IN THE SUPREME COURT OF FLORIDA

DEMETRIS OMARR THOMAS,

Petitioner,

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

STATE OF FLORIDA,

Respondent.
_____/

SUPPLEMENTAL REPLY BRIEF OF PETITIONER

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ARGUMENT

ISSUE I

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.

Thomas argued in the Supplemental Initial Brief that Section 921.137, Florida Statutes (2001), affected his case in two ways. First, it is "the crowning expression of our growing sensitivity to and sympathy for the mentally retarded, [which] compels the conclusion that either Eighth Amendment to the United States Constitution and Article I, Section 17 of our state constitution prohibits executing the mentally retarded." (Supplemental Initial Brief at p. 3). Second, that new law has specific application to this case without regard to any constitutional argument that he raised. The State's Supplemental Answer Brief says nothing as to the first argument. Instead, it focuses only on whether Thomas meets its requirements and if he should have its benefits.

The nature of Reply Briefs forces Thomas to spend most of his effort defeating the State's various arguments, but he wants this Court to understand that

he places great emphasis on Section 921.137 being strong evidence of Florida's evolving sense of decency for state constitutional analysis purposes. It also has significant importance as an indicator of a similar national evolution towards greater sympathy for the mentally retarded. Thus, without any regard to the application of the statute specifically to Thomas, this new law is very strong evidence that we, as a state and as a nation, have evolved beyond putting our mentally retarded citizens to death.

Now to reply to the State's arguments presented in its Supplemental Answer Brief. On pages 3 and 4 of its brief, the State claims that the nonretroactivity clause in Section 921.137 is so essential to the entire statute that this Court would have to strike the entire section if it found that specific provision inapplicable to this case. Hardly. Under the test for severability established by this Court, the subsection can easily be found non applicable to Thomas and other "pipeline" cases.

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provision, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Waldrup v. Dugger, 562 So. 2d 687, 693 (Fla.1990) (quoting Cramp v. Board of Public Instruction, 137 So. 2d 828, 830 (Fla.1962)).

Here, subsection (8)-the nonretroactivity clause- can be easily separated from the remaining valid provisions of section 921.137. It is not "inextricably intertwined" with the other parts of that section. Allen v. Butterworth, 756 So. 2d 52, 64-65 (Fla. 2000). Without that provision, the purpose of the act-to ban the execution of the mentally retarded- can be accomplished. Indeed, without subsection (8), the act remains valid, and the State has made no effort to show how striking it somehow dooms the validity of what is left. Thus, that subsection, at least as it applies to defendants whose cases were pending in this Court on June 12, 2001, can be severed.[1]

The State then moves on, making the amazing claim that Thomas never proved he was retarded (Appellee's brief at p. 4). We need to get some facts in line here to understand the utter bravado exhibited by the State in this claim. First, at the penalty phase hearing Thomas presented uncontested and certainly uncontroverted evidence that he was mentally retarded. Dr. James Larson

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[1] Subsection (8) ostensibly prevents the rush to amend post conviction pleadings by those defendants whose cases have become final, i.e. this Court has affirmed their death sentences before June 12, 2001, and who have belatedly realized that they were retarded.

unequivocally said he was so. The State was present, and it had the opportunity to challenge that expert's conclusions. It also could have had Thomas examined by its experts, Rule 3.202, Fla. R. Crim. P., and it could have presented their testimony to rebut Dr. Larson's conclusions. It never did. Appellate counsel for Thomas simply stands in awe at the State's audacity, its daring, in claiming, for the very first time, that there was never any "thorough evidentiary foundation for classifying him as mentally retarded using any and all definitions extant at that time." (Appellee's Brief at pp 4-5). Just as we face the east to watch the sun rise despite the claims of Californians, this Court has no reason, no argument, and no evidence to conclude that Thomas, the State, and the trial court had other than a full and fair hearing to contest his mental retardation, despite all the claims of the State that the judicial sun now rises in the west.

Second, the trial court unequivocally found Thomas to be mentally retarded (11 R 2170).

