

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-166

DANIEL BURNS

Appellant,

v.

STATE OF FLORIDA

Appellee.

_____ /

**NOTICE OF SUPPLEMENTAL AUTHORITY
AND MOTION FOR PERMISSION TO SUBMIT SUPPLEMENTAL BRIEFING**

COMES NOW the Appellant, Daniel Burns, and respectfully gives notice to this Court of the enactment of Sect. 921.137, Fla. Stat., which was signed into law by Governor Bush on June 12, 2001, and moves this Court for permission to submit supplemental briefing. As noted in Mr. Burn's pleadings, IQ scores obtained by defense experts place Mr. Burn's two standard deviations below the mean and within the standard of retardation adopted in 921.137. Mr. Burns seeks to present expert testimony that Mr. Burns is mentally retarded within the meaning of the Florida Statute 921.137. In support of his request for an opportunity to submit supplemental briefing, Mr. Burns states:

1. Sect. 921.137, provides that "[i]mposition of [a] death sentence upon a mentally retarded defendant [is]

prohibited." This provision extends to mentally retarded individuals a substantive right not to be executed.¹ The legislature directed that "[t]his act shall take effect upon becoming a law." However, the legislature further directed that "[t]his section does not apply to a defendant who was sentenced to death prior to the effective date of this act."²

2. In Fleming v. Zant, 386 S.E. 2d 339 (Ga. 1989), the Georgia Supreme Court was presented with a similar enactment precluding the execution of one found to be mentally retarded. However, the statute was only to apply to capital proceedings that began after July 1, 1988. As the Georgia Supreme Court noted, "On its face the statute does not apply to Son Fleming, who was tried more than ten years ago." 386 S.E. 2d at 341. After full briefing and oral argument, the Georgia Supreme Court held that "although there may be no 'national consensus' against executing the mentally retarded, this state's consensus is clear." 386 S.E. 2d at 342. Thus, the execution

¹ In Ford v. Wainwright, 477 U.S. 399, 427 (1986), Justice O'Connor in considering a Florida statute precluding the execution of the incompetent stated, "the conclusion is inescapable that Florida positive law has created a protected liberty interest in avoiding execution while incompetent."

² Thus, this provision would indicate that the substantive right to not be executed is arbitrarily denied to those mentally retarded individuals with a valid death sentence in place. The substantive right to not be executed would only be restored to a mentally retarded individual under sentence of death if the death sentence were declared invalid and vacated.

of the mentally retarded sentenced to death before the statute's effective date violated the Georgia Constitution's prohibition against cruel and unusual punishments.³

3. In the past, members of this Court have indicated that even without legislative action prohibiting the execution of the mentally retarded, the Florida Constitution's prohibition against "cruel or unusual" punishment should be construed to ban the execution of a mentally retarded individual. Woods v. State, 531 So. 2d 79, 83 (Fla. 1988)(Barkett, J., dissenting, joined by Shaw and Kogan, J.); Hall v. State, 614 So. 2d 473, 479 (Fla. 1993)(Barkett, J., dissenting, joined by Kogan, J.); Hall v. State, 742 So. 2d 225, 231 (Fla. 1999)(Anstead, J., dissenting, joined by Pariente, J.). Certainly, the Florida legislature's adoption of Section 921.137 and the Governor's decision to sign it evidences the development of a consensus within the State of Florida that mentally retarded individuals should not be

³ The Arkansas Supreme Court denied a stay of execution in Fairchild v. Norris, 861 S.W. 2d 111 (Ark. 1993), only because a federal court had previously determined after an evidentiary hearing that Fairchild was not retarded. The dissenting justice in Fairchild explained that but for the federal court determination, he was confident that Fleming v. Zant would have been followed. Fairchild, 861 S.W. 2d at 112 (Newbern, J., dissenting). Here, there has been no evidentiary hearing and factual determination that Mr. Burns is not mentally retarded.

executed.⁴ While addressing the constitutionality of the electric chair, Justice Quince recently stated, "Courts should instead give effect to the legislative enactment as a reflection of the will and the moral values of the people." Provenzano v. Moore, 744 So. 2d 413, 421 (Fla. 1999). The legislature and the Governor have now spoken. This Court should reconsider the issue of whether the Florida Constitution precludes the execution of the mentally retarded in light of the consensus within the State of Florida that such individuals should not be executed.

