IN THE SUPREME COURT OF FLORIDA

MELVIN TROTTER,

Appellant,

v. CASE NO. SC03-735

STATE OF FLORIDA,

Appellee.
_____/

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

_____

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

(a) Procedural History:

Melvin Trotter was indicted and convicted for the June 16, 1985 first-degree murder and robbery of seventy-year-old Virgie Langford. Following a nine-to-three jury death recommendation the trial court imposed a sentence of death. This Court summarized the facts of the case as follows, affirmed the convictions but remanded for a new penalty phase. Trotter v. State, 576 So. 2d 691, 692 (Fla. 1990):

> On 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 back of the store. She had suffered a large abdominal wound 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.
>
> The jury found Trotter guilty of robbery with a deadly weapon and first-degree murder, and recommended the death penalty by a nine-to-three vote. The trial court found four aggravating circumstances n2 and four mitigating circumstances. n3 Finding the aggravating circumstances outweighing the mitigating circumstances, the court sentenced Trotter to death.
>
> n2 The crime was committed while under sentence of imprisonment; the defendant had previously been convicted of a felony involving use or threat of violence; the crime was committed while engaged in the commission of a robbery; and the crime was especially wicked, evil, atrocious, and cruel.

> n3 Defendant was under the influence of extreme mental and emotional disturbance; the capacity of the defendant was substantially impaired; the defendant has a below average I.Q. and a history of family and developmental problems; and remorse.

In the resentencing proceeding the defense called three mental health experts, Dr. Krop, Dr. Wood, and Dr. Maher, as well as a county inspector for foster care homes, Priscilla Ridall, and Detective LaGasse, as witnesses . The jury again recommended death, but by an eleven-to-one vote. The trial court found four aggravating factors, the two statutory mental mitigators and several non-statutory mitigators. This Court affirmed the imposition of a sentence of death. Trotter v. State, 690 So. 2d 1234 (Fla. 1996), cert. den., 522 U.S. 876 (1997). As noted by footnote 7 of this Court's opinion, the non-statutory mitigating circumstances found by the trial court included:

> n7 Trotter has a below average I.Q., has both family and developmental problems, and has a disadvantaged background; Trotter may have suffered from a frontal lobe brain disorder; the defendant is remorseful; and other nonstatutory factors.
>
> (690 So. 2d at 1236).

Trotter subsequently sought postconviction relief and following an evidentiary hearing, the trial court on March 20, 2003 entered a lengthy order denying Trotter's application for postconviction relief. Trotter appealed. Trotter also filed a

successive 3.851 Motion for Postconviction Relief – Motion for Determination of Mental Retardation as a Bar to Execution on November 30, 2004. (R XIX, 2349-2449). On December 17, 2004, this Court entered a Clarified Order Relinquishing Jurisdiction for Determination of Mental Retardation, directing that following a determination of mental retardation pursuant to Rule 3.203 the case be returned to this Court for further proceedings (R XIX, 2462). The lower court held a telephonic status conference on January 13, 2005 (R XX, 2612-2629). Both sides concurred that the court could take judicial notice of the prior postconviction proceedings in 2002 (R XX, 2616). The court conducted another status hearing on April 8, 2005 (R XX, 2630-2646). The defense asked the court to accept Dr. Llorente designated as a defense expert and the State selected Dr. Gamache (R XX, 2634, 2638).

On May 12, 2005, the defense filed a motion to file written reports in lieu of live witness testimony for evidentiary hearing (R XX, 2651-2652). On May 17, 2005, the lower court entered its Order that the hearing scheduled for May 12 and May 13 would not be held, that the State should provide a copy of their expert's report to defense counsel by May 20, 2005 and the parties should file final briefs and expert reports by May 27, 2005. The court noted that the State would not stipulate to the substance of Dr. Llorente's report and asserted a continuing

objection to hearsay contained in the report. The State stipulated to Dr. Llorente's conclusion that Trotter is not mentally retarded (R XXI, 2669-2671). The defense filed its closing argument (R XXI, 2672-2724) and the State filed its Argument (R XXI, 2729-2766). On July 8, 2005, the court entered its Order determining that Trotter is not mentally retarded (R XXI, 2767-2789).

(b) The Trial Court Order:

Following this Court's Order of December 17, 2004, the trial court considered Appellant's successive 3.851 Motion for Postconviction Relief for Determination of Mental Retardation as a Bar to Execution filed by Defendant on February 24, 2005. The court determined that Mr. Trotter is not mentally retarded (R XXI, 2767-2789). The court summarized the testimony and reports of the experts submitted:

(1) Dr. Calvin Pinkard screened Trotter in 1976 and administered the WISC; he opined that Trotter's overall IQ score of 88 on the WISC may have been artificially inflated by approximately eight points and if reduced would place Trotter in the mild mental retardation category. Dr. Pinkard's son is employed as an attorney by CCRC-M. (R XXI, 2774-2775).

(2) Dr. Harry Krop, the mental health expert retained to assist the defense in Trotter's trial and resentencing proceedings, administered the WAIS-R and determined that

Trotter's IQ was 72. He opined that Trotter was functioning in the borderline range of intellectual ability, but he was not mentally retarded. (R XXI, 2775).

(3) Dr. Bill Mosman, retained by CCRC-M, administered a WAIS-III to Trotter in 2001, and Trotter achieved a full score IQ of 78. Dr. Mosman did not perform any adaptive functioning tests because a full score IQ of 78 is not indicative of mental retardation. (R XXI, 2776).

