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

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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ARGUMENT: ISSUE III

DID THE TRIAL COURT REVERSIBLY ERR BY SENTENCING THOMAS TO DEATH WHERE THERE WAS SOME EVIDENCE THAT HE WAS MENTALLY RETARDED? (Restated)

Thomas[1] contends that Chapter 2001-202, Laws of Fla., ("§921.137"; copy attached) mandates that he be sentenced to life in prison because he supposedly is mentally retarded under that statute. Thomas erroneously assumes that he is mentally retarded **under the statute** while ignoring entire portions of it that are crucial to its reflection of the "will of the people" (SIB 6) and their "standards of decency" (SIB 2). Thomas' assumption ignores the legislature's intent, as expressed in the plain language of **all of the statute** and belies his standing to raise this claim.[2]

A. Thomas has failed to show that he meets any of the provisions of the new statute, which must be viewed as a whole.

It is axiomatic that the full, plain intent of the legislation must be implemented, unless that implementation is unconstitutional.[3] An integral part of Section 921.137 is its

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[1] The State references the Supplemental Initial Brief of Appellant as "SIB" and the State's Answer Brief, as "AB."

[2] An appellant bears the burden of demonstrating error in the record. See, e.g., Robinson v. State, 610 So.2d 1288, 1290 (Fla. 1992) ("Robinson has not shown that the jurors noticed, or were affected by, the shackles"); Beech v. State, 436 So.2d 82, 85 (Fla. 1983) (since appellant failed to show where record on appeal established reversible error, "the presumption of correctness stands"; rejecting due process argument).

[3] See, e.g, State v. Rife, 26 Fla. L. Weekly S226 (Fla. Apr. 12, 2001) ("Unless the legislature acts in an unconstitutional manner, courts must permit the legislature to legislate. And unless the legislation is vague, the courts must apply the law **as enacted by the legislature**"), quoting approvingly State v.

prospective-only provision. Thomas' attack on the prospective-only provision mistakenly ignores the plain-intent principle, as well as the obvious omission of a severability clause in the statute. The provision plainly states: "This section does not apply to a defendant who was sentenced to death prior to the effective date of this act," §921.137(8). Here, Thomas was "sentenced" May 3, 2000, (XVII-T 1160) which was over a year "prior to" the June 12, 2001, effective date of the statute. The legislature's intent was clear: Thomas has not shown that he falls within the ambit of the statute.

Furthermore, Section 921.137 includes several other significant provisions, none of which Thomas has shown he meets:[4]

- The defendant must give notice of an intent to rely upon the statute's bar to sentencing the retarded to death; the notice must comply with Rule 3.202, Fla.R.Cr.P.; See §921.137(3),(4);
- After a jury recommendation of death, the trial court determines if the defendant is retarded using the definition of "mental retardation" as defined in the new statute, See §921.137(4);

Rife, 733 So.2d 541, 543 n. 2 (Fla. 5th DCA 1999).

[4] Because the jury recommended that Thomas be sentenced to death (by a vote of 10 to 2, X-R 1881, XVII-T 1149), the State does not include portions of the new statute where a defendant waives the right to a jury recommendation or where the jury recommended life.

- The defendant bears the burden of establishing mental retardation, as defined in the new statute, by "clear and convincing evidence," See Id.;
- The trial court must set out "with specificity" findings that support the determination that the defendant is retarded, as defined in the new statute, See Id.;
- "Mental retardation" is defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18," §921.137(1);
  - "[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," Id.;
  - The "standardized intelligence test" must be specified "in the rules of the Department of Children and Family Services," Id.;

- "[A]daptive behavior"[5] is 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," Id.

The new statute expressly limits its application to cases in which "mental retardation" is determined "in accordance with" its requirements, See §921.137(2). This provision, read in pari materia with the foregoing listed pre-sentencing safeguards and limitations would necessitate striking down the entire statute and any reliance Thomas places upon it if, for any reason, the prospective-only provision falls or otherwise is ineffective. However, given these safeguards and limitations, the prospective-only provision should be given the full force and effect of its plain language.

