

IN THE SUPREME COURT OF FLORIDA

LINROY BOTTOSON,  
Petitioner,

Case No. SC02-42

v.

MICHAEL MOORE, Secretary,  
Florida Department  
of Corrections,  
*et al.*,  
Respondents.

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**RESPONSE TO PETITION TO INVOKE ALL WRITS JURISDICTION**

Comes now the State of Florida, by and through the undersigned, and moves this Court to dismiss Bottoson's petition seeking the exercise of this Court's "All Writs" jurisdiction, a stay of the trial court proceedings, and a stay of execution. For the reasons set out below, all requested relief should be denied.

**PRELIMINARY MATTERS**

Bottoson is under an active death warrant, and execution is scheduled for February 5, 2002, at 6:00 P.M. Bottoson has been ordered to file any successive *Florida Rule of Criminal Procedure* 3.850 motion by 3:00 P.M. on Friday, January 11, 2002.

**THE ISSUE IN THIS PROCEEDING**

The matter that Bottoson seeks to present to this Court is the denial of his Motion for Order to Transport to a facility for the purpose of having a PET or SPECT scan conducted. That

motion was filed on January 7, 2002, and was denied after the trial court heard argument from counsel on January 7, 2002.<sup>1</sup> Bottoson filed an "Emergency Motion for Rehearing", which was denied on January 8, 2002.<sup>2</sup> In his motion, Bottoson asserts that the order denying the Motion for Transport Order "does not conform to the essential requirements of law," and should therefore be reviewed by this Court under its All Writs jurisdiction. This Court should deny the petition because Bottoson can obtain any necessary review of the trial court's denial of the Motion for Transport Order on appeal from the *Florida Rule of Criminal Procedure* 3.850 proceedings.

THE PETITION SHOULD BE DENIED

The law is clear that this Court **may** exercise its jurisdiction under the "All Writs" provision of Article V, Section 3(b)(7) of the Florida Constitution, which allows this Court to issue all writs necessary or proper to the complete exercise of it's jurisdiction. *See, State ex rel. Chiles v. Public Employees Relations Com'n.*, 630 So. 2d 1093, 1094 (Fla. 1994). However, in this case, this Court does not need to invoke

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<sup>1</sup>A copy of the order denying the Motion for Order to Transport is attached hereto as Exhibit A for the convenience of the Court. That order has previously been lodged.

<sup>2</sup>A copy of the Order denying the motion for rehearing is attached hereto as Exhibit B.

the seldom used "all writs" provision because the denial of the Motion for Transport Order can be reviewed on appeal if Bottoson's Rule 3.850 motion, which is due to be filed on January 11, 2002, is denied by the Circuit Court and an appeal is taken therefrom. This Court decided this precise issue in *Davis v. State*, when it affirmed, on appeal from the denial of Rule 3.850 relief, the denial of a motion like the one in this case. *Davis v. State*, 742 So. 2d 233 236-37 (Fla. 1999). This Court held:

In his final postconviction claim, Davis argued that newly discovered evidence of advanced medical technology not available at his trial in 1983 established the need for (1) a PET scan to determine whether Davis has a seizure disorder and (2) a subsequent evidentiary hearing to determine how PET scan results might affect Davis's conviction and sentence. The circuit court found that this claim was procedurally barred as untimely in that this Court's opinion in *Hoskins v. State*, 24 Fla. L. Weekly S211, 735 So. 2d 1281 (Fla. 1999), shows that PET scans "have been around for over two years." *State v. Davis* order at 5. The court found a further procedural bar in that Davis could have and should have raised this claim in his third postconviction motion, which was filed on April 15, 1998. The court also found the claim to be speculative in that Davis presented no PET-scan results to support his claim and meritless in that there is no reasonable probability that the outcome of the trial would have been different with the admission of PET-scan evidence. The court cited *Davis v. Singletary*, 853 F.Supp. 1492, 1544 (M.D. Fla.1994), in which the federal district court referred to Davis's trial attorney's testimony in a federal hearing that Davis was able to relate to him his actions in committing the instant murders, thus negating any claim that Davis was unaware of what he

was doing at the time of the crimes.

We agree with the circuit court that Davis's PET-scan claim is procedurally barred. As the circuit court ruled, this claim is procedurally barred as an abuse of process in that Davis could have and should have raised it in his postconviction motion which was filed on April 15, 1998. See *Zeigler v. State*, 632 So. 2d 48 (Fla. 1993). Davis argues that raising the claim in the April 15, 1998, motion would have been impossible because the motion (his third postconviction motion) was filed a year prior to our decision in *Hoskins*, [footnote omitted] in which we ordered a resentencing based on the failure of a trial judge to authorize a PET scan, and thus, Davis could not have discovered the evidence prior to May 13, 1999. However, we find Davis's postconviction claim to be distinguishable from *Hoskins*, in which the request for a PET scan was made prior to Hoskins' trial. Moreover, PET scans appear in cases reported as early as 1992. *Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968 (8th Cir. 1995); *People v. Weinstein*, 156 Misc.2d 34, 591 N.Y.S.2d 715 (N.Y.Sup.Ct.1992).

