IN THE SUPREME COURT OF FLORIDA

CASE NO. SC93192

JOE ELTON NIXON,

Petitioner,

v.

HARRY K. SINGLETARY,
Secretary, Florida Department of Corrections,

Respondent.

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

JONATHAN LANG

ERIC M. FREEDMAN
JOHN J. LAVIA III

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I. INTRODUCTION

This Amended Petition updates a previous petition for habeas corpus relief submitted on behalf of Joe Elton Nixon on June 5, 1998. In our previous petition, claims for habeas corpus relief were made under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under Article I, Sections 9, 12, 13, 16(a) and 17 of the Florida Constitution. We incorporate those claims by reference.

We make two additional claims in this Petition. *First*, we assert that Nixon's death sentence violates the Sixth and Fourteenth Amendments to the United States Constitution because Florida's capital sentencing statute, under which Joe Nixon was sentenced, "expose[s] the defendant to a greater punishment than that authorized by the jury's verdict." Apprendi v. New Jersey, 530 U.S. 466, 494 (2000). As explained below, we are not briefing this claim now but asserting it now for preservation purposes.

Second, to inflict a death sentence on Joe Nixon violates the Eighth Amendment because Nixon suffers from mental retardation. Mental health experts have examined Nixon and determined that he falls within the lowest 1% of the population. Such a diminished level of comprehension is incompatible with a fundamental principle

underpinning our capital punishment system: that the punishment may not be imposed unless it is proportionate to the personal culpability of the defendant. Joe Nixon's degree of mental retardation is well documented, and has been manifest throughout his life and the Jeanne Bickner murder trial.

Since the United States Supreme Court decided Penry v. Lynaugh, 492 U.S. 302 (1989), a national consensus has emerged against the execution of the mentally retarded. Eighteen states, including Florida, have passed laws to this effect. The United States Supreme Court has now heard arguments in Atkins v. Virginia, No. 00-8452 (October Term 2001), in which the Court is considering whether the imposition of the death penalty on the mentally retarded violates the Eighth Amendment.

Accordingly, we assert this claim, too, for preservation purposes, while respectfully urging that the Court rule on the issues previously briefed and return to this claim only if necessary in light of the disposition of those issues.

II. THE FORM, SUBSTANCE AND TIMING OF THIS PETITION

Joe Nixon files this Petition concurrently with his brief on appeal (the "Brief of Appellant") from the denial by the Circuit Court in and for Leon County of his motion for post-conviction relief under Rule 3.850. To conserve space and not burden this

Court with a reiteration of the procedural history and facts of the case, we refer the Court to the Brief of Appellant for a detailed statement of the case. Petitioner sets forth in this Petition only those facts relevant to the claims asserted herein, and expressly incorporates by reference all other procedural and factual recitations appearing in the Brief of Appellant.

This Amended Petition is filed in accord with Rule 9.140(b)(6)(e) of the Florida Rules of Appellate Procedure, which provides that in death penalty cases petitions for writs of habeas corpus be filed simultaneously with the initial brief in the Rule 3.850 appeal.

III. JURISDICTION

Under Art. V, § 3(b)(9), Fla. Const., and Fla. R. App. P. 9.030(a)(3), this Court has original jurisdiction to grant the writ of habeas corpus guaranteed by Art. I, § 13, Fla. Const. An original habeas petition is governed by Fla. R. App. P. 9.100 and longstanding principles that make it "the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice." Anglin v. Mayo, 88 So. 2d 918, 919-20 (Fla. 1956). See also, Haag v. State, 591 So. 2d 614, 616 (Fla. 1992); Allison v. Baker, 11 So. 2d 578, 579 (Fla. 1943); Jamason v. State,

447 So. 2d 892, 894 (Fla. 4th DCA 1983), approved, 455 So. 2d 380 (Fla. 1984), cert. denied, 469 U.S. 1100 (1985).

IV. PROCEDURAL HISTORY

The detailed procedural history of this case appears in the Brief of Appellant. Joe Nixon was convicted of first degree murder and sentenced to death for the killing of Jeanne Bickner. That conviction and death sentence occurred after a trial from which Nixon was for the most part absent and in which Nixon's court-appointed lawyer, Michael Corin, repeatedly conceded his guilt without Nixon's consent and without Nixon being competent to give any such consent.

