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IN THE SUPREME COURT OF FLORIDA

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COMMENTS ON THE FLORIDA SUPREME COURT'S PROPOSED RULE OF CRIMINAL PROCEDURE 3.202 AND THE COURT'S OPINION OF MAY 4, 1995.

I. Comments on Proposed Rule 3.202

A. Introduction

The Florida Public Defenders' Association feels the proposed rule is fraught with problems. The most egregious problem is the requirement of revealing mental mitigation prior to the guilt phase. Section B will discuss these problems. The Florida Public Defenders' Association opposes compelled mental health evaluations when the defense is introducing mental health evidence for the penalty phase only. Such examinations are unnecessary and violate the Fifth and Sixth Amendments. Section C will discuss our opposition to this concept.

B. Problems With The Proposed Rule

The Court's current proposal is far worse than the interim proposal adopted in Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994). This proposal aggravates the Fifth and Sixth Amendment problems outlined in Section C. It also undercuts many of the premises of this Court in Dixon v. State, 283 So. 2d 1 (Fla. 1973) concerning the advantages of a defendant of a bifurcated proceeding. The present rule also contains many areas that are vague and potentially dangerous. The interim proposal adopted in Dillbeck, supra (and proposed by the Criminal Procedure Rules Committee) makes some attempt to accom-

modate Fifth and Sixth Amendment concerns and recognizes the bifurcated nature of the case outlined in Dixon. The committee proposal requires a defendant list his penalty phase mental health expert after the guilt phase. It was only then that the expert could be deposed and a compelled mental health examination could take place.

The current proposal requires the defendant to list penalty phase mental health experts prior to the guilt phase. It also requires the defendant to list the statutory and non-statutory mental mitigators prior to the guilt phase. This is contrary to the teaching of Gregg v. Georgia, 423 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and Dixon, supra. In Gregg, the United States Supreme Court explained that materials which were irrelevant and even prejudicial at guilt phase could come in at the penalty phase and that this is why we have a bifurcated procedure:

> Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question. This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure -- one in which the question of sentence is not considered until the determination of guilt has been made -- is the best answer. The drafters of the Model Penal Code concluded:
>
> > "[If a unitary proceeding is used] the determination of punishment must be based on less than all the evidence that has a bearing on that issue, such for example as a previous criminal record of the accused, or evidence must be admitted on the ground that it is relevant to sentence, though it would be excluded as irrelevant or prejudicial with respect to guilt or innocence alone. Trial lawyers understandably have little confidence in a solution that admits the evidence and trust to an instruction to the jury that it should be considered only in determining the penalty and disregarded in assessing guilt.
> >
> > "... The obvious solution ... is to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction,

> but once guilt has been determined opening the record to the further information that is relevant to sentence. This is the analogue of the procedure in the ordinary case when capital punishments is not in issue; the court conducts a separate inquiry before imposing sentence." ALI, Model Penal Code § 201.6, Comment 5, pp. 74-75 (Tent. Draft No. 9, 1959). See also *Spencer v. Texas*, 385 U.S. 554, 567-569, 87 S.Ct. 648, 655-567, 17 L.Ed.2d 606 (1967); Report of the Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, ¶¶ 555, 574; Knowlton, Problems of Jury Discretion in Capital Cases, 101 U.Pa.L. Rev. 1099, 1135-1136 (1953). When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.

428 U.S. at 190-192.

This premise was central to the United States Supreme Court's holding that the death penalty was constitutional.

This Court also relied on this type of analysis in holding Florida's death penalty to be constitutional in Dixon, supra.

> The question of punishment is reserved for a post-conviction hearing so that the trial judge and jury can hear other information regarding the defendant and the crime of which he has been convicted before determining whether or not death will be required. Both the State and the defendant are allowed to present evidence at the hearing, evidence which might have been barred or withheld from a trial on the issue of guilt or innocence.

283 So. 2d at 7.

The requirement that a defendant reveal the nature of any statutory or non-statutory mental mitigation prior to guilt phase is contrary to the premise of Gregg and Dixon and creates impossible Fifth and Sixth Amendment problems. Both of the statutory mental mitigating circumstances relate to a defendant's mental condition at the time of the crime. Fla. Stat. 921.141(6)(b)(f). Many non-

statutory mental mitigating circumstances relate to the defendant's mental state at the time of the offense.

