O/a 4-18-89

IN THE SUPREME COURT OF FLORIDA

In Re: Amendments to Florida Rule of Criminal Procedure 3.220 (Discovery).

CASE NO. 73,734

FILED
SID J. WHITE
APR 14 1989
CLERK, SUPREME COURT
By______
Deputy Clerk

COMMENTS ON THE REPORT OF THE FLORIDA SUPREME COURT'S COMMISSION ON CRIMINAL DISCOVERY*

OFFICE OF STATEWIDE PROSECUTION
The Capitol, PL 01
Tallahassee, Florida 32399

* The positions expressed in this Comment have been adopted by the following organizations:

Florida Department of Law Enforcement
Florida Sheriff's Association
Florida Police Chief's Association
Florida Police Benevolent Association
Florida Peace Officer's Association
Florida Network of Victim-Witness Services

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In Re: Amendments to Florida Rule of Criminal Procedure 3.220 (Discovery).	**CASE NO.: 73,734**

COMES NOW the Office of Statewide Prosecution, pursuant to this Court's Request for Comments, and files this response to the recommendations of the Commission on Criminal Discovery.

I. BACKGROUND

The issue of depositions in criminal cases has been before the Supreme Court on two occasions during this decade. In 1985, Florida's 20 State Attorneys petitioned this Court for an Order appointing a commission to study the effects of depositions in criminal cases. The Court referred the petition to the Rules of Criminal Procedure Committee for study. In response, the Rules Committee proposed and this Court adopted two minor changes to the deposition rule in 1986.

In 1988 the State Attorneys re-petitioned this Court for the appointment of a representative commission to study the adverse effects that depositions cause throughout the criminal justice system. It is safe to say that these requests for action are the result of widespread public debate on whether depositions should be retained in their current form.

This debate continued into the 1988 legislative session and concluded with the adoption of House Joint Resolution (HJR) 1679. The resolution recites generally the need for deposition reform with respect to witness protection and the costs that depositions impose on the public. To address these policy concerns the Legislature joined the State Attorneys in urging the appointment of a balanced commission to study the deposition rule and recommend modification responsive to the Legislative findings in HJR 1679. The Legislature specifically recommended representation on the Commission from the law enforcement community, victim's rights organizations, and the Legislature, as well as members of the Bar. Unfortunately, the Commission, as appointed, was not broadly representative of the interests in the criminal justice system, as all 14 commission members are lawyers and only two of those represented prosecution interests.

Viewed in this overall context, the Commission's work product falls far short of the desired mark. It succeeds in appearance but fails in substance; represents process but not progress; change but not reform.

The Legislature urged deposition reform in five general areas:

(1) Protection for victims and other witnesses.

(2) Limiting depositions to only essential witnesses.

(3) Prohibiting the defendant from attending the deposition unless good cause is shown.

(4) Use of technological advances to reduce costs and scheduling problems.

(5) Potential savings of public funds and the time of law enforcement, witnesses, prosecutors, defense counsel, and court personnel that may be delivered by employing alternative discovery techniques.

Adoption of the Commission product will fail to satisfy in any significant fashion these most reasonable Legislative concerns.

II. DEPOSITION REFORM PROPOSAL

A significant majority of the law enforcement community has long supported a simple repeal of the deposition rule. The experience of front line law enforcement officers with depositions is almost uniformly negative. Were this Court to solve law enforcement problems and abolish the rule, Florida would still boast a discovery system that is a model of openness and amongst the most permissive in the nation. Bills repealing the deposition rule are currently pending in the Legislature (e.g. SB 469). However, in an effort to promote a sound alternative to repeal, the Commission's report, and the Rules Committee's comment, the Court is urged to consider the following reform proposal:

STATE OF FLORIDA
DEPARTMENT OF LEGAL AFFAIRS

Office of Statewide Prosecution

Robert A. Butterworth
Attorney General

Peter Antonacci
Statewide Prosecutor

Reply To:

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Tallahassee, Florida 32399

73,734

FILED
SID J. WHITE
APR 19 1989
CLERK, SUPREME COURT
By ______________
Deputy Clerk

M E M O R A N D U M

TO: Clerk of Supreme Court

FROM: Peter Antonacci

RE: Deposition Reform Rule

DATE: April 19, 1989

Enclosed please find Page 4 as it should have appeared in the Comment that I filed with the Court.

PA:at

Enclosure

Comments on the Report

3.220

(d) Discovery Depositions.

1. In all criminal cases, defendants shall have the privilege to take pretrial depositions upon oral examination of the following persons any time after an Indictment or Information has been filed:

   (i) The principal investigating officer as designated by the State in its response to the defendant's demand for discovery.

