IN THE SUPREME COURT OF FLORIDA

No. SC03-735

MELVIN TROTTER,
Petitioner/Appellant,

v.

STATE OF FLORIDA,
Respondent/Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Melvin Trotter's motion for post-conviction relief which was brought pursuant to Florida Rule of Criminal Procedure 3.850.

Citations shall be as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "R ___" followed by the appropriate page numbers. "RS___" followed by the appropriate page numbers. The post-conviction record on appeal will be referred to as "PC-R ____" followed by the appropriate page numbers and the Evidentiary Hearing "EH____" followed by the appropriate page number. All other references will be self-explanatory or otherwise explained.

This appeal is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Trotter was deprived of his right to a fair and reliable trial and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives. Furthermore, as to the denial of Mr. Trotter's motion for post-conviction

relief, there has been an abuse of discretion and a lack of competent evidence to support certain of the trial judge's conclusions.

REQUEST FOR ORAL ARGUMENT

Because of the seriousness of the claims at issue and the stakes involved, Melvin Trotter , a death-sentenced inmate on Death Row at Union Correctional Institution, urges this Court to permit oral argument on the issues raised in his appeal.

STATEMENT OF THE CASE AND FACTS

A Manatee County grand jury returned an indictment on June 20, 1986 charging Mr. Trotter with first degree murder in case number 86-1225 F and robbery with a deadly weapon in case number 86-1240 F [R1-2] . The case proceeded to a jury trial in the Twelfth Judicial Circuit, Manatee County Circuit Court, before Acting Circuit Judge Alan R. Dakan. The jury found him guilty of robbery with a deadly weapon and first degree murder, and recommended death by vote of 9 to 9. On May 18, 1987, Mr. Trotter was sentenced to death for the first degree murder conviction while a concurrent term of twelve years for the robbery conviction was subsequently imposed.

This court summarized the facts in its direct appeal opinion by noting that "[O]n June 16, 1986, a truck driver went into Langford's grocery in Palmetto, Florida, and found the seventy-year-old owner, Virgie Langford, bleeding on the floor in the aback of the store. She had suffered a large abdominal would which resulted in disembowelment; there were a total of seven stab wounds. She told the driver that she had been stabbed and robbed. Several hours after the surgery for her wounds, the victim went into cardiac arrest and died." Trotter v. State, 576 So. 2d 691 (Fla. 1990).

On appeal, Mr. Trotter's conviction was affirmed but the sentence was vacated and a new penalty proceeding before a new jury was ordered because evidence of Mr. Trotter's status on community control at the time of the homicide was admitted in error, and considered as an aggravating circumstance. Id. at 694. On remand to the circuit court, the parties agreed that the State Attorney for the Twelfth Judicial Circuit should be disqualified (R. - 25). An amended order providing for the disqualification and requesting appointment of special prosecutor was entered on January 24, 1992 (R. 98-99) Governor Chiles issued Executive Order No. 92-30assigning the State Attorney

for the Sixth Judicial Circuit to handle the prosecution (R. 100-02). On April 21, 1993, the jury returned its advisory sentence at the re-sentencing trial and recommended death by a vote of 11 to 1 and on July 23, 1993 the court followed the Jury's Advisory recommendation and entered a written order that Mr. Trotter be sentenced to death [R. 547]. The Florida Supreme Court affirmed the sentence. Trotter v. State, 690 So.2d 1235 Fla. 1997). His Petition for Writ of Certiorari with the United States Supreme Court was denied on October 6, 1997. Trotter v. Florida, ___ S. Ct. ___ (1997).

Mr. Trotter filed his initial post-conviction motion on June 8, 1998 to Vacate Judgment of Conviction and Sentence With Special Request for Leave to Amend. Subsequently, a First Amended Motion was filed on June 15, 2000 and a Second amended motion was filed on July 31, 2001 under the authority of Fla.R.Crim.P. 3.850 and Florida Statutes, Section 924.066 seeking collateral relief from his judgments of conviction for first degree murder and armed robbery. A Huff Hearing was held in the case on November 15, 2001. The court via Order Setting Evidentiary Hearing dated January 24, 2002, stated that the Evidentiary Hearing would pertain to Claims I-IV and

all subparts contained in Defendant's Second Amended Motion To Vacate and that legal arguments would be heard on Claims V-VIII and any subparts of those claims. The Evidentiary hearing was held on April 29, 2002 through May 3, 2002. At the conclusion of the hearing, CCRC- M stated its intent to rely on the record and case law cited in the Second Amended Motion as to all issues raised in Claims Four, Five Six, and Seven. (PC-R 813). The court denied CCRC-M's request to revisit the issue of whether Mr. Trotter has frontal lobe damage, in light of improved technology. (PC-R 816-818). By order dated March 20, 2003, the court denied relief to Mr. Trotter as to all claims contained in Defendant's Second Amended Motion to Vacate Judgments of Conviction and Sentence and an appeal to this Honorable Court was subsequently and duly noticed.

SUMMARY OF THE ARGUMENT

Mr. Trotter has established that he is mentally retarded in accordance with the Supreme court's clinical definitions and limitations in adaptive skills in Atkins v. Virginia, 122, S.Ct. 2242, and therefore his execution is prohibited by the 8th

Amendment to the U.S. Constitution.

The Supreme Court left the determination of mental retardation, however, to the States. The State of Florida in adopting F.S. 931.137(4) requires sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifestation prior to age 18.

Sub-average intellectual functioning is measured on a standardized intelligence test specified by the rules of the Department of Children and Family Services (Chapter 393). The individual must score two or more standard deviations from the mean score.

Mr. Trotter was tested on a Wechsler Intelligence Scale Children's Revised at age 14 and scored 70 demonstrating sub-average intellectual functioning. The only expert who examined Mr. Trotter during this relevant period (prior to age 18), was Dr. Pinkard who testified that he had existing concurrent deficits in his adaptive behavior that manifested prior to age 18

and that Mr. Trotter is retarded. Therefore, Mr. Trotter has established his mental retardation in accordance with Florida Statutes and his execution is prohibited by the 8th Amendment of the U.S. Constitution.

Florida's Statutes, F.S. 921.137 is unconstitutional

under the 8th Amendment to the U.S. Constitution due to the fact that it contains no provision for retrospective application
for mentally retarded individuals.

Mental health expert did not provide competent and effective assistance to Mr. Trotter has required by Ake v. Oklahoma. Although Mr. Trotter scored a 72 on a Wechsler Intelligence Test Adult, expert psychologist testimony indicated that his performance was deficient in not proceeding to test Mr. Trotter's adaptive functioning in light of the low score, and formally assess his mental retardation. In assessing adaptive behavior, the clinician conducts interviews with individuals and reviews records that can provide information relative to early development.

Two quick interviews with relatives were conducted on the evening before the re-sentencing, and Dr. Krop never attempted to determine deficits in Mr. Trotter's adaptive skills. Relatives
testifying at the evidentiary hearing testified to defective social skills, daily living, and lack of personal independence evidence of deficient adaptive skills. Dr. Krop did not speak to Mr.Trotter's wife, and counsel for the Defendant testified that this was not based upon any strategic decision.

Dr. Krop errors in assessing Mr. Trotter's reports of black outs and memory loss prohibited counsel from explaining the convoluted version of facts leading up to and including the crime offered by Mr. Trotter. Additionally, Dr. Krop's failure to define sub diagnoses prohibited a specific diagnosis of organic mental disorder from being rendered. For minimally competent psychological assistance to be rendered Mr. Trotter, the psychologist should have administered an MMPI, a TAT, or a Rorschach but did not. Counsel for the Defendant testified
that he never directed Dr. Krop to refrain from administering an MMPI or any other test to Mr. Trotter. Dr. Krop failed to present age (i.e) mental age as mitigation although Mr.Trotter's mental age was between 12-13 years of age.

Additional mitigation was readily available and not presented in behalf of Mr. Trotter: Ability to be rehabilitated, emotional disturbance, background, crime not one in series, good prison record, iatrogenises persistent, medical problems, mental impairment, previous charitable or humanitarian deeds, no role model, cooperation with law enforcement, major depression, post traumatic stress disorder, cocain intoxication, substance abuse disorder and dependent personality disorder. Psychologist, Dr. Mosman and

defendant’s trial counsel Mr. Slater both testified at the evidentiary that Dr. Krop’s performance was deficient.

Trial counsel was ineffective in failing to investigate Mr. Trotter’s background to develop additional mitigating evidence in his behalf. Dr. Krop testified that he made no independent effort to contact witnesses and relied upon counsel. Melvin’s marriage to a prostitute and loving relationship in caring for her two young daughters is powerful mitigation that was never presented in his behalf due to the limited investigation conducted.

In addition, the relationship corroborates Mr. Trotter’s subservient role and further evidences his deficient adaptive functioning skills.

Counsel for Defendant (Judge Dubensky)was aware of the impact that the prior violent felony would have as aggravation in Mr. Trotter’s case in November 1986 but Dr. Krop did not actually communicate that Mr. Trotter was incompetent to understand the plea until the evening prior to the hearing held in November, 1992. Therefore, this information was newly discovered evidence and the belated 3.850 motion to allow Mr. Trotter to withdraw his plea should have been granted.

GROUNDS FOR POSTCONVICTION RELIEF

In his motion for Fla.R.Crim. P. 3.850 relief, Mr. Trotter

asserts that his conviction and sentence of death are the result of violations of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution for each of the reasons set forth below.

ARGUMENT

I. Petitioner Has Made a Prima Facie Showing of Mental Retardation and Must Be Given a Full Adversarial Jury Trial to Resolve the outstanding Factual Issue as to Whether He Is Eligible for the Death Penalty.

Standard of Review

The lower court's order is subject to de novo review in this Court. This Court reviews de novo questions of law and mixed questions of fact and law decided by trial courts hearing motions brought pursuant to Florida Rule of Criminal Procedure 3.850. Stephens v. State, 748 So.2d 1028 (Fla. 1999). Mr. Trotter's claims that (1) the execution of a person with mental retardation violates the Eighth Amendment and article 1, section 17 of the Florida Constitution, and (2) that a person raising such a claim must be afforded all the procedural safeguards required in a capital sentencing trial, are questions of law. Whether Mr. Trotter's execution is prohibited because he has mental retardation depends upon what the legal definition of

mental retardation is in this context. Determining what the correct rule of law is, and determine whether the lower court applied it, is the exclusive province of this Court. *See* Rogers v. State, 783 So.2d 980, 995 (Fla. 2001) ("whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court"). "When the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance." Bose Corp. v. Consumers Union, 466 U.S. 485, 503 (1984).

This Court's cases hold that only if the trial court applied the correct rule of law are its factual determinations subject to competent, substantial evidence review. Bowles v. State, 26 Fla. L. Weekly S659, 2001 WL 11941 (Fla. 2001) ("this court reviews the record to determine whether the trial court applied the correct rule of law . . . and, **if so**, whether such finding is supported by competent, substantial evidence"); Willacy v. State, 696 So.2d 693, 695 (Fla. 1997) (same). *See also* Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982) ("if a [trial] court's findings rest on an erroneous view of the law, they may be set aside on that basis"). "[W]here findings are infirm because of an erroneous view of the law, a remand is the proper

course unless the record permits only one resolution of the factual issue. All this is elementary." Pullman-Standard, 456 U.S. at 291-92 (internal quotations and citations omitted). *See also* Florida Power & Light Co. v. City of Dania, 761 So.2d 1089, 1093 (Fla. 2000). Because the lower court in this case expressly refused to apply or be guided by any legally recognized standards, the only course is for this Court to say what the correct standards are and remand for further proceedings wherein they may be applied.