(4) Dr. Sidney J. Merin testified for the State at Trotter's prior proceedings and based on his involvement in this case and review of other testing performed on Trotter concluded that Trotter is not mentally retarded, nor was he at the time of the crime. (R XXI, 2776-2777).

(5) Dr. Antolin Llorente was retained by CCRC-M for an evaluation of Trotter, administered the WAIS-III and Trotter obtained a full score IQ of 78. He opined that Trotter was not in the mentally retarded range and does not meet the diagnostic criteria for mental retardation set forth by American Association of Mental Retardation. Moreover, Trotter exhibited certain strengths which are not consistent with mental retardation. (R XXI, 2778).

(6) Dr. Michael Gamache was appointed as an expert for the State to examine Trotter pursuant to Rule 3.203(c)(2). Dr. Gamache

administered the WAIS-III in April 2005 and Trotter obtained a full score IQ of 91. Additionally, a number of individual subtest scores placed Trotter in the high average range, which is not typical (or possible) for those with a diagnosis of mental retardation. Dr. Gamache attributed Trotter's lower level of functioning ability more to problems in developmental history with an impoverished background and lack of formal education than to subaverage general intellectual functioning. (R XXI, 2779).

After summarizing the testimony and evidence the court found:

> . . . the law places the burden of proof on Trotter to demonstrate that he has subaverage intellectual functioning. As set forth below, even if the Court were to use the lesser burden of proof urged by the defense (which this court does not find is the correct standard of proof), Trotter has failed to meet this prong. (R XXI, 2781).

The trial court then explained that the "adjustment" of Dr. Pinkard's score of 88 to 80 did not qualify Trotter for relief since borderline mental retardation is not the equivalent to mental retardation, and Dr. Pinkard could not account for the discrepancy in the test results between the WISC and WISC-R (R XXI, 2781-2782). Furthermore, various experts (Krop, Merin, Gamache) noted Trotter's scoring in the average range on certain subtests on the intelligence tests. Dr. Gamache observed that

Trotter's score on the picture completion test measuring the ability to perceive visual detail was so high that he likened it "at a level associated with superior intelligence. Had all of his subtest scores been at this level he would have achieved a total IQ of approximately 120." (R XXI, 2783).

Finally, since 2001 Trotter has taken the WAIS-III four times and scored above the mentally retarded range each time –- well above with scores of 78, 79, 78 and 91. Even Trotter's mental health experts agreed that range was inconsistent with a finding of mental retardation. Dr. Llorente agreed that Trotter does not meet the current criteria for mental retardation. (R XXI, 2783-2784).

The trial court also found that Appellant failed to satisfy the onset by age eighteen prong, finding that Dr. Pinkard's opinion was unreliable and incomplete and that Dr. Llorente's findings were also insufficient – Llorente even explained that Trotter's background and not retardation might account for the low test scores received on the initial tests. Dr. Gamache reached a similar conclusion. (R XXI, 2784-2785).

As to the adaptive behavior prong, the lower court found that Trotter also failed to establish this prong. (R XXI, 2785-87). Dr. Pinkard in his 1976 evaluation noted that Trotter's emotional development was normal and mature for a youngster his age. In contrast Dr. Krop had reviewed a plethora of Trotter's

educational records including a twelve-page adaptive behavior scale prepared by one of Trotter's teachers assessing Trotter's condition in about 75 – 100 areas. Upon review of this and other results, Dr. Krop opined that Trotter was not mentally retarded. The court noted with particular interest defense expert Dr. Llorente's opinion concerning Trotter's artistic abilities – that the overall wealth of information in conjunction with his overall profile were not consistent with mental retardation. (R XXI, 2785-2786). Dr. Gamache also review several documents including school records and concluded that Trotter's adaptive behavior "has been consistent with his measured level of intellect. He is doing so effectively at the present time and there is no reason why historically he may not have been capable of doing so." (R XXI, 2787).

Last, the lower court felt compelled to comment:

> Finally, the Court would be remiss in failing to find that the planning and commission of this crime belie any notion that Trotter suffers deficits in adaptive functioning to the degree necessary to support a finding of mental retardation. After receiving Miranda warnings, Trotter confessed that he went to Virgie Langford's grocery store for the purpose of committing a robbery and waited to enter the store until a customer left. When he entered the store, he went behind the cash register to rob her of cash and food stamps. After taking the money, he encountered Virgie Langford in the store, and a struggle ensued during which Trotter stabbed her several times with a large butcher knife. Virgie

> Langford fell to the floor, and Trotter left her there and fled. He later sold the food stamps for rock cocaine.
>
> Further, Trotter confessed to Detective Van Fleet that he killed Virgie Langford because she had seen him and could identify him. In refuting Trotter's assertion that he lacked the ability to confirm [sic] his conduct to the law, Judge Eastmoore specifically found as follows:
>
> > [Trotter] was observed viewing the store before entering it. There is no evidence that he was under the influence of any drug or acting in a bizarre manner. He was stable enough to ask his girlfriend to provide an alibi for him. He was obviously aware of the wrongful nature of his act.
>
> (R XXI, 2787-2788).

Additionally, the lower court determined that it was unnecessary to address Trotter's claim that the statutory provision requiring Appellant to demonstrate mental retardation by clear and convincing evidence was unconstitutional because violative of due process since Trotter failed to establish retardation either by clear and convincing evidence or by a preponderance (R XXI, 2773, 2788). The court clearly indicated its view that the lesser burden of proof suggested by the defense was not the correct standard. (R XXI, 2781).

