IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1337

RICHARD HENYARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from the trial court's denial of a successive Rule 3.851 motion for postconviction relief by a death-sentenced prisoner predicated on *Roper v. Simmons* and this Court=s decision in *Urbin v. State*. (Succ. PC-R Vol. I 154-58, order denying relief). The record on direct appeal is cited, e.g. R Vol. I 123. An evidentiary hearing was conducted on some claims in Henyard's original motion for postconviction relief. That record is cited in the form, e.g. PC-R Vol. I 123. The record here is cited in the form, e.g. Succ. PC-R 123.

REQUEST FOR ORAL ARGUMENT

Given the seriousness of the claims at issue and the stakes involved, Henyard urges this Court to permit oral argument on the issues raised in his appeal.

STATEMENT OF THE CASE AND OF THE FACTS

Procedural History

Name and location of court which entered the judgment of conviction under attack and state court case number(s):

Circuit Court of the Fifth Judicial Circuit,
Lake County, Florida

Case No. 93-159-CF

Offenses Charged:

Joint Indictment presented against The Defendant, Richard Henyard, and Co-Defendant, Alfonza Smalls. Record on Direct Appeal, Vol. I, 9-11.

Date of Offense: January 30, 1993.
Date of Indictment: February 16, 1993.

Count One: Kidnapping While Armed. (Victim Jasmine Lewis). Jointly charged.
Count Two: Kidnapping While Armed. (Victim Jamilya Lewis). Jointly charged.
Count Three: Kidnapping While Armed. (Victim Dorothy Lewis). Jointly charged.
Count Four: Sexual Battery While Armed. (Victim Dorothy Lewis). Henyard.
Count Five: Sexual Battery While Armed. (Victim Dorothy Lewis). Smalls.
Count Six: Attempted 1st Murder. (Victim Dorothy Lewis). Jointly charged.
Count Seven: Robbery While Armed. (Victim Dorothy Lewis). Jointly charged.
Count Eight: 1st Degree Murder. (Victim Jamilya Lewis). Jointly charged.
Charged in the alternative; premeditation or felony (kidnapping) murder.
Count Nine: 1st Degree Murder. (Victim Jamilya Lewis). Jointly charged.
Charged in the alternative; premeditation or felony (kidnapping) murder.
Jury trial took place (Guilt/Innocence and Penalty Phases) May 23 through June 3, 1994. Dir. App. R. Vol. IX – XXI

Date of judgment of conviction and sentence:

August 19, 1994. R. Vol. VIII, 1456-84.

Sentence:

Count One: Natural life.

Count Two: Natural life.
Count Three: Natural life.
Count Four: Natural life.
Count Five: (Co-defendant charged only)
Count Six: Natural life.
Count Seven: Natural life.
Count Eight: Death.
Count Nine: Death.

All sentences running consecutively.[1]

Direct Appeal:

Direct appeal was taken to this Court, where the judgment and sentence were affirmed. *Henyard v. State*, 689 So.2d 239 (Fla. 1996), *cert. den., Henyard v. Florida*, 522 U.S. 846, 118 S.Ct 130, 139 L.Ed.2d 80 (U.S. Fla. Oct 06, 1997).

Statement of each issue raised on appeal and the disposition thereof:(1) the trial court abused its discretion in failing to grant Henyard's motions for a change of

[1]The court found in aggravation: (1) the defendant had been convicted of a prior violent felony; (2) the murder was committed in the course of a felony; (3) the murder was committed for pecuniary gain, and, (4) the murder was especially heinous, atrocious or cruel. The court found Henyard's age of eighteen at the time of the crime as a statutory mitigating circumstance, and accorded it "some weight". The trial court also found that the defendant was acting under an extreme emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired, but accorded these mental mitigators "very little weight". As for "nonstatutory mitigating circumstances, the trial court found the following circumstances but accorded them "little weight": (1) the defendant functions at the emotional level of a thirteen year old and is of low intelligence; (2) the defendant had an impoverished upbringing; (3) the defendant was born into a dysfunctional family; (4) the defendant can adjust to prison life; and (5) the defendant could have received eight consecutive life sentences with a minimum mandatory fifty years. Finally, the trial court accorded "some weight" to the nonstatutory mitigating circumstance that Henyard's codefendant, Alfonza Smalls, could not receive the death penalty as a matter of law. *Henyard v. State*, 689 So.2d 239, 244 (Fla. 1996) (citations and footnotes omitted).

