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

SUPPLEMENTAL BRIEF OF APPELLANT

Carol C. Rodriguez
Assistant CCRC
Florida Bar No. 931720

Capital Collateral Regional
Counsel - Middle
3801 Corporex Park Dr. Ste. 210
Tampa, Florida 33619-1136
(813) 740-3544

Counsel for Petitioner

PRELIMINARY STATEMENT

This is a supplement to the initial brief in the appeal of the circuit court=s denial of Mr. Trotter=s motion for post-conviction relief which was brought pursuant to Fla.R.Crim.P. 3.850. This Supplemental Appeals Brief is brought in accordance with this Court=s order dated August 4, 2005, and after the circuit court ruled on the issue of Trotter=s mental retardation on remand pursuant to Fla.R.Crim.P. 3.203(d) (4)(e). This brief supplements the Initial brief filed in this case, and Mr. Trotter relies on his initial brief for arguments on any remaining issues properly before this court. Fla. Stat.' 924.066 (2).

The following symbols designate references to the record in this appeal: The record on appeal concerning the original trial court proceedings shall be referred to as "R ___" followed by the appropriate page numbers. The post-conviction records on appeal will be referred to as "ROA____" or "Supp. ROA____" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Trotter has been sentenced to death and is on death row at Union Correctional Institute. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to present issues through oral argument would be more than appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Mr. Trotter, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

TABLE OF AUTHORITIES

CASES **PAGES**

TABLE OF AUTHORITIES

CASES **PAGES**

STATUTES AND CONSTITUTIONAL PROVISIONS

SECONDARY SOURCES

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

A grand jury returned an indictment on June 20, 1986 charging Mr. Trotter with first degree murder in case number 86-1225 F and for robbery with a deadly weapon in case number 86-1240 F. The jury trial was held in the Twelfth Judicial Circuit, Manatee County Circuit Court, before Acting Circuit Judge Alan R. Dakan. A jury convicted him of first-degree murder and robbery with a deadly weapon. Following the penalty phase, the jury recommended a death sentence by a vote of nine to three. Judge Dakan found the following aggravating factors and mitigating factors:

Aggravators

1. The murder was committed while under a sentence of imprisonment.
2. Trotter had previously been convicted of a felony involving the use of threat of violence.
3. The crime was committed during the commission of a robbery.
4. The murder was especially wicked, evil, attrocious, and cruel.

Statutory Mitigators

1. Trotter was under the influence of extreme mental and emotional disturbance.
2. Trotter=s capacity was substantially impaired

Non-Statutory Mitigators

1. Trotter has below average IQ.
2. A history of family and developmental problems.
3. Remorse - See: Trotter v. State, 576 So. 2d 691,694 (Fla. 1991).

On May 18, 1987, Mr. Trotter was sentenced to death for the first degree murder conviction and sentenced Trotter to a concurrent term of twelve years for the robbery conviction. On appeal, the Florida Supreme Court affirmed Trotter=s conviction for first

degree murder, but vacated the death sentence and remanded for sentencing before a newly empaneled jury. The Florida Supreme Court held that the trial court had incorrectly considered his violation of community control as an aggravating factor at sentencing. Id. at 694 (Fla. 1991).

On remand, the jury recommended by a vote of eleven to one that the trial judge impose the death penalty. Judge Eastmore found the following:

Aggravators

1. The murder was committed while on community control.
2. Trotter had previously been convicted of a prior violent felony.
3. The crime was committed during the commission of a robbery and was for pecuniary gain (these two were merged).
4. The murder was especially wicked, evil, atrocious, and cruel.

Statutory Mitigators

1. Trotter was under the influence of extreme mental and emotional disturbance.
2. Trotter=s capacity was substantially impaired

Non-Statutory Mitigators

1. Trotter has below average IQ.
2. Has both family and developmental problems.
3. Disadvantaged background
4. May have suffered from frontal lobe brain disorder.
5. Trotter is Remorseful.

After weighing the factors, Judge Eastmore imposed the death sentence. On appeal, the Florida Supreme Court affirmed the imposition of the death sentence. *See*: Trotter v. State, 690 So.2d 1234 (Fla. 1997). This Court affirmed the imposition of the death sentence. *See*: Trotter v. State, 690 So.2d 1234 (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).

The Office of Capital Collateral Regional Counsel-Middle Region (CCRC-M) currently represents Mr. Trotter and filed his initial post-conviction motion to Vacate Judgment of Conviction and Sentence With Special Request for Leave to Amend on June 8, 1998. A First Amended Motion was filed on June 15, 2000 and a Second Amended Motion on July 31, 2001 under the authority of Fla. R. Crim. P. 3.850 and Fla. Stat. '924.066 (1) seeking collateral relief.

A Huff Hearing was held in the case on November 15, 2001. The court issued an order on January 24, 2004 granting an Evidentiary Hearing on Claims I-IV and all subparts and agreed to hear all legal arguments on Claims V-VIII and any subparts in Defendant=s Second Amended Motion To Vacate. An Evidentiary hearing was held on April 29, 2002 through May 3, 2002. 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 on March 20, 2003. (ROA Vol. VIII - p. 1319) An appeal to the Florida Supreme Court was subsequently and duly noticed on April 23, 2005.

While pending before the Florida Supreme Court, Mr. Trotter filed a Motion To Relinquish Jurisdiction pursuant to Florida Rule of Criminal Procedure 3.203 (d) (4) (E), Defendant=s Mental Retardation As a Bar To Imposition of the Death Penalty on November 26, 2004. The Florida Supreme Court granted Mr. Trotter=s motion on December 3, 2004 remanding this case to the Circuit Court for a determination of the mental retardation issue. A Successive 3.851 Motion For Post Conviction Relief - Motion for Determination of Mental Retardation As a Bar to Execution was filed as directed by

the rules before the circuit court of the Twelfth Judicial Circuit, In and For Manatee County, Florida to properly bring this issue before the Circuit Court for full consideration.

On April 29, 2005, the Defendant filed a Motion to File Written Expert Reports In Lieu Live Testimony and filed a voluntary waiver from the Defendant on May 10, 2005 to pursue this course of action. The Court was requested to determine the mental retardation issue based upon written reports by experts filed as required by Fla. R. Crim. P. '3.203, final briefs filed by the parties, and testimony given by witnesses at Trotter=s 2002 evidentiary hearing. Defendant=s Motion was granted and order issued. (ROA, Vol. XXI - p. 2669) The trial court denied relief issuing an Order Determining that Defendant Failed to Establish Mental Retardation (ROA Vol. XXI - p. 2767) This Court ordered the Appellant to file a Supplemental Brief in this case on or before September 6, 2005.