Similarly, this Court does not decide whether competent substantial evidence supports findings made following a hearing at which a petitioner's due process rights were violated. Cherry Communications Inc., v. Deacon, 652 So.2d 803 (Fla. 1995) (not reaching question whether competent substantial evidence supported commission's conclusion because hearing violated due process). In this case, the lower court violated Mr. Trotter's due process rights by refusing to afford him the procedural safeguards that are required for a determination whether someone is constitutionally or statutorily ineligible for the death penalty. Such a process is "not adequate for reaching reasonably correct results," so the results are due no deference. Townsend v. Sain, 372 U.S. 293, 316 (1963).

A. Mental Retardation as Determined by the Supreme Court of the United States

In Atkins v. Virginia, 122 S.Ct. 2242, decided on June 20, 2002, the Supreme Court held that the Eighth Amendment prohibits the execution of mentally retarded offenders.

In Atkins a determination that the defendant was 'mildly mentally retarded' was based upon interviews conducted with people who knew Atkins, a review of school and court records, and the administration of a standard intelligence test which indicated that Atkins had a full scale IQ of 59. [FN3,4,5]

The Supreme court stated further that clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care and self-direction **that become manifest before age 18.** [FN23] In doing so, the court adopted the definitions of the American Association of Mental Retardation (AAMR) and a similar definition by the American Psychiatric Association. Not only do both entities state that the **onset must manifest before age 18** but most importantly explain when the adaptive skills are to be measured. The AAMR states that related limitations in two or more adaptive skill areas occurs "**concurrently**" with the significant subaverage intellectual functioning. While the APA describes significant

subaverage general intellectual functioning **“accompanied by”** significant limitations in adaptive functioning in at least two of the listed skills areas.[FN3] Since the condition must manifest Before the individual reaches age 18, there can be no question that the adaptive functioning skills must also be measured during that relevant period - Pre Age 18.

Intellectual Functioning & Adaptive Functioning

In Atkins, the court cited with approval **an IQ range of 70 to 75** for the intellectual functioning prong in defining mental retardation excluding margin of error. [FN 5] The Supreme court stated that clinical definitions of mental retardation require not only subaverage intellectual functioning, but also require significant limitations in adaptive skills such as communication, self-care and self-direction **that become manifest before age 18.** [FN23]

B. Determining Mental Retardation in Florida

Florida Statutes, Section 921.137(4) of the Florida Statute states, in pertinent part:

> As used in this section, the term "mental retardation" means significantly **subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.** The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score **on a standardized intelligence test specified in the rules of the Department**

> **of Children and Family Services**. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community."

The Florida Statute adopts the essentially the same definition for determining mental retardation as used by the U.S. Supreme Court.

Specified Instruments are required for measuring intellectual functioning for diagnosing Mental Retardation in Florida.

Chapter 393 dealing with Developmental Disabilities in Florida allows for those diagnosed as mentally retarded under the statutory definition to be qualified to receive certain services. In addition, Chapter 393 specifically designates what types of instruments might be used to measure mental retardation. The definition that is contained in Chapter 393 for mental retardation is the same used by the American Association of Mental Retardation (AAMR) and the American Psychiatric Association (APA). Accepted protocol to evaluate for mental retardation in accordance with Chapter 393 specifies instruments that have been established for reliability and validity in the field to measure intellectual functioning. Those coinciding with the Frye or Del Baros criteria are: the Stanford-Binet, the Wechsler Adult Intelligence Scale, 3d.

version, Wechsler Intelligence Scale for Children Revised (ages 6-16), the Wechsler Pre-school and Primary School of Intelligence (ages 4-6). The DSM-IV, TR is a diagnostic and statistical manual that is used by psychiatrists and psychologists to diagnose mental retardation.

The guide book for developmental disability application eligibility details the standard intelligence tests within Children and Family Services Regulation 162-D recognizing the following tests:

"1.Stanford-Binet Form LM; 2, Wechsler Adult Intelligence Scale; 3, Wechsler Intelligence Scale Children Revised; 4, Wechsler Preschool and Primary Intelligence Level; 5, Bailey Scales of Infant Development; 6, Gerontology Scales; 7, Colombia Mental Maturity Scale; 8, McCarthy Scale of Children's Ability; 9, Leiter International Performance Scale and 10, Hiskey - Nebraska Test of Learning Aptitude for the deaf". See State of Florida, Children and Families Regulation, 162 D.

C. Evaluation of Melvin Trotter for mental retardation based upon the established definition by the Supreme Court and Florida: Sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.

Mr. Trotter's Intellectual Functioning (IQ Testing)

Classifications in both Diagnostic and Statistical Manuals,

as well as the American Association of Mental Deficiency or Mental Retardation qualify a person as being mentally retarded if the individual's IQ score is below 70 in combination with deficits in adaptive behavior skills. Psychological experts agree that associated with this testing there is a margin of error plus or minus 5 points. (EH.278,279) Therefore, an individual scoring 70

to 75 points on an approved intelligence testing instrument can be diagnosed as being mentally retarded.

Dr. Krop, a forensic psychologist, testified at the Evidentiary Hearing that he had administered a Wechsler Adult Intelligence test (an approved standard test in Florida) to Mr. Trotter in 1987 at age 26 and believed that the 72 points scored by Mr. Trotter is accurate.(PC-R.331) Dr. Krop concurred that the diagnosis or classification as "retarded" needs to be made prior to age 18 and confirmed that additional wide range achievement tests had been given to Mr. Trotter prior to his entry into special education classes. (EH.282) A Slosson general verbal IQ screening test given at age 13 reflected a score of 69, and a Wechsler Intelligence Scale Children Revised administered to Melvin Trotter at age 14 reflected a score of 70 (EH.283) Mr. Trotter's tests on measurements of intellectual functioning at 70 are consistent with scores attributed to

mentally retarded individuals and based upon his scores he was placed in classes for mentally retarded children at age 14 on October 14, 1974.(EH.393) Clearly, evidence has been established that Mr. Trotter had demonstrated subaverage intellectual functioning consistent with a diagnosis of mental retardation prior to reaching the age of 18.

Dr. Krop testified that (at age 26) Mr. Trotter's reading level was about at the 3rd grade level.(EH.282) and that Mr. Trotter's early test scores in 1974 were consistent with the score of 72 that he obtained on the Wechsler adult testing administered in 1987.(EH.283) Mr. Trotter was tested twice on Wechsler Intelligence tests. Once on the Wechsler Intelligence Scale Children Revised (at age 14) and a second time with a Wechsler Intelligence Scale Adult (at age 26) on two tests designated as standard intelligence tests for use in diagnosing mental retardation as specified by Florida Statutes. His IQ on each test fell within the 70-75 points recognized by the Supreme Court and Florida as the acceptable range for establishing mental retardation.

Dr. Calvin Pinkard. testified at the evidentiary that he was employed for eight years at the McDonald training center, a facility for the mentally retarded and founded the department of mental health and rehabilitation counseling at the University of

South Florida where he served as chairman for 30 years and retains certification as a rehabilitation counselor. (EH.163) In 1976, less than two years following his testing in the mentally retarded range and placement in special education classes, Mr. Trotter was tested by Dr. Pinkard. A Wechsler Intelligence Scale Children (WISC) test given to Mr. Melvin Trotter, age 15 that yielded a score of 88. Dr. Pinkard testified at the evidentiary hearing in 2002 that "there is a need for correction in what I [he] did in terms of a diagnosis of the IQ Level." (EH.168) Dr. Pinkard read an affidavit prepared by psychologist, Dr. Mosman, a report by investigator Woodie Speed dated January 1987, reviewed Dr. Krop's trial testimony in 1992 and 1993, and his records. Subsequently, Dr. Pinkard stated that he had determined that his intelligence scores were inflated by about eight points. (PC-R. 172, 173). Dr. Pinkard explained that he administered an outdated test that was 27 years old to test Mr. Trotter and that over the years investigators have found that intelligence scores increase in the population by an amount that is .3 of an IQ and reports have been published to that effect since 1984. Dr. Pinkard testified that based on a worldwide study of 16 nations the literature supported the fact that IQ scores increase over time and that the .3 figure was established in 1984 as the factor. While scores increase, the actual IQ of individuals do

not. (EH. 120) If using the test today, Dr. Pinkard testified that he would use the .3 figure (per year) to adjust the score of increases in IQ that have occurred over that period of time.(EH. 127) in order to compare old test scores. Dr. Pinkard testified that reducing the verbal and performance IQ of Mr. Trotter by eight points is significant because a reduction to 80 places Melvin Trotter within the mental retardation category, according to the standards used at the time of his testing per the Diagnostic and Statistical Manual (DSM-II) , published by the American Psychiatric Association (EH 121). Dr. Pinkard testified that when Mr. Trotter was tested in 1976 the range for borderline mental retardation according to the DSM was between 70 to 83. (EH. 121, 127)

Dr. Bill Mosman tested Mr. Trotter on on a Wechsler Intelligence Test (WAIS-III) in January 2001 and obtained a score of 78. Applying the 5 point standard measurement of error, a 73 would be consistent with all of the test administered to Mr. Trotter. Psychologists Merin and Mosman testified at the evidentiary hearing that an inmate's intelligence scores my increase as a result of incarceration over years in the structured death row environment. Mr. Trotter has been on death row over 16 years.

Dr. Pinkard's explanation and adjustment makes Mr. Trotters

score comparable with all prior tests that had been administered to him and all subsequent testing. Other than adjusting the score as described herein, no expert could offer any explanation for the significant variance in high score on the one 1976 test administered by Dr. Pinkard compared to all of the other tests given to Melvin Trotter throughout his life.

Mr. Trotter - Adaptive Behavior

The Supreme court stated that clinical definitions of mental retardation require not only sub-average intellectual functioning, but also require significant limitations in adaptive skills such as communication, self-care and self-direction that become manifest before age 18. Atkins, [FN23]

Florida Statutes, Section 921.137(4) also requires that the sub-average general intellectual functioning exist concurrently with deficits in adaptive behavior manifest during the period from conception to age 18, and defines "adaptive behavior," for the purpose of this as the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community."

