IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE RULE 3.203 AND THE FLORIDA RULES OF APPELLATE PROCEDURE RULE 9.142
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Case No: SC 03-685

Brief in Opposition
Comment on Proposed Rules of Criminal Procedure 3.203 and 9.142

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REQUEST FOR ORAL ARGUMENT

This Court in case no. SC03-685 published proposed rules, Fl.R.Crim.P. 3.203 and Fl.R.App.P. 9.142(c) in response to the United States Supreme Court decision in *Atkins v. Virginia,* 122. S.Ct. 2242 (2002) and the enactment of 921.137, F.S. (2002). This Court requested that all interested persons to submit comments and specifically invited this agency, as one of the three Capital Collateral Regional Counsels, to submit a brief.

Due to the gravity of this issue, the complexity of the argument and the fact that one section of the proposed Rule deals specifically with collateral appeals, the opportunity to appear for oral argument is hereby formally requested.

I. INTRODUCTION

"Without proper rules and procedures in place, the determination of who lives and who dies will surely violate the Eighth Amendment."

On December 9th, 2002, Linroy Bottoson was executed after spending nearly a quarter of a century on Florida's death row. Apart from the various issues litigated during that time span,[1] one area of contention came at the very end: whether Bottoson was mentally retarded and therefore excluded from those class of individuals eligible for the death penalty.

In an obscure record tucked away in over forty banker's boxes of files was one notation showing that Bottoson scored a 77 on a test called the "Terman" in 1951.[2] The "Terman" was the Stanford-Binet test, one of the first comprehensive and most respected "IQ" tests in the world.[3] Years later, after spending more than

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[1] Bottoson v. Moore, 234 F.3d 526 (11th Cir. 2000); Bottoson v. Singletary, 685 So.2d 1302 (Fla. 1997); Bottoson v. State, 674 So.2d 621 (1996); Bottoson v. State, 443 So.2d 962 (1984).

[2] The criterion for having mental retardation prior to 1973 was one standard deviation below the mean which originally included 16% of the population. After 1973, the criterion was changed to two standard deviations. AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* at 26 (10th ed. 2002). As such, Mr. Bottoson would surely have been mentally retarded by any definition.

[3] The Terman was the standard in the field in 1951. The Stanford-Binet is an individually administered test of general intellectual functioning. The "refined Stanford-Binet [was] developed by L.M. Terman and his associates at Stanford University (Terman 1916). It was in this test that the inteligence quotient (IQ), or ratio between mental age and chronological age, was first used." Anastasi, Anne, & Urbina, Susana, *Psychological Testing –Seventh Edition* at 38 (New Jersey Prentice Hall

twenty years in the highly structured environment of death row, Bottoson scored an 84 on the WAIS III test.

In North Carolina, Johnnie Lee Spruill scored a 65 on the WAIS-R test administered in 1984. Eight years later, taking the same test, Spruill scored a 73, a rise of 8 points. The Supreme Court of North Carolina sent the Mr. Spruill's case back to the trial court to conduct an evidentiary hearing. At this hearing, his attorneys argued that, among other issues, that Mr. Spruill has consistently tested in the mentally retarded range on IQ scores. His case is currently pending in the courts of North Carolina. *See* Appendix B; Affidavit of J.R. Flynn.

On May 14, Eric Lynn Moore received a stay of execution. He was scheduled to die the next week by lethal injection in Texas. Moore was given a school administered test in 1973.[4] His IQ score was 74. In 1991 prior to his trial, he scored a 76, a rise of 2 points. Mr. Moore's case is currently pending, awaiting a final determination of Mr. Moore's "true" IQ score.

How Bottoson, Spruill and Moore became "unretarded" is a serious question confronting our judges, lawyers and forensic science. Not too long ago, evidence

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1997). The Stanford-Binet was normed in 1932.

[4] See *supra* note 2.

of mental retardation would have been a mitigating factor[5] but not a bar to execution. But in June of 2002, the Supreme Court of the United States released the decision in *Atkins v. Virginia.*[6] It was a major decision in a term filled with other equally important opinions in the field of death penalty jurisprudence.[7] It barred the execution of the mentally retarded and mandated that the states establish procedures for determining mental retardation.

Now, the question confronting the justice system is not whether the mentally retarded may be executed but "What is mental retardation?". This is no less an important question than the one touched by *Penry v. Lynaugh*, 492 U.S. 302 (1989) (hereinafter *Penry* I) nearly fifteen years ago. Without proper rules and procedures in place, the determination of who lives and who dies will surely violate the Eighth Amendment.

Florida attempted to take that first step when it passed section 921.137,F.S. (2002). Inherent in that statute were certain flaws regarding due process, retrospective application and the very definition of mental retardation.[8] Those

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[5] *See* F.S. 921.141; *Hall v. State*, 742 So.2d 225 (1999); *Woods v. State*, 531 So.2d 79 (1988).

[6] 122 S.Ct. 2242 (2002).

[7] *See, eg., Ring v. Arizona*, 122 S.Ct. 2428 (2002).

[8] *See* brief for petitioner filed January 22, 2002.

issues were litigated in *Bottoson v. Moore*, 813 So.2d 31 (Fla. 2001), but never fully resolved.

What the *Bottoson* case brought to light was the fact that rules are very important in determining mental retardation and that a fluid set of rules can be just as useful as a set carved in stone. Essentially, the rules defining mental retardation must be fluid because a person's IQ score is by no means static. Contrary to the prevailing wisdom, a person's IQ score does change just as there are changes from generation to generation.

We are getting "smarter", as least as intelligence can be measured by IQ tests. We are more intelligent than the generation of our parents which in turn was more intelligent than the generation of their parents. This "Flynn Effect", named after the University of Otago professor that discovered this law, states that IQ scores do rise over time. An individual's score can rise over time, as studies involving children in enriched environments show.[9]

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[9] "Most early childhood interventions cannot hope to provide the persistent environmental enhancement required for permanent gains. Gains of 10 IQ points are not uncommon but after the program ends, they decay, disappearing at much the same rate at which they emerged. The Milwaukee Project (Garber, 1988) may have been an exception. It is also the paradigm intervention in terms of approaching absolute control over early childhood environment." J. R. Flynn, The sociology of IQ: enhancing cognitive skills. In *Culture and Learning: Access and Opportunity in the Curriculum*. M. Ollssen ed. Westport, CT, Greenwood (in press); Ulric Neisser, *Rising Scores On Intelligence Tests*, American Scientist, Sep/Oct 1997. See more, *infra*, Section VI.

Depending on the IQ test administered, IQ gains from generation to generation tend to be anything from three fifths to a full standard deviation. Generally, a standard deviation is regarded as 15 points. Of the 20 countries studied, every single country evidenced "massive" IQ gains over time.[10] Some countries showed a gain of 20 IQ points per generation.[11]

This astonishing, uncontroverted fact is widely misunderstood in the legal community understand this evidence. This Court is attempting to move forward, beyond what the Legislature has done when it enacted section 921.137. There is, however, much work to be done to ensure that both the rule and spirit of *Atkins* is embraced.

What does Atkins embrace? Perhaps most importantly for our purposes is the question of culpability. We will never have that true picture of culpability from the day of the crime as reflected in the various instruments used to identify mental retardation. What can be done, however, is to try find the most relevant picture of culpability.