SUMMARY OF ARGUMENT

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. The Supreme Court, however, left the determination of mental retardation to the States. In the State of Florida, Fla. Stat. '921.137 and Fla. R. Crim. P. 3.203 require that significantly sub-average general intellectual functioning, exist concurrently with deficits in adaptive behavior and that manifestation occur prior **to age 18**. (emphasis added) Sub-average intellectual functioning is measured on a standardized intelligence test as specified by the rules of the Department of Children and Family Services wherein the individual scores two or more standard deviations below the mean. In addition, the

significantly sub-average general intellectual functioning must exist concurrently with adaptive behavior and **manifest from conception to age 18.** (emphasis added)

Mr. Trotter was tested on a Wechsler Intelligence Scale Children=s Revised (WISC-R) at age 14 and scored a 70 thereby demonstrating significantly sub-average intellectual functioning. The only psychologist who examined Mr. Trotter during the relevant time period (prior to age 18) was Dr. Calvin Pinkard who testified at the evidentiary hearing that Melvin Trotter demonstrated concurrent deficits in his adaptive behavior at that point in time. Dr. Pinkard testified that in his opinion Mr. Trotter was mentally retarded then and now. Based on the foregoing, 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 and Florida law. Furthermore, comparison of this case to other capital cases with similar aggravating and mitigating circumstances demonstrates that Trotter=s sentence of death is not proportional and a life sentence should be imposed.

ARGUMENT I

DETERMINATION BY EXAMINING PSYCHOLOGIST DURING STATUTORY TIME PERIOD (PRIOR TO AGE 18) THAT IQ TEST SCORES AND CONCURRENT ADAPTIVE FUNCTIONING DEFICITS ESTABLISH TROTTER=S MENTAL RETARDATION ENTITLES HIM TO RELIEF AS HIS EXECUTION IS BARRED BY ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND BY THE 8TH AMENDMENT TO THE U.S. CONSTITUTION .

A. STANDARD OF REVIEW

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

In Atkins, decided on June 20, 2002, the U.S. Supreme Court held that the Eighth Amendment prohibits the execution of mentally retarded offenders. The 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.

Intellectual Functioning and Adaptive Skill Deficits

The Supreme Court adopted the definitions of the American Association of Mental Retardation (AAMR) and similar definitions from the American Psychiatric Association. Mental retardation "[It] is characterized by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Atkins at 2245.

The Supreme Court cited with approval a full scale IQ range of 70 to 75 for the intellectual functioning prong in defining mental retardation excluding margin of error. Atkins at 2245. The Court also stated that clinical definitions of mental retardation require not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care and self-direction that become manifest before age 18. Atkins at 2251. Since mental retardation 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 - prior to age 18.

The Supreme Court left Ato the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences. Atkins, at 2250.

Determining Mental Retardation in Florida

Florida Statutes, Section 921.137(1) (2001) states, in pertinent part:

> "As used in this section, the term 'mental retardation' means significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term 'significantly sub-average 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 provide in this subsection".

Intellectual & Adaptive Functioning - Florida Statutes

Florida Statute adopts essentially the same definition for determining mental retardation as used by the U.S. Supreme Court. The Statute requires that the Department of Children and Family Services adopt rules to specify which standardized intelligence tests are to be used for diagnosing mental retardation in Florida. The Department of Children and Family Services has adopted Fla. Admin. Code Ann. r.65B-4.032 that provides as follows:

Determination of Mental Retardation in Capital Felony Cases: Intelligence, Tests To Be Administered.

(1) When a defendant convicted of a capital felony is suspected of having or determined to have mental retardation, intelligence tests to determine intellectual functioning as specified below shall be administered by a qualified professional who is authorized in accordance with Florida Statutes to perform evaluations in Florida. The test shall consist of an individually administered evaluation which is valid and reliable for the purpose of determining intelligence. The tests specified below shall be used.

(a) The Stanford-Binet Intelligence Scale
(**b) Wechsler Intelligence Scale.** (Emphasis Added)

Following the U.S. Supreme Court=s ruling in Atkins, the Florida Supreme Court on its own motion proposed Florida Rule of Criminal Procedure 3.203 (Defendant=s/Prisoner=s/ Mental Retardation as Bar to Execution) and Florida Rule of Appellate Procedure Appellate Procedure 9.142 (c).(Appeal of Determination of Mental Retardation Claim) that became effective on October 1, 2004.

Rule 3.203. DEFENDANT=S MENTAL RETARDATION AS A BAR TO IMPOSITION OF THE DEATH PENALTY.

3.203(a) Scope. This rule applies in all first-degree murder cases in which the state attorney has not waived the death penalty on the record and the defendant=s mental retardation becomes an issue.

Application to Melvin Trotter

Mr. Trotter was convicted of first degree murder and death was imposed. Therefore, Florida Criminal Rule 3.203 applies to his case.

3.203(b) Definition of Mental Retardation. As used in this rule, the term 'mental retardation' means significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and **manifested during the period from conception to age 18.** The term 'significantly sub-average general intellectual functioning,' for the purpose of this rule, 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 in rule 65B-4.032 of the Florida Administrative Code. 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.

Application to Melvin Trotter

The definition contained in the section (b) of the rule is to be applied to Mr. Trotter=s case to determine the issue of his mental retardation.

B. MELVIN TROTTER=S - INTELLIGENCE TESTING AND ADAPTIVE FUNCTIONING

Prior to Age 18

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 scores two or more standard deviations below the mean in combination with deficits in adaptive behavior skills. Psychological experts agree that there is a baseline standard measurement (SEM) associated with this testing as a margin of error plus or minus 5 points, in addition to other areas of adjustment. Therefore, an individual scoring within the range of 65 to 75 points on an approved intelligence testing instrument can be diagnosed as being mentally retarded. Atkins at 2245.

The record reveals that a Slosson Intelligence Test (SIT) was given to Mr.Trotter at the age of 13 or 14 and reflected a score of 69. The Wechsler Intelligence Scale Children Revised (WISC-R) was given to him at age 14 on October 14, 1974. Mr. Trotter=s full scale IQ score was 70. (ROA, Vol.XV - p. 336) This test is one of the two standard intelligence tests that have been approved for use in diagnosing mental retardation as specified by Florida Statutes and Mr. Trotter=s score falls within the

baseline range of 70-75 points recognized by the Supreme Court and

Florida as the acceptable range for establishing mental retardation.

In 1976, Dr. Pinkard administered a Wechsler Intelligence Scale Children (WISC). This test was developed in 1949 and was outdated at the time it was used. Dr. Pinkard testified at the evidentiary hearing that he would apply the *Flynn effect* to adjust the outdated test to current norms and Trotter=s score on this instrument would be 80. Dr. Pinkard testified that in his professional opinion, Melvin Trotter=s actual IQ is in the mental retardation range between 70 and 75. (ROA Vol. XIV - p. 181) He testified further that in his professional opinion Melvin Trotter is retarded. (ROA Vol. XIV - p. 181)

Basis For Dr. Pinkard=s Determination That Melvin Trotter is Retarded

Trotter=s Performance on Intelligence Tests

Dr. Pinkard testified at the 2002 evidentiary hearing 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 currently retains certification as a rehabilitation counselor. (ROA Vol. XIV - p. 161-162) In 1974, Trotter tested in the mentally retarded range and was placement in special education classes for mentally retarded students. When tested one year later by Dr. Pinkard at age 15, Trotter scored an 88. The reason for this discrepancy is that Dr. Pinkard used an outdated Wechsler