Dr. Pinkard testified that his examination of Melvin Trotter in 1976, reading the affidavit of Dr. Mosman and the records of

the two trials provided him with an abundant amount of information confirming deficits in Mr. Trotter's adaptive functioning. (PC-R. - 181)

Dr. Pinkard testified that the DSM-II did not actually require the use of an adaptive behavior scale in assessing mental retardation in 1976 as is done today, but practitioners were cautioned to be comprehensive when making a diagnosis of mental retardation by including developmental information.(PC-R. 200) Dr. Pinkard testified that he **did have** information related to Mr. Trotter's adaptive functioning back in 1976 when he evaluated him at age 15, (PC-R. 214) and based upon his evaluation of Mr. Trotter, diagnosed him as having an "inadequate personality, a disorder". Dr. Pinkard explained that this was a disorder listed in the Diagnostic and Statistical Manual (DSM-II) and testified that "inadequate personality is, in fact, an expression of adaptive functioning".(EH.124,125) Following his own clinical observations of a 15 year old Melvin Trotter's "shyness" and indicators of a "negative self image" (EH.125) along with ineffectual responses to the school system in 1976 (EH124) and a reviewing the record, Dr. Pinkard concluded that Mr. Trotter suffers deficits in adaptive functioning concurrent with his sub-average intellectual functioning.(EH.128)

Mental Retardation Determination by Dr. Calvin Pinkard

Dr. Pinkard testified that upon his review of the sampling error, the current manual together with Mr. Trotter's adaptive functioning deficits, he would opine that Mr. Melvin Trotter is borderline mentally retarded. (EH. 127, 128) It is Dr. Pinkard's opinion based upon his examination of Mr. Trotter in 1976 (at age 15) that he was retarded then and now.(EH.125,133,140) Dr. Pinkard rendered a professional opinion, that Melvin Trotter has an actual IQ in the mild mental retardation range between 70 and 75. (PC- R.181) He explained that when he evaluated Mr. Trotter in 1987 he was unaware that he had scored a 69 on a Slosson test or 70 on a Wechsler Intelligence Scale Revised. After reviewing the file and review of that additional information, it is his professional opinion that Melvin Trotter is retarded. (PC-R.181)

Onset Prior to Age 18

The relevant period to review for determination of mental retardation is the time period from conception to age 18. During this time period Mr. Melvin Trotter scored in the mentally retarded range on a standardized testing recognized for making that determination. The evidence presented to the trial court on this issue is uncontroverted. Dr. Pinkard testified that no one

from the Public Defender's Office contacted him concerning the original trial or re-sentencing, although he was available throughout 1986 through 1993. (PC-R. 135-136)Dr. Krop tested Mr. Trotter in 1986 before his incarceration on death row, and again Mr. Trotter's score of 72 placed him within the intellectual sub-average range. Dr. Bill Mosman testified at the evidentiary hearing that the WAIS -R test score obtained by Dr. Krop was "dead end mental retardation". (PC-R. 502) Dr. Mosman testified that an IQ score of 75 or below combined with deficits in adaptive functioning has qualified an individual for diagnosis of mental retardation since 1980 and is supported by the DSM-III, DSM-III-R, DSM-IV and DSM-IV.
Dr. Krop did not use tests to evaluate Mr. Trotter's adaptive behavior and relied on a review of school records, and interviews to form a clinical judgment. (PC- R. 421)

Dr. Pinkard testified at the evidentiary hearing before the trial court that he had evaluated Mr. Trotter's adaptive functioning **prior to age 18** (relevant time period as required by the statute). Concurrent with his borderline mental retardation, Dr. Pinkard testified that Mr. Trotter did have deficits in his adaptive functioning and in that in his opinion Mr. Trotter is mentally retarded. Consequently, the defendant has established more that "mere speculation" in this case that the is mentally

retarded and made.

D. Atkins is retroactive.

Atkins overruled the holding in Penry v. Lynaugh, 492 U.S. 302 (1989) (Penry *I*), that the Eighth Amendment allowed mentally retarded offenders to be executed. When the Supreme Court first considered the constitutionality of executing mentally retarded persons in Penry *I*, it initially addressed the retroactivity of a new rule prohibiting their execution and held that "such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review." 492 U.S. at 329. In addition to the Supreme Court's retroactivity holding in Penry *I*, Justice Stevens' opinion in Atkins makes it clear that the rule adopted in Atkins is a change in substantive criminal law and not merely a new rule of procedural law:

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

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

under Witt v. State, 387 So.2d at 929 (1980).

E. The Atkins rule commands full constitutional protections.

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

Furthermore, all the elements of federal due process must be observed in proceedings to determine any precondition for a death sentence. If petitioner suffers from mental retardation, the precondition for his death sentence announced in Atkins is unsatisfied. The Due Process clause is never more exacting than when life is at stake. "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case," Bell v. Burson, 402 U.S. 535, 540 (1971); accord: Mathews v. Eldridge, 424 U.S. 319, 340-43 (1976); Goldberg v. Kelly, 397 U.S. 254, 264 (1970); Speiser v. Randall, 357 U.S. 513, 520 (1958), and so "whatever process is 'due' an offender faced with a fine or a prison sentence [does

not] necessarily satisfy the requirements of the Constitution in a capital case." Reid, 354 U.S. at 77(Harlan, J., concurring). *See* Ake v. Oklahoma, 470 U.S. 68, 83 (1985)(the Supreme Court has "repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case"). In addition, there is a strong public interest in assuring an accurate determination of mental retardation in capital cases in order to avoid wrongful executions. Id. at 79 ("[t]he State's interest in prevailing at trial . . . is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases"). When life and death are at issue, the public interest in accuracy and reliability is of paramount importance. *Id*. at 83-84 ("[t]he State . . . has a profound interest in assuring that its ultimate sanction is not erroneously imposed");*see* Gardner v. Florida, 430 U.S. 349, 360 (1978): "the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death." Finally, the risk of error inherent in determining mental health issues is great unless the adjudication of such issues is entrusted to a full adversarial trial. *See* Ake, 470 U.S. at 81-82; Barefoot v. Estelle, 463 U.S. 880, 899, 903 (1983); Addington v. Texas, 441 U.S. 418 (1979).

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

1. **The right to a jury trial**

The Atkins and Ring opinions on their face require that capital defendants be afforded a jury trial on mental retardation. Ring is explicit that the procedural rights guaranteed by Apprendi – the rights to demand (a) a factual finding by (b) a unanimous jury, (c) beyond a reasonable doubt, of the factual elements upon which a conviction or eligibility for enhanced punishment depend – attach to elements that are added by Supreme Court "interpret[ations] of the Constitution to require the addition of an . . . element to the definition of a criminal offense in order to narrow its scope." Ring, 2002 WL 1357257at 9. Atkins adds just such an element: "Thus, pursuant to our narrowing jurisprudence which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate." Atkins, 122 S.Ct. at 319. Thus, the question of mental retardation must be submitted to a jury.

2. **Appointed, qualified, competent counsel**

Because the determination of mental retardation is a critical stage of the proceeding, the assistance of counsel is required. Counsel is required during in-custody post-indictment interrogations, Massiah v. New York, 377 U.S. 201 (1964) – including those by mental health examiners, Estelle v. Smith, 451

U.S. 454 (1981) – at preliminary hearings, White v. Maryland, 373 U.S. 59 (1963), during entry of a guilty plea, *ibid*., at trial, Powell v. Alabama, 287 U.S. 45 (1932), and at sentencing, Mempa v. Rhay, 389 U.S. 128 (1967). "The assistance of counsel is often a requisite to the very existence of a fair trial," Argersinger v. Hamlin, 407 U.S. 25, 31 (1972), and "it has become apparent that special skills are necessary to assure adequate representation of defendants in capital cases," *See* Amadeo v. Zant, 384 S.E.2d 181, 182 (Ga. 1989).

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

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

3. **Independent, competent experts**

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

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

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

4. **Notice**

A defendant is entitled to notice of the elements of crimes, *see* Lanzetta v. New Jersey, 306 U.S. 451 (1939), and of elements that are necessary for increased punishment, Apprendi. "No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." Lankford v. Idaho, 500 U.S. 110, 121 (1991).

F. Petitioner has not been provided with mandated constitutional protections.

Petitioner has raised the claim that he is mentally retarded. No constitutional protections of any sort were available or provided to him in order to assure the reliability of the factual determination that Atkins makes decisive of life or death, because there is no particular state post-conviction procedure in connection with this issue.

Florida statutes provides a definition of sorts for mental retardation, Fla. Stat. § 916.106(12), but leaves it to the

Department of Children and Family Services to specify the standardized intelligence tests necessary for a proper determination of mental retardation. There are various standardized intelligence tests with different standardization samples. Further, different tests capture different abilities. See generally American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002). Section 916.106(12) requires a "mean score on a standardized intelligence test *specified in the rules of the Department of Children and Family Services*" in order to determine "significantly subaverage general intellectual functioning".

Dr. Mosman, a forensic psychologist testified that Mr. Trotter's score of 72 on a Wechsler Intelligence test given by Dr. Krop was within the range for mental retardation. Although Mr. Trotter had the mental health assistance of an expert via Dr. Krop he did not

have the competence assistance that Ake requires. Dr. Krop did not test Mr. Trotter's adaptive functioning and therefore was unable to complete a diagnosis of mental retardation. Despite the aggravating factors, there is a likelihood that Mr. Trotter's horrible childhood when coupled with evidence of mental retardation would have made a death sentence disproportionate. Nibert v. State, 574 So. 2d 1059,1063 (Fla. 1990).

G. Due to the fact that expert opinions differed at the evidentiary hearing regarding petitioner's mental retardation, full adversarial proceedings to determine the facts were indispensable.

Several psychologists testified at the evidentiary hearing, Dr. Pinkard, Dr. Krop, Dr. Merin and Dr. Mosman. There is no disagreement among the experts that all of Mr. Trotter's test scores prior to age 18 reflect sub-average intellectual functioning.
Dr. Pinkard is the only expert that interviewed and tested Mr. Trotter during the time period relevant to determining mental retardation (prior to age 18). Dr. Pinkard testified that in his opinion Mr. Trotter's mental retardation range is between 70 to 75.

(PC.-R. 128) Dr. Krop obtained a score of 72 on an intelligence test

administered to Melvin Trotter in 1986 he testified that Mr. Trotter

is in the borderline range and not mentally retarded. (PC- R. 303-

304).

Dr. Pinkard's opinion of Melvin Trotter's deficiencies in adaptive functioning are based upon a review of the record and the actual notes that he made during his evaluation of a young Melvin Trotter (pre age 18). Dr. Krop's opinion that Mr. Trotter has no deficiencies in his adaptive behavior is based upon an informal assessment retrospectively reviewing records

and without completion of any tests suggested for use in the DSM for measuring adaptive functioning.

Dr. Pinkard testified that in his opinion Mr. Trotter had the mental age of a twelve year old. (PC-R.135,136) Dr. Mosman testified that Mr. Trotter's mental age has remained flat during the twenty five year history of testing, and is equal to a child of 13 years, 8 months.(PC -R.547) Dr. Mosman testified that mental age is correlated to adaptive functioning and the Wechsler manuals still provide conversions for the assessment of metal age.(PC- R.548-549)

The Supreme Court in Akins referenced mental age in the context assessing mental retardation quoting justices of the Virginia Supreme Court's statements that "the imposition of the sentence of death upon a defendant who has the mental age of a child of 9-12 is excessive" and"incredulous as a matter of law". Atkins, at 394,395,396.

Dr. Mosman administered an IQ test on Mr. Trotter and obtained a score of 78 but he did not assess Mr. Trotter's adaptive functioning. Dr. Merin expressed an opinion that Mr. Trotter is not retarded but may have some impairment in intellectual functioning. (PC-R. 755) Dr. Merin testified that in addition to IQ in determining retardation he considers adaptive

functioning or “streetwise intelligence” (PC-R. 757-758). Dr. Mosman testified that upon obtaining a score of 72 on an intelligence test, the psychologist is required to follow the procedures outlined in the DSM manuals that require that scales be utilized to access adaptive functioning and “streetwise intelligence”is not recognized. While Drs. Mosman and Merin, Ph.D.’s testified at the evidentiary hearing neither had examined Mr. Trotter during the relevant period (prior to age 18) and are therefore, unable to provide opinions regarding Mr. Trotter’s IQ or adaptive functioning deficiencies to meet Florida’s statutory requirements for rendering a diagnosis of mental retardation prior to age 18.

Dr. Krop testified that a competent psychologist could disagree with his assessment of Mr. Trotter’s adaptive functioning and conclude like Dr. Pinkard that Mr. Trotter is mentally retarded. (PC-R. 440) The experts in Atkins also differed as to their opinion regarding his diagnosis of mental retardation. Atkins imposes a substantive standard not previously recognized and is intended to be applied retroactively. In this case, Petitioner has presented sufficient evidence of his mental retardation to entitle him to a jury trial on the issue under Atkins and Ring.

II. FLORIDA'S STATUTORY SCHEME CONTAINED IN F.S. 921.137 IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT TO THE FEDERAL CONSTITUTION.

Standard of Review

This is a legal question of constitutional magnitude so the appropriate standard of review is de novo. See e.g. Stephens v. State, 748 So.2d 1028, 1032-33 (Fla.2000).