SUMMARY OF THE ARGUMENT

Issue I: Rule 3.203 provides that a defendant's mental retardation is a bar to the imposition of the death penalty. As used in the rule 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 overwhelming testimony and opinion of experts is that Trotter's intellectual functioning as evidenced by four consecutive IQ scores of 78 or higher would preclude his being classified as mentally retarded. Similarly, Drs. Gamache, Merin and Krop determined Trotter did not satisfy either the intellectual deficiency or adaptive functioning prongs for a retardation diagnosis. The trial court correctly made credibility determinations as to the witnesses who presented live testimony and the finding that Trotter is not mentally retarded is fully supported by the evidence.

Issue II: The lower court determined that it was unnecessary to decide the constitutional question of whether the clear and convincing standard of F.S. 921.137(4) violates due process of law since Trotter was not able to demonstrate mental retardation by either a preponderance of evidence or by a clear and convincing evidence standard. It is unnecessary to reach the constitutional question but if the Court does so, there is no

constitutional violation.

Issue III: Appellant's attempt to present ab initio an argument on proportionality of the death penalty is improper. Proportionality review is a function of this Court's direct review responsibility and has already been done in Trotter's case. See Patton v. State, 878 So. 2d 368 (Fla. 2004). It is procedurally barred from asserting as a collateral challenge and the attempt at review here is also improper on this appeal since not presented below.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT'S DETERMINATION THAT APPELLANT HAS FAILED TO SATISFY HIS BURDEN TO SHOW THAT HE IS MENTALLY RETARDED IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE. (RESTATED).

Standard of Review:

The trial court's determination that Melvin Trotter is not mentally retarded is a factual finding. Consequently, the standard of appellate review is whether there is competent substantial evidence to support that factual determination. See Stephens v. State, 748 So. 2d 1028, 1031 (Fla. 1999)("The State takes the position, and we agree, that the 'competent substantial evidence' standard announced in Grossman applies to the trial court's *factual findings*."); Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001); Jones v. State, 709 So. 2d 512, 514-515 (Fla. 1998)("this Court, as an appellate body, has no authority to substitute its view of the facts for that of the trial judge when competent evidence exists to support the trial judge's conclusion."); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997)(as long as the trial court's findings are supported by competent substantial evidence, Supreme Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence).

Florida Statute and Rule:

Florida Statute 921.137(1) provides 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.

Florida Rule of Criminal Procedure 3.203(b) provides:

> As used in this rule, 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 rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by 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 rule, 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 statutory requirement in F.S. 921.137 that the defendant be shown to "have" mental retardation indicates that these impairments of intellectual and adaptive functioning must be demonstrated as currently existing as well as having existed prior to adulthood. Since retardation is being defined for the purpose of barring imposition of the death penalty, it is appropriate that the statute requires retardation to be a relatively permanent and static disability rather than an intermittent condition. This approach is consistent with the mandate of Atkins v. Virginia, 536 U.S. 304 (2002) that the individual states be allowed to develop their own definitions of retardation.

(A) Intellectual Functioning:

The testimony and evidence adduced before Judge Owens overwhelmingly demonstrates that Trotter has totally failed to show that he has satisfied the subaverage intellectual functioning prong. Despite extensive examinations over the past thirty-one years no expert has concluded that Trotter is mentally retarded either under currently applicable diagnostic standards or the definitions. Five experts – three retained by the defense – all concluded that his level of intellectual functioning as is now evidenced by four consecutive IQ scores of

78 or higher would preclude his being classified as mentally retarded.

(1) Dr. Krop testified that in his evaluation of Trotter he was not retarded. (R XV, 356-357). Krop further stated that with Trotter's score of 78 on Mosman's testing he would not qualify as mentally retarded under current standards. (R XV, 398).

(2) Dr. Pinkard on cross-examination acknowledged that an IQ of 78 is not normally considered retarded in our current standards and that IQ of 80 which Pinkard had found on the current standards would exclude Trotter as retarded. (R XIV, 191-192). An IQ of 78 doesn't fit into the retardation category. (R XIV, 212).

(3) Defense witness Dr. Mosman agreed that "there's no way that someone with a 78 IQ could be diagnosed as retarded," that as we stand now Trotter cannot be classified as retarded, and that he did not do any adaptive behavior testing because "the IQ of 78 does not indicate or implicate the mental retardation." (R XVII, 695).

(4) Dr. Merin testified that an IQ of 78 would not qualify as mental retardation currently. (R XVIII, 810).

(5) Dr. Llorente's report declares "it is my opinion with a reasonable degree of certainty that Mr. Trotter does not meet the diagnostic criteria for mental retardation as set forth by

the AAMR" (emphasis supplied)(R XXI, 2710, page 13 of report). Llorente conceded that Trotter was "not within the mentally retarded range."

(6) Dr. Gamache tested Trotter's IQ to be 91; even taking into account the practice effect which might reduce the score 3.2 to 5.7 points to as low as 86, still well above the range associated with mental retardation. (R XXI, 2760). Indeed, on one of the subtests – the picture completion test, "Trotter's performance was well above the mean, in fact at a level associated with superior intelligence. Had all of his subtest scores been at this level he would have achieved a total IQ of approximately 120." (R XXI, 2756; full report at 2750-2762).