Intelligence Scale - Children (WISC). At Trotter=s evidentiary hearing, Dr. Pinkard testified that "there is a need for correction in what I [he] did in terms of a diagnosis of the IQ Level." (ROA, Vol. XIV- p. 168) Dr. Pinkard testified that he determined that Trotter=s intelligence scores were inflated by about eight points (ROA Vol. XIV - p. 172, 173) Dr. Pinkard explained that the need for adjustment is based upon a worldwide study of 16 nations and the literature that supports the fact that IQ scores increase over time a .3 figure was established in 1984 as the adjusting factor (*referred to in research literature as the Flynn Effect*). (ROA Vol. XIV - p. 173) If using the test today, Dr. Pinkard testified that he would use the .3 figure (per year) to adjust the score over the relevant period of time in order to compare an old test score with a current one. (PC-R. 173-174) In Mr. Trotter=s case reduction of his verbal and performance IQ scores by eight points is significant because a reduction to 80 places him within the mental retardation category, according to the standards used at the time of Trotter=s testing per the Diagnostic and Statistical Manual (DSM-II), published by the American Psychiatric Association. (ROA Vol. XIV - p. 174) Dr. Pinkard testified that at the time Trotter was tested in 1976 the range for borderline mental retardation classification in the Diagnostic Statistical Manual (DSM) used by psychologists was 70 to 83. (ROA Vol. XIV - p. 174) Dr. Mosman, a forensic psychologist who also testified at the evidentiary hearing , concurred with Dr. Pinkard=s testimony that an adjustment of the score to 80 was appropriate and that in 1976 a score of 80 would have been borderline mentally retarded and allowed Trotter classification in the mentally retarded category. (ROA Vol. XVII- p.

702-703)

Deficits in Adaptive Functioning

Dr. Pinkard testified that his examination of Melvin Trotter in 1976, revealed deficits in Mr. Trotter=s adaptive functioning. (ROA Vol. XIV - p. 181,214) Dr. Pinkard testified that based upon his clinical observations of Trotter at age 15, he diagnosed him as having an "inadequate personality, a disorder". (ROA Vol. XIV - p. 214) Dr. Pinkard explained that this was a disorder listed in the Diagnostic and Statistical Manual (DSM-II) and explained that "inadequate personality is, in fact, an expression of adaptive functioning". (ROA Vol. XIV - p. 177-178) Melvin Trotter=s "shyness" and indicators of a "negative self image" along with ineffectual responses to the school system in 1976 led Dr. Pinkard to opine that Trotter suffered deficits in adaptive functioning concurrent with his sub-average intellectual functioning. (ROA Vol. XIV - p. 176-178)

Dr. Pinkard testified that upon his review of the sampling error, the current manual together with Trotter=s adaptive functioning deficits, he would opine that Mr. Melvin Trotter is borderline mentally retarded. (ROA Vol. XIV - p. 178-181) Dr. Pinkard testified at the evidentiary hearing that his opinion was based upon an evaluation he had conducted 26 years prior. While he believed that he had no school records, etc. to rely upon, he was only basis this upon the fact that they were not specified them in his report. He could not testify based upon a clear recollection that he had not reviewed school records and other information. While Dr. Pinkard testified that his opinion was based

upon his examination of Mr. Trotter in 1976 (at age 15) and Trotter=s intelligence testing prior to age 18 he testified that he did review trial records containing information that encompassed the psychological work performed by Dr. Krop. Dr. Pinkard=s opinion did not alter during cross examination. He testified that Melvin Trotter was retarded then and is retarded now. (ROA Vol. XIV - p. 181,185-186)

Dr. Pinkard testified that in his professional opinion Trotter has an actual IQ in the mental retardation range between 70 and 75. (ROA Vol. XIV - p. 181) According to Florida Statutes, the relevant period to review for determining the onset of mental retardation is the time period from conception to age 18. Fla. Stat. ' 921.137(1) (2001). It is during this relevant time period that Melvin Trotter scored in the mentally retarded range on standardized testing recognized for making this determination, and it is the testimony of the psychologist examining him during that same relevant time period that Trotter is mentally retarded. There is no question that Melvin Trotter=s test score of 70 on a standardized, recognized intelligence test prior to age 18 reflects significantly sub-average intellectual functioning. While other experts may examine Trotter today, Dr. Pinkard=s testimony should be given great weight as he is the only expert who had an opportunity to test, interview, and observe Trotter during the time frame established by Florida Statutes to determine onset of mental retardation (prior to age 18).

Dr. Pinkard=s opinion of Melvin Trotter=s deficiencies in adaptive functioning are based upon his clinical evaluation of a young Trotter (pre age 18). Dr. Pinkard testified that in his opinion Trotter had the mental age of a twelve year old at the time he

conducted his evaluation in 1976. (ROA Vol. XIV - p. 188,189) This observation is significant because Dr. Krop testified at Trotter=s penalty phase that at 26 years of age "Melvin [Trotter] was still functioning at around a twelve year old level". This record also shows that Trotter had scored a full scale IQ of 72 with a verbal of 73 on a Wechsler Adult Intelligence Test (WAIS-R) on November 21, 1986. (See: Penalty Phase Testimony of Dr. Krop at R. 2064) Dr. Krop=s test score is consistent with the score of 70 that Melvin Trotter obtained in 1974. Using Dr. Krop=s testing information, Dr. Mosman computed Trotter=s mental age in 1986 to be at 12 years, eight months. (ROA, Vol. XV- p.548)

Although mental age is not a factor used in determining mental retardation in Florida, 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 394-396

C. MELVIN TROTTER=S - INTELLIGENCE TESTING AND ADAPTIVE FUNCTIONING.

Subsequent to Age 18

In Florida, Criminal Rule 3.203(e)states as follows: "The circuit court shall conduct an evidentiary hearing on the motion for a determination of mental retardation. At the hearing, the court shall consider the findings of the experts **and all other evidence on the issue** of whether the defendant is mentally retarded."

Dr. Harold Krop was hired at trial and gave Trotter a Wechsler Adult Intelligence Test Revised (WISC-R) in 1986 around the time of the crime when Mr. Trotter was 26 years of age. Trotter scored a full scale IQ of 72. (ROA Vol. XIV - p. 331) Dr. Krop testified that Trotter=s reading level was third grade and that this score was consistent with other intelligence test scores from Trotter=s testing prior to age 18. (ROA Vol. XIV - p. 335). Dr. Bill Mosman tested Trotter at age 41 in January 2001 on a Wechsler Adult Intelligence Test (WAIS III) and Trotter scored a 78. (ROA Vol. XVII - p. 692-695) Dr. Salvatore M. Blandino, administered the Weschler Adult Intelligence Test (WAIS-III) in November, 2004. This assessment revealed an overall score in the borderline range 79. (Supp. ROA Vol. XIX - p.2701) Dr. Antolin Llorente tested Mr. Trotter again on April 8, 2004 on a WAIS-III and obtained a full scale IQ score of 78. (Supp. ROA Vol. XIX - p. 2363) All Trotter=s scores are in the 72-79 range.

