IN THE SUPREME COURT OF FLORIDA

Case Number SC03-685

COMMENTS TO PROPOSED RULE 3.203

The undersigned attorney, representing the Florida Public Defender Association, files the following comments to Proposed Rule 3.203, which establishes a procedure for determining mental retardation in "future" cases.[1]

1. Much of the substance of the Association's comments are contained in the Supplemental Briefs this Court requested in the cases of Demetris Thomas v. State, Case No. SC00-1092 and Willie Miller v. State, Case No. SC01–837. Those briefs are appended to this comment. This Court requested Thomas and Miller to discuss the issues that arose in light of Atkins v. Virginia, 122 S. Ct 2242 (2002), and Section 921.137, Florida Statutes (2001). In summary, the points raised were:

[1] The Association makes no comment on the rule as it affects defendants who are in post-conviction proceedings. It believes the Capital Collateral Regional Representatives are in a position to comment on the issues presented by defendants in a post-conviction posture.

a. The definition of mental retardation provided by the legislature in section 921.137 is the one used in Florida and nationally. It is well accepted and easy to apply.

b. The legislatively crafted procedure encroaches on this Court's exclusive prerogative to determine the practice and procedures the courts of this state will use in implementing legislative mandates.

c. This procedure also is inefficient and wasteful of judicial resources. More logically, the issue of the defendant's intellectual status should be determined pre-trial.

d. The law does not prohibit the defendant from presenting the evidence of his mental retardation to the sentencing jury. The trial court should also tell the jury that if they find him mentally retarded they should return a life recommendation.

e. To establish mental retardation, a defendant need only show it by a preponderance of the evidence rather than the legislatively mandated standard of clear and convincing evidence, as most states, post Atkins, have concluded. To require a higher standard of proof will violate due process. Cooper v. Oklahoma, 517 U.S. 348 (1996).

2. Subsection (c) of the proposed rule states that the notice be filed "not less than 20 days before trial or at such other time as ordered by the court." It

should read “not less than 20 days before trial or at such later time as ordered by the court”. The proposed rule allows the judge to move the date forward or back. This leaves open the possibility of a judge setting an arbitrarily early date. This could lead to the sort of situation which caused a reversal in Morgan v. State, 453 So.2d 394 (Fla. 1984..

3. Subsection (d) of the Rule permits a defendant to raise the mental retardation bar to execution only after the jury has returned a death recommendation. In practice, that procedure will, at best, be ignored, and at worst, lead to confusion and more litigation. Although the rule contemplates delaying consideration of the defendant’s retardation until the jury has returned its sentencing verdict, defense counsel will present all the evidence he can during the penalty phase of the trial that his client has that disability. Strongly entrenched in death penalty law is the notion that the jury must be allowed to consider all relevant mitigation. . Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). Mental retardation undeniably is strong mitigation. Penry v. Lynaugh, 492 U.S. 302 (1989). Thus, a trial court will err, and probably reversibly so, if it prevents a defendant from proving his retardation to the penalty phase jury. See, Espinosa v. Florida, 505 U.S. 1079 (1992). Moreover, because the law requires instructions on the defenses he may raise and which have “any evidence” to

support them, the jury should be told that if they find the defendant mentally retarded they must return a life recommendation. Mora v. State, 814 So. 2d 322, 330 (Fla. 2002); Hooper v. State, 476 So. 2d 1253, 1256 (Fla. 1985).

4. If a defendant presents evidence of his low intellectual capacity to the penalty phase jury, and it finds him mentally retarded, the problem may arise under the proposed rule that the sentencing judge will find him not so because the evidence is not "clear and convincing" that he is intellectually disabled. That is, Florida law requires a defendant to establish mitigation only by a preponderance of the evidence, Knight v. State, 746 So. 2d 423 (Fla. 1998), yet proposed Rule 3.203(i) (as well as section 921.137, Florida Statutes (2001)) requires the defendant to establish his retardation by clear and convincing evidence. Requiring the co-sentencers, Espinosa, cited above, to apply different standards can only lead to confusion and violate due process. Cooper v. Oklahoma, 517 U.S. 348 (1996); see the Supplemental Brief in Demetris Thomas v. State, Case No. SC00-1092, pages 11-12 (Attached to these comments).

5. Subsection (e) of the proposed rule allows the State to seek a death sentence if the jury has recommended the defendant be sentenced to life in prison. Allowing the trial court to override that verdict would violate the defendant's Sixth Amendment right to a jury. Ring v. Arizona, 536 U.S. 584 (2002); but see,

Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002).

6. Subsection (f) requires the defendant to file a motion alleging his mental retardation "no later than 10 days after waiving the right to a penalty phase jury". A defendant could waive a penalty phase jury very early in the case. This could lead to an unreasonably early deadline to file his motion. A better deadline would be "no later than 10 days after the guilt phase verdict."

7. Subsection (j) allows the waiver of a claim of mental retardation if not filed within the time requirements established by this rule unless the defendant can provide good cause for not having done so. However, the Eighth Amendment right of the mentally retarded to avoid execution is fundamental. Penry v. Lynaugh, 492 U.S. 302 (1989). It cannot be waived. It is, in that sense, like competency to proceed, sanity, or youth. A mentally incompetent defendant has a fundamental right to not be tried or executed as long as his disability exists. Pate v. Robinson, 383 U.S. 375 (1966): Ford v. Wainright, 477 U.S. 399 (1986); Stanford v. Kentucky, 492 U.S. 361 (1989). Likewise, a 15-year-old defendant cannot be executed even if he or she waited until five minutes before being put to death to raise that bar. Their status of being incompetent, insane, or young prevents their executions. The same is true of the mentally retarded.

8. The 2003 Legislature abolished the Capital Collateral Regional Counsel-North effective July 1, 2003. At this point, it is unclear who will represent the defendants that agency currently defends. That uncertainty should provide the "good cause" required for defendants to raise claims of mental retardation if they fail to file motions to determine if they are mentally retarded within the time limits established by the Rule.

