IN THE SUPREME COURT OF FLORIDA

DEMETRIS OMARR THOMAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC00-1092

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

SECOND SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Demetris Omarr Thomas, was the defendant in the trial court; this brief will refer to Appellant as such, defendant, or by proper name. Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The record on appeal will be referenced as (R.) followed by the appropriate page number. The trial transcript will be referenced as (T.) followed by the appropriate page number.

STATEMENT OF FACTS RELEVANT TO THE COURT'S QUESTIONS

The Defendant was convicted of first degree murder, kidnapping and sexual battery with a deadly weapon or physical force. (R. 1882-83, 2158-65).

At the penalty phase of the trial, the defendant presented the testimony of Dr. Larson, a psychologist, in an effort to demonstrate possible mitigating evidence of mental retardation. (T. 1045). In preparation for his testimony, Dr. Larson reviewed the defendant's school records from elementary through high school, a previous evaluation conducted by Dr. Oas in 1990 and gave the defendant a cognitive examination. (T. 1048-49, 1052, 1056, 1060-61).

Dr. Larson testified that the defendant was in special education classes in high school, and that he received a composite IQ score of 61 on his cognitive test under the Wechsler Adult Intelligence Scale Revised. (T. 1053, 1060). According to Dr. Larson, this score places the defendant in the mildly retarded category. (T. 1060-61). Dr. Larson also tested the defendant's functional academic ability which he related was at the second or third grade level, approximately the equivalent of an eleven year old. (T. 1072-73).

However, Dr. Larson admitted that the defendant received average grades in his special education classes and that he obtained a completion certificate from high school. (T. 1054; R. 2170). He also conceded that the defendant was able to maintain employment as an auto dealer for a sustained period time. (T. 1057).

During cross-examination, Dr. Larson acknowledged that the defendant socially functions above the level of an eleven year old, making his adaptive functioning higher than the IQ score set by Dr. Larson. (T. 1073-74). Dr. Larson also agreed that the defendant was informed that he was being given an IQ test for purposes of his case and that he is very capable of being deceptive. (T. 1075, 1088). Additionally, Dr. Larson admitted that the defendant had passed his driver's license exam and was

intelligent enough to realize that his seminal fluids would be identifiable in the victim and to concoct a story which would explain this fact. (T. 1088-89).

At the conclusion of the penalty phase, the jury recommended a sentence of death 10-2. (R. 1881). The trial court then imposed the death sentence on May 3, 2000. (R. 2163-72). In its Sentencing Order, the trial court found that among the non-statutory mitigating factors, the defendant was mildly mentally retarded with an IQ of 61 (R. 2169-70).

The defendant took a direct appeal of his conviction and sentence which is currently still pending before this Court. Among the issues raised was the question of whether the death penalty should be applied to retarded persons. (Issue III of defendant's Initial Brief).

On June 12, 2001, section 921.137 of the Florida Statutes became effective. Following the enactment of this statute, the defendant submitted a Supplemental Initial Brief addressing the possible application of the statute to his case. The State filed a Supplemental Answer Brief arguing that the defendant failed to show that he meets the provisions of the statute, that he does not have standing to assert the statute and that the statute's prospective only application renders it inapplicable to the defendant's case. The defendant then filed his

Supplemental Reply Brief.

On June 20, 2002, the United States Supreme Court decided Atkins v. Virginia, 122 S. Ct. 2242 (2002), holding that the Eighth Amendment prohibits the execution of mentally retarded defendants. On December 3, 2002, this Court requested additional briefing with regard to seven questions involving Atkins' implications to the instant case. This brief is offered in response to that request.

SUMMARY OF THE ARGUMENT

Prior to the United States Supreme Court's opinion in Atkins v. Virginia, 122 S. Ct. 2242 (2002), the State of Florida adopted definitions and procedures to enforce legislative policy against the execution of mentally retarded capital defendants. Section 921.137, Florida Statutes (2001), offers a legislative mandate as to these issues to the extent necessary for the implementation of Atkins.

