fla. 1981).[5] The jury was to do this by "render[ing] an advisory sentence to the court," Fla. Stat. § 921.141(2),

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[3] *Morton v. State*, 789 So.2d 324, 333 (Fla. 2001): "The sentencing order is the foundation for this Court's proportionality review, which may ultimately determine if a person lives or dies." Accord: *e.g.*, *Patton v. State*, 784 So.2d 380, 388 (Fla. 2000).

[4] *Spencer v. State*, 615 So.2d 688, 690-691 (1993).

[5] See also, *e.g.*, *Richardson v. State*, 437 So.2d 1091, 1095 (Fla. 1983); *Quince v. State*, 414 So.2d 185, 187 (Fla. 1982); *McCaskill v. State*, 344 So.2 1276, 1280 (Fla. 1977).

which did *not* have to set forth any specific findings of fact, *ibid*.,[6] which was *not* required to be unanimous, Fla. Stat. § 921.141(3), and which the trial judge did *not* have to follow, *ibid*.[7]

This basic statutory framework and its allocation of responsibilities between judge and jury have been uniformly understood and implemented by the Court since *Dixon* first interpreted the statute. "The function of the jury in the sentencing phase . . . is not the same as the function of the jury in the guilt phase." *Johnson v. State*, 393 So.2d 1069, 1074 (Fla. 1981). The jury does not make specific findings of fact, *Cannady v. State*, 427 So.2d 723, 729 (Fla. 1983), because, this Court has held, *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), did not require such

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[6] Compare Fla. Stat. § 921.141(3)(b): "In each case in which the court imposes the death sentence, *the determination of the court shall be supported by specific written findings of fact* based upon the circumstances in subsections (6) and (7) and based upon the records of the trial and the sentencing proceedings." (Emphasis added.) To support a death sentence, specific findings with respect to aggravating and mitigating circumstances are required; it is "insufficient to state generally that the aggravating circumstances that occurred in the course of the trial outweigh the mitigating circumstances that were presented to the jury." *Patterson v. State*, 513 So. 2d 1257, 1263-1264 (Fla. 1987). Accord: *Bouie v. State*, 559 So.2d 1113, 1115 (Fla. 1990). Yet *all* that a jury's advisory verdict can be read as doing is to "state generally that the aggravating circumstances . . . outweigh the mitigating circumstances." This is doubtless why the Court in *Spaziano v. State*, 433 So.2d 508, 512 (Fla. 1983), concluded that "allowing the jury's recommendation to be binding would violate *Furman v. Georgia*."

[7] Even in the rare case where it is possible to guess that a jury at the penalty stage must have found particular facts to be true or untrue, the judge is authorized to find the contrary. *See*, *e.g.*, *McCrae v. State*, 395 So.2d 1145, 1154-1155 (1980).

findings, *Hunter v. State*, 660 So.2d 244, 252 & n.13 (Fla. 1995),[8] and the jury does not bear "the same degree of responsibility as that borne by a 'true sentencing jury,'" *Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986).[9] The jury's role is simply – though importantly – to reflect community judgment "as to whether the death sentence is appropriate," *McCampbell v. State*, 421 So.2d 1072, 1975 (Fla. 1982).[10] The "specific findings of fact" that are the "mandatory statutory requirement" for a death sentence are the responsibility of the presiding judge and no one else. *Van Royal v. State*, 497 So.2d 625, 628 (Fla. 1986). See, *e.g.*, *Patterson v. State*, 513 So.

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[8] That is the precise premise upon which this Court sustained a trial judge's power to override the jury's recommendation of a life sentence as consistent with *Bullington v. Missouri*, 451 U.S. 430 (1981). See, *e.g.*, *Lusk v. State*, 446 So.2d 1038, 1042 (Fla. 1984). It is also why the defendant has no right "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." *Engle v. State*, 438 So.2d 803, 813 (Fla. 1983), *explained in Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). As Justice Shaw has noted, a Florida "jury's advisory recommendation is not supported by findings of fact. . . . Florida's statute is unlike those in states where the jury is the sentencer and is required to render special verdicts with specific findings of fact." *Combs*, 525 So.2d at 859 (concurring opinion). Under Florida practice, "both this Court and the sentencing judge can only speculate as to what factors the jury found in making its recommendation . . . ." *Ibid*. The United States Supreme Court, too, has recognized that "the jury in Florida does not reveal the aggravating circumstances on which it relies," *Sochor v. Florida*, 504 U.S. 527 (1992).

[9] Accord: *Combs*, 525 So.2d at 855-858; *Burns v. State*, 699 So.2d 646, 654 (Fla. 1997), and cases cited.

[10] *See*, *e.g.*, *Cox v. State*, 2002 WL 1027308, pp. *7-*8: (Fla. May 23, 2002) "Florida statutory law details the role of a penalty phase jury, which directs the jury panel to determine the proper sentence without precise direction regarding the weighing of aggravating and mitigating factors in the process."

2d 1257, 1261-1263 (Fla. 1987); *Grossman v. State*, 525 So.2d 833, 839-840 (Fla. 1988);[11] *Hernandez v. State*, 621 So.2d 1353, 1357 (Fla. 1993); *Layman v. State*, 652 So.2d 373, 375-376 (Fla. 1995); *Gibson v. State*, 661 So.2d 288, 292-293 (Fla. 1995); *State v. Riechman*, 777 So.2d 342, 351-353 (Fla. 2000).

B. The statute makes eligibility for a death sentence depend upon findings of fact by the trial judge that go beyond any findings reached by the jury in determining guilt.

The actual operation of the Florida capital-sentencing statute must be viewed against the backdrop of the State's general procedures for prosecuting homicide cases, including potentially capital homicide cases. Although this Court is familiar with those general procedures, we summarize them briefly in order to analyze how the statutory death-sentencing process fits into them. The aim of the analysis is to demonstrate that the statutory death-sentencing process, in context, exposes Florida capital defendants "'to a penalty *exceeding* the maximum . . . [they] would receive if punished according to the facts reflected in the jury verdict alone.'" *Ring v. Arizona,* 2002 WL 1357257 (U.S., June 24, 2002) at *8, quoting *Apprendi v. New Jersey*, 530 U. S. 466, 483 (2000).

All capital crimes in this State must be charged by presentment or indictment of a grand jury. Fla. Const. Art. I, § 15(a) (1980). However, indictments

[11] Holding on other grounds receded from in *Franqui v. State*, 699 So.2d 1312, 1319-1320 (Fla. 1997).

may be open-ended with respect to the prosecution's theory of liability, or may plead alternative theories. For example, an indictment needs not specify in separate counts that a person charged with first-degree murder acted with a premeditated design and that s/he caused the victim's death in the course of an enumerated felony if the prosecution wishes to submit these two factually diverse theories to the jury as alternative bases for a first-degree murder conviction under Fla. Stat. § 782.04 (1979). Some charging instruments do list multiple theories of first-degree murder liability, others list only one. In no event does the instrument have to state the aggravating circumstance or circumstances on which the State will later rely to establish that the defendant is eligible for the death penalty if convicted of first-degree murder. *State v. Sireci*, 399 So.2d 964, 970 (Fla. 1981).

Under standard Florida practice, the jury instructions at a trial upon an indictment charging first-degree murder will allow a conviction on any theory of first-degree liability that has sufficient evidentiary support to sustain a verdict. Verdict forms may or may not specify the theory of liability that the jury found proved beyond a reasonable doubt. It is not common to require juries to return special verdicts making specific findings of fact.