9. Rule 9.142(c); Rule 3.203(k)

A. **Appeal by State**. Determining a defendant is mentally retarded is a matter of fact. C.f. State ex. rel. Bludworth v. Kapner, 394 So. 541 (Fla. 4th DCA 1981)("Sanity is a question for the trier of fact to determine from all the evidence.") Regardless of whether the fact finder is the judge or jury, once the defendant has been found mentally retarded, fundamental constitutional law prohibits the State has from appealing that conclusion. Alternatively, if the fact finder concludes the defendant is mentally retarded and is sentenced to life in prison, that finding is a reasonable basis for imposing that punishment and hence becomes an "acquittal" for double jeopardy purposes under the state and federal constitutions. Wright v. State, 586 So. 2d 1024 (Fla. 1991)(Jury's life recommendation amounted to an "acquittal" for double jeopardy purposes if there was a reasonable basis for that verdict.); see also, Bullington v. Missouri, 451 U.S.

430 (1981)(Imposing a life sentence is an acquittal of the death penalty for double jeopardy purposes.); Arizona v. Rumsey, 467 U.S. 203 (1984); Williams v. State, 595 So. 2d 936 (Fla. 1992). The State has no right to appeal a determination the defendant is mentally retarded.

B. **Time for filing Notice of Appeal**. Proposed Rule 9.142 gives the State 30 days to file a notice of appeal from an order finding the defendant mentally retarded. Rule 9.140(c)(3) gives the State 15 days to file a notice of appeal in other appeals permitted to it. The Association recommends that the 30 day period be reduced to 15 days to be in conformity with the general rule concerning the commencement of State appeals. Doing so will reduce any confusion about the time the State has to file its notice when it wants to challenge a court order finding a defendant mentally retarded.

10. Comment to Rule 3.202 as it applies to nonfinal or "pipeline" cases.

Subsection (g) requires defendants whose appeal is pending at the time the rule is adopted to file a motion to relinquish jurisdiction if they believe they are mentally retarded. The question of the defendant's retardation status will then be determined by the sentencing court. In Demetris Thomas v. State, cited above, the trial court found the defendant mentally retarded but sentenced him to death anyway. His appeal is before this Court. He should not have to go back to court

to establish what the trial court concluded he had already proven. This is particularly true because the State, at the trial level, and in its Answer Brief, never contested Thomas' mental retardation. To allow it to now challenge that judicial determination would give it an unfair windfall and waste judicial resources.

11. Thus. the Florida Public Defender Association endorses the definition of retardation used in section (b). It has, however, significant reservations about sections (c), (d), (e), (f), (i), (j) and (k), as well as the expanded time given the State to file a notice of appeal. Adopting them will make implementing the United States Supreme Court's opinion in Atkins v. Virginia, 122 S. Ct. 2242 (2002) unnecessarily difficult and perhaps unconstitutional. The proposed rule for nonfinal or pipeline cases also gives the State an unfair windfall in cases where a trial court has already found the defendant mentally retarded.

12. The Public Defender Association recommends that in place of the proposed rule that this Court adopt one that lets the defendant raise and resolve the issue of his retardation pre-trial. If determined adversely to him, he should be allowed to present his evidence to the jury and for it to be instructed that if it finds him mentally retarded, it must return a life recommendation. Attached is a copy of the proposed rule with the changes recommended by the Association.

Respectfully submitted,

David A. Davis
Assistant Public Defender
Florida Bar No. 0271543
Representing the Florida Public Defender Association

APPENDIX A

Briefs from Demetris Thomas v. State, SCSC00-1092 and Willie Miller v. State, Case No. SC01–837.

IN THE SUPREME COURT OF FLORIDA

DEMETRIS OMARR THOMAS,

Appellant,

v. CASE NO. **SC00-1092**

STATE OF FLORIDA,

Appellee.
_____/

SUPPLEMENTAL BRIEF OF APPELLANT

NANCY A. DANIELS
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IN THE SUPREME COURT OF FLORIDA

DEMETRIS OMARR THOMAS,

Appellant,

v. CASE NO. **SC00-1092**

STATE OF FLORIDA,

Appellee.
_____/

SUPPLEMENTAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Demetris Thomas submits this supplement Brief as directed by the December 3, 2002 order of this Court in his case.

STATEMENT OF THE CASE AND FACTS

Thomas relies on the Statements of the Case and Facts presented in his Amended Initial Brief.

SUMMARY OF THE ARGUMENT

The definition of mental retardation contained in Section 921.137(1) is the one Florida has traditionally used to define that disability. It is also the one adopted by the American Association on Mental Retardation and the American Psychiatric Association, national organizations that regularly deal with mental retardation issues. This includes the requirement that onset of this disability begin before the age of 18. This Court should accept the judgment of the Florida legislature in defining mental retardation because defining rights is an area of the law that is peculiarly within the legislature's exclusive jurisdiction.

This Court should not, however, follow its lead in defining the procedure to use in determining if the defendant suffers from that disability. That is, by prescribing a procedure for courts to use it has invaded this Court's exclusive jurisdiction in establishing the method or means by which a mentally retarded defendant can raise his or her disability as a bar to execution. If so, considerations of judicial efficiency argue well that this Court should require the defendant to raise the question of his deficient intellectual capacity before trial. If the trial judge finds the defendant has failed to carry his burden of proof, he should, nevertheless, be allowed to present his evidence (assuming he has some) to the jury for them to consider.

This Court should likewise reject the legislature's decree that mental retardation must be established by clear and convincing evidence. The risk of sending a person to death who is retarded under a preponderance of the evidence standard but not a clear and convincing one is too great and the benefits to the State too slight to justify the higher measure.

Besides the questions asked in its December 3, 2002 order, this Court should resolve the question of whether it is cruel or unusual under Florida's constitution to execute the mentally retarded. It should also consider the retroactive effect of Section 921.137, Florida Statutes (2002) and Atkins v. Virginia, 122 S. Ct. 2242 (2002).

