IN THE SUPREME COURT OF FLORIDA

NO. SC68706

CLARENCE EDWARD HILL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

DEATH WARRANT SIGNED, EXECUTION SET FOR JANUARY 24, 2006 AT 6:00 P.M.

REPLY BRIEF OF APPELLANT

D. Todd Doss
Florida Bar No. 0910384
725 Southeast Baya Drive
Suite 102
Lake City, FL 32025
(386) 755-9119

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL AUTHORITY

CASES

PROCEDURAL RULES

TREATISES

ARGUMENT IN REPLY

ARGUMENT I: LETHAL INJECTION

In his Initial Brief, Mr. Hill asserted that a recent study published in the world-renowned medical journal THE LANCET by Dr. David A. Lubarsky and three co-authors confirmed, through the analysis of empirical after-the-fact data, that the scientific critique of the use of sodium pentothal, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.

In its answer, the State claims that A[u]nfortunately for Hill this is a >generous reading= of what is concluded in the research letters.@ (Answer at 10). In making this assessment, the State attempts to draw focus to one paragraph in the study which relates to protocol design. Moreover, the State altogether ignores the affidavit which Mr. Hill presented in the lower court proceedings from one of the **actual authors** of the article, Dr. Lubarski. In this affidavit, Dr. Lubarski states that Athe use of this succession of chemicals (sodium pentothal, pancuronium bromide, and potassium chloride) in judicial executions by lethal injection creates a foreseeable risk of the unnecessary infliction of pain and suffering.@ (Att. B).

According to Dr. Lubarski, pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. (Att. B). Dr. Lubarski further explained in his affidavit that when the third chemical, potassium chloride

reaches the heart, it causes a heart attack. If the anesthesia (first chemical) has worn off by that time, the condemned feels the pain of a heart attack. However, in this case, Mr. Hill will be unable to communicate his pain because the pancuronium bromide (second chemical) has paralyzed his face, his arms, and his entire body so that he cannot express himself either verbally or otherwise. (Att. B).

As Dr. Lubarski concluded, because Florida=s practices are substantially similar to those of the lethal-injection jurisdictions which conducted autopsies and toxicology reports, which kept records of them, and which disclosed them to the LANCET scholars, there is at least the same risk (43%) as in those jurisdictions that Mr. Hill will not be anesthetized at the time of his death. (Att. B).

Despite the fact that Mr. Hill presented Dr. Lubarski=s findings in an affidavit, the State fails to rebut, let alone even mention, Dr. Lubarski=s findings, which were made to a reasonable degree of scientific certainty. (Att. B). Consequently, as there was no evidentiary hearing, the facts presented therein must be taken as true. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999).

Having failed to rebut the facts as presented by Mr. Hill, the State next attempts to assert a procedural bar, claiming that Mr. Hill has not shown why he did not raise this issue in 2003.

(Answer at 11). This assertion is patently false. Mr. Hill clearly addressed the State=s procedural bar claim below and in his Initial Brief. (See Initial Brief at 10-12). Yet, for reasons unknown to Mr. Hill, the State refuses to address or even acknowledge his argument.

The State continues its procedural bar quest by asserting that A[u]nless Mr. Hill can demonstrate that the latest research letters either are so new as not to be unearthed or are so unique that new light is shed on this issue, the trial court was and is bound by the rulings finding execution by lethal injection constitutional. Robinson v. State, 30 Fla.L.Weekly S576, 2005 Fla. LEXIS 1452 (Fla. July 2, 2005).@ (Answer at 12).[1]

Here, the State refuses to accept that this study was published in 2005. It is new. It is post-Sims and post-Robinson. No cases in Florida prior to this one have relied on this study. This Court did not have the benefit of this study when finding that the protocols used in 2000 were constitutional. In fact, to Mr. Hill=s knowledge, this study constitutes the first empirical research published regarding lethal injection, thus making it unique.

[1]The State then proceeds to cite to several other cases that did not rely on the study.