Nixon appealed his conviction and sentence represented by a different court-appointed lawyer, T. Whitney Strickland.

After further proceedings relating mainly to whether Nixon had consented to his trial lawyer's decision to concede guilt, this Court affirmed the conviction and sentence. Nixon v. State, 572 So. 2d 1336, 1342 (Fla. 1990), cert. denied, 502 U.S. 854 (1991). In 1993, Nixon filed a motion for post-conviction relief under Rule 3.850. On October 22, 1997, the Circuit Court denied the Rule 3.850 motion without an

evidentiary hearing. See Nixon v. State, No. 84-2324 (Fla. 2d Cir. Ct. Oct. 22, 1997), Order Denying Motion for Post Conviction relief dated October 22, 1997 (the "October 22 Order") at 1-3; A-318-20.[1]

Petitioner appealed the Circuit Court's denial of Rule 3.850 relief to this Court and filed concurrently the initial Petition for habeas corpus relief. The Court decided that appeal in Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000) ("Nixon II"), ruling that Nixon was entitled to a hearing to determine if he affirmatively consented to his lawyer's concession of guilt. A hearing pursuant to this Court's remand was held in the Circuit Court before the Hon. Janet E. Ferris. On September 20, 2001, Judge Ferris entered an Order denying relief. Nixon appeals that order in the initial Brief of Appellant submitted with this Petition.

V. UPDATED GROUNDS FOR HABEAS CORPUS RELIEF

CLAIM I:

THE DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE IT WAS BASED ON FACTS WHICH EXPOSED THE DEFENDANT TO A GREATER PUNISHMENT THAN THAT AUTHORIZED BY THE JURY'S VERDICT

[1] In accord with Fla. R. App. P. 9.220, Petitioner has submitted an Appendix with this Petition and with the Brief of Appellant. Citations to the Appendix are referenced as "A-___."

By this amendment to his petition for a writ of habeas corpus filed on June 5, 1998, Nixon alleges that his sentence of death was imposed in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States because it was based upon findings of fact made by the trial judge that "expose the defendant to a greater punishment than that authorized by the jury's verdict." Apprendi v. New Jersey, 530 U.S. 466, 494 (2000).

Section 775.082, Fla. Stat. (1979) provides:

> 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.

Nixon's death sentence was imposed pursuant to this statutory procedure and is thus unconstitutional under Apprendi unless the earlier decisions of the United States Supreme Court in Spaziano v. Florida, 468 U.S. 447 (1984); Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam); and Walton v. Arizona, 497 U.S. 639 (1990), survive Apprendi.

In Ring v. Arizona, 122 S. Ct. 865 (Jan. 11 2002), the United States Supreme

Court granted *certiorari* in the case of State v. Ring, 200 Ariz. 267, 25 P.3d 1139 (2001), to decide whether Spaziano, Hildwin, and Walton remain good Sixth Amendment law after Apprendi.

We recognize that following the grant of *certiorari* in Ring, this Court has "consistently rejected" claims "that the United States Supreme Court's holding in Apprendi v. New Jersey [...] applies to Florida's capital sentencing statute." Bottoson v. State, 27 Fla. L. Weekly S119 (Fla. Jan. 31, 2002). However, the United States Supreme Court's granting of stays in the Bottoson case (Bottoson v. Florida, 122 S. Ct. 981 (Feb. 5, 2002)) and in King v. Florida, 122 S. Ct. 932 (Jan. 23, 2002) [decision below reported as King v. State, 27 Fla. L. Weekly S65 (Fla. Jan. 16, 2002)], suggests that the Sixth Amendment challenge to Florida's capital sentencing statute may have merit and requires counsel to raise it for preservation purposes.