ARGUMENT

ON THE RECORD BEFORE THIS COURT THE DEFENDANT IS NOT ENTITLED TO ANY RELIEF UNDER ATKINS V. VIRGINIA, 122 S. CT. 2242 (2002).

This Court's December 3, 2002 order directed the State to file a supplemental brief addressing the application of Atkins, "including but not limited to" seven enumerated questions. The State will first respond to each of the questions posed by this Court. Then, the State will address the insufficient evidence of mental retardation in this case, and the defendant's failure to establish mental retardation to the extent required by Atkins or § 921.137.

A. Questions Posed By This Court

This Court's directive for further briefing in this case presupposes the application of Atkins v. Virginia, 122 S. Ct. 2242 (2002), to the instant case. As this Court has acknowledged, Atkins deferred to the states for the development of appropriate procedures to enforce the constitutional restriction against execution of a mentally retarded defendant. In addition, Atkins identified Florida as having "joined the procession" of states to prohibit the execution of the mentally retarded. 122 S. Ct. at 2248. See § 921.137, Fla. Stat.

(2001). In section 921.137, the Florida Legislature has addressed several of the issues identified in the questions propounded by this Court for consideration. This Court must respect this legislation and apply the will of the legislature to the extent that Atkins is deemed to require these issues to be addressed.

The questions propounded by this Court will each be addressed in turn.

1. The definition of mental retardation to be applied

Clearly, the legislature has already considered the appropriate definition for "mental retardation" which precludes capital punishment, and it is codified in section 921.137(1). That section defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." "[S]ignificantly subaverage general intellectual functioning" is defined as "performance that is two or more standard deviations from the mean score on a standardized intelligence test." Section 921.137(1) also requires deficits in adaptive behavior, defined as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility

expected of his or her age, cultural group, and community."

The definition found in section 921.137(1) mirrors the established definition of mental retardation provided by the American Psychiatric Association and other leading organizations, as well as other provisions of Florida Statutes relating to mental retardation. The DSM-IV-TR provides that mental retardation is (a) significantly sub-average intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test, (b) concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by cultural groups), in at least two of the following areas: communications, self care, home living, social/interpersonal skills, use of community resources, self direction, functional academic skills, work, leisure, health, and safety, and (c) the onset is before age eighteen years. American Psychiatric Association: Diagnostic and Statistical Manual of Mental Diseases, (4th ed. 1994), at 46; see also §§ 393.063(42), 916.106(12), Fla. Stat. (2000); Atkins, 122 S. Ct. at 2245 n.3 (discussing this definition from DSM-IV and similar definition from the American Association of Mental Retardation); Bottoson v. Moore, 813 So. 2d 31, 33-34 (Fla.) (rejecting claim that there was no definition of mental retardation in place in

Florida, where trial court used functional equivalent of definition above), cert. denied, 122 S. Ct. 2670 (2002).

The definition that has been adopted by the Florida Legislature is therefore consistent with relevant psychological and legal authorities. Accepting a definition that requires more than a low IQ score is necessary in order to restrict the mental retardation exemption to those defendants that are actually mentally retarded. It is well established that "[b]eing retarded means more than scoring low on an IQ test." Fairchild v. Lockhart, 900 F.2d 1292, 1295 (8th Cir. 1990). Reliance on low IQ scores alone is insufficient; such scores are hardly dispositive as to showing mental retardation. See San Martin v. State, 705 So. 2d 1337, 1348 (Fla. 1997) (there was "competent substantial evidence to support the trial court's rejection of these mitigating circumstances," including "borderline range of intelligence," where the trial court noted that a performance on an IQ test "an individual's performance on such a test . . . may easily reflect less than his best efforts"); Miles v. Dorsey, 61 F.3d 1459, 1473 (10th Cir. 1995) ("on test designed to assess memory and information, petitioner scored so low as to indicate intentional malingering"); Goldberg v. National Life Insurance Company of Vermont, 774 F.2d 559, 563 (2d Cir. 1985) (inter alia, "his IQ scores were just too low

considering that he was a high school graduate and had been involved in business with some success"); Blackwood v. State, 777 So. 2d 399, 404-05 (Fla. 2000) ("Dr. Garfield could not say with certainty that appellant is retarded because she did not run all of the appropriate tests and because she attributed his scores to the depression"); Walls v. State, 461 So. 2d 381 (Fla. 1994) ("low IQ; expert psychologist stated that Walls' IQ actually had declined substantially during the years prior to the trial").

