1 July 2003

Via Federal Express

Thomas Hall
Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1927

Re: Proposed Amendments to the Florida Rules of Criminal Procedure and the Florida Rules of Appellate Procedure, Case No. SC 03-685

Dear Tom:

The following are my comments to Florida Rule of Criminal Procedure 3.203 and Florida Rule of Appellate Procedure 9.142(c). These comments are made as an individual criminal appellate attorney and are not made in my official capacity as Vice Chair of the Appellate Rules Committee of the Florida Bar or Vice Chair of the Criminal Rules Subcommittee of the Appellate Rules Committee, both of which found insufficient time in the period provided by the Court to comment.

In prosecutions arising after the passage of this rule, judicial economy, the costs involved in prosecuting and defending capital cases, and the state's interest in preventing mentally retarded persons from being executed, all support early determination of mental retardation in pre-trial rather than post-trial sentencing procedures. If a defendant is found to be mentally retarded, it is a waste of state funds and judicial resources to prosecute the person in a capital case, therefore the process for determining mental retardation should be instituted prior to trial.

There is another reason the proposed procedures should be changed to a pre-trial inquiry. The proposed rules are ripe for challenge under state and federal double jeopardy doctrines. The Fifth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution protect an accused against being twice put in jeopardy for the same offense. *See State v. Gaines*,770 So.2d 1221 (Fla.2000);*Thomason v. State*, 620 So.2d 1234, 1236 (Fla.1993). Double jeopardy may bar appellate reversal of a finding that a defendant can't be executed because of mental retardation. In *Wright v. State*, 58 So. 2d 1024 (Fla. 1991) this Court held the double jeopardy protections of Article I, Sections 9 and

17 of the Florida Constitution require the Court to determine if there is a reasonable basis for a jury's life recommendation, and if so, bar the state from seeking the death penalty on retrial. As this Court explained in *Gaines* and *Thomason*, double jeopardy attaches in a criminal proceeding when the jury is impaneled and sworn. *See also Crist v. Bretz*, 437 U.S. 28, 38, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978); and Fla. R.Crim. P. 3.191(c) (providing that the trial is deemed to have commenced when the jury panel for that specific trial is sworn for the voir dire examination or, if the jury is waived, when the trial proceedings begin before the judge). Thus, once the jury is sworn, and a trial judge makes the determination that a defendant may not be sentenced to death because he is mentally retarded, double jeopardy has already attached. This Court is undoubtably already receiving numerous lengthy comments on the double jeopardy implications of the proposed rules and should consider passing a rule which would avoid increasing the number of appeals in capital cases on this issue.

Finally, a rule which places the process clearly in the pretrial stages will obviate the confusion between DCA and Supreme Court jurisdiction contained in the current provisions. The current proposals provide for post trial appeals by the state to the District Courts of Appeal and appeals by the defendant to the Supreme Court of Florida. If state appeals are to be permitted, it makes sense to permit them in the District Courts of Appeal prior to swearing of the jury and prior to a bench trial, at which point the case will have been determined by the trial court to either be a capital case or not. This Court is already deluged with work in the capital appellate arena, and it is logical that if the defendant is mentally retarded the case is not a capital case and belongs in the DCA. That being said, this Court is the only court with expertise in capital appellate issues, thus if the case is already in the pipeline as a capital appeal or a post-conviction case, jurisdiction should remain in this Court, rather than providing for some bifurcated appellate jurisdiction on the issue of retardation.

Thank you for your time in considering these comments.

Sincerely,

Siobhan Helene Shea

cc: Hon. Mark Leban, Chair Appellate Rules Committee
Harvey Sepler, Chair Criminal Appellate Rules Subcommittee