ARGUMENT

ISSUE

SENTENCING THOMAS TO DEATH, A MENTALLY RETARDED PERSON VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

In Atkins v. Virginia, 122 S. Ct. 2242 (2002), the nation's high court declared that America's evolving standards of decency had progressed to the point that we, as a nation, believed the execution of mentally retarded defendants was cruel and unusual punishment. It left unanswered who were those people and how we determine who is retarded. "As was our approach in *Ford v. Wainwright*, with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.' 477 U.S. 399, 405, 416-17, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986)." Atkins, 122 S. Ct. at 2250.

1. What definition of mental retardation is to be applied. (Question 1)

Fortunately, this Court has legislative guidance in defining mental retardation. Indeed, identifying the mentally retarded is properly a legislative responsibility granted by our state constitution. That is, creating a right, is usually a matter of legislative prerogative. In Re Rules of Criminal Procedure, 272 So. 2d 65 ,66 (Fla.

1972)(Adkins, concurring.)("[S]ubstantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property.) This Court has a natural hesitancy doing that. Brennan v. State, 754 So. 2d 1 (Fla. 1999)(Wells, concurring and dissenting). Accordingly, our elected representatives in the 2002 legislative session exercised that responsibility by prohibiting executions of the mentally retarded and then providing definition for that disability. Section 921.137(1), Florida Statutes (2002):

> 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 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.
>
> (2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation.

Section 303.063(42), Florida Statutes (2002), provides a similar definition, and it is the one Florida has used for years in determining eligibility of its citizens for various state programs to benefit or assist the mentally retarded. See Amended Initial Brief at p. 26

Also, this three part definition, or one similar to it, is the one national organizations concerned with mental retardation, have commonly used in defining that disability. See American Association on Mental Retardation, Classification and Retardation 1 (H. Grossman ed. 1983); American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 4th Ed (Text Revision), page 49; Cleburne v. Cleburne Living Center 473 U.S. 432, 442 n. 9 (1985). No reasons exist why this Court should wander away from the traditional, widely used, and easily applied definition of mental retardation found in Section 921.137(1). The legislature acted reasonably in an area in which it has exclusive constitutional authority to do so, and this Court should abide by its definition of retardation.

One its parts requires the manifestation of the intellectual deficiency "during the period from conception to age 18." Section 921.137(1). (Question 6). Since the defendant is the party who would normally, and logically, be the one raising the issue of his mental disability, he should be the one with the burden of establishing that fact. This is not to say that he must have been diagnosed as retarded before the age 18; simply that this disability must have been apparent by the time of the defendant's 18th birthday. As a matter of practice, this is often done by examining school, medical, psychological, and other records, and talking with parents, friends, relatives, and others who knew the defendant as a child.

2. The procedure to use in proving mental retardation.

(Questions 2 and 3)

If the Florida Constitution gives the legislature the exclusive right to determine rights and obligations, it gives this Court the exclusive power to determine the procedures the courts of this state will use in implementing them. Article V, section 2(a), Florida Constitution; Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000). Thus, if Section 921.137(4) provides the method for raising the mental retardation issue at a capital trial, as this Court's December 3, 2002, order explicitly recognized, the legislature encroached on this court's jurisdiction in creating that mechanism.

Moreover, the legislatively mandated procedure wastes judicial, prosecutorial, and defense time and effort. Specifically, subsection 921.137(4) allows the defendant to raise the mental retardation issue only after the jury has found the defendant guilty, and after it has recommended death. If the defendant is mentally retarded, it is better to find out early in the process so that all the parties can avoid the time and expense involved in preparing for a penalty phase that will never result in a death sentence.

Logic and judicial efficiency, therefore, lead naturally to the conclusion that, as in issues such as competency, the matter of the defendant's retardation is best resolved before trial (Question 5).

> As to the forum in which the *Atkins* issue is litigated, it is significant that the majority of states which have provided a statutory exemption from capital punishment for the mentally retarded have made the finding of mental retardation a matter for the trial judge as opposed to the jury. The better practice under *Atkins* is reflected by the procedure of such states as Indiana and Missouri, where the court makes a pre-trial determination of whether the defendant is mentally retarded and thereby spares both the State and the defendant the onerous burden of a futile bifurcated capital sentencing procedure

State v. Williams, Case No. 01-KA-1650 (La. Nov. 1, 2002)(footnotes omitted.)

If, on the other hand, the trial court finds the defendant failed to establish he was mentally retarded, he should, nevertheless be able to present his claim to the penalty phase jury. Lockett v. Ohio, 438 U.S. 586 (1978)(State must allow the penalty phase jury to consider all aspects of the defendant's character.), and the United States Supreme Court's recent decision in Ring v. Arizona, 122 S. Ct. 2428 (2002), compel that conclusion. If so, it should be instructed

> If you find by a preponderance of the evidence adduced at this hearing that the defendant is mentally retarded . . . , then you must not direct a sentence of death.

People v. Smith, Case No. 01-2449-001 (N.Y. Sup. October 30, 2002).

If the defendant bears the burden of establishing his mental retardation, the question arises of what standard of proof he or she must meet to do that. (Question 4). Section 921.137 requires the defendant to do so by clear and convincing evidence, but in placing that burden on the defendant, the legislature has put Florida in the distinct minority of states that require that heightened level of

certainty. Most require only the defendant to do so by a preponderance of the evidence.

Since the United States Supreme Court decided Atkins, courts that have considered the burden of proof issue have uniformly concluded that the defendant has the burden to prove by a preponderance of the evidence that he or she is mentally retarded. Lott v. State, Case No. 1989-0846 (Oh, December 11, 2002); State v. Williams, Case No 01-KA-1650 (La. Nov. 1, 2002); Murphy v. Oklahoma, 54 P.3d 556, 568-69 (Okla. Cr. Sept 4, 2002); People v. Pulliam, Case No. 89141 (Il October 18, 2002); People v. Smith, Case No. 01-2449-001 (N.Y. Sup. Oct. 30, 2002). Cases and statutes pre-Atkins were less uniform, though most required the defendant to show his mental disability by only the lesser standard. Van Tran v. State, 66 S.W.3d 790, 793 (Tenn. 2001); State v. Victor, 612 N.W. 513, 514 (Neb. 2000); State v. White, 709 N.E.2d 140, 161 (OH 1999); Ark. Code Ann. Section 5-4-618 (Michie 1995); Md. Ann. Code Art. 27, Section 412 (1996); N.M. Stat. Ann. Section 31-20A-21 (Michie 1984); N.Y. Crim. Proc. Law section 400-27 (MckInney 1994)(1997-98 pocket part); Wash. Rev. Code Ann. Section 10. 95.303 (1998 pocket part). A minority demanded he or she prove it by clear and convincing evidence. Rogers v. State, 698 N.E.2d 1172, 1175-76 (IN 1998); Colo. Rev. Stat. Sections 16-9-402, -403 (1997). Only Georgia (among the first states to

ban executing the retarded) required the defendant to establish his retardation beyond a reasonable doubt. Ga. Code Ann. Section 17-7-131 (1994).