Appellee notes that in addition to opinions offered by Pinkard, Merin, Mosman, Llorente and Gamache, Mr. Trotter also was assessed by Dr. Blandino who administered the WAIS-III in November 2004 and achieved an IQ score of 79; he obtained verbal and performance IQ scores of 82 and 80. The subtests scores ranged from average to borderline on the WAIS-III. No subtest score fell in the impaired range. (R XXI, 2701).

The trial court was notably impressed with Dr. Gamache's report. The report of Dr. Gamache noted that on his examination Trotter did not display any significant impairment of comprehension. (R XXI, 2752). Dr. Gamache reviewed all provided records for information pertaining to Trotter's level

of intellectual functioning, specifically records of standardized intelligence testing; reviewed records provided relevant to Trotter's adaptive functioning, particularly records pertaining to evidence of personal independence and social responsibility; administered a standardized intelligence test (WAIS-III) to directly assess his level of intellectual functioning; and interviewed Trotter regarding the effectiveness or degree to which he currently maintains personal independence and social responsibility consistent with his present age and setting. (R XXI, 2752-2753). Dr. Gamache determined that each of the IQ/index scores fall within the average to low average range, with his strongest performance occurring on measures of intelligence less dependent on language related skills such as the ability to perceive and recognize important visual information and the ability to make sense of visual-spatial design and organization. The scores related to these abilities were above average in the range of 103 to 105. (R XXI, 2755). Dr. Gamache further noted that although less adept at language based measures (given his limited formal education) he nevertheless performed well within the normal or expected range – four index scores or IQ scores between 84 and 91. Even taking into account some potential for measurement error and inflation of scores, "there is not a single individual index score or intelligence quotient that would be close to the range typically

associated with mental retardation or in the range specified in the appropriate statutes and rules related to the determination of mental retardation in capital cases in Florida." (R XXI, 2755). Dr. Gamache found that based on current testing using the full scale IQ score as the best single measure of Trotter's overall intellectual abilities at the present time, his score of 91 is in the average range and there is a ninety percent probability based on the standard error of measurement for this score that Trotter's full scale intelligence quotient is somewhere in the range of 88 – 95. (R XXI, 2755).

As to Appellant's criticism that Trotter's high score is attributable to practice effect, Dr. Gamache reported that he "specifically inquired" and was told by CCRC that Trotter had not been recently administered the WAIS-II by defense experts. Only subsequent to the examination did he learn that Trotter had been tested only a week or two earlier by an expert (Llorente). Had Dr. Gamache been properly informed of this he could have used an alternative intelligence test to avoid practice effects. The potential inflationary range would have been 3.2 to 5.7 points for full scale IQ and "Trotter's performance on this testing might have resulted in a full scale IQ as low as 86, which is still well above the range associated with mental retardation." (R XXI, 2760). Moreover, while practice effect might have inflated the score, the presence of a third party

observer insisted upon by defense counsel can heighten self-awareness and self-consciousness and have a detrimental effect on test performance. Thus, he opined that the current test administration is likely to be a "very accurate reflection of Mr. Trotter's true intellectual abilities." (R XXI, 2760).

Dr. Merin opined that Trotter was not retarded now or at the time of the crime. (R XVIII, 808-809). Merin further explained that if there is significant scatter between and among the subtests of a given examination that would represent a better measure of the strengths and weaknesses and to some extent the potential of the individual rather than the mathematically-determined IQ score. (R XVIII, 811). Merin's view was confirmed additionally by Dr. Gamache's observation that individuals meeting the diagnostic criteria for mental retardation have a "flat line" profile of subtest performance, i.e., they tend to perform in consistently poor fashion across all subtests. Trotter's performance, in contrast, "is quantitatively and qualitatively inconsistent with a diagnosis of mental retardation." "Trotter displays intellectual strength that if consistently displayed across all subtests would place him in the high average to superior range of intelligence." (R XXI, 2760-2761). This is consistent also with the view of Dr. Llorente. (R XXI, 2710).

(B) <u>Adaptive Functioning</u>:

Since Trotter has failed to establish subaverage intellectual functioning, it would not be necessary to consider the adaptive functioning prong, but on this the weight of expert opinion amply supports the conclusion that Trotter also failed to satisfy this criterion. As the trial court noted, Dr. Pinkard never reviewed any of Trotter's other school records and only briefly evaluated him, finding in 1976 that his emotional development was normal and mature for his age (R XIV, 195-196). Dr. Mosman did not do adaptive functioning testing, recognizing it would be pointless given his IQ scoring did not implicate retardation. Dr. Krop testified at length; he reviewed a plethora of educational records including a twelve-page adaptive behavior scale prepared by a teacher in the seventh grade covering 75 – 100 areas. (R XV, 358). Krop interviewed Appellant's sister and Mrs. Ellington. Trotter got a job at Tropicana and was working, showing his adaptability.

The trial court acknowledged Dr. Llorente's concession regarding Appellant's artistic abilities:

> Finally, although individuals with mental retardation are quite capable of having isolated cognitive strengths, Mr. Trotter's drawing, verbal abstraction capabilities, perceptual reasoning, and overall wealth of information, in conjunction with his overall profile, in my opinion, are not consistent with mental retardation.
>
> (R XXI, 2710, p.13 of report).

Dr. Gamache in addition to conducting an evaluation of Trotter's intellectual abilities also examined Trotter's adaptive behavior. He described Trotter's capacity in eleven areas.