   (ii) Any witness from whom the State has received sworn testimony in certifying the Indictment or Information.

   (iii) Any person who will testify to any post-arrest statement made by the defendant.

   Any person under paragraphs (ii) or (iii) above, who is under 16 years of age, over 65 years of age, a victim of a sexual battery offense or a victim of spouse abuse shall be deposed only in the presence of a judge or special master as the Court may appoint, and only then by order of the Court.

   No other person may be deposed by the defense absent court order upon a showing of exceptional circumstances.

2. No depositions shall be permitted in misdemeanor cases, unless the judge declares that the defendant faces likely incarceration if convicted. If the Judge so declares, the defendant shall be permitted one deposition.

3. No witness shall be deposed more than once in the same cause, unless upon agreement by the parties.

4. Police officers shall not be required to produce police reports for depositions or discovery purposes.

5. No defendant may attend a pre-trial deposition except upon order of the Court upon showing of exceptional circumstances.

6. Pretrial depositions shall be held in a building where the trial may be held, such other place agreed upon by the parties, or where the trial court may designate. The party taking the deposition shall give notice of the time and place of each deposition to each other party. The Clerk of the Court shall issue subpoenas for the testimony of persons whose depositions are to be taken. A resident of the State may be required to attend an examination only in the county where he resides, or is employed, or regularly transacts his business in person.

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A. LIMITATION OF DEPOSITIONS TO ESSENTIAL WITNESSES.

The current practice in Florida is that any Florida resident is subject to compulsory process (without a showing of need) to give pretrial evidence on behalf of the defendant simply upon the filing of a precipe with the Clerk of Court. The proposal seeks to limit the ambit of the rule, while maintaining defendant access to the State's evidence. The policy justifications underlying the proposal are:

1. Making the principal investigation officer, as designated in the State's answer to discovery, available for deposition would provide the defense with an opportunity to learn the contours of the State's investigation and evidence from the person most knowledgeable of the State's case. The totally unregulated current practice of deposing every law enforcement officer who has had a role in the case is not a cost effective means of promoting reasonable discovery. The practical goal of much of Florida deposition practice is to gather impeachment material for trial rather than to discover the facts underlying the State's case. While this is extremely advantageous to defendants, it is unnecessary, very costly, and not mandated by the United States or Florida Constitutions.
2. Florida Rule of Criminal Procedure 3.140(g) requires that the State Attorney charging a felony must certify

that witnesses to the offense have submitted sworn testimony to the charging officer. Making such persons available for deposition provides defense access to persons whom the State regards as critical to the charging decision.

3. Providing defense access to persons testifying to post trial statements of the defendant will provide a detailed context of matters surrounding statements that are now disclosed under FRCP 3.220(a)(1)iii.

In order to depose any other person, the defendant would be required to seek Court approval. This would require establishing a predicate as a condition precedent to further discovery by deposition. This proposal regulates and limits the number of depositions that may ultimately be taken while at the same time providing valuable information to the defendant.

B. PROTECTION OF FRAGILE WITNESSES.

Persons who are witnesses to and victims of crime should be extended all protections that an enlightened justice system has at its disposal. Current rule and practice provides victims and witnesses virtually no institutional protections save seeking a protective order by the State after incidents of harassment and abuse. It is not surprising that the State seeks protective orders so infrequently, since hearings on such motions constitute delay and delay equals avoidable trauma to the victim. Additionally, entry of a protective order can result, at the

election of the defendant, in a withdrawal of the meager discovery reciprocity applicable under FRCP 3.220(b)(4). Therefore, in the spirit of the 1988 Victims Rights Amendment to the Florida Constitution, the Court is urged to require direct judicial supervision over all depositions of persons under 16 and over 65, and the victims of sexual battery and spouse abuse offenses if they fall within the category of persons who may be deposed in proposed 3.220(d)(1)ii and iii.

C. OTHER LIMITATIONS ON DEPOSITIONS.

No witness should be deposed more than once absent an agreement of the parties or exceptional circumstances. Multiple depositions slow down the process and a ban on this practice encourages the kind of preparation that should be expected of counsel who has compelled the appearance of a citizen for the purposes of gathering information.

Depositions should be limited to only the most important cases. The Court is urged to limit the availability of depositions in misdemeanor cases to those cases where the trial court declares the Defendant faces likely incarceration if convicted. This provision will automatically cover certain repeat D.U.I. offenses as well as other matters that the County Courts deem serious enough to require incarceration.