Finally, the State claims that in denying a stay of execution in a Missouri capital case recently, the Eighth Circuit rejected Dr. Lubarski=s paper.[2] The State=s reference to proceedings in Missouri is of no relevance to these proceedings, unless the State wishes to concede an evidentiary hearing wherein it could attempt to use evidence from another State to rebut Mr. Hill=s case. See Lemon v. State, 498 So. 2d 923 (Fla. 1986); McClain v. State, 629 So. 2d 320 (Fla. 1st DCA 1993).

Further, unlike here, the Petitioner in Missouri was attempting to proceed under a 1983 action in federal court, and the Eighth Circuit denied relief in a brief order without addressing any facts.[3] Mr. Hill was not a party to the proceedings in Missouri, has no idea what procedures Missouri uses in its executions, and has never had the opportunity to

[2] The State then immediately cites to several other cases, which misleadingly implies that they too rejected Dr. Lubarski=s study. (Answer at 13). A closer examination demonstrates that this is not true, and that in fact, two of these opinions were issued long before the study in question.

[3] Despite the tenuous procedural posture of that case, four Justices on the United States Supreme Court were in favor of granting certiorari.

examine any witnesses there.

Here, in Florida, the lower court erred in denying Mr. Hill an evidentiary hearing on this issue as he has presented facts that were not known at the time the Florida Supreme Court decided Sims v. State, 754 So. 2d 657 (Fla. 2000), and the motion, files and records in this action fail to conclusively show that Mr. Hill is entitled to Ano relief.@ See Lemon v. State, 498 So. 2d 923 (Fla. 1986); Fl. R. Crim. P. 3.851(f)(5)(B). Contrary to the State=s argument, an evidentiary hearing is required.

ARGUMENT II: MENTAL RETARDATION AND/OR BRAIN DAMAGE

Mr. Hill Has Significant Intellectual and Adaptive Functioning Deficiencies Which Render Him Categorically Exempt From Execution, Per Atkins.

Within their brief, the State recounts Dr. Larson's trial testimony in an attempt to dispute the Atkins claim, notwithstanding the fact that Dr. Larson signed an affidavit acknowledging he failed to recognize the gross disparity in the verbal and performance sections of Mr. Hill's IQ test. See Att. X. The State misleadingly details Dr. Larson's testimony at length without acknowledging the existence of this affidavit. Answer at 16-18. The affidavit demonstrates that Dr. Larson's trial testimony is not credible and certainly not conclusive of Mr. Hill's mental status or abilities.

Within Dr. Larson's February 13, 1990 affidavit, he states:

> 3. Based upon the materials that I was provided by Mr. Terrell and some limited contacts with Mr. Hill's family, I evaluated Mr. Hill. On April 1,

1983, I provided Mr. Terrell with a written report of my evaluation with Mr. Hill. In that evaluation, I indicated that I found no statutory mitigating factors in Mr. Hill's case.

4. I have since been given additional materials concerning Mr. Hill's background and **his life long mental dysfunction**. Additionally, I have been provided with the results of recent psychological testing of Mr. Hill conducted by Drs. Pat Fleming and Ronald Yarborough. **After a thorough review of these additional materials, I must now say that my original opinion was based upon incomplete data.**
5. Based upon the additional data, I would conclude that substantial statutory and nonstatutory mitigating factors were present in Mr. Hill's case. If I had this information at the time of trial I would have testified to the presence of two statutory mitigating factors: that Mr. Hill was under extreme emotional disturbance at the time of the offense and that his ability to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired. I would also have testified to the presence of additional nonstatutory mitigating factors to include that Mr. Hill was under the domination of Mr. Jackson, his codefendant at the time of the offense.
6. Because of insufficient background materials, **I missed the significance of the wide disparity in Mr. Hill's verbal and performance IQ scores. This significant difference is indicia of organic brain damage and additional neuropsychological testing should have been done on Mr. Hill in 1983. If it had been done, it would have made a difference in my findings.**

See Att. X (emphasis added).

Clearly, the State's reliance upon any trial testimony by Dr. Larson is misplaced at best. In light of his admitted mistake and lack of sufficient background material regarding the

"life long mental dysfunction" at issue in this current appeal, see id., Dr. Larson's trial testimony is simply not reliable. Rather, his errors magnify the need for an evidentiary hearing regarding Mr. Hill's brain damage, mental retardation, and mental status.

