Supreme Court of Florida

REVISED OPINION

No. 73,734

IN RE: AMENDMENT TO FLORIDA RULE
OF CRIMINAL PROCEDURE 3.220 (DISCOVERY)

[May 3, 1989]

PER CURIAM.

Pursuant to a Concurrent Resolution from the Florida Legislature[1] requesting this Court to appoint a commission for the purpose of reviewing Florida Rule of Criminal Procedure 3.220, regarding the discovery process in criminal cases, we now consider the findings and recommendations of the Florida Supreme Court Commission on Criminal Discovery. In addition, we also consider the proposals and recommendations submitted by other parties interested in the administration of our criminal justice system. We have jurisdiction. Art. V, § 2(a), Fla. Const.

Initially, we would like to thank the many people who worked with the Commission on Criminal Discovery, who testified before the Commission, and all those who played some part in the production of the Commission's report and participated in the oral arguments before this Court on April 18, 1989. Only through

[1] HCR 1679, 1988 Fla. Laws 2442.

their hard work and effort have we been able to complete this extensive review of a difficult, perplexing question.

In its concurrent resolution, the legislature requested this Court to consider a petition submitted by the State Attorneys of Florida addressing proposed changes in rule 3.220. The legislature requested this Court to appoint the Commission on Criminal Discovery (Commission) to hear testimony on criminal discovery procedures and review the proposals. The legislature requested the Commission to consider:

> (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 derived by employing alternative discovery techniques.
> (6) Any other appropriate issues.[2]

Pursuant to this request, we appointed the Commission on Criminal Discovery.[3] The Commission listened to testimony in three locations (Tallahassee, Tampa, and Fort Lauderdale) and submitted its findings, report, and proposals to this Court on February 1, 1989. Afterwards, we sent the report, along with the minority reports of commissioners in disagreement with the Commission report, to the Florida Bar Criminal Rules Committee (Committee) for consideration. The Committee returned the report to us with a number of recommendations, some of which we have adopted.

We scheduled oral argument to consider the Commission's proposals, the Committee's recommendations, and the minority reports, and we requested all interested parties to submit proposals or letters in support of or in opposition to the Commission's proposals. Following oral argument, we considered all proposals and, accordingly, we amend Florida Rule of Criminal

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[2] Id. at 2443.

[3] In re Criminal Discovery Commission, Fla. Admin. Order (July 7, 1988).

Procedure 3.220 in the manner set forth in the appendix to this opinion.

From all the evidence and testimony taken during the proceedings one fact is clear: virtually all parties at oral argument recognized that depositions in criminal cases play a necessary role in our criminal justice system by insuring fairness and equal administration of justice. Moreover, although there are undeniably some abuses of the deposition process, such abuses are not nearly as widespread as originally feared. Indeed, the records and transcripts in these proceedings lead to a single inevitable conclusion. Discovery depositions are a necessary and valuable part of our criminal justice system, and they are clearly worth the risk of some minor abuse. Although we are amending the discovery rule in hopes of curtailing these abuses, we retain discovery depositions in all cases except misdemeanor cases, where depositions may only be taken upon a showing of good cause.

With some notable exceptions and some minor changes, we accept the Commission's proposed amendments to rule 3.220. The following is a summary of those amendments. Rule 3.220(a) is added to insure that if a defendant utilizes the discovery process, he or she will be required to reciprocate fully in discovery with the prosecution. Rules 3.220(b)(1)(i)(a)-(b) and 3.220(h)(1)(i)-(ii) are amended to provide prosecutors the discretion to designate certain witnesses who may not be deposed unless ordered by the trial court, upon good cause shown. This amendment also provides for sanctions against either side for abuses in designating witnesses or in taking depositions.

Rule 3.220(b)(1)(ii) is amended to include all police reports within the meaning of the term "statement." Rule 3.220(b)(2) is amended to emphasize that information favorable to the defense must be produced regardless of whether the defense files a notice of discovery. An introduction to rule 3.220(d) is added to reflect the change in nomenclature from "demand for discovery" to "notice of discovery." Rule 3.220(h)(1)(iii)

abolishes discovery depositions in misdemeanor cases except upon good cause shown. This proposal was not advanced by the Commission, but rather was recommended by the Committee, which supported the abolition of depositions in misdemeanor cases by a vote of eighteen to four.

Rule 3.220(h)(3) is added to provide that depositions shall be taken in the building where the trial will be held, or in a place designated by the trial judge, administrative judge, or chief judge, or by agreement of the parties. Rule 3.220(h)(4) is added to provide for videotaping of witnesses under the age of sixteen, and to provide that depositions of witnesses of fragile emotional strength may be taken before the trial judge or a special master. This addition is intended to protect these witnesses from harassment or intimidation during the taking of a deposition.

Rule 3.220(h)(5) provides for the establishment of Witness Coordination Offices to help coordinate the taking of depositions of law enforcement officers, although the rule does not mandate the establishment of such offices. Rule 3.220(h)(6) states that a defendant shall not be present at a deposition except upon stipulation of the parties or court order upon good cause shown. The rule defines the court's considerations in reviewing a defendant's motion to be present at a deposition. Rule 3.220(h)(7) allows statements of law enforcement officers to be taken by telephone in lieu of depositions upon stipulation by the parties and consent of the witness.