(1) Communication — no significant impairment. Additionally, historical records provide indication that in the sixth grade Trotter showed dramatic improvements in reading, spelling and arithmetic and as an adult Trotter continued to improve his reading and writing skill substantially. Gamache added "Such rapid and significant improvement is not characteristic of mental retardation." (R XXI, 2757).

(2) Self-Care – There was no reference in the records that Trotter was neglectful in self-care activities prior to incarceration and he takes advantage of grooming and hygiene activities in prison.

(3) Home Living – Although functioning in a structured and limited environment, there is no indication that his cell and living space are chaotic and disorganized.

(4) Social – Trotter indicates no impairment in this regard. He engages in conversation with inmates and detention staff, is able to follow the disciplinary rules, had been described by teachers as "a pleasure, cooperative and cheerful."

(5) Use of Community Resources – He is aware of the law

library and knows what to do if he wanted to use it; he meets with his attorneys as necessary. He knows the procedure for filing grievances if he feels mistreated by the detention staff (but he feels he is treated reasonably well). (R XXI, 2758).

(6) Self-Direction – Trotter pursues things he enjoys such as painting, reading and watching TV. He formulates objectives and goals such as working with attorneys to overturn his sentence and thinking about what he would do if released from prison.

(7) Functional Academic Skills – He has attempted to educate himself by watching educational television shows such as PBS and asks questions of other inmates.

(8) Work – Trotter indicated that he would pursue such opportunities if available. Previously he worked mainly in labor related positions at the Tropicana factory. He indicated that he was capable of filling out job applications, capable of understanding job requirements and complying with them.

(9) Leisure – Trotter routinely engages in painting, maintains a supply of paint and canvasses; regularly plays basketball and watches television (home repair and nature programming).

(10) Health – Trotter is in good health but overweight and has no difficulty in seeking medical care when appropriate. (R

XXI, 2759).

(11) Personal Safety – Trotter reports no difficulties with other inmates and detention staff. He is attentive to potential risk such as conflict with other inmates, recognizes the need to be polite and respectful to detention staff and to avoid association with short-tempered inmates. He tries not to be careless in physical activities that could cause him injuries. (R XXI, 2760).

Dr. Gamache concluded in his report:

> Both current and historical evidence that is available clearly supports the opinion that Mr. Trotter's adaptive behavior has been entirely consistent with his measured level of intellect. There is no indication that he is substantially impaired in his personal independence or in his ability to engage in responsible self-care activities consistent with his age, cultural group and community. He is doing so effectively at the present time and there is no reason why historically he would not have been capable of doing so. (R XXI, 2761).

The trial court did not err in finding:

> Upon review of Dr. Gamache's report, the Court finds that his findings are well supported and documented and consistent with the findings presented by Dr. Krop and Dr. Merin at the 2002 evidentiary hearing. The Court finds that Trotter has failed to establish this prong. (R XXI, 2787).

A determination of mental retardation requires that the

defense establish all three criterion – subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and onset by age eighteen. The failure to either of these prongs renders unnecessary consideration of the others. The overwhelming expert testimony established that Trotter does not have subaverage general intellectual functioning or deficits in adaptive behavior. The inquiry need proceed no further.

(C) Onset by Age 18:

Trotter also failed to establish the onset by age 18 prong. As the lower court noted (R XXI, 2784), Dr. Gamache found in his report:

> He does not suffer from significantly subaverage general intellectual functioning. In fact, the current psychometric results are entirely inconsistent with this even being a possibility. Mr. Trotter is intellectually capable, tests in the average range in terms of his overall intelligence and displays adaptive behaviors that are consistent with his psychometrically measured level of intelligence. I believe that it is reasonable to conclude that any doubts or concerns about his level of intellectual functioning raised in testimony elicited during earlier stages of his case are adequately explained by Mr. Trotter's developmental history. Mr. Trotter is clearly a case of someone who came from an impoverished environment that did not provide early opportunities for enrichment, intellectual stimulation, facilitation of intellectual development, acquisition of knowledge and formal education. Mr.

> Trotter's case is very unusual in that because of family circumstances and neglect he did not even have a chance to begin formal education until he was nine years of age. Because of this primitive and deficient early environment and poor assessment of his abilities when he was young, Mr. Trotter was placed in classes for slow learners and handicapped students and did not, even then, have the opportunity to develop his full intellectual potential. <u>These are not the hallmark characteristics of a mentally retarded child, but instead the circumstances and consequences of being raised during formative years in a primitive, impoverished, neglectful and deficient environment.</u> Mr. Trotter has now demonstrated that he does not suffer a substantial intellectual limit on his capacities, as typically exists with mental retardation. Now that he has had the opportunity to acquire knowledge, even through informal means and without further academic exposure, he has done so effectively and now functions intellectually well within the average range.
>
> (emphasis supplied)(R XXI, 2761).

Dr. Llorente provided a similar conclusion:

> In contrast, arguing against a diagnosis of MR is the fact that he was enrolled in school at the age of 9 years, and such a delay in enrollment clearly affected his development, as well as his performance on the intellectual tests he was administered for placement as a child, most likely dampening his scores, and may have led to a mislabel of placement in EMR (aside from scoring errors). His past and current intellectual scores also present problems because they have consistently varied from the impaired to the low average range, increasing with time.
>
> (R XXI, 2709-

2710).