Early in the history of the State's post-1972 death penalty law, this Court explained what constitutes a capital crime, and where the definition comes from:

"The aggravating circumstances of Fla. Stat. § 921.141(6), F.S.A.,

> actually define those crimes – when read in conjunction with Fla. Stat. § § 782.04(1) and 794.01(1), F.S.A.– to which the death penalty is applicable in the absence of mitigating circumstances."

Dixon, 283 So.2d at 9. Accord: *Alford v. State*, 307 So.2d 433, 444 (Fla. 1975).

Section 782.04, Florida Statutes, defines first degree murder as

"(1)(a) The unlawful killing of a human being:

> "1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;
>
> "2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any . . . [of several enumerated felonies]."

The same section provides that "murder in the first degree . . . constitutes a capital felony, punishable as provided in § 775.082." Fla. Stat. § 782.04(1) (1979).

The sentence for first-degree murder is specified in section 775.082, Florida Statutes:

> "A person who has been convicted of a capital felony ***shall*** **be punished by life imprisonment** and shall be required to serve no less than 25 years before becoming eligible for parole ***unless*** **the proceedings held to determine sentence** according to the procedure set forth in § 921.141 **result in *a finding by the court*** **that such person shall be punished by death**, and in the latter event such person shall be punished by death."

Fla. Stat. § 775.082 (1979) (emphasis added).

Section 921.141, Florida Statutes, describes the procedure to be followed by the court in making the findings which are the necessary precondition for a death sentence and in determining that a death sentence will actually be imposed. See *Dixon*,

283 So.2d at 7 ("[a]fter his adjudication, this defendant is provided with five steps between conviction and imposition of the death penalty"). Section 921.141 is titled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence" and provides the following:

> "Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082."

In the penalty-phase proceeding, the jury may or may not hear additional evidence beyond what was adduced prior to the verdict of guilty. *See Dixon*, 283 So.2d at 7; Fla. Stat. § 921.141(1) (1979). Each side is permitted to make a closing argument to the jury. Fla.R.Crim.Pro. 3.780. The jury is then instructed to consider all the evidence and reach an advisory recommendation regarding the appropriate sentence. The recommendation is to be based on whether sufficient aggravating circumstances exist to justify imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh these aggravating circumstances. Fla. Stat. § 921.141(2) (1979). Aggravators may be considered if proved beyond a reasonable doubt, and mitigators if supported by a preponderance of the evidence.

The aggravating circumstances enumerated by Fla. Stat. § 921.141(5), are:

> "(a) The capital felony was committed by a person under sentence of imprisonment;

"(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

"(c) The defendant knowingly created a great risk of death to many persons;

"(d) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnaping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive-device or bomb;

"(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

"(f) The capital felony was committed for pecuniary gain;

"(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

"(h) The capital felony was especially heinous, atrocious or cruel."

The jury's advisory recommendation does not specify what, if any, aggravating circumstances the jurors found to have been proved. Neither the consideration of an aggravating circumstance nor the return of the jury's advisory recommendation requires a unanimous vote of the jurors.

"The trial judge . . . is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence." *Engle v. State*, 438 So.2d 803, 813 (Fla. 1983), *explained in Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). After the jury has made its advisory recommendation, it is discharged. A separate sentencing hearing is then conducted before the court alone. In some cases tried

around the time of petitioner's case, and in all cases after 1993, this judge-only sentencing hearing involves the presentation of additional evidence and/or argument to support the aggravating and mitigating circumstances. *See generally Spencer v. State*, 615 So.2d 688 (Fla. 1993).

Section 921.141(3), Florida Statutes, provides that

> "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death . . .
>
> "If the court does not make the finding requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082."

The judge is required to issue written findings in support of his or her decision to impose a death sentence. Fla. Stat. § 921.141(3); *Grossman v. State*, 525 So.2d 833 (Fla. 1988).[12] This means that the judge must make specific factual findings with respect to the existence *vel non* of the facts constituting the statutory aggravating circumstances that are a necessary precondition for the imposition of a sentence of death. Not being bound by the jury's sentencing recommendation, the judge may consider and rely upon evidence not submitted to the jury (provided the defendant receives adequate prior notice of the evidence). *Porter v. State*, 400 So.2d 5 (Fla. 1981). The judge is also permitted to consider and rely upon aggravating

[12] Holding on other grounds receded from in *Franqui v. State*, 699 So.2d 1312, 1319-1320 (Fla. 1997).

circumstances that were not submitted to the jury. *Davis v. State*, 703 So.2d 1055 (Fla. 1997), citing *Hoffman v. State*, 474 So.2d 1178 (Fla. 1985) (court's finding of the "heinous, atrocious, or cruel" aggravating circumstance was proper even though the jury was not instructed on it); *Fitzpatrick v. State*, 437 So.2d 1072, 1078 (Fla. 1983) (finding of previous conviction of a violent felony was proper even though the jury was not instructed on it); *Engle*, 438 So.2d at 813.

Because the jury's role is merely advisory, this Court's review of a death sentence is based and dependent upon the judge's written findings. *E.g.*, *Morton v. State*, 789 So.2 324, 333 (Fla. 2001); *Grossman*, 525 So.2d at 839; *Dixon*, 283 So.2d at 8. The Court has repeatedly emphasized that the trial judge's findings must be made independently of the jury's recommendation. *See Grossman*, 525 So.2d at 840 (collecting cases).

C. Petitioner's eligibility for a death sentence was in fact established solely through findings of fact made by the trial judge that went beyond any findings reached by the jury in determining guilt.

Now, here are the proceedings through which petitioner Linroy Bottoson was determined to be eligible for a death sentence and condemned to die:

On November 15, 1979, the grand jury returned an indictment charging that

> "Linroy Bottoson did, on the 29th day of October, 1979, in Orange County, Florida, in violation of Florida Statute 782.04, from a

> premeditated design to effect the death of CATHERINE WILLIE ALEXANDER, murder the said CATHERINE WILLIE ALEXANDER, in the county aforesaid, by stabbing her with a knife and striking her with an automobile."

TR 2672. The indictment did not indicate whether the State would seek the death penalty, or, if so, upon what factual basis.

The evidence adduced at trial is summarized in this Court's opinion affirming petitioner's conviction and sentence. *Bottoson v. State*, 443 So.2d 962, 963-64 (Fla. 1984) ("*Bottoson I*"). Although the indictment charged only premeditated murder, in his closing argument, the prosecutor argued "that the evidence shows both premeditation and felony murder." TR 1998. He argued "there was a kidnapping and robbery. Either one of which would support, which would supply the felony, which will supply the premeditation to get us into first degree murder." TR 1999; 2035. But he concluded by emphasizing premeditation. TR 2036.

The judge informed the prosecutor that the verdict form should state "[j]ust what we put on in the instructions. Guilty, not guilty of murder in the first degree . . . ." TR 2038. The instructions themselves told the jury that

> "[m]urder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, **or** when committed by a person engaged in the perpetration of or in the attempt to perpetrate any of the following crimes: robbery or kidnapping.
>
> * * *

> "If the Defendant, in killing the deceased, acted from a premeditated design to effect the death of the deceased **or** in the perpetration of or in an attempt to perpetrate robbery or kidnapping, he should be found guilty of murder in the first degree."

TR 2077, 2082 (emphasis added). Before sending the jury out, the court instructed it that the "penalty is for the Court to decide. You are not responsible for the penalty in any way because of your verdict." TR 2090. The jurors were told simply to "put a check mark on the line in front of the space which is your verdict." TR 2092.