On June 12, 2001, the Governor of the State of Florida signed legislation banning the execution of the mentally retarded. Contained in section 921.137, F.S. (2001), this statute provides that "A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation". 921.137(2), F.S. (2001). Section 921.137(4) of the Florida Statute also states, in pertinent part:

> As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the **rules of the Department of Children and Family Services.** The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an

> individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The **Department of Children and Family Services shall adopt rules to specify the standardized intelligence tests as provided in this subsection**. (emphasis added)

This section establishes a method by which the aforementioned definition is applied to an individual. The defendant must first provide notice in compliance with the Florida Rules of Criminal Procedure governing the introduction of mental health mitigation testimony. Section 921.137(3), F.S. (2001). After the notice of intent has been filed and after an advisory sentence of death has been recommended, the defense may file a motion to determine whether the defendant has mental retardation. Section 921.137(4), F.S. (2001). Two experts, appointed by the court, evaluate the defendant to determine whether the defendant is mentally retarded. Id. After the experts submit their reports, the court shall conduct a final sentencing hearing. This hearing shall be conducted without a jury. Id. If the court finds by clear and convincing evidence that the defendant is mentally retarded, then the court may not impose a sentence of death. Id.

If, after the advisory jury recommends a life sentence and the state intends to request the court to order the defendant be

sentenced to death, upon proper notice and motion to the court, the procedures outlined *supra* are followed. Section 921.137(6), F.S. (2001).

A. No Provision for Procedural Retrospective Application In Florida

In Atkins v. Virginia, 122 S.Ct. 2242, (2002),the Supreme Court of the United States clearly stated that the states were free to develop the "appropriate ways to enforce the constitutional restriction upon its execution of sentences". Atkins, 122 S.Ct. at 2250, *quoting*, Ford v. Wainwright, 477 U.S. 399 (1986). Implicit in this freedom is the requirement that the states establish procedures to ascertain whether a defendant is mentally retarded.

Florida law, as it currently stands, does not provide for the retrospective application of the ban on the execution of the mentally retarded. *See* 921.137, F.S. (2001), *compare with,* N.C.G.S.A. §§ 15A-2006 (2001).[1] Section 921.137 provides for this determination only during the trial of the defendant. There is no provision for collateral relief for the mentally retarded.[2]

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[1] North Carolina's statute passed during the pendency of the Supreme Court of *McCarver v. North Carolina, (*No. 00-8727), created a provision for retrospective application.

[2] Many states provided for prospective effect only under a shared belief that no one under a sentence of death is men-

(continued...)

Florida Statute 921.137 only contemplates a defendant at trial, there is no definition of mental retardation in the statute as it applies to previously sentenced defendants like Melvin Trotter in light of Atkins. Section 921.137(8) restricts the protection afforded mentally retarded defendants stating: "This section does not apply to a defendant who was sentenced to death prior to the effective date of this act". It is clear that this section banning retrospective application runs afoul of the holding in Atkins.

Atkins states that before you establish whether someone is mentally retarded, it is required that there is a process to make such a determination. In Bottoson v. State, 813 So.2d 31 (Fla. 2002), the Florida Supreme Court conceded that "there are no rules" when reviewing Mr.Bottoson's mental retardation claim. Although Florida Statutes, Section 921.137 requires the Department of Children and Families (DCF) to adopt rules delineating which standardized tests are to be used in determining IQ scores, DCF has failed to do so. Atkins requires

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[2](...continued)
tally retarded. Brief *Amici Curiae* of the American Association on Mental Retardation, et.al., *McCarver v. North Carolina* (No. 00-8727) at 15. *But see Watts v. State,* 593 So.2d 198(Fla. 1992) (IQ scores of 71 and 65); *Hall v. State,* 614 So.2d 473 (Fla. 1993) (Fact of mental retardation accepted by Court); *Thompson v. State,* 648 So. 2d 692 (Fla. 1994) (Mildly retarded).

a definition and procedure. In the absence of such a procedure in Florida, Mr. Trotter's execution would violate the Eighth Amendment.

III. MENTAL HEALTH EXPERT DID NOT PROVIDE MR. TROTTER WITH COMPETENT AND EFFECTIVE ASSISTANCE AS REQUIRED BY AKE. V. OKLAHOMA.

Standard of Review

The Defendant is entitled to competent and effective and assistance of a mental health expert. Due process requires responsive psychiatric testimony as detailed in Ake v. Oklahoma, 470 U.S. 68 (1985)

The defense hired Dr. Krop as a mental expert in this case. At the original sentencing hearing Dr. Krop testified that he saw the defendant between four and four and a half hours and then never saw him again until right before trial in March 1987 for one hour and forty five minutes to evaluate him. (R- 2057)

In administering an IQ test to Mr. Trotter in 1986, Dr. Krop incorrectly recorded that Melvin Trotter had 10 plus years of education, although there is no record that Mr. Trotter ever progressed past the ninth grade. Melvin's score on the first test was 69 with a mental age of 9 years 6 months, and the second was a full scale 70 that equates to a mental age of 10 years, 5 months. (PC-R.1195) Dr. Krop did not perform an extensive psychodiagnostic tests but only completed a general

personality evaluation for mitigating factors. (R.- 2054,2055) He did not actually conduct a neuropsychological evaluation upon Mr. Trotter until June 21, 1991. In April 1993, at Mr. Trotter's re-sentencing hearing Dr. Krop testified that he "just had to admit that [he] made a mistake". (R. - 1534-1535)

There were ample indicators of Mr. Trotter's low intelligence and probable brain damage at the outset: (1) Mr. Trotter was termed a "slow learner" and such labeling is often associated with impairments in processing, perception and production; (2) Dr. Krop believed that he had a possible learning disorder; (3) A psychological evaluation from Dr. Pinkard dated April 12, 1976 showed statisical differences between VIQ and PIQ scores, 81 and 97 respectfully that could be correlated with both emotional and/or left hemisphere brain damage among other conditions, and with Dr. Pinkard's specific finding that his learning disorder was associated with some neurological dysfunctioning. (R. 1516) Dr. Krop had information that Mr. Trotter had scored an I.Q. of 69 and 70 on intelligence tests. He had information that Dr. Pinkard had tested Mr. Trotter on an outdated WISC and that Mr. Trotter had scored an IQ of 88. Dr. Krop was unable to explain the differences and did not was clearly ineffective for failing to test Mr. Trotter, again.

Dr. Krop diagnosed Mr. Trotter “cocaine abuse” and then updated this diagnosis at the re-sentencing to “cocaine dependency” and incorrectly testified that a person had to be psychotic with cocain in order to cloud, black out or have an impaired memory

(RS.2545) At the Evidentiary Hearing, Dr. Mosman testified that Dr. Krop was inaccurate as paranoid feeling, memory loss are expected when cocaine is involved and no psychotic state is necessary to experience a memory loss or black out. (PC-R.1186-1187) Mr. Trotter’s credibility was an issue in his interviews with law enforcement, hearings and trial. Dr. Krop’s erroneous conclusions regarding memory loss or black outs prohibited defense counsel from providing an explanation for Mr. Trotter’s convoluted version events leading up to and including the circumstances of the crime itself. In 1992, after Dr. Krop finally administered tests to Mr. Trotter he opined that he frontal lobe disorder. Although the defendant was able to obtain a non-statutory mitigator he was prejudiced by Dr. Krop’s failure to define sub diagnoses and specifically diagnose organic mental disorder. (PC-R1187)

Dr. Mosman testified that Dr. Krop was obligated when testing Melvin Trotter to proceed with testing of his adaptive functioning in order to formally assess his mental retardation.

Yet no adaptive testing was done by Dr. Krop even though he was aware that Mr. Trotter had been placed in educable mentally retarded classes (EMR) and a mental age of 12 identified. (PC-R 1189)

The diagnostic criteria for establishing mental retardation since 1980 has been a valid reliable IQ score below 75 and impairments in adaptive functioning existing prior to age 18. (PC-R.1188) Dr. Mosman testified at the evidentiary hearing that adaptive functioning testing was available for use in 1991 and the only way to formally assess adaptive functioning using the DSM III-R. (EH.541) Sufficient information was available by re-sentencing in 1992 for his borderline mental retardation to have been established, but Dr. Krop "did absolutely nothing" and instead the court found non-statutory mitigation that Mr. Trotter's intelligence was merely below average. (EH.541)

In order to provide minimally competent and acceptable psychological assistance to Mr. Trotter, Dr. Mosman testified that an MMPI, a TAT, a Rorschach, should have been administered or alternate test of a psychodiagnostic nature to confirm test results. (PC.-R 1190) Mr. Slater disputed Dr. Krop's assertion that he had asked him to forgo an MMPI and stated that such strategic decision have only been made in the last eight years and not at the time of Melvin Trotter's trial. Dr. Krop should

have administered the test and there was no basis for him not having done so.(PC-R. 1198) Additionally, Interviews should have been conducted with individuals that could provide information relative to his early developmental period (age 0 to 18) i.e. relatives, foster parents, early clinicians, teachers. All social service records should have been obtained and personality testing conducted. Interviews with Mr. Trotter, collection and review of all jail, prison and medical records along with lengthy meetings with counsel to discuss all aspects of the testing and use of information were required. (PC.-R.1190,1191)

The record reflects that Dr. Krop interviewed the defendant's mother and sister on the eve of his testimony in court at Mr. Trotter's re-sentencing in 1992. (RS.1491) Lengthy discussions with counsel did not occur as Mr. Slater testified at the evidentiary hearing that Dr. Krop was not available and squeezed in his testimony that he opined was unsatisfactory. Relatives Gladys Casimir and Marsha Polite lived in Manatee County and were ready and willing to testify. At the evidentiary hearing they testified that Dr. Krop never contacted them. Both can attest to Mr. Trotter's defective social skills, daily living skills, personal independence and support of his deficient adaptive skills.

In reviewing Dr. Krop's work at the re-sentencing regarding available mitigation presented in behalf of Mr. Trotter, Dr. Mosman testified that Dr. Krop's work was not competent.

(EH582) In support he stated that Dr. Krop failed to present age as mitigation the mental age, social age, developmental age that could have been shown in behalf of Mr. Trotter. (EH. 585) and testified that Mr. Trotter's mental age since 15 has been between 12 to 13 and has never changed much. (EH.596) While Mr. Trotter's chronological age has increased 200 percent, from age 18 to 40 his mental age remains flat and equal to that of a about a 13 year 8 month old child. (EH547) According to Dr. Mosman, there is no debate in the psychological field about using mental age as a factor where the practitioner understands the concept. Psychologists are taught to convert scales in test manuals to provide mental age information "because the issue of mental age is often times more informative than an IQ score". Mental age is correlated with adaptive functioning and "you should see deficits in both if they are both accurate".(EH.548) Dr. Mosman testified that Dr. Krop had not properly correlated the information and therefore was unable to properly diagnose Mr. Trotter's level of functioning. (EH.690)

In Mr. Slater's opinion Dr. Krop had taken on too many

cases, and didn't seem to have sufficient time available. He did not appear to be spending the time necessary in preparation and was difficult to get in touch with. Dr. Krop's failure to interview witnesses early and referrals for further interviews prevented him from gathering information relevant to providing mitigating evidence readily available for Mr. Trotter. According to Mr. Slater, Dr. Krop's own records revealed that he had spent less than 24 hours in Manatee County. Trial counsel Slater testified that as a result of Dr. Krop's poor performance in this case he was "pretty much finished with employing him" in other cases. (PC-R.119) Mr. Slater (Mr. Trotter's attorney) and Dr. Mosman both testified at the evidentiary hearing that Dr. Krop's work was deficient.