Trotter=s adaptive functioning skills were evaluated by Dr. Llorente in 2004. He interviewed Melvin Trotter and noted behavior that made him appear younger than his adult chronological age would suggest. Dr. Llorente reported Trotter=s speech to be slow and content primitive for a man his age. In response to questions surrounding the murder, he found that Trotter exhibited significant remorse and cried as he explained what happened. He observed a similar affect when Trotter discussed his childhood. Overall, Dr. Llorente surmised Trotter=s affect appeared to be flat. (Supp. ROA Vol. XXI - p. 2702)

Dr. Llorente also interviewed Trotter=s siblings to establish his developmental and

family history. Based upon this information, Dr. Llorente noted the presence of developmental delays as Trotter was maturing and noted that Trotter exhibited problems with speech and significant academic learning difficulties. Many members of Mr. Trotter=s family reported perceiving him as "slow". Other members of Mr. Trotter=s family, including brothers Abraham, Robert, and sisters had to be placed into Educably Mentally Retarded (EMR) classes while attending school. Dr. Llorente noted that there may be a positive history for mental retardation in the family and that Trotter and his older brother were occasionally called Aretarded@. A more in-depth clinical interview revealed that Mr. Trotter suffers from difficulties in cognition (dampened intellect) along with difficulties in verbal abstraction. (Supp. ROA Vol. XXI - p. 2698-2711)

Dr. Llorente interviewed a former teacher, Mr. Samuel McDowell responsible for instruction in all subject matters except physical education at Bradenton Middle School (Junior High). Mr. McDowell described young Melvin Trotter as a "pleasure, cooperative, and cheerful" and a "good" pupil. Despite a lack of absences, Mr. McDowell indicated that Trotter had difficulties absorbing the material presented in class and made "no academic progress". Mr. McDowell communicated that he felt Trotter was a "borderline retardate" who was properly labeled and placed in Educably Mentally Retarded (EMR) programs. Mr. McDowell described the EMR program as predominately for the purpose of teaching adaptive skills (i.e.) handling money, telling time and that the grades he received were not regular programming grades but modified for children in EMR placement. Review of his academic record revealed poor grades and

the presence of significant academic difficulties consistent with a history of cognitive difficulties as noted in his school testing. (Supp. ROA Vol. XXI - p. 2698-2711)

D. STATE EXPERT=S INTELLIGENCE TEST RESULT IS INCONSISTENT WITH TROTTER=S ENTIRE SCORE HISTORY.

Several practitioners have tested Melvin Trotter on a Wecshler AdultIntelligence Tests (WAIS). Dr. Krop tested Mr. Trotter in 1986 and Trotter scored 72. Dr. Mosman tested him in 2001 and he scored 78. Dr. Blandino tested him in November, 2004, and Trotter scored 79. Dr. Llorente tested Trotter again on April 8, 2004 on a Wechsler Adult intelligence Scale - Third Ed. (WAIS-III) and obtained a full scale IQ score of 78. In addition, Dr. Llorente administered a battery of tests. Procedures to assess the presence of feigned symptom exaggeration and/or response bias were administered (Rey 15 - Item Memory Test, Dot Counting Test, The Symptom Validity Technique [SVT], Color Pens). The results of these tests revealed that Mr. Trotter was being straightforward and honest. (Supp. ROA Vol. XXI - p. 2698-2711)

All of Mr. Trotter=s intelligence scores have consistently been in the 70's throughout his testing history. Dr. Michael Gamache examined Mr. Trotter in behalf of the State on April 15, 2005. During this examination, Trotter communicated to Dr. Gamache that he had just been tested by another expert, Dr. Llorente. Instead of contacting Dr. Llorente to discuss Trotter=s testing, Dr. Gamache administered the very same test a Wechsler Adult intelligence Scale - Third Ed. (WAIS III) and reported Trotter=s full scale IQ as 91. A full neuropsychological report was prepared by Dr.

Llorente on April 29, 2005 and provided to Dr. Gamache prior preparation of his May 19, 2005 report, and identified all of the testing instruments used. Dr. Gamache merely suggested that 3.2 to 5.7 points should be subtracted to account for the inflationary influence of the practice effect and suggested that Trotter=s full scale IQ score of 91 could be reduced to 86. This adjustment does not adequately address the practice effect and or explain that his final scoring is totally inconsistent with all of the test results conducted by various psychologists throughout Melvin Trotter=s lifetime. Administering the same intelligence test within 7 days of a prior is unacceptable. It is logical to conclude that the 91 is an aberrant score, and should not be considered representative in any respect of Melvin Trotter=s intelligence.

E. <u>TROTTER SUFFERS FROM COGNITION THAT IS BELOW THE AVERAGE RANGE</u>.

Dr. Llorente administered subtests from the WJ-III (Letterword Identification, Ready Fluency, and Passage Comprehension) to assess Trotter=s reading skills. Mr. Trotter=s performance demonstrates that he suffers from severe reading problems as he is at a third grade-equivalent level in reading, and at a second grade level in fluency and reading comprehension. (Supp. ROA Vol. XXI - p.2703)

When Dr. Llorente administered a Wechsler Adult intelligence Scale - Third Ed. (WAIS-III), Trotter obtained scores in the low average and borderline range in verbal and perceptual reasoning skills, respectively. Index scores associated with verbal comprehension and perceptual organization fell in the low average range whereas index

scores associated with processing speed and working memory fell in the borderline range. The majority of Trotter=s (WAIS-III) subtests scores fell in the low average to borderline range revealing Trotter to be in the borderline range of intellectual ability. He obtained a Full Scale IQ score of 78. Dr. Llorente noted that Trotter=s (WAIS-III) Index and IQ scores that he obtained are consistent with scores he registered on Dr. Blandino=s examination (WAIS-III) in November, 2004. Dr. Llorente concluded that Mr. Trotter suffers from cognition that is below the average range. Given his history of developmental delays, particularly in speech and language, Dr. Llorente opined that Trotter=s intellectual and language difficulties were present before the age of 18 years (congenital in nature). (Supp. ROA Vol. XXI - p. 2711) This conclusion was supported by psychosocial history provided during this interview, and a probable history of mental retardation in his family.

F. THERE ARE CURRENTLY NO VALID FORMAL MEASURES TO RETROSPECTIVELY ASSESS ADAPTIVE SKILLS.

Dr. Llorente=s report states that there are no valid, formal measures to retrospectively assess adaptive skills. In addition, he further states that a clinician is unable to assess these abilities while an individual is incarcerated where adaptation and organization is provided by the Criminal Justice Systems. (Supp. ROA Vol. XXI - p. 2698-2711) Therefore, any assessment of Trotter=s adaptive functioning conducted by the State=s expert and based upon Mr. Trotter=s current living conditions and prison environment are irrelevant in determining deficits in adaptation for the purpose of

diagnosing mental retardation. Clearly, the Florida Statute addresses when adaptive skills are to be measured and that point in time is prior to age 18.

