June 30, 2003

Via FedEx #850-488-0125

Thomas Hall
Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1927

Re: Amendments to the Florida Rules of Criminal Procedure and the Florida Rules of Appellate Procedure, Case No. SC 03-685

Dear Mr. Hall:

I am a member of the Criminal Rules Subcommittee of the Appellate Rules Committee. The Court has solicited comments from the Appellate Rules Committee regarding proposed amendments to Florida Rule of Criminal Procedure 3.203 and Florida Rule of Appellate Procedure 9.142(c), Case No. SC 03-685. It was determined that the Appellate Rules Committee did not have sufficient time to respond to the Court's request by the Court's July 1 deadline. Consequently, I am submitting the following comments, which are solely my own and not those of the Subcommittee or Committee. These comments are limited to the appellate aspects of the proposed rules.

Citation Format and a Combined Rule.

The proposals provide three different versions of Rule 3.203. One version is applies to trials beginning after the effective date of the rule, the second version applies to cases that have been tried but are not yet affirmed on appeal, and the third

version is effective for death sentences that have been affirmed on appeal. Because all of these rules have the same rule number and title, I am perplexed how they should be cited in appellate briefs. In these comments, I have referred to these rules variously as Rule 3.203 (future cases), Rule 3.203 (pending cases), and Rule 3.203 (final cases), but this references are manifestly cumbersome.

The three versions have substantial text in common. I believe that, with careful writing but not much difficulty, the three rules could be combined into a single rule that would be considerably shorter than three versions of the same rule. Certainly, a combined rule would be easier to cite. I recommend a single rule, rather than three different versions of the rule under the same rule number.

State Appeals and the Double Jeopardy Doctrine.

Section 921.137(7), Fla. Stat., provides that the State has a right to appeal a mental retardation determination. Proposed Rule 9.142(c)(2) provides procedures to effectuate Section 921.137(7). I have substantial doubts that the state and federal double jeopardy doctrines permit appellate reversal of a mental retardation determination favoring a defendant. See Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986) ("When a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him."). This Court should endeavor not to promulgate unconstitutional rules.

In Brown v. State, 521 So. 2d 110 (Fla. 1988), the trial judge imposed a life sentence after erroneously ruling that the death penalty was barred as a matter of law. Citing Arizona v. Rumsey, 467 U.S. 203 (1984), Brown held that imposing the death sentence after a successful state appeal would violate the double jeopardy doctrine.

> The facts of this case are on point with Rumsey. There the trial court erred in ruling that the death penalty could not be imposed, but, upon reversal and remand imposed a death sentence. . . . [B]oth the Arizona and United States Supreme Courts held that the erroneous ruling

> acquitted the defendant of the death penalty and terminated jeopardy. Accordingly, it was held to be a violation of double jeopardy to reopen the sentencing phase and to impose the death penalty. . . . On the authority of Rumsey, we quash that portion of the district court opinion reversing the life sentence . . . .

521 So. 2d at 112. See also Spaziano v. Florida, 468 U.S. 447, 458 (1984) ("[T]he Double Jeopardy Clause bars the State from making repeated efforts to persuade a sentencer to impose the death penalty.").

The Rumsey capital sentencing proceeding was before a judge, not a jury, but the Court nevertheless determined that the double jeopardy doctrine applied, because the proceeding was "like a trial." 467 U.S. at 212. Similarly, the mental retardation proceeding contemplated in Rule 3.203 and Section 921.137(4) is "like a trial." The trial court hears evidence and then determines whether, by clear and convincing evidence, the defendant is mentally retarded. If the court finds that the defendant is mentally retarded, then "the court may not impose a sentence of death" and must prepare and file detailed written findings. § 921.137(4), Fla. Stat. The double jeopardy doctrine applies to this trial-like proceeding, in the same manner that it applied to the trial-like proceeding in Rumsey.

The rule proposals appear to recognize this problem. Rule 3.203(I) (future cases) and Rule 3.203(j) (pending cases) provide that, if the trial court finds that the defendant is mentally retarded, the "court shall stay the sentencing proceeding . . . to allow the state the opportunity to appeal the order." Rule 9.142(c)(2)(B) correspondingly states that, "[d]uring the pendency of the state's appeal, further proceedings in the circuit court are stayed." The purpose of these proposed stay provisions may be to avoid double jeopardy issues, on the theory that the doctrine does not apply if the trial court has stayed the proceedings and not yet rendered a final judgment and sentence.

