Florida House of Representatives

Johnnie Byrd
Speaker

The Florida Supreme Court
Supreme Court Building
500 South Duval Street,
Tallahassee, Florida 32399-1927

October 2, 2003

Re: Amendments to Florida Rules of Criminal Procedure (Mental Retardation)
Case No. SC 03-685

May It Please The Court:

It is respectfully requested that the Court consider these remarks concerning the current rule proposals relating to the implementation of the prohibition against execution of a mentally retarded person convicted of a capital crime. No comments were filed regarding the rule as published because in that form, there was no apparent inconsistency with the recently enacted section 921.137, F.S. It was not discovered until after the deadline for submitting comments had passed, that the Court was considering an alternative proposal to the rule published for comment. It is not the purpose or intention of these remarks to present a position relating to whether aspects of the proposed rule are procedural or substantive. Nor is the purpose of these remarks to repeat concerns and issues already raised by others.

These comments are submitted in the hope that the perspective and observations of members of the Legislature will be of some assistance to the Court in formulating an appropriate rule of procedure. It appears that there are two ways in which the proposed rule deviates from the statute which are of concern. First, the alternative proposed rule changes the statutory burden of proof necessary to establish mental retardation. This is a fundamental departure from the intent of the Legislature. Second, the proposal provides for a pretrial determination on the issue of the defendant's mental retardation, in direct contravention of statutory policy.

As the Court is keenly aware, the decision in Atkins v. Virginia, 122 S.Ct 2242 (2002), prohibits the execution of mentally retarded persons convicted of capital crimes. The Court, however, should consider that decision in a way which examines the rationale utilized by the United States Supreme

Court in reaching its conclusion. The Court should keep in mind that when the United States Supreme Court applied its "evolving standards of decency" analysis in Atkins, it followed the lead of the state legislatures which addressed the issue before finally concluding that execution of a mentally retarded person constitutes cruel and unusual punishment. It is also important to note that although Atkins v. Virginia was a 6 - 3 decision, all 9 justices agreed that when applying the evolving standards of decency analysis, the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Atkins, *supra* at 312; *See also*, Atkins at 322-323, (Rehnquist dissenting). To paraphrase Justice Scalia, rarely if ever will the Court have a better sense of the evolution of the views of Floridians than do their elected representatives. *See*, Thompson v. Oklahoma, 487 U.S. 815, 863-864 (1988) (Scalia dissenting).

In that vein, certainly the policy decisions of the Florida Legislature reflected in what is now section 921.137 F.S., are the clearest and most reliable objective evidence of Florida's social standards. The United States Supreme Court in Atkins ". . . found no reason to disagree with the judgment of the legislatures which have recently addressed the matter and concluded that death is not a suitable punishment for a mentally retarded criminal." (Emphasis added) Atkins, *supra* at 321.

By way of example, and without stating a position on whether the burden of proof is procedural or substantive in nature, if this Court decided to lower the standard of proof for establishing the fact of mental retardation, as recommended by the Criminal Court Steering Committee ("Committee"), a reviewing court could later construe that as reflective of the social standards of Florida. If the Legislature did not share that view, its only option to avoid that false impression, would be to repeal the rule. Clearly then, members of the Legislature and the Court must be vigilant in preventing policy decisions of the Legislature from being imperfectly reflected in judicial procedure.

There is more from the perspective of a policy maker. The Committee holds the view that the clear and convincing evidence standard is "likely" unconstitutional, and this Court might avoid that potential problem by lowering the standard at the outset. From the perspective of a legislator, however, it can be argued that it is better public policy for the statutory clear and convincing standard to be retained, and to test that standard in the context of a genuine case or controversy when it arises.

Here are the policy reasons for leaving the burden of proof at the clear and convincing standard: First, the determination of mental retardation is separate and distinct from competence to proceed to stand trial, which is established by the preponderance of the evidence standard. Any individual pursuing a hearing to determine mental retardation will have already passed the threshold determination of competence. The constitution requires a low burden proof to establish competency before commencing trial, to protect the right to a full and effective defense. *See*, Cooper v. Oklahoma, 517 U.S. 348 (1996). However, in the context of s. 921.137. F.S., and under the rule of Atkins, we must determine if the defendant, although guilty of a capital offense, should be disqualified from the otherwise lawful imposition of capital punishment because of his or her status as a mentally retarded individual. There is no basis to assume that the Eighth Amendment of the United States Constitution requires a low standard of proof in this context. This matter involves a factual determination of whether an individual should be spared a death sentence, under an "evolved standard" of mercy rooted in the social

standards of citizens. There is, in other words, no basis to deny that those social standards may require a high degree of proof.
Second, these are not defendants whose degree of mental impairment is so severe as to negate the question guilt by reason of insanity. In many instances, the "fact" of mental retardation will turn on nothing more than the credibility of expert witnesses giving opinions. Setting the burden of proof at a mere preponderance of the evidence standard leaves more opportunity for illegitimate claims of mental retardation to be successful in cases where the evidence is weak. Third, ordinary mitigating factors already have a low standard of proof preserving a degree of mercy in unclear cases. Fourth, once established, the fact of mental retardation is much more than a mitigating factor; it is an absolute bar to execution and is not weighed against any aggravating factor or factors regardless how heinous or brutal the crime may be, or how many aggravating factors are found to be present. For all of these reasons, the "fact" of mental retardation deserves to be proven with some degree of certainty greater than mere "more likely than not."