The most relevant evidence would be an IQ test and properly extrapolated

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[10]J.R. Flynn, IQ Gains Over Time: Toward Finding the Cause. In *The Rising Curve: Long-Term Gains in IQ and Related Measures*. Ulric Neisser, ed. American Psychological Association 1998.

[11] Id. at 27.

score near the time of the offense rather than ten to twenty years after an individual has been on death row. Evidence of adaptive behavior dysfunction should come from fact and historical witnesses who know of an individual's development and functioning in free society rather than from prison officials who operate in a structured environment. Lastly, evidence of onset should be measured from a variety of resources and should never be discounted because a bureaucrat in some educational system decided not to administer an IQ test to an individual.

In implementing the Supreme Court's mandate in *Atkins*, it is necessary that this Court take into consideration the various factors such as test norming, standard of error measurement rates, practice effect and possible gains in "g" in the definition of mental retardation. In addition, and specific to the collateral process, score relevance must be mandated. The current proposed Rules do not address any of these issues.

II. "CURRENT" DEFINITION OF MENTAL RETARDATION

> "*The criterion for diagnosis is approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instrument's strengths and limitations*."
> -AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* at 17, 198 (10th ed. 2002)

The American Association on Mental Retardation ("AAMR") in 1992

defined mental retardation as: (1) subaverage general intellectual functioning (i.e., an IQ of approximately 70 to 75 or below) existing concurrently with (2) related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work; and (3) onset before the age of eighteen. American Association on Mental Retardation, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) [hereinafter "1992 AAMR Manual"]. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV-TR") employs a definition that is nearly identical to the one set out in the 1992 AAMR Manual.[12] The Supreme Court has expressly relied on the 1992 AAMR Manual's three-prong definition of mental retardation, see Atkins, 122 S. Ct. at 2245 n.3; Penry I, 492 U.S. at 307-09.

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[12] The DSM-IV-TR defines mental retardation as follows:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A), that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4TH ed., text rev. 2000) ("DSM-IV-TR"); see Atkins, 122 S. Ct. at 2245 n.3 (setting out American Psychiatric Association's definition with approval).

The American Association On Mental Retardation in its 10th edition of its manual defines mental retardation as "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18."[13] As is evident in this definition, there are three critical areas of importance in determining whether someone is mentally retarded: Significant limitations in intellectual functioning, significant limitations in adaptive skills and onset before the age of 18.[14]

a. Deficits in Intellectual Functioning

The first component of the clinical assessment of mental retardation is measuring the magnitude of the individual's intellectual impairment. To be classified as mentally retarded, an individual must be found to be functioning at the very lowest intellectual level encountered in the general population, as measured by standardized intelligence tests. The intellectual functioning of any individual with mental retardation will fall within the lowest three percent of the entire population. See Atkins, 122 S. Ct. at 2245 n.5 ("It is estimated that between 1 and 3 percent of

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[13] AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* at 8 (10th ed. 2002). As stated supra, the Supreme Court has expressly relied on the 1992 AAMR Manual's three-prong definition of mental retardation, see Atkins, 122 S. Ct. at 2245 n.3.

[14] Id.

the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition"); but see DSM-IV-TR 46 ("The prevalence rate of Mental Retardation has been estimated at approximately 1%"). Thus, the first prerequisite for a diagnosis of mental retardation is severely impaired cognitive functioning.

There is a word of caution, however, in dealing with IQ scores. In its 9th edition, the AAMR Manual stated:

> The intellectual limitation in mental retardation is unfortunately often thought of only as a low IQ score on a standardized intelligence test. In fact, the limitations of intelligence tests are well known[.] It is important here to note that IQ is a score on a test and not necessarily the same as the fundamental intellectual capabilities affected in mental retardation. These capabilities are commonly thought to be measured by the intelligence test, but we note that the IQ is merely a convenient measure of this construct. The validity of the intelligence test-the extent to which it measures the individual's true intellectual capabilities-must be reasonably certain in order for it to be used for diagnostic purposes. When clinicians are faced with situations in which the validity of the IQ may be uncertain, such as the assessment of individuals with markedly different cultural, social, linguistic, family and educational backgrounds, other sources of information about intellectual capabilities should be identified.

1992 AAMR Manual at 14.

In the next edition, the AAMR continued with this concept of intellectual functioning and IQ scores.

Although far from perfect, intellectual ability is still best represented by

> IQ scores when obtained from appropriate assessment instruments. The criterion for diagnosis is approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instrument's strengths and limitations.

AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS at 17, 198 (10th ed. 2002)(hereinafter "2002 AAMR Manual").

Commentators have also expressed reservations about using a "hard-and-fast" IQ score. Rather, the emphasis should be placed on a proper and complete clinical evaluation by an experienced diagnostician. *See* James W. Ellis, *Mental Retardation and the Death Penalty: A Guide To State Legislatures(2002)*, available at http://www.aamr.org/Library/STATE%20LEGISLATIVE%20GUIDE.doc.; Douglas Mossman, *Psychiatry in the Courtroom*, Public Interest, Winter 2003.[15]

b. Deficits in Adaptive Behavior

"The second consideration within the definition of mental retardation is the existence of limitations in adaptive skills." 1992 AAMR Manual at 38. "Adaptive functioning refers to how effectively individuals cope with **common life demands**

[15] Mossman states: "When concientious mental health professionals interpret IQ scores and plan treatment interventions, they keep in mind that someone who scores a 69 on an IQ test is practically indistinguishable from someone who scores 71, and that two persons with IQ scores of 67 and 73 have much more in common with each other than with a person who scores 88."

and how well they meet the standards of **personal independence** expected of someone in their particular age group, sociocultural background, and community setting." DSM-IV TR at 40 (emphasis added). The AAMR separates adaptive skills into ten categories, and for mental retardation requires evidence of deficits in at least two: communication, self-care, home-living, social, community use, self-direction, health and safety, functional academics, leisure, and work. 1992 AAMR Manual at 41. These categories incorporate both "practical intelligence," the ability **independently** to maintain ordinary daily activities and to use one's physical abilities to achieve the greatest degree of independence possible, and "social **independence**," which includes the ability fully to comprehend social cues and behavior and formulate appropriate responses. 1992 AAMR Manual at 15 (emphasis added). When determining whether someone has limited adaptive skills, DSM encourages mental retardation professionals to "gather evidence for deficits . . . from one or more reliable **independent** sources (e.g., teacher evaluation and educational, developmental, and medical history.)" DSM-IV at 40 (emphasis added).

In late May 2002, the AAMR released the latest version of its manual. Mental retardation is redefined as "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in

conceptual, social, and practical adaptive skills. This disability originates before age 18." American Association on Mental Retardation, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (10th ed. 2002) [hereinafter "2002 AAMR Manual"]. The three diagnostic criteria are the same, but the new manual places a greater emphasis on adaptive behavior deficits and describes those deficits in a different way. In the 2002 AAMR Manual, adaptive behavior is described as "the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives." Id. at 73. In assessing deficits in adaptive behavior, the 2002 AAMR Manual stresses that "[l]imitations in adaptive behavior affect both daily life and the ability to respond to life changes and environmental demands." Id. at 91.