Although we feel obliged to raise the Apprendi claim before this Court at the earliest practicable opportunity, we will not infringe on the Court's time by briefing it now. Three considerations make such briefing inappropriate:

First, the Court has recently rejected the claim on the merits in the Bottoson and Amos King cases after being advised of the grant of *certiorari* in Ring.

Second, Nixon's present appeal presents compelling grounds for reversal of his

conviction, including one ground already decided in his favor by this Court in Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000), which would moot the Apprendi issue in his case.

Third, any briefing of the Apprendi issue before the United States Supreme Court decides Ring v. Arizona would be written in quicksand and would require re-briefing after Ring clarifies this area of federal constitutional law.

Nixon will accordingly request leave of this Court to brief his Apprendi claim if that course appears appropriate after Ring v. Arizona is decided by the United States Supreme Court.

CLAIM II:
THE EXECUTION OF MENTALLY RETARDED INDIVIDUALS IS UNCONSTITUTIONAL AND A VIOLATION OF FLORIDA LAW

Nixon also alleges that his death sentence may not constitutionally be carried out because he is mentally retarded. Three medical experts have evaluated him and determined that he is unable to function in society at any higher level than a typical 6 to 8 year old. Execution of the death penalty on such an individual violates the Eighth and Fourteenth Amendments to the United States Constitution as well as Florida Constitutional and statutory law.

A. The Record Demonstrates That Joe Nixon is Mentally Retarded

The evidence proffered with Joe Nixon's 3.850 motion (which was wrongly denied by the original 3.850 court without a hearing) establishes that he is mentally retarded[2] and suffers from organic personality disorder (brain tissue damage).[3] See Resume of Neurological Evaluation Re: Joe Elton Nixon, prepared by Henry L. Dee, Ph.D., October 6, 1993 (3.850R. 719-26; A-133-40) (the "Dee Report"); Summary of Standard Test Results, prepared by Denis William Keyes, Ph.D., September 25, 1993 (3.850R. 731-40; A-144-53) (the "Keyes Report"); Report of Alec J. Whyte, M.D., October 6, 1993 (3.850R. 747-63; A-159-75) (the "Whyte Report").

According to Dr. Keyes, Joe Nixon:

> […] functions in the lowest percentile of the U.S. population. His adaptive skills are within the severe range of retardation in all skill areas. His actual adaptive functioning is estimated to be developed at the level of a child between six and eight years of age. His social development level is similar to that of a 6 year-old child. His mental capacities place him below the lowest 1% of the population. His adaptive behavior is so distorted as to place below the lowest

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[2] Joe Nixon is mentally retarded, he is not "borderline." See Dee Report, 3.850R. 719-26; A-133-40; Keyes Report, 3.850R. 731-40; A-144-53; Whyte Report, 3.850R. 747-63; A-159-75. His "Composite Score" is 65 on the Stanford Binet Intelligence Scale (Keyes Report; A-144) and his "Full Scale" IQ is 72 on the Wechsler test (Dee Report; A-136).

[3] See Dee Report at 6, A-138; Keyes Report at 7, A-150; Whyte Report at 2,4-6; A-160, 162-64.

.01 percent of the general population.

Keyes Report at 5-7, 3.850 R. 735-37; A-148-51.

Dr. Keyes found that on the Stanford Binet Fourth Edition test battery Nixon consistently functioned below the intellectual cut-off level of mental retardation.[4]

According to Dr. Dee, a second examiner, the pretrial mental health assessments of Mr. Nixon were fundamentally flawed in several ways:

> They were performed in the absence of crucial background material and life history information, which is a vital component of any forensics exam but is especially critical when mental retardation, cerebral dysfunction, or episodic psychotic disorder are suspected. [...] Some of the most vital facts were unknown by the prior examiners, among them: Mrs. Nixon's alcohol ingestion during pregnancy, the high level of brutality, neglect, and hunger experienced in the Nixon home; the long-term rape and sexual abuse suffered by Joe Nixon; his lifelong adaptive functioning disabilities; and his numerous and longstanding psychotic symptomtology.

