**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC 03-685**

**IN RE: AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE AND THE FLORIDA RULES OF APPELLATE PROCEDURE**

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**COMMENTS OF THE CAPITAL COLLATERAL REGIONAL COUNSEL-SOUTH**

**COMES NOW THE CAPITAL COLLATERAL REGIONAL COUNSEL-SOUTH** (henceforth CCRC-South), by and through the undersigned attorneys, and herein submits the following comments with respect to the above-captioned action. The comments relate to the general definitions of mental retardation and the standard of proof and raise points that are of specific concern to defendants already in post conviction on or before the effective date of the rule.

## I. INTRODUCTION

In Atkins v. Virginia, 122 S.Ct. 2242 (June 20, 2002), the United States Supreme Court held that the execution of a person with mental retardation violates the Eighth Amendment's prohibition of cruel and unusual punishment. Atkins constitutes a direct reversal of the Court's prior holding in Penry v. Lynaugh, 492 U.S. 302 (1989), which held that the execution of people with mental retardation was not excessive because, in 1989, there was "insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment." Penry, 492 U.S. at 335. In Atkins the Court emphasized that the Eighth Amendment prohibits punishment that is excessive as well as punishment which is cruel and unusual, Atkins, 122 S. Ct. at

2246, and addressed the change in public policy since its decision in Penry.

The Court surveyed the evidence from State legislatures, particularly the number of enactments limiting the execution of the mentally retarded since the Penry decision, and addressed the public policy issues offered in support of the death penalty and considered their applicability to people with mental retardation. The Court concluded that executing people with mental retardation would not "measurably contribute" to either deterrence or retribution in the criminal justice system. Atkins, 122 S. Ct. at 2251. The principal focus of the Court's opinion was on the reduced culpability of people with mental retardation. However the Court also noted concerns about factual innocence and the appropriateness of the death penalty for people with mental retardation, noting that "mentally retarded defendants in the aggregate face a greater risk of wrongful execution." Id at 2252.

## II. THE DEFINITION OF MENTAL RETARDATION

### A. Introduction.

Proposed Rule 3.203 (b) defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18". This definition is similar to the definitions set forth by both the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision* (2002), (henceforth *DSM-IV TR*), and American Association on Mental Retardation, *Mental Retardation:*

*Definition, Classification and Systems of Supports, 10th Edition*, (2002) (henceforth *AAMR*), in the requirement that the defendant satisfy all three component prongs of intellectual functioning, adaptive functioning and age of onset before being diagnosed as mentally retarded. CCRC-South submits that the proposed rule's definitions of the three component prongs of mental retardation are restrictive and create a risk that a number of individuals who meet the national consensus identified by the Supreme Court in Atkins could be excluded by the Florida definition. Additionally, CCRC-South is concerned about the definition as it relates to individuals in postconviction.

In cases that have become "final" there will usually have been a number of years between the offense and the current proceedings. The individual's functioning may well have changed as a result of the highly structured prison environment of death row. The definition of mental retardation in proposed Rule 3.203 should therefore make plain the necessity of determining whether the defendant met the diagnostic criteria at the time of the crime for which they have been sentenced to death without regard to whether they have adapted to their prison life at the time of the post conviction proceeding.

**B. Intellectual functioning**

Proposed Rule 3.203 defines the term "significantly subaverage intellectual functioning" as performance that is two or more standard deviations from the mean on a standardized intelligence test specified in the rules of the Florida Department of Children and Family Services. While the proposed rule does not set forth any hard

and fast cutoff IQ score, it is rigid as to the requirement for "performance that is two or more standard deviations from the mean score."

Relevant professional organizations have long recognized the importance of clinical judgment in assessing general intellectual functioning and the inappropriateness and imprecision of arbitrarily assigning a single IQ score as the cutoff boundary of mental retardation. The DSM-IV TR's diagnostic criterion for significant subaverage intellectual functioning is "an IQ of **approximately** 70 or below on an individually administered IQ test." DSM-IV TR at 49. Importantly, DSM-IV TR allows for persons with IQs as high as 75 to be classified as mentally retarded. DSM-IV TR note 16 at 41-42.