If Dr. Krop had formally evaluated Mr. Trotter's adaptive functioning skills, in accordance with the scales and interviewed relevant witnesses he could have reached the conclusion that he is mentally retarded as opposed to merely low functioning. He could have established organic brain damage as opposed to a possible frontal lobe brain disorder, he could have established Trotter's mental age as a mitigator and other non-statutory mitigation as the result of interviews.(PC.-R.1191)

Dr. Krop did not interview Mr. Trotter's wife. Mr. Slater testified at the Evidentiary hearing that nothing was brought up

about his relationship with the wife because he did not recall having any information available and not due to strategy.(PC-R. 1194) Dr. Mosman testified at the evidentiary hearing regarding mitigation that was readily available but not presented: Ability to be rehabilitated, Emotional Disturbance (history of emotional and diagnosable mental disorders), Background (different from disadvantaged background), Crime not one of a series occurring closely in time, Good prison record, Iatrogenises persistent, medical problems, mental impairments, previous charitable or humanitarian deeds, no role model, cooperation with law enforcement, major depression.(EH597,598) Post traumatic stress disorder, cocaine intoxication, substance abuse disorder, dependent personality disorder. (EH 601) There was a substantial amount of additional mitigation that was readily available and could have been offered in behalf of Mr. Trotter but Dr. Krop did not do so and as such, he is incompetent.

IV. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE MR. TROTTER'S BACKGROUND AND DEVELOP AVAILABLE MITIGATING EVIDENCE IN HIS BEHALF.

Standard of Review

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, (1984) set forth the standards to be applied by the courts in analyzing claims of ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient and that errors were so serious that counsel was not functioning as the "counsel" guaranteed by the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

In Wiggins v. Smith, 123 S.Ct.2527 (2003), the Supreme court held that the decision of counsel not to expand their investigation beyond pre-sentence report (PSI) and department of social services records fell short of prevailing professional standards, and (2) that inadequate investigation by counsel prejudiced petitioner.

Dr. Krop testified that he made no independent efforts to contact relatives and that the information regarding how to contact Mr. Trotter's mother and sister was not forthcoming from Mr. Slater until just before the re-sentencing. These were the only contacts that he recalled being provided for him to speaking to. (EH.428) As a result of counsel's limited investigation, Mr. Trotter was required to testify and his low mental capacity prevented him from creating a favorable impression before the jury. Consequently, this failure to investigate and provide mitigation via other witnesses other

than Mr. Trotter was extremely prejudicial.

Melvin Trotter's niece Gladys Casimir testified at the evidentiary hearing and detailed growing up alongside Melvin as one of 12 children. She testified as to the alcoholism that occurred, abandonment, neglect and alcoholic men that would frequent to have sex with Melvin's mother. She described Melvin as a hard working man that had no male role model (EH-82) Importantly, her testimony also supports deficits in Mr. Trotter's adaptive functioning. She testified that Melvin did not have a bank account and that all of his money was handled by his wife or other ladies (EH86) and that Mrs. Trotter made all the decisions for him. While his prostitute wife was out, Melvin remained at home and babysat two stepdaughters. All of her testimony provided evidence that Mr. Trotter does not function individually. (EH.87) In addition to confirmation of his deficits, she described Melvin Trotter as a caring father figure within this family unit, non-statutory mitigation that was never presented to him prior than the 2002 evidentiary hearing. She testified that although her residence has been stable in Manatee County for approximately 32 years, she was never contacted to provide testimony.

Another niece, Marsha Polite also testified at the evidentiary hearing that her mother had been Melvin's source of

emotional support and he had lost that with her death. (EH93) She described Melvin's marriage to a prostitute that he had met while working in the fields as one of convenience for Mrs. Trotter. She was able to continue to prostitute and have sex with varied men, including Melvin's stepfather and Melvin was required to work and stay at home to babysit her children. (EH. 94) She testified that Mrs. Trotter abandoned him on several occasions, leaving behind her two young daughters for Melvin to care for. (EH. 94) She too described him as unable to pay his own bills and function independently. As a result, after Mrs. Trotter left him to move in with his stepfather Mr. Trotter could not live alone and move in with her sister. (EH. 95) She described Mr. Trotter as an individual without initiative and with a very submissive personality that never spoke up for himself or was ever able to stand up to anyone. (EH96) Ms. Polite confirmed that she lived in Manatee County was available and had never been contacted to appear in court. (EH97).

The foregoing information corroborates serious deficits in Mr. Trotter's adaptive behavior and this information was never available to Dr. Krop, and provides other valuable non-statutory mitigation that the jury had never heard. Therefore, it relevant and not cumulative.

Counsel's failure to investigate Mr. Trotter's background

and locate these readily available witnesses was ineffective assistance of counsel. No strategic decision was revealed for failing to provide Dr. Krop with the names of these additional witnesses (Polite and Casmir) for interview or for trial counsel not contacting either to provide compelling testimony for Mr. Trotter at either trial. As a result, Dr. Krop was unable to completely assess Mr. Trotter's mental deficiencies or provide testimony to the jury to humanize Mr. Trotter via additional non-statutory mitigation to weigh against the aggravators.

V. COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE TIMELY MOTIONS TO SET ASIDE AND VACATE MR. TROTTER'S 1985 ROBBERY CONVICTION WHICH WAS THEN USED TO ESTABLISH TWO OF THE FOUR AGGRAVATING CIRCUMSTANCES FOUND BY THE COURT IN IMPOSING THE DEATH SENTENCE.

Standard of Review

1. Counsel's failure to file timely Motion

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, (1984) set forth the standards to be applied by the courts in analyzing claims of ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient and that errors were so serious that counsel was not functioning as the "counsel" guaranteed by the defendant by

the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

2. Trial Court's failure to Grant Motion to Set Aside Prior Plea based upon Defendant's Incompetence

This is a legal question of constitutional magnitude so the appropriate standard of review is de novo. Stephens v. State, 748 So.2d 1028,1032-33 (Fla.2000).

In the order sentencing Mr. Trotter to death, Judge E. L. Eastmore found four statutory aggravating circumstances had been proven beyond a reasonable doubt [R 544]. Those factors were: (1) The crime for which the defendant is to be sentenced was committed while the defendant was on community control. (2) The defendant has been convicted of a felony involving the use or threat of violence to some person. (3) The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of a robbery. (4) The crime for which the defendant is to be sentenced was especially wicked, atrocious and cruel [R 544].

The first two aggravating factors listed above were based upon a September 12, 1985 conviction for robbery under case number 85-463 F. That conviction was following a plea of no

contest entered by Mr. Trotter before the Honorable Judge Thomas Gallen, Circuit Court Judge of the Twelfth Judicial Circuit. The plea colloquy conducted by the court prior to acceptance of the plea of no contest went as follows:

> MR. MORELAND : Your Honor, I have Melvin Turner, who is in jail, judge. For the record this should be Melvin Trotter, T-r-o-t-t-e-r.
>
> THE COURT: It is also known as Melvin Trotter on the information?
>
> MR. MORELAND: Judge, this is Melvin Trotter in case number 85-463 F. At this point we would change our previously entered plea of not guilty to one of no contest with the understanding judge, that on counts one and two of the information, which is the burglary of a dwelling and robbery, that Mr. Trotter will be placed on two years community control with credit for time served, concurrent in both counts, and that

counts three and four are to be nol-prossed, Judge, with the understanding that Mr. Trotter would be released from jail today.

THE COURT: That is the State’s understanding, that the State is going to nol-prosse counts three and four?

THE DEPUTY CLERK: **They already have your honor**.

THE COURT: That by entering this plea here today, that you are giving up your right to trial by jury?

THE DEFENDANT: Yes sir.

THE COURT: That is a decision you are making freely and voluntarily?

THE DEFENDANT: Yes

THE COURT: The court will accept your plea,

will adjudicate you to be guilty of counts one and two and place you on two years community control. Now I want to warn you and caution you that if you violate the terms of community control, that you can be sent to prison. Do you understand that?

THE DEFENDANT: Yes

THE COURT: You have thirty days in which to appeal the sentence of the court. If you cannot afford an attorney, an attorney would be appointed for you.

At the time that Mr. Trotter appeared before the court to change his plea, the State had already dropped counts three and counts four against him. Yet, it is clear by Mr. Moreland's opening remarks that counsel was not aware that this had occurred when he addressed the court.

Since the State had already dropped two of the charges against Mr. Trotter, there was no quid pro quo from the State

offered to Mr. Trotter as an incentive to enter into the plea as counsel represented on the record was the case. In fact, Mr. Lee subsequently testified at a hearing before the Honorable Judge Stephen Dakan on November 13, 1992 that the state had been unable to serve the victim in the case involving counts three and four, and he had learned that the victim had left the state.(R.0059) The record is clear that counsel did not discuss anything with Mr. Trotter after the deputy clerk announced in open court that counts three and four had already been dropped. Instead, Mr. Trotter was left to enter a plea of guilty to be "released from jail today"as promised by trial counsel.

On July 18, 1986, the Office of the Public Defender was appointed to represent Mr. Trotter on the charges of murder and robbery. Appointed counsel had full notice and knowledge of Mr. Trotters prior robbery conviction in case number 85-463F as the same Public Defenders Office had represented him in that case. Messrs. Peter Dubensky and James Slater were assigned to the case and Judge Dubensky testified at the Evidentiary hearing that he was very familiar with the facts of the underlying case, as he had represented the co-defendant.(EH.13) Judge Dubensky testified that he knew early from the time the State sought the death penalty that the previous robbery conviction would be used

as a statutory aggravator by the State against Mr. Trotter.(EH19) Both Trial Counsel were appointed to represent Mr. Trotter well within the procedural time frame of two years to file a 3.850 motion in order to set aside and vacate the plea in case number 85-463F and attack the aggravating factors in the course of defending Mr. Trotter on the murder/robbery charge. The colloquy was so insufficient that it was obviously suitable immediately for the challenge that was ultimately made and a hearing granted.

Judge Dubensky failed to file any motion challenging the plea prior to Mr. Trotters first trial. The State used the prior robbery conviction as an aggravating factors of prior violent felony conviction and under sentence of imprisonment. In explaining why he had not filed a motion to withdraw the plea during Mr. Trotter's initial trial, Judge Dubensky conceded his failure to be due to " a lack of skill on my part" and that he was "not wise enough to do it". (EH 30)

Prior to re-sentencing, counsel did file a motion to vacate the judgment and sentence for the robbery and burglary conviction under case number 85-463F. A hearing on the motion was held before the Honorable Judge Stephen Dakan on November 13, 1992 [R 0005] At that hearing the defense called Dr. Harry Krop [R 0007]. Dr. Krop testified that Mr. Trotter had an IQ of

72, placing him in the bottom 2.5% to 3% of the population [R.0011]. Mr. Trotters reading capability ran at a third grade level [R. 0011]. Mr. Trotter had quit school at the age of 18 or 19 years of age and his grades in school were all D's and F's [R 0014]. Dr. Krop stated that Mr. Trotter had a very low comprehension both in terms of just actually reading the printed word and being able to comprehend anything somewhat complex [R 0015]. Dr. Krop evaluated Mr. Trotters ability to comprehend the rights form he signed on September 12, 1985 [R 0016]. In undertaking that analysis Dr. Krop reviewed the acknowledgment and waiver of rights form, transcripts of the sentencing proceedings, the attorneys billing records which reflected the amount of time counsel spent with Mr. Trotter, and spoke to Mr. Trotter about his recollection of the events surrounding his plea.[R 0018]. Dr. Krop stated that Mr. Trotter was unable to comprehend the words robbery, minimum, probation, nol-prossed, represented, perjury, including, prosecution, admit, factual, proposed, paragraph, threatened, and attendance [R 0023]. These were all words used on the plea form [R 0023]. Dr. Krop further testified that in his opinion Mr. Trotter could not comprehend paragraphs 2,4 and 7 of the rights form [R 0025].