The 1992 AAMR Manual defined adaptive behavior by focusing on ten specific skills. The 2002 AAMR Manual shifts to three broader domains of adaptive behavior. The three broader domains of conceptual, social, and practical skills in the new definition "are more consistent with the structure of existing measures [of adaptive behaviors] and with the body of research on adaptive behavior." Id. at 73. As the 2002 AAMR Manual illustrates, however, the ten skill areas listed in the 1992 definition can be conceptually linked to one or more of the three domains in the 2002 definition of mental retardation. 2002 AAMR Manual at

82.

As the Supreme Court has noted, all people with mental retardation "have a reduced ability to cope with and function in the everyday world." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985). The requirement of real, identifiable disabling consequences in the individual's life – of reduced ability to "cope with common life demands," DSM-IV-TR 42 – assures that the diagnosis applies only to persons with an actual, functional disability. *See* 1992 AAMR Manual at 38. Previous versions of the definition of mental retardation expressed this requirement in terms of "deficits in adaptive behavior," *see Penry I*, 492 U.S. at 308 n.1 (citing an earlier edition of the AAMR's classification manual), while more recent formulations employ the terms "related limitations" in "adaptive skill areas." 1992 AAMR Manual at 5; see DSM-IV-TR 42. According to the 2002 AAMR definition, the significant limitations in adaptive functioning are expressed in "conceptual, social, and practical adaptive skills." 2002 AAMR Manual at 73. Both sets of terms reflect the same concept: that the impairment in intellectual ability must have an actual impact on everyday functioning. *See id.* at 74 (noting that "most adaptive behavior instruments measure the skill level a person typically displays when responding to challenges in his or her environment") (internal quotation marks omitted).

c. Onset

The third prong of the definition of mental retardation is that the disabling condition must have manifested itself during the developmental period of life, before the individual reaches the age of eighteen. Requiring the disability to have occurred at birth or during childhood means that the individual's mental development during his or her crucial early years was affected by the impairment of the brain's ability to function. This element of the definition is derived from the understanding of modern neuroscience about the way the brain develops and the implications of its arrested development for cognitive impairment. See 1992 *AAMR Manual* at 16-18. The 2002 AAMR Manual identifies four main categories of risk factors for mental retardation – biomedical, social, behavioral, and educational – that can occur at the prenatal, perinatal, or postnatal stage of development. See 2002 AAMR Manual at 127 (Table 8.1). In practical terms, it means that any individual with mental retardation not only has a measurable and substantial disability now, but that he or she also had it during childhood, significantly reducing the ability to learn and gain an understanding of the world during life's formative years.

In all, it is necessary to have all three components of mental retardation in order for there to be a proper diagnosis. However, the reliability and emphasis of

each "element" varies as noted in the AAMR Manuals. It is clear that the most suspect element is the IQ portion. This will be detailed more fully below.[16]

III. Mental Retardation and The Death Penalty Pre-*Atkins*

> *"The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."*
> -*Tison v. Arizona*, 481 U.S. 137, 149 (1987).

With respect to certain categories of defendants, the death penalty may violate "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. at 101. *See Enmund v. Florida*, 458 U.S. 782, 797 (1982). This is decided by determining whether a sentence of death is "disproportionate" in light of the defendant's personal culpability, *Coker v. Georgia*, 433 U.S.584, 592 (1977); whether it comports with "acceptable goals of punishment," *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989)(opinion of O'Connor, J.) (citation omitted) (hereinafter *Penry I*); and whether juries can adequately perform the narrowing role on a case-by-case basis, *see Penry I*, 492 U.S. at 316. Because executing persons with mental retardation fails these criteria, it "is nothing more than the purposeless and needless imposition of pain and suffering," *see*

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[16] It should be noted that counsel submits that the most compelling evidence of mental retardation is that which is accurately reflected in the adaptive behavior portion of the definition of mental retardation. The comments submitted on behalf of CCRC-South fully address this aspect.

Penry I, 492 U.S. at 335 (O'Connor, J., concurring) (citations omitted), and, therefore, is excessive and unconstitutional.

Developments since *Penry I* and before *Atkins* confirmed that persons with mental retardation lacked the personal culpability requisite for the death penalty, in a way that the record before the Court in *Penry I* did not. In *Penry I*, the Court recognized that the Eighth Amendment places some restrictions on the execution of individuals with mental retardation by noting that the Eighth Amendment likely forbids executing "profoundly or severely retarded" persons. *Penry I*, 492 U.S. at 333. *Cf. Ford*, 477 U.S. at 400-01. Based on the "record before the Court," *Penry I*, 492 U.S. at 338 (O'Connor, J.), however, the Court held that all other mentally retarded individuals (i.e., those not profoundly or severely retarded) could be sentenced using the same procedures as for other defendants. *See id.* at 319-40.

But since *Penry I*, not a single state legislature or foreign jurisdiction considering the appropriateness of executing persons with mental retardation identified a line that would treat "profoundly" or "severely" retarded individuals differently from others with mental retardation. Indeed, the AAMR has since changed the definition of mental retardation to eliminate such categorization. AAMR, Mental Retardation at 34 ("[T]he use of a single diagnostic code of mental retardation removes the previous, largely IQ-based labels of mild, moderate, severe,

and profound. The person either is diagnosed as having or not having mental retardation based upon meeting the three criteria ....").

It was clear prior to *Atkins* that death for such an offender does not--and cannot--comport with the "two principal social purposes [of punishment]: retribution and deterrence of capital crimes by prospective offenders." *Thompson v. Oklahoma*, 487 U.S. 815, 836 (1988) (internal quotations and citation omitted). As the Court has recognized, the death penalty cannot serve the goals of deterrence if a person cannot appreciate the consequences of his actions or understand the link between his actions and the punishment. *See, e.g.*, *id.* at 837. The intellectual impairments suffered by mentally retarded persons dramatically reduce their ability to engage in the sort of reasoning process that is a necessary precondition of being deterred from engaging in criminal acts. Indeed, the inability to imagine and assess competing courses of action is a core aspect of mental retardation. Nor can removing persons with mental retardation from the universe of those who are subject to execution possibly reduce any deterrent effect the death penalty may have on the rest of the population. *See Ford v. Wainwright*, 477 U.S. 399, 407 (1986) ("[I]t provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment.").

The Supreme Court recognized before *Atkins* that "[t]he heart of the

retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987); *see also Ford*, 477 U.S. at 409 ("[W]e may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.").

When the Supreme Court first considered the constitutionality of executing the mentally retarded in 1989, it concluded that, as of that time, there was "insufficient evidence" of a national consensus against the execution of persons with mental retardation to justify a constitutional prohibition. S*ee Penry I*, 492 U.S. at 335. Justice O'Connor recognized, however, that "a national consensus against the execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency ....'" *Id.* at 340.

The emergent national consensus was most immediately evident in the actions of state legislatures, which, the Court has said, provide[t]he clearest and most reliable objective evidence of contemporary values." *Penry I*, 492 U.S. at 331. At the time *Penry I* was decided, only two states -- Georgia and Maryland -- and the federal government had enacted legislation outlawing the imposition of the death penalty on defendants with mental retardation. In less than 12 years, that number of states has grown nine-fold to 18, not counting Texas, where a bill was passed by

the legislature but vetoed by the governor.