Appellant argues that the lower court erred in rejecting the testimony of Dr. Pinkard. Judge Owens noted that Pinkard apparently had relied on findings in Dr. Mosman's affidavit to conclude that Trotter had deficits in adaptive functioning. In footnote 23 of its Order the court noted that Pinkard did not conduct an independent review of Trotter's school records or progress notes to assess adaptive functioning and that Pinkard acknowledged that his son is employed as an attorney for CCRC-M. (R XXI, 2775; see also R XIV, 205-207, 223). The court also noted in footnote 55 that Pinkard had referred to the DSM-II classification as "mild mental retardation" as opposed to the correct terminology of "borderline mental retardation." (R XXI, 2781). The court noted that Pinkard struggled to account for the discrepancy in test results (even taking into account the Flynn effect) and finally admitted that he could not account for the higher score. (R XXI, 2782; see also R XIV, 221-223). The lower court seriously questioned Pinkard's opinion and found it unreliable because (1) he was completely unable to account for the differences in the test results between the WISC and the WISC-R, (2) Pinkard struggled and seemed unable to answer some questions during cross-examination, and (3) he 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. (R XXI, 2782; see also R XIV, 206-214).[1]

The law is clear that it is for the trial court not this Court to evaluate the credibility of witnesses since only that court observes and hears their testimony. See Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998) ("It is the province of the trier of fact to determine the credibility of witnesses and resolve conflicts. [citations omitted]. Sitting as the trier of fact in this case, the trial judge had the superior vantage

[1]Dr. Pinkard acknowledged during his cross-examination that the mental age concept has not been used for many years. The Wechsler test used a different approach and abandoned the mental age approach. (R XIV, 189). If the WISC score of 88 were accurate that would not be a score of retardation. (R XIV, 189-190). Pinkard conceded that you cannot have a diagnosis of retardation without all three criteria: IQ approximately two standard deviations below the norm which would be even with the standard error measurement under current criteria at most 75, deficient adaptive functioning and onset before age 18. All three criteria must be satisfied. (R XIV, 190-191). Pinkard's report indicated Trotter had normal emotional development and was a mature youngster for his age. (R XIV, 195). Trotter was willing and able to follow complex directions that he gave verbally. He was capable of being trained as a skilled worker in a variety of trades and that his long range vocational forecast was excellent. Pinkard had concluded that Trotter had an almost average intelligence. (R XIV, 196). Pinkard conceded that when on direct he described Appellant with mild mental retardation he meant borderline. (R XIV, 198). Pinkard had not been told of Trotter's recent scoring in 2001 of a full scale 78 IQ on the WAIS-III. (R XIV, 210). Twice Pinkard noted during cross-examination that his answers were confusing since he was "nearing nap time." (R XIV, 217, 222). Pinkard agreed that the WISC test used in 1976 was a valid test with a valid result (except for the inflation he mentioned). (R XIV, 221). He could not account for the different scores on his and the school's tests. (R XIV, 222).

point to see and hear the witnesses and judge their credibility. ...Secondly this Court will not reweigh the evidence when the record contains sufficient evidence to prove the defendant's guilt beyond a reasonable doubt."); Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984); State v. Spaziano, 692 So. 2d 174, 178 (Fla. 1997)("We give trial courts this responsibility because the trial judge is there and has a superior vantage point to see and hear the witnesses presenting the conflicting testimony. The cold record on appeal does not give appellate judges that type of perspective."); Wainwright v. Witt, 469 U.S. 412, 434, 83 L.Ed.2d 841, 858 (1985)(quoting from an earlier case that "face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded"). Suffice it to say the fact finder heard and decided which witnesses were credible. See also Walls v. State, 641 So. 2d 381, 390-391 (Fla. 1994)("Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking.").

Judge Owens correctly determined that Trotter is not mentally retarded and thus does not satisfy the ineligibility for the death penalty prohibition under Atkins v. Virginia, 536 U.S. 304 (2002). The lower court's findings and credibility determinations are supported by competent substantial evidence.

Accordingly, the order should be affirmed.

ISSUE II

WHETHER THE CLEAR AND CONVINCING STANDARD OF F.S. 921.137(4) IS UNCONSTITUTIONAL AND WHETHER THE TRIAL COURT'S DETERMINATION WAS ERRONEOUS.

Standard Of Review:

The standard of appellate review in determining whether a statute is unconstitutional is de novo since it is a question of law. Caribbean Conservation Corp., Inc. v. Florida Fish And Wildlife Conservation Commission, 838 So. 2d 492 (Fla. 2003).

The lower court concluded that:

> . . . Defendant has failed to establish mental retardation (by either clear and convincing evidence *or* by a preponderance of the evidence) pursuant to the criteria set forth in Rule 3.203(b) and section 921.137(1), Florida Statutes." (R XXI, 2788).

Since Appellant failed to establish mental retardation either under a preponderance standard or one of clear and convincing evidence, it is not necessary for the Court to decide whether F.S. 921.137(4) is unconstitutional. As is well-known, a court will not decide constitutional questions if an issue can be determined on other grounds. See United States v. Maxwell, 386 F.3d 1042 (11th Cir. 2004); State v. Tsavaris, 394 So. 2d 418, 421 (Fla. 1981); State v. Boyd, 846 So. 2d 458, 459 (Fla. 2003); Wooten v. State, 332 So. 2d 15, 18 (Fla. 1976);

Singletary v. State, 322 So. 2d 551, 552 (Fla. 1975); Mulligan v. City of Hollywood, 871 So. 2d 249, 255 (Fla. 4th DCA 2003).