Once the trial court has found that the defendant is mentally retarded, however, a life sentence is automatic, and imposition of the final judgment and sentence is only a ministerial formality. Rumsey said that the double jeopardy doctrine applies to

capital sentencing proceedings because they are like trials. At the guilt phase of a trial, jeopardy attaches at the time the jury is empaneled, and it certainly attaches by the time of the verdict. See United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (The "state of jeopardy attaches when a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence.").

Consequently, when a jury announces an acquittal, the state cannot avoid the double jeopardy doctrine by persuading the judge to stay issuance of a formal written judgment of acquittal until the state's appeal is concluded. See id. at 571 (citations omitted) ("[W]hat constitutes an 'acquittal' is not to be controlled by the form of the judge's action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."). For the same reason, after a finding that a defendant is mentally retarded in a death penalty case, the state cannot fend off the double jeopardy doctrine by delaying entry of the ministerially imposed judgment and life sentence pending appeal.

The double jeopardy issue is clearest for future cases under the first version of Rule 3.203, because the trial court in these cases has not yet entered a sentence of death. I believe the doctrine also applies, albeit less clearly, to pending and final cases under the second and third versions of Rule 3.203, even though the trial court in these cases has already entered a death sentence. See United States v. Wilson, 420 U.S. 332 (1975) (State can appeal the trial judge's decision to acquit a defendant notwithstanding the jury's guilty verdict.); Arizona v. Rumsey, 467 U.S. 203, 211-12 (1984) ("No double jeopardy problem was presented in Wilson because the appellate court, upon reviewing asserted legal errors of the trial judge, could simply order the jury's guilty verdict reinstated; no new factfinding would be necessary, and the defendant therefore would not be twice placed in jeopardy.").

Unlike the typical postconviction litigation under Florida Rule of Criminal Procedure 3.851, a Rule 3.203 proceeding is a separate, independent, and mandatory trial-like sentencing proceeding, in which the trial judge determines for the first time whether the evidence of mental retardation satisfies the statutory preclusion of the death penalty. For double jeopardy purposes, I see this new and independent fact-

finding proceeding as fundamentally different from ordinary Rule 3.851 litigation, which merely asserts errors in the initial trial or sentence. For the mental retardation issue, jeopardy attaches at the time the judge begins to hear evidence under Rule 3.203 and terminates when the judge resolves the facts and, in effect, acquits the defendant of the death penalty. See Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 737 (2003) ("[A]n 'acquittal' at a trial-like sentencing phase, rather than the mere imposition of a life sentence, is required to give rise to double-jeopardy protections."); Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986) (citation omitted) ("'[A]cquittals, unlike convictions, terminate the initial jeopardy.'"). A successful postconviction state appeal would improperly vacate an acquittal rendered after an independent, trial-like proceeding, rather than merely reinstating the original sentence of death.

I recognize that, in Brown, this Court said in dictum that "the state might have sought interlocutory review by writ of certiorari after the ruling and prior to the imposition of the sentence." 521 So. 2d at 112. In State v. Ferguson, 556 So. 2d 462 (Fla. 2d DCA 1990), disapproved on other grounds, State v. Hernandez, 645 So. 2d 432 (Fla. 1994), the Second District relied on Brown to hold that it could review by certiorari whether the trial court improperly disallowed presentation of evidence to a penalty phase jury in a death penalty case. See also Hernandez, 645 So. 2d at 434 ("The State filed a petition for writ of certiorari seeking review of the trial court's order" permitting the defendant to waive a penalty phase jury without the state's consent.).

In Ferguson and Hernandez, however, and in the circumstances envisioned by the dictum in Brown, no evidence was presented to a penalty phase jury, and no other proceeding similar to a trial occurred (except of course for the guilt phase trial). The circumstances of Ferguson, Hernandez, and the Brown dictum were more akin to a dismissal than to a trial. The state can appeal a dismissal before trial without implicating double jeopardy concerns, because jeopardy has not yet attached. See Serfass v. United States, 420 U.S. 377, 393 (1975) (Government may appeal pretrial dismissal; "an accused must suffer jeopardy before he can suffer double jeopardy."). Similarly, without potentially placing the defendant in jeopardy twice, the state can seek review if the court dismisses a penalty phase jury before jeopardy has attached through the submission of evidence.