Signs of change appeared in legislative sessions immediately after the Court's decision in *Penry I* called attention to the practice. In 1990, Tennessee and Kentucky implemented legislation banning the execution of persons with mental retardation. *See* Tenn. Code Ann. § 39-13-203; Ky. Rev. Stat. § 532.130- 140. New Mexico followed in early 1991. *See* N.M. Stat. Ann. § 31-20A-2.1. Between March and May 1993, three more states -- Arkansas, Colorado, and Washington -- joined the growing number of states prohibiting the practice. *See* Ark. Code Ann. § 5-4-618; Colo. Rev. Stat. § 16-9-401-03; Wash. Rev. Code Ann. § 10.95.030. Indiana became the ninth state to outlaw the imposition of the death penalty on persons suffering from mental retardation in 1994. *See* Ind. Code § 35-36-9-1.

In 1994 and in 1995, Kansas and New York respectively reinstated capital punishment, but explicitly exempted persons with mental retardation from the class of death-eligible defendants. *See* Kan. Stat. Ann. § 21-4623; N.Y. Crim. Proc. § 400.27(12). The consensus against executing persons with mental retardation continued to grow through the late 1990s and in 2000, when Nebraska and South Dakota enacted prohibitory legislation. *See* Neb. Rev. Stat. § 28- 105.1; S.D. Codified Laws § 23A-27A-26.1. Last spring, Arizona also passed similar

legislation.[17] *See* Ariz. Rev. Stat. § 13-3982 (2001). And even more recently, the legislatures and governors in Florida, Missouri, Connecticut, enacted laws banning the execution of persons with mental retardation. Fla. Stat. § 921.137 (2001); R.S.Mo. 565.030; Conn. Gen. Stat. § 1-1(g) (2001). The Texas legislature, too, overwhelmingly passed a bill to ban executions of people with mental retardation, but it was allowed to die without the governor's signature. Tex. H.B. 236, 77th Sess. (2001).

The tally of states represented a clear consensus.[18] The 18 state jurisdictions and the federal government, when added -- as the Court did in *Thompson*, 487 U.S. at 826 (plurality), 849 (O'Connor, J., concurring) -- to the 12 states (and the District

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[17]Although the legislative process has inevitably resulted in some minor variations among these statutes, all jurisdictions have in common a similar definition of mental retardation. All recognize two key components -- that an individual have significant subaverage intellectual function (in many instances measured by an IQ score) and that an individual suffer a substantial impairment in adaptive behavior.

[18]Closer examination of the states that impose the death penalty but that have not yet explicitly prohibited its imposition on persons with mental retardation demonstrates an even broader consensus. In two states -- Illinois and Oregon -- both houses of the legislatures have passed legislation to ban the execution of persons with mental retardation, only to have this legislation vetoed by the governor. The Court has made clear that it is legislative action -- not the actions of one individual, even a chief executive -- that is the most reliable indicator of public opinion. *See Penry*, 492 U.S. at 331; *Enmund*, 458 U.S. at 801. Thus, 21 legislatures, counting Texas, have in fact passed bills that explicitly bar the execution of persons with mental retardation. Illinois has since imposed a moratorium on the death penalty, *see* Steve Mills & Kevin Armstrong, Governor to Halt Executions, Chi. Trib. Jan. 20, 2000 at 1, and a renewed effort to pass legislation that would ban the execution of persons with mental retardation has been postponed pending a report from the Governor's Study Commission on the Death Penalty.

of Columbia), which have rejected capital punishment entirely, form a majority of jurisdictions that now prohibits the execution of persons with mental retardation. The Court has previously recognized that legislative judgments need not be "wholly unanimous" to show a consensus. *Enmund*, 458 U.S. at 793. Rather, it is sufficient if -- as it was here prior to *Atkins* -- legislative judgment "weighs on the side of rejecting capital punishment" for the category of defendants at issue. *Enmund*, 458 U.S. at 793; *see Coker*, 433 U.S. at 596.

IV. Atkins v. Virginia

> *"The Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender."*
> *-Atkins v. Virginia*, 122 S. Ct. 2242, 2252 (2002).

In *Atkins v. Virginia*, 122 S.Ct.2242 (2002), the United States Supreme Court held that the execution of the mentally retarded violated both the Eighth Amendment's prohibition against excessive punishment and cruel and unusual punishment. *Id*.at 2252. The petitioner in *Atkins* was convicted of abduction, armed robbery and capital murder for the 1996 murder of Eric Nesbitt. *Id.* at 2244. Atkins was sentenced to death. *Id.*

At trial, both Atkins and his co-defendant, William Jones, testified during the guilt phase of the trial. Jones testified pursuant to a plea. Each testified to

essentially the same facts with the exception that each stated the other individual had actually shot the victim. *Id.* Atkins was convicted in large part due to the credibility of Jones and the incoherent testimony presented by Atkins. *Id.* at 2244-45.

During the penalty phase, the State proved two aggravating circumstances qualifying the petitioner for the death penalty. The defense relied on an expert witness to present evidence of mental retardation. The expert's conclusion was that Atkins was "mildly mentally retarded". *Id*. at 2245. The jury sentenced Atkins to death but his sentenced was reversed by the Virginia Supreme Court because of a misleading verdict form. *Id.* at 2245-46.

At re-sentencing, the defense again presented testimony from their expert regarding mental retardation. The state presented its own expert who testified that Atkins was not mentally retarded and diagnosable as having antisocial personality disorder. Atkins was again sentenced to death. *Id.* at 2246. On appeal again, the Virginia Supreme Court affirmed the imposition of the death sentence. *Id.*

The United States Supreme Court reversed stating that the execution of the mentally retarded would violate the Eighth Amendment's prohibition against excessive punishment due to the reduced culpability of this class of defendants. *See id.* at 2250. The Supreme Court reasoned that "This consensus [among the

states] reflects widespread judgement about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty." *Id.* As such, the Court concludes, "Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability."[19] *Id.*

Reversing its prior decision in *Penry I*, the Court concluded that "the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Atkins v. Virginia*,122 S. Ct. 2242, 2252 (2002) (internal quotation marks omitted). The Court rested its conclusion on two grounds.

First, the Court found persuasive that, at the time of *Penry I* in 1989, only two death penalty states and the federal government had banned the execution of mentally retarded offenders. *Id.* at 2248. However, since that time, an additional sixteen states had prohibited the use of the death penalty for the mentally retarded. The Court noted that it "is not so much the number of States that is significant, but the consistency of the direction of change." *Id.* at 2249. These enactments, "[g]iven the well-known popularity of anticrime legislation," provided the Court

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[19] It should also be noted that the Court recognized that the execution of the mentally retarded would not further the twin goals of the death penalty, namely retribution and deterrence. *Atkins*, 122 S.Ct. at 2251.

with "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* In its search for a national consensus, the Court relied upon the fact that the legislatures passing the laws voted "overwhelmingly in favor of the prohibition." *Id.* The Court also looked to the opinions of social and professional organizations with "germane expertise," such as the American Psychological Association, the opposition to the practice by "widely diverse religious organizations," international practice, and polling data. *Id.* at 2249 n.21. While "not dispositive," these factors bolstered the Court's opinion that a consensus opposing the practice existed "among those that have addressed the issue." *Id.* Finally, the Court noted that even in those states that retained the death penalty for the mentally retarded, only five had actually carried out the execution of a mentally retarded individual since *Penry I*. *Id.* Because the practice had become "truly unusual," it was "fair to say," according to the Court, that "a national consensus has developed against it." *Id.*