Rule 3.220(n)(2) details sanctions to be imposed against counsel for willful violation of an applicable discovery rule or an order issued pursuant thereto. Rule 3.220(n)(3) is added to require that attorneys or parties filing any papers pursuant to these rules must provide certification that they are requesting or providing discovery in good faith. In addition to these changes, several minor amendments involving numerical adjustments and word rearrangement are also adopted by this Court.

Appended to this opinion is the amended and new Florida Rule of Criminal Procedure 3.220 relating to criminal discovery procedures. Deletions are indicated by use of struck-through type. New language is indicated by underscoring. All rules and statutes in conflict with the following rules are hereby superceded as of the effective date of these rules. The comments are the work of the Commission, the Committee, and this Court, and are not adopted by the Court as part of the rules. These amendments shall become effective July 1, 1989.

It is so ordered.

EHRLICH, C.J., and OVERTON, McDONALD and GRIMES, JJ., Concur
OVERTON, J., Concurs specially with an opinion
GRIMES, J., Concurs with an opinion
KOGAN, J., Concurs in part and dissents in part with an opinion, in which SHAW and BARKETT, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED. THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE RULES.

Rule 3.220 - DISCOVERY.

(a) Notice of Discovery. If a defendant should elect to avail himself of the discovery process provided by these rules, including the taking of discovery depositions, the defendant shall file with the court and serve upon the prosecuting attorney notice of the defendant's intent to participate in discovery. Such "Notice of Discovery" shall bind both the prosecution and defendant to all discovery procedures contained in these rules. The defendant may take discovery depositions upon the filing of such notice. The defendant's participating in the discovery process, including the defendant's taking of the deposition of any person, shall be an election to participate in discovery. If any defendant knowingly or purposely shares in discovery obtained by a codefendant, he shall be deemed to have elected to participate in discovery.

~~(a)~~(b) Prosecutor's Discovery Obligation.

(1) After the filing of the indictment or information, within fifteen days after ~~written demand by the defendant~~ service of the defendant's notice of election to participate in discovery, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:

(i) The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto. The defendant may take the deposition of any person not designated by the prosecutor as a person:

a. who performed only a ministerial function with respect to the case or whom the prosecutor does not, in good faith, intend to call at trial, and

b. whose involvement with the case and knowledge of the case is fully set out in a police report or other statement furnished to the defense.

(ii) The statement of any person whose name is furnished in compliance with the preceding paragraph. The term "statement" as used herein ~~means~~ includes a written statement made by said person and signed or otherwise adopted or approved by him, ~~or a stenographic, mechanical, electrical, or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement, provided, however, if the court determines in camera proceedings as provided in subsection (i) hereof that any police report contains irrelevant, sensitive information or information interrelated with other crimes or criminal activities and the disclosure of the contents of such police report may seriously impair law enforcement or jeopardize the investigation of such other crimes or activities, the court may prohibit or partially restrict such disclosure. The court shall prohibit the State from introducing in evidence the material not disclosed, so as to secure and maintain fairness in the just determination of the cause.~~ and also includes any statement of any kind or manner made by such person and written or recorded or summarized in any writing or recording. The term "statement" is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case but shall not include the notes from which such reports are compiled.

(iii) Any written or recorded statements and the substance of any oral statements made by the accused, including a copy of

any statements contained in police reports or report summaries, together with the name and address of each witness to the statements.

(iv) Any written or recorded statements and the substance of any oral statements made by a codefendant if the trial is to be a joint one.

(v) Those portions of recorded grand jury minutes that contain testimony of the accused.

(vi) Any tangible papers or objects which were obtained from or belonged to the accused.

(vii) Whether the State has any material or information which has been provided by a confidential informant.

(viii) Whether there has been any electronic surveillance, including wiretapping, of the premises of the accused, or of conversations to which the accused was a party; and, any documents relating thereto.

(ix) Whether there has been any search or seizure and any documents relating thereto.

(x) Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

(xi) Any tangible papers or objects which the prosecuting attorney intends to use in the hearing or trial and which were not obtained from or belonged to the accused.

(xii) If the court determines, in camera, that any police or investigative report contains irrelevant, sensitive information or information interrelated with other crimes or criminal activities and the disclosure of the contents of such police report may seriously impair law enforcement or jeopardize the investigation of such other crimes or activities, the court may prohibit or partially restrict such disclosure.

(xiii) The court may prohibit the State from introducing into evidence any of the foregoing material not disclosed, so as to secure and maintain fairness in the just determination of the cause.

(2) As soon as practicable after the filing of the indictment or information the prosecutor shall disclose to the defense counsel any material information within the State's possession or control which tends to negate the guilt of the accused as to the offense charged, regardless of whether the defendant has incurred reciprocal discovery obligations.

(3) The prosecutor shall perform the foregoing obligations in any manner mutually agreeable to him and defense counsel or as ordered by the court.