venue [denied on the merits]; (2) the trial court erred when it (a) granted the State's challenge for cause of one prospective juror (who stated he could not, under any circumstances, recommend a death sentence for Henyard because of his youth) [denied on the merits], and (b) refused to excuse three prospective jurors Henyard challenged for cause [procedurally barred; had the claim been preserved it would have been denied on the merits]; (3) the trial court erred in denying Henyard's motions to suppress his statement to the police because the interrogating officers failed to honor Henyard's request to cease questioning in violation of his right to remain silent under article I, section 9 of the Florida Constitution [denied on the merits; arguendo any error would be harmless]; (4) the trial court abused its discretion in admitting DNA evidence which was not supported by a proper predicate of reliability [denied on the merits]; (5) the trial court erred by (a) allowing the State, during voir dire, to tell prospective jurors that if the evidence of aggravators outweighed the evidence of mitigators then the jury's sentence recommendation must be for death as a matter of law [deemed harmless error], and (b) suggesting during closing argument that Henyard never admitted to raping Lewis when, in fact, he did confess to raping her in his third confession to police on the day after the murders [denied on the merits]; (6) the trial court erred in allowing a police officer to testify as to hearsay statements Lewis made to him when he came to her aid after the offense [Held: the statements were properly admitted; assuming arguendo that the statements were not properly admitted, the error was harmless]; (7) the trial court erred by giving the standard jury instructions on premeditated murder and reasonable doubt,

and by failing to give the jury a special verdict form on the theory of guilt [rejected in other cases and rejected in this case without further discussion]; (8) the trial court erred during the penalty phase by (a) instructing the jury on the avoid arrest aggravator [Held: not properly preserved for appellate review and therefore procedurally barred; assuming that the claim had been preserved the error was harmless]; (b) expressly considering as an aggravator, and allowing the jury to hear, evidence of Henyard's prior juvenile adjudication for robbery with a weapon [Held: the trial court erred, however the error was deemed harmless].

This Court also considered whether the trial court improperly doubled the contemporaneous kidnapping convictions with the aggravating circumstance that the murder was committed in the course of a kidnapping and found that the claim was without merit, and (c) allowing Lewis and Leroy Parker to testify at the penalty phase because their testimony did not tend to prove any statutory aggravating circumstance [the Court found that the trial court properly admitted the Lewis statement into evidence; with regard to Parker=s testimony the Florida Supreme Court found that the trial court did not abuse its discretion in allowing the blood stain analyst to testify at the penalty phase]; (9) the trial court abused its discretion in denying Henyard's specially requested penalty-phase jury instruction on the heinous, atrocious or cruel aggravating circumstance, which instructed on "tortuous [sic] intent," and further erred by giving the standard heinous, atrocious or cruel instruction, which is unconstitutionally vague and overbroad [rejected in other cases and rejected in this case without further discussion]; (10) the trial

court erred by relying upon two aggravating circumstances--pecuniary gain and heinous, atrocious or cruel--as support for Henyard's death sentences because they were not proven beyond a reasonable doubt [denied on the merits]; and (11) the death penalty is not proportionally warranted in this case [denied on the merits].

State postconviction proceedings in the trial court:

A timely motion for postconviction relief was filed on May 11, 1999. The motion was denied April 11, 2002.

Appeal of the trial court's denial of postconviction relief:

Reported at *Henyard v. State*, 883 So.2d 753 (Fla.2004)

Issues and disposition:

On appeal of the trial court=s denial of his motion for postconviction relief, the Defendant alleged ineffective assistance of counsel, raising six subclaims that his trial counsel did not adequately investigate or present the following nonstatutory mitigating circumstances:

(1) Henyard's lack of stable parental contact and supervision; [this specific claim was not made in Henyard's postconviction motion, and therefore it was deemed procedurally barred]

(2) Henyard suffered physical abuse at the hands of his father's common law wife, Edith Ewing [deemed a strategic decision, denied on the merits];

(3) "mental" age; [deemed cumulative to evidence presented at trial]

(4) Henyard suffered sexual abuse as a child [the court found that Henyard had failed to

report this to counsel and otherwise no prejudice];

(5) Henyard's chronic use of alcohol [denied because not addressed in any detail at the evidentiary hearing];

(6) Henyard's mental state as characterized by his suicidal feelings [deemed a reasonable strategic decision by Henyard's counsel].

