IN THE SUPREME COURT OF FLORIDA

LAWANDA BYRD,

Petitioner,

v. CASE NO. SC03-284

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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IN THE SUPREME COURT OF FLORIDA

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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant before the trial court and the appellant in the lower tribunal. A one volume record on appeal and one volume supplement will be referred to as "I or II R," followed by the appropriate page number in parentheses. A one volume transcript of competency hearings held in 1999 will be referred to as “I T.” A one volume transcript of a motion hearing held on August 15, 2001, will be

referred to as “II T.” A one volume transcript of a motion hearing held on November 7, 2001, will be referred to as “III T.”

Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Byrd v. State, 834 So. 2d 872 (Fla. 1st DCA 2002). This brief is also being submitted on a disk in WordPerfect 9 format.

II STATEMENT OF THE CASE AND FACTS

By indictment filed on January 22, 1999, petitioner was charged with first degree murder and armed robbery (I R 25-27). According to the case progress docket, experts were appointed to determine if petitioner was competent to stand trial due to her mental retardation. These experts testified at hearings on March 17 and April 29, 1999, and all agreed that petitioner was incompetent to stand trial due to her mental retardation (I T 3-175).

The judge found petitioner incompetent to proceed (I T 175), and on April 29, 1999, entered an order committing petitioner to the Developmental Services Program of the Department of Children and Families [hereinafter referred to as DCF] (II R 28-31).

On July 23, 2001, petitioner’s counsel filed a motion to dismiss the criminal

charges and alleged that a March 26, 2001, report from the Mentally Retarded Defendant Program [MRDP] indicated that petitioner remained incompetent to proceed and was unlikely to become competent; the motion further requested that the judge dismiss her criminal charges under §916.303(1), Fla. Stat. (1999), and enter an order of civil commitment (I R 1-2).

On August 14, 2001, petitioner's counsel filed a memorandum of law and argued that §916.303(1), Fla. Stat. (1999), created a substantive right to discharge from the criminal charges after two years and controlled over the procedural rule, Fla. R. Crim. P. 3.213(a), which extended the period to five years (I R 3-8)

At a hearing on August 15, 2001, petitioner's counsel argued the motion (II T 3-12). The prosecutor argued the statute was procedural and the rule applied (II T 12-15; 19-20).

At a further hearing on November 7, 2001, the judge denied the motion to dismiss (III T 2-6). In a written order filed that day, the judge found that §916.303(1), Fla. Stat. (1999), constituted an unconstitutional encroachment on this Court's rule-making authority in adopting Fla. R. Crim. P. 3.213(a), and that the rule superseded

the statute (I R 11-13).

On November 13, 2001, a timely notice of appeal was filed (I R 13). The Public Defender of the Second Judicial Circuit was reappointed to represent petitioner.

The lower tribunal treated petitioner's notice of appeal as a petition for common law certiorari under Vasquez v. State, 496 So. 2d 818 (Fla. 1986), but denied the petition:

> Petitioner, Lawanda Byrd, filed a petition for writ of certiorari to review the trial court's decision to deny her motion to dismiss without prejudice, which was filed pursuant to section 916.303(1), Florida Statutes (1999). We agree with the trial court's finding that Florida Rule of Criminal Procedure 3.213(a) supersedes the statute and required denying the motion to dismiss. However, given the Legislature's clear intention to differentiate between defendants who are incompetent to proceed due to mental illness, which is often curable, and those whose incompetence is due to mental retardation or autism, for which there is no "cure," the Florida Supreme Court may find it appropriate to consider amending Rule 3.213 to reflect such a distinction.

Appendix at 1.

Petitioner filed a timely notice of discretionary review, and this Court granted review by order dated July 7, 2003.

III SUMMARY OF THE ARGUMENT

The facts are undisputed. Petitioner was found incompetent to stand trial in 1999 due to her mental retardation. When two years elapsed without her regaining her competency, her counsel filed a motion to dismiss the criminal charges in 2001 under the controlling statute. The judge denied the motion because this Court's rule allows a five year period.

The standard of review is de novo, for this is purely a question of law.

The First District's opinion in this case held that this Court's rule superseded the statute. This was error for a number of reasons. The statute sets forth a substantive right to have the charges dismissed after two years. While this Court has the constitutional power to promulgate rules of practice and procedure in the courts, this Court's procedural rule cannot override a substantive right established by the Legislature. To do so would be do violate the separation of powers in the Constitution.