This preponderance of the evidence burden to establish a defendant's diminished mental capabilities naturally evolves from the the United States Supreme Court's decision in Cooper v. Oklahoma, 517 U.S. 348 (1996). In that case, the court held that while a state may require a defendant to prove his incompetency, it could not increase the risk of convicting an incompetent defendant by requiring him or her to establish that fact by clear and convincing evidence. A defendant who may be incompetent by a preponderance of the evidence but competent under a clear and convincing measure has far more to lose if a court required him to prove he was incompetent under the latter standard than the than the State did if it required only that he meet a preponderance of the evidence test.

> For the defendant, the consequences of an erroneous determination of competency are dire. . . .[A] erroneous determination of competence threatens a "fundamental component of or criminal justice system"-the basic fairness of the trial itself.
>
> By comparison to the defendant's interest, the injury to the State of the opposite error-a conclusion that the defendant is incompetent when he is in fact malingering-- is modest.

Id.

The retarded defendant faces a similar scenario as the one who could not meet the a clear and convincing standard for competence. For him or her, the consequences are even more dire-life or death. On the other hand, if the defendant

is wrongly found retarded under a preponderance of the evidence measure, the State's injury is only the money required to house the defendant for the rest of his or her life. While that may be considerable it pales in comparison to the life itself and may be less than that required to execute him or her.

> Clearly, in the Atkins context, the State may bear the consequences of an erroneous determination that the defendant is mentally retarded(life imprisonment at hard labor) far more readily than the defendant of an erroneous determination that he is not mentally retarded."

State v. Williams, Case No. 01-KA-1650 (La Nov 1, 2002)

Thus, under the Supreme Court's rationale in Cooper, defendants who claim they are mentally retarded should only have to prove that fact by a preponderance of the evidence.

3. Other substantive issues (Question 7)

In Thomas' Initial Brief, he argued that executing mentally retarded defendants violates not only the Eighth Amendment to the United States Constitution, but Article I, Section 17 of the Florida Constitution. While Atkins resolved the issue for the nation, this Court should answer whether our state constitution likewise precludes executing the mentally retarded.

In Thomas' Supplemental Initial Brief, he argued that he should receive the benefit of Section 921.137, Florida Statutes (2002). That law was enacted after he had committed his crimes, after he had been sentenced to death, and indeed, after he had filed the Initial Brief in his case. This Court should resolve whether Section 921.137 applies to Thomas.

CONCLUSION

For the reasons presented here, in the Amended Initial Brief, the Supplemental Initial Brief, and the Supplemental Reply Brief, the Appellant, Demetris Thomas respectfully asks this honorable Court to reverse the judgment and sentence in this case and remand for a new trial; or reverse the trial court's sentence of death and remand for imposition of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to **STEPHEN R. WHITE**, Assistant Attorney General, The Capital, Tallahassee, FL 32399-1050; and to appellant, **DEMETRIS OMARR THOMAS**, #221834, Union Correctional Institution, 7819 NW 288th Street, Raiford, FL 32025-1440, on this date, July 7, 2003.

Respectfully submitted,

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_____

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that pursuant to Rule 9.201(a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

_____

DAVID A. DAVIS

IN THE SUPREME COURT OF FLORIDA

WILLIE MILLER,

Appellant,

v. . . . . .

Case No. **SC01-837**

STATE OF FLORIDA,

Appellee.
_____/

SUPPLEMENTAL BRIEF OF APPELLANT

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WILLIE MILLER,

Appellant,

v. Case No. **SC01-837**

STATE OF FLORIDA,

Appellee.
_____/

SUPPLEMENTAL BRIEF OF APPELLANT

Preliminary Statement

This supplemental brief is filed in response to this Court's order dated September 26, 2002, directing the parties to address the mental retardation issues presented in this case as affected by section 921.137, Florida Statutes (2001), and Atkins v. Virginia, 122 S. CT. 2242 (2002).

Statement of the Case and Facts

Appellant will rely on the statement of the case and facts in his Initial Brief.

Summary of Argument

The United States Supreme Court's decision in Atkins requires this Court to vacate Mr. Miller's death sentence and remand for imposition of a life sentence.

First, Atkins applies to Miller because the holding in Atkins--that the execution of mentally retarded persons violates the Eighth Amendment--is a new rule of law warranting retroactive application. Moreover, even if the rule announced in Atkins did not meet the requirements for retroactive application, the new rule would apply to nonfinal or "pipeline" cases, such as Miller's.

Second, the evidence introduced at Miller's resentencing established that Miller meets the definition of mental retardation in section 921.137, Florida Statutes (2001), Florida's statutory prohibition against executing mentally retarded persons. There was expert testimony that Miller is mentally retarded. The expert based his determination on psychological testing, school and psychological records, and family history. Miller's IQ score on the Weschler Adult Scale was 64. At age 17, Miller's IQ score was 59 and 60. Evaluators at that time determined Miller was mentally retarded and had severe

limitations in academic and social functioning. Miller's school records, the expert testimony, and the testimony of family members established that Miller's adaptive functioning in numerous areas, including academic, communication, work, and daily life were severely impaired. The evidence or Miller's mental retardation was undisputed below. The state did not challenge the expert's conclusion or present any evidence to the contrary. Moreover, the trial judge made a finding that Miller is mentally retarded. Because the definition in our statute is consistent with the definition used by the American Psychiatric Association and that used in other provisions of the Florida Statutes, the state was on notice of the criteria upon which Dr. Krop rested his conclusions and diagnosis, yet raised no challenge to them.

