IN THE SUPREME COURT OF FLORIDA

DEMETRIS OMARR THOMAS,

Appellant,

v. CASE NO. **SC00-1092**

STATE OF FLORIDA,

Appellee.
_____/

SUPPLEMENTAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Demetris Thomas submits this supplement Brief as directed by the December 3, 2002 order of this Court in his case.

STATEMENT OF THE CASE AND FACTS

Thomas relies on the Statements of the Case and Facts presented in his Amended Initial Brief.

SUMMARY OF THE ARGUMENT

The definition of mental retardation contained in Section 921.137(1) is the one Florida has traditionally used to define that disability. It is also the one adopted by the American Association on Mental Retardation and the American Psychiatric Association, national organizations that regularly deal with mental retardation issues. This includes the requirement that onset of this disability begin before the age of 18. This Court should accept the judgment of the Florida legislature in defining mental retardation because defining rights is an area of the law that is peculiarly within the legislature's exclusive jurisdiction.

This Court should not, however, follow its lead in defining the procedure to use in determining if the defendant suffers from that disability. That is, by prescribing a procedure for courts to use it has invaded this Court's exclusive jurisdiction in establishing the method or means by which a mentally retarded defendant can raise his or her disability as a bar to execution. If so, considerations of judicial efficiency argue well that this Court should require the defendant to raise the question of his deficient intellectual capacity before trial. If the trial judge finds the defendant has failed to carry his burden of proof, he should, nevertheless, be allowed to present his evidence (assuming he has some) to the jury for them to consider.

This Court should likewise reject the legislature's decree that mental retardation must be established by clear and convincing evidence. The risk of sending a person to death who is retarded under a preponderance of the evidence standard but not a clear and convincing one is too great and the benefits to the State too slight to justify the higher measure.

Besides the questions asked in its December 3, 2002 order, this Court should resolve the question of whether it is cruel or unusual under Florida's constitution to execute the mentally retarded. It should also consider the retroactive effect of Section 921.137, Florida Statutes (2002) and Atkins v. Virginia, 122 S. Ct. 2242 (2002).

ARGUMENT

ISSUE

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.

In Atkins v. Virginia, 122 S. Ct. 2242 (2002), the nation's high court declared that America's evolving standards of decency had progressed to the point that we, as a nation, believed the execution of mentally retarded defendants was cruel and unusual punishment. It left unanswered who were those people and how we determine who is retarded. "As was our approach in *Ford v. Wainwright*, with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.' 477 U.S. 399, 405, 416-17, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986)." Atkins, 122 S. Ct. at 2250.

1. What definition of mental retardation is to be applied. (Question 1)

Fortunately, this Court has legislative guidance in defining mental retardation. Indeed, identifying the mentally retarded is properly a legislative responsibility granted by our state constitution. That is, creating a right, is usually a matter of legislative prerogative. In Re Rules of Criminal Procedure, 272 So. 2d 65 ,66 (Fla.

1972)(Adkins, concurring.)("[S]ubstantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property.) This Court has a natural hesitancy doing that. Brennan v. State, 754 So. 2d 1 (Fla. 1999)(Wells, concurring and dissenting). Accordingly, our elected representatives in the 2002 legislative session exercised that responsibility by prohibiting executions of the mentally retarded and then providing definition for that disability. Section 921.137(1), Florida Statutes (2002):

> 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. The Department of Children and Family Services shall adopt rules to specify the standardized intelligence tests as provided in this subsection.
>
> (2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation.

Section 303.063(42), Florida Statutes (2002), provides a similar definition, and it is the one Florida has used for years in determining eligibility of its citizens

for various state programs to benefit or assist the mentally retarded. See Amended Initial Brief at p. 26

Also, this three part definition, or one similar to it, is the one national organizations concerned with mental retardation, have commonly used in defining that disability. See American Association on Mental Retardation, Classification and Retardation 1 (H. Grossman ed. 1983); American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 4th Ed (Text Revision), page 49; Cleburne v. Cleburne Living Center 473 U.S. 432, 442 n. 9 (1985). No reasons exist why this Court should wander away from the traditional, widely used, and easily applied definition of mental retardation found in Section 921.137(1). The legislature acted reasonably in an area in which it has exclusive constitutional authority to do so, and this Court should abide by its definition of retardation.