The State further claims that Mr. Hill has developed "no evidence" to support his claim that Mr. Hill suffers "from an equivalent and equally paralyzing affliction that must be entitled to the same protections under Atkins . . . See Answer at 20. However, in making this specious claim the State completely ignores and fails to admit that Mr. Hill provided a wealth of evidence regarding his affliction in the affidavits and reports attached to Mr. Hill's postconviction motion. See Atts. A-AA.

These affidavits and reports are replete with evidence of brain damage, adaptive functioning deficits, and mental retardation. Doctors who have tested and assessed Mr. Hill, including Dr. Fleming and Dr. Eisenstein, have noted over and over his substantial impairments in intellectual and adaptive functioning, as well as his organic brain damage. Dr. Eisenstein specifically addresses mental retardation and adaptive functioning issues in his report. Yet interestingly, the State fails to acknowledge Dr. Eisenstein's report in their answer brief when arguing their misguided contention that Mr. Hill

produced no evidence to support his Atkins claim. Significantly, Dr. Eisenstein stated:

> Mr. Clarence Hill=s neuropsychological data and history of head trauma, are significant for brain damage. In all probability, his brain damage is left hemispheric, long standing, and developmental in nature. . . . Mr. Hill=s intelligence has remained consistent as evaluated over the years of his incarceration. **It is my clinical opinion that Mr. Hill was in the Educable or Mild Mental Retardation range of intellectual functioning**. He has benefitted from the structure, focus, and rehabilitative aspects of his imprisonment. This has given him the opportunity to acquire new knowledge and skills that otherwise would not have been available. As a result, his I.Q. scores have increased, however, his true pre-morbid level of intellectual functioning was in the Borderline to Mild Mental Retardation range. **Mr. Hill=s adaptive functioning, or degree to which he was able to maintain himself independently was consistent with mild mental retardation**. He is extremely concrete, slow and simplistic. He is unable to abstract and figure out alternative solutions to problems. **Mr. Hill=s level of understanding and maturity remains like a pre-adolescent child**. His communication skills are limited, with social withdrawal and isolation. **His limited basic skill level would have made it difficult to function independently and effectively in society**.

Dr. Eisenstein Report (December 2005), Att. AA at 13-14 (emphasis added).

The State's Answer Brief also fails to acknowledge the findings of neuropsychologist Dr. Pat Fleming, who found in 1990 that Mr. Hill=s brain damage rendered him mentally disabled, and his behavior at the time of the offense was marked by impulsivity, lack of judgment, inability to foresee consequences,

and confusion. See Attachment C.[4]

Mr. Hill clearly suffers from organic brain damage and mental deficiencies that radically limit his ability to comprehend and process information, to learn from experience, to engage in logical reasoning, or to control his impulses. According to Dr. Fleming, AAt the time of the crimes, Mr. Hill was functioning under the combined effects of drugs, brain damage, impulsivity, dependency, and the need for approval.@ See Att. C. Dr. Fleming stated in her report that Mr. Hill=s combination of deficits, including drug abuse and brain damage, severely impaired Mr. Hill=s ability to function and rendered him incapable of appropriate or sensible behavior. See Att. C. Dr. Fleming concluded:

> The crime was not consistent with his previous behavior. Prior to his association with more aggressive friends, he was never described as violent, hostile, or aggressive. Clarence previously compensated for his deficits by withdrawing the (sic) playing with his toys, not in antisocial behavior. The drug and alcohol abuse and the leadership of friends . . . apparently led him to exhibit atypical behavior. . . . The combined effects of brain damage and drug abuse would severely impair Mr. Hill=s

[4] Undersigned counsel has attached numerous affidavits that attest to Mr. Hill=s significant deficits in mental and adaptive functioning. The facts as stated in these affidavits were fully incorporated as part of Mr. Hill=s motion to vacate that is the subject of the instant appeal.

> ability to function. It would affect his ability to think clearly, process information, and control behavior, and control impulses and emotions.