There are also strong policy reasons for not conducting the hearing to determine mental retardation before trial, especially with a lower burden of proof. One of the more compelling reasons is the effect it would have on capital murder prosecutions when the state wishes to appeal an adverse ruling. As the alternative proposal would operate, the state would have thirty days to appeal a pretrial ruling that the defendant is mentally retarded. The standard of review would consist of nothing more than an evaluation of whether the judge *abused discretion* in finding by a *preponderance of the evidence* that the defendant is mentally retarded. It is safe to assume that a low standard of proof, when coupled with an abuse of discretion standard of review, leaves very little likelihood of success on an appeal by the state. In those instances where the state pressed forward with a pretrial appeal of a determination of mental retardation and won, the trial judge could, based on the same weak evidence, override a jury's recommendation of death finding a mitigating factor in the defendant's mental capacity. Even if that ruling was later overturned, the state's original victory in its pretrial appeal would have been no more than a duplicative process that delayed the trial. Under those circumstances, the state would have to appeal twice to succeed on essentially the single issue of the mental capacity of a defendant who was competent to proceed and not insane. Under the statutory scheme, the two sentencing-related mental capacity issues can be addressed in a single appeal.

The state has a significant interest in having a meaningful appeal of an erroneous ruling, on the issue of mental retardation, when seeking to impose the maximum penalty for someone charged with a capital crime. As the alternative rule is written, it does not adequately protect the state's interest in this regard by setting the burden of proof too low to adequately safeguard against abuse of such claims. Further, a pretrial hearing to determine mental retardation will force the state to delay proceeding on a capital murder trial, on a sentencing issue, if the state must appeal an adverse ruling.

Finally, the absence of a rule requiring a judicial determination of mental retardation prior to trial does not preclude state attorneys from sensibly evaluating the possibility of mental retardation when making the decision to seek capital punishment. The argument that pre-trial proceedings will save significant trial costs assumes that prosecutors will not rationally evaluate their likelihood of success on the matter.

For the foregoing reasons, it is respectfully requested that the Court not promulgate a rule allowing for pretrial determinations of mental retardation or that reduces the burden of proof to merely a preponderance of the evidence, in direct contravention of the legislated scheme.

Respectfully Submitted;

Jeff Kottkamp, Chair
Committee on Judiciary

and by

David De La Paz, Staff Director
on behalf of:

Gustavo Barreiro, Chair
Committee on Public Safety & Crime Prevention

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing comments have been provided by U.S. mail to the Honorable Oscar H. Eaton, Jr., Chair, The Florida Bar Criminal Procedure Rules Committee, Seminole County Courthouse, 301 N. Park Avenue, Sanford, Florida 32771-1243, and to John Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, Carolyn M. Snurkowski, Assistant Deputy Attorney General, The Capitol, Tallahassee, FL 32399-1050; Candance M. Sabella, Assistant Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607;
Stephen Krosschell, 14020 Roosevelt Blvd., Suite 808, Clearwater, FL 33762; William D. Matthewman, Esq., 2300 Glades Road, Suite 340-W, Boca Raton, FL 33431; Arthur I. Jacobs, General Counsel, Florida Prosecuting Attorneys Association, P. O. Box 1110, Fernandina Beach, FL 32035-1110; David A. Davis, Assistant Public Defender, 301 S. Monroe Street, Suite 401,

Tallahassee, FL 32301-1803; Andrew Stanton, Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 Northwest 14th Street, Miami, FL 33125; Edith Georgi, Coordinator, Capital Litigation Unit, Eleventh Judicial Circuit of Florida, 1320 Northwest 14th Street, Miami, FL 33125; James T. Miller, Chair, Amicus Curiae Committee, Florida Association of Criminal Defense Lawyers, 233 E. Bay Street, Suite 920, Jacksonville, FL 32202; Neal A. Dupree, Capital Collateral Regional Counsel, Southern Region, 101 N. E. 3rd Ave., Suite 400, Fort Lauderdale, FL 33301; Rachel L. Day, Assistant CCRC South, 101 N. E. 3rd Ave., Suite 400, Fort Lauderdale, FL 33301; William M. Hennis, III, Assistant CCRC South, 101 N. E. 3rd Ave., Suite 400, Fort Lauderdale, FL 33301; Michael Messer, Association for Retarded Citizens, South Florida, 5555 Biscayne Blvd., Miami, FL 33137 this 2nd day of October, 2003. .