Appellee would respectfully submit that the standard of clear and convincing evidence is proper and does not suffer any constitutional infirmity. Florida Statute 921.137(4) requires the defendant to prove his claim of retardation by clear and convincing evidence. This standard is consistent with that required for other mental health issues which may be presented in a criminal action. See Fla.R.Crim.P. 3.812(e) (competency to be executed); § 775.027(2), Fla. Stat. (insanity as affirmative defense); Walker v. State, 707 So. 2d 300, 317 (Fla. 1997) (establishment of mental mitigation); see also §§ 394.467(1), 394.917(1), 916.13, Fla. Stat. (civil commitment proceedings). Rule 3.203 did not adopt a standard of proof because of concerns that this was a substantive rather than a procedural issue and the concerns of some Justices and Rules Committee members that under Cooper v. Oklahoma, 517 U.S. 348 (1996), a defendant could constitutionally be required to prove his competence to stand trial by a preponderance of evidence but not by the higher burden of clear and convincing evidence. See, Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure, 875 So. 2d 563 (Fla. 2004)(Pariente, J., concurring).

Cooper ruled that requiring a defendant to prove his incompetence to stand trial by clear and convincing evidence could force a defendant to go to trial even when he could be shown more likely than not to be incompetent. Drawing on a lengthy history of jurisprudence and an overwhelming consensus of State statutory and procedural law opposing this position, the Supreme Court found this to violate due process.

For many reasons, the State feels that Cooper is distinguishable from the instant proceeding and that the clear and convincing burden is both appropriate and constitutional. State criminal procedures are not subject to proscription by the Due Process Clause unless they offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Patterson v. New York, 432 U.S. 197 (1977). Historical practice is the Court's "primary guide" in determining whether a principal in question is fundamental. Montana v. Egelhoff, 518 U.S. 37 (1996). Unlike the historical perspective required by due process analysis, the Eighth Amendment reasoning employed by the Atkins Court relied on a newly emerging consensus among state legislatures and state courts that mentally retarded defendants should not be subject to the death penalty. Clearly, there was no issue that this practice was deeply rooted in our jurisprudence, since only

fifteen years earlier, the Court had reached the opposite conclusion in Penry v. Lynaugh, 492 U.S. 302 (1989).

Recognizing that the same States that constituted this emerging consensus disagreed on how retardation should be defined and on the standard of proof required to establish it, the Atkins majority determined that "as was our approach in Ford v. Wainwright, 477 U.S. 399 (1986) with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" Since Atkins was decided two additional States have enacted legislation requiring that a defendant prove retardation by clear and convincing evidence. See, Ariz. Rev. Stat. § 13-703.02(G) (2003); N.C. Gen Stat. § 15A-2005(c) (2003).[2]

Georgia, which was the first state to outlaw execution of the mentally retarded, requires that the defendant prove retardation by the even higher standard of proof beyond a reasonable doubt. Recognizing that Atkins did not mandate a

[2]Appellee acknowledges that some other states have chosen to attribute to a defendant the burden to establish mental retardation by a preponderance of the evidence. See, e.g., Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004). Along with Florida, the states that have set the burden at clear and convincing evidence include Arizona, Colorado, Delaware, and Indiana. See Ariz. Rev. Stat. § 13-703.02 (2003); Colo. Rev. Stat. § 18-1.3-1102 (2003); Del. Code Ann. Tit. 11, § 4209 (2003); Ind. Code § 35-36-9-4 (2003).

standard of proof, Georgia Courts have consistently upheld their statute against due process challenges under Cooper. Head v. Hill, 587 S.E.2d 613 (Ga. 2003); Mosher v. State, 491 S.E.2d 348 (Ga. 1997). Finding that a mental retardation claim is similar to a claim of insanity at the time of the crime "in that both relieve a guilty person of at least some of the statutory penalty to which he would otherwise be subject," the Georgia court was guided by Leland v. Oregon, 343 U.S. 790 (1952) which approved the application of the reasonable doubt standard to a defendant's proof of an insanity defense. Id. Accord, People v. Vasquez, 84 P.3d 1019 (Colo. 2004) (upholding 1993 statute requiring proof of retardation by clear and convincing evidence); State v. Grell, 66 P.3d 1234 (Ariz. 2003)(en banc) (approving clear and convincing standard without discussion. Cf. Medina v. State, 690 So. 2d 1241 (Fla. 1997)(upholding requirement of clear and convincing proof that defendant is not competent to be executed). But see Pruitt v. State, 2005 Ind. LEXIS 822 (Ind., Case No. 15S00-0109-DP-393, Sept. 13, 2005)(holding clear and convincing standard unconstitutional). See Montana v. Egelhoff, 518 U.S. 37, 51 (1996) ("In sum, not every widespread experiment with a procedural rule favorable to criminal defendants establishes a fundamental principle of justice. Although the rule allowing a jury to consider evidence

of a defendant's voluntary intoxication where relevant to *mens rea* has gained considerable acceptance, it is of too recent vintage, and has not received sufficiently uniform and permanent allegiance, to qualify as fundamental, especially since it displaces a lengthy commonlaw tradition which remains supported by valid justifications today.").