To the extent that this Court determines that Atkins requires Florida courts to adopt a procedural rule incorporating a specific definition of mental retardation, this Court need look no farther than section 921.137(1) for such a definition.

2. The appropriate procedures for determining whether an offender is mentally retarded so as to prohibit their execution under Atkins

The appropriate procedures for a determination of mental retardation are similarly set forth in section 921.137. Under these procedures, the issue of mental retardation is to be raised by the defendant prior to trial and considered by a judge following a jury's recommendation for the death penalty. See § 921.137(3) - (7), Fla. Stat. (2001). Once again, there is no

reason to ignore legislative direction when this issue has been specifically addressed by statute.

3. Whether section 921.137(1), (4), Florida Statutes (2002), should be applied as the definition and procedure for the determination of mental retardation

As noted in the responses to Questions 1 and 2 above, section 921.137 provides the legislative definition and procedures for the determination of mental retardation as relevant for capital sentencing. To the extent that definitions and procedures are necessary under Atkins, this Court should utilize the consideration already provided to these issues and codified in section 921.137.

4. The standard (i.e., clear and convincing, preponderance of the evidence) by which an offender must prove that the offender is mentally retarded

The standard of proof which must be met in order to establish mental retardation is clear and convincing evidence. This standard is included in the procedures outlined in section 921.137. See § 921.137(4). 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).

Any suggestion that due process requires a standard no greater than preponderance of the evidence in accordance with Cooper v. Oklahoma, 517 U.S. 348 (1996), is not well taken. In Medina v. State, 690 So. 2d 1241, 1246-47 (Fla. 1997), this Court examined Cooper with regard to the standard of proof required to establish that a defendant is incompetent to be executed. Medina held that Cooper's due process concern with a lower standard for a pretrial determination of competency was not applicable in the postconviction context, where the state has a more substantial interest at stake and the heightened procedural protections are accordingly relaxed. Similarly, Cooper does not require a preponderance of the evidence standard in assessing claims of mental retardation as a bar to execution. Therefore, the clear and convincing standard adopted by the legislature must be applied.

5. Whether the determination of whether an offender is mentally retarded is a question for the judge or the jury

This Court has already rejected the claim that a determination of mental retardation must be made by a jury. See

Bottoson v. State, 27 Fla.L.Weekly S891 (Fla. Oct. 24, 2002), cert. denied, 122 S. Ct. ____, 2002 WL 31748799 (Dec. 9, 2002). Bottoson had presented a mental retardation issue in litigation during an active death warrant, and the trial court held an evidentiary hearing, ultimately ruling that Bottoson had failed to establish retardation. Bottoson's later plea that he was entitled to a jury determination on this issue under Ring v. Arizona, 122 S. Ct. 2428 (2002), was rejected by this Court.

The ruling in Bottoson is correct. A finding as to mental retardation does not "increase" the maximum sentence for first degree capital murder. Nothing in Ring or Atkins supports the suggestion that a determination of mental retardation must be made by a jury. Criminal defendants are presumed to be competent and to have the mental agility to proceed to trial; a defendant's mental state is not an aggravating factor that makes a defendant death eligible, rather it is only a mitigating factor which may or may not rise to the level of mitigation in a given case. Analytically it is no different than a pretrial determination of competency to proceed under Florida Rules of Criminal Procedure 3.210-3.212. The law is well settled that a determination of competence to proceed is made by the trial judge, and is subject to review on appeal. See Hunter v. State, 660 So. 2d 244 (Fla. 1995). There is no arguable basis upon

which to suggest a defendant claiming incompetency is entitled to a jury resolution of the issue, and there is no "right" to a jury's determination of mental retardation in the context of a capital trial.[1] As there is no right to a jury trial as to the issue of retardation, and the legislative decision to place this determination in the hands of a trial judge in section 921.137 must be respected.