Third, the State, until now, has never challenged that conclusion. It did not do so at the penalty phase hearing, and until now, it has not done so on appeal.[2] It

[2] Indeed, it made only a perfunctory cross-examination of Dr. Larson's conclusion that Thomas was mentally retarded. Instead, it focused on whether the defendant satisfied the statutory mental mitigators.

never filed a notice of cross appeal challenging that finding, and its Answer Brief argument conceded Thomas was retarded.[3]

It is, therefore, far too late in this appeal for the state, in a supplemental Answer Brief to, for the first time, now complain that Thomas is not mentally retarded. It has had ample opportunity to develop a record and present argument at the trial and appellate levels, and until now, it has chosen to ignore that tact. Indeed, if Thomas had pulled this stunt, forests world wide would howl in protest because the State would have used reams of paper on which it would cite the legions of cases totally demolishing the folly of trying to make such a belated effort. Thomas' appellate counsel, being a friend of trees, merely cites two cases: Cannady v. State 620 So. 2d 165 (Fla 1993); DuPree v. State,656 So. 2d 430 (Fla. 1995), and the State's darling act, the Criminal Appeal Reform Act, Section 924.051(3), Florida Statutes (2000 Supp.). Cannady and DuPree hold that the procedural default rules the State so gleefully and freely use against defendants apply in equal measure to the State. Likewise, Section 924.051(3) prohibits appeals

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[3] The prosecutor in this case, Mr. Robert Elmore, certainly is aware of his right to appeal trial court findings arising from the penalty phase portion of a capital trial. In Jeffrey G. Hutchinson, Case No. SC01-4318, which is pending before this Court, he filed a Notice of Cross Appeal, challenging sentencing proceeding rulings of Judge Barron, who was also the trial judge in this case. See volume XIV pages 2762-63 of that record.

taken from a trial court order "unless a prejudicial error is alleged and is properly preserved." Of course, appellate counsel for Thomas understands the State's tactic of wanting to argue unpreserved error, having tried to use it many times himself. But, just as this Court has turned a deaf ear to his siren's song, so it should skip the State's recital here. The evidence Thomas is mentally retarded is simply so strong, so unchallenged, and so conclusive that the State at trial and on appeal would have sounded tone deaf and off key to have challenged it. So it did not, and this Court should not give it an opportunity to present an encore performance.

Moreover, Thomas clearly met the three prong test required by Section 921.137: (1) He has an IQ of 61 (6 R 1142, 17 R 1060), which is more than two standard deviations below the mean score on a standardized intelligence test; (2) he has deficits in his adaptive behavior (6 R 1144-45); and (3) this has manifested itself before he was 18 years old (17 R 1050-51).[4]

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[4] Thomas points out that Section 921.137 has no provision that the defendant has to establish he meets each of the required elements defining mental retardation. He need only present expert testimony that he does. The State, on cross examination, of course can then require him or her to "specify the facts or data" justifying their opinion the defendant is retarded. Section 90.705(1) Florida Statutes (2000 Supp.); Esty v. State, 642 So. 2d 1074 (Fla. 1994).

The State, on pages 4-5 of its Supplemental Answer Brief says that Thomas had notice of the criteria for mental retardation, which, of course, is correct, but so what? As just mentioned, he provided evidence that he had met each element required by Sections 921.137, 393.063(42), and 916.106(12), Florida Statutes (2000 Supp.). That is not the issue. Section 921.137 has fundamental significance because for the first time since Florida re enacted its death penalty procedure, and indeed, probably since it has ever had capital punishment the Florida legislature (and not this Court, Brennan v. State, 754 So. 2d 1, 14 (Fla. 2000) (Harding concurring and dissenting)) has identified a group of people who are to be spared a death sentence. Paraphrasing what this Court recently said in Farina v. State, Case No. SC93050 (Fla. August 16, 2001) "[W]hen a defendant is [mentally retarded, his mental disability] is such a substantial mitigating factor that it cannot be outweighed by any set of aggravating circumstances as a matter of law." Under any fair legal system, that is a fundamental change to the way Florida has being doing its death penalty business for at least the last quarter of a century. C.f., Maddox v. State, 760 So. 2d 89, 98 (Fla. 2000).

