IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 03-685

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

COMMENTS OF CAPITAL LITIGATION UNIT OF THE OFFICE OF THE PUBLIC DEFENDER 11TH JUDICIAL CIRCUIT ON PROPOSED FLORIDA RULE OF CRIMINAL PROCEDURE 3.230

The undersigned agree with the comments submitted by the Florida Public Defender Association. We write separately to comment on the timing of the mental retardation determination.

ELIGIBILITY FOR THE DEATH PENALTY SHOULD BE DETERMINED BEFORE THE COURT CONDUCTS THE GUILT AND PENALTY PHASES OF A CAPITAL TRIAL.

The Court should amend the proposed rule to provide for pretrial determinations of mental retardation. Common sense suggests that ineligibility for the death penalty should be established before a capital trial. Simple fairness requires the same result. The mentally retarded are ineligible for the death penalty. *See Atkins v.*

Virginia, 536 U.S. 304 (2002). They should not have their guilt or innocence decided by juries that have been skewed by the death-qualification process. Nor should they face pressure to plead guilty to escape an unconstitutional execution. Finally, at a time when the criminal justice system is facing a serious financial crisis, it would be a mistake to adopt a procedure that will unnecessarily expend capital trial resources. This Court should exercise its procedural prerogative and adopt a pretrial determination procedure.

A. This Court Has Exclusive Authority To Adopt Rules Of Procedure.

The proposed rule tracks section 921.137 in delaying the determination of mental retardation until after the jury has returned its sentencing phase recommendation. This Court has exclusive authority to "adopt rules for the practice and procedure in all courts." Art. V, § 2 Fla. Const.; *see Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000). The Court has adopted the following distinction between procedural and substantive matters:

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.
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> Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to

> the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.

Allen, 756 So. 2d at 60, *quoting In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring). The time and manner in which the mental retardation determination is made are clearly procedural matters to be determined by the Court.

B. The Mentally Retarded Should Not Be Tried By Death-Qualified Juries.

The proposed post-trial procedure would have an anomalous and constitutionally suspect side-effect: Death-ineligible, mentally retarded defendants would have their guilt or innocence tried by death-qualified juries. The death-qualification process will yield juries biased in favor of the State. *See Lockhart v. McCree*, 476 U.S. 162, 187-88 (Marshall, J., dissenting).[1] In *McCree*, Justice Marshall explained:

> The data strongly suggest that death qualification excludes a significantly large subset – at least 11% to 17% – of potential jurors who could be impartial during the guilt phase of trial. Among the members of this

[1]Although critical of some of the evidence, the *McCree* majority assumed that the evidence established that death-qualification produced somewhat more conviction-prone juries. 476 U.S. at 173.

> excludable class are a disproportionate number of blacks and women.
>
> The perspectives on the criminal justice system of jurors who survive death qualification are systematically different from those of the excluded jurors. Death-qualified jurors are, for example, more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more mistrustful of defense attorneys, and less concerned about the danger of erroneous convictions. This proprosecution bias is reflected in the greater readiness of death-qualified jurors to convict or to convict on more serious charges. And, finally, the very process of death qualification – which focuses attention on the death penalty before the trial has even begun – has been found to predispose the jurors that survive it to believe that the defendant is guilty.
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> The evidence thus confirms, and is itself corroborated by, the more intuitive judgments of scholars and of so many of the participants in capital trials – judges, defense attorneys, and prosecutors.

476 U.S. 187-188 (footnotes and citations omitted).

The United States Supreme Court has permitted the use of death-qualified juries, but it has only done so where the exclusion of jurors unable to impose the death penalty furthers a legitimate state interest. In *McCree*, the court approved the use of a death-qualified jury in the guilt phase of a capital trial because death qualification "serves the State's entirely proper interest in obtaining a single jury that could impartially decide all of the issues in *McCree's* case." 476 U.S. at 180. In *Buchanan v. Kentucky*, 483 U.S. 402 (1987), the court considered the use of a death-qualified jury to try a death-ineligible defendant in a joint trial with his death-eligible codefendant. The court approved the procedure, again pointing out the state interests served by the

use of a death-qualified jury:

> Where, as here, one of the joined defendants is a capital defendant and the capital-sentencing scheme requires the use of the same jury for the guilt and penalty phases of the capital defendant's trial, the interest in this scheme, which the Court recognized as significant in *McCree*, 476 U.S., at 182, 106 S.Ct., at 1768, coupled with the Commonwealth's interest in a joint trial,[2] argues strongly in favor of permitting "death qualification" of the jury.