That the Legislature has chosen to treat mentally retarded defendants differently from mentally ill defendants for the past 20 years is not a matter for this Court's

concern. The Legislature has to power to address social problems in any manner it chooses, without interference from the judicial branch. The most recent 1998 overhaul of the statutes on the care and treatment of forensic defendants in DCF's cutody retained the distinction between the two year period for mentally retarded defendants and the five year period for mentally ill defendants.

The statute is in effect a statute of limitations, which is within the Legislature's prerogative to establish. It grants DCF two years to determine if a mentally retarded defendant will become competent to stand trial. If not, the statute mandates that the charges be dismissed. Another statute suspends the normal statute of limitations in the event the state chooses to refile the charges when the defendant becomes competent.

This Court's rule cannot supersede something which was not in existence at the time the rule was adopted. The rule came into effect in 1980. The statute came into effect in 1983. Thus, it cannot be said that the rule superseded the statute.

Further, the fact that the rule was in effect when the Legislature passed the statute demonstrates the Legislature's intent that its statute be substantive law.

The rule does not differentiate between those found incompetent to stand trial due to mental retardation and those found incompetent to stand trial due to mental illness. It establishes the same five year time period for both. The Legislature was no doubt aware that one who is mentally retarded may never become competent to stand trial, since mental retardation is an organic condition.

Others who are incompetent to stand trial due to mental illness may eventually be restored to competency within five years by the use of psychotropic drugs, and so the Legislature had a valid purpose in determining that two years was enough time to determine if a mentally retarded criminal defendant will ever become competent to stand trial.

Since petitioner has not gained her competency within two years, she had the right to have the criminal charges dismissed. If she ever is found to be competent to stand trial, she may be prosecuted for her crimes. In the meantime, the state has the right to seek her involuntary commitment as a civil patient who is mentally retarded. The proper remedy is to reverse the decision of the lower tribunal and remand with directions that the criminal charges be dismissed.

IV ARGUMENT

THE TRIAL JUDGE AND THE LOWER TRIBUNAL ERRED IN HOLDING THAT FLA. R. CRIM. P. 3.213(a) SUPERSEDES §916.303(1), FLA. STAT. (1999).

The facts are undisputed. Petitioner was found incompetent to stand trial in 1999 due to her mental retardation. When two years elapsed without her regaining her competency, her counsel filed a motion to dismiss the criminal charges in 2001 under the controlling statute. The judge denied the motion because this Court's rule allows a five year period.

The standard of review is de novo, for this is purely a question of law.

The First District's opinion in this case held that this Court's rule superseded the statute. This was error for a number of reasons, based primarily on legislative history in this area.

A. THE STATUTE CREATES A SUBSTANTIVE RIGHT TO DISMISSAL OF THE CRIMINAL CHARGES AFTER TWO YEARS.

The statute sets forth a substantive right to have the pending criminal charges dismissed after one who is <u>mentally retarded</u> spends <u>two years</u> in the state hospital:

> 916.303. Determination of incompetency due to retardation or autism; dismissal of charges
>
> (1) **The charges against any defendant found to be incompetent to proceed due to retardation or autism shall be dismissed without prejudice to the state if the defendant remains incompetent to proceed within a reasonable time after such determination, not to exceed 2 years**, unless the court in its order specifies its reasons for believing that the defendant will become competent to proceed within the foreseeable future and specifies the time within which the defendant is expected to become competent to proceed. The charges against the defendant are dismissed without prejudice to the state to refile the charges should the defendant be declared competent to proceed in the future. (bold emphasis added).

§916.303(1), Fla. Stat. (1999).

The Legislature has enacted a separate statute for one who is <u>mentally ill</u> and spends <u>five years</u> in the state hospital:

> 916.145. Adjudication of incompetency due to mental illness; dismissal of charges
>
> **The charges against any defendant adjudicated incompetent to proceed due to the defendant's mental illness shall be dismissed without prejudice to the state if the defendant remains incompetent to proceed 5 years after such determination**, unless the court in its order specifies its reasons for believing that the defendant will become competent to proceed within the foreseeable future and specifies the time within which the defendant is expected to become competent to proceed. The charges against the defendant are

> dismissed without prejudice to the state to refile the charges should the defendant be declared competent to proceed in the future. (bold emphasis added).