Additionally, The Defendant=s claim that counsel was deficient in preparing one of Henyard's mental health experts for trial was denied because no evidence was presented at the evidentiary hearing.

State Petition for Writ of Habeas Corpus

Henyard raised three claims:

(1) appellate counsel rendered ineffective assistance for not raising on direct appeal the court=s improper ruling on trial counsel's motion to withdraw [denied because trial counsel=s motion to withdraw did not meet state statutory requirements so appellate counsel was not ineffective for not raising the issue on appeal];

(2) *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) [denied relief],

(3) incompetency at the time of execution [not ripe for review].

Federal Petition for Writ of Habeas Corpus and Appeal

Petition for writ of habeas corpus filed in the U.S.D.C., Middle District of Florida, Ocala Division; Case No. 5:04-cv-621-Oc-10GRJ, denied August 3, 2005. Appeal to the U.S. Eleventh Circuit Court of Appeal and motion to hold in abeyance pending exhaustion

of state remedies is pending.

Reason the claim raised in the present motion was not raised in the former motion:

The claims raised herein are based on:

A. Newly discovered evidence which could not have been ascertained by the exercise of due diligence until within one year prior to the date of the motion for postconviction relief (scientific discoveries regarding brain and behavioral development in youth).

B. *Roper v. Simmons*, 543 U.S. ----, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The rule announced in *Roper v. Simmons* alters the class of persons eligible for the death penalty and therefore applies retroactively. *Id.*, 125 S.Ct. at 1198 ("In holding that the death penalty cannot be imposed upon juvenile offenders, we ... [hold] that Stanford [v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989)] should no longer control in those few pending cases or in those yet to arise.").

Statement Of The Facts

On appeal of his original motion for postconviction relief, this Court summarized the facts this way:

> On January 30, 1993, Henyard and Smalls waited outside of a Winn-Dixie store in Eustis, Florida. Their victims were Mrs. Dorothy Lewis and her daughters, Jasmine, age three, and Jamilya, age seven, who were shopping at the Winn-Dixie. As the three left the store and returned to their car, Smalls approached Lewis with a gun and ordered her and her daughters in the back of the car. Henyard drove the car out of town.

> Henyard stopped the car at a deserted location where the two boys raped Lewis on the trunk of the car while her daughters remained in the back seat. Afterward, Henyard shot Lewis four times, wounding her in the leg, neck, mouth, and the middle of the forehead between her eyes. Henyard and Smalls rolled Lewis's unconscious body off to the side of the road and got back in the car. Jamilya and Jasmine were then driven to a separate location and taken from the car into a grassy area where they were each shot in the head and killed. Lewis survived and was able to make it to a nearby house where the police were called.

Henyard v. State, 883 So.2d 753, 756 (Fla. 2004).

STANDARD OF REVIEW

To uphold the trial court's summary denial of claims raised in a motion for postconviction relief, the claims must be either facially invalid or conclusively refuted by the record. Where no evidentiary hearing is held below, the Court must accept the defendant's factual allegations to the extent they are not refuted by the record. *Peede v. State*, 748 So.2d 253, 257 (Fla.1999) (citation omitted); *Kimbrough v. State*, 886 So.2d 965 (Fla.2004).

SUMMARY OF THE ARGUMENT

Richard Henyard's age at the time of the instant offense was about eighteen years and seven months. The court found Henyard's age of eighteen at the time of the crime as a statutory mitigating circumstance, and accorded it only "some weight".

On March 1, 2005 the United States Supreme Court held that the Eighth and Fourteenth Amendments forbid the execution of offenders who were under the age of 18 when their crimes were committed in the landmark case of *Roper v. Simmons*, --- U.S.

----, 125 S.Ct. 1183, 1194-96, 161 L.Ed.2d 1 (2005). The *Simmons* Court reaffirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual.

In *Urbin v. State*, 714 So.2d 411 (Fla.1998), this Court held that the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier the age statutory mitigator becomes. Urbin was afforded relief from his death sentence based on statutory and nonstatutory mitigation related to age and maturity issues even though he was above the age of maturity at which execution was constitutionally barred.

The trial court gave "some weight" to the statutory age mitigator, but gave either little or very little weight to Henyard's other statutory and nonstatutory mitigation, including evidence that Henyard functions at the emotional level of a thirteen year old and is of low intelligence. The court erred in summarily rejecting the instant motion that, at the very least, it conduct an evidentiary hearing and reevaluate the weight to be afforded to the statutory and non-statutory mitigators related to age and maturity.

