IN THE SUPREME COURT OF FLORIDA

LINROY BOTTOSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC02-128

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Fla. Bar #998818

JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
Fla. Bar #428847
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457
COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Goldfarb v. Robertson,
82 So. 2d 504 (Fla. 1955) 12

MISCELLANEOUS

STATEMENT OF THE CASE

This is an appeal from the January 18, 2002, order issued by Orange County Circuit Judge Anthony Johnson denying relief on Bottoson's successive *Florida Rule of Criminal Procedure* 3.850 motion. The "Statement of the Case" set out on pages 1-3 of Bottoson's *Initial Brief* is argumentative and is denied. The State relies on the following Statement of the Case.

Bottoson was convicted and sentenced to death for the October 1979 murder of Catherine Alexander. This Court affirmed his conviction and sentence in 1983. *Bottoson v. State,* 443 So. 2d 962 (Fla. 1983). The denial of his first *Florida Rule of Criminal Procedure* 3.850 motion was affirmed in 1996. *Bottoson v. State,* 674 So. 2d 621 (Fla. 1996). Bottoson's state petition for a writ of habeas corpus was denied in 1997. *Bottoson v. Singletary,* 685 So. 2d 1302 (Fla. 1997). The denial of Federal habeas corpus relief was affirmed by the Eleventh Circuit Court of Appeals in November of 2000. *Bottoson v. Moore,* 234 F.3d 526 (11th Cir. 2000).

A warrant for the execution of Bottoson's sentence of death was issued on November 19, 2001, and execution is scheduled for February 5, 2002, at 6:00 P.M. Bottoson initiated the public records process on December 12, 2001, by filing various requests for production of documents. (R730-43). Proceedings were conducted with respect to the public records requests, and those matters were resolved (to Bottoson's satisfaction), on December 20, 2001.

On January 11, 2002, Bottoson filed a successive motion for relief under Rule 3.850.[1] (R1386-1459). The State filed an answer to the successive motion on January 14, 2002, (R1546-1628), and a *Huff* hearing was conducted on January 15, 2002. (R205-304). At the conclusion of the *Huff* hearing, the Court determined that it was appropriate to hold a hearing on Claim I of the motion, which alleged that Bottoson was mentally retarded and that his execution would therefore violate various constitutional dictates, and on a portion of Claim II, which alleged, *inter alia*, that "evolving standards of decency" prohibit the execution of an individual who is "mentally ill." (R1396). That evidentiary hearing took place on January 16 and 17, 2002, and consisted of the testimony of three expert witnesses. (R319; 423; 499). On January 18, 2002, the Circuit Court issued an order denying relief on Bottoson's successive Rule 3.850 motion. This appeal follows.

STATEMENT OF THE FACTS[2]

Bottoson called Henry Dee, Ph. D., a licensed clinical psychologist, to testify about his opinions and conclusions regarding Bottoson's mental state. (R319-423). Dr. Dee testified

---

[1]This filing was timely under the schedule established by the Circuit Court. (R1529-30).

[2]Bottoson's brief does not contain a Statement of the Facts, but instead states that the evidence from the hearing "will be discussed in greater detail in the argument section." *Initial Brief*, at 3. That "discussion" of the evidence is hysterical in tone, hyperbolic in effect, and grossly misleading in character. The State relies on the Statement of the Facts contained herein.

that, in his opinion, and as a result of his testing, Bottoson has a Full Scale IQ score of 84. (R345; 347). Dr. Dee also testified, that, in his opinion, Bottoson is mentally retarded, even though Dr. Dee can identify no source that is accepted among mental health professionals that indicates (or even suggests) that it is appropriate to make such a diagnosis of an individual having a Full Scale IQ of 84. (R366; 368). Dr. Dee testified that the *Diagnostic and Statistical Manual-IV-TR* (hereinafter *DSM-IV-TR*) requires that an individual's Full Scale IQ be 70 or below before a diagnosis of mental retardation is appropriate, but attempted to explain why he did not "recognize" the *DSM-IV-TR* criteria "in every case." (R368; 603-604). Dr. Dee did, however, agree with the *DSM-IV-TR* criteria which, in addition to significantly subaverage intellectual functioning, require "concurrent deficits in **present** adaptive functioning," accompanied by onset before the age of 18.[3] (R366-67; State's Exhibit 1). Dr. Dee opined that Bottoson is mentally retarded based upon his score on an unidentified "intelligence test" administered to him in 1951 while he was a student in the Cleveland, Ohio, school system.[4] (R333). The test instrument is

---

[3]Dr. Dee made no attempt to assess Bottoson's **present** adaptive functioning, and explained his failure to undertake such an assessment by claiming that it would not be possible to do so since Bottoson is incarcerated. (R379; 416). He provided no support for that claim other than his belief that it is so.