The verdict form did not authorize the jury to convict on the basis of felony-murder. It included a space to mark whether the jury found "defendant guilty of murder in the first degree, *as charged*." TR 3328 (emphasis added). As we have seen, the charge laid in the charging instrument was premeditated murder, nothing more or less or different.

The guilt phase of trial ended at 8:00 p.m. on April 6, 1981, with a jury verdict of guilty of first degree murder as charged. TR 2100. The penalty phase began on April 9, 1981, and ended the following day. *See* TR 2113; 2168. The State presented one witness. TR 2116-17. The defense presented three character witnesses, and one residual-doubt witness. TR 2127-2139. No evidence was presented to support any of the seven statutory mitigating factors.

Following arguments by counsel, the judge instructed the jury. In accordance with Fla. Stat. § 921.141(2) and (3), the judge began by telling the jury

that

> "it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of murder in the first degree. As you have been told, *the final decision as to what punishment shall be imposed is the responsibility of the Judge*; however, it is your duty to follow the law which will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. . . . The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence, beyond a reasonable doubt."

TR 2155-56 (emphasis added). The judge then listed all eight statutory aggravating circumstances. TR 2156. He continued:

> "If you do not find that there existed sufficient of the aggravating circumstances which have been described to you, it will be your duty to recommend a sentence of life imprisonment. . . .
>
> "Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence, are these:"

TR 2156-2157. The judge then listed the seven statutory mitigating circumstances. These did not include a catch-all circumstance relating to character of the defendant and the circumstances of the offense. TR 2157-58. Regarding the proof of aggravating circumstances, the judge charged:

> "[a]ggravating circumstances must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision. Proof of an aggravating circumstance beyond a reasonable doubt is

> evidence by which the understanding, judgment and reason of the jury are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the circumstance has been proved to the exclusion of and beyond a reasonable doubt."

TR 2158-59.

The jury returned an advisory verdict recommending a sentence of death by a vote of 10 to 2. Despite the jury instruction precluding consideration of any of petitioner's nonstatutory mitigating evidence[13] and the complete absence of any evidence supporting statutory mitigating circumstances, two jurors voted against the death penalty. TR 2168. Since there were no mitigating circumstances as defined by the instructions to weigh against the aggravating circumstances, and since the jury was not instructed that it could recommend a life sentence if it found an aggravating circumstance but no mitigating circumstances, a plausible inference is that the two jurors who voted for life failed to find the aggravating circumstances. In any event, the jury's 10-to-2 vote establishes beyond dispute that no unanimous jury finding was ever made in petitioner's case of the facts that rendered him eligible for a death sentence under Florida law.

The judge excused the jury (TR 2170), and "set sentencing for 9:45 on May 1." TR 2171. On the day of sentencing, the judge entered his "Findings of Fact"

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[13] See *Bottoson v. State*, 624 So.2d 621, 622-623 (Fla. 1996) ("*Bottoson II*"), finding that the trial judge had committed error under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), but that the error was harmless.

to justify the death sentence. TR 3363-69. The judge's written justification is a classic example of bench-trial findings of fact and conclusions of law. For example:

> "D. WHETHER THE MURDER OF WHICH DEFENDANT WAS CONVICTED WAS COMMITTED WHILE HE WAS ENGAGED IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING, AIRCRAFT PIRACY, OR THE UNLAWFUL THROWING, PLACING OR DISCHARGE OF A DESTRUCTIVE DEVICE OR BOMB.
>
> "FACT: The victim, Cathering Willie Alexander was abducted against her will from her place of employment after she was the victim of a robbery. The evidence showed she was abducted in order for the robber to effectuate his escape from the Eatonville Post Office.
>
> "CONCLUSION: There is an aggravating circumstance under this paragraph."

(TR 3364.) This pattern was repeated for each statutory aggravating and mitigating circumstance.[14]

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[14] *E.g.*:

> "E. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.
>
> "FACT: The evidence affirmatively establishes that the Defendant killed Catherine Willie Alexander for one purpose, and one purpose only, to avoid being arrested after commission of the robbery. The murder was accomplished to eliminate the only witness to the crime of robbery. The evidence having established that Defendant believed that the only good witness is a dead witness.

(continued...)

Only after entering his findings into the record did the judge impose the death sentence. TR 3370-71.

On direct appeal, this Court mentioned the jury's recommendation only in passing and indirectly when briefly addressing petitioner's unpreserved claim that the trial court had erred by not instructing the jury – as other juries were instructed – that the jurors could recommend a sentence less than death even if there were aggravating circumstances and no mitigating circumstances. *Bottoson I*, 443 So.2d at 966; *id.* at 964. The Court's consideration of whether the death sentence was properly imposed depended entirely upon the trial court's findings:

> "Finally we hold that the trial judge properly imposed the death sentence. As aggravating circumstances, *the trial judge found* that appellant had previously been convicted of a crime involving the threat of violence; that the crime was committed during the commission of a felony; that it was committed for the purpose of avoiding arrest; and that it was especially heinous, atrocious, or cruel. He found no mitigating circumstances.
>
> "All of these aggravating circumstances were proven beyond a reasonable doubt. Appellant had previously been convicted of a bank robbery which inherently involves the use or threat of use of violence against another person. *See Antone v. State*, 382 So.2d 1205 (Fla.), *cert. denied*, 449 U.S. 913 (1980). Appellant concedes that the crime was committed during the commission of a robbery. That it was committed for the purpose of avoiding arrest was proven by appellant's own

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[14](...continued)

> "CONCLUSION: There is an aggravating circumstance under this paragraph".

TR. 3364.

> statement to Kuniara that 'dead witnesses are the best witnesses.' Finally that the victim was held captive for at least three days before being stabbed about fifteen times and then run over with a car renders this crime especially, heinous, atrocious, or cruel. These aggravating circumstances, considered in light of the nonexistence of any mitigating factors, clearly justified the *trial court's determination that a sentence of death is proper*.
>
> "We therefore affirm the conviction for first-degree murder and the sentence of death."

Bottoson I, 443 So.2d at 966 (emphasis added).

D. *Ring v. Arizona* holds that the federal constitutional right to jury trial is violated by the imposition of a death sentence to which the defendant is exposed solely through findings of fact made by the trial judge that go beyond any findings reached by the jury in determining guilt.

In *Ring v. Arizona*, 2002 WL 1357257 (U.S., June 24, 2002), the Supreme Court overruled *Walton v. Arizona,* 497 U. S. 639 (1990), "to the extent that . . . [*Walton*] allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." 2002 WL 1357257 at *10. Quite simply, *Ring* subjected capital sentencing to the Sixth and Fourteenth Amendment rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "that the Sixth Amendment does not permit a defendant to be 'expose[d] ... to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" *Ring*, 2002 WL 1357257 at *3, quoting *Apprendi*, 530 U.S. at 483. "Capital defendants, no less than non-capital defendants," the Court in *Ring* declared,

"are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ibid*.