Appellant can think of no reason why this case should be remanded for another determination of whether or not he is mentally retarded. However, if the Court believes it necessary to remand this case for a so-called Atkins hearing, there are other issues it should consider,

including whether the issue of mental retardation must be submitted to a jury and what standard of proof is required to sufficiently protect the constitutional prohibition on executing mentally retarded persons. Ultimately, it is this Court's responsibility to fashion procedural rules governing post-conviction challenges under Atkins. Furthermore, although 921.137 sets forth a procedure and standards for challenging death-eligibility on the basis of mental retardation, those procedures are prospective only and apply to the statutory right. The procedures and standards in 921.137 may be inadequate to enforce the constitutional ban on executing mentally retarded persons.

Argument

Issue Presented

MILLER'S DEATH SENTENCE MUST BE VACATED UNDER ATKINS V. VIRGINIA, 122 S. CT. 2242 (2002), WHERE THE UNDISPUTED EVIDENCE PRESENTED AT RESENTENCING ESTABLISHES MILLER IS MENTALLY RETARDED AS DEFINED IN SECTION 921.137, FLORIDA STATUTES (2001).

In Atkins, the United States Supreme Court held the execution of mentally retarded persons violates the Eighth Amendment of the United States Constitution. A mentally retarded person thus is not eligible for the death penalty.

Retroactivity

There is no question that Atkins applies to defendants, such as Miller, whose cases are not yet final, as well as to defendants on collateral review. In deciding Penry v. Lynaugh, 492 U.S. 302 (1989), the United States Supreme Court addressed the retroactivity question as a threshold matter since Penry had raised his claim in collateral proceedings. A unanimous Court recognized that if it held the Eighth Amendment prohibited the execution of mentally retarded persons, its holding would apply

retroactively. Under federal law, the Court said, excluding mentally retarding persons from the death penalty would be a "new rule." Teague v. Lane, 489 U.S. 288, 301 (1989)(a case "announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government"). A new rule is to be applied retroactively only if it (1) places certain kinds of primary, private individual conduct beyond the power of the state to proscribe or (2) requires the observance of procedures implicit in the concept of ordered liberty. Id. at 307. The Court concluded a prohibition against executing the mentally retarded fit within the first Teague exception:

> [T]he first exception set forth in Teague should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of defendants because of their status or offense. Thus, if we held ... that the Eighth Amendment prohibits execution of mentally retarded persons . . . such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review.

Id. at 330.

The Atkins rule also warrants retroactive application under Florida law. In Florida, a new rule is to be retroactively applied if it (1) originates in either the United States Supreme Court or the Florida Supreme Court; (2) is constitutional in nature; and (3) has fundamental significance. State v. Callaway, 658 So. 2d 983, 986 (Fla. 1995); Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). A constitutional ban on executing a certain category of defendants meets these requirements. Moreover, in Florida, even if this change in the law did not meet these requirements, the new rule would be applicable to nonfinal or "pipeline" cases, such as Miller's:

> we hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final.

Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992).

Accordingly, the constitutional prohibition on executing the mentally retarded announced in Atkins applies to Miller.

Applicable Standards

In holding that death is not a legal punishment for mentally retarded defendants, the Atkins Court recognized there was disagreement "in determining which offenders are in fact retarded." In Atkins, for instance, the Commonwealth of Virginia disputed that Atkins suffered from mental retardation. The Court thus did not define who is or who is not mentally retarded for purposes of death-eligibility but decided to "leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." 122 S. CT. at 2250.

Our legislature already has done that in section 921.137, Florida Statutes (2002), Florida's statutory prohibition against executing mentally retarded persons. Although 921.137 is prospective only and therefore inapplicable to Miller, it provides a clear expression of the legislature's intent with regard to the definition of mental retardation. Pursuant to the Court's direction in

Atkins, the 921.137 definition thus should be used in enforcing the constitutional prohibition.

Section 921.137 provides:

> (1) 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 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.

This definition is consistent with the definitions used by the American Association of Mental Retardation (AAMR) and the American Psychiatric Association (APA), as reflected in footnotes three and five of the Atkins opinion.[2]

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[2]The AAMR defines mental retardation as follows: 'Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living,

Applicability to Miller

The evidence presented at Miller's resentencing proceeding established that he suffers from mental retardation, as defined in 921.137. At the resentencing hearing, the defense presented the testimony of Dr. Harry Krop, a forensic psychologist. Dr. Krop evaluated Miller before trial and again in 2000 before the resentencing proceeding. At resentencing, Dr. Krop expressed the opinion that Miller is mentally retarded. Dr. Krop's conclusion was based on interviews with Miller; a review of school, psychological, and court records; and the

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social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.' Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).

The APA's definition is similar: '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). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.' American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). 'Mild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. Id. at 42-43.

administration of a standard intelligence test which indicated Miller had a full scale IQ of 64.[3] Dr. Krop testified Miller's I.Q. places him in the bottom 1% of the population.

Dr. Krop testified he did not believe Miller was malingering for a number of reasons. First, Dr. Krop had attempted to evaluate Miller before the guilt/innocence phase of his trial in 1994 to determine competency and insanity. At that time, Miller refused to cooperate and purposely tried to look mentally ill by "describing in a very naive manner psychotic symptoms or severe psychiatric symptoms such as hallucinations and delusions." V 524. In contrast, Miller was cooperative and did not portray himself as mentally ill the three times Dr. Krop saw him in 2000. The psychological testing also indicated Miller was not malingering because the pattern of results was consistent across all the tests and the I.Q. result was consistent with I.Q. tests administered when Miller was 17

[3]Dr. Krop administered the Weschler Adult Intelligence Scales Test, the Third Edition (WAIS-III). As the Court in Atkins recognized in footnote five, the WAIS-III is the standard instrument in the United States for assessing intellectual functioning.

years old, a time when he had no motive to look bad. V 527-528. The prior tests indicated I.Q. scores of 59 (April 1977) and 60 (June 1977). Defense Exhibit 2. At that time, the evaluators used the Weschler Bellevue, an earlier version of the WAIS-III. Both evaluators of the earlier testing diagnosed Miller as mentally retarded. V 530-533; Defense Exhibit 2.