The AAMR 2002 definition also stresses the impossibility of obtaining a certain score, particularly in the borderline range around the IQ of 70. As the AAMR 2002 notes, AAMR does not "intend[] for a fixed cutoff point for making the diagnosis of mental retardation." AAMR 2002 at 58. In the 2002 definition of mental retardation the AAMR defines the "intellectual functioning" criterion for diagnosis of mental retardation as "**approximately** two standard deviations from the mean." AAMR 2002 at 58. The impossibility of defining an absolute cutoff is also reflected in the Atkins decision which noted that "an IQ between 70 and 75" is "typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." 122 S. Ct. at 2245 n. 5.

The proposed definition as it stands appears to encompass a smaller group of defendants than that envisioned by the national

consensus and the nationally recognized definitions set forth in DSM-IV TR and AAMR 2002. It fails to afford specific protection to that group of individuals whose IQ tests result in scores of between 70 and 75. To insist on strict adherence to the requirement of intellectual functioning of exactly two or more standard deviations from the mean would thus amount to a violation of the Eighth Amendment prohibition of excessive punishment under Atkins. Therefore, CCRC-South submits that the proposed rule should be amended to reflect the guidelines suggested by the AAMR, DSM IV TR and Atkins.

**C. Adaptive behavior**

Proposed Rule 3.203 defines "adaptive behavior" as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for his or her age, cultural group and community." Proposed Rule 3.203 (b). The definition focuses not on the **limitations** of an individual but on any **skills** that he or she may also possess. The rule is in contradiction to the recommendations and definitions set forth by the AAMR and DSM IV TR. Specifically, AAMR emphasizes that the presence of skills cannot preclude the appropriate diagnosis of mental retardation. The AAMR 2002 definition of mental retardation admonishes that "[w]ithin an individual, limitations often coexist with strengths." AAMR note 17. Similarly, the DSM-IV TR also looks at deficits or impairments in adaptive functioning, requiring

impairments in at least two areas out of ten areas listed.[1] Thus, according to DSM-IV TR an individual may have strengths in several of these areas but so long as the deficits are present in at least two of the areas, he or she may be diagnosed as mentally retarded.

The Proposed Rule would narrow the class of defendants who would be defined as mentally retarded in contravention of the national consensus. Therefore a more appropriate definition would be one that focuses on the individual's limitations. CCRC-South submits that the formulation in the 2002 AAMR definition appears to be better suited for forensic evaluations in death penalty cases. This requires that the individual must have **limitations** in adaptive behavior as expressed in conceptual, social and practical adaptive skills. AAMR at 1.

**D. Age of onset**

The proposed rule requires that the deficits in intellectual and adaptive functioning condition "manifested during the period from conception to age 18." This definition is consistent with the definitions of both the AAMR and the DSM-IV TR. The purpose of this prong in both definitions is to distinguish mental retardation, which is a developmental disability from other conditions that may occur in later life.[2] While the definition meets the requirement of

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[1] Communication, self care, home living, social/interpersonal skills, use of community resources, self direction, functional academic skills, work, leisure, and health and safety.

[2]These may for example be injuries caused by traumatic brain injury, or disease affecting intellectual functioning and adaptive functioning.

professional diagnostic criteria, its application will present proportionality and equal protection concerns.

There is a significant problem concerning proof of the age of onset, particularly in post conviction cases where the defendant may have been incarcerated for many years before being formally evaluated for the presence or absence of mental retardation. The requirement of **manifestation** prior to age 18 does not mean that the individual has to have been **tested** during the developmental period. This would clearly be an equal protection violation. While in some cases there are test data and other indicia such as school records from the developmental period that suggest that the individual's problems arose before age 18, in other cases there has never been a diagnosis of mental retardation before age 18. In such cases the mental retardation expert is faced with the task of "retro-diagnosing" the age of onset many years after the individual's 18th birthday.

In these instances it will be necessary for the mental retardation expert concerned to consider information about the individual before his or her 18th birthday. This will typically involve the review of school, medical and other records in addition to obtaining information from other sources, including interviews with family members, teachers and others who knew the defendant before age 18. While this approach may be successful when there are such sources of information for the expert's review, this may not be the case with inmates who are comparatively elderly and for whom no useful records can be located and no family members or others who

knew him or her before age 18 can be located. The same is true for certain foreign-born or foreign national inmates, where it is not possible to obtain the necessary information for a reliable diagnosis of age of onset.