§916.145, Fla. Stat. (2003). These two statutes are identical, except for the difference between the two and five year periods.

The Legislature was no doubt aware that one who is mentally retarded may never become competent to stand trial, since mental retardation is an organic condition. Others who are incompetent to stand trial due to mental illness may eventually be restored to competency within five years by the use of psychotropic drugs, and so the Legislature had a valid purpose in determining that two years was enough time to determine if a mentally retarded criminal defendant will ever become competent to stand trial.

Both of these statutes arose out of the same session law, ch. 98-92, Laws of Fla. This was a major overhaul of ch. 916, Fla. Stat. (1997), to further define the various forensic services that DCF was required to offer those in DCF's custody who were mentally retarded as opposed to being mentally ill.

Ch. 98-92, Laws of Fla., also created §916.301(1), Fla. Stat. (2003), which

requires DCF to provide the courts with a list of experts who are competent to evaluate a mentally retarded defendant to determine if he or she is competent to proceed. That session law also requires the judge to appoint DCF's Developmental Services Program as one of the two experts. §916.301(2), Fla. Stat. (2003).

That session law also created a special test for the experts to use in determining whether a retarded defendant is competent to proceed. §916.3012, Fla. Stat. (2003). That session law also created a special test for the judge to use in determining whether a retarded defendant is incompetent to proceed and should be committed. §916.302, Fla. Stat. (2003).

Thus, it is obvious that the Legislature views those criminal defendants who are mentally retarded differently than those who are mentally ill. This Court has made no such distinction in any of its rules of procedure.[1]

The Senate Staff Analysis and Economic Impact Statement for CS/CS/SB 442 further

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[1] *See* Fla. R. Crim. P. 3.210 ("Incompetence to Proceed: Procedure for Raising the Issue"); Fla. R. Crim. P. 3.211 ("Competence to Proceed: Scope of Examination and Report"); Fla. R. Crim. P. 3.212 ("Competence to Proceed: Hearing and Disposition"); and the rule at issue here, Fla. R. Crim. P. 3.213 ("Continuing Incompetency to Proceed ... Disposition").

explains the reason for the statute's distinction between mentally retarded clients and mentally ill clients:

> The CS/CS/SB 442 amends and reorganizes chapter 916, F.S., into three distinct parts. Part I includes general provisions that pertain to all forensic clients, Part II relates specifically to forensic services for adult defendants found incompetent to proceed due to mental illness, and Part III relates specifically to forensic services for adult defendants found incompetent to proceed due to retardation or autism.
>
> * * *
>
> Chapter 916, F.S., does not differentiate between the evaluation and treatment or training of clients with mental retardation and clients with mental illness. Because the terms "mental illness" and "mental retardation" are intermingled throughout chapter 916, F.S., the department reports that there is a misconception that persons who have a mental illness and persons who have mental retardation or autism require the same services or treatment or training milieu. This lack of clear distinction between the service needs of defendants has created significant difficulties for law enforcement officers, judges, state attorneys, public defenders, and state program professionals in interpreting specific sections of Florida law.

The original rule on incompetence to stand trial was adopted by this Court in 1980, in response to the Legislature's passage of ch. 80-75, Laws of Fla., which set forth the substantive rights of those found incompetent to stand trial or found not

guilty by reason of insanity. The Florida Bar, In re Rules of Criminal Procedure, 389 So. 2d 610 (Fla. 1980): "Rules 3.210-3.219, relating to mental competency of a defendant, augment HB 426 which became law effective July 1, 1980."

This Court's rule did not in 1980 and does not now differentiate between those found incompetent to stand trial due to mental retardation and those found incompetent to stand trial due to mental illness. It establishes the same five year time period for both:

> Rule 3.213. Continuing Incompetency to Proceed, Except Incompetency to Proceed with Sentencing: Disposition
>
> (a) Dismissal without Prejudice during Continuing Incompetency. If at any time after **5 years after determining a person incompetent to stand trial** ... the court, after hearing, determines that the defendant remains incompetent to stand trial ..., that there is no substantial probability that the defendant will become mentally competent to stand trial ... in the foreseeable future, and that the defendant does not meet the criteria for commitment, it shall dismiss the charges against the defendant without prejudice to the state to refile the charges should the defendant be declared competent to proceed in the future. (bold emphasis added).