ARGUMENT

MR. HENYARD'S SENTENCE OF DEATH VIOLATES THE UNITED STATES AND FLORIDA CONSTITUTIONAL REQUIREMENT OF DUE PROCESS AND PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT IN LIGHT OF *ROPER v. SIMMONS*

Richard Henyard's date of birth is June 26, 1974. His age at the time of the instant

offense, January 30, 1993, was about eighteen years and seven months. On August 19, 1994, the trial court imposed two death sentences on Mr. Henyard. The court found Henyard's age of eighteen at the time of the crime as a statutory mitigating circumstance, and accorded it "some weight". The trial court also found that the defendant was acting under an extreme emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired, and accorded these mental mitigators "very little weight". As for nonstatutory mitigating circumstances, the trial court found the following circumstances but accorded them "little weight": (1) the defendant functions at the emotional level of a thirteen year old and is of low intelligence; (2) the defendant had an impoverished upbringing; (3) the defendant was born into a dysfunctional family; (4) the defendant can adjust to prison life; and (5) the defendant could have received eight consecutive life sentences with a minimum mandatory fifty years. Finally, the trial court accorded "some weight" to the nonstatutory mitigating circumstance that Henyard's codefendant, Alfonza Smalls, could not receive the death penalty as a matter of law. Henyard I, 689 So.2d 239, 244.

In *Allen v. State*, 636 So.2d 494, 497 (Fla, Mar 24, 1994), this Court held that the death penalty was either "cruel or unusual if imposed upon one who was under the age of sixteen when committing the crime; and death thus is prohibited by article I, section 17 of the Florida Constitution." The *Allen* Court relied heavily on *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), in which the United State Supreme Court held that the Eighth and Fourteenth Amendments prohibited the execution of a

defendant convicted of first-degree murder committed when he was fifteen years old.

In *Urbin v. State*, 714 So.2d 411 (Fla.1998), this Court held that ***the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier the age statutory mitigator becomes.*** Urbin was seventeen years old at the time of his offense, and yet he was afforded relief from his death sentence based on statutory and nonstatutory mitigation related to age and maturity issues even though he was above the age of maturity at which execution was constitutionally barred. The *Urbin* Court said that, "Here the defendant is seventeen, below the age of majority, although above the constitutional line for the death penalty. . . . [C]onsidering that it is the patent lack of maturity and responsible judgment that underlies the mitigation of young age . . . the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes." *Id*. 418. Following *Allen*, the Court held in *Brennan v. State*, 754 So.2d 1 (Fla.1999), that "our decision in Allen interpreting the Florida Constitution compels the finding that the death penalty is cruel or unusual if imposed on a defendant under the age of seventeen." In *Ramirez v. State*, 739 So. 2d 568 (Fla. 1999), this Court held that the trial court abused its discretion in assigning "little weight" to the defendant=s age at the time of offense (he was 17 years, 1 month old). Both *Brennan* and *Ramirez* were issued on the same day: July 8, 1999.[2]

[2]While the amount of weight accorded mitigating or aggravating circumstances is normally left to the discretion of the sentencing court, the authority cited here shows that there are limitations on that discretion.

On March 1, 2005 the United States Supreme Court held that the Eighth and Fourteenth Amendments forbid the execution of offenders who were under the age of 18 when their crimes were committed in *Roper v. Simmons*, --- U.S. ----, 125 S.Ct. 1183, 1194-96, 161 L.Ed.2d 1(March 1, 2005). *Roper v. Simmons* is a landmark decision. A sweeping array of organizations including the ABA, leading American medical, religious, and legal institutions, child and victim advocate groups and nearly 50 countries, along with more than 15 Nobel Peace Prize Laureates, including former President Jimmy Carter, former Soviet President Mikhail Gorbachev, former South African President F. W. de Klerk and the Dalai Lama, as well as nine former U.S. Diplomats filed amicus curiae briefs calling for an end to the juvenile death penalty. The nation=s leading medical organizations, including the American Medical Association, American Psychiatric Association, the American Society of Adolescent Psychiatry and the American Academy of Children and Adolescents, submitted a brief. Additionally, a cross section of more than 420 prominent pediatricians, child and adolescent psychiatrists and neurologists, including such notable physicians as former Surgeon Generals C. Everett Koop and Julius Richmond, and Drs. T. Berry Brazelton and Alvin Poussaint, submitted the Health Professionals' Call to Abolish the Death Penalty to the Court as part of Simmons' brief. Nearly 30 major religious denominations in the United States also submitted a brief, including the U.S. Conference of Catholic Bishops, Greek Orthodox Church, Presbyterian Church, American Baptist Church USA, United Methodist Church, Episcopal Church USA and the American Jewish Committee, saying that because of minors' age and

immaturity, they lack the degree of culpability necessary to place them in the category of criminals the Supreme Court has described as deserving of the death penalty.