The second reason the Supreme Court advanced for banning the execution of the mentally retarded was that "this consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders and the relationship between mental retardation and the penological purposes served by the death penalty." *Id.* at 2250. The Court noted that, due to their

impairments, defendants with mental retardation "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to control impulses and to understand the reactions of others." *Id*. These deficiencies, the Court held, while not justifying an exemption from criminal liability, do diminish a mentally retarded person's personal culpability to the extent that neither of the justifications advanced by states in support of the death penalty – retribution and deterrence – would be served by permitting a retarded person's execution. *Id.*

Retribution in the capital context had been limited to ensuring that "only the most deserving of execution are put to death." *Id.* at 2252. Because the "just deserts" rationale necessarily depends on the culpability of the offender, the most extreme punishment was deemed excessive due to the "lesser culpability of the mentally retarded offender." *Id.* And, because capital punishment can serve as a deterrent only when a crime is the result of premeditation and deliberation, no deterrence interests are served. *Id.* This type of calculus, the Court noted, is at the "opposite end of the spectrum" from the behavior of the mentally retarded because of their cognitive and behavioral impairments. *Id.*

The Court also opined that, due to the impairments of mentally retarded individuals, a host of factors – from the increased risk of false confessions,

difficulties in communicating with counsel, and their lesser ability due to limited communication skill to effectively testify on their own behalf or express remorse – created, "in the aggregate," an unacceptable "risk of wrongful executions" for mentally retarded defendants. *Id.* at 2251. In short, the Court held that its "independent evaluation of the issue reveals no reasons to disagree with the judgment of the legislatures that have . . . concluded that death is not a suitable punishment for a mentally retarded criminal," and thus the Constitution "places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Id.* (internal quotation marks omitted).

V. Mental Retardation and Exclusion From the Death Penalty: A Problem

> *"Because all measurement, and particularly psychological measurement, has some potential for error, obtained scores may actually represent a range of several points."*
> -AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* at 57 (10th ed. 2002).

It is not by accident that both the 1992 AAMR and 2002 AAMR manuals refuse to use a bright line cutoff score. In its 1992 edition, the AAMR states:

> Assuming that appropriate standardized measures are available for the individual's social, linguistic, and cultural background, and that proper adaptations may be made for any motor or sensory limitation, the conceptual intelligence criterion of performance should be *approximately* two or more standard deviations below the mean. This criterion assumes a standard score of *approximately* 70 to 75 or

below on scales with a mean of 100 and a standard deviation of 15.

AAMR, Mental Retardation: Definition, Classification, and Systems of Supports at 35 (9th ed. 1992)(emphasis added)(hereinafter "1992 AAMR Manual").

In the next addition, the AAMR continues with this line of reasoning:

> In the 2002 AAMR system, the "intellectual functioning criterion for diagnosis of mental retardation is *approximately* two standard deviations below the mean, considering the SEM for the specific assessment instruments used and the *instrument's strengths and weaknesses.*

AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS at 58 (10th ed. 2002)(emphasis added).

With this, we must ask ourselves "why is IQ a fluid concept?", necessitating the consistent use of "approximately" in a definition once thought to be static and absolute. As stated above in Section II, both recent editions of the AAMR manual and commentators expressed reservations about the use of IQ scores. Below are some of the reasons why.

a. Obsolete norms

An IQ test is normed on a sample of Americans at a given time, say 1948, and at that time, a score below 70 may isolate those two standard deviations below the mean. Even before it is published, say 1950, thanks to IQ gains over time, people begin scoring at 70 and above despite the fact that they are two standard

deviations below the mean. This is not theory but fact. The WISC IQ test was normed in 1948. By 1972, typical American were scoring at 108 on that test, rather than the predicted 100; and those on the cutting line of mental retardation were scoring at 78 rather than 70. The reason they were scoring 78 is, of course, because they were being compared to a previous generation of Americans (the children of 1948) rather than to their own generation (the children of 1972). They were really two standard deviations below their age cohorts but appear to be well above that because their scores were being inflated by obsolete norms. There is no evidence that they were better able to deal with the real world than the mentally retarded of the previous generation. If that were so, there would be no mentally retarded left today. Almost everyone scores at 70 or above if you pick a test that was normed in the distant past. Therefore, to adjust for obsolescence, you must: first, measure the gap between when the test was normed and when it was taken - in the above case 24 years; second, take that times the rate of IQ gains on that kind of test - here 0.33 points per years - so that X 24 years equals 8 points; and finally, deduce that from the subjects IQ - here you would lower 78 to 70, showing that the subject was in fact two standard deviations below the mean despite appearances. *See* Appendix A; Affidavit of J.R. Flynn.

The WISC tests (WISC, WISC-R, and WISC-III) were normed in 1947-48,

1972 and 1989. The Weschler adult tests were normed in 1949, 1974, and 1992.[2] During that 40 year period, dramatic IQ gains changed the proportion of eligible children from a high of 1 in 23 to a low of 1 in 213, if you took IQ scores at fact value. The lesson is that you simply must not take IQ scores at face value but must adjust for obsolescence. *See* Appendix A; Affidavit of J.R. Flynn.

b. Systematic Bias

When they norm a test, testing organizations make every effort to get a representative sample of Americans, If you could knock on every tenth door in America, you would get such a huge random sample that its representative character would be assured. However, since you cannot get a "true" random sample, you select and test a "stratified sample". This is done by collecting data from schools in the major geographical regions and match that data up with income distribution. Regarding adults samples, many times the data is collected by phone, much in the same way opinion polls operate.

This process creates a systematic bias in the sample. Comparative analysis has shown that the WISC - III and the WAIS - III samples have an error of anywhere from 1.5 to 2.0 IQ points. No one knows whether only one or both samples were mildly unrepresentative or in what direction. Therefore, certainty beyond a reasonable doubt means deducting another two IQ points, In the above

case, we would have to deduct a total of 10 points and need a score of 80 to isolate those two standard deviations below the mean. *See* Appendix A; Affidavit of J.R. Flynn.

c. Measurement Error

In its 10th edition, the AAMR Manual made several important observations about the reliability of an IQ cutoff score.

> Errors of measurement as well as true changes in performance outcome must be considered in the interpretations of test results. This process is facilitated by considering the concept of standard of error measurement (SEM), which has been estimated to be three to five points for well-standardized measures of general intellectual functioning....Therefore, an IQ of 70 is most accurately understood not as a precise score, but as a range of confidence with parameters of at least one SEM (i.e., scores of about 66 to 74; 66% probability), or parameters of two SEMs (i.e., scores of 62 to 78; 95% probability). This is a critical consideration that must be part of any decision concerning a diagnosis of mental retardation.

AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS at 57 (10th ed. 2002) (internal cites omitted).

The point being made is this. No test can be administered perfectly. If you measure the height of your child against a wall with a pencil mark, there is a margin of error. From experience, we know that two administrations of a test will give varying scores. And we must allow for that fact by treating scores as a reliable measurement only within plus or minus so many points. Indeed, to be safe (getting

odds of 39 to one that a score is able a certain point), we would allow 8 points. This source of error is over and above those described so far because it is error that exist even assuming you have a perfect normative sample selected at the present moment. In the above case, the WISC sore obtained in 1972, we now have a total of 18 points to be deducted from the subject's score: 8 for obsolescence, 2 for systematic error, and 8 for measurement error. We would need a score of 88 to be certain beyond a reasonable doubt that we had a "true" score of 70 - and since two standard deviations below the mean is 70 or below, you would really want a score of 89 to be sure the true 71 or above. *See* Appendix A; Affidavit of J.R. Flynn.

d. Practice Effect

The Handbook of Psychological Assessment notes, discussing the updated WISC-III, that average scores on retests of the WISC-III over the course of 23 days result in an increase of "7 to 8 points for the full scale, 2 to 3 points for the verbal, and 11 to 13 points for performance IQ." Gary Groth-Marnart, HANDBOOK OF PSYCHOLOGICAL ASSESSMENT, at 137 (4th Ed. 2003). This suggests that "moderate short term increases in scores of 5 to 10 points should not usually be considered to indicate true improvement in ability." *Id*.