Not only has Thomas failed to show how he has met each the foregoing provisions of the statute listed above, **he has failed**

[5] As the State argued in its Answer Brief (AB 39-42, 14-21, 44-49), the evidence demonstrates a level of adaptive functioning well-above any IQ scores here. See also Walls v. State, 641 So.2d 381,*8 (Fla. 1994) ("Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking"); Strunk v. Heckler, 732 F.2d 1357, 1359-61 (7th Cir. 1984) (upheld denial of social security benefits; "even if the plaintiff's I.Q. was within the 60-69 range, she still would not be entitled to benefits as he found that she suffered from no other physical or mental impairment that imposed a significant work-related limitation of function as required by 20 C.F.R. Part 404"); 20 CFR §416.926a ("you may have a valid IQ score below the level in paragraph (e)(2), but other evidence shows that you have learned to drive a car, shop independently, and read books near your expected grade level").

to show that he has met ANY of them. Thus, Thomas has failed to establish that he is entitled to any relief under the statute.

If Thomas claims that he had no notice whatsoever of these cri-teria for mental retardation, he would be mistaken. See §§ 393.063(42),916.106(12) Fla. Stat.(2000). See also State v. Kinner, 398 So.2d 1360, 1363 (Fla. 1981) ("When read together, ... the sections [in ch. 393, Fla. Stat., concerning involuntary com-mitment and defining retardation] provide the requisite standards and safeguards with respect to involuntary commitment"); §760.22(7)(b), Fla. Stat. (2000) (cross references "developmental disability as defined in s. 393.063"). Thus, the State disputes Thomas's suggestions (SIB 2,4) that Section 921.137, as well as any appellate decision based upon it[6], reach any "fundamental" level.

Further, Thomas' counsel argued below that retardation per se prohibits the imposition of a death sentence upon him (X-R 1968), indicating that his counsel was aware of the importance of providing a thorough evidentiary foundation for classifying him as mentally retarded using any and all definitions extant at that time. A fortiori, Thomas' argument to the trial court recognized the pendency of "a bill before the legislature to prevent the execution of the mentally retarded." (Id.)

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[6] See, e.g., Glock v. Moore, 776 So.2d 243, 248 (Fla. 2001) (discussion of cases holding that Espinosa not retroactive); Lambrix v. Singletary, 520 U.S. 518, 528, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) ("fundamental fairness and accuracy of the criminal proceeding" not applicable to *Espinosa* errors).

B. Thomas has no standing to argue the application of the statute.

The principle of standing requires a party to demonstrate, in order to challenge a statutory provision, that s/he is adversely affected by the application of that specific provision. See, e.g., Greenway v. State, 413 So.2d 23, 24 (Fla. 1982) ("Appellant may challenge only those portions of section 944.47 with which he is charged since he is unaffected by other provisions"); State v. Olson, 586 So.2d 1239, 1242 (Fla. 1st DCA 1991) ("must be affected by the portion of the statute which he attacks").[7]

Here, Thomas' burden to show that the prospective-only clause of Section 921.137(8) adversely affects him is intertwined with his burden of showing 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. For example, Thomas has failed to show that he clearly-and-

[7] Put in terms of Fourth Amendment rights, a defendant must establish standing that his or her reasonable expectation of privacy was violated, not the privacy of someone else. See, e.g., Jones v. State, 648 So.2d 669, 675 (Fla. 1994); Wells v. State, 402 So.2d 402, 404 (Fla. 1981); Rakas v. Illinois, 439 U.S. 128, 139-43, 148-49, 99 S.Ct. 421 (1978).

Standing concerns specific rights and duties under the provision of law being invoked or challenged, not an ultimate adverse outcome of the case. Thus, the fact that a defendant will be negatively affected by the prosecution's use of an item of evidence does not confer Fourth Amendment standing to challenge its introduction. See U.S. v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547 (1980) ("automatic standing rule ... is therefore overruled").

convincingly proved that he per-formed 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 manifested these criteria during the period from conception to age 18.