G. EXPERT PSYCHOLOGICAL TESTIMONY ESTABLISHED THE PRESENCE OF A CHRONIC HISTORY OF ADAPTATION DELAYS IN SEVERAL AREAS.

Dr. Llorente reviewed available records and interviewed independent sources for information relating to delays in Trotter=s adaptation. Based upon this information, Dr. Llorente concluded that Trotter suffered moderate to severe adaptive delays. He found that Trotter=s records indicated the presence of a chronic history of delays and adaptation in several areas. A chronic history of academic difficulties responsible for his placement in special education for the mentally handicapped (EMR) classes during a majority of his school life was found. In addition, when removed from special (EMR) classes, Trotter failed in regular classes. Similarly, Trotter=s vocational history showed that he was employed in menial, unskilled jobs and only worked a short time before incarceration. Trotter never maintained a bank account as his wife took care of the finances, which suggests the presence of further adaptive delays in handling financial affairs. (Supp. ROA Vol. XXI - p. 2698-2711)

Mr. Trotter=s scores on psychological measures recorded during his youth should be heavily weighed along with the information provided by his former teacher, Mr. McDowell addressing the degree of Trotter=s cognitive difficulties. Due to the fact that the instructor=s observations of Trotter=s cognitive difficulties and those sub average intellectual functioning scores occurred before the age of 18 years when a diagnosis of

mental retardation can be assigned consistent with AAMR criteria. Trotter=s current intellectual scores and adaptation to prison gauge his current level of functioning and should not be used for the purpose of establishing a diagnosis of mental retardation because the American Association of Mental Retardation (AAMR), Florida Supreme Court and Florida Statutory criteria indicates that the oneset must manifest before age 18.[1] Therefore, only scores and information during this relevant period (conception to age 18) should be used for the purpose of diagnosing mental retardation. Mr. Trotter=s current level of adaptation is provided by the Florida State Correctional System and is not representative of his adaptive skills outside of this artificial, structured environment in carrying out daily living skills, socialization, and vocational areas.

Dr. Llorente tested Trotter on a standardized intelligence test the Wechsler Adult

[1]In Atkins, decided on June 20, 2002, the U.S. Supreme Court held that the Eighth Amendment prohibits the execution of mentally retarded offenders. The 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. The Supreme court stated further that clinical definitions of mental retardation require not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care and self-direction that become manifest before age 18. In doing so, the court adopted the definitions of the American Association of Mental Retardation (AAMR) that the onset must manifest before age 18 for sub-average intellectual functioning and for deficits in adaptive skills. The AAMR states that related limitations in two or more adaptive skill areas occurs "concurrently" with the significant sub-average intellectual functioning. Since the Mental Retardation must manifest itself 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. Fla. Stat. '921.137(1) (2003) adopts the requirement that onset must manifest prior to age 18 stating, in pertinent part: "As used in this section, the term 'mental retardation' means significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and

intelligence Scale - Third Ed. (WAIS-III) and conducted interviews of people who knew Trotter, and reviewed school and court records, as did the clinician in Atkins. Although Dr. Llorente concluded that Melvin Trotter=s current status does not fall within the mentally retarded range, it is his clinical impression based on his history, behavioral observations and present findings however that he [Trotter] suffers from sub-average intellectual functioning. He also concludes that Trotter suffers from significant limitations in adaptation affecting all areas including daily living skills, socialization, and vocation. Dr. Llorente found Melvin Trotter=s intellectual functioning to be "very close to the mentally retarded range as set for by the AAMR". With a reasonable degree of scientific certainty it is his impression that:

> "Mr. Trotter suffers from subaverage intellect consistent with an overall intellectual level in the borderline range of cognitive abilities. His [Trotter=s] overall cognitive profile is marked by deficits in working memory and information processing, as well as delays in verbal and perceptual reasoning. Superimposed upon his [Trotter=s] cognitive delays, he [Trotter] also suffers from a debilitating learning disorder and moderate to severe adaptive delays. His [Trotter=s] difficulties in adaptation and cognition were in all likelihood present before the age of 18 years. He [Trotter] also suffers from organic brain damage (static encephalopathy cannot be ruled out) and moderate to severe depressive symptoms." (Supp. ROA Vol. XXI - p. 2711)

Dr. Llorente=s retrospective observations support Dr. Calvin Pinkard=s diagnosis that Melvin Trotter met the criteria for a diagnosis of mental retardation when examined by him at age 15. Mr. Sam McDowell, one of Trotter=s teachers confirmed that despite absences, Trotter demonstrated difficulties absorbing class material, lacked academic

---

manifested during the period from conception to age 18".

progress and in his opinion was a "borderline retardate" who was properly labeled and placed in Educable Mentally Retarded (EMR) programs. A program established predominately for the purpose of teaching adaptive skills (i.e.) handling money, telling time and with a modified type of grading system. (Supp. ROA Vol. XXI - p. 2700)

Trotter was tested by the Manatee Co. Schools on a Slosson and WISC-R Intelligence Test and scored a 69 and 70 respectively at the ages 13 and 14. In 1976, Dr. Calvin Pinkard tested Melvin Trotter at age 15 but instead of using the WISC-R he used an outdated WISC and obtained a score of 88. (ROA Vol. XIV - p. 168) In Denying Trotter relief, the trial court stated that it "seriously questions Dr. Pinkard=s opinion and finds it unreliable for several reasons. First, Dr. Pinkard was completely unable to account for the differences in the test results between the WISC and the WISC-R." (Supp. ROA, Vol. XXI - p. 2727) This conclusion is erroneous.

Dr. Pinkard explained that he had administered an outdated version of the Wecshler Intelligence Test- Children=s version (WISC) to Trotter. He testified that the test he gave Trotter a test that was 27 years old and that giving it had resulted in improperly inflated IQ test scores for Melvin Trotter. (ROAVol. XIV - p. 168-173) Dr. Pinkard explained that research in the field by researcher Flynn indicated that an adjustment of .03 per year should be made to compare an outdated test to a current one. He was unable to account for the factors that resulting in a remaining difference of ten points between the WISC-R score of 70 and the WISC score of 80 (after adjustment). (ROA, Vol. XIV, p. 173) Obviously, the outdated test given to Trotter in 1976, cannot

be considered as representative of his intellectual functioning.

In considering Dr. Pinkard=s testing results, and testimony the trial court failed to consider Trotter=s test score history (a 69 on a Slosson Intelligence test and a 70 on a Wechsler Intelligence Scale- Children=s version (WISC-R) (the correct version of the test) before Pinkard=s testing. The WISC-R is a test authorized by the Department of Children and Family Services in rule 65B-4.032 of the Florida Administrative Code for diagnosing mental retardation and a score at 70 placed Trotter two or more standard deviations from the mean establishing his sub-average intellectual functioning. The court also failed to consider the fact that at age 26, Trotter was still scoring consistent with these earlier scores by registering a score of 72 on a Wechsler Adult Intelligence Scale- (WAIS) administered by Dr. Krop (near the time this crime was committed). (ROA Vol. XVI - p. 331) Classifications in both Diagnostic and Statistical Manuals, and the American Association of Mental Retardation qualify an individual with scores of 70 or below in combination with deficits in adaptive behavior for diagnosis as mentally retarded.[2] Psychological experts agree that there is a margin of plus or minus five points associated with testing results. See: Atkins at 2245.

