IN THE SUPREME COURT OF FLORIDA
CASE NO. SC-03-685.

RESPONSE OF FLORIDA PROSECUTING ATTORNEYS ASSOCIATION TO AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE AND THE FLORIDA RULES OF APPELLATE PROCEDURE

COMES NOW the Florida Prosecuting Attorneys Association, "FPAA" a private non-profit corporation whose membership consists of the twenty(20) State Attorneys of Florida and their some one thousand six hundred (1,600) Assistants.

Section (g) of the rule for trials to begin after the date the rule becomes effective, as well as section (h) of the rule for trials that have already begun after the effective date, and section (e) of the rule for post-conviction claims, allows the state to have its expert evaluate the defendant only if the defense intends to present the findings of an expert chosen by the defense who has evaluated the defendant. So, if the defense chooses to go only with the court appointed experts, under this rule, the state would not be able to have its expert evaluate the defendant (no matter how many times the defendant has been evaluated by their experts who they choose not to call). We believe the rule should allow the state to have its expert evaluate the defendant regardless of which experts the defense decides to call. There are times when the state does not agree with the experts appointed by the court or finds their evaluations to be inadequate. So these provisions should be amended to state:

> Further, where it is the intention of the defendant to present the findings of a court appointed or 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.

The post conviction rule gives those defendants, like Bottoson, a second bite of the apple, where they had raised the issue of mental retardation, either at trial where in addressing mental mitigation, the trial court found the defendant was not mentally retarded (under a lesser burden of proof) or in a post conviction proceeding, usually under the theory of ineffective assistance of counsel or inadequate mental health experts, the claim was litigated with an evidentiary hearing and the trial court found the defendant not to be retarded (also under a lesser burden of proof). There should be a provision in the rule stating that the rule does not apply to claims of mental retardation that have already been litigated. Under both the rule where the death sentence has been imposed and the case is on appeal or in the rule for post-conviction cases there should be language to exclude the re-litigation of the mental retardation issue. We recognize that the defense will probably argue that at the time of the prior litigation there were no set standards for determining mental retardation, as set forth in the statute, but I think the need to not re-litigate should be addressed. We suggest the following:

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

(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 certificate by appellate counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is mentally retarded. The certificate shall specify the reasonable grounds. It shall not be reasonable grounds if the defendant had presented evidence at the sentencing hearing, either before the jury or the judge, that he was mentally retarded, and the trial

court in it's sentencing order had found that the defendant was not mentally retarded. The Supreme Court may deny the motion if reasonable grounds are not specified.

Rule for cases where death sentence was imposed and affirmed on direct appeal before the effective date of this rule.

(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 Rules 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. The certificate shall specify the reasonable grounds. It shall not be reasonable grounds if the defendant had presented evidence at the sentencing hearing, either before the jury or the judge, that he was mentally retarded, and the trial court in its sentencing order had found that the defendant was not mentally retarded. It also shall not be reasonable grounds if the defendant has previously filed a prior motion for collateral relief in which the issue of whether the defendant was mentally retarded was litigated and the trial court in its order on the prior motion for collateral relief found that the defendant was not mentally retarded. The trial court many deny the motion if reasonable grounds are not specified.

The FPAA further request that this court allow its undersigned counsel to participate in oral arguments.

Respectfully Submitted,

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