In such cases the lack of evidence of age of onset would preclude a formal diagnosis of mental retardation and hence preclude relief pursuant to Atkins from the death penalty, even though the level of culpability is no greater than with someone who met all three prongs of the definition. Again this amounts to an equal protection and due process violation. CCRC-South recognizes that age of onset is a diagnostic criterion in any nationally recognized definition of mental retardation, this Court will have to consider the ramifications in terms of proportionality on individuals who cannot prove the third prong to gain relief from the death penalty.

## III. STANDARD OF PROOF

The proposed rule provides that the trier of fact must find that the defendant is mentally retarded by "clear and convincing evidence." Proposed Rule 3.203 (g). The use of the "clear and convincing" standard in Fla. Stat. s. 921.137 places it in the minority of the 18 states with pre-Atkins statutes that prohibited the death penalty for the mentally retarded in some form. Most of the states with these statutes require the that the defense only demonstrate retardation by a "preponderance of the evidence."[3]

[3]Among the pre-Atkins "preponderance" States were Tennessee, Nebraska, Ohio, Arkansas, Maryland, New Mexico, New

This standard poses problems both practical and constitutional. Under Ring v. Arizona, 536 U.S. 584 (2003), the State must bear the burden of proof by a reasonable doubt. If this Court does not agree with the application of Ring, then consideration must be given to Cooper v. Oklahoma, 517 U.S. 348 (1996), where the United States Supreme Court unanimously held that it was violative of the Due Process clause for a State to assign the burden of persuasion to the defendant on the issue of competence to stand trial to a level of "clear and convincing evidence."

The Cooper analysis is entirely analogous to the Atkins right not to be executed if mentally retarded. "The function of a standard of proof as that concept is embodied in the Due Process Clause and in the realm of fact finding is to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Cooper 547 U.S. at 361, at quoting In re Winship 397 U.S. 358. "The more stringent the burden of proof, a party must bear, the more that party bears the risk of an erroneous decision." Cooper, 547 U.S. at 361. "Far from jealously guarding a mentally retarded defendant's right not to be executed, [the proposed Florida Rule 3.203] imposes a significant risk of an erroneous determination that the defendant is [not mentally retarded]." Id at 361. This is of particular concern in post conviction cases where an evaluation will typically take place a number of years after both the

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York, and Washington. Since Atkins the list also includes Kansas, Oklahoma, Missouri and Illinois.

defendant's 18th birthday and the date of the crime in question.

Under the proposed rule, CCRC-South is concerned that the clear and convincing standard will inevitably result in a significantly increased risk of executing a mentally retarded person.

## IV. PROCEDURAL CONCERNS

CCRC-South is concerned about several aspects of the proposed rule relating to appointment of experts and the time of the examinations. The proposed rule anticipates that Court experts in the field of mental retardation are to be appointed "within 30 days" of either the relinquishment of jurisdiction by the Supreme Court or the filing of a properly filed Fla. R. Crim. P. 3.851 motion or amended motion. These experts are to "promptly evaluate the prisoner and submit to the court and the parties a written report of the expert's findings." This proposal fails to take into account the detailed process of evaluating a person for purposes of the three part diagnosis of mental retardation. All of the standardized tests to determine intellectual functioning and best psychological practice caution against repeated administration of the same test at intervals of less than six months. This is because of the "practice effect" which can distort IQ scores if subsequent IQ tests are administered too closely together in time. To insist on a succession of evaluations over too short an interval inevitably sacrifices accuracy.

CCRC-South also is concerned about proposed Fla. R. App. P. 9.142 (c), which provides for the State to appeal to the district court of appeal any order determining that the defendant is mentally

retarded. The appeal situation in the proposed rule should be no different that when the State appeals a grant of relief in circuit court on Rule 3.850/3.851. This Court should retain jurisdiction throughout.

## V. CONCLUSION

Based upon the forgoing, CCRC-South recommends the amendment of the rule as suggested in these comments.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Comments of CCRC-South has been furnished by United States Mail, first class postage prepaid, to the other counsel invited to comment, on July 1, 2003.


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