By contrast, the right of review permitted in Ferguson, Hernandez, and the Brown dictum does not apply to mental retardation proceedings under section 921.137 and proposed rule 3.203, because these proceedings are like trials, and jeopardy attaches when they begin. At a minimum, jeopardy has attached by the time the trial judge has heard the evidence, made a ruling, and issued the detailed written findings necessary under section 921.137 to support a determination of mental retardation. Consequently, the double jeopardy doctrine does not permit the state to seek review of a mental retardation finding in a death penalty case.

From a practical point of view, if a trial-like proceeding is held, and the trial judge finds as a fact that the defendant is mentally retarded, I predict that the district courts would seldom if ever vacate this factual finding in favor of another proceeding in which the ultimate penalty might be imposed, even if the state is given the right to appeal. Allowing an interlocutory state appeal would change at best the final result of only a very small number of cases. Moreover, an appellate reversal of a mental retardation finding might itself be reversed in the federal courts under Atkins v. Virginia, 536 U.S. 304 (2002).

In addition, if final sentencing is stayed to allow an interlocutory appeal predictably lasting a year or longer, then these mentally retarded defendants will presumably be required to remain in the county jail during that time rather than be transferred to the state prison system. The state prisons are better equipped than the local jails to handle the special interests of mentally retarded defendants. During their lengthy time in the county jail pending appeal, these inmates with impaired mental functioning will exist in a state of limbo, not knowing whether they will be executed. This uncertainty clearly implicates the double jeopardy doctrine. Green v. United States, 355 U.S. 184, 187 (1957) ("The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . ."). These practical concerns suggest that this Court should allow review, if any, only by the speedier procedures of certiorari, rather than by interlocutory appeal, but the likelihood of reversal by certiorari is even smaller than by appeal, given the difficult

standard of review that applies to certiorari petitions. These practical concerns further support not including in rules 3.203 and 9.142 provisions for the state to seek review in appellate courts.

This Court generally does not decide constitutional questions during rule-making proceedings. The Court may therefore wish to leave to an actual case the final resolution of the constitutionality of section 921.137(7) that affords the state a right to appeal a mental retardation determination. On the other hand, providing for state appeals in rules 3.203 and 9.142 without deciding the constitutionality of these appeals would arguably give an inappropriate imprimatur of approval to this purported right of appeal. This Court should endeavor not to approve unconstitutional rules. Consequently, I recommend deleting entirely the provisions in rules 3.203 and 9.142 for state appeals. If, in a particular case, the state chooses to rely on section 921.137(7) to appeal an adverse mental retardation finding, the constitutionality of 921.137(7) can be determined at that time.

State Appeals and Jurisdiction.

Under rule 3.203(k) (future cases) and rule 3.203(*l*) (pending cases), state appeals proceed under Rule 9.142(c)(2)(A), which in turn provides for jurisdiction in the district courts. Under Rule 3.203(I) (final cases), state appeals in cases that are final proceed under rule 9.142(a), which presumes that the appeal is taken to this Court. If this Court retains this allocation of jurisdiction, it should clarify Rule 9.142(c)(2)(A), which seems on its face to provide for district court jurisdiction of all state appeals of mental retardation decisions, including final cases that pursuant to Rules 3.203(I) (final cases) and 9.142(a) would go to this Court.

For the reasons previously stated, I would delete all references in the rule proposals to state appeals. If this Court does provide for state appeals, however, I disagree with the allocation of jurisdiction in Rules 3.203 and 9.142(c)(2) and would instead draw the jurisdictional line between (1) cases for which the death penalty has been imposed, and (2) cases for which it has not yet been imposed. Category (1) would include all future cases and a small number of pending cases; category (2)

would encompass final cases and most pending cases. State appeals should be taken to the district courts in category (1) cases and to this Court in category (2) cases.

In State v. Fourth Dist. Court of Appeal, 697 So. 2d 70, 71 (Fla. 1997) (citation omitted), this Court held as follows:

> In order to clarify our position, we now hold that in addition to our appellate jurisdiction over sentences of death, we have exclusive jurisdiction to review all types of collateral proceedings in death penalty cases. This includes cases in which this Court has vacated a death sentence and remanded for further penalty proceedings. However, our jurisdiction does not include cases in which the death penalty is sought but not yet imposed or cases in which we have vacated both the conviction and sentence of death and remanded for a new trial.

This holding clearly requires that state appeals in category (1) cases, including those few pending cases for which a trial has begun but the death sentence has not yet been imposed, should be taken to the district courts.