Dr. Krop stated that Mr. Trotter related to him that he spoke to his attorney a day or two prior to the hearing and was

informed that if he went to trial he would lose be sentenced to two years in prison and counsel recommended that Mr. Trotter enter a plea and take community control [R 0027]. Mr. Trotter informed Dr. Krop that his attorney had not discussed the facts of the case with him, or explained to him at all why they thought he would lose. Mr. Trotter stated that he had never had the rights form explained or read to him [R 0028] and that he had never been asked if he could read the form himself. [R0028, R0031]. Counsel had informed Mr. Trotter that there would be a form in the courtroom for him to sign, the judge would ask him questions and had been instructed to respond affirmatively to everything the judge asked [R 0028]. Dr. Krop stated that based upon his evaluation he reached a opinion that Mr. Trotter could not have read the form. While he could have read a few basic words, Dr. Krop testified that Mr. Trotter was unable to read to the extent necessary to comprehend it. [R. 0029] In his opinion based upon his work in general with mentally retarded or intellectually limited defendants who are involved in plea negotiations, Dr. Krop stated that Mr. Trotter did not understand the Waiver of Rights Form and did not understand that his was waiving constitutional rights (i.e) right to trial by jury and the significance of that, right to cross-examine witnesses and to confront witness, to present his own witnesses,

right not to testify that not testifying would not be held against him, that he was agreeing that there was a basis for the charges, what the charges were, the facts behind those charges, rights under an appeal, and the fact that he was giving all those up by entering the plea. [R 0031]. Dr. Krop testified that he reached this opinion regarding Mr. Trotter's disabilities back on November 21, 1986 following evaluation of him in connection with the homicide case [R 0032].

The court then asked the following questions of Dr. Krop:

> THE COURT: I need, before you start sir, I need-Doctor, you reached this opinion back in when, about Mr. Trotter-when did you first determine his disability?
>
> THE COURT: **And you communicated that to his lawyers**?
>
> THE WITNESS(Dr. Krop): **Yes**
>
> THE WITNESS (Dr. Krop): I first evaluated his intellectual ability, in November, November 21st 1986.
>
> THE COURT: **So the information that you've given us this morning was available in June of 1987, is that right?**
>
> THE WITNESS(Dr. Krop): **I presume so yes**. [R 0032, 0033]

In denying the defense motion to set aside the plea and vacate the judgment the court stated as follows:

> Well, I guess we all agree that even though the defense did not use the rule number, that 3.850 obviously applies. The two year period, any way you want to calculate it, has long since expired. Even if you were willing to say that the time didn't really begin running until 1987, which was when the community control was revoked, and Mr. Trotter was given a sentence, which interestingly enough was after his conviction when the aggravating factor apparently was used, so the knowledge question is somewhat an interesting argument, but nonetheless, there's no question in my mind that the time period has long since gone.[R 0111] If, in fact, the newly discovered evidence criteria was to be used, I would normally read that to mean newly discovered evidence of the crime itself. But for the moment let us assume that newly discovered evidence could extend to Dr. Krop's opinion that Mr. Trotter was incapable of understanding the things even though they were explained to him. That evidence was available in 1986, and in fact, Dr. Krop said he told Mr. Trotter's lawyers all that in 1986, and they certainly knew it in 1987.

The above excerpt from the ruling clearly shows that the court focused denial of the motion based upon the expiration of time for filing a 3.850 motion to vacate the judgment and sentence, although the subsequent order also cited legal insufficiency.

The court's finding confirms that counsel for Mr. Trotter had notice of the facts and circumstances with which to base a motion to vacate the judgment in robbery case as early as 1986 and 1987 and yet failed to act. The failure of counsel to

timely file a motion to set aside the prior robbery conviction was ineffective assistance of counsel in that Mr. Trotter's plea was not freely and voluntarily given and a timely motion would have eliminated two of the four aggravating circumstances used against Mr. Trotter. This ineffectiveness claim is based upon counsels duty to legally challenge the aggravating circumstances against Mr. Trotter in the murder/robbery case. It does not involve an ineffective assistance of post-conviction counsel in the prior robbery, but rather addresses breach of counsel's responsibilities to Mr. Trotter in representing him in the murder case.

The legalities concerning the insufficiency of the plea colloquy in Mr. Trotter's September 12, 1985, no contest plea to robbery and the prejudice associated with counsel's failure to file a timely motion to set aside the plea and vacate the judgment are discussed below.

The legal insufficiencies of the plea:

The above plea colloquy performed by the court in accepting Mr. Trotter's plea to burglary and robbery was legally inadequate and insufficient under the laws of the State of Florida in existence at the time of the plea. Both the Florida Rules of Criminal Procedure and case law establish the requirements associated with acceptance of a no contest plea.

Florida Rule of Criminal Procedure 3.172, adopted in 1977, and the law of the State of Florida on September 12, 1985, when Mr. Trotter entered his no contest plea, specifically outlines the proper procedures to be followed before a trial court may accept a plea of guilty or no contest. First of all, the rule states that the court shall be satisfied that the plea is voluntarily entered and that there is a factual basis for it .(F.R.C.P. 3.172 (a) *emphasis added*). In the case of Mr. Trotter's plea the court made no effort to determine a factual basis for the plea.

F.R.C.P. 3.172(c) further states that the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally. (*emphasis added*) In the case of Mr. Trotter's plea, the trial court failed to place the defendant under oath contrary to the specific mandate of the rule. The rule also states that after placing the defendant under oath, the court shall determine that the defendant personally understands the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, (*see* F.R.C.P. 3.172(c) (1) *emphasis added*) In the case of Mr. Trotter's plea, the court made no effort to determine that the defendant personally understood the nature of

the charge or the maximum possible penalty provided by law.

Additional requirements of the F.R.C.P. 3.172 are for the court to determine that the defendant has the right to plead not guilty or to persist in that plea if it has already been made and that the defendant has the right to be tried by a jury and that at that trial has the right to assistance of counsel, the right to call witnesses on his behalf, the right to confront and cross examine witnesses against him, and the right not to be compelled to incriminate himself or herself. (*emphasis added*) In the case of Mr. Trotter's plea, the court only informed the defendant that he had the right to a trial by jury and that by entering the plea he was waiving that right. No inquiry was made by the court that Mr. Trotter understood that at a trial he would have assistance of counsel, the right to compel attendance of witnesses on his behalf, the right to confront and cross examine witnesses against him, and the right not to be compelled to incriminate himself. The rule further requires that the trial court shall determine that if the defendant pleads nolo contendere without express reservation of the right to appeal, he gives up the right to appeal all matters relating to the judgement, including the issue of guilt or innocence. (F.R.C.P. 3.172(c)(4)) In the case of Mr. Trotter's plea, the court made

no inquiry as to the defendants understanding of any of these rights.

In comparing the plea colloquy performed by the court with the requirements mandated by the Florida Rules of Criminal Procedure outlined above, clearly no judicial determination of the factual basis for the charges of burglary and robbery was made or determination of whether the plea was even freely and voluntarily made by Mr. Trotter. The trial court completely neglected to inquire of Mr. Trotter's understanding of significant legal rights. Therefore, Mr. Trotter's plea was legally inadequate.

A leading Florida case in this area is Koenig v. State, 597 So.2d 256 (Fla. 1992). Koenig is applicable to Mr. Trotter's 1985 plea because it is merely a restatement and clarification of existing law. The Florida Supreme Court held that the Florida Rules of Criminal Procedure specifically provides that a trial judge should, in determining the voluntariness of a plea, inquire into the defendants understanding of the fact that he is giving up the right to pled not guilty, the right to trial by jury with the assistance of counsel, the right to compel the attendance of witnesses on his behalf, the right to cross examine adverse witnesses, and the right to avoid self incrimination. Id. The Court held that the brief colloquy

between the trial court and Koenig failed even to mention any of these rights. Id. Although the judge did ask Koenig if he understood that he was waiving "certain rights" he was never explained what those rights were. Id. The Court stated "we simply cannot be assured from the superficial plea colloquy here that Koenig's plea was voluntary and intelligent". Id. In the case of Mr. Trotter's plea, the colloquy was equally superficial as the court failed to inquire about the defendants understanding of significant legal rights.

Koenig also establishes that the use of a plea form is no substitute for a proper plea colloquy between the court and the defendant. The Court stated that " before his plea hearing, Koenig signed a form which described in detail the rights he was waiving. In response to the judges inquiry, he said he had discussed this with his attorney. However, there is nothing in this record to demonstrate that he could understand the form he signed or what his attorney had told him about it. The record does not even reflect the extent of Koenig's education or whether he can even read". (Koenig at 258) Similarly, in the case of Mr. Trotter's plea, he signed a "rights form". However, unlike the Koenig case, the court did not even inquire of Mr. Trotter as to whether he discussed it with his attorney prior to signing it. In any event, Koenig is very clear that the use of

a plea form is not a substitute for a proper plea colloquy.

Cases decided prior to Koenig also addressed the legal necessities associated with acceptance of a no contest or guilty plea . In Cheever v. State, 272 So.2d 875 (Fla. 3rd DCA 1973), the Third District Court of Appeals ruled that the defendant in that case should be allowed to withdraw his no contest plea after sentencing because the record was devoid of any inquiry by the trial judge into the voluntary nature of the plea. In Huot v. State, 516 So.2d 1140 (Fla. 4th DCA 1987), the Fourth District Court of Appeals held that "failure to advise a defendant of a maximum possible sentence prevents the defendant from being properly apprised of the significance of his plea and therefore error for which the defendant must be afforded an opportunity to withdraw a plea of guilty". (Id. at 1140, *emphasis added*) In Scheller v. State, 327 So.2d 876 (Fla. 2nd DCA 1976), the Second District Court of Appeals remanded the case due to the trial courts failure to inquire into the voluntariness of the plea as required by Rule 3.170. In doing so the Court stated "the appellant point on appeal is well taken in that we find this record is completely devoid of any plea colloquy whatsoever on the question of the voluntariness of the appellant's plea. A guilty plea, to be accepted, requires an affirmative showing that it was entered intelligently and

voluntarily. This is fundamental to the validity of any such plea since after it has been accepted nothing more remains but to enter judgment and sentence". Id.

Cases following Koenig have reaffirmed the necessity of a proper plea colloquy in compliance with the Rules of Criminal Procedure. In Black v. State, 599 So.2d 1380 (Fla 1st DCA 1997), the First District Court of Appeals reversed a conviction and sentence due to the failure of the trial court to comply with Rule 3.172. Justice Zehmer stated in his concurring opinion "as in Koenig, the record in this case reveals that the Circuit Courts inquiry into the voluntariness of the factual basis for Blacks plea was inadequate because it failed to comply fully with the procedure outlined in Rule 3.172. Prior to accepting Blacks plea, the Court did not determine that Black understood each of his rights outlined in Rule 3.172(C). The record is silent as to the factual basis for the plea. The Court mentioned neither the nature of the charges nor the mandatory minimum penalty and the maximum penalty provided by law, as required by Rule 3.172." Id. In Elledge v. State, 706 So. 2d 1340 (1997), this Court refused to apply Koening retroactively many years later based upon a finding that the defendant had "full understanding of the significance of his plea and its voluntariness" as required by rule 3.17(j). The Elledge case

is distinguishable from Mr. Trotter's. In Elledge unlike Trotter the court's inquiry was far more detailed and the court's decision that the colloquy comported with the required rule was based not solely on the plea but on "the factual testimony" that was presented. As a restatement and clarification of existing law Koening can be applied retroactively to the facts in Mr. Trotter's case.