4. Additionally, Mr. Burns would note that under Florida's new provision, the date of the sentencing determines whether a mentally retarded person may be executed.⁵ This renders the provision arbitrary. For example, assuming Mr. Burns death sentence is vacated on other grounds and a resentencing is ordered, a death sentence will be precluded under the new provision if it is determined that Mr. Burns is

⁴ Sect. 921.137 was unanimously passed by the Senate and by a vote of 110-1 in the House. Governor Bush had issued a press release on March 27, 2001, announcing that he "will never sign a death warrant for an individual who is mentally retarded."

⁵ In Rhodes v. State, 698 N.E. 2d 304, 309 (Ind. 1998), the Indiana Supreme Court upheld a distinction under the Indiana Constitution because the distinction was premised upon the date of the crime ("the controlling law is that which is in effect at the time the crime is committed").

mentally retarded. The date of the crime does not control, but the date of the sentencing. Those mentally retarded individuals already sentenced to death who are lucky enough to get a resentencing ordered on other grounds may not be resentenced to death. However, mentally retarded individuals who do not obtain a resentencing on other grounds would not get the benefit of the new provision.⁶ The difference in treatment of those death sentenced mentally retarded individuals turns on a factor entirely unrelated to either the circumstances of the crime or the character of the defendant. Gregg v. Georgia, 428 U.S. 153, 199 (1976) ("Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offender, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstance of the crime and the defendant."). Thus, such an arbitrary distinction calls into question Florida's capital sentencing process.

⁶ However, Governor Bush has stated that as to these individuals "I will never sign a death warrant for an individual who is mentally retarded.." Though no death warrant may be signed, these mentally retarded individuals will be "maintained in a six-by-nine-foot cell with a ceiling nine and one-half feet high. These prisoners are taken to the exercise yard for two-hour intervals twice a week. These facilities and procedures were not designed and should not be used to maintain prisoners for years and years." Swafford v. State, 679 So. 2d 736, 742 n. 8 (Fla. 1996)(Wells, J. dissenting).

5. Moreover, this Court has held that "the death penalty is either cruel or unusual if imposed upon one who was under the age of sixteen when committing the crime." Allen v. State, 636 So. 2d 494, 497 (Fla. 1994). This is because this Court could not "countenance a rule that would result in some young juveniles being executed while the vast majorities of others were not, even where the crimes were similar." Id. See Brennan v. State, 754 So. 2d 1 (Fla. 1999). In light of the new legislative enactment there can be no real dispute that it will be unusual for a mentally retarded individual to be executed. Thus, the Florida Constitution will not "countenance a rule" that would permit a mentally retarded person to be executed while other mentally retarded persons have a substantive right to not be executed.

6. "A prisoner under a death sentence remains a living person and consequently has an interest in his life." Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 288 (1998)(O'Connor, J., concurring). Mr. Burns is such a prisoner with such an interest. He has further been found to be a mentally retarded individual, and therefore within the scope of those individuals protected under Sect. 921.137. "Liberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the

laws of the States." Hewitt v. Helms, 459 U.S. 460, 466 (1983). The Florida Legislature and the Governor have determined that mentally retarded individuals like Mr. Burns have a substantive right to not be executed. Apparently for the sake of finality, the legislative enactment deprives Mr. Burns the substantive right extended to other mentally retarded individuals and violates due process and equal protection. It is undisputed that the Florida legislature does have the power to enact "substantive law." Allen v. Butterworth, 756 So. 2d 52, 59 (Fla. 2000). However, it is equally undisputed that it is for the courts to determine "whether the State's positive law has created a liberty interest and whether its procedures are adequate to protect that interest from arbitrary deprivation." Ford v. Wainwright, 477 U.S. at 430-31. There really should be no dispute that the legislative enactment has arbitrarily deprived Mr. Burns of a substantive right in violation of his constitutional rights.