[4]Dr. Dee also testified, for the first time on cross examination, about a previously unrevealed test called the "Leiter". (R417; 419). Dr. Dee does not use this test, and knows

identified by the name "Terman," and Dr. Dee assumed that this must have been a Stanford-Binet test instrument -- he provided no support that conclusion.[5] (R334; 607). Dr. Dee testified that it is not possible for someone to "fake good" on intelligence testing. (R375). In other words, an individual cannot produce an IQ score on an intelligence test that **inflates** their level of intelligence. (R376).

Harry McClaren, Ph. D., is a forensic psychologist who evaluated Bottoson at the request of the State.[6] (R427; 436; 439; 459; 468). Dr. McClaren testified that, under the prevailing professional norms, mental retardation is defined as being significantly subaverage intellectual functioning (which is an IQ of approximately 70 or below on an individually administered IQ test) accompanied by concurrent deficits or impairments in present adaptive functioning, with an onset before the age of 18. (R483; State's Exhibit 1).

Dr. McClaren reviewed a number of documents relevant to this

---

little about it. (R417). His reference to it was based upon hearsay, apparently conveyed to him by Mosman. (R416). Dr. Dee apparently did not rely on this test in reaching his opinions and conclusions.

[5]Dr. Prichard testified that, in his opinion, no one could successfully interpret a score on the "Terman" while "not knowing anything about the testing situation, what the Terman really is, who administered it, *et cetera, et cetera.* It's just not enough information to make any kind of conclusion." (R519).

[6]Bottoson called Dr. McClaren in his case-in-chief. (R119).

case; interviewed, tested and evaluated Bottoson;[7] interviewed individuals who have had contact with Bottoson while he has been incarcerated; and caused a Vineland Adaptive Behavior Scale to be conducted to assess Bottoson's present adaptive functioning[8] -- that procedure indicated that Bottoson's present level of adaptive functioning is in the average range.[9] (R476; 482). In the intelligence testing conducted by Dr. McClaren, Bottoson generated a Full Scale IQ score of 85. (R451; 474). Dr. McClaren testified that, in his opinion, Bottoson is not mentally retarded under any accepted definition of that condition, that his IQ is in the low-average range, and that it would be inappropriate to diagnose Bottoson as mentally retarded based upon his IQ score and his level of adaptive functioning. (R474). Dr. McClaren further pointed out that, professionally speaking, there was no need to conduct the Vineland Scale because Bottoson's IQ is so far above the cut-off score for a diagnosis of mental retardation that such a diagnosis would not be proper under prevailing professional practice. (R460; 476-7). Dr. McClaren emphasized that, at the time of his testing

---

[7]Dr. McClaren administered the standard version of the WAIS-III intelligence test. (R468).

[8]The Vineland Scale consists of a series of questions that are put to an individual familiar with the person being assessed. (R509). Those questions concern various aspects of daily life, and are designed to generate information about the individual's ability to function and the life skills he possesses. (R511-12).

[9]The fact that Bottoson is on Death Row does not mean that he no longer must engage in adaptive functioning. (R476).

and evaluation of Bottoson, he did not have any information about the Full Scale IQ score obtained by Dr. Dee (which was not provided until January 15, 2002), and therefore, because of the gravity of the case, had the Vineland conducted in an overabundance of caution. (R476-77).

The State also presented the testimony of Greg Prichard, Ph. D., who is a forensic psychologist with a sub-speciality in mental retardation.[10] (R499-501). Dr. Prichard conducted the Vineland Adaptive Behavior Scale at Dr. McClaren's request, and testified that it is "common practice" to administer that adaptive behavior scale in an institutional setting (*i.e.*, psychiatric hospital, jail, or prison). (R502; 510).[11] Dr. Prichard testified that the overarching objective of the Vineland is to assess the adaptive

---

[10]Dr. Prichard conducts mental retardation evaluations for the Department of Children and Families -- as a part of those evaluations, DCF **requires** that he administer the Vineland Adaptive Behavior Scale. (R508).

[11]Dr. Prichard testified at length about how the Scale is administered by asking the series of questions contained in it to an individual ("informant") who is familiar with the subject of the evaluation. (R509-512). The "informant" in this case was a Correctional Officer Sergeant who has known Bottoson and been in contact with him over the preceding eight or nine years. (R510). In the case of an incarcerated or institutionalized individual, this is the proper procedure to follow in utilizing the Vineland Scale. (R502). Dr. Prichard has followed this procedure many times in other cases, and this procedure follows the procedures set out in the Vineland's manual (which specifies how to administer the test instrument). (R502; 510; 527; 535). It would be professionally inappropriate to administer the Vineland to someone (such as a family member) who has not had regular and recent contact with Bottoson. (R529).