Additional compelling evidence of Mr. Hill's mental and intellectual impairments can be adduced from Mr. Hill's IQ test scores from Mobile County School records. These scores qualified him as Amentally retarded@ according to then existing standards as defined by the American Association on Mental Deficiency (Retardation). Mr. Hill achieved a full-scale IQ score of 59 on the California Achievement Test while attending Gorgas Elementary School – a score which clearly established Mr. Hill as mentally retarded under both the standards of the time, as well as today=s definition of mental retardation. See Att. Z.

The foregoing clearly demonstrates that there is no merit to the State's claim that Mr. Hill has developed "no evidence" to support his contention that he suffers an affliction entitling him to the protections granted the mentally retarded in Atkins. Given his mental impairments and deficiencies, Mr. Hill is constitutionally protected from execution because the death penalty is an unconstitutionally excessive punishment for Mr. Hill for all the reasons delineated in Atkins.

ARGUMENT III: SIMMONS CLAIM

Within the State's brief, substantial reliance is placed upon Dr. Larson's trial testimony. See Answer 21-22. Yet the

State utterly fails to acknowledge Dr. Larson's affidavit, see infra, where Dr. Larson acknowledges the substantial errors he made at trial. These errors include his misunderstanding of the concept of mental age as applied in a legal context. In his 1986 testimony at Mr. Hill's re-sentencing Dr. Larson admitted his confusion as to the concept of mental age:

> Q. Now, you said that you were requested to do a determination of psychological age?
> A. Yes, I was.
> Q. Could you explain basically what that is?
> A. I'm not sure I can. There's a problem with that. Psychological age really isn't a psychological term. It's a legal term that's in the statute. I presume what the legislature meant at that time was they were interested in what a person's intellectual level was. And so the way I addressed that was to address his intellectual functions, and we're going to discuss that.
> As one develops, we look at mental age developing chronologically with chronological age. If chronological age goes up and mental ages (sic) goes at a much slower rate, then we see there's a descrepancy (sic) between the two, but mental age our brain basically matures pretty much at the age of 17, 18, 19. And so our mental age really doesn't go much beyond the age of 18 or 19, even though our chronological age does. So overall, I'm not really sure, again, on what the intent of the legislature was, because there is a psychological term. But I saw his overall intellectual development just as I described in detail to the jury.
> Q. How about his level of academic function? What height of achievement did he achieve?
> A. Well, we didn't assess that formally, but he couldn't read the MMPI. I would estimate that his reading ability is below the sixth grade, fourth grade, fifth grade perhaps. He was able to do basic arithmetic processes. In other words, he could add, you know, subtract, multiply and divide

> with basic arithmetic kind of situations, change making, so forth, and so on.

RSR 513-514.

Obviously, Dr. Larson mistakenly discounted the concept of mental age at all. Thus, his testimony regarding Mr. Hill's mental age is immediately suspect, as mental age is an acknowledged concept, defined as "a measure of mental development as determined by intelligence tests, generally restricted to children and expressed as the age at which that level is typically attained." The American Heritage Dictionary, 3rd Edition (1996). Dr. Larson's error regarding the applicability of mental age is compounded when combined with his mistakes regarding the significant disparity between the verbal and performance portions of Mr. Hill's IQ scores and admitted lack of background materials available for review. Dr. Larson's faulty opinions at trial do not, as the State erroneously claims, provide "conclusive" record evidence that an evidentiary hearing is not warranted. Rather, his mistakes serve only to heighten the need for an evidentiary hearing concerning Mr. Hill's mental age, and the applicability of the death penalty to someone who, like Mr. Hill, has a mental age of less than 18 years.

Additionally, Dr. Larson's trial testimony, even if it were to be accepted as true, is in stark contrast to the reports of Drs. Fleming and Eisenstein, which must be accepted as true by

this Court due to the summary denial by the circuit court.[5] In 1989, Dr. Fleming rendered a report that stated Mr. Hill=s mental age **was approximately ten years old and he functioned as such**. See Att. C. Similarly, Dr. Eisenstein reported: "Our current finding of an age equivalent of 10 years 8 months is similar to the previous evaluation result of 10 years 11 months. Mr. Hill's level of understanding and maturity remains like a pre-adolescent child." Att. AA at 12. Dr. Eisenstein concluded:

> Mr. Hill's adaptive functioning, or degree to which he was able to maintain himself independently, was consistent with mild mental retardation. He is extremely concrete, slow and simplistic. He is unable to abstract and figure out alternative solutions to problems. **Mr. Hill's level of understanding and maturity remains like a pre-adolescent child.** His communication skills are limited, with social withdrawal and isolation. His limited basic skill level would have made it difficult to function independently and effectively in society.

