IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE AND FLORIDA RULES OF APPELLATE PROCEDURE) Case No. 03-685

ATTORNEY GENERAL'S COMMENTS TO PROPOSED ADDITION OF FLORIDA RULES OF CRIMINAL AND APPELLATE PROCEDURE, RULES 3.203 AND 9.142; DEFENDANT'S MENTAL RETARDATION AS A BAR TO EXECUTION

COMES NOW the State of Florida, by and through the undersigned Assistant Attorney General, and files the following comments in response to this Court's Request for Comments on April 28, 2003 in the above captioned cause and states:

Rule 3.203;**Nonfinal cases**[1]

1. The definition of mental retardation in this Court's proposed rule should be amended to be consistent with the generally recognized definition accepted by mental health professionals. The *DSM-IV-TR*[2] includes a requirement that

[1] For purposes of clarity the State has addressed the three different versions of Rule 3.203 as set forth by the Court but has renumbered them 3.203 (1)- 3.203 (3). However, since the three versions have substantial text in common, we also recommend that the three rules should be reduced to a single rule to encompass the presentation of all claims of mental retardation as a bar to execution. The remaining comments set forth in this pleading have been included in an edited version of the proposed rule and are attached as an exhibit to this pleading. Additions to the rule are in italics and are double underscored. Deletions have been stricken through.

[2] THE AMERICAN PSYCHIATRIC ASSOCIATION: *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000)*

"present" adaptive functioning be established and that the measured performance is two or more standard deviations *below* the mean score. The DSM-IV-TR definition does not include "general" in reference to the subaverage intellectual functioning. Additionally, the proposed rule's inclusion of social responsibilities in the definition of mental retardation as a bar to execution is an inappropriate moral judgment and is inconsistent with any authoritative source. The practical effect of this difference will be to insure that all death row inmates automatically qualify as possessing a deficit in adapative behavior. Rather, the focus for adaptive skills should be limited to the defendant's ability to *presently* meet the standards of personal independence expected of his or her age, cultural group, and community which in the case of a death-sentenced-inmate would be death row.

2. The contents of the Notice of Intent to Raise Mental Retardation as Bar to Execution, whether at trial or when the case is on appeal, should be expanded to require a good faith basis, a statement of relevant facts, names and addresses of lay witnesses relied upon to support the claim and a certificate that a copy of the notice has been sent to the prosecuting authority and the trial judge and, in cases on appeal, to the Attorney General.

3. In cases where a remand is being requested from this

Court, it should be limited to cases where evidence of mental retardation has been presented below and the motion should include an attached affidavit of an expert in support of the good faith basis alleged in the motion.

4. The rule should also set guidelines as to the minimum requirements for the mental retardation experts. The expert should be a psychologist licensed in the State of Florida who has a minimum of three years of experience as an independent professional in the diagnosis and assessment of mental retardation and/or three years of active criminal forensic experience. All expert examinations should be videotaped for review.

5. To insure the timely disclosure of mental health expert reports, the provisions relating to the exchange of such reports, should be modified to require exchange no later than 10 days prior to the hearing required by the rule in the absence of an order of the court.

Rule 3.203;final cases

1. Florida Rule of Criminal Procedure 3.851 provides the necessary framework to review any properly raised collateral claims, including mental retardation, in either an initial or successive motion. A separate rule with inconsistent pleading requirements and time limits would only serve to confuse and delay any litigation.

2. Moreover, proposed Rule 3.203 (3) appears to create a right to raise the claim where there may be none. Under Rule 3.851 any claim raised under Atkins v. Virginia, 536 U.S. 304 (June 20, 2002) that has not already been filed, is not within the one year time limit and is, therefore, procedurally barred. Additionally, mental retardation claims raised under Rule 3.851 would be subject to denial based on other procedural bars, res judicata and nonretroactivity. But see Dixon v. State, 730 So. 2d 265, 267-268 (Fla. 1999)(window for seeking relief on collateral claims based on fundamental change in the law begins with decision giving a prior opinion retroactive application to convictions and sentences that are already final.)