The Court's decision was recognized as a wastershed ruling. E.g. Christian Science Monitor, March 2, 2005 ("Juvenile justice advocates hail the ruling as a major advance for American society" in "landmark decision"); Washington Post, March 2, 2005 ("In concluding that the death penalty for minors is cruel and unusual punishment, the court cited a 'national consensus' against the practice, along with medical and social-science evidence that teenagers are too immature to be held accountable for their crimes to the same extent as adults"); CNN.com, March 1, 2005 (a ruling that marked a change in "national standards"). See generally http://www.abanet.org/crimjust/juvjus/simmons.

The *Simmons* Court reaffirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. The Court outlined the similarities between its analysis of the constitutionality of executing juvenile offenders and the constitutionality of executing the mentally retarded. Prior to 2002, the Court had refused to categorically exempt mentally retarded persons from capital punishment. *Penry v. Lynaugh*, 492 U.S. 302 (1989). However, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that standards of decency had evolved in the 13 years since Penry and that a national consensus had formed against such executions, demonstrating that the execution of the mentally retarded is cruel and unusual punishment. The majority opinion

found significant that 30 states prohibit the juvenile death penalty, including 12 that have rejected the death penalty altogether. The Court counted the states with no death penalty, pointing out that "a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles." In ruling that juvenile offenders cannot with reliability be classified as among the worst offenders, the Court found significant that juveniles are vulnerable to influence, and susceptible to immature and irresponsible behavior. In light of juveniles' diminished culpability, neither retribution nor deterrence provides adequate justification for imposing the death penalty. Justice Kennedy, writing for the majority, said: "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."

In the instant case, the aggravating and mitigating circumstances be must reweighed in light of Simmons, considering whether the instant case was the "least mitigated of the mitigated." *Stringer v. Black*, 503 U.S. 222, 229-232, 112 S.Ct. 1130, 1136-1137, 117 L.Ed.2d 367 (1992); *Terry Williams v. Taylor*, 529 U.S. 362 at 398, 120 S.Ct. 1495 (2000) (faulting the court for "fail[ing] to evaluate the totality of the available mitigation evidence--both that adduced at trial, and the evidence adduced in the habeas proceeding--in reweighing it against the evidence in aggravation"). The rule announced in *Roper v. Simmons* alters the class of persons eligible for the death penalty and therefore applies retroactively. Id., 125 S.Ct. at 1198 ("In holding that the death penalty cannot be

imposed upon juvenile offenders, we ... [hold] that Stanford [v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989)] should no longer control in those few pending cases or in those yet to arise.").

In the case at bar there is extensive evidence of parental abuse and neglect that played a significant role in Henyard's lack of maturity and responsible judgment. At the penalty phase, evidence was presented that the defendant's mother, Hattie Gamble, used and abused alcohol and marijuana during her pregnancy. Henyard was born with a physical complication and was shunned as an infant due to a disfiguring skin disorder, and he had no father figure to provide him with the normal role models or to provide him with those basic human needs provided by males in a normal family setting. Evidence was presented that his only role model was his mother, who frequently had contact with the criminal justice system for her lawlessness, that during his formative years, he had little or no love or nurturing from his mother, and that he had extremely limited contact with his father. During his lifetime, the defendant's mother continued to use and abuse alcohol and drugs including cocaine. At age 11, when he went to live with his father, his mother, Hattie Gamble, had no direct contact with him for years, reinforcing his belief that no one cared about him. He had an impoverished upbringing and he was raised in a grossly dysfunctional family with no stable living environment. It was established that Richard Henyard has a very low IQ. His lack of maturity is illustrated by his request to speak with his "auntie" when questioned by law enforcement concerning the instant case.