The Court further found that "at the 2002 evidentiary hearing, Dr. Pinkard

[2] Dr. Pinkard testified at evidentiary hearing that in 1976 the Diagnostic and Statistical Manual (DSM-II) had changed the range to 70 to 83 (one standard deviation below the mean) and a score of 80 would have placed Trotter within the mild mental retardation classification. See: Evidentiary Hearing Transcript, ROA Vol. XIV - p. 180.

struggled during his testimony, especially during cross-examination". (Supp. ROA Vol. XXI - p. 2727) Dr. Pinkard testified that he retired at the conclusion of a career spanning 40 years as a licensed psychologist in the State of Florida. Employed by the University of South Florida the mental health and rehabilitation counseling department=s founding Chairman for 30 years his duties at the University were mostly administrative, teaching, and research. However, he maintained a clinical psychology practice doing evaluations and therapies about one day a week. During this lengthy career, Dr. Pinkard testified that he had testified only twice in jury trials in the State of Florida. Once in a civil case and another time in testifying in a capital offense. (ROAVol. XIV- p. 164)

Dr. Pinkard=s age and limited exposure to courtroom cross examination, should not form the basis for the trial court characterizing him as a "struggling" witness. [3] As

[3]Dr. Pinkard has a bachelor=s degree from Birmingham Southern College and Theology Degree from Emory, a Master=s and PhD from the University of Florida in Clinical Psychology and holds an active license in clinical psychology and certification as rehabilitation counselor in the State of Florida. He spent 2 years in a Community Health Center in Gainesville, Fla. and 8 years at McDonald Center, a facility for the mentally retarded. He moved to the University of South Florida and founded a department in mental health and rehabilitation counseling serving as Chairman for 30 years. Although his duties at the University were mostly administrative, teaching, and research, he maintained a clinical psychology practice doing evaluations and therapies about one day a week. He retired approx. 7 years prior to testifying in this case and works about a day and a half a month doing evaluations to determine eligibility for rehabilitation services for persons with physical and mental disabilities. Active in a number of National Psychological and Rehabilitation Counseling Associations, past president of the Florida Rehabilitation Counseling Association, Chairman twice of the Florida Psychological Legislative Committee, 25 publications, 30 grants as principal investigator and over 110 presentations over the course of career. (ROA Vol. XIV- p. 160-163)

evidenced by an example of the difficulty of the compounded questions posed during cross examination:

> Q. Prosecutor: "In fact, isn't this diagnosis, this whole criteria, based upon -- if you look at the footnote down at the bottom, didn't they adopt that from the 1961 version published by the American Journal of mental Deficiency, which is published by the American Association of mental Deficiency? And it was also based on the ICDA; International Classification of Diseases?"
> A. Dr. Pinkard: "I Don't know. I've got to - - you've got to give me a minute."
> Q. Prosecutor: "I'm sorry I'm talking too fast."
> A. Dr. Pinkard: "That's all right. I'm going to read this footnote." (ROA Vol. XIV- p. 201)

Dr. Pinkard did not testify that he needed any additional information to form his diagnosis. He testified that he only had his testing and interview with Trotter to refer to and that sometimes "no information is diagnostic. And it was in this case". He testified that at times he saw people without having any background information. (ROA Vol. XIV- p. 175,176) Therefore, the absence of background information for evaluation of Trotter was not unusual. At the time of Trotter's evaluation, Dr. Pinkard testified that he made a diagnosis of "inadequate personality" which he considered equivalent to evaluating Trotter's adaptive functioning. (ROA Vol. XIV- p. 177) Although he did not diagnose Trotter as mentally retarded in 1976 because of the erroneously inflated IQ score, Pinkard still found that young Trotter exhibited deficits in his adaptive functioning. He diagnosed Trotter with a disorder "inadequate personality" based upon clinical observations. (ROA Vol. XIV- p. 182)

After adjusting the score on the outdated test as indicated by his research,

reviewing Trotter=s earlier IQ scores, and reviewing results of Dr. Krop=s testing and testimony, Dr. Pinkard opined that Trotter was mentally retarded in 1976 and believes Trotter=s IQ range today to be within 70 to 75 point range. (ROA Vol. XIV, p. 181) Dr. Pinkard testified that his opinion was bolstered by Dr. Krop=s testing of Trotter in young adulthood and along with an abundant amount of information in Trotter=s trial records that supported his conclusion of deficits in his adaptive functioning. (ROA Vol. XIV- p. 182)

The court=s finding that "Dr. Pinkard based his opinion on incomplete data because the defense did not provide him with many of the relevant and pertinent materials regarding Trotter, such as current IQ test scores, school records, and adaptive behavior scales, which may have altered his opinion" is without basis. (Supp. ROA Vol. XXI - p. 2727) Dr. Pinkard=s evaluation and conclusions were based on psychological information that was obtained prior to Trotter reaching the age of 18. Dr. Krop=s information obtained at or near the time of trial was reviewed and supported his conclusion. Since Florida Statutes require the onset of mental retardation to be established from conception to age 18, this is the relevant time period that Dr. Pinkard focused his attention on for review. Dr. Pinkard never testified that he lacked information to base an opinion on, or that review of additional information would have altered his opinion. Trotter=s school records actually support Dr. Pinkard=s testimony. Report cards illustrate that Trotter performed very well when assigned to (EMR) classes for retarded students but performed very poorly outside

this special class setting.[4]

[4] A copy of Mr. Trotter=s report card from Brandon Middle School dated August 26, 1974 demonstrated that shows Trotter=s grades as A=s and B=s in Art, Arithmetic, Social Studies, Arts and Crafts and Vocational courses while enrolled in special Educably Mentally Retarded (EMR) classes. When Mr. Trotter was transferred to regular classes at South East High School in Bradenton his grades plummeted to D=s and F=s in Math, Biology, and in English. In regular classes, Trotter maintained a B in vocational education for one semester and even that score dropped to a C. See: Florida Supreme Court Order Granting Appellee/Respondent=s Motion to Require a Complete Record or in the Alternate to Relinquish Exhibits to Lower Court to Allow Copying, December 19, 2003. Exhibits filed on July 11, 2003 with the Florida Supreme Court.

ARGUMENT II

REQUIREMENT BY FLORIDA STATUTE 921.137(4) THAT MENTAL RETARDATION BE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE IS UNCONSTITUTIONAL AND VIOLATES MR. TROTTER=S DUE PROCESS RIGHTS AS PROTECTED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE TRIAL COURT=S DETERMINATION THAT TROTTER FAILED TO ESTABLISH HIS MENTAL RETARDATION BY CLEAR AND CONVINCING EVIDENCE OR BY A PREPONDERANCE STANDARD IS ERRONEOUS.

In Cooper v. Oklahoma, 517 U.S. 348 (1996), the United States Supreme Court held that an Oklahoma statute which required a criminal defendant to prove by clear and convincing evidence that he was incompetent to stand trial was unconstitutional and violated the defendant=s Due Process rights. The court found that "Oklahoma=s practice of requiring the defendant to prove incompetence by clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is competent." Cooper at 363. The court further reasoned that the clear and convincing standard of proof requirement affects a class of cases where the defendant has already demonstrated that he is more likely than not incompetent and the "consequences of an erroneous determination are dire." Id. At 364. The court further noted that a majority of jurisdictions, in accord with common law, require the defendant to prove incompetence by a mere preponderance of the evidence. Because of these concerns, the Court found the Oklahoma statute unconstitutional.

