IN THE SUPREME COURT OF FLORIDA

AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE
AND
THE FLORIDA RULES OF APPELLATE PROCEDURE,

CASE NO. SC 03-685

COMMENTS OF THE

CRIMINAL COURT STEERING COMMITTEE

Honorable O. H. Eaton, Jr.
Chair

Honorable Philip J. Padovano
Honorable Thomas H. Bateman
Honorable Dedee S. Costello
Honorable Ilona M. Holmes
Honorable Stan R. Morris
Honorable Phyllis D Kotey
Honorable Wayne M. Miller

SUMMARY OF COMMENTS

I. Except for the definition of mental retardation, Florida Statute 921.137 is procedural.

II. The Court should fashion a procedural rule that implements the requirements of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 355 (2002) and which efficiently resolves the mental retardation issue prior to trial.

III. The burden of proof to establish mental retardation should be by a preponderance of the evidence instead of by clear and convincing evidence.

IV. Recommendations of the Criminal Court Steering Committee.

COMMENTS

I. Except for the definition of mental retardation, Florida Statute 921.137 is procedural.

The legislature enacted F. S. 921.137 in 2001 with an effective date of July 1, 2001. The enactment was well before the United States Supreme Court determined that mentally retarded defendants had a constitutional right not to be executed for murder. That decision was pronounced in *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 355 (2002) on June 20, 2002. The legislature decided that the procedure to be followed to determine mental retardation would be to require the issue

to be noticed before trial but not determined until after the penalty phase and after the death penalty became a genuine issue.

Article V, sec. 2, *Florida Constitution*, provides as follows:

> (a) The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought.

There is no doubt that this Court bears the sole responsibility for adopting rules of practice and procedure. *Allen v. Butterworth*, 756 So.2d 52 (2000). And while this Court has adopted rules that track procedural statutes in the past, it has no obligation to do so. For instance, F.S. § 921.141 that attempts to govern penalty phase procedure in capital litigation has been held not to violate the constitution because Rule 3.780 tracks it identically. *Booker v. State*, 397 So.2d 910 (1981), certiorari denied 102 S.Ct. 493, 454 U.S. 957, 70 L.Ed.2d 261, *habeas corpus granted* 922 F.2d 633, *certiorari denied* 112 S.Ct. 277, 502 U.S. 900, 116 L.Ed.2d 228; *Dobert v. State*, 375 So.2d 1069 (Fla. 1979). In contrast, this Court did not hesitate to invalidate the poorly conceived procedures contained in the Death Penalty Reform Act. *Allen v. Butterworth, supra*.

The proposed Rule 3.203 basically tracks the provisions of F.S. 921.137. As Justice Adkins correctly stated over three decades ago, "[a]s related to criminal law and procedure, substantive law is that which declares what acts are crimes and provides or regulates the steps by which one who violates a criminal statute is punished." *In re: Florida Rules of Criminal Procedure*, 272 So.2d 65 (Fla. 1972), Adkins, J., concurring. The "steps" to determine whether a defendant is mentally retarded are the province of this Court and not the legislature.

II. The Court should fashion a procedural rule that implements the requirements of Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed2d 355 (2002) and which efficiently resolves the mental retardation issue prior to trial.

While it is perhaps tempting to fashion a rule that tracks the legislative vision of how and when to determine whether a capital defendant is mentally retarded, this Court should ignore the temptation to do so for several reasons.

First, when the mental retardation statute was enacted it was perceived to be a matter of legislative grace and not of constitutional magnitude. Due process considerations demand that issues that exclude a defendant from the death penalty be decided pretrial in an expeditious and timely manner. These types of issues are routinely decided pretrial in death penalty cases in the following situations: (1) the defendant is under age 17, *Brennan v. State*, 754 So.2d 1 (Fla. 1999); (2) the

defendant is a codefendant and does not have the requisite culpability, *Enmund v. Florida*, 458 U.S. 782 (1982); (3) the more culpable codefendant received a life sentence, *Larzelere v. State*, 676 So.2d 394 (Fla. 1996); (4) no aggravating factors are present, *Banda v. State*, 536 So.2d 221 (Fla. 1988).