The importance of this only becomes relevant when read in conjunction with the relevant portion of this Court's proposed Rule:

> **(e) Appointment of Experts; Time of Examination.** Within 30 days of the filing of a properly filed motion or amended motion seeking a determination of mental retardation in the circuit court, or within 30 days of relinquishment of jurisdiction by the supreme court in a case in which an appeal is pending, the circuit court *shall appoint 2 experts in the field of mental retardation*. *Each expert shall promptly evaluate* the prisoner and submit to the court and parties a written report of the expert's findings. Further, where it is the intention of the prisoner to present the findings of a mental health *expert chosen by the prisoner* who has tested, evaluated, or examined the prisoner, the court also shall order that the prisoner be examined by *a mental health expert chosen by the state*. Attorneys for the state and prisoner may be present at the examinations conducted under this subdivision. The reports of the mental health experts shall be exchanged prior to the hearing required in section (g) as directed by order of the circuit court.

As stated in the proposed Rule, up to four experts may be testing and evaluating an individual to determine whether he or she is mentally retarded. According to this Court's proposed Rule, only those tests approved by DCF may be used. Currently, DCF has not promulgated any rules.[20] The only Rules indicating which

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[20]Nor has DCF promulgated any rules required with the adoption of 921.137, F.S..Section921.137(4) of the Florida Statutes states:

> As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test

tests can be used is the old HRSM 160-2D adopted October 1, 1985. Rule 3-2(c)(1)(a) lists the appropriate tests:

1. Stanford Binet, Form LM.
2. Wechsler Adult Intelligence Scale.
3. Wechsler Intelligence Scale for Children - revised.
4. Wechsler Preschool and Primary Scale of Intelligence.
5. Bayley Scales of Infant Development.
6. Cattell Infant Intelligence Scale.
7. Columbia Mental Maturity Scale.
8. McCarthy Scales of Children's Abilities.
9. Leiter International Performance Scale.
10. Hiskey-Nebraska Test of Learning Aptitude (for the deaf).

Of these ten listed tests, only three are suitable for adults. Now the problem becomes obvious: with up to four experts testing an individual and only three tests

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> **specified in the rules of the Department of Children and Family Services**. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. **The Department of Children and Family Services shall adopt rules to specify the standardized intelligence tests as provided in this subsection.**

Section 921.137(4), F.S. (2001)(emphasis added).
Chapter 120, Florida's Administrative Procedure Act regulates the rulemaking process of Florida administrative agencies. Section 120.54, F.S. (2001) governs agency rulemaking. This sections begins by stating that "Rulemaking is not a matter of agency discretion". Section 120.54(1)(a), F.S. (2001). Further, section 120.54 mandates that "Whenever an act of the Legislature is enacted which requires implementation of the act by rules of an administrative agency within the executive branch of state government, such rules shall be drafted and formally proposed as provided in this section within 180 days after the effective date of the act, unless the act provides otherwise." Section 120.54(1)(b), F.S. (2001). Section 921.137 requires the Department of Children and Families to adopt rules delineating which standardized tests are to be used in determining IQ scores. DCF has failed to do so.

available on the list, the likelihood of practice effect is assured.[21] Every score obtained after the initial testing would have to be scrutinized for the possibility of practice effects.

e. An Example

An example has already been given but let us look at an updated example. An individual takes the WAIS - III (which was normed in 1995) in the year 2002 and scores a 79. This would be considered to be clearly outside the range of mental retardation *if one does not follow the recommendations of the AAMR*. The generally accepted rate of gain on Weschler tests in the United States is between .25 and .30 points per year. As a result, a test obsolescence of seven years (1995 to 2002) would inflate the score by about 2 points, lowering the IQ score from 79 to 77. As usual, we would have to allow for a "systematic error" of 2 more points. Now, the IQ score drops from 77 to 75. The WAIS-III is thought to have a measurement error less than most tests. To cut the odds of a mistake to one in forty, we would have to allow 5 points. Therefore, the true score drops from 75 to 70, putting the subject two standard deviations below the mean.

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[21]The Rule does allow for other tests, but the AAMR does not identify others that may be used where "special circumstances" do not exist. AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* at 59-66 (10th ed. 2002).

When determining placements, whether to put a child in a special class, odds against measurement error of one in 20 are sometimes consider adequate. We have assumed that when a life is at stake, odds of one in 40 would be appropriate. Using the lower odds would only make a different of one IQ point (the difference between a "one-tailed" and "two-tailed" test of confidence). But if a mistake is made, a child can be restored to his old class. Resurrecting the dead is, at present, beyond our competence.

f. Gains from a more structured environment

There are currently no studies today showing that death row inmates have enjoyed a rise in IQ because of the highly structured environment.

Intervention projects designed to enrich the environments of children at risk of mental retardation sometimes show an IQ rise of as much as 20 points. No one would argue that prison upgrades quality of environment to a similar degree. Nonetheless, prison provides a highly structured system for the mentally retarded. Meal times are exact and food is delivered. Bathing times are regular. Exercise is also on a regular basis. Medical care is provided as well as television and reading. Since there is an inordinate amount of time spent in the cell, reading and writing is a main form of entertainment. A rigid form of rules and discipline ensure that none of these patterns are broken. *See* J. R. Flynn, The sociology of IQ: enhancing

cognitive skills, in CULTURE AND LEARNING: ACCESS AND OPPORTUNITY IN THE CURRICULUM. M. Ollssen ed. Westport, CT, Greenwood (in press).

Compare this to the chaotic pre-prison environment of many of the retarded, attempting to cope on their own. Compare it to the sort of environment typical of many offenders who commit violent crimes.

VI. Atkins and The True Meaning of Culpability: Mental Retardation at the Time of the Offense or at Execution

> *"Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."*
> -*Atkins v. Virginia,* 122 S. Ct. 2242 (2002).

Any classification of mental retardation will have a different reason for that application. The 2002 AAMR states:

> The function or reasons for applying a definition of mental retardation to a person are multiple and may include diagnosis, classification, and/or planning of supports. Within each function are multiple purposes. For example, the diagnosis function may be applied to determine eligibility for services, benefits or legal protections.

AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS at 198 (10th ed. 2002).

The *Atkins* decision itself discussed the varied reasons for excluding the mentally retarded from the death penalty. The Supreme Court advanced for banning the execution of the mentally retarded was that "this consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders and the relationship between mental retardation and the penological purposes served by the death penalty." *Id.* at 2250. The Court noted that, due to their impairments, defendants with mental retardation "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to control impulses and to understand the reactions of others." *Id.* These deficiencies, the Court held, while not justifying an exemption from criminal liability, do diminish a mentally retarded person's personal culpability to the extent that neither of the justifications advanced by states in support of the death penalty – retribution and deterrence – would be served by permitting a retarded person's execution. *Id.* As such, mental retardation "makes these defendants less morally capable", *Id.* At 2251, clearly evincing a concern of the Supreme Court that evidence of mental retardation at the time of the offense is relevant.