In Medina v. State, 690 So. 2d 1241 (Fla. 1997) this Court rejected a similar argument that Cooper v. Oklahoma, 517 U.S. 348 (1996) rendered unconstitutional the requirement in Rule 3.812 that there be clear and convincing evidence that a prisoner is insane to be executed. As the Supreme Court acknowledged in Ford v. Wainwright, 477 U.S. 399 (1996) the State has a legitimate and substantial interest in taking petitioner's life as punishment for a crime and the heightened procedural requirements in capital trials and sentencing procedures do not apply (in contrast to competency to stand trial determinations where the defendant's interest is substantial and the state's interest modest).

Significantly, the issue presented here is in a context of a collateral, postconviction challenge to Appellant's judgment and sentence, as his direct appeal became final years ago. Trotter v. State, 690 So. 2d 1234 (Fla. 1996), cert. den., 522 U.S. 876 (1997). The reduced demands of due process recognized by

concurring Justices Powell and O'Connor in Ford, *supra*, should be noted and obviously it is not necessary or appropriate in the instant case to determine whether the standard might be different in a case presenting a challenge to F.S. 921.137 on direct appeal of a judgment and sentence. That is simply a case for another day.

The lower court's order should be affirmed.

ISSUE III

WHETHER APPELLANT IS ENTITLED TO POSTCONVICTION RELIEF PURSUANT TO PROPORTIONALITY REVIEW.

Trotter's claim must be rejected for several reasons. To the extent that Appellant may be contending that the federal Constitution requires proportionality review of his capital sentence, he is mistaken. See Pulley v. Harris, 465 U.S. 37 (1984). To the extent Trotter seeks relief pursuant to this Court's state law proportionality review jurisprudence, his request must be deemed unavailing since proportionality review is performed by this Court as a part of its responsibility on direct review of the judgment and sentence imposed. See State v. Dixon, 283 So. 2d 1 (Fla. 1973)("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."); McCaskill v. State, 344 So. 2d 1276 (Fla. 1977) (reviewing Court's final responsibility in death penalty case is to review the case in light of other decisions and determine whether the death penalty punishment is too great). This Court affirmed Trotter's judgment and sentence and thus approved the proportionality of the sentence imposed. Trotter v. State, 690 So. 2d 1234 (Fla. 1996).

In Patton v. State, 878 So. 2d 368, 380 (Fla. 2004) this Court explained:

3. Proportionality Review

Patton next asserts that this Court failed to conduct a proportionality review of his death sentence. Patton's allegation that appellate counsel was ineffective for failing to raise proportionality is without merit for two reasons. First, a proportionality review is inherent in this Court's direct appellate review and the issue is considered regardless of whether it is discussed in the opinion or raised by a party, and second, the death sentence in this case was proportional.

"The mere fact that proportionality is not mentioned in the written opinion does not mean that no proportionality review was conducted." Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1994) (citing Booker v. State, 441 So. 2d 148, 153 (Fla. 1983)). In Booker, this Court explained that failure to mention proportionality in its opinion does not mean that the Court did not consider it. *See* 441 So. 2d at 153. This Court stated that a proportionality review "is an inherent aspect of our review of all capital cases. We need not specifically state that we are doing that which we have already determined to be an integral part of our review process." Id. Thus, the fact that the direct appeal of Patton's resentencing does not include a discussion of proportionality is not a fact that warrants reversal.

In Patton's direct appeal, this Court considered the following claims: (1) whether the death penalty procedure was unconstitutional because the sentencing jury did not have to report its findings of aggravation and mitigation in detail; (2) and (3) whether the prosecutor's arguments in voir dire constituted presentation of nonstatutory aggravating factors; (4) whether the jury was erroneously instructed as to the applicability of certain aggravating factors; (5) whether the trial

> court erred in its finding that no mental mitigators existed; (6) whether an error committed in the first sentencing phase trial should be reconsidered; and (7) whether the death penalty itself is constitutional. Of these seven claims, five involved consideration of aggravating and mitigating factors. Thus, inherent in this Court's review of these claims was a thorough consideration of the findings of mitigation and aggravation, and the Court expressly affirmed the trial judge's imposition of death.

See also Bolin v. State, 869 So. 2d 1196 (Fla. 2004); Davis v. State, 859 So. 2d 465 (Fla. 2003). Since proportionality review analysis is performed as part of this Court's direct review duties whether discussed in the opinion or not, such a challenge now is procedurally barred (even if it had been raised below) since issues resolved on direct appeal may not be litigated collaterally. Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995).

Additionally, the instant issue is not properly before this Court. The instant appeal is from the denial of postconviction relief by the trial court and most recently the lower court's determination that Mr. Trotter is not mentally retarded. Since the lower court was not asked to consider proportionality review, did not do so and would not be authorized to overturn this Court's prior determination that the death penalty was not disproportionate, there is no lower court action to review on this point. See Thomas v. State, 838 So. 2d 535, 539 (Fla.

2003)(“A claim of ineffectiveness of trial counsel must be raised in circuit court, not this Court, for--above all--it is this Court's job to *review* a circuit court's ruling on a rule 3.850 claim, not to *decide* the merits of that claim.”); Washington v. State, 907 So. 2d 512 (Fla. 2005)(“Washington failed to raise this claim in his present rule 3.851 motion, and he is procedurally barred from raising it now.”); Doyle v. State, 526 So. 2d 909 (Fla. 1988)(improper to raise a claim on appeal not urged in the postconviction motion); Griffin v. State, 866 So. 2d 1, 11 n.5 & n.7 (Fla. 2003)(noting that new claims not raised in the postconviction motion were not properly before the court).

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Carol C. Rodriguez, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33619-1136, this 6th day of October, 2005.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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