7. The circumstances are very much akin to those Justice O'Connor found to be present in Ford v. Wainwright. There, the Florida legislature had extended a substantive right to incompetent individuals under sentence of death. However, the procedures afforded those individuals for vindicating that

right were found to be inadequate. Ford v. Wainwright, 477 U.S. at 430 (O'Connor, J., concurring in result) ("Because Florida's procedures are inadequate to satisfy even the minimal requirements of due process in this context, I would vacate the judgment below with instructions that the case be returned to Florida so that it might assess petitioner's competency in a manner that accords with the command of the Fourteenth Amendment."). Thereafter, this Court promulgated court rules setting forth the procedure for determining whether an individual was competent to be executed. See Rule 3.811, Fla. R. Cr. Pro.

8. Additionally, the Eight Amendment to the United States Constitution prohibits cruel and unusual punishment. The United States Supreme Court has addressed the Eighth Amendment and explained its dynamic character:

Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gives it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly human institutions can approach it."

* * *

The [cruel and unusual punishment clause], in the opinion of the learned commentators,

may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.

Weems v. United States, 217 U.S. 349, 373, 378 (1910). When the Supreme Court addressed whether the Eighth Amendment precluded the execution of those who were 17 years of age at the time they committed a capital offense, the plurality explained:

When this Court broke loose from the historical moorings consisting of the original application of the Eighth Amendment, it did not embark rudderless upon a wide-open sea. Rather, it limited the Amendment's extension to those practices contrary to the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S., at 101 (plurality opinion) (emphasis added).

Stanford v. Kentucky, 492 U.S. at 378-79 (plurality opinion as to part V).

9. One measure of the evolving standards of decency that has been repeatedly used by the Supreme Court has been whether a national consensus against the imposition of a particular punishment in particular circumstances exists. Ford v. Wainwright, 477 U.S. at 406 ("this Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects"). First among the

"objective indicia that reflect the public attitude toward a given sanction" are statutes passed by society's elected representatives. McCleskey v. Kemp, 481 U.S. 279, 300 (1987), quoting Gregg v. Georgia, 408 U.S. 153, 173 (1976). Such a legislative review enables a court "to determine whether our Nation has set its face against a punishment to an extent that it can be concluded that the punishment offends our 'evolving standards of decency.'" Stanford, 492 U.S. at 383 (Brennan, J., dissenting), quoting Trop v. Dulles, 356 U.S. 86, 101. The majority in Stanford stated, "As far as the primary and most reliable indication of consensus is concerned - the patten of enacted laws - petitioners have failed to [establish a national consensus against the execution of an individual who was 17 at the time of the commission of the capital offense]." 492 U.S. at 373.

10. In Enmund v. Florida, 458 U.S. 782 (1982), the Supreme Court addressed whether the Eighth Amendment precluded a state from executing an individual who merely aided and abetted in a felony, in the course of which a homicide occurred. In concluding that the Eighth Amendment precluded a sentence of death in such circumstances, where the condemned did not kill, attempt to kill, or intend to kill, this Court explained:

The Coker [v. Georgia, 433 U.S. 584 (1977)] plurality observed that “[a]t no time in the last 50 years have a majority of the States authorized death as a punishment for rape.” Id., at 593. More importantly, in reenacting death penalty laws in order to satisfy the criteria established in Furman v. Georgia, 408 U.S. 238 (1972), only three states provided the death penalty for the rape of an adult woman in their revised statutes. 433 U.S., at 594. The plurality therefore concluded that “[t]he current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.” Id. 433 U.S., at 596 (footnote omitted).

458 U.S. at 789. The Court in Enmund then surveyed the laws of each state legislature to determine the position of each as to the execution of one convicted of felony-murder, but who did not kill, attempt to kill, or intend to kill. The Court concluded:

Thus only a small minority of jurisdictions - eight - allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed. Even if the nine States are included where such a defendant could be executed for an unintended felony murder if sufficient aggravating circumstances are present to outweigh mitigating circumstances - which often include the defendant's minimal participation in the murder - only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder occurred to be sentenced to die. Moreover, of the eight

States which have enacted new death penalty statutes since 1978, none authorize capital punishment in such circumstances.