One its parts requires the manifestation of the intellectual deficiency "during the period from conception to age 18." Section 921.137(1). (Question 6). Since the defendant is the party who would normally, and logically, be the one raising the issue of his mental disability, he should be the one with the burden of establishing that fact. This is not to say that he must have been diagnosed as retarded before the age 18; simply that this disability must have been apparent by the time of the defendant's 18th birthday. As a matter of practice, this is often done by examining

school, medical, psychological, and other records, and talking with parents, friends, relatives, and others who knew the defendant as a child.

2. The procedure to use in proving mental retardation. (Questions 2 and 3)

If the Florida Constitution gives the legislature the exclusive right to determine rights and obligations, it gives this Court the exclusive power to determine the procedures the courts of this state will use in implementing them. Article V, section 2(a), Florida Constitution; Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000). Thus, if Section 921.137(4) provides the method for raising the mental retardation issue at a capital trial, as this Court's December 3, 2002, order explicitly recognized, the legislature encroached on this court's jurisdiction in creating that mechanism.

Moreover, the legislatively mandated procedure wastes judicial, prosecutorial, and defense time and effort. Specifically, subsection 921.137(4) allows the defendant to raise the mental retardation issue only after the jury has found the defendant guilty, and after it has recommended death. If the defendant is mentally retarded, it is better to find out early in the process so that all the parties can avoid the time and expense involved in preparing for a penalty phase that will never result in a death sentence.

Logic and judicial efficiency, therefore, lead naturally to the conclusion that, as in issues such as competency, the matter of the defendant's retardation is best resolved before trial (Question 5).

> As to the forum in which the *Atkins* issue is litigated, it is significant that the majority of states which have provided a statutory exemption from capital punishment for the mentally retarded have made the finding of mental retardation a matter for the trial judge as opposed to the jury. The better practice under *Atkins* is reflected by the procedure of such states as Indiana and Missouri, where the court makes a pre-trial determination of whether the defendant is mentally retarded and thereby spares both the State and the defendant the onerous burden of a futile bifurcated capital sentencing procedure

State v. Williams, Case No. 01-KA-1650 (La. Nov. 1, 2002)(footnotes omitted.)

If, on the other hand, the trial court finds the defendant failed to establish he was mentally retarded, he should, nevertheless be able to present his claim to the penalty phase jury. Lockett v. Ohio, 438 U.S. 586 (1978)(State must allow the penalty phase jury to consider all aspects of the defendant's character.), and the United States Supreme Court's recent decision in Ring v. Arizona, 122 S. Ct. 2428 (2002), compel that conclusion. If so, it should be instructed

> If you find by a preponderance of the evidence adduced at this hearing that the defendant is mentally retarded . . . , then you must not direct a sentence of death.

People v. Smith, Case No. 01-2449-001 (N.Y. Sup. October 30, 2002).

If the defendant bears the burden of establishing his mental retardation, the question arises of what standard of proof he or she must meet to do that. (Question 4). Section 921.137 requires the defendant to do so by clear and convincing evidence, but in placing that burden on the defendant, the legislature has put Florida in the distinct minority of states that require that heightened level of certainty. Most require only the defendant to do so by a preponderance of the evidence.

Since the United States Supreme Court decided Atkins, courts that have considered the burden of proof issue have uniformly concluded that the defendant has the burden to prove by a preponderance of the evidence that he or she is mentally retarded. Lott v. State, Case No. 1989-0846 (Oh, December 11, 2002); State v. Williams, Case No 01-KA-1650 (La. Nov. 1, 2002); Murphy v. Oklahoma, 54 P.3d 556, 568-69 (Okla. Cr. Sept 4, 2002); People v. Pulliam, Case No. 89141 (Il October 18, 2002); People v. Smith, Case No. 01-2449-001 (N.Y. Sup. Oct. 30, 2002). Cases and statutes pre-Atkins were less uniform, though most required the defendant to show his mental disability by only the lesser standard. Van Tran v. State, 66 S.W.3d 790, 793 (Tenn. 2001); State v. Victor, 612 N.W. 513, 514 (Neb. 2000); State v. White, 709 N.E.2d 140, 161 (OH 1999); Ark. Code Ann. Section 5-4-618 (Michie 1995); Md. Ann. Code Art. 27, Section 412 (1996); N.M. Stat. Ann.