483 U.S. at 402.

Unlike in *McCree* and *Buchanan*, the death-qualification of juries to try the mentally retarded would serve no legitimate state interest. In both *McCree* and *Buchanan*, the states had efficiency and fairness interests that weighed in favor of using death-qualified juries to determine the defendants' guilt. Here, just the opposite is true. If a defendant is not eligible for the death penalty, it would be grossly inefficient to conduct a capital trial. Neither fairness nor efficiency would be served by excluding otherwise competent jurors who are unable to recommend an unavailable punishment. The State's interest in efficiency argues in favor of a pretrial determination. The interests of fairness – for the State, for witnesses, and, most importantly, for defendants – command the same result.

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[2]The court observed that joint trials furthered the state's interest in "promoting the reliability and consistency of its judicial process," as well as "a concern that it not be required to undergo the burden of presenting the same evidence to different juries …" 483 U.S. 402, 418-19.

C. Mentally Retarded Defendants Should Not Be Made To Plead Guilty Under Threat of An Unconstitutional Penalty.

There is only one way in which the proposed procedure could be said to promote efficiency: The threat of execution could be used to win guilty pleas from mentally retarded defendants who might otherwise go to trial. Of course, this rationale is so distasteful that no one who supported our system of constitutional justice would advocate it. Guilty pleas must be made intelligently and voluntarily. *See Boykin v. Alabama*, 395 U.S. 238 (1969); Fla. R. Crim. P. 3.172. The United States Supreme Court has warned: "Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." *Boykin*, 395 U.S. 242-43. Intentionally threatening mentally retarded defendants with an unconstitutional punishment is something no prosecutor, defender, judge, legislator, or citizen would support.

The Court should not, then, adopt a system that would have the same result, albeit unintentionally. So long as a capital defendant's mental retardation is unadjudicated, he or she will face pressure to plead guilty to escape death. There is no compelling reason to keep the defendant – or indeed the State – ignorant as to the maximum possible penalty until the trial is over. The Court should be especially concerned to avoid unnecessary pressure for defendants to plead guilty in light of the

growing number of exonerations. Both in Florida and elsewhere, the exonerated include mentally retarded defendants who gave false confessions. *See Brown v. Crosby*, 249 F. Supp. 2d 1285 (S.D. Fla. 2003); *Brown v. Singletary*, 229 F. Supp. 2d 1345, 1363-64 (S.D. Fla. 2002); Paula McMahon & Ardy Friedberg, *Justice Can Elude Mentally Impaired, Validity Of Their Confessions Produces More Legal Challenges*, SUN-SENTINEL, March 24, 2002, at A1 (discussing false confessions of three mentally retarded Florida men: Tim Brown, Jerry Frank Townsend, and John Purvis); Morgan Cloud et. al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002); Paul T. Hourihan, Note, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 VA. L. REV. 1471 (1995). The United States Supreme Court noted this same concern in deciding *Atkins*. 536 U.S. at 320 n. 25.

D. Mental Retardation Should Be Determined Before The Time & Expense of A Capital Trial Are Incurred.

The proposed rule will waste the criminal justice system's resources on unnecessary capital trials. Capital cases demand more time, effort, and money from courts, defenders, and prosecutors alike. *See, e.g., Wiggins v. Smith*, ____ U.S. ____, 2003 WL 21467222 (June 26, 2003); Dave Von Drehle, *Bottom Line: Life in Prison One-Sixth as Expensive*, July 10, 1988, at A12.. It is only common sense that eligibility for the death penalty should be determined before these resources are spent

conducting the guilt and penalty phases of a capital trial. This is all the more apparent at a time when the system is facing both budget cuts and the looming transfer of funding under Revision 7 to Article V. *See* Jan Pudlow, *Courts React to New Budget Realities: Suffering 'Substantial Budget Pain,'* 30 FLA. BAR NEWS 12, at 1 (June 15, 2003); Jan Pudlow & Gary Blankenship, *Courts Feel Budget Axe*, 30 Fla. Bar News 11, at 1 (June 1, 2003). What would be wise under any circumstances may be a necessity today.

Respectfully submitted,

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