Fla. R. Crim. P. 3.213(a).

That the Legislature has chosen to treat mentally retarded defendants differently

from mentally ill defendants is not a matter for this Court's concern. The Legislature has to power to address social problems in any manner it chooses, without interference from the judicial branch.

In fact, the Legislature saw a distinction between mentally ill and mentally retarded defendants as long ago as 1983. In ch. 83-274, §5, Laws of Fla., the Legislature provided for separate examinations of those defendants who were thought to be mentally retarded, by adding the following language to §916.11(2), Fla. Stat. (1982 Supp.):

> If the defendant's suspected mental condition is mental retardation, the court shall appoint the Department of Health and Rehabilitative Services' diagnosis and evaluation team to examine the defendant and determine whether he meets the definition of retardation in s. 393.063 and if so, whether he is competent to stand trial.

In ch. 83-274, §6, Laws of Fla., the Legislature originally enacted the <u>two year</u> time period for those found incompetent to stand trial due to mental retardation, by adding the following language to §916.13(1), Fla. Stat. (1982 Supp.):

> The charges against any defendant adjudicated incompetent to stand trial due to his mental retardation shall be dismissed, if the defendant remains incompetent to stand trial 2 years after such

> adjudication, unless the court in its order specifies its reasons for believing the defendant will become competent to stand trial and the time frame therefor.

Thus, the Legislature was aware in 1983 that this Court's 1980 rule did not differentiate between those found incompetent to stand trial due to mental retardation and those found incompetent to stand trial due to mental illness, and so it expressed its legislative intent that mentally retarded defendants should have the benefit of a shorter time period.

No doubt the Legislature was aware in 1998, when it enacted ch. 98-92, Laws of Fla., that this Court's 1980 rule did not differentiate between those found incompetent to stand trial due to mental retardation and those found incompetent to stand trial due to mental illness.

In ch. 98-92, §27, Laws of Fla., the Legislature created the present §916.303(1), Fla. Stat., to retain the <u>two year time</u> for one to be held as incompetent to stand trial <u>for mental retardation</u>. And in ch. 98-92, §18, Laws of Fla., it amended §916.145, Fla. Stat. (1997), to <u>increase</u> the time for one to be held as incompetent to stand trial for <u>mental illness from two to five years</u>:

> 916.145. Adjudication of incompetency due to mental illness ~~retardation~~; dismissal of charges
>
> The charges against any defendant adjudicated incompetent to proceed ~~stand trial~~ due to the defendant's ~~his or her~~ mental illness ~~retardation~~ shall be dismissed without prejudice to the state if the defendant remains incompetent to proceed 5 years after such determination ~~stand trial 2 years after such adjudication~~, ...

Thus, the Legislature has in effect adopted separate statutes of limitations, one for those who suffer from mental retardation, and another for those who suffer from mental illness.

It is within the Legislature's prerogative to establish statutes of limitations, which are substantive rights. Rubin v. State, 390 So. 2d 322 (Fla. 1980); Lane v. State, 337 So. 2d 976 (Fla. 1976); and State ex rel. Manucy v. Wadsworth, 293 So. 2d 345 (Fla. 1974).

In addition to the normal statutes of limitations found in §775.15, Fla. Stat. (2003), the Legislature has provided a special statute of limitations for one in petitioner's position: "The statute of limitations shall not be applicable to criminal charges dismissed because of the incompetency of the defendant to proceed." §916.14,

Fla. Stat. (2003).

Thus, the Legislature has established the substantive right to have the charges dismissed after two years for one in petitioner's position, but has also established the substantive right of the state to refile the charges without regard to the normal statutes of limitations.

B. SINCE THE STATUTE IS SUBSTANTIVE LAW, THE RULE CANNOT SUPERSEDE THE STATUTE, ESPECIALLY WHERE THE STATUTE WAS NOT IN EFFECT AT THE TIME THE RULE WAS ADOPTED.

