

ORIGINAL

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IN THE SUPREME COURT OF FLORIDA

FILED
THOMAS D. HALL
JUL 30 2002

**IN Re: Proposed Rule 3.203
Florida Rules of Criminal
Procedure**

SC02- 1230

CLERK, SUPREME COURT
BY _____

**COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION,
INC.**

The Florida Public Defender Association, Inc., submits these comments relating to proposed Rule of Criminal Procedure 3.203 related to implementation of Section 921.137 Florida Statutes (2001) that prohibits the imposition of the death penalty on defendants who are mentally retarded:

1. Paragraph (c) of the rule provides a procedure for the State to notify the defendant if it intends to seek death when the jury has recommended life and the defendant may be mentally retarded. In light of Ring v. Arizona, __ U.S. __, 122 S.Ct. 2428 (2002), and more particularly, Harris v. United States, __ U.S. __, 122 S.Ct. 2406 (2002), this paragraph no longer has constitutional legitimacy. In our hybrid system, the jury's recommendation deserves "great weight." Tedder v. State, 322 So. 2d 908(Fla. 1975); Espinosa v. Florida, 505 U. S. 1079 (1992). Indeed, unless no reasonable person could agree that life was appropriate, the sentencing court has no alternative but to impose a life sentence. Tedder, at 910.

In Harris, the Supreme Court characterized the jury's verdict as a sentence limiting authority. Whatever crime the jury found the defendant guilty of committing, the sentencing court could not exceed the maximum punishment for that offense. In the context of Florida's death penalty scheme this would mean that if the jury had decided that the defendant should live, the court could not impose a harsher, i.e. death, sentence. Hence, the prosecution can no longer seek death for any defendant, even a mentally retarded one, when the jury has recommended life. Paragraph (c) has no relevance in the post Ring and Harris world.

2. Paragraph (e) requires "The court shall appoint two experts in the field of mental retardation upon the receipt of the motion for determination of mental retardation." They are to examine the defendant and make a report of their findings. Requiring experts "in the field of mental retardation" is commendable because mental retardation is distinctly different from mental illness, and many mental health experts simply lack the substantial training and expertise required to properly determine if a person is mentally retarded. Ellis and Luckason, "Mentally Retarded Criminal Defendants," 53 George Washington Law Review, 414, 485-86.

3. Paragraph (g) provides for a hearing on the issue of the defendant's mental retardation, and at the hearing "the court shall consider the findings of the court-appointed experts, the findings of any other expert offered by the state or the

defense and all other evidence on the issue of whether the defendant has mental retardation."

The "any other expert" provision of paragraph (g) can potentially gut the mental retardation expertise requirement of paragraph (e). That is, the experts appointed according to paragraph (e) may conclude the defendant is or is not mentally retarded. The defense or prosecution, unsatisfied with their conclusion, could let their fingers do the walking through the yellow pages of the telephone book for "any other expert," and find a psychologist or psychiatrist who has no expertise, experience, or training in mental retardation, but who is willing to scan the criteria for mental retardation as defined in section 921.137(1) Florida Statutes (2001) and make an evaluation that the defendant is or is not mentally retarded. Paragraph (g)'s allowance of such casual expertise should not undermine the qualified conclusions of mental retardation experts.

It is recommended, therefore, that before "any expert" be allowed to testify about the defendant's mental retardation that he or she have a significant knowledge of or experience with mentally retardation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to
John Harkness, Executive Director, The Florida Bar 650 Apalachee Parkway
Tallahassee, Florida 23299-2300; Kevin M. Emas, Chairman, Criminal Procedure
Rules Committee, 1351 N.W. 12th St. Ste 523, Miami, Florida 33125-1629, this 30th
day of July, 2002.



DAVID A. DAVIS