In section B of its brief, the State claims Thomas lacks standing to challenge the non retroactivity clause, ostensibly because he failed to show "that he met the terms of the Section 921.137 upon which he claims he is entitled to relief. Without

establishing he met those terms, he fails to establish that the prospective-only clause makes any difference in his case." Apparently, Thomas, according to the State, never proved he was mentally retarded as section 921.137 defines it. In particular it claims "Thomas has failed to show that he clearly-and-convincingly proved that he performed 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, that he had concurrent deficits in adaptive behavior, and, that he manifest these criteria during the period from conception to age 18." (Appellee's brief at p. 6)

When we analyze Section 921.137, we find it has only three parts: 1. A restatement of the standard definition of mental retardation; 2. a declaration that the mentally retarded will not be executed; 3. A procedure to determine if the defendant is retarded, and if so when the court will impose a life sentence. The State's part B argument focuses on the first part and complains that Thomas lacks "standing" because he failed to prove he met the requirements of the standard definition that Florida has used for years. Yet, as shown above, that is patently false. Moreover, because no evidence exists refuting any of those elements, this Court must conclude he has carried not only his "clear and convincing" burden but has established it beyond a reasonable doubt. After reviewing the evidence

Thomas presented of his intellectual disability, this Court can only have an "abiding conviction" that he is mentally retarded. See, Fla. Std Jury Instr (Criminal) 2.03

The State, on pages 6-7 of its brief, underscores its argument by speculating on "the ability of a defendant to artificially lower his/her IQ score below actual intellectual functioning." First, this entirely unfounded claim is presented here for the first time, and is therefore, precluded. Cannady v. State, 620 So. 2d 165 (Fla. 1993); C.f. Durocher v. Singletary, 623 So. 2d 482, 484 (Fla.1993) ("CCR argues that Durocher is not competent to waive collateral representation, but presents nothing more than speculation to support its argument.") It had every opportunity the law provides at the sentencing hearing to present its case that Thomas was malingering or trying to fake the test results. It never did so at trial, and until now it has never complained about any lack of finding that this defendant somehow distorted his intellectual development.

Second, Dr. Larson specifically refuted the malingering argument, noting that Thomas tried to do his best on the various tests given him (6 R 1169). In contrast to this uncontroverted evidence, the State can only create a hypothetical situation. Perhaps Thomas was trying to fake his retardation, so we need another hearing to see if he was. Appellate counsel is, frankly, torn by this argument. If this Court accepts it he would like to use its subsequent opinion allowing new hearings as

precedent every time he gets a ruling he does not like. Forget that the defendant "could have or should have" raised that issue below. Instead, speculative arguments about what could have happened now control. The mind boggles at the possibilities, and if this Court is duped by this bizarre argument, it can strike "finality" from its lexicon.

As to the State's Part C argument, Thomas has few quibbles with it. Indeed, he does not because it has ignored his argument: Until his punishment has become final, he has not been sentenced to death. This Court has held that finality occurs when the United States Supreme Court has denied certiorari. Thus, Thomas, though the trial court has imposed a death sentence, has not been sentenced to death because that punishment is not yet final. Mann v. Moore, 26 Fla. L. Weekly S490 (Fla. July 12, 2001)("Mann's death sentence became final when the Supreme Court denied certiorari on January 19, 1993,").

CONCLUSION

Normally, conclusions are routine, and the relief Thomas requested in his Initial and Reply briefs was typical of those of this genre.

The State, however, has asked for "a full evidentiary hearing in the circuit court" apparently so it can relitigate whether Thomas is retarded. (Appellee's brief at p. 10) Thomas objects. That issue has been decided, and the prosecution should not be allowed to contest an issue it has belatedly realized is important. Thomas certainly could not have done that. Legions of cases from this Court have rejected defense efforts in post conviction litigation to raise issues that could have or should have been raised on direct appeal. The State has had its opportunity to have Thomas examined, but it never did so. The State has had its opportunity to present its case against finding him retarded, but it never did so. The State has had its opportunity to appeal the trial court's finding him mentally retarded, but again it never did so. By now, it has had so many bites of the apple that none remains for it to eat. The trial court found Thomas mentally retarded, and it had an abundant amount of unrebutted evidence to support that conclusion. That issue has been decided. Now the only question remains what this Court should do with it. Thomas respectfully asks this Court to conclude that under the Eighth Amendment

to the United States Constitution, Article I Section 17 of the Florida Constitution, or Section 921.137, Florida Statutes (2001), he is ineligible for execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to **STEPHEN R. WHITE**, Assistant Attorney General, by hand delivery to The Capitol, Plaza Level, Tallahassee, Florida 32399-1050, and a copy has been mailed to Petitioner, **DEMETRIS OMARR THOMAS,** #221834, Florida State Prison, Post Office Box 181, Starke, FL 32083-0181, on this day, September 6, 2001.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Rule 9.100(1), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

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DAVID A. DAVIS
Assistant Public Defender