skill presented by the particular question contained on the test instrument, and that the manual requires flexibility in getting at the skill based upon the individual's life circumstances (which can include incarceration or institutionalization). (R564; 571; 589). The Vineland Scale indicated that Bottoson's level of adaptive functioning fell within the normal range. (R515). Dr. Prichard testified that Bottoson is not mentally retarded, and that it is inappropriate to attempt to label him as such because his Full Scale IQ score is far above the cut-off score at which an individual can be considered mentally retarded.[12] (R504; 507; 521). Dr. Prichard testified that the process of determining whether a person should be diagnosed as mentally retarded begins with an assessment of **present** intellectual and adaptive functioning, and only when those assessments indicate mental retardation does the focus become determining whether the condition was present before the age of 18 (the third diagnostic criteria). (R523). None of the collateral source information about Bottoson, which was obtained through interviews of persons in contact with him and through review of pre-existing records, indicates that he is mentally

[12]Dr. Prichard agreed with Dr. McClaren that there was not much point in even assessing Bottoson's adaptive functioning because his IQ score (which is valid) is so far above the cut-off for a diagnosis of mental retardation. (R504). Dr. McClaren and Dr. Dee obtained IQ scores in the mid-80s, and those scores are consistent with the BETA score of 86 Bottoson received when he was tested by the United States military at age 18. (R506).

retarded.[13] (R515-516).

THE CIRCUIT COURT'S ORDER

In its order denying relief on Bottoson's Rule 3.850 motion, the Circuit Court made various findings of fact with respect to the matters presented at the January 16-17, 2002, evidentiary hearing. Specifically, the Circuit Court found, after consideration of all of the evidence presented at the hearing, that Bottoson is not mentally retarded, regardless of whether the "clear and convincing evidence" standard (or the lesser "preponderance of the evidence" standard) is applied. *Order,* at 9. The Court found that the definition of mental retardation is "significantly sub-average intellectual functioning and deficits in adaptive behavior manifesting before age 18."[14] *Order,* at 6. The three experts who testified at the evidentiary hearing were in essential agreement with that definition.[15] *Id.* As set out above, Bottoson attained a Full Scale IQ score of 84 on the intelligence test administered by

---

[13]Dr. Harry Krop evaluated Bottoson in 1984, and commented that he appeared to be of average intelligence. (R519-20).

[14]This is the definition set out in Bottoson's Rule 3.850 motion, and is the definition applied by the Circuit Court in resolving the issue before it. Because Bottoson advanced that definition, it would make no sense at all, and could not be in good faith, for him to argue that mental retardation is in some way "undefined."

[15]The only difference between Bottoson's definition of mental retardation and the *DSM-IV-TR* definition is the latter's requirement that the adaptive functioning deficits exist in the individual's **present** level of adaptive functioning.

his expert, Dr. Henry Dee. *Order*, at 7. The Circuit Court rejected Bottoson's argument that the score he attained on the performance part of the Wechsler test should be considered in isolation, and concluded that the credible testimony indicated that "it is improper to draw conclusions about overall intelligence based on how a subject scores on a specific component of an intelligence test." *Order*, at 7. The Court found that Dr. Dee's Full Scale score of 84 was the relevant result of that testing. *Id.* The Circuit Court declined to rely upon a test referred to as the "Terman," stating that:

> Bottoson argues that a notation on his school records that he scored a 77 on something called a "Terman" test in 1951 demonstrates his sub-average intellectual functioning. This Court disagrees. First, no expert could testify with certainty what that test was, or the significance of that score. Second, if, as Dr. Dee speculated, that test was a version of the Stanford-Binet test, the score of 77 is still above the mental retardation range. Third, the more recent data, which was obtained through the use of instruments available to the parties' experts for analysis, shows that Mr. Bottoson is of at least low average intelligence. Accordingly, the Court finds that the evidence shows that Mr. Bottoson's intellectual functioning is average, rather than sub-average, and therefore outside the mental retardation range. Thus, Mr. Bottoson is not mentally retarded.

Order, at 8.

The Circuit Court also discussed the second, adaptive functioning, component of the diagnostic criteria for mental retardation. The Court stated:

> Although the Court finds that Mr. Bottoson's failure to satisfy the first prong of the test for mental retardation provides an adequate and independent ground

> to deny this claim, the evidence also indicates that he cannot satisfy the second prong of the test.

Order, at 8. The Court rejected Bottoson's claim that Dr. Greg Prichard had in some way inappropriately assessed his level of adaptive functioning. *Id.,* at 9. The Circuit Court found Dr. Prichard's explanation of the process used to evaluate Bottoson's level of adaptive functioning to be credible, and accepted that explanation.[16] *Id.,* at 9. The Circuit Court found as a fact that Bottoson does not "demonstrate the deficiencies in adaptive behavior necessary to qualify as mentally retarded." *Id.* Because that is so, Bottoson is not mentally retarded, and fails to satisfy either of the first two prongs of the definition of mental retardation. *Id.* His failure to satisfy either prong establishes two adequate and independent grounds for determining that Bottoson is not mentally retarded and for denying relief on this claim. *Id.*

In concluding that Bottoson is not mentally retarded under either the preponderance of the evidence or the clear and convincing evidence standard, the Court stated:

> Only Dr. Dee found Mr. Bottoson to be mentally retarded, and the Court finds his basis for that opinion to be unacceptably vague in light of the objective evidence, and **therefore not credible.**

Order, at 9. [emphasis added].