There is no question that Miller has deficits in adaptive behavior, the second criterion of mental retardation. This was apparent when Miller was in the early elementary grades. Even then, severe limitations in academic and social functioning were noticed and resulted in his placement in special classes. The same observations were made when Miller was 17 (and still in the seventh grade, which he never completed): "Willie appears to be functioning in the retarded range with corresponding social and academic development". Defense Exhibit 2. Miller's ability to work also was limited by his mental retardation. "Individuals with mental retardation at his level obviously are not going to do particularly well in terms of jobs." V 564.

Family members' testimony further supported Dr. Krop's diagnosis. When Willie lived with his sister in Georgia when he was in his 20's, he worked for his brother-in-law in exchange for room and board, and his sister gave him spending money. When he lived with another sister in Florida, she gave him room and board in exchange for babysitting her children. All the family members who testified said that even after he reached adulthood, Willie remained slow and childlike. See Initial Brief of Appellant at 13-18.

Moreover, the state did not dispute or challenge Dr. Krop's conclusion that Miller is mentally retarded. The state certainly had the opportunity to challenge Dr. Krop with regard to his diagnosis but did not do so. As noted above, the definition in 921.137 is the same as that in the DSM-IV, as well as other provisions of Florida Statutes pertaining to mental retardation, see s. 393.062(42), 916.106(12). The state thus was well aware of the criteria upon which Dr. Krop rested his conclusion and diagnosis. The state has waived any argument it may

have as to the validity of Dr. Krop's conclusion on mental retardation.

In sum, the evidence presented at Miller's resentencing proceeding demonstrates beyond any reasonable doubt that he meets the criteria for mental retardation delineated in 921.137. This was not a case where there was some evidence suggesting the defendant is mentally retarded and some evidence suggesting he is not. The evidence here was clear cut and conclusive. All three of the criteria for mental retardation were supported by an abundance of evidence. The trial judge's finding that Miller is mentally retarded was supported by competent, substantial evidence. The judge's finding makes Miller ineligible for the death penalty.

Other Considerations

Should this Court conclude the present case must be remanded for a new determination of whether Miller is or is not mentally retarded, there are other issues the Court must consider:

(1) Whether Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 122 S. CT. 2428 (2002), require a jury finding on the issue of mental retardation before a death sentence may be imposed.

The Court in Ring held capital defendants, like non-capital defendants, are entitled to a jury determination of any factors that may affect the ultimate penalty imposed. Thus, juries, not judges, must make the findings of fact necessary to impose the death sentence.

Although Ring dealt with aggravating factors, any fact upon which a defendant's eligibility for the death penalty depends would appear to fall within the ambit of Ring. As Justice Scalia explained:

> I believe the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt.

Ring, 122 S. CT. at 2444 (Scalia, J., concurring).

Under Atkins, if a defendant is mentally retarded, he is not eligible for the death penalty. It would appear therefore that once a defendant claims he is mentally

retarded, a jury would have to find the defendant was not mentally retarded before a death sentence could be imposed. Obviously, the fact of not being retarded is neither an aggravator, a sentencing factor, or a Mary Jane, for that matter. However, as the Court emphasized in Ring, "the relevant inquiry is one not of form, but of effect," 122 S. CT. at 2439 (citations omitted), and like the finding of a particular aggravating circumstance, the finding that a defendant is not mentally retarded operates as the "functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." 122 S. CT. at 2443 (citations omitted). If this is so, then once the defendant raises the issue of mental retardation, the state would have the burden of proving the defendant is not retarded beyond a reasonable doubt. And a jury would have to make a unanimous finding that the defendant is not mentally retarded before death could be imposed.

(2) Apart from the jury-finding issue, what procedures should be used for cases like Miller's, which are not yet final, as well as in future trials and post-conviction

proceedings where the defendant intends to use the issue of mental retardation to avoid the death penalty?

Although section 921.137 establishes a procedure for raising the issue of mental retardation, 921.137 applies to Florida's statutory prohibition on executing the mentally retarded. We have no legislative or court rules to effectuate the constitutional-based prohibition against executing the mentally retarded. Accordingly, this Court must fashion a remedy that is sufficiently protective of the fundamental constitutional right. Although substantive matters, such as the definition of mental retardation, are within the Legislature's domain, purely procedural issues are within this Court's purview.

At least one other state court has fashioned a procedure for Atkins claims. See Murphy v. State, 54 P.3d 556 (2002). In that case, the Court of Criminal Appeals of Oklahoma held that unless the issue of mental retardation is resolved prior to trial, the issue of mental retardation is to be decided in the sentencing stage. If the jury determines a defendant is mentally retarded, the defendant is no longer eligible for the

death penalty. However, if the jury finds the defendant is not mentally retarded and imposes the death penalty, the trial judge shall, upon the defendant's request, hold a post-judgment Atkins hearing to determine whether the factual determinations related to the question of mental retardation were imposed under the influence of passion, prejudice, or any other arbitrary factor. The trial judge conducts a de novo review and makes written findings and conclusions on the issue of mental retardation. If the trial judge finds the defendant is mentally retarded and the jury's decision was due to some arbitrary factor, then that issue may be raised as part of the mandatory review process.

Judge Chapel, concurring in result, outlined a different procedure: The trial court should hold an pretrial evidentiary hearing to determine mental retardation. If the trial judge determines by a preponderance of the evidence that the defendant is mentally retarded, the trial would proceed as a non-capital first-degree murder case. If the court should not so find, the jury then would make this determination

before aggravating and mitigating evidence is presented in the second stage. If the jurors find the defendant is mentally retarded by a preponderance of the evidence, they would subsequently hear evidence on and consider only the punishments of life or life without parole. If jurors find otherwise, the capital punishment sentencing procedure would begin.