6. Whether an offender must prove that mental retardation manifested during the period from conception to age eighteen

All relevant authorities agree that a diagnosis of mental retardation requires a finding of onset prior to age eighteen. See American Psychiatric Association: Diagnostic and Statistical Manual of Mental Diseases (4th ed. 1994), at 46; Mental Retardation: Definition, Classification, and Systems of Supports, American Association of Mental Retardation (9th ed. 1992), at 5 (both discussed in Atkins, 122 S. Ct. at 2245 n.3); see also http://www.thearc.org/faqs/mrqa.html (The Arc website, using AAMR definition); Merriam Webster Medical Dictionary (1997); MedlinePlus Medical Encyclopedia, at

[1] It is axiomatic that the right not to be tried while incompetent is firmly ingrained in the law. See Dusky v. United States, 362 U.S. 402 (1960). The principle announced in Atkins is not superior to Dusky and its progeny, and it makes no sense to suggest to the contrary.

http://www.nlm.nih.gov/ medlineplus/ency/article/001523.htm. It is apparent from the consistency with which authorities acknowledge the required finding of onset prior to age eighteen in the diagnosis of mental retardation that this is a critical element of any appropriate definition. Therefore, a defendant must be required to prove this element in order to satisfy his burden of establishing mental retardation as a bar to execution.

7. Any other issues relating to the substantive restriction on the State's power to execute a mentally retarded offender.

The only other issue that the State will address is that, based on the record in the present case, the defendant has not demonstrated that he meets the standard for mental retardation under Atkins and § 921.137.

B. Insufficiency Of The Defendant's Proof

Because this Court has ordered a supplemental briefing "including but not limited to" the questions set forth above, the State will also address the insufficiencies of the record as relating to mental retardation.

An examination of the record below demonstrates that the defendant has failed to establish by clear and convincing evidence that he is mentally retarded under the statutory definition, standards, and guidelines applicable in Florida. In the present case, the trial court found as a mitigating circumstance that the defendant was mildly mentally retarded. In doing so, the trial court neither complied with the procedures set forth in § 921.137, nor was it required to do so. In fact, when the defendant presented evidence of possible mental retardation, the trial court was only required to find

that it was a mitigating factor and give it weight assuming it went uncontroverted.[2] There was no burden of proof as to whether in fact the "evidence" of mental retardation was proven nor any credibility requirement assigned to the finding of that factor. Moreover, the defendant was required to do nothing more than state that he was mentally retarded. Accordingly, the defendant certainly did not demonstrate that he is entitled to relief under § 921.137 or Atkins, because he has not established mental retardation under the requisite Florida guidelines.

Section 921.137 defines mental retardation as a person of subaverage general intelligence (meaning two or more standard deviations from the mean score on a standardized intelligence test) who also has deficits in adaptive behavior (referring to the standards of personal independence and social responsibility expected of a person's age, cultural group, and community) and has manifested these states prior to age 18. Fla. Stat. 921.137(1)(2001). In the present case, the defendant failed to demonstrate that he meets the qualifications under the adaptive behavior prong of this test or that he has manifested his

[2] The defendant also attempted to use the defendant's alleged mental retardation to establish the statutory mitigator of substantial impairment of one's ability to appreciate the criminality of one's conduct or conform that conduct to the requirements of the law. However, the trial court found that the defendant's evidence was insufficient to establish the statutory mitigator.

retardation prior to age 18, and he has failed to demonstrate the first prong in the manner required by § 921.137.

As to his adaptive behavior, while Dr. Larson testified that the defendant functioned as eleven year old academically, he admitted that the defendant had held jobs, obtained a driver's license, functioned as an adult, and had an adaptive level higher than his educational level.