---

[16]Of course, implicit in that credibility determination is a rejection of Dr. Dee's contrary testimony as **incredible.** This is not the first time Dr. Dee has been found to be an incredible witness. *See, Porter v. State,* 788 So. 2d 917, 923 (Fla. 2001).

The remaining claims contained in Bottoson's Rule 3.850 motion were denied on procedural grounds, and are discussed as appropriate in the argument section herein.

SUMMARY OF THE ARGUMENT

The Circuit Court properly found that Bottoson is not mentally retarded, and denied relief on the mental retardation issue. That Court observed the witnesses, and was in the best position to make the necessary credibility determinations.

The Circuit Court correctly found, as a fact, that Bottoson is not mentally retarded. No credible evidence suggests that he is.

The Circuit Court correctly denied relief on procedural grounds on the claims that were not the subject of the Rule 3.850 hearing.

ARGUMENT

I. THE MENTAL RETARDATION AS A BAR TO EXECUTION CLAIM

On pages 5-43 of his brief, Bottoson argues that the Circuit Court incorrectly decided his claim that it would be unconstitutional to carry out his death sentence because he is mentally retarded. The Circuit Court found, after a full and fair evidentiary hearing, that this claim had no factual basis because Bottoson is not mentally retarded to begin with.[17] That finding of

---

[17]The Circuit Court correctly started its analysis from the basic premise that, "[b]eing retarded means more than scoring low on an IQ test." *Fairchild v. Lockhart*, 900 F.2d 1292, 1295 (8th Cir. 1990).

fact is supported by competent substantial evidence, and should not be disturbed. Because there is no factual basis for this claim, the constitutional issue is not present in this case and need not be decided. Alternatively, Bottoson's mental retardation as a bar to execution claim is procedurally barred because it could have been raised on direct appeal but was not. *Brown v. State,* 755 So. 2d 616, 620 n.2 (Fla. 2000).

The standard of review applied by this Court in reviewing the trial court's ruling on a Rule 3.850 motion following an evidentiary hearing is:

> As long as the trial court's findings are supported by competent substantial evidence, "this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'"

Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997), *quoting Demps v. State,* 462 So. 2d 1074, 1075 (Fla. 1984), *quoting Goldfarb v. Robertson,* 82 So. 2d 504, 506 (Fla. 1955); *Melendez v. State,* 718 So. 2d 746 (Fla. 1998).[18]

Mental retardation is defined as significantly sub-average intellectual functioning (which is in turn defined as an IQ of

---

[18]On pages 3-5 of his brief, Bottoson claims that the "lower court's order is subject to *de novo* review in this Court." *Initial Brief,* at 3. While this Court does exercise *de novo* review over questions of law and over mixed questions of law and fact, **that is not the case with respect to the credibility determinations made by the Circuit Court after observing the witnesses testify and with respect to questions of fact.** Bottoson's contrary implication is false.

approximately 70 or below on an individually administered IQ test), which is accompanied by concurrent deficits or impairments in present adaptive functioning, with an onset before the age of 18. *DSM-IV-TR,* at 49.[19] The Circuit Court used the following definition of mental retardation: Significantly sub-average intellectual functioning and deficits in adaptive behavior manifesting before age 18.[20] That definition is not significantly different from either the *DSM-IV-TR* definition or the definition contained in § 921.137, *Fla. Stat.*, and was the one put forward by Bottoson in his Rule 3.850 motion.[21] *Order,* at 6.[22] The Circuit Court applied that definition, and concluded, after hearing all of the evidence, that Bottoson is **not** mentally retarded because he does not have

---

[19]The relevant portion of the *DSM-IV-TR* was introduced into evidence as State's Exhibit 1.

[20]Section 921.137, upon which Bottoson endeavors to rely, establishes a full scale IQ score of **75** as the **upper limit for a diagnosis of mental retardation**. This comports with all of the expert testimony, and suggests that the upper range score is not so elusive a result as Bottoson would have this Court believe. *See, Initial Brief,* at 19-20 n.10.

[21]The *DSM-IV-TR* requires deficits in **present** adaptive functioning. The difference is not of great significance in this case, since Bottoson has not demonstrated significantly sub-average intellectual functioning, and therefore does not even meet the first of the three required diagnostic criteria.