Att. AA at 13 (emphasis added).

Dr. Larson's misguided, and admittedly mistaken trial testimony, does not negate the necessity of an evidentiary hearing. The testimony is simply in stark conflict with the reports of Drs. Fleming and Eisenstein and highlights the need for an evidentiary hearing.

---

[5] The State in their brief concedes, "In cases where there has been no evidentiary hearing, we must accept the factual obligations made by the defendant to the extent they are not refuted by the record. See Peede v. State, 748 So.2d 253 (Fla. 1999); Valle v. State, 705 So.2d 1331 (Fla. 1997)." Answer at 9.

Simmons bars the execution of individuals who mentally function as juveniles.

The State maintains that "Roper does not involve mental age at the time of the offense. See Kimbrough v. State, 886 So.2d 965, 975-977 (Fla. 2004)." Kimbrough was decided before Roper and does not address age as a bar to execution; therefore, how Kimbrough applies to Mr. Hill's Roper claim is unexplainable.

The Simmons Court never used the word "chronological" to modify the term juvenile or the phrase "age 18" in its opinion holding that the "death penalty cannot be imposed upon juvenile offenders."[6] At first glance, one might assume that "chronological" is implied or that "juvenile offenders" automatically means a person whose chronological age is below 18. But a closer analysis of the Court's opinion and the plain meaning of the words "mental age" and "juvenile" show otherwise.

The Court stated that "juvenile offenders" include more than just offenders whose chronological age is below 18. Specifically, the Court stated that "[y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage . . . [t]he qualities that distinguish juveniles from

---

[6] Simmons, 125 S.Ct. at 1198.

adults do not disappear when an individual turns 18."[7] The Court then dedicated more than three pages of its opinion to discussing the immaturity, irresponsibility, and susceptibility to negative influences inherent in anyone who functions as a juvenile, and how these factors prevent the retributive and deterrent goals of the death penalty from being served by executing juveniles. This language demonstrates that the Simmons holding covers anyone whose mental functioning is below that of an 18 year old.

The plain meaning of "juvenile" and "mental age" also show that the Court means more than just chronological age. "Juvenile" is defined as "not fully developed" and "marked by immaturity."[8] These characteristics are not limited to chronological juveniles. Rather, they apply to anyone whose has the "mental age" of a juvenile. "Mental age" is defined as "a measure of mental development as determined by intelligence test, generally restricted to children and expressed as the age at which that level is typically attained."[9] This definition is exactly what the Simmons Court was referring to when it used the word "juvenile."

The reasoning in Simmons applies to individuals who have the mental age of a juvenile.

---

[7] Id. at 1195, 1197 (internal citations omitted).
[8] The American Heritage Dictionary, 3d. Edition (1996).
[9] Id.

Because of the irresponsibility, immaturity, and susceptibility to negative influences inherent among juveniles, the Simmons Court recognized that juveniles are categorically less culpable than the average criminal.[10] The reasoning in Simmons demonstrates that the execution of individuals with the mental age (mental capacity) of a juvenile suffers from the same problems that led the Court to prohibit the execution of juveniles. If this Court rules that Simmons does not prohibit the execution of individuals with the mental capacity of a juvenile, this Court should nonetheless 1) embrace the reasoning of Simmons; 2) recognize that the reasons juveniles cannot be executed apply equally to individuals with the mental age of a juvenile; and, 3) rule that the Eighth Amendment cruel and unusual punishment clause prohibits executing a person whose mental functioning is the same as a chronological juvenile, particularly since executing such a person will not measurably contribute to the goals of the death penalty. To act otherwise would be to ignore the basis for the decision in Simmons.

"Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of

[10] Simmons, 125 S.Ct. at 1194, quoting, Atkins, 536 U.S. at 316.

execution."[11] To determine whether the culpability of a category of offenders makes them the "worst of the worst," and thus eligible for execution, the Court decides whether executing that category of offenders measurably serves one of the only two recognized purposes for the death penalty: retribution and deterrence of prospective offenders.[12] If imposing a death sentence on a class of people does not serve one of these purposes, the punishment is "nothing more than the purposeless and needless infliction of suffering."[13] The Simmons Court's analysis of this issue flows directly from and cites to Atkins.

In Atkins, the Court recognized that "by definition [the mentally retarded] have diminished capacities to understand and process mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others . . . there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders."[14] For these reasons, the Court stated that mentally retarded people "do not act with the level of moral culpability that characterizes

[11] Simmons, 125 S.Ct. at 1194.
[12] See generally, Roper v. Simmons, 125 S.Ct. 11993 (2005); Atkins v. Virginia, 536 U.S. 304 (2002).
[13] Enmund v. Florida, 458 U.S. 782, 798 (1982).
[14] Atkins, 536 U.S. at 318.

the most serious adult criminal conduct."[15] Because the culpability of the average non-mentally retarded adult murderer is insufficient to justify the most extreme sanction available, the "lesser culpability of the mentally retarded offender surely does not merit that form of retribution."[16]

For the same reasons, executing the mentally retarded does not measurably contribute to the deterrent goal of the death penalty. "The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct."[17] This theory, however, does not work with the mentally retarded. The cognitive and behavioral impairments that make mentally retarded defendants less morally culpable also make it less likely that mentally retarded people as a whole are capable of processing the possibility of execution as a penalty and controlling their conduct based on that information.[18] Thus, executing the mentally retarded does not measurably further the goal of deterrence.

Because the diminished capacity of mentally retarded people make them less culpable and unlikely to be deterred by the death penalty, the Court held that executing the mentally retarded is

---

[15] Id. at 306.
[16] Id. at 319.
[17] Id. at 320.

"excessive."[19]

Less than three years later, the Court undertook the same analysis to determine if executing juveniles measurably contributes to the goals of the death penalty - - retribution and deterrence. The Court considered the following facts:

- "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young;"[20]
- "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;"[21] and,
- "the character of a juvenile is not as well formed as that of an adult."[22]

Based on these facts, the Court concluded that:

- "the susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult;"[23]
- "once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than adults;"[24]
- "retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity;"[25] and,

---

[18] Id.
[19] Id. at 321.
[20] Simmons, 125 S.Ct. at 1195.
[21] Id.
[19] Id.
[23] Id.
[24] Id. at 1196.
[25] Id.

- "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."

For these reasons, the Court held that the conclusion reached in Atkins also applies to juveniles - - their diminished capacity as a whole means their execution will not measurably contribute to the deterrent and retributive goals of the death penalty.

The same holds true for individuals with the mental age of a juvenile. In all respects other than physical age, the mental age juvenile is the same person as the chronological juvenile. Both of them have an underdeveloped temperament, characterized by immaturity, irresponsibility, and an increased susceptibility to outside influences. Because the Simmons Court has ruled that executing a person suffering from these characteristics does not measurably contribute to the retributive and deterrent goal of the death penalty, this Court must hold that the reasoning of Simmons mandates extending the categorical bar against executing juveniles to a bar against executing those with the mental age of a juvenile.

This court's authority to extend Simmons is found in the United States Supreme Court's jurisprudence interpreting the Eighth Amendment in a flexible and dynamic manner. This allows a lower court to "bring its independent judgment to bear on the proportionality of the death penalty for a particular class of

crimes or offenders,"[26] which is exactly what the Missouri Supreme Court did in extending Atkins to juveniles[27] - - a ruling that was affirmed by the United States Supreme Court.[28] This Court should do the same and rule that the rationale for barring the execution of juveniles also bars the execution of individuals whose mental functioning is the equivalent of a juvenile.[29]

The lower court=s finding of a procedural bar is erroneous. Mr. Hill submits that his Eighth Amendment right to be free from cruel and unusual punishment cannot be subject to a procedural bar, as this is an eligibility issue which precludes the death penalty for anyone under eighteen years of age.

