SUPREME COURT OF FLORIDA

CASE NO. SC 03-685

In Re:

AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE AND THE FLORIDA RULES OF APPELLATE PROCEDURE, RULE 3.203 AND RULE 9.142
_____/

COMMENT OF ATTORNEY WILLIAM D. MATTHEWMAN TO PROPOSED RULE OF CRIMINAL PROCEDURE 3.203 AND PROPOSED RULE OF APPELLATE PROCEDURE 9.142

William D. Matthewman, a member of The Florida Bar, hereby comments regarding the proposed Fla.R.Crim.P. 3.203 and Fla.R.App.P. 9.142, and would show as follows:

PROPOSED FLA. R..CRIM.P. 3.203

A. Definition of Mental Retardation:

I. Age 18 vs. Age 22 for Manifestation of Mental Retardation:

1. In paragraph (b) of both proposed Rules 3.203, there is a definition of "Mental Retardation", which is subject to some dispute. The proposed definition requires that mental retardation be manifested "during the period from conception to age 18". It is suggested that, if an "age of onset" date is going to be utilized [see Sec. II below], rather than age 18, the "age of onset" of 22 years should be used as the period during which mental retardation may be manifested. There is authority for support of the proposition that mental retardation may be manifested up to age 22.

2. For example, the Federal Government defines Mental Retardation as follows:

"12.05 Mental Retardation: Mental Retardation refers to significantly sub-average general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22. "

See 42 U.S.C.A. App., 20 CFR Pt. 404, Subpt. P, App. 1, Sec. 12.05 [copy attached hereto as Ex. "A"]. See also Section 102 of the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C.A. 6001 [repealed].

3. Likewise, the State of Pennsylvania uses the "age of onset" of 22 years, for a diagnosis of mental retardation, as follows:

"(3). It has been certified that documentation to substantiate that the appellant's or recipient's conditions were manifest before the applicant's or recipient's 22nd birthday, as established in section 102 of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C.A. 6001).

55 Pa. Code Sec. 6210.1 [attached hereto as Ex. "B"].

Accordingly, there is support, both in federal law and the law of the State of Pennsylvania, that the mental retardation definition should state that mental retardation must have been manifested "during the period from conception to age 22".

II. Should the Definition Contain an "Age of Onset" at All?

4. The primary purpose of having an "age of onset" requirement, whether it is age 18 or 22, is to distinguish mental retardation from other forms of brain damage that may occur later in life, such as traumatic head injury, or dementia caused by disease or illness, or similar conditions. See James W. Ellis, Mental Retardation And The Death Penalty: A Guide To State Legislative Issues, Regents Professor of Law, University of New Mexico School of Law, p. 11. However, other forms of brain damage that occur later in life, such as traumatic head injury or dementia caused by illness, could result in a defendant becoming mentally

retarded. What happens if there is a death penalty case where the defendant, who had suffered a traumatic head injury at age 30, for example, met entirely the definition of mental retardation except for the "age of onset" requirement? Would that defendant be ignored under the new proposed rule? Is that defendant less mentally retarded than a defendant whose mental retardation manifested prior to age 18, or 22? Principles of equal protection, and protections against cruel and unusual punishment, mandate that either the "age of onset" requirement be eliminated entirely, or that it read as follows:

> "As used in this rule, the term 'mental retardation' means significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18 [or 22], or if not manifested during the period from conception to age 18 [or 22], caused by traumatic head injury, dementia caused by disease or illness, or by some other similar condition".

In this way, defendants who are effectively mentally retarded, but who have become mentally retarded as a result of a car accident, trauma to the head, or illness such as Dementia due to HIV Disease, and whose accident or illness occurred after age 18 [or 22], would equally benefit from the new proposed Rule 3.203. Failure to make such a change in the proposed Rule leaves open a strong constitutional challenge to the Rule based upon equal protection principles and protections against cruel and unusual punishment. The United States Supreme Court in Atkins v. Virginia, 122 S.Ct. 2242, 2246 (2002), stated that:

> "...Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude that such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender".

Id. Does this principle apply less to a defendant who is mentally retarded due to some accident or illness which occurred after age 18? Does the Eighth Amendment only protect

those who have manifested mental retardation prior to age 18? Would not such a Rule clearly violate the Equal Protection Clause? I think that the answer is clear, and that an amendment to the proposed "age of onset" language contained in Rule 3.203 is required.

B. Standard of "Clear and Convincing Evidence" is Unconstitutional:

5. In Section (i) of proposed Rule 3.203 dealing with "future" cases, and in section (g) of proposed Rule 3.203 dealing with "final" cases, the standard of "clear and convincing evidence" is utilized. It is suggested that such a standard is likely unconstitutional. In Cooper v. Oklahoma, 517 U.S. 438 (1996), the United States Supreme Court held that it was a violation of due process to assign to the defendant the burden of persuasion on competency to stand trial on a "clear and convincing evidence" basis. Under Atkins v. Virginia, 122 S.Ct. 2242 (2002), a mentally retarded defendant is constitutionally protected from facing a death sentence. Requiring a mentally retarded defendant to meet an elevated burden of proof, such as "clear and convincing evidence", is unconstitutional. Such standard must be eliminated from the proposed Rule or it will fail to pass constitutional muster.

6. The State must be required to prove that a defendant is not mentally retarded beyond a reasonable doubt. Ring v. Arizona, 122 S.Ct. 2428 (2002). A burden of "clear and convincing evidence" cannot be placed upon a mentally retarded defendant.

PROPOSED FLA.R.APP.P. 9.142

7. In section (c)(1)(A), "Commencement", of proposed Fla.R.App.P. 9.142, it states that: "A defendant or prisoner appealing an order determining that the defendant or prisoner has failed to established [sic] mental retardation shall appeal at the time...." As discussed previously in section B of these comments, It is submitted that this Honorable Court

may not constitutionally place the burden of establishing mental retardation upon the mentally retarded defendant. Accordingly, the language of section (c)(1)(A) should be amended to delete any reference to the defendant appealing an Order in which the Defendant has failed to establish mental retardation.

CONCLUSION

8. It is respectfully submitted that the proposed Fla.R.Crim.P. 3.203 ("future" cases), Fla.R.Crim.P. 3.203 ("final" cases), and Fla.R.App.P. 9.142, require substantial modification. As written, they are likely unconstitutional. Undersigned counsel is currently engaged in a capital trial, and regrets that due to time limitations, he cannot be more thorough in these comments. However, these Comments are respectfully submitted for this Honorable Court's consideration.

DATED this ___ day of June, 2003.

Respectfully Submitted,

William D. Matthewman, Esq., of
Seiden, Alder & Matthewman, P.A.
Boca Raton Office:
2300 Glades Road
Suite 340-W
Boca Raton, Fla. 33431
Phone: 561-416-0170
Fax: 561-416-0171
and
Miami Office:
44 West Flagler Street, Suite 1100
Miami, Fla. 33130
Phone: 305-577-3707
Fax: 305-424-1707

By:_____

WILLIAM D. MATTHEWMAN, ESQ.
FLORIDA BAR NO. 372757

T:\BRIEFS\Briefs pdf'd\03-685_CommentsMatthewman.wpd