Dee Report, 8; 3.850 R.726; A-140. See also Whyte Report, 3.850 R.747-63; A-173-175.

The third examiner, Dr. Whyte, determined that Nixon suffers from moderate[5] mental retardation and organic personality syndrome. Whyte Report at 2; 3.850 R. 748; A-160.

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[4] Keyes Report at 5-7, 3.850 R. 735-37; A-148-51.

[5] The euphemism "moderate" is misleading. The misnomer "borderline retarded was discontinued in 1983. See Grossman, H. (Ed.) Terminology and Classification Manual of the American Association of Mental Retardation (8th ed. 1983).

B. Execution of Retarded Individuals Violates Fundamental Legal Norms

Persons who have mental retardation do not possess the requisite level of individual culpability to warrant death. By definition, they lack the ability for reasoned choice that is an indispensable prerequisite to directing that an individual's life be forfeited.

If needed after the decision of the United States Supreme Court in Atkins, we will document the overwhelming nationwide and worldwide support for the proposition that retarded persons cannot be executed in accordance with fundamental legal norms. For now, we note only that in 2001 Florida joined the consensus with the enactment of § 921.137, Fla. Stat. (2001).[6] Moreover, this Court has made abundantly clear its view that mental retardation, even of the "borderline" variety, is a substantial mitigating factor that must be given "significant weight" by the trial court in the sentencing calculus. See Crook v. State, 27 Fla. Weekly S207, n. 6 (Fla. 2002), and

[6] The statute on its face is prospective only and would not apply to Nixon unless his current death sentence is set aside on other grounds. However, the application of the statute in this way would be constitutionally impermissible. Cf. Dawson v. State, 274 Ga. 327, 330, 335, 554 S.E.2d 137, 140, 144 (2001).

the cases cited therein;[7] Thompson v. State, 648 So. 2d 692, 697 (Fla. 1994) (low intelligence is a "significant" mitigating factor); Jones v. State, 705 So. 2d 1364, 1366 (Fla. 1998) ("our review of the record reveals copious unrebutted mitigation," including defendant's IQ of 76).

This court has noted, "Society's understanding of mental retardation continues to evolve." Crook, at n. 5. Governor Bush has unequivocally added the weight of his authority, stating, "I pledge never to sign a death warrant for an individual who is mentally retarded."[8] Although the legal path is as yet unclear, its destination is certain: Joe Nixon's mental retardation precludes his execution.

VI.

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[7] Nixon's Wechsler IQ of 72 and Stanford Binet IQ of 65 place him squarely in the range of the many cases in which this Court has observed that mental retardation becomes a significant mitigating factor.

[8] *In the News* (official newsletter of the Executive Office of the Governor of Florida), "Message from the Governor," Volume 3, Issue 13, March 30, 2001, at page 1.

CONCLUSION

For all of the foregoing reasons, Petitioner Joe Elton Nixon respectfully urges the Court to grant habeas corpus relief.

Dated: May 3, 2002

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for a Writ of Habeas Corpus has been mailed by first class mail to the Office of Attorney General, The Capitol, Tallahassee, FL 32399-1050, Attention: Curtis French, Esq., Assistant Attorney General and Eddie M. Evans, Esq., Deputy State Attorney on May 3, 2002.

_____

Jonathan Lang, Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I hereby certify that this Amended Petition for Writ of Habeas Corpus complies with Florida Rule of Appellate Procedure 9.100(l).

Dated: May 3, 2002.

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Jonathan Lang, Attorney for Petitioner