Judge Chapel noted the "huge contrast in these two approaches," and raised the following questions:

> The majority unnecessarily wastes judicial resources without providing any significant degree of protection to either the defendant or the State. Why should the state of Oklahoma pay for a capital trial, and why should judicial resources be consumed in conducting a capital trial, where the defendant is not eligible for the death penalty? Why should witnesses, including grieving family members of the murder victim, be forced to endure a capital second-stage proceeding and even give evidence regarding their loved one, when that evidence can have no relevance because the defendant is not death-eligible? Why should jurors be presented with evidence of aggravating circumstances which cannot be charged, much less found, because the defendant cannot be executed? Partly due to a mentally retarded defendant's cognitive and behavioral impairments, aggravating circumstances in these cases are often horrible; the defendants frequently are poor witnesses and may not exhibit remorse, and evidence of mental retardation itself may be aggravating in some jurors' minds.

> What possible purpose is served by allowing a jury to hear evidence in aggravation, and victim impact evidence, which is irrelevant to sentencing and can only be inflammatory? The majority asks jurors to disregard what may be truly awful circumstances of the crime, and even a genuinely unpleasant defendant, because, that defendant is more likely than not retarded. Why should jurors be put in this impossible position? Finally, why is the trial court not allowed to act on the results of the majority's ill-advised post-trial Atkins hearing? In any other circumstance where a trial court determines the jury has erred, the court may issue a judgment notwithstanding the verdict. Here, where the issue is of constitutional dimensions and concerns a defendant's inability to be executed, this Court deprives the trial court of any authority to remedy a clearly erroneous jury verdict, most probably caused by the irrelevant evidence in aggravation.

54 P.2d at 576-77 (footnotes and citations omitted).

Appellant recognizes his case may not present any of these issues and has cited and quoted the Murphy decision because it raises many of the questions that must be considered in adopting a procedure for determining whether a defendant is mentally retarded and death-eligible.

If this Court decides to remand this case for an evidentiary hearing, however, there is no procedure in place, and this Court must either fashion a remedy or leave it to the trial court to do so. The Court may want

to direct the Criminal Rules Committee to study the issue and submit a proposed rule for this Court's consideration.

Conclusion

For the foregoing reasons, appellant respectfully asks this Court to vacate his sentence of death and remand for imposition of a life sentence.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Carolyn M. Snurkowski, Assistant Deputy Attorney General, The Capitol, PLO1, Tallahassee, FL 32399-1050, and to appellant, Willie Miller, on this date, November 4, 2002.

Nada M. Carey
Assistant Public Defender

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this brief was typed in Courier New 12 point.

Nada M. Carey
Assistant Public Defender

APPENDIX B

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.

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

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

Text of section effective for all trials that begin after (date on which this rule is adopted).

(a) Scope. This rule applies in all first-degree murder cases in which the state has not formally waived the death penalty on the record.

(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 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 two or more standard deviations from

the mean score on a standardized intelligence test 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.

(c) Notice of Intent to Raise Mental Retardation as Bar to Execution; Time for Filing; Contents. A defendant who intends to raise mental retardation as a bar to the defendant's execution shall give written notice to the prosecutor not less than 20 days before trial or at such ~~other~~ later time as ~~ordered~~ authorized by the court. When the defendant bases mental retardation upon the findings of a mental health expert or experts who has or have tested, evaluated, or examined the defendant, notice shall provide the names and addresses of all mental health experts by whom the defendant expects to establish mental retardation.

(d) Motion for Determination of Mental Retardation; Time for Filing After Recommendation of Death. A defendant who has given timely notice under subdivision (c) of this rule may file a motion for determination of mental retardation ~~not more than 10 days after an advisory jury has recommended a death sentence~~.

~~**(e) Notice of Intent to Seek Death Sentence; Motion for Determination of Mental Retardation; Time for Filing After Recommendation of Life.** The prosecutor shall notify the defendant, within 10 days after an advisory jury has returned a recommended sentence of life imprisonment, if the state intends to seek a sentence of death. A defendant who has given timely notice under subdivision (c) of this rule may file a motion for determination of mental retardation not more than 10 days after receiving notice that the state intends to seek a death sentence.~~

~~**(f)** **Motion for Determination of Mental Retardation; Time for Filing After Waiver of Advisory Recommendation.** A defendant who has given timely notice under subdivision (c) of this rule and who has waived the right to a penalty phase jury may file a motion for determination of mental. retardation no later than 10 days after ~~waiving the right to a penalty phase jury~~ guilt phase verdict.

~~**(e) (g)** **Appointment of Experts; Time of Examination.** Within 30 days of the filing of the motion for determination of mental retardation, the court shall appoint 2 experts in the field of mental retardation. Each expert shall promptly evaluate the defendant and submit to the court and parties a written report of the expert's findings prior to the final sentencing hearing.

Further, where it is the intention of the defendant to present the findings of a mental health expert chosen by the defense who has tested, evaluated, or examined the defendant, the court also shall order that the defendant be examined by a mental health expert chosen by the state. Attorneys for the state and defendant 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 (i) as directed by order of the court. If the motion is filed prior to trial, it shall be ruled on prior to trial. If the motion is filed after trial, but before the penalty phase, it shall be heard and ruled on prior to the penalty phase.

(f) ~~(h)~~ Defendant's Refusal to Cooperate. If the defendant 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 defense to allow the court-appointed experts to review all mental health reports, tests, and evaluations by the defendant's expert;

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

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

(g) ~~(i)~~ Hearing on Motion to Determine Mental Retardation. The 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 defendant is mentally retarded. If the court finds by ~~clear and convincing~~ a preponderance of the evidence that the defendant is mentally retarded as defined in subdivision (b) of this rule, the court shall enter a written order setting forth with specificity the court's findings in support of its determination. ~~The court shall stay the sentencing proceeding for 30 days from the date of rendition of the order on mental retardation, or if a motion for rehearing is filed, for 30 days following the rendition of the order denying rehearing, to allow the state the opportunity to appeal the order.~~ If the court determines that the defendant has not established mental retardation, the.-4- court shall enter a written order setting forth with specificity the court's findings in support of its determination, and thereafter continue with the sentencing proceeding.

