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Florida Association of Criminal Defense Lawyers
Miami Chapter
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Founded in 1963 by Daniel Pearson & Harry Prebish

In Re Proposed Rule 3.203, Fla. R. Crim. P.

FILED
THOMAS D. HALL
JUL 31 2002
CLERK, SUPREME COURT
BY

SC02-1230

May It Please the Court:

Please accept this letter as the comment of **the Florida Association of Criminal Defense Lawyers-Miami, opposing adoption of the emergency petition proposing a new Florida Rule of Criminal Procedure 3.203** (Defendant's Mental Retardation as a Bar to the Imposition of the Death Penalty). The emergency petition does not take into account two significant, intervening decisions of the United States Supreme Court: Ring v. Arizona, 122 S. Ct. 2428 (2002), which dramatically alters the law governing imposition of the death penalty by the states, and Atkins v. Virginia, 122 S. Ct. 2242 (2002), which establishes an Eighth Amendment prohibition on executing the mentally retarded. Since the proposed emergency rule was drafted before the Supreme Court decided Ring and Atkins, it is respectfully submitted that the continuing validity of the proposed rule, and much of the Florida death penalty scheme, are now in question. We ask that the proposed rule be returned to committee, where it should be re-examined under the focus of the Ring and Atkins decisions.

We offer the services of our members to assist in this re-examination. In particular, I commend to you Eugene Zenobi, Esq., one of our directors, and a longtime death penalty specialist, who has highlighted a few of the areas that deserve renewed attention. These areas are outlined below:

Sections (a) and (b) of the proposed rule require that a defendant give notice to invoke a mental retardation defense, and to file motions for a determination of mental retardation. Pretrial notice, however, is not a prerequisite to invoking the mental retardation defense under the Eighth Amendment's Cruel and Unusual Punishment Clause, as interpreted by Atkins. Moreover, the fact of mental retardation is solely within the jury's province, not the trial judge's, under the view expressed in Ring, which adopted into death penalty jurisprudence the requirements of Apprendi v. New Jersey, 530 U.S. 466 (2000). The proposed rule overlooks this requirement and, even if clarified, the rule cannot be effectively implemented without jury instructions to cover this defense.

Section (c) conflicts with Ring, since it permits a prosecutor to seek imposition of the death penalty after the jury has already returned a recommended sentence of life imprisonment. Ring was decided pursuant to Apprendi, which requires that the jury has the sole province to decide whether to enhance a sentence from life imprisonment to the death penalty. The proposed Florida rule is irreconcilable with Ring, since it directly authorizes death penalty proceedings before a judge after the jury has decided against imposing death.

Section (a)'s notice requirement also implicates Fifth Amendment, Sixth Amendment and attorney-client privilege concerns, since it permits discovery by the state before the guilt phase has concluded. The pretrial notice requires that the "names and addresses of any experts whom the defendant may call to testify" shall be provided along with the notice of intent. The consequences of this rule may require premature exposure of confidential information, reports, names, and factual data not properly available to the state before trial (due to Fifth Amendment protections); or the exposure of attorney-client privileged information (since the medical expert is an agent of the attorney); or exposure of psychotherapist-patient privileged information.

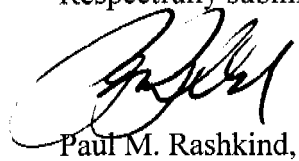
Section (a) seems to be supplemented by section (e) Appointment of Experts: Time of Examination, although it is unclear. If section (e) is used as a pre-guilt-phase vehicle, then the preceding discussion applies to section (e), as well. Additionally, section (e) provides for attendance of the state attorney during court-appointed expert examinations, which portends a host of concerns beyond the spectrum of Rule 3.203 (collateral offenses, limitations on the scope of the examination, etc.). We suggest that section (e) should only permit defense counsel to be present at the actual examination (to protect the client's constitutional rights), while the state attorney should be present only during a deposition of the expert, taken at an appropriate stage of the proceedings.

Section (f) Defendant's Refusal to Cooperate, also raises concerns. Subsection (f)(2), allows that the court may, "in its discretion," "prohibit defense experts from testifying concerning any tests, evaluations, or examinations of the defendant regarding the defendant's mental retardation." This raises two formidable problems. First, the difficulty with "prohibiting defense experts from testifying" is that the exact issue to be examined (i.e., retardation) may be the impediment to the refusal (along with a multitude of other integrated psychological, medical, pharmacological issues) and thus the rule invites a due process violation. Second, a fairly persuasive position can be taken that simple discretion is not a constitutionally permissible test, but rather that a compelling reason must be advanced before the defense evidence may be excluded for refusal to cooperate. Either way, the proposed discretionary prohibition likely fails to fulfill due process protections for the uncooperative, yet mentally challenged, defendant. At the very least, we suggest that a mandatory procedural due process hearing requirement be included in the rule, since the factual and medical evidence of retardation, along with legal arguments, may be complex and intricate. The drastic remedy of a complete prohibition of defense experts should certainly require a hearing on these issues.

Section (g), Hearing on Motion to Determine Mental Retardation, requires a finding by "clear and convincing evidence" by "the court." The former phrase violates Atkins, while the latter violates Ring and Apprendi.

Our comments and discussion are not exhaustive. We do submit, however, that the proposed rule and the entire present death penalty scheme in Florida require exhaustive review and revision, in order to comport with U.S. Supreme Court decisions rendered in the past Term.

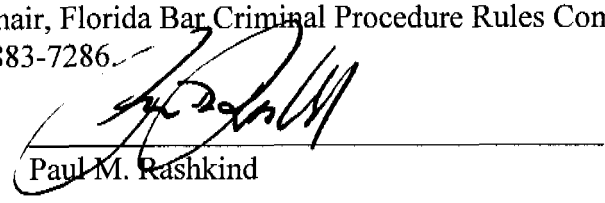
Respectfully submitted,



Paul M. Rashkind, Esq.
President, FACDL-Miami

Certificate of Service

I hereby certify that a copy of the foregoing comment was served by mail this 30th day of July, 2002, upon Raymond J. Rafool, II, Chair, Florida Bar Criminal Procedure Rules Committee, P.O. Box 7286, Winter Haven, Florida 33883-7286.



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