That rule squarely and indisputably outlaws the Florida sentencing procedure used to impose petitioner Bottoson's death sentence. No other conclusion can plausibly be reached, for several reasons:

First, in overruling *Walton* (which had upheld Arizona's capital sentencing procedure against the challenge that it violated capital defendants' Sixth Amendment right to jury trial), *Ring* necessarily also overruled *Hildwin v. Florida,* 490 U.S. 638 (1989) (per curiam), and its precursors (which had upheld Florida's capital sentencing procedure against the identical challenge). The *Walton* decision had treated these Florida precedents as controlling and had regarded the Florida and Arizona capital-sentencing procedures as indistinguishable. Thus, *Walton* said:

> "We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. *Hildwin v. Florida,* 490 U.S. 638 . . . (1989) (*per curiam*); *Spaziano v. Florida,* 468 U.S. 447 . . . (1984); *Proffitt v. Florida,* 428 U.S. 242 . . . (1976). In *Hildwin,* for example, we stated that '[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida,' 490 U.S., at 638 . . . and we ultimately concluded that 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' *Id.,* at 640-641 ....
>
> "The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific

> factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona."

497 U.S. at 647-648. *Ring*, too, explicitly recognized the indissolubility of the *Walton-Hildwin* linkage:

> "In *Walton v. Arizona,* 497 U.S. 639 (1990), we upheld Arizona's scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* noted, on the ground that 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' *Id.,* at 648 (quoting *Hildwin v. Florida,* 490 U.S. 638, 640-641 (1989) (per curiam)). ***Walton*** **found unavailing the attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's**. In neither State, according to *Walton*, were the aggravating factors 'elements of the offense'; in both States, they ranked as 'sentencing considerations' guiding the choice between life and death. 497 U. S., at 648 (internal quotation marks omitted)."

Ring, 2002 WL 1357257 at *6 (emphasis added). Sure as one plus one equals two, and sure as two minus two equals zero, *Hildwin* bit the constitutional dust alongside *Walton*.

Second, *Ring*'s recognition that the "right to trial by jury guaranteed by the Sixth Amendment . . . encompasse[s] the factfinding . . . necessary to put . . . [a capital defendant] to death" (*Ring*, 2002 WL 1357257 at *10) upsets the fundamental premise on which Florida's capital-sentencing process was constructed. As we have

seen in § I-A above, the very essence of the Florida process was the *relegation of the jury to a subordinate, advisory, non-factfinding role* in death sentencing, together with *reliance on written findings of fact by the trial judge* to establish (and to make reviewable by this Court) the factual bases on which a death sentence is authorized and appropriate for each capital defendant's crime. *E.g.*, *Porter v. State*, 723 So.2d 191, 195-196 (Fla. 1998).[15] Reacting to its early impression of *Furman*'s demands, the 1972 Florida Legislature vested in judges, not juries, the full factfinding responsibility necessary to keep capital sentencing disciplined by "rules" and by "reason" (*Dixon*, 283 So.2d at 8) so as to eliminate "[d]iscrimination or capriciousness" (*ibid.*).[16] With the benefit of the hindsight furnished by *Apprendi* and belatedly by *Ring*, it becomes apparent that this was an overreaction to *Furman*. And like the overreactions to *Furman* which produced mandatory-death-sentence schemes and restricted-mitigation-consideration schemes – it bent over backwards into a

[15] See also *Walker v. State*, 707 So.2d 300, 318-319 (Fla. 1997); the cases cited in text before and after note 11 *supra*; and the cases in notes 2, 3, and 6 *supra*. As the Court pointed out in *Dixon*, it is the written findings of the trial judge that ensure that capital sentencing will proceed "within the framework of rules provided by the statute" (283 So.2d at 8); and as the Court has since repeatedly recognized, "[t]he statute itself requires the imposition of a life sentence if the written findings are not made," *Christopher v. State*, 583 So.2d 642, 646 (Fla. 1991).

[16] "As we have repeatedly stressed, a trial judge's weighing of statutory aggravating factors and statutory and nonstatutory mitigating circumstances is the essential ingredient in the constitutionality of our death penalty statute. . . . It is for this very reason that we have found it essential for trial judges to adequately set forth their weighing analyses in detailed written orders." *Porter*, 723 So.2d at 196.

different form of federal unconstitutionality.[17]

Third, petitioner Bottoson's death sentence, exactly like Timothy Ring's in *Ring v. Arizona*, was imposed without a "jury determination of any fact on which the legislature condition[ed] an increase in their maximum punishment" from imprisonment to death (*Ring*, 2002 WL 1357257 at *3). Under the plain terms of Fla. Stat. § 775.082, a person convicted of first-degree murder "*shall* be punished by life imprisonment . . . [without parole before 25 years] *unless* the proceedings held to determine sentence according to the procedure set forth in [Fla. Stat.] § 921.141 result in *a finding by the court* that such person shall be punished by death." (Emphasis added.)[18] Therefore, petitioner was "'expose[d] ... to a penalty *exceeding*'" life

[17] See, *e.g.*, *Woodson v. North Carolina*, 428 U.S. 280 (1976); [*Stanislaus*] *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); and see *Beck v. Alabama*, 447 U.S. 625 (1980), for still another legislature's unconstitutional overreaction to *Furman*.

[18] These statutory terms make even clearer than Arizona's that factfinding by a judge, going beyond any factual findings made by the jury in returning a verdict of guilty of first-degree murder, is required as the precondition for a death sentence. The Arizona statute is described and quoted in *Ring* (2002 WL 1357257 at *3) as follows:

> "The State's first-degree murder statute prescribes that the offense 'is punishable by death or life imprisonment as provided by §13-703.' Ariz. Rev. Stat. Ann. §13-1105(C) (West 2001). The cross-referenced section, §13-703, directs the judge who presided at trial to 'conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances . . . for the purpose of determining the sentence to be imposed.' §13-703(C) (West Supp. 2001). The statute further instructs: 'The hearing shall be conducted before the court alone. The court alone shall
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> (continued...)

imprisonment (*Ring*, 2002 WL 1357257 at *3) – he was subjected to "an increase in . . . [his] maximum punishment" (*ibid.*) – only upon the legislatively specified condition that certain factual findings were made going beyond "'the facts reflected in the jury verdict alone'"(*ibid*). And those findings, "necessary for imposition of the death penalty" (*id*. at *10), were made by a sentencing judge, not by a jury.

The jury's verdict of "guilty as charged" at the guilt phase of petitioner's trial "reflected" no more than a finding of premeditated first-degree murder.[19] Under the plain terms of § 775.082, such first-degree murder was punishable by life imprisonment (without parole before 25 years) "*unless*" some further factual "finding"

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[18](...continued)

> make all factual determinations required by this section or the constitution of the United States or this state.' *Ibid.*"

Thus, the basic penalty-setting section of the Arizona statute contains a cross-reference to a procedure-prescribing section – much like Fla. Stat. § 775.082's cross-reference to Fla. Stat. § 921.141 – but is less explicit than Fla. Stat. § 775.082 in saying that the maximum penalty for first degree murder is imprisonment "*unless* the proceedings held to determine sentence according to the" cross-referenced procedure section result in a prescribed "finding by the court." And Arizona's cross-referenced procedure section prescribes a process of judicial sentencing which is a virtual carbon copy of the one which this Court has found to be required by Fla. Stat. § 921.141. See text at note 3 *supra*.

[19] As we have noted, the written verdict returned by the jury specified that petitioner was guilty of first-degree murder "as charged" in an indictment *which charged premeditated murder and nothing else*. See pages 12-14 *supra*. But even if this explicit expression of the jury's findings is disregarded, the fact remains that the guilt-phase jury instructions permitted a first-degree murder conviction on *either* a premeditation theory *or* a felony-murder theory *in the alternative* (see pages 12-13 *supra*); so there is no possible way to read the jury's guilty verdict as reflecting any finding *in addition to* premeditation.

was made "by the court." Accordingly, the trial judge then proceeded (at TR 3363-69) to make the findings "necessary for imposition of the death penalty" (2002 WL 1357257 at *10), and this Court upheld petitioner's death sentence solely by reference to those findings. The *jury* made no further findings of fact at the penalty stage so as to satisfy the requirements of *Ring*, *Apprendi*, and the Sixth Amendment. It did not and it could not make such findings for three separately sufficient reasons:

One: Florida juries do not make factual findings at the penalty stage of a capital trial. See § I.A. *supra*. And petitioner's jury in particular was not instructed to make any factual findings.[20] See pages 14-16 *supra*.