While this Court has the power to adopt rules of practice and procedure for the courts, art. V, §2(a), Fla. Const., this Court's procedural rule cannot override a substantive right established by the Legislature, for to do so would be to violate the separation of powers as expressed in art. II, §3, Fla. Const.

The punishment for criminal offenses is clearly substantive law, to be determined by the Legislature. State v. Garcia, 229 So. 2d 236 (Fla. 1969). *See also* Smith v. State, 537 So. 2d 982 (Fla. 1989) (former sentencing guidelines are substantive law); and Hall v. State, 823 So. 2d 757 (Fla. 2002) (present criminal punishment code is substantive law).

The seminal case in this area is Benyard v. Wainwright, 322 So. 2d 473 (Fla. 1975). There the Legislature had enacted a statute, §921.16, Fla. Stat. (1975), which is still in existence today, which stated that two sentences arising from separate indictments were to be imposed consecutively, unless the judge stated otherwise. This Court had a rule which required them to be construed as concurrent sentences. This Court recognized that sentencing was a matter of substantive law, and its rule encroached on the power of the Legislature to define criminal penalties:

> We recognize direct conflict exists between Rule of Criminal Procedure 3.722, adopted February 1, 1973, and Section 921.16, Florida Statutes (1973). Our Rule of Criminal Procedure 3.722 directs that sentences are concurrent unless affirmatively designated as consecutive by the sentencing court. In our opinion, **the statute must prevail over our rule because the subject is substantive law.**
>
> **Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions**. Procedural law concerns the means and method to apply and enforce those duties and rights. Procedural rules concerning the judicial branch are the responsibility of this Court, subject to repeal by the legislature in accordance with our constitutional provisions. *See In re Clarification of Florida Rules of Practice and Procedure*, 281 So.2d 204 (Fla. 1973); *In re Florida Rules of Criminal Procedure,* 272 So.2d 65, amended 272

So.2d 513 (Fla. 1973).

> The prescribed punishment for a criminal offense is clearly substantive law. *State v. Garcia,* 229 So.2d 236 (Fla. 1969). An argument can be made that the manner of the imposition of the sentence is procedural; however, it is our opinion that **whether a sentence is consecutive or concurrent directly affects the length of time spent in prison and, therefore, rights are involved, not procedure**. A judge should affirmatively state whether a sentence is consecutive or concurrent; when he fails to do so, it necessarily follows that the legislature has the primary authority to determine if the sentence should be consecutive or served concurrently with another sentence.

322 So. 2d at 475; bold emphasis added.

The same is true in the instant case. As argued above, the Legislature has determined as matter of substantive law that one in petitioner's position is entitled to have her criminal charges dismissed after two years. This "directly affects the length of time spent in [the state hospital] and, therefore, rights are involved, not procedure." This Court's rule, allowing a five year period, encroaches on the Legislature's authority to establish a statute of limitations on petitioner's crimes.

The judge and the lower tribunal held that this Court's rule "supersedes" the statute. As noted above, this Court's rule was adopted in 1980. The Legislature

first adopted the two year time period in 1983. A rule cannot "supersede" a statute when the statute was not in effect at the time the rule was adopted. The legal definition of "supersede" is: "obliterate, set aside, annul, replace, make void, inefficacious or useless, repeal." Black's Law Dictionary at 1607 (4th ed.). Another dictionary defines the term as: "to set aside or cause to be set aside as void, useless, or obsolete, usually in favor of something mentioned; make obsolete: *They superseded the old statute with a new one.*" Random House Dictionary at 1428 (unabridged ed.) (italics in original).

Thus, by the chronology shown above, when the Legislature established the two year time period as a matter of substantive law in 1983, it in fact "superseded" this Court's 1980 rule, and not vice versa. This Court should amend its rule to conform to the statute.

C. PETITIONER IS ENTITLED TO HAVE HER CRIMINAL CHARGES DISMISSED AND THE STATE IS ENTITLED TO SEEK AN INVOLUNTARY CIVIL COMMITMENT UNDER §§393.11, AND 916.303(2), FLA. STAT. (2003).