[22]Because his own definition of mental retardation was used, because he never sought to supply a different definition, and because all of the mental state experts agreed on the definition of mental retardation, Bottoson cannot argue in good faith that he was unaware (or unsure) of the proper definition. Dr. Dee, Bottoson's own expert, testified that the definition of mental retardation has been settled for years. (R329).

significantly sub-average intellectual functioning with a full scale IQ of 84, **and** because he does not have deficits in adaptive functioning.[23] *Order,* at 7-9. Both characteristics are necessary, and Bottoson has neither one -- because that is so, he is not mentally retarded, as the trial court found.[24] *Id.* Because Bottoson does not have significantly sub-average intellectual functioning, and because he does not have deficits in his present adaptive behavior, he is not mentally retarded -- because he is not mentally retarded, the "onset" of a non-existent condition cannot be prior to the age of 18. Stated in different terms, the absence of the first two diagnostic criteria renders the "pre-18 onset" criteria a nullity.[25]

Moreover, despite the histrionics of his *Initial Brief,* Bottoson has identified no evidence, credible or otherwise, that **suggests** that an individual with a full scale IQ score of 84 would **ever** be diagnosable as mentally retarded. The Circuit Court's

---

[23]This Court has noted that an IQ score of **77** places the individual in the **borderline** range of intelligence. *Woods v. State,* 733 So.2d 980, 992 (Fla. 1999). Bottoson's score places him in the **low average** range of intellectual functioning. (R474).

[24]Because the first two criteria do not exist, there is no requirement (or reason) to inquire into the pre-18 onset criteria. (R502; 506).

[25]Mental retardation is not the proper diagnosis when the onset comes after the age of 18. *See, DSM-IV-TR,* at 147 *et seq.* Dr. Prichard testified in detail about the "decision tree" utilized in the diagnosis of mental retardation. (R523).

factual finding that Bottoson is not mentally retarded, which was made after observing the demeanor of the witnesses and assessing their credibility, is supported by competent substantial evidence, and should not be disturbed. *State v. Mills*, 788 So. 2d 249 (Fla. 2001); *State v. Huggins*, 788 So. 2d 238 (Fla. 2001); *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001) (finding that trial court's rejection of the testimony of Dr. Henry Dee was supported by competent substantial evidence); *Provenzano v. State*, 761 So. 2d 1097, 1099 (Fla. 2000); *Shere v. State*, 742 So. 2d 215, 218 n.5 (Fla. 1999) (the role of the trial court in an evidentiary hearing is to make credibility determinations and findings of fact); *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1999). To the extent that further discussion of the issue is necessary, the trial court found that Bottoson's expert, Dr. Dee, was not credible, stating, "Only Dr. Dee found Mr. Bottoson to be mentally retarded, and the Court finds his basis for that opinion to be unacceptably vague in light of the objective evidence, and therefore not credible." *Order*, at 9. That credibility determination should not be disturbed.[26]

To the extent that Bottoson argues that § 921.137 does not contain a proper definition of mental retardation, that claim is, at best, disingenuous. The diagnostic criteria for mental retardation are not complex, and it is not difficult for a mental

[26]In a very real sense, Dr. Dee's testimony was that Bottoson is retarded because he says that he is. That testimony satisfies no diagnostic criteria.

health professional to make such a diagnosis.[27] (R502). Moreover, as Drs. McClaren and Prichard testified, the WAIS-III and the Vineland Adaptive Behavior Scale are, in fact, standardized tests, which are referenced within the *DSM-IV-TR* as the sort of standardized tests that are employed in making a diagnosis of mental retardation (or in ruling such a diagnosis out). *See,* State's Exhibit 1. Likewise, as Dr. Prichard testified, "rules" put forth by the Department of Children and Families are not necessary in order to make the determination that Bottoson is not mentally retarded -- his IQ score of 84 is so far above the maximum score at which a diagnosis of mental retardation would be appropriate that it is ridiculous to assert that he **is** mentally retarded.[28] (R504-505). There are no diagnostic criteria under which it would be proper to diagnose Bottoson as mentally retarded.[29] (R505; 507).

In his brief, Bottoson argues that the "Terman" test referred

---

[27]Bottoson's own expert, Dr. Dee, testified that he did not need anyone to tell him how to diagnose mental retardation. (R370).

[28]On page 16 of his *Initial Brief*, Bottoson says that the Circuit Court agreed that "we don't yet know exactly what mental retardation means." That comment was made at the *Huff* hearing, and referred to the fact that no evidence **about** mental retardation had yet been presented. It is disingenuous for Bottoson to ascribe some other meaning to that statement.