Two: petitioner's jury returned no unanimous verdict of *any* sort at the penalty stage, but rather rendered its advisory verdict for death by a vote of 10 to 2. The Sixth and Fourteenth Amendment right to jury trial recognized in *Apprendi* and *Ring* stands upon an

"historical foundation . . . [that] extends down centuries into the common

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[20] As stated *supra* and in the Petition for Writ of Habeas Corpus, Florida law's diminution of the jury's role in capital sentencing proceedings also lead to violations of petitioner Bottoson's state-law right to have notice in the indictment of all the elements on which the State would seek to impose a death sentence, Art. I, § 15(a), Fla. Const. (1980); *State v. Rodriguez*, 575 So.2d 1262, 1265 (Fla. 1991) (receded from on other grounds, *Harbaugh v. State*, 754 So.2d 691 (Fla. 2000)), the right to a unanimous verdict on each such element, Art. I, § 16, Fla. Const. (1980); *Jones v. State*, 92 So.2d 262 (Fla. 1957) (on reh'g); *Brown v. State*, 690 So.2d 309 (Fla. 1st DCA 1995); and the right to proof beyond a reasonable doubt to the satisfaction of a unanimous jury. Art. I, § 16, Fla. Const. (1980); *Russell v. State*, 71 Fla. 236, 71 So. 27 (1916).

> law. '[T]o guard against a spirit of oppression and tyranny on the part of rulers,'and 'as the great bulwark of [our] civil and political liberties,' 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that '*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours....' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) . . . (emphasis added)."

Apprendi, 530 U.S. at 477.[21]

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[21] In its Response to the present habeas petition and in its motion to the U.S. Supreme Court to vacate this Court's stay order, respondent Moore argued that *Johnson v. Louisiana,* 406 U.S. 356 (1972), and *Apodaca v. Oregon*, 406 U.S. 404(1972), cut off this limb of *Ring* because they establish that the Sixth Amendment as incorporated into the Fourteenth does not require jury unanimity. The argument is specious. Neither *Johnson* nor *Apodaca* holds non-unanimity acceptable in a **capital** case. The Louisiana statute at issue in *Johnson* required jury unanimity in capital cases; it authorized nonunanimity only in *noncapital* cases punishable by imprisonment at hard labor. The latter provision was all that was at issue in *Johnson* and was all that the U.S.Supreme Court addressed. Similarly, the Oregon statute at issue in *Apodaca* authorized conviction by a nonunanimous jury for all crimes *except* first-degree murder – the sole capital crime in Oregon. Again, the single issue presented and decided in *Apodaca* was whether the defendants' *noncapital* convictions by nonunanimous juries were constitutional. And of course since *Reid v. Covert*, 354 U.S. 1 (1957), it has been clear that the Sixth Amendment's guarantee of the right to jury trial has special force and special significance in capital cases. As Justice Harlan put it in *Reid* – in respect to "a question analogous . . . to issues of due process . . . [specifically,] the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context," *id*. at 75 – "capital cases . . . stand on quite a different footing than other offenses. . . . I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, . . . nor is it negligible, being literally that between life and death." *Id*. at 77. The reason for the distinction is equally clear: "The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most

(continued...)

And *three*: the jury's penalty-stage verdict *was* merely advisory [22] – as the court had told the jurors it would be (see page 14 above). The jury factfinding requirement of *Apprendi*, *Ring*, and the Sixth and Fourteenth Amendments is based on recognition of the importance of interposing independent jurors between a criminal defendant and punishment at the hands of a "compliant, biased, or eccentric judge,"[23]

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[21](...continued)
heavily in favor of the procedural safeguards of the Bill of Rights." *Id*. at 45-46 (concurring opinion of Justice Frankfurter). And see, *e.g.*, *Beck v. Alabama*, 447 U.S. 625, 637-638 (1980), and cases cited.

In any event, the right to a unanimous jury verdict whenever facts are required to be found by a jury has deep roots in Florida law and legal culture. See, *e.g.*, Fla. Rule Crim. Pro. 3.440; *Jones v. State*, 92 So.2d 261 (Fla. 1957) (on rehearing). The measure of the jury-trial right under Article I, §§ 16 and 22 of the Florida Constitution is the common-law tradition as it was known in 1845, *State v. Webb*, 335 So.2 826, 828 (Fla. 1976); and under that tradition, "the practice [of requiring a unanimous verdict] is so ancient and so long sanctioned, that the idea of unanimity becomes inseparably connected in our minds with a verdict." J. Proffatt, A Treatise on Trial By Jury, § 77 at p. 113 (1877). Accord: W. Forsyth, History of Trial by Jury 293 (1876). Hence, if the federal Constitution as interpreted in *Ring* requires jury trial of particular facts, then Florida law requires that the jury's verdict on those facts must be unanimous. *Cf*. *State v. Neil*, 457 So.2d 481 (Fla. 1984).

[22] This Court has frequently upheld such instructions as consistent with *Caldwell v. Mississippi*, 472 U.S. 320 (1985), precisely *because* they accurately state that under Florida law the jury is *not* the ultimate, responsible decisionmaker at the penalty stage. See cases cited in note 9 *supra*.

[23] *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The context (*id*. at 155-156) is: "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury of
(continued...)

and cannot be satisfied by a jury which is told that "the final decision as to what punishment shall be imposed is the responsibility of the Judge" (TR 2155).

In short, there is no rational way to square the process that produced petitioner's death sentence with *Ring* and *Apprendi*.[24]

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[23](...continued)
his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."

[24] In dissenting from this Court's order of July 8 granting a stay of execution in the present case, Justice Wells noted that the United States Supreme Court had denied several petitions for *certiorari* on the *Apprendi-Ring* issue in Florida cases "just four days after the Supreme Court announced its decision in *Ring." Bottoson v. Moore,* Order of July 8, 2002, p. 19. With respect, the attribution of any significance to the denial of *certiorari* in these cases is doctrinally impermissible and empirically unsound. "Of course, '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.'" *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995), quoting *United States v. Carver*, 260 U.S. 482, 490 (1923). The authoritative discussion of the subject remains Justice Frankfurter's opinion, expressing a view endorsed by a majority of the Court, in *Brown v. Allen*, 344 U.S. 443, 488 (1953). Thus, the Court has frequently denied *certiorari* in a criminal case, only to grant review and order postconviction relief later on the same issue in the same case. *E.g.*, *Turner v. Murray*, 476 U.S. 28 (1986) [granting postconviction relief on an issue on which *certiorari* was denied in *Turner v. Virginia*, 451 U.S. 1011 (1981)]; *Estelle v. Smith*, 451 U.S. 454 (1981) [granting postconviction relief on an issue on which *certiorari* was denied in *Smith v. Texas*, 430 U.S. 922 (1977)]; *Kruchten v. Eyman*, 408 U.S. 934 (1972) (per curiam) [granting postconviction relief on an issue on which *certiorari* was denied in *Kruchten v. Arizona*, 385 U.S. 1043 (1967)]; *Yates v. Cook*, 408 U.S. 934 (1972) (per curiam) [granting postconviction relief on an issue on which *certiorari* was denied in *Yates v, Mississippi*, 382 U.S. 931(1965)]; *Rogers v. Richmond*, 365 U.S. 534 (1961) [granting postconviction relief on an issue on which *certiorari* was denied in *Rogers v. Connecticut*, 351 U.S. 952 (1956)]; *Greene v. Massey*, 437 U.S. 19 (1978) [granting postconviction relief on
(continued...)