In addition, the "procedural" concerns of the Court indicate that mental Retardation is only relevant from the time of the offense. A major problem with the

mentally retarded is there inability to effectively participate in their defense. "Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Id.* at 2250. The *Atkins* Court continued: "Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 2252.

It is clear that the Supreme Court's concerns focus on two close points in time: The crime itself and trial. These two points of time are more relevant to the question of culpability of an individual than the time after direct appeal and during the collateral process. As such, any Rule promulgated by this Court should clearly state that the relevant evidence of mental retardation should be from at or near the time of the offense if available.

VII. Atkins and Ring

> *"Because a mentally retarded defendant is no longer constitutionally eligible for the death penalty, mental retardation now becomes a factual issue ' that . . . must be found by a jury beyond a reasonable doubt.' "*

An analysis of the current legal landscape, including another case decided by the Supreme Court this term, *Ring v. Arizona*, 122 S. Ct. 2428 (2002), indicates that both judge and jury have a significant role to play in resolving a postconviction *Atkins* claim. Ring involved a Sixth Amendment challenge to Arizona's judge-sentencing capital punishment scheme. Relying on the constitutional principles established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that the Sixth Amendment does not permit a defendant to be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone), Ring argued that *Apprendi* was irreconcilable with the Court's prior decision in *Walton v. Arizona*, 497 U.S. 639 (1990), which upheld Arizona's judge-sentencing procedure. The *Ring* Court agreed, overruled *Walton*, and held that the Sixth Amendment requires that any finding of fact that makes a defendant eligible for the death penalty must be unanimously made by the jury beyond a reasonable doubt. 122 S. Ct. at 2440.

While *Ring* dealt specifically with statutory aggravating circumstances, it included "factfinding[s] necessary to . . . put [a defendant] to death." *Id.* at 2443. *Atkins* held that the Eighth Amendment prohibits a mentally retarded defendant from being sentenced to death. 122 S. Ct. at 2252. Because a mentally retarded defendant is no longer constitutionally eligible for the death penalty, mental

retardation now becomes a factual issue "that . . . must be found by a jury beyond a reasonable doubt." *Ring*, 122 S. Ct. at 2439. In effect, the absence of mental retardation is "the functional equivalent of an element of [capital murder]." *Apprendi*, 530 U.S. at 494.

The judge still plays a very important role in this determination. Much like the current Florida practice with regard to the admissibility of a defendant's statements, eyewitness identification, and expert testimony, the constitutionally required procedure occurs in two steps. In the first step, the judge must make an independent judicial determination that the defendant does (or does not) have mental retardation, and whether the defendant is eligible for a death sentence under *Atkins*.

The reasons for the requirement of a distinct ***judicial*** determination of fact and law are discussed in *Jackson v. Denno*, 378 U.S. 368 (1964), and reiterated in *Crane v. Kentucky*, 476 U.S. 683 (1986): the enforcement of a federal constitutional prohibition against exposing retarded persons to a death sentence at the jury's discretion can hardly be left solely to a procedure whereby the jury makes the ultimate factual determination of the existence of the facts on which the prohibition turns. In *Jackson*, for example, the Court stated "the ***requirement*** that the court make a pretrial voluntariness determination does not undercut the

defendant's traditional prerogative to challenge the statement's reliability during the course of the trial." 378 U.S. at 386 (emphasis added). There is, in short, a due process mandate that the trial court make the initial determination whether the defendant's constitutional rights were violated. *Crane*, 476 U.S. at 687-88. This is especially important in the context of a jury determination regarding mental retardation. The Supreme Court created the constitutional prohibition in part as a result of recognition of the handicaps that retarded persons suffer in litigating issues in front of juries, which in turn exposes them to "a special risk of wrongful execution." 122 S. Ct. at 2252 (noting: (1) the difficulty a mentally retarded person may have in testifying; (2) the possibility that a mentally retarded person's "demeanor may create an unwarranted impression of lack of remorse;" and (3) the possibility that evidence of mental retardation may enhance the likelihood that future dangerousness will be found by the jury).

In the second step of the process required for addressing and resolving an *Atkins* claim, the defendant who presents evidence of mental retardation has a right to insist that he not be sentenced to death unless the jury finds unanimously, beyond a reasonable doubt, that he is ***not*** mentally retarded. *Ring* and *Atkins*, read together, say this very clearly. *Ring* is explicit that the procedural rights guaranteed by *Apprendi* attach to elements that are added by Supreme Court "interpret[ations]

of the Constitution to require the addition of an . . . element to the definition of a criminal offense in order to narrow its scope." *Ring,* 122 S. Ct. at 2442. It is equally clear that *Atkins* adds such an element. The *Atkins* Court stated: "Thus, ***pursuant to our narrowing jurisprudence***, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate." 122 S. Ct. at 2251.

VIII. REQUIRED CHANGES TO Fl.R.Crim.P. 3.203

> *"Failing to provide the Circuit Courts with the appropriate guidance in these important areas may result in the execution of defendants who are truly mentally retarded and, therefore, will not comply with the mandate of Atkins."*

The Office of the Capital Collateral Regional Counsel for the Middle region proposes changes to the Rule only as it pertains to cases that are final[22]. Those changes, however, are relevant to all stages of the proceedings because they deal with the very definition of mental retardation.

[22] Due to the limited mandate under Chapter 27.

In formulating the rules relating to mental retardation claims this Court should be cognizant of the appropriate goals of the new rules; (1) Fairly identifying those who are truly retarded and (2) Follow the mandate of the *Atkins* decision. In order to accomplish these goals, it is necessary for this Court to provide guidance to the Circuit Courts concerning several issues related to the determination of mental retardation which are recognized by the AAMR and DSM-IV and which are absent from the definition of mental retardation in the proposed rules as well as Florida Statute 921.137. Failing to provide the Circuit Courts with the appropriate guidance in these important areas may result in the execution of defendants who are truly mentally retarded and, therefore, will not comply with the mandate of *Atkins.*

The proposed rule defines "significantly subaverage general intellectual functioning" as performance which is two standard deviations below the mean score on a standardized intelligence test specified in the rules of the Department of Children and family Services. This definition, while technically correct, fails to address aspects of "significantly subaverage intellectual functioning" which have become generally recognized by the AAMR and the DSM-IV and are essential for a fair determination of this prong of a determination of mental retardation.

Specifically, the new rule fails to specifically take into account the Standard Error of Measurement (SEM) which are commonly recognized in assessing scores

on a standardized intelligence test. In general, the SEM on a standardized intelligence test is + or - five points. This means that an IQ score of 75 or below is currently recognized as the *approximate* cut-off score for the "subaverage intellectual functioning" element of Mental Retardation. The United States Supreme Court specifically recognized this cut-off score in the *Atkins* decision *Atkins,* 122 S.Ct at 2245, fn. 5.