The Court is further urged to eliminate depositions in delinquency and dependency proceedings. Incarceration in juvenile proceedings is a very unlikely outcome particularly since there are fewer than 200 beds available statewide for sentenced

juvenile offenders. In addition, juvenile and dependency proceedings are conducted under the provisions of the Juvenile Justice Act that sets forth its rehabilitative, nonincarcerative goals. Fla. Stat. Secs. 39.001 and 39.002 (1987)

D. POLICE REPORTS.

This Court and the Legislature have consistently declined to make police reports generally discoverable as statements or public records. However, police reports are now furnished to defendants as a matter of courtesy in most judicial circuits in Florida. There was no showing to the Commission that this practice has been an ineffective means of providing information to the defense and encouraging efficiency in the system. Stating specifically by rule the protected status of police reports will clarify the current law. Breedlove v. State, 413 So.2d 1 (Fla.1982).

E. PRESENCE OF THE DEFENDANT AT DEPOSITIONS.

There is no more abusive experience in Florida's criminal justice system than to be a victim sitting in a small room across a table from the defendant while defendant's counsel cross examines on the traumatic details of the crime. This is a coarse practice that should be banned for all time. There is simply no reason for a defendant to attend a pre-trial deposition of anyone, much less a victim. The presence of defendants at depositions continues to cause friction within the system and is particularly offensive to victims' groups. If there are valid reasons for a defendant to attend a deposition, counsel should be required to state the grounds by motion prior to taking a deposition.

Adoption of this proposal, _in toto_, will produce lean, cost effective discovery processes, as well as give our system a humane face. It will close the door on excess while guaranteeing fundamental fairness to the defendant.

III. OBJECTIONS TO THE COMMISSION'S REPORT

The Commission has proposed numerous amendments to the rules of criminal procedure that will make for great change in the system. These changes will generate dislocation and have a generally negative impact, particularly on the prosecution.

A. DESIGNATION OF WITNESSES AND PRODUCTION OF POLICE REPORTS.

The heart of the Commission's proposal is creation of a new category under 3.220(a)1 for "non-material" witnesses. This scheme provides no relief from excessive depositions either to the prosecution or the law enforcement community nor does it meaningfully address Legislative concerns regarding cost or witness abuse. The proposal divides the world into three parts:

1. Persons possessing relevant information about an offense;
2. Persons possessing relevant information about an offense but who performed only a ministerial function _and_ who wrote a detailed police report.
3. All other persons.

Under the Commission's proposal the defense has an absolute right to depose all persons in groups 1 and 3 and has a qualified right to depose persons in group 2. Not only does this proposal not meaningfully limit the universe of those subject to giving compelled pre-trial statements but it dramatically magnifies the workload that is required of the State to answer discovery. Persons who conduct ministerial tasks in criminal cases represent only a tiny fraction of all deponents and those who write police reports are a smaller fraction again.

The Commission proposes the State make trial decisions regarding witness relevance when answering discovery, far in advance of trial. Answering discovery will be a much more time consuming undertaking. Most prosecutors are unable to make critical trial decisions so soon after an arrest; and such a heavy burden should not be imposed. By the same token, the State has no incentive to designate group 2 witnesses and run the risk that essential testimony is excludable at trial.

The issue of police reports is of particular concern since the Commission's proposal will undermine long-standing understandings between State and Federal agencies regarding the discoverability of investigative reports. As previously stated, there were simply no empirical data presented to the Commission that show the need to change a system that works. Inexplicably, the Commission does not propose reciprocal discovery of investigative reports from the defendant. The effect of the

proposal is to make the State's work product routinely discoverable while continuing to protect the defendant's.

B. PRESENCE OF THE DEFENDANT.

The Commission's proposal regarding the physical presence of the defendant at depositions is little more than a bizarre notice provision. On the one hand, the Commission recommends the Court find that there is no right for defendants to be present at depositions and then goes on to suggest that any defendant who intends to be present at a deposition give the State five days notice. This kind of Orwellian double-speak in an area as sensitive as victim and witness protection should not be countenanced by the Court. The Commission's recommendation therefore should be rejected outright and replaced with a straightforward, uncomplicated ban on the presence of the defendants at depositions, allowing the trial courts to sort out incidents of particularized need.

C. RECIPROCITY.

What passes for reciprocity under the current rule is a system that encourages nondisclosure by the defendant. The recommendations of the Commission do not go far enough to change this indefensible artifact of the rule. The underlying goal of all modern discovery practice is to discourage trial by ambush. If this goal is worthy, reciprocal discovery should be automatic as proposed in the dissenting reports of Middlebrooks and York. The Commission's attempt to account for multi-defendant discovery

sharing by imposing sanctions on defendants who knowingly share in discovery information obtained by co-defendants is impossible to enforce or supervise and would require judicial rummaging in multi-defendant cases. If the Court should choose to move in this area, it should adopt Middlebrooks Proposal 1 and York Proposal 2. These proposals will promote truth seeking and defeat secrecy and trial by ambush.