E. Petitioner Linroy Bottoson should not be put to death in execution of a sentence imposed in disregard of the constitutional rule of *Ring v. Arizona*.

In *Bottoson v. State*, 813 So.2d 31, 36 (Fla. 2002), this Court rejected petitioner's *Apprendi-Ring* claim on the merits, on authority of *Mills v. Moore*, 786 So.2d 532 (Fla. 2001), and of *King v. State*, 808 So.2d 1237 (Fla. 2002), which had in turn relied on *Mills* (see 808 So.2d at 1245-1246). The premise of the *Mills* decision, repeated at least four times in the *Mills* opinion (786 So.2d at 536-538), was that "*Apprendi* does not apply to already challenged capital sentencing schemes that have been deemed constitutional." 786 So.2d at 536.

Ring has since taught us that that premise is no longer tenable, and that *Apprendi* **does** invalidate already-challenged capital-sentencing schemes. The rule of *Apprendi* as applied in *Ring* invalidated the Arizona scheme upheld in *Walton*; and, as we have shown above, the rule of *Apprendi* as applied in *Ring* invalidated the Florida scheme which was used to sentence petitioner to death. The sole remaining question is whether this learning has come too late to save petitioner from execution under a death sentence imposed in disregard of the Sixth and Fourteenth Amendments,

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[24](...continued)
an issue on which *certiorari* was denied in *Greene v. Florida*, 421 U.S. 932 (1975)]. Claims going to the constitutionality of a state-wide procedure are no exception: for example, in *Jacobs v. Alabama*, 439 U.S. 1122 (1979), the Court denied *certiorari* on the selfsame issue on which it subsequently held Alabama's statutory capital trial procedure unconstitutional in *Beck v. Alabama*, 447 U.S. 625 (1980).

Apprendi and *Ring*.

The answer to that question turns on whether the *Apprendi-Ring* rule is retroactive according to the criteria of *Witt v. State*, 387 So.2d 922 (1980). Under *Witt*, a change in law supports postconviction relief in a capital case when "the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." 387 So.2d at 931. The first two criteria are obviously met here; the third presents the crucial inquiry. In elaborating what "constitutes a development of fundamental significance," the *Witt* opinion includes in that category "changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* [*v. Denno*, 388 U.S. 293 (1967)] and *Linkletter* [*v. Walker*, 381 U.S. 618 (1965)]," adding that "*Gideon v. Wainwright* . . . is the prime example of a law change included within this category." 387 So.2d at 929.

The three-fold *Stovall-Linkletter* test considers: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." 387 So.2d at 926. It is not an easy test to use, either generally or in the present case, because there is a tension at the heart of it. Any *change* of law which "constitutes a development of fundamental significance" is *bound* to have a broadly unsettling "effect on the administration of justice" and to upset a goodly measure of "reliance on

the old rule." The example of *Gideon* – a profoundly unsettling and upsetting change of constitutional law – makes the tension obvious, and the *Witt* Court was aware of it.[25] How the tension is resolved ordinarily depends mostly on the first prong of the *Stovall-Linkletter* test – the purpose to be served by the new rule – and whether an analysis of that purpose reflects that the new rule is a "fundamental and constitutional law change[ ] which cast[s] serious doubt on the veracity or integrity of the original trial proceeding." 387 So.2d at 929. *Cf. Thompson v. Dugger*, 515 So.2d 173, 175 (Fla. 1987).

Two considerations call for recognizing that the *Apprendi-Ring* rule is precisely such a fundamental constitutional change:

First, the purpose of the rule is to change the very *identity* of the decisionmaker with respect to critical issues of fact that are decisive of life or death. In the most basic sense, this change remedies a "'structural defect[ ] in the constitution of the trial mechanism,'" *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993): it vindicates "the jury guarantee . . . [as] a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function," *ibid*. In *Johson v. Zerbst*, 304 U.S. 458 (1938) – which, of course, was the taproot of *Gideon v.*

[25] See 387 So.2d at 924-925: "The issue is a thorny one, requiring that we resolve a conflict between two important goals of the criminal justice system ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other within the context of post-conviction relief from a sentence of death."

Wainwright, this Court's model of the case for retroactive application of constitutional change – the Supreme Court held that a denial of the right to counsel could be vindicated in postconviction proceedings because the Sixth Amendment required a lawyer's participation in a criminal trial to "complete the court" (304 U.S. at 468); and a judgment rendered by an incomplete court was subject to collateral attack. What was a mere imaginative metaphor in *Johnson* is ***literally*** true of a capital sentencing proceeding in which the jury has not participated in the life-or-death factfinding role that the Sixth Amendment reserves to a jury under *Apprendi* and *Ring*: the constitutionally requisite tribunal was simply ***not all there***; and such a radical defect necessarily "cast[s] serious doubt on the veracity or integrity of the . . . trial proceeding," *Witt*, 387 So.2d at 929.

Second, "the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression . . . in this insistence upon community participation in the determination of guilt or innocence," *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) – including, under *Apprendi* and *Ring*, guilt or innocence of the factual accusations "necessary for imposition of the death penalty," *Ring*, 2002 WL 1357257 at *10; and see *Apprendi*, 530 U.S. at 494-495. The right to a jury determination of factual accusations of this sort has long been the

central bastion of the Anglo-American legal system's defenses against injustice and oppression.[26] As former Justice Lewis F. Powell, Jr. wrote: "jury trial has been a principal element in maintaining individual freedom among English speaking peoples for the longest span in the history of man."[27]

Justice Powell also quotes de Tocqueville as observing

> "that the jury 'places the real direction of society in the hands of the governed. . . . and not in . . . the government. . . He who punishes the criminal . . . is the real master of society. All the sovereigns who have chosen to govern by their own authority, and to direct society, instead of obeying its direction, have destroyed or enfeebled the institution of the jury.'"[28]

Inadvertently but nonetheless harmfully, the United States Supreme Court lapsed for a time and enfeebled the institution of the jury through its rulings in *Hildwin v. Florida* and *Walton v. Arizona*. Its retraction of those rulings in *Ring* restores a right

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[26] See Blackstone's Commentaries, §§ 349-350 (Lewis ed. 1897): "[T]he founders of the English law have with excellent forecast contrived . . . that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors. . . . So that the liberties of England cannot but subsist, so long as this *palladium* remains sacred and inviolate; not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it. . . ." See also *Rex v. Poole*, Cases Tempore Hardwicke 23, 27 (1734), quoted in *Sparf v. United States*, 156 U.S. 51, 94 (1895): "[I]t is of the greatest consequence to the law of England, and to the subject, that these powers of the judge and the jury are kept distinct; that the judge determines the law, and the jury the fact; and, if ever they come to be confounded, it will prove the confusion and destruction of the law of England."

[27] Powell, *Jury Trial of Crimes*, 23 Washington & Lee L. Rev. 1, 11 (1966).