Federal law also establishes the constitutional requirements associated with accepting a plea of guilty or no-contest in a criminal case. The Eighth Circuit Court of Appeals recently issued an opinion in Wilkins v. Bowersox, 145 F.3d 1006 (8th Cir. 1997) in a case similar to the circumstances surrounding Mr. Trotters plea to the 1985 robbery and burglary charges. Defendant Heath Allen Wilkins from infancy through his teenage years suffered severe physical and emotional abuse at the hands of his mother and other adults in his life.(Id. At 1008) At age 10 he became a ward of the state. Id. At age 16 he robbed a liquor store and committed murder by inflicting multiple stab wounds. Id. The trial court accepted Wilkins guilty plea. Id. He later filed a motion for post conviction relief alleging that his guilty plea was not knowingly and voluntarily given. Id. The Eighth Circuit agreed and held that the plea was not knowing and intelligent. In reaching that conclusion the court stated:

> Initially we note that Wilkins' conclusory affirmation that he was pleading guilty voluntarily does not establish definitively that his plea was in fact valid. See Von Molkte, 332 U.S. at 724, 68 S.Ct 316; Gonzales v. Grammar, 848 F.2d 894 (8th Cir. 1988). As demonstrated above, the record indicates that Wilkins youth , troubled background, and substantial mental impairments clouded his decision making throughout the state proceedings. At the state postconviction hearing, Dr. Mandracchia directly stated his opinion that neither Wilkins guilty plea nor his waiver of presenting mitigating evidence were intelligent or voluntary. Moreover, the record does not establish that Wilkins possessed the required "understanding of the law in relation to the facts". McCarthy, 394 U.S. at 466, 89 S.Ct. 1166.

It is important to note that the court in Wilkins relied on longstanding federal law in reaching its opinion that Mr. Wilkins plea was not freely and voluntarily given. Specifically, that court relied on the United States Supreme Court case of McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). In McCarthy, the defendant pled guilty to the charge of tax evasion. (Id at 460) The District Judge asked the defendant if he desired to plead guilty and if he understood that such a plea waived his right to a jury trial and subjected him to imprisonment for as long as five years and to a fine as high as $10,000.00. Id. The defendant stated he understood these consequences and wanted to plead guilty. Id. The defendant further stated his plea had not been induced by any

threats or promises and that it had been entered of his own volition. Id. After sentencing, the defendant moved to set aside his plea because the District Court had accepted his plea without (1) first addressing him personally and determining that the plea was made voluntarily with an understanding of the nature of the charge and (2) that the court had entered judgment without determining that there was a factual basis for the plea.(Id. at 464) The Supreme Court held that the defendants plea was improperly given because the District Court Judge did not personally inquire as to whether the defendant understood the nature of the charges and because the judge did not determine a factual basis for the plea.(Id at 465, 466) In doing so the Court specifically stated " There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendants understanding of the nature of the charge against him". (Id. at 471) The Court rejected any evidence that the defendants attorney had explained his rights to him but instead placed the responsibility for a proper plea colloquy squarely on the sentencing judge. The Court stated "It is, therefore, not too much to require that, before sentencing the defendant to years of imprisonment, District Judges take the few minutes necessary to inform them of their rights and to determine whether they understand the actions they are

taking”(Id. at 471) In applying the reasoning of McCarthy to the case at hand, it can likewise be said that it is not asking to much that, before imposing a sentence of death, that the aggravating circumstances of a prior violent felony and under sentence of imprisonment used to sustain that sentence be based upon a knowingly and intelligently entered plea and not, as in Mr Trotter’s case, a legally insufficient plea colloquy. As demonstrated in McCarthy the law concerning a proper plea colloquy was set down by the Supreme Court 17 years before Mr. Trotter entered his plea to robbery and burglary on September 12, 1986.

The Unites States Supreme Court has ruled that a death sentence which was based, at least in part, on a prior felony conviction that was latter vacated violates the Eighth Amendment prohibition against cruel and unusual punishment. (Johnson v. Mississippi, 486 U.S. 578 (U.S. 1988) In Johnson the trial court found aggravating circumstances of (1) that the defendant was previously convicted of a felony involving the use or threat of violence to the person of another. (2) That the defendant committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody (3) The capital murder was especially heinous atrocious and cruel. (Id. at 580) Following his conviction, the New York Court of Appeals reversed the 1963

conviction that was the basis of the aggravating factor of a previous felony conviction involving the use of a threat of violence to the person of another. Id. In finding that the New York conviction provided no legitimate support for the sentence imposed the Court stated " It is equally apparent that the use of that conviction in the sentencing hearing was prejudicial. The prosecutor repeatedly urged the jury to give it weight in connection with the assigned task of balancing aggravating and mitigating circumstances. Even without that express argument, there would be a possibility that the juries belief that petitioner had been convicted of a prior felony would be "decisive" in the "choice between a life sentence and a death sentence". (Id at 585, citing Gardner v. Florida, 403 U.S. 359 (1977).

The prosecuting attorney in the case at bar also emphasized the prior felony conviction during his closing argument at the re-sentencing trial:

> Let's talk about the aggravating factors. The first one–and I'm not going to discuss them exactly in the order that you will be instructed on–prior violent felony. Prior violent felony. Why is that significant? Why has the Legislature said that it is an aggravating factor the jury should consider and may consider in deciding whether death is an appropriate sentence in any case? Well certainly a man's criminal history is a significant issue. And we'll talk about that more when I deal with mitigating

> circumstances. But this was not Melvin Trotter's first robbery. This was not the first person he victimized with violence. It was undoubtably a severe escalation from the robbery that occurred before. But in January of 1985, as you've heard from the evidence, and as even the defense experts have acknowledged from the witness stand, albeit somewhat reluctantly, in January of 1985, before this man ever saw crack cocaine, he and another man broke into an older person's home and Melvin Trotter held him down while his place was ransacked. A home invasion robbery. The Judge will instruct you that that's a violent crime And certainly the pattern of conduct, the escalation of conduct, the fact that it was not his first robbery, is a very significant factor for you to consider when you go back to the jury room. [R2035, 2036]

As the prosecutors argument shows, the introduction of the 1986 robbery conviction was highly prejudicial to Mr. Trotters case. It was a centerpiece in the prosecution of the case against Mr. Trotter. The prosecutor effectively used it to support the aggravating circumstances of a prior violent felony and under sentence of imprisonment as well as to negate the impact of the defense mitigator of crack cocaine addiction. To borrow the words of the prosecutor, the prior violent felony conviction was a "very significant factor" in the juries consideration as to whether to choose life or death. Even without that strong argument and emphasis by the prosecutor there is a possibility, as in Johnson, that the juries belief that petitioner had been convicted of a prior violent felony

would be “decisive” in the “choice between a life sentence and a death sentence”.

Florida Courts have followed the mandate of the United States Supreme Court concerning setting aside death sentences which were based upon prior conviction aggravators that were later set aside. In Preston v. State, 564 So.2d 120 (Fla. 1990), the Court vacated a death sentence because the conviction of a prior violent felony was set aside. The court stated:

> we note that the prosecution emphasized the importance of the prior violent felony in his closing argument to the jury. In addition, only two of the four aggravating circumstances remain because this court has previously eliminated the finding that the murder was committed in a cold, calculated, and premeditated manner. Further, there was mitigation evidence introduced at the trial even though no statutory mitigating circumstances were found. Finally, the jury recommended death by a one vote margin. Had the jury returned a recommendation of life imprisonment, we cannot be certain whether Preston’s ultimate sentence would have been the same. Under the circumstances, we are unable to say that the vacation of Preston’s prior violent felony conviction constituted harmless error as related to his death sentence.

(Id. at 122).

The prejudice associated with the jury and sentencing courts consideration of the improper aggravating factors of a prior violent felony conviction and under sentence of imprisonment is further established by the Florida Supreme Courts opinion in

Trotter v. State, 576 So.2d 691 (Fla. 1990). The Court reversed and remanded for a new sentencing based upon the then improper consideration by the jury and sentencing judge of the single aggravating factor of under sentence of imprisonment. In doing so the Court stated:

> Because the trial judge erroneously treated violation of community control as an aggravating factor in sentencing and because there were four aggravating and four mitigating circumstances, we remand to a jury for re-sentencing. (Id. at 694).

The clear meaning of the excerpt of the Courts opinion is that the weighing of the aggravating circumstances as against the mitigating circumstances was very close in Mr. Trotter's case to the point where the elimination of one aggravator required a new sentencing. If counsel for Mr. Trotter had filed the motion to set aside the plea only two aggravators would have been available for weighing against four mitigating circumstances. Clearly, the foregoing is evidence of the prejudice Mr. Trotter suffered as a result of counsel's failure.

At the Evidentiary Hearing, Dr. Krop testified based on his prior evaluations and testing of Melvin Trotter that he did not understand the Waiver of Rights Form due to his low intellectual functioning. Therefore, his September 12, 1986 plea to the offenses of robbery and burglary cannot be considered freely and voluntarily given. In addition to failing to understand the

rights that he was waiving, the record reveals that the colloquy was devoid of a factual basis in direct contradiction to the Florida Rules of Criminal Procedure.

Mr. Trotter was represented by the Public Defender in both the plea on the prior charges and in the instant murder case. Therefore, counsel had actual or imputed notice that Mr. Trotters no contest plea to robbery and burglary was deficient. Counsel for Mr. Trotter had ample time and opportunity to file an appropriate motion to set aside the plea under F.R.C.P. 3.850 in the course of providing representation to Mr. Trotter in the subsequent murder case. However, Counsel was ineffective for failing to file the motion in timely manner. The ineffectiveness of counsel was prejudicial to Mr. Trotter in that the sentencing jury was allowed to consider and weigh the aggravating circumstances of a prior violent felony conviction and under sentence of imprisonment based upon an involuntarily plea and with factual basis in the record. There is a reasonable probability that absent the prior robbery conviction, and under sentence aggravators, a jury would have recommended a life sentence and not death.

In the years following his representation of Melvin Trotter, counsel Peter A. Dubensky became a Circuit Court Judge and today has been on the circuit bench twelve (12) years. In those

twelve years Judge Dubensky has had an opportunity to take pleas in criminal cases and is familiar with the requirements of a plea colloquy and the questions that should be asked. (EH 19) In response to the State's question regarding whether he felt comfortable rendering an opinion as to whether Judge Dakan's decision to uphold the plea was correct, Judge Dubensky testified "...[I] think it was wrong". (EH-37-38) In reviewing the plea colloquy to see if there is any factual basis for the plea entered by Mr. Trotter in 1986, Judge Dubensky testified that there was not. (EH52)

Competency of Mr. Trotter to enter plea:

Dr. Harry Krop testified based upon the information available to him and his own evaluation of Mr. Trotter that he [Trotter] "was not competent to enter the plea". (EH 286)

In explaining the basis for his opinion Dr. Krop stated that he "went over his [Trotter's] reading, the various times which would have been contained in the plea arrangement and the rights and so forth, and I [Dr. Krop] felt that based on his overall intellectual ability, that it was my opinion that unless he had someone to really spend considerable time with him and educate him with regard to those issues, that I felt he would not have been competent". Dr. Krop testified that he felt that he [Mr. Trotter] was incompetent, or should have been determined to be

incompetent during that period of time". (EH 286). In reaching this conclusion, Dr. Krop relied on his review of the actual acknowledgment and waiver of rights form, transcripts from the sentencing proceedings, and attorney's billing records reflecting the time counsel spent with Mr. Trotter prior to plea, along with Mr. Trotter's recollection regarding facts surrounding the entry of the plea. There is no testimony to refute Mr. Trotter's assertions that counsel had minimal contact with him prior to entry of the plea. In fact, at the point in time when the plea was actually entered in court Attorney Lee was not present and Attorney Moreland stood in to handle the plea.