3. The proposed rule further conflicts with Rule 3.851 in that it contemplates that experts should be appointed and that an evidentiary hearing should be had in all cases, without consideration of the very real possibility that a prisoner may not be able to meet the threshold pleading requirements.[3] Moreover, where this claim has already been the subject of an evidentiary hearing consistent with this rule and relief has been

[3] A defendant should be required to allege that he meets the definition of mental retardation which includes low IQ, present deficits in adaptive behavior and manifestation during the period from conception to age 18 to obtain any consideration of the claim. According to Sheerenberger (1983), these elements of the definition of mental retardation were well accepted in the United States by 1900. See http://www.uab.edu/cogdev/mentreta.htm. See also Section 393.063(22) Fla. Stat. (1977).

denied, a defendant should not be entitled to a second proceeding under this rule. See Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 123 S. Ct. 662 (2002) (Atkins relief not warranted where Bottoson already was afforded a hearing on the issue of mental retardation and the evidence did not support his claim.)

4. Requiring this claim to be raised and reviewed under Rule 3.851 in all final cases properly provides the trial court with the opportunity to review the claim and summarily deny it if it is factually or legally insufficient in combination with any other properly raised claims.

5. This rule should provide that the claim may be asserted in a properly filed Rule 3.851 motion and set forth the mental retardation definition, expert qualifications, waiver and the standard of proof.

6. Finally, with regard to final cases, the proposed rule fails to recognize that "final" cases covers a broad range of procedural postures. The rule's 60 day deadline is appropriate for prisoners amending a currently pending motion or for those bringing a new successive motion; however, in those cases where the initial motion is not yet due, the rule should require the issue to be included in a timely filed motion under Rule 3.851.

Rule 9.142(c)

1. This addition to Rule 9.142 is unnecessary. The

creation of a new subsection 9.142(c) suggests or implies that a separate appellate proceeding be instituted upon the denial of a claim of mental retardation. This addition may lead to confusion and possible delay. A defendant who obtains an adverse ruling on his mental retardation claim will be afforded appellate review under Rule 9.142 (a) Procedures in Death Penalty Appeals. Rule 9.142 (a) explicitly governs appeals seeking review of the imposition of sentence or the denial of post conviction relief without the need for any additions. If this Court should order a remand under Proposed Rule 3.203 (2)(g), jurisdiction could be temporarily relinquished to allow such proceedings and then briefing ordered as necessary.

2. The State's right to appeal should also be included in Rule 9.140 (C) (1), which enumerates rulings the State may appeal. A provision should be added expressly permitting State appeals from orders determining that the defendant or prisoner is mentally retarded.

3. Finally, the stay of proceedings provisions should expressly preclude the imposition of a sentence less than death, during the pendency of a state's appeal of a finding that the defendant's execution is barred as a result of his mental retardation. Without this caveat, the state may be precluded from obtaining review if a life sentence is imposed prior to the state's time for seeking an appeal has run. See Williams v.

State, 595 So. 2d 936 (Fla. 1992) (holding that where defendant already sentenced to life, the double jeopardy clause prevented a new penalty phase proceeding subjecting defendant to a sentence of death.)

CONCLUSION

WHEREFORE, the State urges that this Court make the above recommended changes to proposed rules 3.203 and 9.142. in order to clarify the procedures to be employed in considering mental retardation as a bar to execution.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
CAROLYN M. SNURKOWSKI
Asst. Deputy Attorney General
Florida Bar No. 158541
OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300

_____
CANDANCE M. SABELLA
Assistant Attorney General
Chief - Capital Appeals
Florida Bar ID#: 0445071
Concourse Center 4
3507 E. Frontage Road, Ste. 200
Tampa, Florida 33607
(813) 287-7910
(813) 281-5501 Facsimile

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to_____ this _____ day of July, 2003.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____

COUNSEL FOR APPELLEE