Second, capital litigation presents unique procedural problems. A defendant is entitled to present any matter of mitigation to the jury (or the judge, if a jury has been waived). *Hitchcock v. Dugger*, 481 U. S. 393 (1987). Diminished mental capacity is a mitigating circumstance. *Knowles v. State*, 682 So.2d 62 (Fla. 1993). Since it is constitutionally impermissible to execute a defendant who is mentally retarded, that issue will undoubtedly be presented to the jury during the penalty phase. The statute neither provides for the jury to determine mental retardation by a special verdict during the penalty phase nor does it provide for whether that determination must be made by majority vote or unanimously. Accordingly, a less than unanimous vote recommending the death penalty when mental retardation is an issue will cause confusion at trial. If mental retardation is submitted to the jury as a mitigating circumstance instead of a constitutional bar, and the jury recommends the death penalty, the trial judge must still make an independent determination of the defendant's mental condition - this places the trial judge in an awkward position, especially if the

jury recommendation is not unanimous. There is no reason to put trial judges in this position when the mental retardation issue can be decided pretrial.

Third, most state legislatures that have considered mental retardation as a bar to execution have decided to have the issue determined by the trial judge pretrial. *Atkins v. Virginia: Commutation for the Mentally Retarded*, 54 S.C. L. Rev. 809 (Spring, 2003); *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 11 (Jan./Feb. 2003). Other states, including South Carolina and Pennsylvania are agreeing. *Id.*; Pennsylvania Senate Bill No. 26, June 16, 2003.

Fourth, pretrial determination of other issues are allowed in related rules. For instance, the issue of whether evidence or statements of the defendant should be suppressed generally occurs prior to trial. Rule 3.190(h) and (j). And the present rules provide for pretrial dismissal of a charge if there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant. Rule 3.190(c)(4).

Fifth, a pretrial determination of disqualifying death penalty issues results in (a) conservation of judicial resources, (b) elimination of the considerable expense incurred by county and state governments for needless preparation of a penalty phase hearing and (c) reduction of time of pretrial incarceration.

Sixth, a pretrial determination of the mental retardation issue eliminates the possibility that mentally retarded defendants will be pressured to plead guilty in order to escape the threat of execution since they would have a ruling on mental retardation before the jury recommends the death penalty.

The rules of criminal procedure already provide for determining if a defendant is competent to proceed. 3.210 *Fla. R. Crim Pro.* et.seq. That procedure is known to both prosecutors and defense counsel and has been used for years. The Court should adopt a rule determining mental retardation as a bar to execution using a similar procedure.

III. The burden of proof to establish mental retardation should be by a preponderance of the evidence instead of by clear and convincing evidence.

The proposed rule requires the defendant to prove mental retardation by clear and convincing evidence. Requiring the defendant to shoulder the burden of proof is consistent with the ruling in Medina v. California, 505 U. S. 437 (1992). However, the clear and convincing evidence standard is likely excessive and unconstitutional. In *Cooper v. Oklahoma*, 517 U. S. 348 ((1996), the Court had the occasion to review the clear and convincing evidence standard to prove competency. While mental retardation and incompetence are separate concepts, they contain similarities in

presentation of evidence. The standard should be preponderance or greater weight of the evidence.

In *Cooper*, the court concluded that the greater weight of the evidence standard was the standard historically applied to determine competency and concluded that the state's interest in a higher standard must give way to a defendant's fundamental right not to be tried while incompetent. The Court stated,

> A heightened standard does not decrease the risk of error, but simply reallocates that risk between the parties. In cases in which competence is at issue, we perceive no sound basis for allocating to the criminal defendant the large share of the risk which accompanies a clear and convincing evidence standard. We assume that questions of competence will arise in a range of cases including not only those in which one side will prevail with relative ease, but also those in which it is more likely than not that the defendant is incompetent but the evidence is insufficiently strong to satisfy a clear and convincing standard. While important state interests are unquestionably at stake, in these latter cases the defendant's fundamental right to be tried only while competent outweighs the State's interest in the efficient operation of its criminal justice system.
> 517 U.S. at 364. (Citations omitted.)

