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FILED

SID J. WHITE

NOV 3 1993

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN RE:

EMERGENCY PETITION TO AMEND
FLORIDA RULES OF CRIMINAL
PROCEDURE 3.170 AND 3.700.

CASE NO. 82,529

_____ /

COMMENTS ON EMERGENCY PETITION TO AMEND
FLORIDA RULES OF CRIMINAL PROCEDURE 3.700

The undersigned, a member of The Florida Bar, respectfully submits the following comments on the proposed amendment to Rule 3.700(c), Florida Rules of Criminal Procedure ("Rule 3.700(c)").

The proposed amendment makes clear that Rule 3.700(c) does not apply to capital cases. As amended, however, the text of the rule will make no provision on the procedure to be followed in capital cases. The only reference to capital cases is in the Committee Note, which states that the procedure detailed in Corbett v. State, 602 So. 2d 1240 (Fla. 1992), is to be followed in capital cases.

Rather than incorporate the Corbett case by reference, the court should adopt a clear, concise statement of the rule it intends to apply in capital cases and place the rule within the body of Rule 3.700(c). In that way, the focus of any later interpretative effort will be on the rule rather than on the opinion, and the need to make reference to a document outside the rules merely to determine the content of the rule will be avoided. Including the rule for capital cases within the text of Rule 3.700(c) will reduce the risk of trial court error and the consequent need for reversal and retrial.

The proposed amendment, by tacitly allowing the Committee Note to

define the procedure to be followed in capital cases, effectively makes the Committee Note part of the rule. While Committee Notes are often helpful in interpreting the rules, Committee Notes should not serve to modify or supplement the express language of the rule.

For the purpose of implementing what I perceive to be the intent of the Corbett case, I respectfully suggest that Rule 3.700(c) be amended and restated to read as follows:

(c) **Sentencing Judge.**--

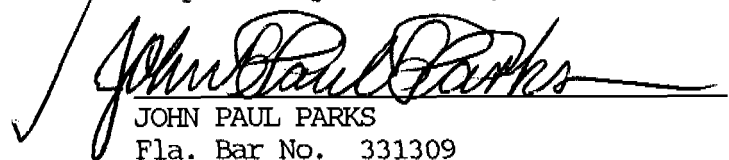
(1) **Non-Capital Cases.** In any case, other than a capital case, in which it is necessary that sentence be pronounced by a judge other than the judge who presided at trial or accepted the plea, the sentencing judge shall not pass sentence until the judge becomes acquainted with what transpired at the trial, or the facts, including any plea discussions, concerning the plea and the offense.

(2) **Capital Cases.** In a capital case, a judge who is substituted before the penalty phase is completed must conduct a new sentencing proceeding before a jury.

See Corbett v. State, 602 So. 2d 1240, 1244 (Fla. 1992).

I CERTIFY that a copy hereof was mailed to Mr. John F. Harkness, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 1st day of November, A.D. 1993.

Respectfully submitted,



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