IN THE SUPREME COURT OF FLORIDA

DEMETRIS OMAR THOMAS,

Appellant,

v. Case No. **SC00-1092**

STATE OF FLORIDA,

Respondent.
_____________________/

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

Appellee/Respondent.
____________________________/

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

ARGUMENT

ISSUE III

SENTENCING THOMAS TO DEATH, A MENTALLY RETARDED PERSON VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

On June 12, 2001, after Thomas and the State had filed their briefs, Governor Jeb Bush signed in law Ch 2001-202, Laws of Florida. (See Appendix) It absolutely prohibits the execution of the mentally retarded, and it provides a procedure by which the mental retardation issue can be raised. This new legislation also requires the Department of Children and Families to establish the standard

tests to be used to determine retardation. Finally, section 8 prohibits the retroactive application to persons who had been "sentenced to death prior to the effective date of this act."[1] This is the most significant piece of death penalty legislation passed in the last quarter century, and in no uncertain terms its message clearly indicates that Florida has joined the growing number of states to reject the execution of the mentally retarded. Indeed, with this expression of Florida's evolving standard of decency, a majority of the states in the union now either ban executions altogether or at least prohibit executing the mentally retarded.

That number-more than half of the states-is significant because in Ford v. Wainwright, 477 U.S. 399 (1986), that U.S. Supreme Court found that because 26 states prohibited the execution of the insane, our national evolving standard of decency, as expressed in the Eighth Amendment, also prohibited putting them to death. Similarly, our evolving standard of decency, as illustrated by a majority of the states including Florida, has now reached a level that it precludes executing those who are mentally retarded. Similarly, under the "Cruel or Unusual" clause found in our state constitution, Florida's standards of decency have evolved so that we, like the majority of Americans, find the execution of those intellectually disabled repugnant to our core values.

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[1] The law became effective when signed by the Governor.

Thus, Ch 2001-202, taken as the crowning expression of our growing sensitivity to and sympathy for the mentally retarded, compels the conclusion that either the Eighth Amendment to the United States Constitution and Article I, section 17 of our state constitution prohibit executing the mentally retarded.

Ch 2001-202 has application beyond the constitutional analysis that looks to our evolving standards of decency. It specifically applies to this case even if this Court rejects the constitutional argument raised. The only reason it would have no bearing on Thomas' case arises from the non-retroactivity clause in that law, yet even that subsection has no impact on this case because Thomas' death sentence has not been imposed-at least as this Court has used that term.

There are two lines of reasoning concerning the retroactive application of the law. First, the "ex post facto" provisions found in the United States and Florida Constitutions applies to statutory changes in the law. Article 1, Section 10, United States Constitution; Article I, Section 10, Florida Constitution. That is, a legislative change in the law that applies retroactively to increase the punishment for a crime after it has been committed violates these constitutional proscriptions. Carmel v. Texas, 529 U.S. 513 (2000); Collins v. Youngblood, 497 U.S. 37, 42 (1990). On the other hand, rules or laws that are purely procedural in effect can be applied without regard to any ex post facto limitation. Carmel; Dobbert v. Florida,

432 U.S. 282 (1977)(Florida's amended and constitutional death penalty statute was procedural in nature and could be applied retroactively since it merely affected the mode or procedure by which a person could be sentenced to death and not the punishment.) Obviously, Ch 2001-202, Laws of Florida, even if applied retroactively, inures to Thomas' benefit, so no ex post facto limitation controls here.

Second, decisional changes in the law can have retroactive effect if they "(1) originate in either the United States Supreme Court or the Florida Supreme Court; (2) be constitutional in nature; and (3) have fundamental significance." State v. Callaway, 658 So. 2d 983, 986 (Fla. 1995); Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Moreover, decisions that may not satisfy any of those requirements may, none the less, be given "retroactive" application to nonfinal or "pipeline" cases. See, Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992):

> Thus, we hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or no yet final.

In this case, section 8 of Ch 2001-202. Laws of Florida. prohibits application of the change of law if Thomas was "sentenced to death prior to the effective date of this act." That effective date was June 12, 2001, and obviously the trial court

had “sentenced him to death” before then. Yet, not really because until this Court affirms that lower court punishment it is not final. Said another way, until this Court affirms Thomas’ death sentence, it is not been imposed, and his case remains in the pipeline. Smith. Thus, if the non retroactivity clause were decisional law, it would have no impact on this case because Ch 2001-202 qualifies under the standard established in Witt, or his case is still in the pipeline.

Of course, where a legislative act is clear this Court should give effect to it, and Thomas is not asking this Court to do otherwise. He merely says until this Court affirms his death sentence, it has not been imposed. Until it does so, finality has not attached.

In 1988, the Georgia legislature, like Florida’s, banned the execution of the mentally retarded. Its law, also like ours, had a non retroactivity clause. When faced with implementing it, however, the Georgia Supreme Court, refused to give that limiting provision any effect because Georgia’s Constitutional prohibition against Cruel and Unusual punishments applied to all punishment, regardless of when the crime was committed or the sentence imposed. Fleming v. Zant, 386 S.E.

2d 339, 342 (Ga. 1989). This Court should similarly limit the effects of section 8 of Ch. 2001-202. But see, Rondon v. State, 711 N.E. 2d 506, 512 (In. 1999)[2]

Therefore, Ch 2001-202, Laws of Florida, represents the will of the people in Florida that no person otherwise eligible for death sentence will be sentenced to death if he or she is mentally retarded. State and federal constitutional analysis must conclude that we no longer, as a state or a nation, want men such as Thomas executed for the murders they have committed. Similarly, because this defendant's death sentence is not final, the new law directly controls this issue, notwithstanding the nonretroactivity clause. This Court should reverse the trial court's sentence of death and remand for imposition of a life sentence.

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[2] The Georgia and Indiana Supreme Courts rejected due process and equal protection arguments that their statutes banning the execution of the mentally retarded should apply to defendants whose convictions had become final. While the Georgia high court justified retroactive application of its law under a cruel and unusual analysis, the Indiana Supreme Court never considered the retroactivity argument from that perspective because it found no violation of that federal constitutional proscription despite its state law banning executing the retarded.

CONCLUSION

Based on the arguments presented here, the Appellant, Demetris O'Marr Thomas, respectfully asks this honorable Court for the following relief: (1) Reverse the trial court's judgment and sentence and remand for a new trial; (2) Reverse the trial court's sentence of death and remand for imposition of a life sentence without the possibility of parole; or (3) Reverse the trial court's sentence of death and remand for a new sentencing hearing.

Respectfully submitted,

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____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **STEPHEN R. WHITE**, Assistant Attorney General, by hand delivery to The Capitol, Plaza Level, Tallahassee, FL 32399-1050; and a copy has been mailed to appellant, **DEMETRIS OMAR THOMAS**, #221834, Florida State Prison, Post Office Box 181, Starke, FL 32091-0181, on this date, July 27, 2001.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Fla. R. App. P. 9.210(a)(2), this brief was typed in Times New Roman 14 point.

____
DAVID A. DAVIS
Assistant Public Defender

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____________________________/

APPENDIX TO
SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

APPENDIX

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