The same concerns arise in Mr. Trotter=s case under Fla. Stat. '921.137(4) where

it is required to present to the Court "clear and convincing evidence that [Mr. Trotter] has mental retardation". This requirement imposes a significant risk of an erroneous determination as to whether Mr. Trotter is mentally retarded and the consequences to Mr. Trotter are dire and irreversible. As such, the statute violates Mr. Trotter=s Due Process Rights under both the Florida and United States Constitutions.

A. SUFFICIENT EVIDENCE EXISTS TO SUPPORT A DETERMINATION THAT MELVIN TROTTER ESTABLISHED HIS MENTAL RETARDATION PRIOR TO REACHING AGE 18

In denying Trotter=s claim of mental retardation the court held: "Trotter has failed to demonstrate he is mentally retarded by clear and convincing evidence or by a preponderance of the evidence; therefore, it is unnecessary for this Court to address Trotter=s constitutional claims". State v. Burdette, 826 So. 2d 1092, 1094 (Fla. 2d DCA 2002). (Supp. ROA Vol. XXI, p. 2727) If the Statute=s requirement that the onset of mental retardation must occur prior to age 18 is to be given any effect, then the evidence to be reviewed are the tests administered prior to age 18 and Trotter=s adaptive functioning at that point in time. Trotter=s score of 70 on a Wecshler Intelligence Test, Revised, Dr. Pinkard=s diagnosis of "inadequate personality" confirming deficits in adaptive functioning, Trotter=s documented poor performance in regular classes. His referral to special classes and teacher McDowell=s description of him as a "borderline retardate" who was properly labeled and placed in Educably Mentally Retarded (EMR) programs are all clear and convincing evidence of his mental retardation at that point in time. The court=s holding that Trotter failed to meet either the clear and convincing prong

or that he failed to established mental retardation by a preponderance of the evidence during the prescribed statutory onset time period is erroneous.

ARGUMENT III

MITIGATION IN MR. TROTTER=S CASE ESTABLISHES THAT HIS DEATH SENTENCE IS DISPROPORTIONAL, ARBITRARY, AND DISPARATE IN VIOLATION OF HIS RIGHTS UNDER, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Following remand, the jury recommended by a vote of eleven to one that the trial judge impose the death penalty. Defendant=s counsel filed a Sentencing Memorandum on July 23, 1993 and requested consideration of several mitigating factors. (R. - p. 548) One mitigator requested for consideration was Trotter=s "young mental age" . (R. - p.553)

When a factor is proposed as a mitigating circumstance, the court must first determine whether the factor is mitigating in nature. A factor is mitigating in nature if it falls within a statutory category. The court must next determine whether the factor is mitigating under the facts in the case at hand. If a proposed factor falls within a statutory category, it necessarily is mitigating in any case in which it is present. If a proposed factor is mitigating in the case at hand, it must be considered by the sentencer and accorded some weight or given no weight for additional reasons unique to the case. Campbell v. State, 571 So. 2d 415,419 (1990), Trease v. State, 768 So. 2d 1050 (Fla. 2000).

Dr. Krop testified at penalty phase that at 26 years of age "Melvin [Trotter] was

still functioning at around a twelve year old level". (See: Penalty Phase Testimony of Dr. Krop at R. 2064). The record reflects that Trotter scored a full scale IQ of 72 with a verbal of 73 on a Wechsler Adult Intelligence Test (WAIS-R) on November 21, 1986. Using this information, defense psychologist Dr. Bill Mosman testified at the 2002 evidentiary hearing that his computations supported Dr. Krop=s penalty phase testimony and that Trotter=s mental age in 1986 was at 12 years, eight months. (ROA Vol. XV-p.548) Trotter=s low mental age has been reasonably established by the greater weight of the evidence. Campbell, 571 So. 2d at 419.

Judge Eastmore=s Sentencing Order dated July 23, 1993 (R.- p. 543) reflects that he found the following:

Aggravators

1. The murder was committed while on community control.
2. Trotter had previously been convicted of a prior violent felony.
3. The crime was committed during the commission of a robbery and was for pecuniary gain (these two were merged).
4. The murder was especially wicked, evil, atrocious, and cruel.

Statutory Mitigators

1. Trotter was under the influence of extreme mental and emotional disturbance.
2. Trotter=s capacity was substantially impaired

Non-Statutory Mitigators

1. Trotter has below average IQ.
2. Has both family and developmental problems.
3. Disadvantaged background
4. May have suffered from frontal lobe brain disorder.
5. Trotter is Remorseful.

6. The court has considered the other non-statutory factors presented by the Defendant. (R. - p.546)

A death sentence was imposed and the Florida Supreme Court affirmed the imposition of the death sentence on appeal. *See*: Trotter v. State, 690 So.2d 1234 (Fla. 1997). The age of the defendant at the time of the crime is a Statutory Mitigator as provided in Fla. Stat. ' 921.141(6) (g) (1997) and that factor was proposed to the trial court for consideration. (R. - 553) However, the trial court never identified this mitigator as being proposed, considered or weighed in its= sentencing order. (R. - p. 546) although Dr. Krop=s penalty phase testimony was uncontroverted.

The concept of "mental age" is part of Florida case law. The phrase Amental age@ was included in Florida jurisprudence well before the enactment of Fla. Stat. '90.803(23) (a) in 1985. See: Schaeper v. J.M. Fields, Inc., 362 So. 2d 350, 350 (Fla. 1st DCA 1978) (describing plaintiff in false arrest action as "a 14 year old Mongoloid child with the mental age of a four-year-old...") Corbett v. State, 602 So. 2d 1240, 1242 (Fla. 1992) (noting psychologist=s testimony that defendant Ahad a mental age of about fourteen@).

In appealing the imposition of the death sentence, the Defendant filed an Initial Brief to the Florida Supreme Court on September 30, 1994 and challenged the imposition of the death penalty based upon deficiencies in the trial court=s sentencing order as mandated by this Court in Campbell v. State, 571 So. 2d 415 (1990). Counsel challenged the court=s failure to assign weights to mitigation established and objected to lumping all

non-statutory mitigation proffered into paragraph (6) as noted above. This Court has interpreted Campbell as requiring individualized weighing of aggravating and mitigating factors. Hurst v. State, 819 So. 2d 689,697 (Fla. 2002) Sentencing orders have been deemed insufficient due, in part, to the trial court=s failure to assign individualized weights to aggravators and mitigators. Woodel v. State, 804 So. 2d 316,327 (Fla. 2001) The requirement to assign a weight to each aggravator and mitigator found stems from and advances, the constitutional requirement for individualized sentencing that compelled the Florida Supreme Court to provide the Campbell guidelines in the first place. Campbell, 571 So. 2d at 420. The claim raised by Trotter in his appeal challenged the sufficiency of the sentencing order and noted its ambiguity.

The Eighth and Fourteenth Amendments require that trial courts consider "as a mitigating factor, any aspect of a defendant=s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 , 98 S.Ct. 2954 (1978) The Supreme Court held that the trial court may not "determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration." Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. at 869 but this is precisely what the trial court did in Mr. Trotter=s case. On appeal, this Court did not specifically address Trotter=s claim that the trial court=s order was deficient, and merely issued a general denial of dismissal stating "We find the remainder of Trotter=s present claims to be without merit". Trotter, 690 So.2d. at 1237 The trial court=s order does

indicate that the Statutory Mitigator "Age"("young mental age") was ever considered and weighed in Trotter=s case.