[29]On page 26 of the *Initial Brief*, Bottoson claims that Dr. Prichard testified that the pre-18 onset component of the mental retardation criteria "made no sense." That is a false representation of Dr. Prichard's testimony which was that it made no sense to do as Bottoson wants to do and go back 50 years in an attempt to establish mental retardation because the issue is **current functioning.** (R505).

to by Dr. Dee "was the standard in the field in 1951." *Initial Brief,* at 20. There is no evidence in the record to support this claim, and Bottoson's own expert, Dr. Dee, could not say what the "Terman" test was.[30] (R607). However confident Bottoson's counsel may be that the test at issue was, in fact, the Stanford-Binet, their hand-picked expert was not willing to make that conclusion. Moreover, as Dr. Dee testified, there are any number of factors, including scoring errors, which could have affected Bottoson's score on the unknown, unidentified test. (R386-88). In any event, accepting for the sake of argument the assumption that the "Terman" is the Stanford-Binet, the score of 77 is not two standard deviations below the mean, as Dr. Dee agreed.[31] (R606; 611). In any event, it is not possible for an individual to "fake good" on an intelligence test -- in other words, it is not possible for an individual to score as **smarter** than he or she is. (R375-76).

---

[30]Dr. Dee could not say "how an individual practioner" would have viewed the "Terman" score in 1959, nor was he sure about what diagnosis would be attached thereto in 1959. (R614). The 1959 diagnosis does not matter, because the "Terman" was administered to Bottoson in **1951** (R599), and changes were made in 1959. (R613). Dr. Dee's rebuttal testimony, which begins on R598, was presented for the purpose of showing "what the standard was in **1959**." (R604).

[31]Dr. Dee was unsure whether the standard deviation was 15 or 16, and could provide no references to support his conclusion. (R607-8). However, if the standard deviation was 15, a score of 70 would be required for the individual being tested to score at the two-standard-deviation benchmark. (R611). If the standard deviation was 16, a score of 68 would fall to that level. (R610). Bottoson's score of 77 was **not** two standard deviations below the mean. (R606; 611).

Bottoson's score of 84 on Dr. Dee's testing is a valid score.[32] (R392). To the extent that Dr. Dee seeks to minimize the importance of Bottoson's Full Scale IQ score of 84 in favor of emphasizing the performance scale only, no basis for doing that is advanced other than Dr. Dee's statement that that is how it should be done.[33]

To the extent that Bottoson engages in extensive criticism of Dr. Prichard's assessment of his adaptive functioning through the administration of a Vineland Adaptive Behavior Scale, the overriding consideration is that Bottoson does not exhibit significantly sub-average intellectual functioning, and, because that is so, there is no reason (from a mental health standpoint) to address the adaptive functioning component of the diagnostic criteria. R504). Nonetheless, Dr. Prichard did assess Bottoson's adaptive functioning in his present environment, which is the process through which such an assessment is conducted. (R523). As Dr. Prichard testified, the inapplicability of a particular assessment item to an individual because he is incarcerated (or institutionalized) is not the issue presented by the Vineland's

---

[32]Whatever the result of testing performed by Bottoson's expert, Mosman (who did not testify), Dr. Dee testified that the full scale score of 84 was a valid result. (R392). Any score obtained by Mosman is meaningless -- Bottoson had every opportunity to call that person as a witness, but did not.

[33]In view of the extensive criticism leveled at Dr. Prichard for "singular adherence to his own theories," this argument is, at the very least, consistent with a failure to recognize the internal inconsistencies contained in Dr. Dee's testimony in general, and in the *Initial Brief* as a whole.

inquiry items -- the issue is whether the individual exhibits the skill subsumed within the item based upon his present life circumstances. (R509). The fact that an individual is incarcerated (or institutionalized) does not mean that that individual ceases to function -- it means that his adaptive functioning is reflected by his life circumstances, and any assessment of his adaptive functioning makes it necessary to assess his adaptive functioning must consider and account for his present circumstances.[34] Despite the hyperbole of Bottoson's brief, and despite his dissatisfaction with the results, Dr. Prichard conducted his evaluation in a fashion that comported with the relevant professional standards. In any event, even if the various Vineland items about which Bottoson complains in his brief are factored **out** of the ultimate result, there is no evidence at all that the outcome of the Vineland (that Bottoson is in the normal range) would change. (R512-15). Bottoson meets none of the diagnostic criteria for mental retardation, as the Circuit Court found. Bottoson is entitled to no relief on this claim because the claim contained in his brief has no basis in fact.[35]

---

[34]Bottoson makes much of the fact that he has been incarcerated for 20 years on death row. The real significance is that no one in the Department of Corrections perceives him as mentally retarded. (R392-3; 516).

[35]Bottoson's discussion of *Atkins v. Virginia*, No. 00-8452, is no more than an historical discussion since Bottoson is not mentally retarded in the first place. The result in *Atkins* will not impact this case under any scenario.

II. EXECUTION OF THE MENTALLY ILL IS UNCONSTITUTIONAL

On pages 43-46 of his brief, Bottoson argues that his execution is barred under various legal theories because he is "mentally ill." The Circuit Court denied relief on this claim, finding it not only meritless, but also procedurally barred.

