IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC 03-685

COMMENTS OF O. H. EATON, JR.,
CIRCUIT JUDGE
EIGHTEENTH JUDICIAL CIRCUIT OF FLORIDA

SUMMARY OF COMMENTS

I. Florida Statute 921.137 is procedural and contains little substantive law.

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

III. The Court should refer this matter to the Criminal Court Steering Committee for review before adopting any rule regulating the procedure to determine mental retardation.

I. Florida Statute 921.137 is procedural and contains little substantive law.

The legislature enacted F. S. 921.137 in 2001 with an effective date of July 1, 2001. Laws 2001, c. 2001-202. The enactment was well before the United States Supreme Court determined that mentally retarded defendants had a constitutional right not to be executed for murder. That decision was pronounced in *Atkins v. Virginia,* 536 U.S. 304,122 S. Ct. 2242, 153 L.Ed.2d 355 (2002) on June 20, 2002. The legislature decided that the procedure for determining mental retardation should be for the issue to be noticed before trial but not determined until after the penalty phase and after the death penalty became a genuine issue.

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

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

There is no doubt that this Court bears the sole responsibility for adopting rules of practice and procedure.

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

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

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

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

First, the legislative enactment of the mental retardation statute was perceived as a matter of legislative grace and not of constitutional magnitude. Due process considerations demand that issues that exclude a defendant from the death penalty be decided pretrial in an expeditious and timely manner. These types of issues are routinely decided pretrial in death penalty cases in the following situations: (1) the defendant is under age 17, *Brennan v. State,* 754 So.2d 1 (Fla. 1999); (2) the defendant is a codefendant and does not have the requisite culpability, *Enmund v. Florida*, 458 U.S. 782 (1982); (3) the more culpable codefendant received a life sentence, *Larzelere v. State,* 676 So.2d 394 (Fla. 1996); (4) no aggravating factors are present, *Banda v. State,* 536 So.2d 221 (Fla. 1988).

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

Third, a pretrial determination of disqualifying death penalty issues results in (1) conservation of judicial resources, (2) elimination of the considerable expense incurred by county and state governments for needless preparation of a penalty phase hearing and (3) reduction of the time a capital defendant must await in custody in the county jail prior to trial.

There is no compelling reason to wait for this issue to be decided after trial. In fact, except perhaps for the publicity of it all, or the experience gained by trial lawyers, there is no valid reason to decide this issue post trial.

III. The Court should refer this matter to the Criminal Court Steering Committee for review before adopting any rule regulating the procedure to determine mental retardation.

The undersigned is informed that Judge Stan Morris has filed a motion with the Court requesting that the procedures to determine mental retardation in capital cases be referred for comment to the Criminal Court Steering Committee. The Court should refer this rule to that committee. The Criminal Court Steering Committee was created to advise this Court on matters involving trial procedure, particularly in capital cases, and the committee is composed of some of the most experienced trial judges in the state. Some of the committee members teach other trial judges the Handling Capital Cases course at both the Florida College of Advanced Judicial Studies and the National Judicial College. This Court's opinion announcing consideration of the proposed rule has only recently been brought to the attention of the committee and this Court's opinion inviting comments on the proposed rule did not specifically invite the committee to respond.

Attached to these comments is a copy of a draft of an alternative rule governing the procedure to be used in determining the mental retardation issue in capital cases. This draft is an informal collection of ideas presented by some of the committee members and is only a starting point. However, if the committee is given the opportunity to fully develop an alternative rule, this Court will be able to consider the suggestions of judges who regularly try these cases and regularly deal with these important issues.

The proposed rule has several obvious problems:

(1) Sections e and f assume that there is a significant delay between the verdict in the guilt phase of the trial and the commencement of the penalty phase. This is not always the case. Delay

starting the penalty phase results in a jury wandering around the community for days or weeks being subjected to outside influences.

(2) Section g of the proposed rule assumes that no experts have previously examined the defendant to determine mental retardation and that is the exception rather than the rule.

(3) Section k allows the defendant to have an interlocutory appeal if the motion is denied. The State may need that right but the defendant has an adequate remedy by plenary appeal. Allowing the defendant an interlocutory appeal assumes that the death penalty will be imposed without consideration of other mitigating circumstances.

(4) As drafted, the proposed rule is both prolix and "unnecessarily redundant."

These are only a few problems with the proposed rule. The proposal should be referred to the Criminal Court Steering Committee for review and comment prior to the date of oral argument, August 25, 2003.

DATED June 25, 2003.

Respectfully submitted

O. H. Eaton, Jr.