A. STANDARD OF REVIEW

Proportionality is a question of constitutional magnitude and implicates the need for a unified precedent. Accordingly, the appropriate standard of review is **de novo**. See e.g. Stephens v. State, 748 So.2d 1028, 1032-33 (Fla.2000).

This Court reviews each death sentence to ensure that the death penalty is reserved for only the most aggravated and least mitigated crimes.

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

State v. Dixon, 283 So.2d 1, 10 (Fla.1973). Proportionality review Arequires a discrete analysis of the facts@, Aof the underlying basis for each aggravator and mitigator@, and Arequires this Court to consider the totality of the circumstances in a case and to compare the case with other capital cases@. Terry v. State, 668 So.2d 954, 965 (Fla.1996); Urbin v. State, 714 So.2d 411, 416 (Fla. 1998); Voorhees v. State, 699 So.2d 602, 614 (Fla.1997). The Probable Cause Report form in Case No. 85-000463 March 11, 1985 reflects the underlying basis for Trotter=s prior violent felony conviction. Trotter

assisted Danny Williams in forcing open a locked door and entered the room of one of William=s boarding house neighbors (Edie Little) without permission. Trotter jumped on top of Mr. Little who was lying in bed watching television, used the weight of his body and bed coverings to hold Little down. During this time, Williams went through Little=s clothing and took $90 in currency from inside the pocket of Little=s pants that were on a chair inside the room. (R.2087) Trotter was on Community Control for this offense at the time this crime was committed. A review of the totality of the circumstances and the evidence established throughout Mr. Trotter=s death penalty proceedings and post conviction proceedings prove that his was not one of the most aggravated and least mitigated crimes. Jones v. State, 705 So.2d 1364, 1366 (Fla.1998).

During the evidentiary hearing at post-conviction stage, Trotter presented the testimony of psychologist, Dr. Bill Mosman that supports "age" as a statutory mitigator in his case. Dr. Mosman testified that computations from Wecshler Intelligence Tests taken by Trotter in 1986 revealed his mental age to be at 12 years, 8 months near the time of crime. (ROA Vol. XV- p.548)

Trotter=s niece, Gladys Casimir testified for the first time at evidentiary hearing in this case. She testified that Trotter never had a bank account; his money was always managed by others who also handled all decision making. (ROA Vol. VIII - p. 1465) This testimony confirms Trotter=s immaturity or "young mental Age" and inability to function individually. (ROA. Vol. VIII - p. 1466)

Another niece, Marsha Polite also testified for the first time in this case at Trotter=s

evidentiary hearing. (ROA. Vol. VIII- p. 1472) She also described Trotter as unable to pay his own bills and function independently. After Trotter=s wife abandoned him, she testified that Trotter could not live alone and moved in with her sister. (ROA. Vol. VIII - p. 1465) She described Mr. Trotter as having a very submissive personality and someone that was never able to speak up for himself or stand up to anyone. (ROA. Vol. VIII - p. 1466) In Mann v. State, 420 So. 2d 578, 581(Fla. 1982), this Court held that in preparing an order sentencing an individual to death "a trial court=s findings must be of unmistakable clarity". The trial court=s sentencing order in Trotter=s case did not meet this requirement as it does not state the basis for the trial court=s rejection of "age" as a proposed statutory mitigator. Nonetheless, expert testimony in the penalty phase from psychologist, Dr. Krop and from psychologist, Dr. Mosman and two lay witnesses at Trotter=s 2002 Evidentiary Hearing establish that "young mental age" is an appropriate mitigating circumstance established by the evidence in this case. In discussing "age" as statutory mitigation this Court has stated that "if it is to be accorded any significant weight, it must be linked with some other characteristic of the defendant such as immaturity or senility". Echols v. State, 484 So. 2d 568 (Fla. 1985) Trotter has met that burden.

CONCLUSION AND RELIEF SOUGHT

There can be no question that over the last 18 years on death row Mr. Trotter has been in a very structured environment. As a result, his intelligence test scores have improved. This circumstance cannot change the fact that in 1974 his IQ was recorded at

70 and Dr. Pinkard diagnosed him with inadequate personality. It cannot change the fact that in 2002, Dr. Pinkard opined that the boy he examined in 1974 was retarded then and therefore is retarded now. Based on the foregoing, this Court should find that Melvin Trotter established his mental retardation existed prior to age 18, and order that his conviction and sentence be vacated and that a life sentence be imposed.

Dr. Antolin M. Llorente, Ph.D. summarized his evaluation of Mr. Trotter within a reasonable degree of scientific certainty stating his impression that:

> "Mr. Trotter suffers from subaverage intellect consistent with an overall intellectual level in the borderline range of cognitive abilities. His overall cognitive profile is marked by deficits in working memory and information processing, as well as delays in verbal and perceptual reasoning. Superimposed upon his cognitive delays, he also suffers from a debilitating learning disorder and moderate to severe adaptive delays. His difficulties in adaptation and cognition were in all likelihood present before the age of 18 years. He also suffers from organic brain damage (static encephalopathy can not be ruled-out) and moderate-to-severe depressive symptoms". (ROA Vol. XXI - p. 2809

When determining whether the death sentence is proportional in a particular case, this Court is required to consider the totality of circumstances surrounding the case and compare it to other capital cases. Sexton v. State 885 So. 2d 923 (Fla. 2000) Brown v. State, 721 So. 2d 274 (Fla. 1998). Considering all evidence in this record today and comparing this case to other capital cases with similar aggravating and mitigating circumstances demonstrates that Trotter=s sentence of death is not proportional and a life sentence should be imposed.

Carol C. Rodriguez
Florida Bar No. 0931720
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
Telephone 813-740-3544
Fax: 813-740-3554
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Supplemental Brief of the Appellant has been furnished by U.S. Mail, first class postage prepaid to, Robert J. Landry, Assistant Attorney General, Office of the Attorney General, Westwood Building, Seventh Floor, 2002 North Lois Avenue, Tampa, Florida 33607-7013**,** Douglas E. Crow, Specially Designated Assistant State Attorney, Office of the State Attorney, P.O. Box 5028, Clearwater, Florida 33758,Melvin Trotter**,** DOC#: 573461,Union Correctional Institution,7819 NW 228th Street, Raiford, Florida 32026 on this ___day of September, 2005.

_____

Carol C. Rodriguez
Florida Bar No. 0931720
Assistant CCRC
CAPITAL COLLATERAL REGIONAL COUNSEL-MIDDLE
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
Telephone: 813-740-3544
Fax: 813-740-3554
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Supplemental Brief was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

Carol C. Rodriguez
Florida Bar No. 0931720
Assistant CCRC
CAPITAL COLLATERAL REGIONAL COUNSEL-MIDDLE
3801 Corporex Park Drive,Suite 210
Tampa, Florida 33619
Telephone: 813-740-3544
Fax: 813-740-3554
Counsel for Appellant