Since petitioner has not gained her competency within two years, she had the

right to have the criminal charges dismissed under §916.303(1), Fla. Stat. (1999). If she ever is found to be competent to stand trial, she may be prosecuted for her crimes under that statute and §916.14, Fla. Stat. (2003).[2]

In the meantime, the state has the right to seek petitioner's involuntary commitment as a civil patient who is developmentally-disabled under §393.11, Fla. Stat. (2003), and §916.303(2), Fla. Stat. (2003):

> (2)(a) If the charges are dismissed and if the defendant is considered to lack sufficient capacity to give express and informed consent to a voluntary application for services and lacks the basic survival and self-care skills to provide for his or her well-being or is likely to physically injure himself or herself or others if allowed to remain at liberty, the department, the state attorney, or the defendant's attorney may apply to the committing court to involuntarily admit the defendant to residential services pursuant to s. 393.11.
>
> (b) If the defendant is considered to need involuntary residential services under s. 393.11 and, further, there is a

[2]This issue is also important to DCF. The Department is charged with providing programs for citizens with developmental disabilities. §20.19(4)(b)3., Fla. Stat. (2003). Its MRDP budget is specified by the Legislature, and increasing the time DCF has to care for mentally retarded patients who are incompetent to stand trial from two to five years may have a significant impact on its budgetary operations. This Court may wish to request a response from DCF.

> substantial likelihood that the defendant will injure another person or continues to present a danger of escape, and all available less restrictive alternatives, including services in community residential facilities or other community settings, which would offer an opportunity for improvement of the condition have been judged to be inappropriate, then the person or entity filing the petition under s. 393.11, the state attorney, the defendant's counsel, the petitioning commission, or the department may also petition the committing court to continue the defendant's placement in a secure facility or program pursuant to this section. Any defendant involuntarily admitted under this paragraph shall have his or her status reviewed by the court at least annually at a hearing. The annual review and hearing shall determine whether the defendant continues to meet the criteria for involuntary residential services and, if so, whether the defendant still requires placement in a secure facility or program because the court finds that the defendant is likely to physically injure others as specified in s. 393.11 and whether the defendant is receiving adequate care, treatment, habilitation, and rehabilitation, including psychotropic medication and behavioral programming. Notice of the annual review and review hearing shall be given to the state attorney and to the defendant's attorney. In no instance may a defendant's placement in a secure facility or program exceed the maximum sentence for the crime for which the defendant was charged.

The proper remedy is to reverse the decision of the lower tribunal and remand with directions to dismiss the charges.

V CONCLUSION

Based upon the arguments presented here, petitioner respectfully asks this Court to quash the decision below and hold that the statute creates a substantive right to dismissal of the criminal charges after two years if the mentally retarded defendant is not restored to competency. Petitioner further requests this Court to amend its rule to conform to the statute.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail to: Giselle Lylen Rivera, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida; and petitioner, c/o Florida State Hospital, P.O. Box 1000, Chattahoochee, Florida 32324; on this ___ day of August, 2003.

_____
P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief was prepared in Courier New 12 point type.

_____
P. DOUGLAS BRINKMEYER

IN THE SUPREME COURT OF FLORIDA

LAWANDA BYRD,

Petitioner,

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STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

APPENDIX TO BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

In the District Court of Appeal of Florida,
First District.

Lawanda BYRD, Petitioner,
v.
STATE of Florida, Respondent.

No. 1D01-4683.

Oct. 23, 2002.
Rehearing Denied Jan. 17, 2003.

Petition for Writ of Certiorari--Original Jurisdiction.

Nancy A. Daniels, Public Defender; Ed Harvey, Assistant Public Defender, Tallahassee, for Petitioner.

Robert A. Butterworth, Attorney General, Tallahassee; Giselle Lylen Rivera, Assistant Attorney General, Tallahassee, for Respondent.

MINER, J.

Petitioner, Lawanda Byrd, filed a petition for writ of certiorari to review the trial court's decision to deny her motion to dismiss without prejudice, which was filed pursuant to section 916.303(1), Florida Statutes (1999). We agree with the trial court's finding that Florida Rule of Criminal Procedure 3.213(a) supersedes the statute and required denying the motion to dismiss. However, given the Legislature's clear intention to differentiate between defendants who are incompetent to proceed due to mental illness, which is often curable, and those whose incompetence is due to mental retardation or autism, for which there is no "cure," the Florida Supreme Court may find it appropriate to consider amending Rule 3.213 to reflect such a distinction.

DENIED.

BENTON and LEWIS, JJ., concur in result.