At the 1999 postconviction evidentiary hearing further evidence revealed that

Richard Henyard was a "door-to-door child" who was neglected by his mother and who was taken in frequently by neighbors. His mother was promiscuous, on drugs, stayed out all night, failed to take care of him or feed him, and eventually died of AIDS. Richard Henyard was sexually abused as a child by a neighbor named Bruce Kyle. Ms. Turner, Ms. Wiley, and another witness, Trena Lenon, testified that, prior to the penalty phase hearing, Mr. Henyard divulged this sexual abuse to them. PC-R Vol. VI 1017; 1022-23; 1109-11. Additionally, Ms. Wiley's testimony established that Mr. Henyard made these statements regarding the sexual abuse when he was approximately seven years old. PC-R Vol. VI 1038-39.

Evidence was presented that his mother was devoted to drinking and doing drugs rather than taking care of him or giving him emotional support. There was testimony concerning the possibility that Richard Henyard suffered from Fetal Alcohol Syndrome. Had the jury heard of the defendant=s difficult upbringing, his emotional and intellectual immaturity level, victimization, and been instructed that the law prohibits the execution of individuals under the age of 18 years old at the time of the offense, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been altered.

On May 17, 2004, the National Institutes of Health, Bethesda, MD (NIH) published a breakthrough study of the adolescent human brain. The report was published in the Proceedings of the National Academy of Sciences of the United States of America on May 25, 2004. Succ. PC-R Vol. I, 147-52. The trial in this case took place in 1994,

ten years prior to the publication of the NIH study.

The study, entitled "Dynamic Mapping of Human Cortical Development During Childhood through Early Adulthood", was the result of an international effort lead by NIH=s Institute of Mental Health and the University of California Los Angeles' Laboratory of Neuro-Imaging. The authors reported the dynamic anatomical sequence of brain development between the ages of 4-21 years. Through the imaging process and using accepted statistical and anatomical benchmarks, human cortical development could be visualized across the age range. Their findings were that: (i) higher-order association cortices mature only after lower-order somatosensory and visual cortices are developed, and (ii) phylogenetically older brain areas mature earlier than newer ones. Brain development parallels behavioral maturation, with the primary sensorimotor cortices along with frontal and occipital poles maturing first, and the remainder of the cortex developing in a parietal-to-frontal (back-to-front) direction. The frontal lobes, involved in executive function, developed last. Moreover, the maturation of the brain followed the evolutionary sequence in which these different areas emerged in the past.

According to this and other recent studies, brain maturation does not peak until after age 21. The brain's frontal lobe, which exercises restraint over impulsive behavior, does not even begin to mature until 17 years of age. The frontal lobe is where the cerebrum is located. It contains both white and gray matter. White matter contains the myelinated neurons and continues to grow until around age 25. This increased myelination in the adult frontal cortex relates to the maturation of cognitive processing and

other 'executive' functions: planning, organizing, anticipating the consequences of one's actions, decision-making, reasoning, and the exercise of restraint over impulsive behavior.

Simmons teaches that eighteen year olds may not possess the adequate maturity level to have imposed upon them the ultimate penalty:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. ***The qualities that distinguish juveniles from adults do not disappear when an individual turns 18***. . . . the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." . . . The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. . . . As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter. ***In 1930 an official committee recommended that the minimum age for execution be raised to 21.*** House of Commons Report from the Select Committee on Capital Punishment (1930), 193, p. 44. Parliament then enacted the Children and Young Person's Act of 1933, 23 Geo. 5, ch. 12, which prevented execution of those aged 18 at the date of the sentence.

Simmons at 1197, 1198-1200 (emphasis added).

The evolving standards of decency in society prohibit the cruel and unusual execution of an individual who was the functional equivalent of a 13 year old at the time of the offense. The lower court erred by failing to vacate the sentence of death in light of the *Simmons* and *Urbin* decisions, grant a new penalty phase, or at the very least,

conduct an evidentiary hearing and reevaluate the weight to be afforded to the statutory and non-statutory mitigators related to age and maturity.

CONCLUSION AND RELIEF SOUGHT

The evolving standards of decency in society prohibit the cruel and unusual execution of an individual who was the functional equivalent of a 13 year old at the time of the offense. The lower court erred by failing to vacate the sentence of death in light of the *Simmons* and *Urbin* decisions, grant a new penalty phase, or at the very least, conduct an evidentiary hearing and reevaluate the weight to be afforded to the statutory and non-statutory mitigators related to age and maturity. This Court should reverse the judgment below and provide such relief as the Court shall deem proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on November _____, **2005.**

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

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