To the extent that this claim is based upon a claim that Bottoson is mentally retarded, that claim fails because it has no basis in fact, as the Circuit Court found. *Order,* at 10. To the extent that Bottoson claims that "current standards of decency" prohibit the execution of a mentally ill individual,[36] that claim is, as the Circuit Court found, procedurally barred because it could have been but was not raised at trial, on direct appeal, or in Bottoson's prior Rule 3.850 proceeding, during which he presented extensive evidence as to his mental state. Bottoson's failure to raise this claim in a timely fashion is a procedural bar under settled Florida law. *Fla. R. Crim. P.* 3.851(d). Moreover, Bottoson's claim was insufficiently pleaded below (and is inappropriate here) because Bottoson has never provided the explanation for his failure to raise this claim in his prior post-conviction motion that is required by *Florida Rule of Criminal Procedure* 3.851(e)(2)(A) and (B). Alternatively and secondarily, as the Circuit Court found, Bottoson's claim fails because it has no

[36]Bottoson has not pleaded this claim as an "insanity for execution" claim, and that issue is not before this Court.

legal basis. *Order,* at 10. Bottoson has presented no legal authority for the proposition that either the United States or Florida Constitutions prohibit the execution of an individual solely because he is suffering from mental illness.[37]

To the extent that Bottoson complains that he was denied a "fair opportunity to establish the extent of his neurological impairments," it is noteworthy that he was evaluated by at least two mental state experts that were selected by him, but that only one of those experts, Dr. Dee, testified. The other "expert," Mosman, submitted a lengthy affidavit (R1414), but was not called to testify, even though Bottoson had every opportunity to do so. The only reasonable conclusion to be drawn therefrom is that Mosman's testimony would have been more damaging than helpful to Bottoson's cause. It stands reason on its head to suggest that a decision not to call a witness can be turned into a claim of a denial of a full and fair hearing. Bottoson is not entitled to any relief.

---

[37]The Circuit Court apparently assumed that Bottoson suffers from schizophrenia. *Order,* at 10. The testimony at the previous Rule 3.850 proceeding was that Bottoson suffers from **schizoaffective disorder.** (TR581). The only testimony on the subject in this proceeding was that Bottoson suffers from "psychosis not otherwise specified." (R427). Bottoson presented no testimony in addition to that brief reference, even though he had every chance to do so. His complaints of a denial of a fair opportunity to present evidence of his "neurological impairments" set out at page 46 of his brief are frivolous.

III. THE "NEW EVIDENCE" OF BRAIN DAMAGE

On page 46 of his brief, Bottoson argues that he is entitled to relief because he has "newly discovered evidence" of what he describes as "brain damage." According to Bottoson's brief, this claim is based upon evaluations conducted by two psychologists which took place since the November 19, 2001, signing of his death warrant.

The collateral proceeding trial court found this claim procedurally barred, stating:

> In preparation for the hearing on his previous Rule 3.850 motion, Mr. Bottoson was evaluated by his own witness, Dr. Robert Phillips, a physician. At the evidentiary hearing in 1991, Dr. Phillips testified as to Mr. Bottoson's mental condition, averring that Mr. Bottoson was a latent schizophrenic. At no time did he indicate that Mr. Bottoson suffered from brain damage.

Order, at 10-11. The fact that Bottoson has presented such evidence at this late date proves nothing more than the truism that mental state experts disagree often in a court of law. *See, Ake v. Oklahoma,* 470 U.S. 68, 81 (1985) ("... psychiatrists disagree widely and frequently on what constitutes mental illness ..."). As the Circuit Court pointed out, this Court decided the same issue adversely to Bottoson's position 20 years ago, when this Court stated:

> If 'evidence' such as that offered here is found to warrant a new proceeding, there will be no end to the appeal process. The finality of the judicial process would be nil if a new proceeding was required everytime a party found an expert who reached a conclusion, with regard to information available at the time of trial,

> that differed from the opinions and conclusions presented at that trial. There must be a point at which the proceeding is concluded and the matter is settled.

Booker v. State, 413 So. 2d 756, 757 (Fla. 1982). As the collateral proceeding trial court found, Bottoson could have been subjected to additional mental state evaluations at the time of the previous Rule 3.850 litigation -- the fact that such evaluations were not undertaken precludes this claim because Bottoson cannot establish the "due diligence" component of *Jones v. State,* 709 So. 2d 512 (Fla. 1998). Obviously, the "evidence" at issue "existed" at the time of the prior Rule 3.850 proceeding, and, had Bottoson been unhappy with the testimony of Dr. Phillips, he could easily have sought out another expert (or two). This claim cannot meet the standard for newly discovered evidence, and is not available as a basis for relief.