Category (2) cases, however, are more problematic. For pending cases in which the death penalty has been imposed but not yet affirmed on direct appeal, rule 3.203(g) (pending cases) provides for this Court to relinquish jurisdiction to the circuit court for appropriate findings on mental retardation. Under rule 3.203(j) (pending cases), if the circuit court does not find mental retardation, jurisdiction is returned to this Court, but rule 3.203(j) (pending cases) does not say what happens if the circuit court finds mental retardation to exist. If the state appeals, rule 3.203(j) (pending cases) and 9.142(c)(2)(B) require a stay pending appeal. Because proceedings are stayed, a final order imposing a life sentence is not imposed, the death sentence is not vacated, and the state appeal is therefore a nonfinal appeal. The mental retardation order, however, would be a postconviction order, and Rule 9.142(b)(1) provides for review in this Court of nonfinal orders in postconviction death penalty matters, albeit under a certiorari-like standard of review. Under the logic of Trepal v. State, 754 So. 2d 702 (Fla. 2000), this Court likely has the discretion to review nonfinal

postconviction mental retardation orders in death penalty cases under a plenary rather than certiorari standard of review, if it so chooses.

Thus, contrary to rule 3.203(*l*) and rule 9.142(c)(2)(A), jurisdiction for state appeals of mental retardation orders in pending cases in which the death penalty has not yet been affirmed appears to be in this Court, not the district courts. A contrary conclusion would be inefficient, because it would result in simultaneous appeals in this Court and the district court in the same case. This Court could not dismiss its appeal that was pending while jurisdiction was relinquished, because the guilt phase issues would still require resolution. This Court could not immediately decide its appeal, because the penalty phase issues might be resurrected, if the district court reversed the state appeal. This Court could not transfer its appeal to the district court, because this Court has exclusive jurisdiction of death penalty cases, and the death penalty would still be in effect. This Court would simply have to wait for the district court proceeding to conclude.

To avoid this inefficiency, rule 3.203(j) (pending cases) could provide for an immediate imposition of a life sentence, rather than a stay, if a mental retardation finding is made. This Court could then transfer its appeal to the district court, on the theory that it lost jurisdiction when the death sentence was vacated. If the district court reinstated the death penalty, however, then the appeal would inefficiently ping-pong back to this Court.

Moreover, the usual principle is that jurisdiction is determined at the time the case is initiated, and a court does not lose jurisdiction through later events. "A court having obtained jurisdiction retains it until final disposition of the cause . . . ." Kirkley v. Behe, 381 So. 2d 242, 243 (Fla. 4th DCA 1979) (citation omitted). Fourth Dist. Court of Appeal clearly states that this Court has jurisdiction of postconviction cases, even when "this Court has vacated a death penalty and remanded for further penalty proceedings." 697 So. 2d at 71. This statement indicates that, once the death penalty is imposed, this Court has at least the discretion to retain continuing jurisdiction, even if the trial judge vacates the death penalty. Thus, both practically and jurisdictionally, state appeals of pending cases in which the death penalty has been imposed should go to this Court, not the district courts.

Unlike rules 3.203 (future cases) and 3.203 (pending cases), rule 3.203 (final cases) does not provide for a stay of the mental retardation order. The automatic stay of rule 9.142(c)(2)(B) would seem not to apply, because, pursuant to rule 3.203(I) (final cases), state appeals of final cases proceed under rule 9.142(a), not 9.142(c). If proceedings are not stayed, the trial judge would presumably impose a life sentence and vacate the death penalty, which arguably would divest this Court of jurisdiction. As previously stated, however, under the logic of Fourth Dist. Court of Appeal, this Court has continuing jurisdiction, once the death penalty is imposed, and it does not automatically lose this continuing jurisdiction if the judge later enters a life sentence, although the life sentence might allow this Court in its discretion to transfer the appeal to the district court in appropriate cases.

A contrary conclusion would again be highly inefficient. Rule 3.203(d) (final cases) provides for relinquishment of jurisdiction, if an appeal is already pending in this Court of the denial of a postconviction motion. If a life sentence is imposed, this pending appeal would become moot, but the district court might reverse, in which case the pending appeal would be resurrected. Alternatively, the rule 3.203 motion might be filed simultaneously with the rule 3.851 motion. If the trial court denies the rule 3.851 motion and grants the rule 3.203 motion, requiring the defendant's rule 3.851 appeal to go to this Court, and the state's rule 3.203 appeal to go to the district court would be obviously undesirable. Consequently, I believe that state appeals of mental retardation orders in death penalty cases that have previously been affirmed on direct appeal are properly brought to this Court, as proposed rules 3.203(I) and 9.142(a) provide.