The **importance of ALL of the 921.137 criteria and the clear-and-convincing burden of proof** on the defendant is underscored by the ability of a defendant to artificially lower his/her IQ score below actual intellectual functioning. San Martin v. State, 705 So.2d 1337, 1348 (Fla. 1997), held that 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 reasoned concerning IQ-test performance, "[A]n individual's performance on such a test ... may easily reflect less than his best efforts." Patently, "less than best efforts" may be motivated by a desire to avoid the death penalty or, perhaps as a teenager, by a lack of motivation to pursue any more academic-oriented schooling. Thus, the Diagnostic & Statistical Manual of Mental Disorders (4th ed. 2000) ("DSM-IV"), has an entire section devoted to Malingering (copy attached), which is characterized by a motive to produce a false score, such as to "avoid[] legal responsibility," Id. at 517 (copy attached).[8]

[8] See also Miles v. Dorsey, 61 F.3d 1459, 1473 (10th Cir. 1995) ("On tests designed to assess memory and information, Petitioner scored so low as to indicate intentional malingering"); Goldberg v. National Life Ins. Co. of Vermont,

Accordingly, Section 921.137 provides safeguards of timely notice and the opportunity for multiple expert evaluations for full adversarial testing and requires the defendant to bear the burden at the level of clear and convincing rather than only the preponderance-of-evidence required of a mitigator, See, e.g., Walls v. State, 641 So.2d 381, *8 (Fla. 1994) ("prove mitigating factors by a preponderance of the evidence").

Here, because Thomas would only have rights under the statute if he had adduced clear-and-convincing evidence of **ALL** of its cri-teria, he has failed to show his rights have been adversely impac-ted by the new statute's prospective-only clause. He has failed to show that he has standing to challenge that clause. Put another way, arguendo, viewing all portions of the new statute as indicia of human decency, Thomas has failed to show that sentencing him to death violates any "evolving standard[] of decency" (SIB 2-3).

C."Pipeline" theory does not assist Thomas' position.

Thomas attempts to bypass the prospective-only clause of the new statute by arguing that his sentence is not "final," making

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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"). Also, depression can lower an IQ score, See Blackwood v. State, 777 So.2d 399, 404-405 (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 score to the depression"; affirmed sentence of death), and IQ scores can vary over time, See Walls v. State, 641 So.2d 381 (Fla. 1994) ("low IQ"; "expert psychologist stated that Walls' IQ actually had declined substantially during the years prior to the trial"; judgment and sentences affirmed).

it a "pipeline" case. (See SIB 3-5)[9] The State has several

[9] Perhaps Thomas is attempting to distinguish his case from the many defendants on death row whose IQ is in the low range, especially considering that there is a reportedly measurement error of approximately five points, independent of malingering, See DSM-IV 41 (4th ed. 2000) (copy attached): E.g., Hall v. State, 742 So.2d 225, 227-30 (Fla. 1999) ("Hall 'is probably somewhat retarded'"; IQ scores of 60, 73, 74), habeas denied Hall v. Moore, 26 Fla. L. Weekly S316 (Fla. May 10, 2001) (rejected claim that "appellate counsel committed fundamental error for failing to argue on direct appeal that Hall is mentally retarded and that his execution would be unconstitutional"); Blackwood (70 IQ); Thompson v. State, 648 So.2d 692, 697 (Fla. 1994) (70 IQ and "scores of between 56 and 63"; "very low intellectual functioning, a psychotic disturbance, brain damage, a history of drug abuse, delusions and hallucinations"; "judge properly considered the fact of Thompson's low intelligence as a mitigating factor"); Taylor v. State, 630 So.2d 1038, 1043 (Fla. 1993) (IQ scores 68-70 and, as a child, "normal"; trial court found mild retardation, giving it slight weight; evidence of normal behavior); Kight v. State, 512 So.2d 922, 926 (Fla. 1987) (69 IQ; "no error in the trial court's failure to find Kight's low IQ and history of abusive childhood as non-statutory mitigating factors"); Jones v. State, 732 So.2d 313, 316 (Fla. 1999) ("IQ test administered while appellant was in public school established that appellant was in the 'moderately retarded' range"; subsequent IQ test, 70-75); Phillips v. State, 608 So.2d 778, 782-83 (Fla. 1992) (remanded for resentencing; post-conviction evidence of IQ score of 73-75), affirmed after resentence Phillips v. State, 705 So.2d 1320 (Fla. 1997)(mitigator of "Phillips' low intelligence (given little weight)"); San Martin v. State, 705 So.2d 1337, 1348 (Fla. 1997) (77 IQ); Kearse v. State, 770 So.2d 1119, 1139 (Fla. 2000) (75 IQ; Justice Anstead, dissenting). See also Alston v. State, 723 So.2d 148, 162 (Fla. 1998) (reasoning in part that "borderline IQ, ... mental age ... between thirteen and fifteen" rebutted by evidence of higher mental capacity; affirmed sentence of death); Lawrence v. State, 698 So.2d 1219, 1221 n. 2 (Fla. 1997) ("court found that Lawrence cooperated with police ... Lawrence had a learning disability and low IQ ... Lawrence had a deprived childhood"; affirm the convictions and sentences); Wickham v. State, 593 So.2d 191, 193 (Fla. 1991) ("brain damage, psychiatric history, low IQ, and inability to cope with normal life"); Johnston v. Dugger, 583 So.2d 657, 659-60, 661 (Fla. 1991) ("IQ of 57 at the age of seven and a half"; "Although according to Dr. Fleming defendant had a severe

