IN THE SUPREME COURT OF FLORIDA

CASE NO: SC03-685

COMMENTS OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (FACDL) ON PROPOSED RULE 3.203, FLA. R. CRIM. P. (EXECUTION OF MENTALLY RETARDED DEFENDANT)

The Florida Association of Criminal Defense Lawyers, (FACDL) by and through the undersigned attorney offers the following comments on Proposed Rule 3.203 Fla. R. Crim. P.

1. FACDL is a statewide organization of over 1,500 criminal defense lawyers, including Public Defenders and private attorneys. One of the founding purposes of FACDL is to promote the fair and constitutional administration of justice. Consequently, FACDL files these comments. Although FACDL supports most of the provisions of Proposed Rule 3.203, FACDL respectfully submits that one provision of the proposed Rule is unconstitutional and fundamentally unfair.

2. Section (g) of Rule 3.203 states that “if the court finds by clear and convincing evidence that the Defendant has mental retardation as defined in Section 921.137, Florida Statutes (2002), the court may not impose a sentence of

death." Although Rule 3.203(g) does not specifically assign the burden of proof to the Defendant, as a practical matter the Defendant will have the burden of proof in most, if not all cases. Regardless of who has the burden of proof, the clear and convincing standard of proof violates due process and Cooper v. Oklahoma, 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed 2d 498 (1996). In Cooper, the United States Supreme Court held that a clear and convincing burden of proof on the issue of incompetency to stand trial violated due process. Justice Stevens noted for the court that the more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision. 517 U.S. at 363, citing Cruzan v. Director, Mo. Dept. Of Health, 497 U.S. 261, 283, 110 S. Ct. 2841, 111 L. Ed 2d 224 (1990).

FACDL realizes that this Court has rejected the argument that the clear and convincing standard of proof violates due process as to the issue of competency (insanity at time of execution). See Provenzano v. State, 750 So.2d 597 (Fla. 1999); Medina v. State, 690 So.2d 1241 (Fla. 1997). The issue of competency to execute is, in the context of Cooper v. Oklahoma, a different issue than the issue of whether a Defendant is mentally retarded. In Medina v. State, *supra*, this court cited

the view of Justice O'Connor in Ford v. Wainwright, 477 U.S. 399, 425, 106 S. Ct. 2595, 2609 - 2610, 91 L. Ed 2d 335 (1986) that the state had a substantial and legitimate interest in execution and the question of competency to execute could never be conclusively and finally determined (up to the very moment of execution); a Defendant could claim he had become insane just before execution and the potential for false claims and deliberate delay is great. 690 So.2d at 1247.

In a case of the determination of whether a Defendant is mentally retarded, the problems cited by Justice O'Connor do not exist. The definition of mental retardation in Rule 3.203 preclude a false claim designed for delay. Mental retardation must manifest itself during the Defendant's childhood. For example, a 30 year old Defendant cannot suddenly claim just before his/her execution that he/she recently became mentally retarded. Section B of the Proposed Rule states that 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 additional specific definitions of mental retardation in Section B will also prevent a last minute and false or spurious claim of mental retardation merely to achieve a delay.

FACDL respectfully submits that the clear and convincing standard of proof is inappropriate under Rule 3.203. As to insanity, there is a presumption that all persons are sane. Consequently, a burden of proof like clear and convincing may be appropriate to overcome this presumption, especially in light of the possibility of false or dilatory claims. However, there is no legal presumption that all persons are not mentally retarded. Proof of mental retardation requires proof of a lifetime (or since onset during childhood) of significantly subaverage general intellectual functioning with concurrent deficits in adaptive behavior.

There is no practical reason to require clear and convincing proof of mental retardation. If the greater weight of the evidence establishes that a Defendant is mentally retarded, then the interests of both the state and the Defendant will be met. This burden of proof will meet the due process interests of the Defendant pursuant to Atkins v. Virginia, 534 U.S. 304, 122 S. Ct. 2242, 153 L. Ed 2d 335 (2002) and Section 921.137, Florida Statutes. A preponderance burden of proof will meet the state's interests to carry out an execution; this burden will also eliminate false or spurious clams in the context of proof of mental retardation.

As Justice Stevens noted in Cooper v. Oklahoma: the more

stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision. In the context of mental retardation, there is no reason for a Defendant to assume that risk. Most states have a preponderance standard. "Mental Retardation and the Death Penalty: A Guide to State Legislature Issues." fn.49 James W. Ellis, Professor of Law, University of New Mexico School of Law, at www.deathpenaltyinfo.org/MREllisLeg.pdf See also State v. Grell, 66 P.3d 1234 (Ariz. 2003); State v. Dunn, 831 So.2d 862 (La. 2002); People v. Smith, 193 Misc. 2d 538 (Sup. Ct. N.Y. Erie County 2002); State v. Lott, 97 Ohio St. 3d 303 (Ohio 2002); Lambert v. State, 2003 Okla. Crim. App Lexis 11 (Okla. Ct. Crim. App. May 29, 2003); State v. Smith, 893 S.W. 2d 908 (Tenn. 1994); State v. Elledge, 26 P.3d 271 (Wash. 2001).

If a Defendant has a constitutional right not to be executed if he is mentally retarded, then that Defendant should have to establish (if he has the burden of proof) the fact of mental retardation by a preponderance of the evidence. The preponderance or greater weight of the evidence standard will ensure that the fact of mental retardation is more likely than not true. If the fact of mental retardation is more likely than not true, the state's interest should not demand a higher burden of proof.

As FACDL noted above, a higher burden of proof in a mental retardation case is **not** necessary to fulfill the state's interest (like competency for execution): to overcome the presumption of competency or to prevent false or dilatory claims. FACDL simply cannot see why the state would demand greater proof than a preponderance: the state's only legitimate interest is to have an execution carried out, **if there is no constitutional impediment to an execution**. Proof, by the greater weight of the evidence, will establish that impediment, if it exists. Consequently, this Court should amend the standard of proof in Rule 3.203 to a preponderance of the evidence.

Respectfully submitted,

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Amicus Curiae Committee,
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