Section 31-20A-21 (Michie 1984); N.Y. Crim. Proc. Law section 400-27 (MckInney 1994)(1997-98 pocket part); Wash. Rev. Code Ann. Section 10. 95.303 (1998 pocket part). A minority demanded he or she prove it by clear and convincing evidence. Rogers v. State, 698 N.E.2d 1172, 1175-76 (IN 1998); Colo. Rev. Stat. Sections 16-9-402, -403 (1997). Only Georgia (among the first states to ban executing the retarded) required the defendant to establish his retardation beyond a reasonable doubt. Ga. Code Ann. Section 17-7-131 (1994).

This preponderance of the evidence burden to establish a defendant's diminished mental capabilities naturally evolves from the the United States Supreme Court's decision in Cooper v. Oklahoma, 517 U.S. 348 (1996). In that case, the court held that while a state may require a defendant to prove his incompetency, it could not increase the risk of convicting an incompetent defendant by requiring him or her to establish that fact by clear and convincing evidence. A defendant who may be incompetent by a preponderance of the evidence but competent under a clear and convincing measure has far more to lose if a court required him to prove he was incompetent under the latter standard than the than the State did if it required only that he meet a preponderance of the evidence test.

> For the defendant, the consequences of an erroneous determination of competency are dire. . . .[A] erroneous determination

> of competence threatens a "fundamental component of or criminal justice system"-the basic fairness of the trial itself.
>
> By comparison to the defendant's interest, the injury to the State of the opposite error-a conclusion that the defendant is incompetent when he is in fact malingering-- is modest.

Id.

The retarded defendant faces a similar scenario as the one who could not meet the a clear and convincing standard for competence. For him or her, the consequences are even more dire-life or death. On the other hand, if the defendant is wrongly found retarded under a preponderance of the evidence measure, the State's injury is only the money required to house the defendant for the rest of his or her life. While that may be considerable it pales in comparison to the life itself and may be less than that required to execute him or her.

> Clearly, in the Atkins context, the State may bear the consequences of an erroneous determination that the defendant is mentally retarded(life imprisonment at hard labor) far more readily than the defendant of an erroneous determination that he is not mentally retarded."

State v. Williams, Case No. 01-KA-1650 (La Nov 1, 2002)

Thus, under the Supreme Court's rationale in Cooper, defendants who claim they are mentally retarded should only have to prove that fact by a preponderance of the evidence.

3. Other substantive issues (Question 7)

In Thomas' Initial Brief, he argued that executing mentally retarded defendants violates not only the Eighth Amendment to the United States Constitution, but Article I, Section 17 of the Florida Constitution. While Atkins resolved the issue for the nation, this Court should answer whether our state constitution likewise precludes executing the mentally retarded.

In Thomas' Supplemental Initial Brief, he argued that he should receive the benefit of Section 921.137, Florida Statutes (2002). That law was enacted after he had committed his crimes, after he had been sentenced to death, and indeed, after he had filed the Initial Brief in his case. This Court should resolve whether Section 921.137 applies to Thomas.

CONCLUSION

For the reasons presented here, in the Amended Initial Brief, the Supplemental Initial Brief, and the Supplemental Reply Brief, the Appellant, Demetris Thomas respectfully asks this honorable Court to reverse the judgment and sentence in this case and remand for a new trial; or reverse the trial court's sentence of death and remand for imposition of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to **STEPHEN R. WHITE**, Assistant Attorney General, The Capital, Tallahassee, FL 32399-1050; and to appellant, **DEMETRIS OMARR THOMAS**, #221834, Union Correctional Institution, 7819 NW 288th Street, Raiford, FL 32025-1440, on this date, December 23, 2002.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that pursuant to Rule 9.201(a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

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DAVID A. DAVIS