We further find that the PET-scan claim, even if it were not procedurally barred, does not meet the second prong of the test in *Jones v. State*, 591 So. 2d 911 (Fla. 1991), for admission of newly discovered evidence. Under *Jones*, newly discovered evidence in a capital case must be of such nature that it would probably produce an acquittal or a life sentence on retrial. *Id.* at 915. Davis had pretrial neurological screening, including a CT scan and an electroencephalogram, which indicated no abnormalities and are consistent with the record of a postconviction proceeding reflecting that Davis told his trial attorney that he remembered committing the murders, thus negating any claim that his mind went blank during the crimes because he had suffered a seizure. *Davis v. Singletary*, 119 F.3d 1471, 1473-74 (11th Cir. 1997); *Davis v. Singletary*, 853 F.Supp. at 1543-44. There is no probability that a PET scan performed more than seventeen years after these murders would bring about a different result upon retrial on the basis of this record. Moreover, Davis's death sentence is

based upon five strong aggravators [footnote omitted] and no mitigation, which reinforces the conclusion that a PET scan would be unlikely to produce a life sentence.

*Davis v. State*, 742 So. 2d 233, 236-7 (Fla. 1999). Clearly, Bottoson will have an adequate opportunity to seek appellate review of the denial of the Motion for Transport Order in the event that Rule 3.850 relief is denied -- this Court need not, and should not, resort to the all writs provision in order to fully exercise its jurisdiction.<sup>3</sup> Bottoson is not entitled to interlocutory review of the denial of his Motion for Transport Order, and this Court should decline to entertain this case at this juncture.

In *Trepal v. State*, this Court set out the following standard for obtaining interlocutory review of a discovery order:

Drawing upon the district courts' use of the writ of certiorari to provide an instructive model of how this Court may exercise its jurisdiction in such cases, we hold that to obtain relief an appellant must establish that the order compelling discovery does not conform to the essential requirements of law and may cause irreparable injury for which appellate review will be inadequate.

*Trepal v. State*, 754 So. 2d 702, 707 (Fla. 2000). When that

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<sup>3</sup>The Circuit Court relied on *Davis* in denying Bottoson's motion. *Davis* is clearly the law with respect to this issue, and, were the PET/SPECT issue before this Court for decision, the Circuit Court's decision should be affirmed.

standard is applied to the facts of this case, it is undisputable that the Circuit Court did not depart from the essential requirements of law when it denied Bottoson's motion. To the contrary, that decision is based squarely upon *Davis*, which, as set out above, is functionally identical to Bottoson's case. Because the Circuit Court based its ruling on controlling precedent of this Court, Bottoson fails to satisfy the first prong of *Trepal*. Likewise, Bottoson does not satisfy the second part of *Trepal* because appellate review is clearly adequate to prevent irreparable injury. If the PET/SPECT issue was reviewable on appeal in *Davis*, and it clearly was because this Court addressed it, the same issue is reviewable in the same fashion in Bottoson's case. Bottoson will suffer no "irreparable injury for which appellate review will be inadequate." *Trepal*, *supra*.

Finally, the Circuit Court properly denied Bottoson's motion. As that Court found, the PET/SPECT scans "have been used in courts since at least 1992," and could have been requested, through the exercise of due diligence by Bottoson or his counsel, by 1996 at the latest. *Exhibit A*, at 2. The Circuit Court found that the PET/SPECT scans would not produce evidence that would qualify as "newly discovered evidence" under the *Jones v. State*, 709 So. 2d 512 (Fla. 1998) standard. That ruling

is correct under *Davis, supra* and, if this issue were before the Court on the merits, affirmance would be proper. Moreover, Bottoson has failed to "establish a particularized showing of need for the PET-Scan. See *Hoskins*, 702 So. 2d at 208-09; *Robinson*, 761 So. 2d at 275-76." *Rogers v. State*, 783 So. 2d 980, 999 (Fla. 2001). The Circuit Court did not abuse its discretion, and its decision should not be disturbed.

#### CONCLUSION

For the reasons set out above, Bottoson is not entitled to pursue an "all writs"/interlocutory review of the Circuit Court's order denying his motion to be transported for purposes of administering a PET/SPECT scan. The Circuit Court's ruling did not depart from the essential requirements of law, and will not result in an irreparable injury for which appellate review is inadequate. Bottoson's petition for the invocation of this Court's all writs jurisdiction should be denied, as should Bottoson's request for a stay of the proceedings and a stay of execution. Bottoson should receive no delay of any sort by virtue of the filing of this Petition, and his Rule 3.850 motion remains due to be filed on January 11, 2002.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by Fax and U.S. Mail to: **Peter Cannon**, CCRC-MIDDLE, 3801 Corprex Park Dr., Suite 210, Tampa, FL 33619, on this \_\_\_\_\_ day of January, 2002.

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Of Counsel