Additionally, Dr. Larson testified that the defendant's understanding was "surprisingly good given the fact that he's retarded" (R. 1149), that the defendant was "very clear about the charges against him, possible range of penalties," and that he "had an adequate understanding of the nature of the adversarial process." (R. 1160).

Indeed, the defendant had told his trial attorneys to ask the "jury to find me guilty of Manslaughter or Second Degree," (R. 1879, T. 984-86) thereby displaying a tactical appreciation for the evidence amassed against him.

Dr. Larson also admitted to the defendant's capacity to learn by indicating "an appreciable difference" in his test results within a two-month span. (R. 1158, 1168). By the time of the motion to suppress hearing, the defendant supposedly comprehended "his Miranda rights." (R. 1166).

The defendant also has shown the ability to understand jail

rules and conform his behavior accordingly. (T. 1074). He was able to understand and conform to the rules of three years of felony probation, except making monthly payments on time, with which almost everyone has a problem (T. 1033).

Perhaps most importantly, the defendant demonstrated his mental capacity as he adapted his stories to cover what he thought the police knew about the instant crimes and, when it served his needs, he characterized himself to the police as "paranoid" (T. 740).

Moreover, the defendant's grandmother testified for him that he graduated from high school and the trial court found that the defendant had obtained a "special certificate or diploma of graduation" from high school. (T. 1105; R. 2170). Thus, from the record before this Court, the defendant has failed to establish the adaptive behavior prong of the definition of mental retardation under § 921.137(1).

Additionally, the defendant failed to establish any prong of definition in the manner required by § 921.137(4). In subsection (4), the legislature required that the finding of mental retardation be made based on clear and convincing evidence. Fla. Stat. 921.137(4)(2001). The trial court in the present case did not clarify the quantum of evidence which led to its finding of the non-statutory mitigator. Because the

standard of proof for establishing a mitigating circumstance is lower, it cannot be presumed that the trial court would still have found the defendant mentally retarded under the greater standard. See Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990) (mitigating circumstances to be reasonably established by the greater weight of the evidence: (footnote omitted) "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established."), quoting, Fla.Std.Jury Instr. (Crim.) at 81.

In addition to the fact that mental retardation was not proved under the correct legal standard, the trial court's finding also failed to comply with the requirement that *two experts in the field of mental retardation* must be appointed on this issue and that they must report their findings to the trial court. Fla. Stat. 921.137(4)(2001). In the present case, only one psychologist testified as to the defendant's alleged retardation. Further, there is no testimony specifically establishing that this psychologist is an expert in the field of mental retardation, as required by § 921.137(4). (R. 1436; T. 1046-47).

Subsection (1) of §921.137 also requires that the mental retardation manifest itself prior to age 18. Dr. Larson

testified that he examined the defendant’s school records and that a Dr. Oas performed an evaluation of the defendant in 1990. However, the content of the school records is unclear, and fails to establish manifestation before age 18 by clear and convincing evidence. Likewise, given the defendant’s birth date, it is not clear that Dr. Oas' examination occurred prior to age 18. (R. 2173).

Thus, as the record currently stands, the defendant has failed to demonstrate that he meets the definition of mental retardation under the applicable definitions, standards and guidelines set forth in § 921.137. As discussed above, it is clear that these standards are the appropriate ones to be applied in Florida. The defendant’s failure to satisfy the requirements of § 921.137 means that he has not demonstrated that he is entitled to relief under Atkins or § 921.137.

Likewise, it is clear that the State was unaware of the all-or-nothing consequences of this issue at the time of sentencing. Therefore, if this Court were to find that Atkins or § 921.137 adversely impacts the existing sentence, then a full opportunity to address this issue under the applicable statutory guidelines and with a complete understanding of the consequences should be afforded to the State.

CONCLUSION

For all the reasons stated above, this Court should deny the defendant supplemental relief.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to David A. Davis, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by U.S. Mail on this _____ day of December, 2002.

Respectfully submitted and served,

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CERTIFICATE OF 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).

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