Thus, the Court concluded that the clear and convincing evidence standard, while preferred by the state, must give way to the defendant's fundamental right not to be tried while incompetent. The clear and convincing standard to determine that issue violates due process.

Of the 18 states that enacted mental retardation legislation prior to Atkins, most required the preponderance of the evidence standard. 27 Mental & Physical Disability L. Rep. 11, *supra*. The weight of authority was one of the considerations made by the U. S. Supreme Court in deciding *Cooper v. Oklahoma, supra*.

IV. Criminal Court Steering Committee Recommendations.

1. The Criminal Court Steering Committee respectfully submits two alternative rules. The Committee recommends that the mental retardation issue be addressed in Rule 3.190 and 3.851 rather than Rule 3.202 because the procedures under each rule govern the particular circumstance of the case whether it be pretrial or on postconviction relief.

Proposed Rule 3.190(l) provides for mental retardation to be decided pretrial and utilizes the same procedure that is presently used to determine competency to stand trial. That would allow the mental retardation issue to be decided pretrial. The Committee's proposed rule is based upon Rule 3.210 et seq. which establishes the procedure to determine competency to proceed.

Proposed Rule 3.851(h) provides for a determination of mental retardation in a postconviction relief proceeding.

2. The Committee does not recommend the provision of the proposed rule that governs appeals that are presently pending. The Committee suggests that there

are not enough of those cases to justify a rule to govern them and the Court should authorize mental retardation issues to be raised by separate order in each pending case. It is not possible to provide a specific rule for every conceivable situation and it is not advisable to create a rule that fits a limited number of cases pending before this Court at the time the rule is implemented.

3. The Committee recommends that the burden of proof to establish mental retardation be changed from clear and convincing evidence to preponderance or greater weight of the evidence.

4. The Committee recommends that the definition of mental retardation be eliminated from the rule because it is a matter of substantive law and is defined by statute.

5. The Committee recommends that the defendant not be given the right to appeal the pretrial ruling on mental retardation because (1) the jury will consider the issue at trial and (2) the defendant's right to plenary appeal is a sufficient remedy.

Respectfully submitted,

O. H. Eaton, Jr.
Circuit Judge, 18th Judicial Circuit
Chair, Criminal Court Steering Committee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carolyn M. Snurkowski, Assistant Deputy Attorney General, The Capitol, Tallahassee, FL 32399-1050; Candance M. Sabella, Assistant Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Stephen Krosschell, 14020 Roosevelt Blvd., Suite 808, Clearwater, FL 33762; William D. Matthewman, Esq., 2300 Glades Road, Suite 340-W, Boca Raton, FL 33431; Arthur I. Jacobs, General Counsel, Florida Prosecuting Attorneys Association, P. O. Box 1110, Fernandina Beach, FL 32035-1110; David A. Davis, Assistant Public Defender, 301 S. Monroe Street, Suite 401, Tallahassee, FL 32301-1803; Andrew Stanton, Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 Northwest 14th Street, Miami, FL 33125; Edith Georgi, Coordinator, Capital Litigation Unit, Eleventh Judicial Circuit of Florida, 1320 Northwest 14th Street, Miami, FL 33125; James T. Miller, Chair, Amicus Curiae Committee, Florida Association of Criminal Defense Lawyers, 233 E. Bay Street, Suite 920, Jacksonville, FL 32202; Neal A. Dupree, Capital Collateral Regional Counsel, Southern Region, 101 N. E. 3rd Ave., Suite 400, Fort Lauderdale, FL 33301; Rachel L. Day, Assistant CCRC South, 101 N. E. 3rd Ave., Suite 400, Fort Lauderdale, FL 33301; William M. Hennis, III, Assistant CCRC South, 101 N. E. 3rd Ave., Suite 400, Fort Lauderdale, FL 33301; Michael Messer, Association for Retarded Citizens, South Florida, 5555 Biscayne Blvd., Miami, FL 33137 this ____ day of July, 2003.

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Linda Herendeen
Judicial Assistant