Dr. Krop testified that he spent over two and a half hours with Mr. Trotter going over the rights waiver form itself, and estimated spending about an hour going over each individual section. In addition, he [Dr. Krop] went over certain general terminology in terms of reading skills with Mr. Trotter. (EH 288). At the end of considerable time spent with Dr. Krop testified that he [Trotter] was able to understand the form but communicated to Dr. Krop that if he had understood numbers 4,7, and 8 on the waiver of rights form he would not have agreed to it. (EH -189).

According to Dr. Krop, in attempting to read the waiver form

Mr. Trotter, “made errors in reading the words – for example, robbery, minimum, probation, nolle pros, represented, and perjury”. There were ... “other words that he [Trotter] just couldn’t read” and “then there were additional words ...that “he [Trotter] wasn’t able to read prosecution, factual, proposed, paragraphs, threatened, and attendance”. Dr. Krop “tried to define every word for him [Trotter] and at the conclusion communicated that Mr. Trotter’s overall response was “that if I [Trotter] knew the facts of the case without community control I’d never take it”. (EH291). Dr. Krop testified that he “communicated in very simple terms” and stressed that at the point he met with Mr. Trotter he “felt that he [Mr. Trotter] was more sophisticated with regard to the legal issue”. (EH - p. 291) Dr. Krop attributed Mr. Trotter’s sophistication due to his time in prison and talking to other inmates, and meetings with his own attorneys for a sense that he was more knowledgeable overall about the legal process. (EH- p. 292) Although Dr. Krop testified that Mr. Trotter put good effort, optimal effort into trying his hardest when reviewing the plea form, Dr. Krop still found that he [Trotter] was not competent to enter this plea. (EH- 294) Based upon his evaluation of Mr. Trotter, Dr. Krop concluded that he [Trotter] would have had difficulty in comprehending much of the plea form before his session.(EH 296)

Mr. Trotter established that his September 12, 1986 plea to the offenses of robbery and burglary were not freely and voluntarily given. Through expert mental health testimony from Dr. Krop, and a review of the record of the plea colloquy between the judge and Mr. Trotter it is clear that Mr. Trotter's plea was unknowing and therefore involuntary. First, because of Mr. Trotter's low intellect and second, because there was no factual basis. In Carreon v. United States, 578 F.2d 176 (7th DCA) 1978, the court stated that even on collateral attack, when a factual basis requirement was not satisfied, the question of voluntariness is left open and judgment of conviction should be vacated and defendant allowed to withdraw his guilty plea and replead. In explaining its rationale, the court acknowledged that the Supreme Court's reasons for allowing the defendant to replead in McCarthy a direct appeal case are equally relevant in considering relief that is appropriate in a collateral review under Section 2255 and stated "If a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all of the elements of a formal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to

the facts. McCarthy, 394 U.S. at 466. Dr. Krop's testimony at the motion hearing was not hearsay. As a psychologist Dr. Krop testified about statements made by Mr. Trotter to him in the process of his

evaluation of Mr. Trotter to provide a diagnosis regarding his competency. As such, Dr. Krop's statements were admissible as and exception to the hearsay rules provided in Fla. Statutes 90.803 (4) for this very purpose.

The trial court erred in failing to grant counsel's motion to withdraw the plea at the hearing in November, 1992. Dr. Krop knew that Mr. Trotter had low intellect when he evaluated him in November 21, 1986 but did not review the actual plea form with the client until the day before the hearing. His opinion regarding Mr. Trotter's lack of knowledge was based not only upon information provided by Mr. Trotter but by his own evaluation as a psychologist of Mr. Trotter's deficiencies after each paragraph was reviewed with him. The record is clear that this did not occur until just prior to the hearing. Therefore, the court should have considered Dr. Krop's evaluation and opinion regarding Mr. Trotter's understanding of the plea as newly discovered evidence previously unknown to counsel and an exception to the rule that required such appeals to be filed within a two year period. Richardson v. State, 546 So. 2d 1037

(Fla. 1989). Dr. Krop's testimony that Mr. Trotter did not understand the waiver of rights form is newly discovered evidence that would have conclusively prevented the trial judge from entering judgment against him. Hallman v. State, 371 So. 2d 482(Fla. 1979). Thereafter, the trial court could have inquired to see if this new evidence could have been discovered earlier with the exercise of due diligence. Steinhorst v. State, 695 So. 2d 1245 (Fla. 1977) but no such inquiry was ever undertaken. Absent evidence that the newly discovered evidence (Mr. Trotter's incompetence to enter a plea) could have been obtained at an earlier time using due diligence,

the court should have granted counsel's motion to set aside the plea.

There is no question that in addition to being fraught with technical errors, there was never a factual basis established on the record for the offenses that Mr. Trotter had pled to. The record is clear that counsel represented to both Mr. Trotter and the court that he was entering a plea and in exchange the State was dropping two charges but that was, in fact, clear error and not the case. The State had already dropped two of the charges before Mr. Trotter ever entered his plea as stated by the clerk during the plea colloquy. The record is clear that after the clerk's announcement that these charges had already been

dropped, Mr. Trotter's counsel did nothing. Counsel never requested time to discuss this new development with Mr. Trotter and the record shows that he proceeded to simply enter the plea.

A plea may be involuntary if the Defendant has an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Johnson v. Zerbst, 304 U.S, 458,464-465 (1938). While accepting the competence of defense counsel and wisdom of recommending the entry a plea to a defendant the Supreme Court still required that the defendant receive real notice of the true nature of the charges against him. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary. Smith v. O'Grady, 312 U.S. 329 (1941).

Mr. Trotter's counsel finally challenged the plea via a Motion filed to exclude the aggravators, there is no testimony on the record at the November 1992 hearing that any counsel ever reviewed and explained each paragraph of the actual plea form with Mr. Trotter. Without hearing a factual basis for the charges against him or being informed that the state had already dropped two of the charges against him Mr. Trotter's plea was without the notice intended by the Supreme Court and cannot be considered voluntary. While low mental capacity of the defendant may provide a reasonable explanation for counsel's

oversight in explaining the nature of the offense in sufficient detail to give accused notice of what is being asked to admit, it also forecloses the conclusion that the error is harmless beyond a reasonable doubt and inadequate notice of offense results in an involuntary plea without due process. Henderson v. Morgan, 96 S.Ct. 2253 (1976)

Ineffective Assistance of Counsel

The record is not abundantly clear but it appears that the trial court accepted counsel's motion to set aside the aggravators as a belated 3.850 motion. Motions filed more than two years from the date judgment and conviction are final will be considered only if based on a claim of illegal sentence, newly discovered evidence or fundamental change in the law that is held to apply retroactively. Bannister v. State, 606 So. 2d 1247 (1992) The court did not elaborate on its rationale for failing to view evidence of Mr. Trotter's incompetency to enter the plea as "newly discovered" evidence. The court denied the motion based upon the expiration of the two year statute of limitations for filing the 3.850 and legal sufficiency.

The court's inquiry focused on when Dr. Krop made the determination that Mr. Trotter was incompetent and in doing so attributed prior knowledge to counsel of Mr. Trotter's borderline intellectual functioning. The clear implication was

that counsel had the information and should have filed the motion to set the plea aside as early as November, 1986 (timely within the two year period). Under such circumstances, Judge Dubensky testified that he was aware of the impact of such aggravation and acknowledged that he committed error in failing to timely file such a motion in Mr. Trotter's behalf.

There can be no question that Mr. Trotter was prejudiced as a result of counsel's failure to act timely. The conviction secured via this plea in violation of his constitutional rights to due process served as the only prior conviction for violent felony and under community control in support of his death penalty sentence.

V. CONCLUSION AND RELIEF SOUGHT

In Jones v. State, 705 So. 2d 1364, 1366 (Fla. 1998) the trial court rejected evidence that the defendant had organic brain damage and was borderline mentally retarded and imposed a sentence of death. This court on appeal reversed the defendant's sentence of death and remanded for the imposition of a life sentence stating that the record revealed unrebutted mitigation including evidence that the defendant was borderline mentally retarded upon an IQ score of 76, and the fact that the defendant was placed in special education classes, had first

grade reading ability, and learning disabilities. In Cooper v. State, 739 So. 2d 82, 88-89(Fla. 1999) a death sentence was vacated and life sentence imposed where evidence was presented of an abusive childhood, evidence of brain damage, and borderline mentally retardation of defendant with IQ score of 77. In Morris v. State, 557 So.2d 27, 30 (Fla.1990) a death sentence was vacated and life sentence imposed where the defendant was borderline mentally retarded with an IQ score of approximately 75. In Brown v. State, 526 So.2d 903, 908 (Fla. 1988) a death sentence was set aside and life imposed where the defendant had an IQ of 70-75, and classified as borderline defective or just above the level for mild mental retardation.

In this case, Dr. Krop, Dr. Mosman, Dr. Pinkard all agree that Melvin Trotter's IQ is in the borderline defective range. As in Jones, Mr. Trotter has frontal lobe damage, and an elementary school reading ability, along with an IQ score in the borderline mental retardation range. Mr. Trotter's mental age is 13 years like the borderline mentally retarded defendant in Downs v. State, 574 So.2d 1095 (Fla. 1991) whose sentence was commuted to life. Mental retardation is significant when considering whether the death sentence is appropriate in a given case.

Mr. Trotter's case involved the following:

Aggravators

1) Crime was committed while the Defendant was on Community control
2) Prior conviction of a violent felony (Robbery)
3) Crime was committed while engaged in the commission of a robbery for pecuniary gain.
4) Crime was Heinous, Atrocious, and Cruel

Mitigators

1) Defendant was under the influence of extreme mental and emotional distress.
2) Capacity of Defendant was substantially impaired (Cocaine)
3) Below average IQ
4) Abuse and neglect
5) Developmental problems
6) Disadvantaged background
7) May have suffered frontal lobe brain disorder which slowed down his reaction times.
8) Remorseful
9) Considered “other” non-statutory mitigators presented by Defendant

If the trial court had properly considered Mr. Trotter’s brain damage, and borderline mental retardation and the effect that these mental mitigators would have had on the crime in question, the trial court may have found the non-statutory mitigators in this case outweighed the aggravators.

In Campbell v. State, 571 So. 2d 415 (Fla. 1990) this court adopted the definition of mitigating circumstance from the United States Supreme Court, as “ any aspect of a defendant’s character or record and any of the circumstances of the offense” that reasonably may serve as a basis for imposing a sentence

less than death. Additional mitigation offered at the evidentiary hearing from witnesses Polite and Casmir in behalf of Mr. Trotter was uncontroverted and new evidence. Failure of the trial court to consider and weigh it was error. Robinson v. State, 574 So. 2d 175,177 (Fla. 1994) citing Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). Mr. Trotter's counsel failed to file a motion to vacate failed to file a prompt motion to vacate aggravators that

later were used to establish a prior violent felony in aggravation. Counsel did not contact Dr. Pinkard for consultation with Dr. Krop so that a proper mental health diagnosis could be rendered in behalf of Mr. Trotter although Dr. Pinkard was readily available. In addition counsel did not contact relatives of Mr. Trotter that would have provided additional information for both the mental health experts and the jury to consider as non-statutory mitigation. As such, counsel's performance was deficient of the duty to conduct reasonable investigations required by Strickland v. Washington, 466 U.S. 668 (1984).

Based on the foregoing, the lower court improperly denied Rule 3.850 relief to Melvin Trotter. This Court should order that his conviction and sentence be vacated and remand the case for such further relief as the Court deems proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by U.S. Mail, first class postage prepaid, Robert J. Landry, Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 E. Frontage Rd. Suite 200, Tampa, Florida 33607-7013, Melvin Trotter, DOC#573641, Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this ___ day of November, 2003.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief, was generated in Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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