Placement of Text of Rule 9.142(c)

I recommend that the text of proposed rule 9.142(c) be included in other appellate rules. As I have said, rule 9.142(c)(2) relating to state appeals should be deleted entirely. Even if this text is kept, it should not remain in rule 9.142. The versions of rule 3.203 for pending and final cases are only temporary and soon will not be used or needed, because they call for the filing of motions within sixty days of the effective date of the rule. After these pending and final cases are resolved, state appeals for all future cases would go to the district courts. No death penalty will ever

have been imposed in these future cases. Consequently, provisions regarding state appeals in these cases should be included in rule 9.140 for regular appeals, not rule 9.142 for death penalty appeals.

This Court could readily insert a new rule 9.140(c)(1)(J) as follows: "The state may appeal an order . . . (J) granting relief under Florida Rule of Criminal Procedure 3.203; (JK) ruling on a question of law . . ." This amendment would also have the consequence of a fifteen-day right to appeal like all other state appeals under rule 9.140(c)(3), rather than the thirty days provided in rule 9.142(c)(2)(A). If this Court wants to require an automatic stay, then it can amend rule 9.140(c)(3) accordingly.

I would also delete rule 9.142(c)(1) relating to defense appeals. Rule 9.142(c)(1) is concerned primarily with forestalling separate appeals and briefs on the mental retardation issue. Given the structure of the various versions of rule 3.203, which require mental retardation issues to be heard prior to the initial imposition of the death penalty or as part of a rule 3.851 motion, however, I do not see this concern as so substantial that it warrants a separate rule. If a separate rule is genuinely necessary, I would add a new rule 9.142(a)(6) as follows, along with sentences on the procedure if jurisdiction was relinquished:

> *(6) Mental Retardation*. Defendants or prisoners shall not separately appeal an order denying relief under Florida Rule of Criminal Procedure 3.203 and shall include their mental retardation arguments, if any, in their briefs seeking review of the judgment and sentence of death or of the order denying relief under Florida Rule of Criminal Procedure 3.851. If the Court relinquished jurisdiction for the mental retardation proceeding, the clerk of the lower tribunal shall prepare a supplemental record. If briefs were filed prior to relinquishment of jurisdiction, the parties shall file supplemental briefs limited to the mental retardation issue in accordance with the schedules set forth in rule 9.140(g).

Other Comments

I would delete rules 3.203(k) (future cases), 3.203(*l*) (pending cases), and 3.203(I) (final cases) as superfluous, because they unnecessarily provide for a right to appeal and incorrectly imply that the appeal is separate from the defendant's other appeal. If the rule 3.203 proceeding occurs prior to imposition of the death penalty, then the mental retardation issue is automatically included in the appeal from the sentence of death. If the rule 3.203 proceeding occurs as part of a rule 3.851 proceeding, then the issue is automatically included in the rule 3.851 appeal. If jurisdiction is relinquished by this Court for this proceeding, then jurisdiction automatically returns to this Court afterward. In all cases, a separate provision in rule 3.203 for an appeal is unnecessary.

I also see no reason for providing in rule 9.142 that motions for rehearing toll the time for filing the state's notice of appeal. To the extent that motions for rehearing are authorized under rule 3.203, they automatically toll time under Florida Rule of Appellate Procedure 9.020(h). The appellate rules generally rely on rule 9.020(h) and do not otherwise specify for particular orders that motions for rehearing toll the time for filing the notice of appeal.

On a related point, I noticed in preparing these comments that rule 9.142(a)(2) now incorrectly refers to rule 9.140(f), when it should refer to rule 9.140(g). This error occurred last year, when this Court *sua sponte* moved text from rule 9.140 to rule 9.142 and inadvertently changed the reference from 9.140(g) to 9.140(f). This Court will see the error when it compares the old text in rule 9.140 and the new text in rule 9.142, which are both found in Amendment to the Florida Rules of Appellate Procedure (Rule 9.142), 837 So. 2d 911 (Fla. 2002).

Finally, I note that the word "established" in rule 9.142(c)(1)(A) is misspelled.

Thank you for allowing me to file these comments.

Sincerely,

Stephen Krosschell

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