D. WITNESS PROTECTION.

Our system should protect in the first instance all victims of and witnesses to crime. For reasons known only to the Commissioners, a majority did not embrace needed institutional protections for sexual assault victims, elderly witnesses, and victims of spouse abuse. Contemporary notions of fairness and compassion require much more. A humane system should insure that victims of crime are extended the maximum protection permissible under our Constitution. The Commission's proposal provides no such protection and casts too small a net around victims deemed worthy of judicial protection.

E. LOCATION OF DEPOSITIONS.

The Commission proposes that the Administrative Judge of each Circuit be authorized to allow, by general order, depositions to take place outside the courthouse as is now the practice. The Commission comments indicate a desire to encourage depositions at police departments; yet the proposal is open ended and invites abuse. This is an area where meaningful participation of the law

enforcement community and local government would have been helpful. The Committee did not know whether local government is capable of accommodating the great space demands inherent in the proposal. There is little doubt that the pressure for space, particularly in high growth circuits, will result in depositions being taken in lawyers offices much as they were in prior years. The Court should not allow a bad situation to become worse by requiring victims to be deposed at defense lawyers' offices with the defendant present.

F. WITNESS COORDINATION OFFICES.

The experience with witness coordination offices around the State is spotty and reference to them in the report is mere window dressing. The recommendation regarding these offices is permissive, has no enforcement provision, and adds a bureaucratic layer onto a system in need of streamlining, not additional demands. The creation of these bodies and their funding should be a matter for the Legislature to determine in the context of budgeting considerations for the overall system.

G. TELEPHONIC STATEMENTS.

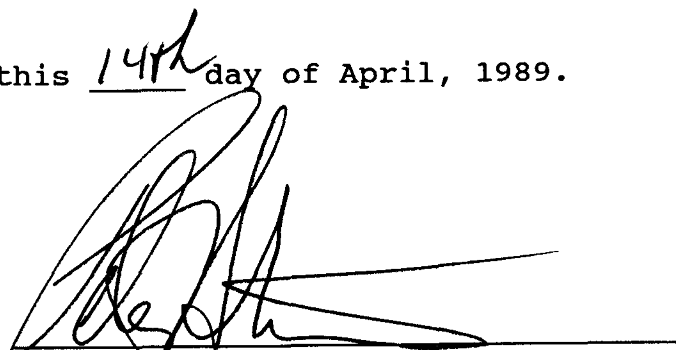
It is possible under the current rule and practice to take a statement over the telephone. The proposal is an unnecessary addition to the discovery rule that accomplishes no real objective save to generate more impeachment material for trial.

Adoption of the Commission's proposal or any of its component parts yields no cost saving for Florida, no meaningful victim protection and no reform to a system sorely in need of change.

CONCLUSION

Therefore, the Court is urged to reject the proposal of the Criminal Discovery Commission and to adopt instead the proposal outlined herein which has as its goals: 1) protection of crime victims and witnesses; 2) reduction in the number of costly depositions; and, 3) assurance that the defense has readily accessible, relevant information to aid in the preparation of its case.

Respectfully Submitted, this 14th day of April, 1989.



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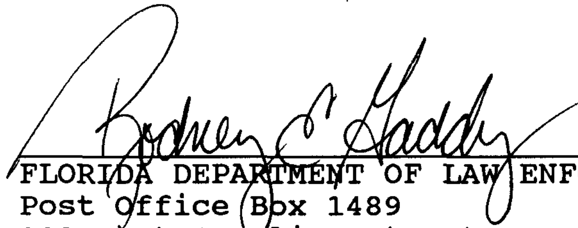

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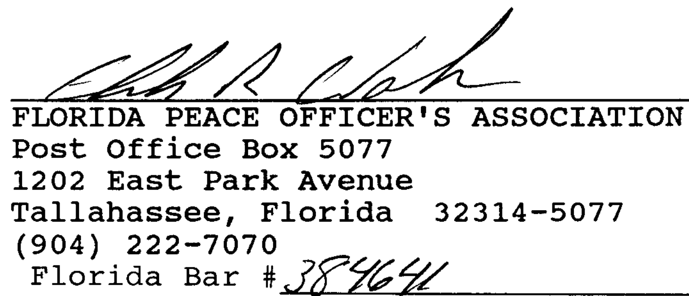

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Respectfully Submitted this 13 day of April, 1989

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