[28] *Id*. at 5, quoting 1 de Tocqueville, Democracy in America 282 (Reeve trans. 1948).

to jury trial that is neither trivial nor transitory but "the most transcendent privilege which any subject can enjoy."[29] Petitioner Bottoson should not be denied its benefit simply because the Supreme Court temporarily overlooked the point before finally getting it right.

II. PETITIONER HAS MADE A PRIMA FACIE SHOWING OF MENTAL RETARDATION AND MUST BE GIVEN A FULL ADVERSARIAL JURY TRIAL TO RESOLVE THE FACTUAL ISSUE WHETHER HE IS ELIGIBLE FOR THE DEATH PENALTY

A. *Atkins* is retroactive.

In *Atkins v. Virginia*, 122 S.Ct. 2242, decided on June 20, 2002, the Supreme Court held that the Eighth Amendment prohibits the execution of mentally retarded offenders. *Atkins* overruled the holding in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), that the Eighth Amendment allowed mentally retarded offenders to be executed. When the Supreme Court first considered the constitutionality of executing mentally retarded persons in *Penry I*, it initially addressed the retroactivity of a new rule prohibiting their execution and held that "such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review." 492 U.S. at 329. In addition to the Supreme Court's retroactivity holding in *Penry I*, Justice Stevens' opinion in *Atkins* makes it clear that

[29] Blackstone's Commentaries, quoted in Powell, *supra* note 26 at 3 n.7. See also, *e.g.*, *United States v. Battiste*, 24 Fed Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545) (Justice Story): "I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law." 2 Sumner 240, 243 (1835).

the rule adopted in *Atkins* is a change in substantive criminal law and not merely a new rule of procedural law:

> "Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we . . . conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender.

122 S.Ct. at 2252, *quoting Ford v. Wainwright*, 477 U.S. 399, 405 (1986). When the Supreme Court announces a new constitutional rule that "place[s] beyond the authority of the state the power to . . . impose certain penalties," that rule is retroactive under *Witt v. State*, 387 So.2d at 929.

B. The *Atkins* rule commands full constitutional protections.

The Supreme Court left it to each State initially to develop the "appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Atkins*, 122 S.Ct. at 2250. As we have pointed out in note 20 above, Florida constitutional law imposes specific, stringent requirements on the way facts must be found in criminal cases. It is under this umbrella that the facts bearing on petitioner's mental retardation must be determined. *Traylor v. State*, 596 So.2d 957 (1992).

Furthermore, all the elements of federal due process must be observed in proceedings to determine any precondition for a death sentence. If petitioner suffers from mental retardation, the precondition for his death sentence announced in

Atkins is unsatisfied. The Due Process clause is never more exacting than when life is at stake. "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case," *Bell v. Burson*, 402 U.S. 535, 540 (1971); accord: *Mathews v. Eldridge*, 424 U.S. 319, 340-43 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); *Speiser v. Randall*, 357 U.S. 513, 520 (1958), and so "whatever process is 'due' an offender faced with a fine or a prison sentence [does not] necessarily satisf[y] the requirements of the Constitution in a capital case." *Reid*, 354 U.S. at 77 (Harlan, J., concurring). *See Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)(the Supreme Court has "repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case"). In addition, there is a strong public interest in assuring an accurate determination of mental retardation in capital cases in order to avoid wrongful executions. *Id*. at 79 ("[t]he State's interest in prevailing at trial . . . is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases"). When life and death are at issue, the public interest in accuracy and reliability is of paramount importance. *Id*. at 83-84 ("[t]he State . . . has a profound interest in assuring that its ultimate sanction is not erroneously imposed"); *and see 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." Finally, the risk of error inherent in determining mental health issues is great unless the adjudication of such issues is entrusted to a full

adversarial trial. *See Ake*, 470 U.S. at 81-82; *Barefoot v. Estelle*, 463 U.S. 880, 899, 903 (1983); *Addington v. Texas*, 441 U.S. 418 (1979).

Thus, the state and federal constitutional protections to which petitioner is entitled include the following:

1. The right to a jury trial

The *Atkins* and *Ring* opinions on their face require that capital defendants be afforded a jury trial on mental retardation. *Ring* is explicit that the procedural rights guaranteed by *Apprendi* – the rights to demand (a) a factual finding by (b) a unanimous jury, (c) beyond a reasonable doubt, of the factual elements upon which a conviction or eligibility for enhanced punishment depend – attach to elements that are added by Supreme Court "interpret[ations] of the Constitution to require the addition of an . . . element to the definition of a criminal offense in order to narrow its scope." *Ring*, 2002 WL 1357257at *9. *Atkins* adds just such an element: "Thus, pursuant to our narrowing jurisprudence which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate." *Atkins*, 122 S.Ct. at __. Thus, the question of mental retardation must be submitted to a jury.

2. Appointed, qualified, competent counsel

Because the determination of mental retardation is a critical stage of the

proceeding, the assistance of counsel is required.[30] "The assistance of counsel is often a requisite to the very existence of a fair trial," *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972), and "it has become apparent that special skills are necessary to assure adequate representation of defendants in capital cases," *See Amadeo v. Zant*, 384 S.E.2d 181, 182 (Ga. 1989).

> "[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process."

Powell v. Alabama, 287 U.S. 45 (1932); *and see Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."). And counsel must perform effectively. [*Terry*] *Williams v. Taylor*, 529 U.S. 362 (2000)(counsel held ineffective for failing to adduce evidence of "mild mental retardation").

3. Independent, competent experts

Ake v. Oklahoma, 470 U.S. at 80, mandates the assistance of competent,

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[30] Counsel is required during in-custody post-indictment interrogations, *Massiah v. New York*, 377 U.S. 201 (1964) – including those by mental health examiners, *Estelle v. Smith*, 451 U.S. 454 (1981) – at preliminary hearings, *White v. Maryland*, 373 U.S. 59 (1963), during entry of a guilty plea, *ibid*., at trial, *Powell v. Alabama*, 287 U.S. 45 (1932), and at sentencing, *Mempa v. Rhay*, 389 U.S. 128 (1967).

independent, experts when the issue of mental retardation is addressed:

> "[A] reality that we recognize today . . . [is] that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense."

4. Notice

A defendant is entitled to notice of the elements of crimes, *see Lanzetta v. New Jersey*, 306 U.S. 451 (1939), and of elements that are necessary for increased punishment, *Apprendi*. "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).

5. Discovery and Brady *materials*

Florida provides criminal defendants with broad discovery rights, *see* Fla. Rule Crim. Pro. 3.220, and due process requires that the state disclose exculpatory evidence relevant to either guilt or punishment, *see Brady v. Maryland*, 373 U.S. 83 (1963), including evidence bearing on the credibility of witnesses. *Kyles v. Whitley*, 514 U.S. 419 (1995).

6. Adequate time and resources

Factfindings that are determinative of life and death in a criminal proceeding cannot be made in a rush. *See Powell*. A defendant must be provided the time, resources, and tools necessary to prepare an adequate defense. *Ake*.

C. Petitioner has been provided with none of these constitutional protections.

In a previous postconviction proceeding, before there was any recognized federal constitutional right not to be executed if retarded, petitioner raised the claim that he was mentally retarded. No constitutional protections of any sort were available or provided to him in order to assure the reliability of the factual determination that *Atkins* makes decisive of life or death, because there was then no federal or state constitutional entitlement to any particular state post-conviction procedure in connection with this issue.

