IN THE SUPREME COURT OF FLORIDA

CASE NO. SC93192

JOE ELTON NIXON,

Petitioner,

v.

MICHAEL W. MOORE, Secretary, Florida Department of Corrections,

Respondent.

REPLY TO STATE'S RESPONSE TO APPELLANT'S AMENDEND PETITION FOR WRIT OF HABEAS CORPUS

JONATHAN LANG	ERIC M. FREEDMAN
JOHN J. LAVIA III	

PRELIMINARY STATEMENT

This Reply Brief of Appellant is in response to the State of Florida's Response to Amended Petition for Writ of Habeas Corpus (the "Response") filed on August 20, 2002. In this response, Appellant will address only two issues raised in the State's Response.

CLAIM I
THE APPRENDI/RING ISSUE

The effect of Ring v. Arizona, 122 S. Ct. 2428 (2002) on Florida law is presently before this court in the King v. Florida, No. SC02-1457 (2002) and Bottoson v. Florida, No. SC02-1455 (2002) cases. Accordingly, appellant Joe Nixon agrees with the State that it would be premature to argue that Florida's sentencing procedures are invalid under Apprendi v. New Jersey, 530 U.S. 466 (2002).

Therefore, Nixon requests leave of this court to brief his Apprendi claim when that course appears appropriate after this court has issued decisions in the King and Bottoson cases.

CLAIM II
THE MENTAL RETARDATION ISSUE

Nixon is entitled to the constitutional prohibition against imposing the death penalty on the mentally retarded of Atkins v. Virginia, 122 S. Ct. 2242 (2002), because the record clearly demonstrates that he is mentally retarded. Execution of such an individual violates the Eighth and Fourteenth Amendments to the United States Constitution, and Florida's Constitutional and statutory law.

The State offers no legal argument in response to Nixon's claim and merely presents a factual dispute based on two IQ tests, which, on their face, cannot offer any meaningful standard of reliability. In support of this Claim, Appellant submits herewith the affidavit of Dr. Denis William Keyes (the "Keyes Aff.").

The first IQ test conducted at the Dozier School for Boys was not even conducted by a qualified professional and is so clearly flawed that it cannot meet any standard of reasonableness for the purposes of relying on its results. (Keyes Aff. ¶ 3). Moreover, it was conducted at a facility infamous for its egregious treatment of its charges. The only other IQ test the State relies upon is equally unreliable on its face: "[a] psychological screening is based upon a necessarily brief (15 to 30 minute) and narrowly focused clinical interview. It is not, and should not be, a substitute for a psychological evaluation." Defense Trial Exhibit 39. As such, the only reliable tests before this court indicate that Nixon is mentally retarded and is not a borderline case. See Appellant's Amended Petition for Writ of Habeas Corpus, pp. 8-10.

In the alternative, Nixon is, at the very least, entitled to a hearing on this issue.

Upon a writ of *habeas corpus* to the Florida Supreme Court, the court has the power to refer the matter to a circuit judge to make findings and recommendations on the issues tendered by the pleadings where "the determination of factual questions are necessary to a final decision and judgment". Sneed v. Mayo, 66 So. 2d 865, 874 (Fla. 1953) (explaining that when there is a dispute as to the truth or falsity of the charges respecting the alleged violation of constitutional rights of petitioner, as to which the official court record is entirely silent, the cause should be set down for a hearing on the merits). Moreover, to do otherwise would violate federal due process. See Ford v. Wainwright, 477 U.S. 399 (1986). The Supreme Court of the United States has held that it is unconstitutional to impose the death penalty on the mentally retarded. See Atkins, 122 S. Ct. 2242. Furthermore, this court has recognized the retroactive application of a new rule of law that originates in the United States Supreme Court or the Florida Supreme Court, is constitutional in nature, and has a fundamental significance. See Ferguson v. State of Florida, 789 So. 2d 306, 310 (Fla. 2001). In this case, petitioner Nixon is alleging a violation of his constitutional right not to be executed because he is mentally retarded. The holding in Atkins is a new constitutional rule with fundamental significance that should be given retroactive effect because Nixon was never given a chance to affirmatively prove his mental retardation during the course of his trial. Moreover, Nixon has provided sworn testimony discrediting the reliability of the only two IQ tests cited by the State. Therefore, the issue of mental retardation should be remanded for a determination of the factual questions necessary to a proper final decision and judgment.

CONCLUSION

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

Dated: September 26, 2002

Respectfully submitted,

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JONATHAN LANG
Attorney for Defendant Joe Elton Nixon
305 West 103rd Street
New York, NY 10025
212-932-0881; Fax: 212-932-0882
Florida Bar No.: Admitted Pro Hac Vice

ERIC M. FREEDMAN
Attorney for Defendant Joe Elton Nixon
250 West 94th Street
New York, NY 10025

212-665-2713; Fax: 212-665-2714
Florida Bar No.: Admitted Pro Hac Vice

JOHN J. LAVIA III
Local Counsel for Defendant Joe Elton Nixon
310 West College Avenue
Tallahassee, FL 32301
850-681-0311
Florida Bar No.: 85366

To:

Eddie M. Evans, Esq.
Deputy State Attorney
Office of the State Attorney
Leon County Courthouse, 4th Floor
Tallahassee, FL 32301

Curtis French, Esq.
Assistant Attorney General
Office of the Attorney General
The Capitol – PL-01
Tallahassee, FL 32399-1050

CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply to State's Response to Appellants' Amended Petition for Writ of Habeas Corpus complies with Florida Rule of Appellate Procedure 9.210(a)(2).

Dated: September 26, 2002.

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Jonathan Lang, Attorney for Appellant