responses. First, to be a "pipeline" case for the application of a new rule of law, the defendant must show that, but-for the timing of his appeal, he is entitled to the right at issue. See, e.g., Smith v. State, 598 So.2d 1063, 1066 (Fla. 1992) (defendant must have objected if preservation required to appeal). As discussed supra, Thomas has made no such showing here. Second, the entire idea of "pipeline" is inconsistent with the plain prospective-only provision of the statute, as the watershed "pipeline" case explained that the "pipeline" principle denotes the "**retrospective application** by the courts of this state," Smith, 598 So.2d at 1066. Accord Wuornos v. State, 644 So.2d 1000, 1007, 1007 n. 4 (Fla. 1994) ("new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise"; requirement instruction on "'doubling' of the aggravating factors of murder committed for pecuniary gain and murder committed during a robbery" prospective only and not applicable to pipeline cases); Mitchell v. Moore, 26 Fla. L. Weekly S229, n. 8 (Fla. 2001). And, third, the "pipeline" principle applies to appellate decisions, See, e.g., Smith, 598 So.2d at 1066 ("retrospective application of the **decisions of this Court** with respect to all nonfinal cases"); Wuornos ("new points of law **established by this Court**"); Mitchell ("Whenever

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memory retention deficit, he did score a verbal IQ of 75 and a performance IQ of 101 on the WAIS-R test which would have placed him in the low average intelligence range"); Walls ("low IQ so that he functioned intellectually at about the age of twelve or thirteen").

a **court** announces a new rule of law"; quoting Smith), not to provisions of a statute, especially ones that are explicitly prospective only.

Accordingly, Thomas (SIB 5-6) reads into the statute a "finality" proviso that simply is not there and not the intent of the legislature as expressed in the plain words of 921.137(8). Thomas' argument that a sentence is not "imposed" until it is finalized on appeal is unfounded and contrary to the role of the circuit judge specified Sections 921.141, Fla. Stat., in imposing the sentence and contrary to the basic role of this Court to review cases in which the sentence of death has been already imposed. Thus, the jurisdiction here of this very case depends for its viability upon the fact that the "defendant ... **was** sentenced to death," §921.137(8), thereby precluding this case from falling within the ambit of the new statute. See Art. 5 § 3, Fla. Const. ("Shall hear appeals from **final** judgments of trial courts imposing the death penalty"); 921.141(4), Fla. Stat.; Rule 9.030, Fla.R.App.P. (Florida Supreme Court jurisdiction to review "**final** orders of courts imposing sentences of death"). See also State v. Clements, 668 So.2d 980, 981 (Fla. 1996) (conviction maintained where appellate process not completed due to death of defendant).

In sum, if the legislature really wanted Section 921.137 to apply to cases already on appeal, it would have said so. See State v. Kokal, 562 So.2d 324, 326-27 (Fla. 1990) (discussing Section 119.07: "until the conclusion of the litigation or adversarial administrative proceedings").

CONCLUSION

The State respectfully maintains its request for affirmance of Appellant's judgment and sentence, and, if, for any reason, law applicable to this case is changed so that retardation per se renders a defendant death-sentence-ineligible, the State requests a full evidentiary hearing in the circuit court.

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 MAIL on August 27, 2001.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla.R.App.P. 9.210.

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APPENDIX

A. Chapter 2001-202, Laws of Fla., §921.137, Fla. Stat.

B. Diagnostic & Statistical Manual of Mental Disorders (4th ed. 2000): excerpts of pages 41-43, 517, 739-40.