There was no jury, just a postconviction judge; there were no qualified counsel;[31] there was no notice of rules[32] and there was no notice of the definition of

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[31] None of the attorneys who represented Petitioner in his Rule 3.850 proceedings qualify to represent a person in a capital trial or sentencing proceeding. 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 for counsel in capital cases 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 all defendants being sentenced today and in the future – cannot arbitrarily be denied petitioner.

[32] "We all know that there aren't any rules, okay?" September 16, 2002 hearing, at 142 (judge's comment).

mental retardation;[33] there was no recognition of the right to competent, indepen-dent

[33] A Florida statute provides a definition of sorts for mental retardation, Fla. Stat. § 921.137(4), but leaves it to the Department of Children and Family Services to specify the standardized intelligence tests necessary for a proper determination of mental retardation. The Department still has not specified the tests. The lower court judge commented that "we don't yet know exactly what mental retardation means." Huff hearing at 21. There are various standardized intelligence tests with different standardization samples. Further, different tests capture different abilities. See generally American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002). Each test, therefore, can result in a different test score. *Id*. Because section 921.137 requires a "mean score on a standardized intelligence test *specified in the rules of the Department of Children and Family Services*" in order to determine "significantly subaverage general intellectual functioning," there is no definition of what mental retardation is in the statute.

At the hearing conducted before the postconviction judge, these problems were raised:

> "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*."

(continued...)

experts;[34] and there was no time for a reliable determination of mental retardation.[35]

(...continued)
Id. at 90 (emphasis added). The State's expert, Dr. McClaren, also testified that the state 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. The state argued that definitions were not necessary because "[w]e are certainly not under the [mental retardation] statute in the first place." January 16 hearing, at 10.

[34] Petitioner was provided with expert assistance, but not of the sort that *Ake* requires. *Ake* requires experts who can perform competently and independently, and who are given the assistance of competent counsel for the accused who are performing effectively. The *Ake* protections are enforced primarily through the right to effective assistance of counsel, a constitutional right which petitioner did not enjoy in his post-conviction proceedings. Furthermore, the experts had to perform under the press of time, without discovery, and without any state statutory definitions of retardation.

[35] When a federal constitutional right regarding a defendant's mental state has been recognized by the United States Supreme Court, this Court has determined that litigation under death warrant conditions can be inadequate for a proper determination of facts. For example, in *Provenzano v. State*, 750 So.2d 597 (Fla. 1999), this Court held that the trial court had abused its discretion by failing to continue a hearing for four days so that the petitioner's expert could testify. By failing to grant "a reasonable delay to hear the testimony," the trial court prevented the question of Provenzano's competence from being "resolved in the crucible of an adversarial proceeding." 750 So.2d at 601 (internal quotation omitted).

Justice Anstead agreed with the Court's decision to provide Provenzano

> "with a reasonable opportunity to present evidence, including expert opinion evidence, of his competency to be executed. Unfortunately, it appears that *these proceedings were driven by the perceived need to be certain that there would be no delay in the date of execution set for the defendant*. We must share the blame for that perception by not being more explicit in our opinion

(continued...)

(...continued)

> that the critical focus of the trial court should be on determining the competency of the defendant, rather than on rushing to get the proceedings over in time for the scheduled execution to take place."

750 So.2d at 603 (Anstead, J., concurring). Justice Lewis, too, decried placing expediency above reliability:

> "I concur in the majority opinion and write only because we once again encounter imposition of the ultimate penalty without the full measure of the deliberative process. The issue of competency for execution, by its very nature, can only be confronted in close proximity to an execution. That does not mean, however, that the process to resolve the issue deserves less consideration than other steps in the judicial processing of this type of case. *There is an established right under the Eighth Amendment of the United States Constitution* which prohibits the execution of one who is insane, as set forth by the United States Supreme Court in *Ford v. Wainwright,* 477 U.S. 399, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986). Although the *Ford* decision did not provide a unified voice for definitional and procedural requirements, it is clear that a fundamentally fair process is required to ensure that the constitutional right recognized in Ford is protected. See, *e.g.*, 477 U.S. at 424 (Powell, J., concurring in part and concurring in the judgment) (emphasizing 'it is clear that an insane defendant's Eighth Amendment interest in forestalling his execution unless or until he recovers his sanity cannot be deprived without a "fair hearing." Indeed, fundamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause') (emphasis added). Florida has a procedural mechanism in place to accommodate resolution of the *Ford* issues, but application of the procedural mechanism here violated fundamental due process requirements to permit the presentation of desired evidence.
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> * * *
>
> "I express no opinion as to whether Provenzano is sane or insane to be executed based upon the present record. However, because there was a dispute created by differing opinions of mental health professionals, I question a process which denies a short continuance to afford an opportunity to present the live testimony of the inmate's key witness. The issue at this

(continued...)

D. Because expert opinions differed regarding petitioner's mental retardation, full adversarial proceedings to determine the facts were indispensable.

Petitioner earlier presented sufficient evidence of his mental retardation to entitle him to a jury trial of the issue under *Atkins* and *Ring*. For example, with respect to intellectual functioning, Dr. Dee testified that petitioner was two standard deviations below 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."

(...continued)

> stage is not what the ultimate factual determination may be. On the contrary, the issue is this Court's nondelegable duty to protect the process and procedures that give substance and meaning to a constitutional right recognized by our nation's highest court.

750 So.2d at 604 (Lewis, J., concurring).

When Petitioner Bottoson's case of mental retardation was first before this Court, there was not " *an established right under the Eighth Amendment of the United States Constitution* which prohibit[ed] the execution of one who is" mentally retarded. There is now, and the earlier litigation under warrant conditions *"driven by the perceived need to be certain that there would be no delay in the date of execution set for the defendant,"* did not produce a record upon which this court can now reliably depend.

T. at 29-30. As he stated in his affidavit,[36] as he testified below,[37] and as is recognized now by the Supreme Court,[38] a score of 70 -75 satisfies the two-standard- deviations requirement, and two points over 75 is "insignificant." See the testimony of state expert Pritchard at T. 229 (two points is "not significant"). With respect to adaptive functioning, 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

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[36] "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."

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

[38] *Atkins*, 122 S. Ct. at 2245 n. 5 (IQ between 70 and 75 is "typically considered the cut-off IQ score").

it." *Id.* at 36.

It is true that the state presented evidence that petitioner was not mentally retarded. However, the same can be said of Mr. Atkins, who is **now** entitled to a *real* hearing with *real* decisions being made. As the Supreme Court noted, Dr. Evan Nelson evaluated Atkins before trial and concluded that he was "mildly mentally retarded." *Atkins*, 122 S. Ct. at 2245. In sharp contradiction of Dr. Nelson, the State's expert, Dr. Samenow, testified that Atkins was not mentally retarded, but was of "average intelligence, at least." 122 S. Ct. at 2246. Like *Atkins*, petitioner's case presents a conflict in the evidence that requires a full adversarial hearing before a jury on the issue of mental retardation.[39]

VI. CONCLUSION

For the foregoing reasons, this Court should provide LINROY BOTTOSON the protections sought here and in his Petition for Writ of Habeas Corpus, and thereafter grant habeas corpus relief.

Respectfully submitted,

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[39] Petitioner recommends that this Court adopt the process structured by the Georgia Supreme Court in *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989). In *Fleming*, the Court held that upon a primae facie showing in post-conviction proceedings that a defendant may be retarded (as here, one expert opinion), the case must be transferred to the trial court for a jury trial on the question.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing corrected opening 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 26th day of July, 2002.

CERTIFICATE OF COMPLIANCE

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

_____

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