~~(4) The court may deny or partially restrict disclosures authorized by this Rule if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.~~

~~(5) Upon a showing of materiality to the preparation of the defense, the court may require such other discovery to defense counsel as justice may require.~~

~~(b)~~(c) Disclosure to Prosecution.

(1) After the filing of the indictment or information and subject to constitutional limitations, a judicial officer may require the accused to:

(i) Appear in a line-up;

(ii) Speak for identification by witnesses to an offense;

(iii) Be fingerprinted;

(iv) Pose for photographs not involving re-enactment of a scene;

(v) Try on articles of clothing;

(vi) Permit the taking of specimens of material under his fingernails;

(vii) Permit the taking of samples of his blood, hair and other materials of his body which involves no unreasonable intrusion thereof;

(viii) Provide specimens of his handwriting; and

(ix) Submit to a reasonable physical or medical inspection of his body.

(2) Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the prosecuting attorney to the accused and his counsel. Provisions may be made for appearances for such purposes in an order admitting the accused to bail or providing for his pre-trial release.

(d) Defendant's Obligation.

If a defendant elects to participate in discovery, either through filing the appropriate notice or by participating in any discovery process, including the taking of a discovery deposition:

~~(3)~~(1) Within seven days after receipt by ~~defense counsel~~ the defendant of the list of names and addresses furnished by the prosecutor pursuant to Section ~~(a)~~(b)(1)(i) of this Rule the ~~defense counsel~~ defendant shall furnish to the prosecutor a written list of the names and addresses of all witnesses whom the ~~defense counsel~~ defendant expects to call as witnesses at the trial or hearing. When the prosecutor subpoenas a witness whose name has been furnished by ~~defense counsel~~ the defendant, except for trial subpoenas, reasonable notice shall be given to ~~defense counsel~~ the defendant as to the time and place of examination pursuant to the subpoena. At such examination, the defendant, through defense counsel, shall have the right to be present and to examine the witness. The physical presence of the defendant shall be governed by Rule 3.220(h)(6) below.

~~(4)~~(2) ~~If the defendant demands discovery under Section (a)(1)(ii), (x), (xi) of this Rule, the~~ The defendant shall disclose to the prosecutor and permit him to inspect, copy, test and photograph, the following information and material ~~which corresponds to that which the defendant sought and~~ which is in the defendant's possession or control:

(i) The statement of any person ~~whom the defendant expects to call as a trial witness~~ listed in section (d)(1), above, other than that of the defendant.

(ii) Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

(iii) Any tangible papers or objects which the ~~defense counsel~~ defendant intends to use in the hearing or trial.

~~Defense counsel~~ The defendant shall make the foregoing disclosures within fifteen days after receipt by him of the corresponding disclosure from the prosecutor. ~~Defense counsel~~ The defendant shall perform the foregoing obligations in any manner mutually agreeable to him and the prosecutor; or as ordered by the court.

The filing of a motion for protective order by the prosecutor will automatically stay the times provided for in this section. If a protective order is granted, the defendant may, within two days thereafter, or at any time before the prosecutor furnishes the information or material which is the subject of the motion for protective order, withdraw his ~~demand~~ notice of discovery and not be required to furnish reciprocal discovery.

(e) Restricting Disclosure. The court on its own initiative or on motion of counsel shall deny or partially restrict disclosures authorized by this Rule if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to either party.

(f) Additional Discovery. Upon a showing of materiality, the court may require such other discovery to the parties as justice may require.

~~(c)~~(g) Matters Not Subject to Disclosure.

(1) Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda, to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney, or members of his legal staff.

(2) Informants. Disclosure of a confidential informant shall not be required unless the confidential informant is to be produced at a hearing or trial, or a failure to disclose his identity will infringe the constitutional rights of the accused.

~~(d)~~(h) Discovery Depositions.

(1) Generally. At any time after the filing of the indictment or information the defendant may take the deposition upon oral examination of any person who may have information relevant to the offense charged. ~~The deposition shall be taken in a building where the trial may be held, such other place agreed upon by the parties or where the trial court may designate by special or general order.~~ ~~The~~ Subject to the provisions of this rule, a party taking ~~the~~ a deposition shall give reasonable written notice to each other party. The notice shall state the time and place the deposition is to be taken and the name of each person to be examined. After notice to the parties the court may, for good cause shown, extend or shorten the time and may change the place of taking. Except as provided herein, the procedure for taking such deposition, including the scope of the examination, shall be the same as that provided in the Florida Rules of Civil Procedure. Any deposition taken pursuant hereto may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. The trial court or its clerk shall, upon application, issue subpoenas for the persons whose depositions are to be taken. In any case,

including multiple defendant or consolidated cases, no person shall be deposed more than once except by consent of the parties, or by order of the court issued upon good cause shown. A resident of the State may be required to attend an examination only in the county wherein he resides, or is employed, or regularly transacts his business in person. A person who refuses to obey a subpoena served upon him may be adjudged in contempt of the court from which the subpoena issued.

(i) No defendant may take the deposition of a person designated under section (b)(1)(i) above unless an order has been entered by the trial court permitting the taking of said deposition based upon good cause shown by the defendant.

(ii) Abuses by either the prosecutor or the defendant in designating and seeking to take the depositions of those persons designated under 3.220(b)(1)(i) above are subject to the sanctions provision of this rule.

(iii) No deposition shall be taken in a case where the defendant is only charged with a misdemeanor or a criminal traffic offense when all other discovery provided by this rule has been complied with unless good cause can be shown to the trial court. In determining whether to allow a deposition, the court should consider the consequences to the defendant, the complexity of the issues involved, the complexity of the witness' testimony (e.g., experts) and the other opportunities available to the defendant to discover the information sought by deposition. However, this prohibition against the taking of depositions shall not be applicable if following the furnishing of discovery by the defendant the State then takes the statement of a listed defense witness pursuant to Florida Statute 27.04.

(2) Transcripts. No transcript of a deposition for which a county may be obligated to expend funds shall be ordered by a party unless it is: (a) agreed between the State and any defendant that the deposition should be transcribed and a written agreement certifying that the deposed witness is material or specifying other good cause is filed with the court, or (b) ordered by the court upon a showing that the deposed witness is material or upon showing of good cause. This rule shall not apply to applications for reimbursement of costs pursuant to Florida Statute 939.06 and Article I, Section 9 of the Florida Constitution.

(3) Place of Deposition. The deposition shall be taken in a building where the trial will be held, such other place agreed upon by the parties or such place as the trial judge, administrative judge, or the chief judge, may designate by special or general order.

(4) Depositions of Sensitive Witnesses. Depositions of children under the age of 16 shall be videotaped unless otherwise ordered by the court. The court may order the videotaping of a deposition or the taking of a deposition of a witness with fragile emotional strength to be in the presence of the trial judge or a special master.

(5) Witness Coordinating Office/Notice of Taking Deposition. If a witness coordinating office has been established in the jurisdiction pursuant to applicable Florida Statutes the deposition of any law enforcement officer should be coordinated through such office. The Witness Coordinating Office should attempt to schedule depositions of witnesses, especially law enforcement officers, at a time and place convenient for the witness and acceptable to counsel for both the defense and the prosecution.

(6) Defendant's Physical Presence. A defendant shall not be physically present at a deposition except upon stipulation of the parties or upon court order for good cause shown.

(i) The defendant may move the court for an order permitting physical presence of the defendant upon a showing of good cause. In ruling on such a motion, the court may consider the need for the physical presence of the defendant to obtain effective discovery, the intimidating effect of the defendant's presence on the witness, if any, and any cost or any inconvenience related to the defendant's presence.

(ii) In considering the defendant's motion to be physically present at a discovery deposition, the court may consider alternative electronic or audio/visual means to protect the defendant's ability to participate in discovery without his physical presence.

(7) Telephonic Statements. Upon stipulation of parties and the consent of the witness, the statement of a law enforcement officer may be taken by telephone in lieu of the deposition of the officer. In such case, the officer need not be under oath. The statement, however, shall be recorded and may be used for impeachment at trial as a prior inconsistent statement pursuant to the Florida Evidence Code.

~~(e)~~(i) Investigations Not to Be Impeded. Except as is otherwise provided as to matters not subject to disclosure or restricted by protective orders, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information (except the accused) to refrain from discussing the case with opposing counsel, or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

~~(f)~~(j) Continuing Duty to Disclose. If, subsequent to compliance with the rules, a party discovers additional witnesses or material which he would have been under a duty to disclose or produce at the time of such previous compliance, he shall promptly disclose or produce such witnesses or material in the same manner as required under these rules for initial discovery.

~~(g)~~(k) Court May Alter Times. The court may alter the times for compliance with any discovery under these rules upon good cause shown.

~~(h)~~(l) Protective Orders. Upon a showing of good cause, the court ~~may~~ shall at any time order that specified disclosures be restricted or deferred, that certain matters not be inquired into, or that the scope of the deposition be limited to certain matters, that a deposition be sealed and after being sealed be opened only by order of the court, or make such other order as is appropriate to protect a witness from harassment, unnecessary inconvenience or invasion of privacy, provided that all material and information to which a party is entitled must be disclosed in time to permit such party to make beneficial use thereof.

~~(i)~~(m) In Camera Proceedings. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing to be made in camera. A record shall be made of such proceedings. If the court enters an order granting the relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

~~(j)~~(n) Sanctions.

(1) If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order such party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

(2) Willful violation by counsel of an applicable discovery rule, or an order issued pursuant thereto, ~~may~~ shall subject counsel to appropriate sanctions by the court. Such sanctions may include, but are not limited to, contempt proceedings against the attorney, as well as the assessment of costs incurred by the opposing party, where appropriate.

(3) Every request for discovery or response or objection, including a notice of deposition made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and list his address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, or belief formed after a reasonable inquiry it is: (i) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (ii) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (iii) not unreasonable or unduly burdensome or expensive, given the needs of the case, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of this Rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the firm or agency with which the person is affiliated, the party on whose behalf the request, response, or objection is made, or any or all of the above, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

~~(k)~~(o) Costs of Indigents. After a defendant is adjudged insolvent, the reasonable costs incurred in the operation of these rules shall be taxed as costs against the county.

~~(l)~~(p) Pre-trial Conference. The trial court may hold one or more pre-trial conferences, with trial counsel present, to consider such matters as will promote a fair and expeditious trial. The accused shall be present unless he waives this in writing.

COMMENTS

3.220(a) The purpose of this change is to ensure reciprocity of discovery. Under the previous rule, the defendant could tailor discovery, demanding only certain items of discovery with no requirement to reciprocate items other than those demanded. A defendant could avoid reciprocal discovery by taking depositions, thereby learning of witnesses through the deposition process, and then deposing those witnesses without filing a demand for discovery. With this change, once a defendant opts to use any discovery device, the defendant is required to produce all items designated under the discovery rule, whether or not the defendant has specifically requested production of those items.

Former paragraph (c) is re-lettered (b). Under (b)(1) the prosecutor's obligation to furnish a witness list is conditioned upon the defendant filing a "Notice of Discovery."

Former paragraph (a)(1)(i) is re-numbered (b)(1)(i) and, as amended, limits the ability of the defense to take depositions of those persons designated by the prosecutor as witnesses who should not be deposed because of their tangential relationship to the case. This does not preclude the defense attorney or his investigator from interviewing any witness, including a police witness, about his or her knowledge of the case.

This change is intended to meet a primary complaint of law enforcement agencies, that depositions are frequently taken of persons who have no knowledge of the events leading to the charge, but whose names are disclosed on the witness list. Examples of these persons are transport officers, evidence technicians, etc.

In order to permit the defense to evaluate the potential testimony of those individuals designated by the prosecutor, their testimony must be fully set forth in some document, generally a police report.

(a)(1)(ii) is re-numbered (b)(1)(ii). This paragraph is amended to require full production of all police incident and investigative reports, of any kind, discoverable, provided there does not exist some independent reason for restricting their disclosure. The term "statement" is intended to include summaries of statements of witnesses made by investigating officers as well as statements adopted by the witnesses themselves.

The protection against disclosure of sensitive information, or information that otherwise should not be disclosed, formerly set forth in (a)(1)(i), is retained, but transferred to paragraph (b)(1)(xii).

The prohibition sanction is not eliminated, but is transferred to paragraph (b)(1)(xiii). "Shall" has been changed to "may" in order to reflect the procedure for imposition of sanctions specified in Richardson v. State, 246 So.2d 771 (Fla. 1971).

The last phrase of re-numbered paragraph (b)(2) is added to emphasize that constitutionally required Brady material must be produced regardless of the defendant's election to participate in the discovery process.

Former paragraph (b) is re-lettered (c).

Former paragraph (b)(3) and (4) are now included in new paragraph (d). An introductory phrase has been added to paragraph (d). Paragragh (d) reflects the change in nomenclature from a "Demand for Discovery" to the filing of a "Notice of Discovery."

As used in paragraph (d), the word "defendant" is intended to refer to the party rather than to the person. Any obligations incurred by the "defendant" are incurred by the defendant's attorney if the defendant is represented by counsel and by the defendant himself if the defendant is representing himself.

The right of the defendant to be present and to examine witnesses, set forth in re-numbered paragraph (d)(1), refers to the right of the defense, as party to the action. The term refers to the attorney for the defendant if the defendant is represented by counsel. The right of the defendant himself to be physically present at the deposition is controlled by new paragraph (h)(6).

Re-numbered paragraph (d)(2), as amended, reflects the new Notice of Discovery procedure. If the defendant elects to participate in discovery, the defendant is obligated to furnish full reciprocal disclosure.

Paragraph (e) was previously numbered (a)(4). This paragraph has been modified to permit the remedy to be sought by either prosecution or defense.

Paragraph (f) was previously numbered (a)(5) and has been modified to permit the prosecutor, as well as the defense attorney, to seek additional discovery.

Former paragraph (c) is re-lettered (g).

Former paragraph (d) is re-lettered (h). Re-numbered paragraph (h)(1) has been amended to reflect the restrictions on deposing a witness designated by the prosecution under (b)(1)(i) (designation of a witness performing ministerial duties only or one who will not be called at trial).

(h)(1)(i) is added to provide that a deposition of a witness designated by the prosecutor under (b)(1)(i) may be taken only upon good cause shown by the defendant to the court.

(h)(1)(ii) is added to provide that abuses by attorneys of the provisions of (b)(1)(i) are subject to stringent sanctions.

New paragraph (h)(1)(iii) abolishes depositions in misdemeanor cases except upon good cause shown.

A portion of former paragraph (d)(1) is re-numbered (h)(3). This paragraph now permits the administrative judge or chief judge, in addition to the trial judge, to designate the place for taking the deposition.

New paragraph (h)(4) recognizes that children and some adults are especially vulnerable to intimidation tactics. Although it has been shown that such tactics are infrequent, they should not be tolerated because of the traumatic effect on the child. The videotaping of the deposition will enable the trial judge to control such tactics. Provision is also made to protect witnesses of fragile emotional strength because of their vulnerability to intimidation tactics.

New paragraph (h)(5) emphasizes the necessity for the establishment, in each jurisdiction, of an effective Witness Coordinating Office. The Florida Legislature has authorized the establishment of such office through Florida Statute 43.35. This paragraph is intended to make depositions of witnesses and law enforcement officers as convenient as possible for the witnesses and with minimal disruption of law enforcement officers' official duties.

New paragraph (h)(6) recognizes that one of the most frequent complaints from child protection workers and from rape victim counselors is that the presence of the defendant intimidates the witnesses. The trauma to the victim surpasses the benefit to the defense of having the defendant present at the deposition. Since there is no right, other than that given by the rules of procedure, for a defendant to attend a deposition, the Florida Supreme Court Commission on Criminal Discovery believes that no such right should exist in those cases. The "defense," of course, as a party to the action, has a right to be present through counsel at the deposition. In this section, the word "defendant" is meant to refer to the person of the defendant, not to the defense as party. See comments to rule 3.220(d) and 3.220(d)(1).

Although defendants have no right to be present at depositions and generally there is no legitimate reason for their presence, their presence is appropriate in certain cases. An example is a complex white collar fraud prosecution in which the defendant must explain the meaning of technical documents or terms. Cases requiring the defendant's presence are the exception rather than the rule. Accordingly, (h)(6)(i)-(ii) preclude the presence of defendants at depositions unless agreed to by the parties or ordered by the court. These paragraphs set forth factors that a court should take into account in considering motions to allow a defendant's presence.

New paragraph (h)(7) permits the defense to obtain needed factual information from law enforcement officers by informal telephone deposition. Recognizing that the formal deposition of a law enforcement officer is often unnecessary, this procedure will permit such discovery at a significant reduction of costs.

Former paragraphs (e), (f), and (g) are re-lettered (i), (j), and (k), respectively.

Former paragraph (h) is re-lettered (l) and is modified to emphasize the use of protective orders to protect witnesses from harassment or intimidation and to provide for limiting the scope of the deposition as to certain matters.

Former paragraph (i) is re-lettered (m).

Former paragraph (j) is re-lettered (n).

Re-numbered (n)(2) is amended to provide that sanctions are mandatory if the court finds willful abuse of discovery. Although the amount of sanction is discretionary, some sanction must be imposed.

(n)(3) is new and tracks the certification provisions of federal procedure. The very fact of signing such a certification will make counsel cognizant of the effect of that action.

Paragraph (k) is re-lettered (o).

Paragraph (l) is re-lettered (p).

OVERTON, J., concurring specially.

I fully concur with the modifications in our discovery rule which address the problems and abuses that our commission objectively identified. We have made some major changes, which include restricting discovery in misdemeanors, limiting the defendant's presence at depositions, providing for protection of certain witnesses, and strengthening the sanctions for abuse of the discovery process. I find that three points should be mentioned.

The first concerns cost efficiency in discovery depositions. It would be inappropriate to address this matter in the rule because it is one which should be handled administratively. I strongly believe that all chief judges in this state should take the necessary steps to reduce deposition discovery costs by utilizing, to every extent possible, electronic reporting for criminal discovery depositions. The Eighth and Ninth Circuits have substantially reduced their costs by having such programs in place for years. Florida Rule of Judicial Administration 2.070(c) authorizes this practice.

Second, we have restricted discovery in misdemeanor cases because the process has been abused in these cases, especially in DUI matters. If law enforcement provides the defendant with a complete police report, including a full statement from the officer or officers who will testify as to the elements of the offense, then the fairness of these proceedings should not be adversely affected and the number of good cause hearings should be substantially reduced.

Third, it is important to understand that our discovery rule cannot be considered in a vacuum. Other rules are dependent upon full reciprocal discovery. For example, Florida Rule of Criminal Procedure 3.200, our notice of alibi rule, requires a defendant to furnish the state with specific information of where he claims to have been at the time of the offense and with the names and addresses of those persons who will support his alibi defense. The United States Supreme Court upheld this rule in

Williams v. Florida, 399 U.S. 78 (1970), because reciprocal discovery was available. On the other hand, the United States Supreme Court, in Wardius v. Oregon, 412 U.S. 470 (1973), found the same type of alibi rule unconstitutional on due process grounds because that state did not provide reciprocal discovery in its rules. Further, as we explained in Sparks v. State, 273 So. 2d 74 (Fla. 1973), and State v. Waters, 436 So. 2d 66 (Fla. 1983), our discovery rules have eliminated the necessity for a number of prior common law rules developed to assure a fair trial when no discovery existed. If the discovery rule is substantially changed, then how defendants are charged in indictments and informations would have to be modified since our "broad discovery" rule, as explained in Waters, eliminated the need for detailed specificity in informations and indictments.

All should agree that fairness is an essential ingredient in any justice system. While a great deal has been said about Florida being one of only a few states allowing discovery, nothing has been said concerning the fact that we are also one of the few states which permits prosecuting attorneys to subpoena witnesses to testify ex parte before them. As conceded by the statewide prosecutor during oral argument, only a few jurisdictions give prosecuting attorneys that authority.* In most jurisdictions, the prosecuting attorneys are limited in their subpoena power. Our discovery process was developed to bring fairness and efficiency to the criminal justice process in a manner that allows both sides to know what witnesses will say. The process is not only fair but, as most authorities agree, it is also more efficient because the number of guilty pleas is increased and the number of trials is significantly reduced.

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* It appears that only three other states authorize prosecuting attorneys to act in this fashion. See Ark. Stat. Ann. § 43-801 (1977); Kan. Stat. Ann. § 23.3101 (1981); La. Code Crim. Proc. Ann. art. 66 (West Supp. 1987).

I conclude that the court has properly modified the discovery rule.

GRIMES, J., concurring.

I write this opinion to explain my vote to eliminate depositions as a matter of course in misdemeanor and criminal traffic offense cases.

A defendant does not have a constitutional right to take depositions. A large majority of the other states do not permit him to do so. Nevertheless, I fully concur with the decision to continue to permit depositions in felony cases because of their role in ensuring fairness and the equal administration of justice. I also acknowledge that there are some misdemeanor and criminal traffic offense cases in which the taking of depositions may further the same objectives. However, the evidence presented to the Commission convinces me that the benefits to be derived from permitting unlimited depositions in those cases does not justify the expenditure of resources. According to the Commission's report:

> Although compiled data for the state do not exist, testimony from law enforcement officials has shown that the cost of the deposition process to law enforcement is substantial. In its survey of all sheriff's offices and police departments in the state, the Florida Department of Law Enforcement set out the dollar costs of depositions to these various departments. Although the report is less than clear as to the time frame involved in its survey, (the report merely states that this is an "annual" expenditure), and is also unclear as to the method used to compute the dollar amounts, the numbers are imposing.[64]
>
> Testimony to the commission from sheriffs and police chiefs demonstrated that the cost is substantial. Chief Melvin Tucker, Chief of Police in Tallahassee, testified that depositions drive up the cost of litigation for law enforcement agencies. Mr. John Fuller, attorney for the Florida Sheriff's Association, testified in Tallahassee that contract negotiations and the inflexibility of the Fair Labor Standards Act contribute to the expense by forbidding offices to use "comp time". Mr. Dan Condon, Legal Advisor to the Escambia County Sheriff's Department for the past three and one-half years, testified that the average officer spends 4 hours per month in deposition, that investigators spend 6 to 8 hours per month, and Personal Crimes Unit officers and Narcotics Unit officers spend 8 1/2 to 9

> hours per month in depositions. At its hearing in Tampa, the commission received valuable statistical data from Sgt. Will Brommelsick, with the Research and Planning Division of the Pinellas County Sheriff's Office and from Sgt. Lonnie Hill. Sgt. Brommelsick testified that his office spent over $50,000 on depositions alone, utilizing 3,300 man hours in processing 4,200 formal charges. Sgt. Hill described the impact of the process on the officers themselves, and pointed out that because of their assignments some officers are called to depositions far more frequently than are others, some officers on the DUI squad averaging two to three depositions per week. Chief Austin McLane of the Tampa Police Department summed it up when he stated that ". . . we just don't have the manpower and the budget to sometimes do what the criminal justice system needs to do." Chief Sid Klein, of the Clearwater Police Department, after pointing out that we are dealing with "big, big bucks," illuminated another facet of the problem when he pointed out that the data do not include the hours spent by police reviewing documents to prepare for depositions. Chief Joe Gerwens of the Fort Lauderdale Police Department testified that depositions for the past fiscal year cost his department $125,000 and that the cost projected for the current year was $150,000. He further pointed out that the labor contract with the police union required that a minimum of 2 hours pay be allotted whenever the officer is called for an off-duty deposition.
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> [64] The report indicates that $12,178,200 was spent on depositions, along with 748,230 manhours devoted to depositions. The report does not indicate whether the manhours were on-duty hours or off-duty hours.

Report of the Florida Supreme Court's Commission on Criminal Discovery, at 35-38 (Feb. 1, 1989) [hereinafter Commission Report] (footnotes 63, 65-73 omitted.)

Drawing the line between felonies and misdemeanors may be viewed as arbitrary, but it is a line that the legislature has drawn in prescribing lower penalties for less serious crimes. Moreover, the Commission's report indicates that much of the law enforcement officers' deposition time is spent in DUI cases, many of which do not involve the likelihood of incarceration. In addition, we have amended these rules to require the state to provide the defendant with the police reports in all cases.

Finally, upon a showing of good cause, the defendant can still take depositions even in misdemeanor and criminal traffic cases. It is also significant that while the Commission did not recommend the change, the Criminal Rules Committee approved it by an overwhelming vote.

The following portion of the separate statement of Commission member Donald M. Middlebrooks is well taken:

> An approach short of total abolition of discovery depositions is scrutiny of types of crimes or levels of punishment to determine whether depositions are appropriate. Depositions in certain types of cases may involve a particularly heavy cost in terms of resources compared to any increase in accuracy of the truth finding process. In other words, even if we accept that depositions are a good thing for the criminal justice system, it is reasonable to ask whether at some point the costs outweigh the benefits.
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> As noted above, the burden of discovery depositions weighs particularly heavy upon police agencies and particular persons within those agencies. Witness after witness before the Commission, for example, spoke of the impact of discovery upon DUI enforcement. . . . When a DUI officer spends more time in deposition and in court than on the streets you have to question our allocation of resources.
>
> Examination of Supreme Court records pertaining to criminal cases in recent years provides some data concerning the proportionate impact of types of cases upon the system:

	1986	1987	1988[7]
Def. Accused/ Felonies	135,539	148,061	128,333 (170,683)
Def. Accused/ Misdemeanors	408,564	445,785	347,747 (462,504)
Criminal Traffic Cases[8]	672,626	454,741	357,339 (475,260)
DUI Cases	75,121	71,507	47,395 (63,036)

> These figures show to some degree the relative impact of misdemeanors, and criminal traffic cases, particularly DUI cases upon the system. Curtailment of depositions in these cases should produce a significant lessening of the burden on police agencies. . . .

7/ 1988 figures are for the nine month period, 1/88-9/88. Annualized figures based upon the first nine months are enclosed in parentheses.

8/ Figures for criminal traffic cases are kept by number of violations rather than defendants.

Commission Report, Middlebrooks, Criminal Discovery in Florida -- A System Tilting Towards the Defense at 14-15.

KOGAN, J., concurring in part, dissenting in part.

Generally, if something is not broken, repairs are not necessary. I do not believe, as the State Attorneys of Florida argue, that the criminal discovery deposition system is broken. Accordingly, I would not attempt to fix it. While I agree that our system of taking discovery depositions needs some fine tuning as has been recommended by our Commission on Criminal Discovery and by The Florida Bar Criminal Rules Committee, I dissent from the provisions allowing prosecutors to limit the scope of available deponents and eliminating discovery depositions in misdemeanor and criminal traffic cases.

The state attorneys complain of widespread abuse of the discovery process by defense attorneys throughout the state. The testimony at proceedings conducted by the Supreme Court Discovery Rules Commission suggests that this is not the case. The Court's concern here is the efficient, fair, fiscally-sound administration of justice. While most of those who testified at the proceedings were primarily interested in gaining a tactical advantage for one side or the other, the one notable exception to this was the circuit judges, who clearly shared our interest in the fair and efficient administration of justice. Each judge who provided input stated, without reservation, that discovery depositions were vital to the administration of justice and that claims of abuse were significantly overstated.

It is eminently unfair that we allow all parties in civil proceedings full discovery before the adjudication of a property or financial dispute, while we limit a defendant's ability to conduct discovery in criminal proceedings where his or her life or liberty is at stake. It makes no logical sense to allow full discovery in civil cases but restrict discovery in criminal cases.

It is equally illogical to give prosecutors the discretion to determine which witnesses are relevant to a defendant's case and those witnesses who are not. Even assuming that a prosecutor

will always exercise this discretion in good faith, the prosecutor is not in a position to determine what is relevant to the defendant's case. Relevance is in the eye of the beholder, particularly when the beholder is an adversary. I firmly believe that a defendant should be allowed to determine which witnesses may be important to his or her case. Prosecutors cannot accurately predict or determine what a defendant's case will be. It is the function of a defendant's trial counsel to determine those matters that are important to the defendant's case. This is made more difficult under the new rule adopted by the majority.

Lastly, the elimination of discovery depositions in misdemeanor and criminal traffic cases is unfair to the defendant. The Commission listened to many hours of testimony and reached the conclusion that discovery depositions are an essential part of our criminal justice system in all cases, not merely felony cases. On the other hand, the Criminal Rules Committee considered the issue at one meeting, and without any testimonial or evidentiary support, concluded that depositions in misdemeanor and criminal traffic cases should be eliminated. I can see no basis for this conclusion, as none was ever presented, but I do see the great harm it will cause.

Depositions in misdemeanor and criminal traffic cases, as in all criminal cases, ferret out the frivolous cases, clarify the factual issues, and improve the efficiency of the system at the county court level. Their elimination will radically disrupt the fair and equitable administration of justice in misdemeanor and criminal traffic cases.

It is no coincidence that each county court judge who submitted evidence, correspondence, or testimony to the Commission fully supported the retention of discovery depositions, especially in misdemeanor and criminal traffic cases. It has been well documented that abolishing these depositions will result in further case overload that will place an insurmountable burden on the county courts, making their jobs

substantially more difficult. If the administration of justice is truly our ambition, these rules changes ignore that ambition.

Accordingly, I concur in part and dissent in part from the Court's adoption of the Commission's proposals. I would leave rule 3.220, as it pertains to discovery depositions in criminal cases, substantially unchanged.

SHAW and BARKETT, JJ., Concur

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