458 U.S. at 793. Thus, the fact that a total of seventeen (17) states may have statutorily permitted the execution of an accessory to felony-murder did not preclude a finding of a national consensus given the obvious trend between 1978 and 1982.

11. In Penry v. Lynaugh, 492 U.S. 302, 330-31 (1989), while considering whether the Eighth Amendment precluded the execution of the mentally retarded, the Supreme Court explained:

The prohibition against cruel and unusual punishments also recognizes the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion); Ford [v. Wainwright], 477 U.S. 399,] 406 [(1986)]. In discerning those "evolving standards," we have looked to objective evidence of how our society views a particular punishment today. See Coker v. Georgia, [433 U.S. 584,] 593-597 [(1977)]; Enmund v. Florida, 458 U.S. 782 (1982). The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.

In Penry, the Supreme Court concluded, "at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to

conclude that it is categorically prohibited by the Eighth Amendment." 492 U.S. at 335.⁷

12. Since the decision in Penry, a national consensus has developed against executing the mental retarded. As reported on June 16, 2001, President Bush has stated, "We should never execute anybody who is retarded." As noted in the Senate Staff Analysis of Sect 921.137, twelve states had joined Georgia since the Penry decision in prohibiting the execution of the mentally retarded. Since that analysis was written in February of this year, the list has grown longer. Arizona and Florida have new laws prohibiting such executions.⁸ Legislation has passed in Connecticut, Missouri and Texas, and is awaiting a signature from the Governors of those states. And still other states are considering such legislation in their legislative sessions this year. When the twelve states that do not have a death penalty are included, it is clear that a majority of states prohibit the execution

⁷ It must be noted that now, some twelve years later, the United States Supreme Court has granted certiorari review in order to revisit this issue in light of the growing number of states which have prohibited the execution of the mental retarded. McCarver v. North Carolina, 121 S.Ct. 1401 (2001).

⁸ Thus, the total number of states with the death penalty and laws prohibiting the execution of the mentally retarded has now reached fifteen (15).

of the mental retarded.⁹ Execution of Mr. Burns would be a violation of the Eight Amendment prohibition against cruel and unusual punishment.

WHEREFORE, Mr. Burns provides notice of his intention to rely on this supplemental authority and moves this Court for permission to file supplemental briefing regarding the effect of this new legislation upon his sentence of death.

⁹ Consideration should also be given to the moratorium currently in place in Illinois and the legislative attempt in New Hampshire to abolish the death penalty entirely which was vetoed by the Governor who noted that no one has been sentenced to death there since its re-adoption in 1976. Further, it should be noted that the District of Columbia does not have a death penalty, and the federal government bans the execution of people with mental retardation. See Federal Anti-Drug Abuse Act of 1988, Pub. L. 100-690, s7001(1), 102 Stat. 4390, 21 U.S.C. s848(1) (1988 ed.); Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. s3596(c) (1994).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Notice of Supplemental Authority and Motion for Permission to Submit Supplemental Briefing has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 1st day of February, 2002.

Eric Pinkard
Florida Bar No. 065-1443
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
Counsel for Appellant

Copies furnished to:

The Honorable William C.
Johnson, Jr.
Circuit Court Judge
251 North Ridgewood Avenue,
Room 201
Daytona Beach, Florida 32114

Dennis Nales
Assistant State Attorney
Office of the State Attorney
Criminal Justice Center
Fourth Floor
2071 Ringling Boulevard
Sarasota, Florida 34251

Carol Dittmar
Assistant Attorney General
Westwood Bldg., Seventh
Floor
2002 North Lois Avenue
Tampa, Florida 33607

Daniel Burns
DOC# 111918; P4206S
Union Correctional
Institution
Post Office Box 221
Raiford, Florida 32083

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Notice of Supplemental Authority and Motion for Permission to Submit Supplemental Briefing ,was generated in a Courier New non-proportional, 12 point font, pursuant to Fla. R. App. P. 9.210. this 1st day of February, 2002.

ERIC PINKARD
Florida Bar No. 651443
Capital Collateral Regional
Counsel
Middle Region
3801 Corporex Park Drive
Suite 210
Tampa, FL 33619
Attorney for Defendant
(813) 740-3544