Therefore, the undesigned respectfully requests that the rule on the Definition of Mental Retardation section read as follows, with the proposed addition italicized:

> **As used in this rule, the term "mental retardation" means significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior *at or near the time of the homicide* and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning" for the purposes of this rule, means performance that is *approximately* two or more standard deviations from the mean score on a standardized intelligence test, *taking into account the Standard Error of Measurement(SEM) of the given test and the instrument's strengths and limitations,* specified in the Rules of the Department of Children and Family Services.**

The AAMR recognizes several instruments to measure intelligence; the Wechsler Intelligence Scale for Children- III, the Wechsler Adult Intelligence Scale-

III, the Stanford-Binet-IV, the Cognitive Assessment System, the Kaufman Assessment Battery for Children, the Slosson Intelligence test, the Bayley Scales of Infant Development, the Comprehensive Test of Nonverbal Intelligence, the Leiter International Performance Scale-Revised (Leiter-R), and the Universal Nonverbal Intelligence Test (UNIT). *Id.* at 59-66.

In formulating a standard for establishing the "significantly subaverage general intellectual functioning" element of mental retardation, this Court should adopt the standard of *approximately* a score of 75 or below (taking into account the standard error of measurement), on one or more of the standardized, individually administered intelligence test recognized by either the American Psychiatric Association (through the DSM-IV-TR) or the American Association of Mental Retardation(through the Definitions, Classifications, and Systems of Supports) . This is the same standard as two standard deviations below the mean (a score of 70), when taking into account the standard error of measurement of plus or minus 5. This would place the Florida standard as to the "significantly subaverage intellectual functioning" element of mental retardation in harmony with the current standard of assessment of mental retardation by mental health professionals and would comply with the mandate of *Atkins*.

• Proposed rule of criminal procedure for determining mental retardation in "final" cases.

RULE 3.203. PRISONER'S MENTAL RETARDATION AS A BAR TO EXECUTION

Text of section effective in all cases where a sentence of death was imposed and affirmed on direct appeal on or before the effective date of this rule.

(a) Scope. This rule applies in all cases where the prisoner was convicted of first-degree murder and sentenced to death and the conviction and sentence were affirmed on direct appeal on or before the effective date of this rule which is _____.

(b) Definition of Mental Retardation. As used in this rule, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior at or near the time of the homicide and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is approximately two or more standard deviations from the mean score on a standardized intelligence test, taking into account the Standard Error of Measurement and the instrument's strengths and limitations, specified in the rules of the Department of Children and Family Services. The term "adaptive behavior," for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

©) Motion for Determination of Mental Retardation; Conformity with Rule 3.851. A prisoner may file a motion for collateral relief seeking a determination of mental retardation. The motion must be filed in conformity with Florida Rule of Criminal Procedure 3.851. The following conditions apply.

(1) A motion for collateral relief seeking a determination of mental retardation made by counsel for the prisoner shall contain a certification by counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is mentally retarded.

(2) If a death-sentenced prisoner has not filed a motion for collateral relief on or before the effective date of this rule, the prisoner shall raise a claim under this rule in an initial rule 3.851 motion.

(3) If a death-sentence prisoner has filed a motion for collateral relief and that motion has not been ruled on by the circuit court on or before the effective date of this rule, the prisoner may amend the motion to include a claim under this rule within 60 days of the effective date of this rule. The filing of this motion shall not stay any other proceedings.

(4) If a death-sentenced prisoner has filed a motion for collateral relief and that motion has been ruled on by the circuit court and an appeal is pending on or before the effective date of this rule, the prisoner may proceed under subdivision (d) of this rule.

(5) If a death-sentenced prisoner has filed a motion for collateral relief and that motion has been ruled on by the circuit court and that ruling is final on or before the effective date of this rule, the prisoner may raise a claim under this rule in a successive rule 3.851 motion filed within 60 days of the effective date of this rule. The circuit court may reduce this time period and expedite the proceedings if the circuit court determines that such action is necessary.

(d) Appeal of Motion for Collateral Relief Currently Pending. If an appeal of a circuit court's ruling on a motion for collateral relief is pending on the effective date of this rule, the prisoner may file a motion to relinquish jurisdiction for a mental retardation determination within 60 days of the effective date of this rule. If the prisoner's motion complies with subdivision ©) of this rule, the supreme court will relinquish jurisdiction to the circuit court for a mental retardation determination under this rule. Failure to raise such a motion to relinquish under this subdivision will be deemed a waiver of the claim and the prisoner will be barred from raising the claim in a successive motion. The court may reduce the time period for filing such motion if the court determines that such action is necessary.

(e) Appointment of Experts; Time of Examination. Within 30 days of the filing of a properly filed motion or amended motion seeking a determination of mental retardation in the circuit court, or within 30 days of relinquishment of jurisdiction by the supreme court in a case in which an appeal is pending, the circuit court shall

~~appoint 2 experts in the field of mental retardation. Each~~ require each expert ~~shall~~ to promptly evaluate the prisoner and submit to the court and parties a written report of the expert's findings. Further, where it is the intention of the prisoner to present the findings of ~~a~~ mental health experts chosen by the prisoner who has tested, evaluated, or examined the prisoner, the court also shall order that the prisoner be examined by ~~a~~ mental health experts chosen by the state. Attorneys for the state and prisoner may be present at the examinations conducted under this subdivision. The reports of the mental health experts shall be exchanged prior to the hearing required in section (g) as directed by order of the circuit court.

(f) Prisoner's Refusal to Cooperate. If the prisoner refuses to be examined by or fully cooperate with the ~~court-appointed experts or the~~ state's expert, the court may, in its discretion~~:~~

~~(1) order the prisoner to allow the court-appointed experts to review all mental health reports, tests, and evaluations by the prisoner's expert;~~

~~(2) prohibit the prisoner's experts from testifying concerning any tests, evaluations, or examinations of the prisoner regarding the prisoner's mental retardation;~~

~~(3)~~ order such relief as the court determines to be appropriate.

(g) Hearing on Motion to Determine Mental Retardation; Disposition. The circuit court shall conduct an evidentiary hearing on the motion. 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 prisoner is mentally retarded. If the court finds by ~~clear and convincing~~ a preponderance of the evidence that the prisoner is mentally retarded as defined in subdivision (b) of this rule, the court's written order addressing the motion for collateral relief shall state that the prisoner is not death eligible due to mental retardation. The court's order denying or granting collateral relief shall conform with the requirements identified in rule 3.851. As explained under rule 3.851, the order shall be considered the final order for purposes of appeal. The clerk of the trial court shall promptly serve upon the parties and the attorney general a copy of the final order, with a certificate of service. Motions for rehearing shall be filed with 15 days of the rendition of the trial court's order and a response thereto filed with 10 days thereafter. The trial court's order disposing of the motion for

rehearing shall be rendered not later than 15 days thereafter. If the supreme court relinquished jurisdiction, the order shall return the case to the supreme court. A notice of an order on mental retardation that returns jurisdiction to the supreme court shall be filed in the supreme court with a copy of the order attached.

(h) Waiver. A claim authorized under this rule is waived if not filed in accord with the time requirements for filing set out in this rule, unless good cause is shown for the failure to comply with the time requirements.

(I) Appeal. An appeal may be taken by any adversely affected party. Appeals are to proceed in accord with Florida Rule of Appellate Procedure 9.142(a).

(j) Deadline for Filing Claim. A claim under this rule must be filed no more than 60 days after the effective date of this rule.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition, Comment on Proposed Rule of Criminal Procedure 3.203 has been has been furnished by United States Mail, first class postage prepaid, to the Florida Supreme Court on this _____ day of July, 2003.

_____
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