~~(j) 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.~~

~~**(k) 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©).~~

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

RULE 3.203. DEFENDANT'S MENTAL RETARDATION AS A BARTO EXECUTION

Text of section effective in all trials that begin on or before the effective date of this rule but where sentence has not been imposed and affirmed on direct appeal on or before the effective date of this rule.

(a) Scope. This rule applies in all first-degree murder cases in which the state has not formally waived the death penalty on the record. The effective date of this rule 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 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 two or more standard deviations from the mean score on a standardized intelligence test 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.

(c) Notice of Intent to Raise Mental Retardation as Bar to. Execution; Contents. A defendant who intends to raise mental retardation as a bar to the defendant’s execution shall give written notice to the prosecutor no later than 30 days after the effective date of this rule. When the defendant bases mental retardation upon the findings of a mental health expert or experts who has or have tested, evaluated, or examined the defendant, notice shall provide the names and addresses of all mental health experts by whom the defendant expects to establish mental retardation.

(d) Motion for Determination of Mental Retardation; Time for Filing After Recommendation of Death. A defendant who has given

timely notice under subdivision (c) of this rule may file a motion for determination of mental retardation ~~not more than 10 days after an advisory jury has recommended a death sentence, or if an advisory jury has already recommended a death sentence on the effective date of this rule, the motion shall be filed prior to the filing of an appeal or in accord with section (g) if an appeal is pending on the effective date of this rule.~~

~~**(e) Notice of Intent to Seek Death Sentence; Motion for Determination of Mental Retardation; Time for Filing After Recommendation of Life.** The prosecutor shall notify the defendant, within 10 days after an advisory jury has returned a recommended sentence of life imprisonment, if the state intends to seek a sentence of death. A defendant who has given timely notice under subdivision (c) of this rule may file a motion for determination of mental retardation not more than10 days after receiving notice that the state intends to seek a death sentence.~~

(e) ~~(f)~~ Motion for Determination of Mental Retardation; Time for Filing After Waiver of Advisory Recommendation. A defendant who has given timely notice under subdivision (c) of this rule and who has waived the right to a penalty phase jury may file a motion for determination of mental retardation no later than 10 days after ~~waiving the right to a penalty phase~~

~~jury~~ the guilt phase verdict.

~~(f)~~ (g) ~~If~~ Appeal is Pending. If an appeal of a circuit court order imposing a judgment of conviction and sentence of death is pending on the effective date of this rule, the defendant may file a motion to relinquish jurisdiction for a mental retardation determination within 60 days of the effective date of this rule. The motion shall contain a certification by appellate counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is mentally retarded.

~~(g)~~ (h) ~~Appointment~~ Appointment of Experts; Time of Examination. Within 30. days of the filing of the motion for 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 defendant and submit to the court and parties a written report of the expert's findings prior to the final sentencing hearing. Further, where it is the intention of the defendant to present the findings of a mental health expert chosen by the defense who has tested, evaluated, or examined the defendant, the court also shall order that the defendant be examined by a mental health expert chosen by the state. Attorneys for the state and

defendant 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 (j) as directed by order of the court.

(h) ~~(i)~~ Defendant's Refusal to Cooperate. If the defendant 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 defense to allow the court-appointed experts to review all mental health reports, tests, and evaluations by the defendant's expert;

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

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

(i) ~~(j)~~ Hearing on Motion to Determine Mental Retardation. The 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 defendant is mentally retarded. If the court finds

by ~~clear and convincing~~ a preponderance of the evidence that the defendant is mentally retarded as

defined in subdivision (b) of this rule, the court shall enter a written order setting forth with specificity the court's findings in support of its determination. ~~The court shall stay the sentencing proceeding for 30 days from the date of rendition of the order on mental retardation, or if a motion for rehearing is filed, for 30 days following the rendition of the order denying rehearing, to allow the state the opportunity to appeal the order.~~ If the court determines that the defendant has not established mental retardation, the court shall enter a written order setting forth with specificity the court's. findings in support of its determination, and thereafter continue with the sentencing proceeding or, if a sentence of death has already been imposed, the court shall order that jurisdiction be returned 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. If the court determines that the defendant is retarded it shall impose a life sentence and return jurisdiction to the Supreme Court to hear the appeal of the guilt phase issues.

(k) 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.~~

~~**(l) 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©).~~

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 rul*e.

(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 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 two or more standard deviations from the mean score on a standardized intelligence test 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.

(c) 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 (c) of this rule, the supreme court will relinquish jurisdiction to the circuit court for a mental retardation determination under this rule. ~~Failure to raise.-9- 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 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.

(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 shall then impose a life sentence. 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.~~

Proposed addition to Florida Rule of Appellate Procedure 9.142.

RULE 9.142. PROCEDURES FOR REVIEW IN DEATH PENALTY CASES

(c) Appeal of determination of mental retardation claim.

(1) *Appeal by Defendant or Prisone*r.

(A) Commencement. A defendant or prisoner appealing an order determining that the defendant or prisoner has failed to established mental retardation shall appeal at the time the defendant files an appeal of the defendant's conviction and sentence of death, or at the time prisoner files an appeal of an order denying a motion under Florida Rule of Criminal Procedure 3.851.

(B) Briefs. A defendant shall include in the defendant's.-11-

brief in the appeal of the conviction and sentence of death, the appeal of the order on mental retardation. A prisoner shall include in the prisoner's brief in the appeal of the order denying a rule 3.851 motion, the appeal of the order on mental retardation.

~~(2) *Appeal by State*.~~

~~(A) Commencement. The state may appeal to the appropriate district court an order determining that the defendant or prisoner is mentally retarded within 30 days of the order on mental retardation. In the event that a motion for rehearing of the order on mental retardation is filed by the state, the 30 days shall commence to run from the rendition of the order denying the rehearing.~~

~~(B) Stay. During the pendency of the state's appeal, further proceedings in the circuit court are stayed.~~