ARGUMENT IV: DENIAL OF PUBLIC RECORDS

With regard to this issue, the State insinuates that Mr. Hill waived his argument because, during the December 19th public records hearing, counsel Aaverred that he was satisfied with the responses@ of the State agencies. (Answer at 24, 27).

---

[26] Id. at 1198.
[27] Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003) (en banc).
[28] Roper v. Simmons, 125 S.Ct. 1183 (2005).
[29] See Simmons, 125 S.Ct. at 1198 (noting that the logic for not executing individuals under sixteen years of age extends to those who are under 18).

The State=s lack of candor to this Court is verified by a cursory examination of the transcript of the public records hearing. Counsel for Mr. Hill did state that he was satisfied with the responses of the Pensacola Police Department (12/19/05 hearing, p. 4-5), the Escambia County Sheriff=s Office (id. at 6), the State Attorney=s Office (id. at 10) and the Florida Department of Law Enforcement (id. at 18).[30]

However, this is where counsel=s Asatisfaction@ ended. During the hearing, argument was heard by the court regarding objections filed by the Department of Corrections, the Medical Examiner=s Office, 8th District, and the Office of the Attorney General. Id. at 12-15, 16-17. Subsequently, the court granted the objections both orally and by written order. Nowhere in this transcript, nor anywhere else for that matter, did counsel express satisfaction with these agencies. As argued in his Initial Brief, counsel believes that he is entitled to the public records that he requested from each of these state agencies (See Initial Brief at 52-57).

The State=s next argument, that Mr. Hill has not demonstrated a colorable claim of relief nor has he demonstrated that these records could not have been requested at an earlier date (Answer at 25), is a regurgitation of the lower court=s order which Mr. Hill previously addressed in his Initial Brief

[30] Consequently, Mr. Hill did not assert a claim of denial of public records by any of these agencies in his Initial Brief.

(See Initial Brief, Argument IV). Other than quoting the lower court=s order, the State makes no attempt to Aanswer@ Mr. Hill=s arguments.

With regard to the State=s argument pertaining to Mr. Hill=s 3.852(i) request to the Medical Examiner=s Office, District Eight, the State argues that Mr. Hill should have pursued these records previously, as they have been available since February 23, 2000 through April 5, 2005 (Answer at 28). The State=s argument is disingenuous, as the scientific study upon which Mr. Hill relies was conducted in 2005, thereupon making the records necessary to Mr. Hill=s claim for relief. Further, any request made prior to the study would surely have been objected to by the State and denied by the lower court as not establishing a colorable claim of relief in light of this Court=s opinion in Sims.

In its Answer, the State fails to address Mr. Hill=s argument that the lower court, in denying Mr. Hill public records, established standards not in conformity with Rule 3.852 (h)(3). (See Initial Brief at 53-5). Rather, the State spends several pages arguing about matters that do not appear in Mr. Hill=s Initial Brief.[31] As the State has failed to rebut any of

[31] The State argues about records related to the Pensacola Police Department, the State Attorney=s Office and DNA evidence (Answer at 28-31). As there is no argument in Mr. Hill=s Initial Brief pertaining to these issues, Mr. Hill will refrain from addressing them.

Mr. Hill=s actual allegations, Mr. Hill asks this Court to remand the case to the circuit court for full public records disclosure and to permit amendment of this motion based upon future records received.

CONCLUSION

Mr. Hill submits that this case should be remanded for an evidentiary hearing on each of his issues, and that he should receive full public records disclosure and be permitted to amend his Rule 3.850 motion based upon future records received. Based on his claims for relief, Mr. Hill is entitled to a new sentencing proceeding and/or the imposition of a life sentence. Finally, Mr. Hill submits that he should not be executed in a manner that constitutes cruel and unusual punishment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished to Carolyn Snurkowski, Assistant Attorney General, Office of the Attorney General, Plaza Level 1, The Capitol, Tallahassee, FL 32399, this 5th day of January 2006.

CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

_____
D. TODD DOSS
Florida Bar No. 0910384
725 Southeast Baya Drive
Suite 102
Lake City, FL 32025-6092
Telephone (386) 755-9119
Facsimile (386) 755-3181