IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 03-685

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

COMMENTS OF THE ASSOCIATION FOR RETARDED CITIZENS, SOUTH FLORIDA REGARDING PROPOSED RULES FOR DETERMINING A DEFENDANT MENTAL RETARDATION AS A BAR TO EXECUTION.

The Association for Retarded Citizens, South Florida (ARC) is a not-for-profit organization dedicated to protecting the rights of Persons with Mental Retardation and citizens with other developmental disabilities in our community. Founded in 1953 by a small group of parents of individuals with mental retardation who recognized both the potential of their children and the need for ensuring their rights, our mission has remained basically the same for these past 50 years. We appreciate the opportunity to provide our comments to regarding important issue.

The ARC of South Florida supports the adoption of rules to govern the adjudication of a defendant mental retardation in the wake of Atkins v. Virginia[1] and the enactment of section 921.137. In some respects, however, we are concerned that the proposed

[1] 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

rules fail to adequately protect the rights of defendants with mental retardation. By delaying the determination of mental retardation until after the guilt and penalty phase, the proposed rules will endanger the trial rights of some of Florida's most vulnerable defendants. By permitting executions unless the heightened standard of "clear and convincing evidence" is met, the rules will allow some mentally retarded defendants to be executed in violation of the Eighth Amendment to the United States Constitution.

A defendant's ineligibility for capital punishment should be determined at the earliest possible opportunity. If a defendant is not eligible for capital punishment due to mental retardation, he or she should not be subjected to a capital trial. The proposed rule delays the hearing to determine mental retardation until after both the guilt and penalty phase jury trials.[2] Atkins has made it clear that persons with mental retardation are categorically ineligible for the death penalty. Delaying the determination hearing until the end of a capital trial will have the unintended and unnecessary effect of burdening the rights of these defendants.

The proposed rule will result in some defendants with mental retardation giving up their trial rights to escape the threat of execution. Unable to know whether or not the judge will find

[2] Although the Legislature specified a post-trial procedure in section 921.137, this Court has exclusive authority to adopt rules of procedure under article V, section 2 of the Florida Constitution. See Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000).

them categorically ineligible for the death penalty, these defendants will inevitably plead guilty in exchange for a life sentence. A pretrial determination would allow all parties to know the maximum penalty before any plea agreement is struck. If defendents with mental retardation may not be executed, neither should they be made to give up their rights to escape the threat of death.

This is of particular concern because these defendents are more likely than others to be charged with crimes they did not commit. There is and has historically been a grave risk that persons with mental retardation will confess to crimes of which they are innocent, a risk the Supreme Court recognized in Atkins. Empirical research has shown that these individuals are more likely than others to change their answers to please their interrogators.[3] Sadly, South Florida knows this only too well. Only this month, a man with mental retardation who had falsely confessed to shooting a Broward deputy was freed after more than ten years in prison.[4] Timothy Brown, a 15-year-old with an IQ of 56 gave a "confession" that was inconsistent with many of the known facts about the shooting of Deputy Patrick Behan.[5] A

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[3] Caroline Everington & Solomon M. Fulero, Competence to Confess: Measuring Understanding and Suggestibility of Defendants With Mental Retardation, 37 Mental Retardation 212 (1999).

[4] Wanda J. DeMarzo, Finally, Brown is Free, Miami Herald, Jun. 6, 2003, at A1.

[5] Brown v. Singletary, 229 F. Supp. 2d 1345, 1363-64 (S.D. Fla. 2002).

federal district court freed Mr. Brown after another man implicated himself in the crime.[6]

The case of Jerry Frank Townsend provides another cautionary example. Detectives got the mentally-retarded Townsend to falsely confess to some 20 murders around the country.[7] According to his lawyer, Mr. Townsend pleaded guilty to some of these charges in order to avoid the death penalty.[8] DNA evidence exonerated Mr. Townsend after he spent 21 years in prison.[9]

The Court should also reconsider the standard of proof to be used in determining mental retardation. The "preponderance of the evidence" should be employed. The Legislature adopted the "clear and convincing" standard before Atkins was decided. After Atkins, it is clear that the execution of a defendant with mental retardation violates the eighth amendment. The clear and convincing standard will not prevent all unconstitutional executions. If the standard is not changed, it will be possible for the State to execute a defendant even though the greater weight of the evidence establishes mental retardation so long as a judge finds that the heightened standard of proof is not satisfied.

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[6] Id.; Brown v. Crosby, 249 F. Supp. 2d 1285 (S.D. Fla. 2003).

[7] Paula McMahon & Ardy Friedberg, DNA Clears 21-Year Inmate, Review Reverses 2 Murder Cases; 4 Others Await, Sun-Sentinel, Apr. 28, 2001, at A1.

[8] Paula McMahon & Ardy Friedberg, Meeting Sought with Jailed Man, Sun-Sentinel, May 24, 2001, at B1.

[9] Paula McMahon & Ardy Friedberg, DNA Clears 21-Year Inmate, Review Reverses 2 Murder Cases; 4 Others Await, Sun-Sentinel, Apr. 28, 2001, at A1.

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