Moreover, as the Rule 3.850 court found, this claim is untimely. *Order,* at 11. Bottoson could have raised this claim at the time of his first Rule 3.850 motion, and, because he did not, he is time barred from relitigating that motion under a different mental state theory. Bottoson's failure to comply with Rule 3.851(e)(2)(B), which requires a successive collateral attack motion to state the reasons for the failure to timely present the claim, also compels the imposition of a procedural bar to relitigation of this claim, and is an independent and adequate additional basis for the denial of relief.

IV. THE PET/SPECT SCAN CLAIM

On pages 46-48 of his brief, Bottoson argues that the Circuit Court erred in finding that the results of a PET or SPECT scan would not be "newly discovered evidence" under controlling Florida law. This claim was correctly decided by the Circuit Court, and has already been denied once by this Court in the "All Writs" petition filed on January 9, 2002, and denied on January 15, 2002.

As the Rule 3.850 court found, this precise issue was considered and rejected by this Court in *Davis v. State,* 742 So. 2d 233, 237 (Fla. 1999), when this Court held that brain scans such as the one requested by Bottoson have been in existence since at least as long ago as 1992. Under settled law, a claim that is based upon "newly discovered evidence" must be brought within one year of the date the "evidence" was discovered, or **could have been discovered,** through the exercise of due diligence. *Jones, supra; Glock v. Moore,* 776 So. 2d 243, 251 (Fla. 2001). Under the precedent of this Court, the time for filing begins to run when the test becomes available. *Zeigler v. State,* 654 So. 2d 1162 (Fla. 1995). As this Court expressly noted in *Rogers v. State,* 783 So. 2d 980, 997 n.5 (Fla. 2001), the PET/SPECT scan has existed at least since 1995, and, as the Circuit Court found, should have been raised, at the latest, in 1996. This issue is time-barred under settled Florida law, and the Circuit Court's denial of relief should be affirmed in all respects.

To the extent that this claim includes a claim that Bottoson was denied a full and fair hearing as a result of the Circuit Court's ruling denying the motion to transport for the PET/SPECT scan, that claim is directly linked to and controlled by the *Davis* and *Rogers* cases. To the extent that further discussion is necessary, the Circuit Court denied relief on this issue on January 7, 2002, and then denied Bottoson's motion for rehearing of that motion on January 9, 2002. *Order,* at 13-14. This claim is nothing more than a repetitive motion for rehearing, which was properly denied by the Circuit Court. Bottoson is not entitled to any relief.

Alternatively and secondarily, even if this claim was not procedurally barred, Bottoson would not be entitled to any relief because he has not met the threshold requirements for establishing a particularized need for the PET or SPECT scan as required by the precedents of this Court. *Rogers, supra; Robinson (Michael) v. State,* 761 So. 2d 269 (Fla. 1999).

V. THE "CLARIFICATION" OF DR. KIRKLAND'S TESTIMONY

On pages 48-49 of his brief, Bottoson argues that he is entitled to relief based upon a January 10, 2002, affidavit of Dr. Robert Kirkland in which that individual disagrees with certain inferences drawn by the Courts with respect to his testimony.[38] The

[38]Dr. Kirkland is a psychiatrist who evaluated Bottoson before trial, and who testified about his findings at the prior Rule 3.850 hearing.

collateral proceeding trial court found this claim procedurally barred, stating:

> ... it is not necessary to reach the merits of Mr. Bottoson's contentions, since this claim is procedurally barred. Mr. Bottoson could have filed a timely motion for rehearing in either of those courts [the Florida Supreme Court and the Eleventh Circuit Court of Appeals] alleging an error interpreting Dr. Kirkland's testimony. He did not. This Court does not review for error the decisions of either the Supreme Court of Florida or the Eleventh Circuit Court of Appeals.

Order, at 14. This claim is procedurally barred, as the Circuit Court found, and, moreover, is time-barred because it is untimely by many years. This claim is not a basis for relief.

CONCLUSION

Based upon the foregoing arguments and authorities, there is no basis in fact or law for any of the relief Bottoson seeks. The issues are not complex, and were thoroughly addressed by the Circuit Court. There is no basis for a stay of execution, or any other relief. It is time for Bottoson's sentence to be carried out.

Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818

JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
Florida Bar #438847
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118

(386) 238-4990
Fax # (386) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by fax and U.S. Mail to: **William Jennings**, CCRC- Middle, **Peter Cannon**, CCRC - Middle, **Eric Pinkard**, CCRC - Middle, **Elizabeth A. Williams**, CCRC-Middle, Office of the Capital Collateral Regional Counsel, 3801 Corporex Park Dr., Suite 210, Tampa, FL 33619, **Mark E. Olive**, 320 West Jefferson St., Tallahassee, FL 32301 and **Tim Schardl**, 801 K Street, 10th Floor, Sacramento, California 95814, on this 25th day of January, 2002.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL