

77,946

IN THE SUPREME COURT OF FLORIDA

CASE NO:

**FILED**

SID J. WHITE

MAY 21 1991

CLERK, SUPREME COURT

By BAV  
Chief Deputy Clerk

IN RE: RULES OF  
CRIMINAL PROCEDURE

PETITION TO AMEND FLORIDA RULES OF  
CRIMINAL PROCEDURE 3.370(b)

The Florida Rules of Criminal Procedure Committee hereby petitions this Court to amend Florida Rules of Criminal Procedure 3.370(b), and in support thereof states the following:

I

BACKGROUND

There is not now, nor has there ever been, a requirement that a jury be sequestered during a trial. It has rested in the sound discretion of the Court, if the Court finds sequestration is necessary to avoid the effect of outside influence upon the verdict. If not sequestered during the trial, R.Cr.P. 3.370(b) provides that prior to beginning their deliberation, a jury may be permitted to separate. However, the rule is silent as to whether a jury, once deliberations have begun, may be permitted to separate.

In Livingston v. State, 458 So.2d. 235 (Fla. 1984), the Supreme Court clearly stated the position that in capital cases, once deliberations have begun, the jury must be sequestered

until it either reaches a verdict or is discharged if unable to do so. (App. 1)

Finding that the Defendant's right to a trial by an impartial jury must be safeguarded, the Court stated that in a capital case absent exceptional circumstances of emergency, accident or other special necessity, if a jury separates once deliberations have begun, a mistrial will generally be necessitated.

Having established the need to have exceptional circumstances before permitting a jury in a capital case to separate during deliberations, two years later the Court was faced with Brookings v. State, 495 So.2d. 135 (Fla. 1986). (App. 6) Following approximately three hours of deliberation, at about midnight, the trial judge asked if either side objected to recessing the jury until the following morning. Hearing no objections from either side, the judge strictly admonished the jury, and permitted them to go home. Upon conviction, the Defendant sought reversal based upon Livingston, infra. The Supreme Court held that counsel cannot acquiesce in such a procedure, then claim reversible error.

The Livingston and Brookings rule did not specifically address non-capital cases. Hence, it appeared that, in such cases, the restrictions upon separation of the jury may not be absolutely necessary. However, later that year, the Court extended the holding of Livingston and Brookings to non-capital

cases, as well.

In Taylor v. State, 498 So.2d. 943 (Fla. 1986), it became clear that there was to be no distinction between capital and non-capital cases on this issue. (App. 17)

## II

### NECESSITY FOR CHANGE

Rule 3.370(b) reads as follows:

(b) SEPARATION AFTER SUBMISSION OF CAUSE.

Unless the jurors have been kept together during the trial the court may, after the final submission of the cause, order that the jurors may separate for a definite time to be fixed by the court and then reconvene in the courtroom before retiring for consideration of their verdict.

The current rule does not specifically address the issues which were raised by Livingston or its progeny. It speaks only to the period before deliberations begin and is silent on the matter of when, if ever, a jury may separate once deliberations have begun. In order to conform the rule to the case law, it is necessary to delete the current rule and replace it with language that clearly delineates the Court's holdings.

The current rule is also silent about bifurcated trials. While the Court has specifically refused to apply Livingston to the period between the guilt and penalty phase, nothing in the current rule suggests this.

## III

### PROPOSED CHANGE

The proposed rule contains completely new language. It

reads:

(b) SEPARATION OF JURY AFTER SUBMISSION OF CAUSE.  
Absent exceptional circumstances of emergency, accident or other special necessity or unless sequestration is waived by the State and the Defendant, once the jurors have retired for consideration of their verdict, they must be sequestered until such time as the jurors have reached a verdict or have otherwise been discharged by the Court.

The proposed rule tracks the language of Livingston, adopts the principle enunciated in Brookings and makes no distinction between capital and non-capital cases as required by Taylor. It was felt by the Committee that the proposal also addresses, by inference, the ruling in Banda v. State, 536 So.2d. 221 (Fla. 1988), which deals with separation between the guilt and penalty phase of a capital case.

#### IV

#### EXPRESSED CONCERNS

While it would appear that amending this rule to conform to case law would raise few concerns other than drafting problems, such is not the case.

The Rules of Criminal Procedure Committee began its study of this proposal in September 1989.

At the June 14, 1990 meeting of the Rules of Criminal Procedure Committee, the subcommittee reported to the full Committee. The first proposed rule was voted upon, but failed to receive a 2/3 vote favoring passage. The vote was 15 for and 10 opposed. (App. 23-24) The matter was referred back to the subcommittee. The subcommittee was concerned with many issues,

including the cost impact to small counties/circuits should this rule continue in place. (App. 27)

At the Rule of Criminal Procedure Committee meeting of January 25, 1991, the amended proposed change was again presented to the Committee. (App. 33) It was passed by a vote of 34-0.

Once more, however, the Committee expressed its concerns. By a vote of 19 for and 14 against, it was moved that the Supreme Court be advised that the rule change was only being presented because the case law mandated such a change.

...however the Court is advised that a segment of the Committee urges the Court to require sequestration in capital cases only and recede from the requirement of sequestration in non-capital cases; (App. 34)

On March 21, 1991, the proposed rule change was presented to the Board of Governors, The Florida Bar, for consideration. The proposal was unanimously approved by a vote of 27-0.

## V

### CONCLUSION

Sequestration of jurors in non-capital cases constitutes a great expense for the counties. In multi-county rural circuits, it is frequently quite difficult to obtain suitable facilities in which to sequester a jury. The Committee, therefore, would

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The Jury Management Steering Committee, appointed by the Supreme Court, has also requested the Court to recede from it holding in Taylor v. State. The Criminal Procedure Rules Committee agrees with the Committee Note contained in their report. (App. 48-49)

urge the Court to recede from its ruling in Taylor v. State,  
498 So.2d. 943 (Fla. 1986).

Should the Court decline to do so, the Committee believes  
the proposed change in Rule 3.370(b) expresses the intent of the  
Court as contained in the cases cited herein, thus conforming  
the rule to current case law.

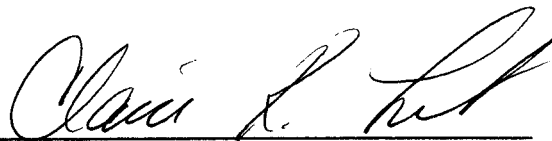
WHEREFORE the Criminal Procedure Rules Committee  
respectfully requests that the Court amend Florida Rule of  
Criminal Procedure 3.370(b), as discussed in this petition.

Respectfully submitted,



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