The procedure proposed by this Court would make it virtually impossible to pursue a claim of innocence at the guilt phase and to pursue any form of mitigation concerning mental state at the time of the offense. Indeed, the statutory mental mitigating circumstances and the non-statutory mental mitigating circumstances relating to a defendant's mental state at the time of the offense all presuppose the defendant's commission of the offense. Both Gregg and Dixon uphold the constitutionality of the death penalty based on a bifurcated procedure in which a defendant is completely free to pursue a guilt phase defense and also free to pursue all forms of mitigation, including those relating to mental state at the time of the offense.

The requirement of revealing mental mitigation prior to guilt phase creates severe Fifth and Sixth Amendment problems. Counsel is faced with the dilemma of pursuing a guilt phase defense and abandoning mitigation concerning mental state at the time of the offense or pursuing mental mitigation and virtually abandoning his client at the guilt phase, sabotaging his guilt phase defense, or even (directly or indirectly) helping the State prove its case at the guilt phase. This is a stark violation of the Fifth and Sixth Amendments. Revealing mental mitigation prior to guilt phase will inevitably lead the prosecution to evidence which will help convict the defendant. This Court should abandon any rule which requires the defendant to reveal mental health evidence prior to guilt phase.

The requirement that the defendant list the statutory and non-statutory mental mitigators prior to guilt phase is also completely unnecessary. The purpose of the early listing seems to be to allow

the prosecution to hire its mental health expert so that the compelled evaluation can take place soon after the conclusion of the guilt phase in order to reduce the time between phases. However, this same purpose could be achieved with a simple notice of intent to present mental mitigation without requiring the nature of the mitigation or the name of the expert. This would put the State on notice that it needed to hire an expert and have the expert ready at the conclusion of the guilt phase.

Assuming arguendo this Court feels that a defendant must reveal mental mitigation prior to the guilt phase, the present rule contains many areas that are unworkable, one-sided, and/or vague. The requirement that a defendant reveal the name of his mental health expert and mental "no later than 45 days" prior to the guilt phase is completely unworkable. The unworkability of such a rule has been implicitly recognized by this Court in the insanity context. Morgan v. State, 453 So. 2d 394 (Fla. 1984). In Morgan, supra, defense counsel filed a notice of intent to rely on insanity with a statement of particulars 14 days before trial. Id. at 396. (The trial date had been previously continued.) Id. The trial court struck the insanity defense as untimely. This Court reversed and held this to be a "clear due process violation under both the federal and state constitutions." Id. at 397.

A rule requiring disclosure of penalty phase mitigation "no later than 45 days" before guilt phase is far more unreasonable than the trial court's order held to be a due process violation in Morgan, supra. It is rare that a defendant will know 45 days before guilt phase who his penalty phase mental health expert will be and the nature of his mental mitigation. First, the date of the trial is

often continued within 45 days of the original trial date upon motion of the defense or prosecution or by order of the court. More importantly, it is often only after guilt phase that defense counsel often comes to a final decision as to what mental mitigation to utilize. This often depends on the final composition of the jury, their answers to questions on voir dire, the exact nature of the guilt phase evidence, judicial rulings during trial concerning evidence and/or argument, the length of the guilt phase deliberations, jury questions during deliberations, and the jury's verdict on other counts. It is impossible to know "no later than 45 days" before guilt phase what mental mitigation the defense will use. Indeed, this decision can be made only after the guilt phase.

This aspect of the proposed rule will lead to extensive litigation. The proposed rule states that the mental mitigation must be disclosed "no later than 45 days before trial." It is unclear whether a trial judge can set an even earlier deadline. The rule is also unclear as to what, if any, the sanctions are for "late" disclosure. The unworkability of a requirement of listing mental mitigation witnesses and the specifics of mental health testimony 45 days is further demonstrated by a comparison to Fla.R.Crim.P. 3.200 (requiring notice of alibi 10 days before trial) and Fla.R.Crim.P. 3.201 (requiring notice of battered-spouse syndrome 30 days before trial). Both of these involve guilt phase defenses and require less notice to the State than the proposed rule which requires penalty phase testimony only. This aspect of the proposed rule will inevitably lead to more litigation like Morgan concerning unreasonable deadlines and/or unduly harsh sanctions.

The proposed rule takes a completely one-sided approach. The proposed rule imposes a duty on the defense to reveal the names of any mental health experts and the nature of all statutory or non-statutory mental mitigating circumstances "no later than 45 days before the guilt phase." However, it imposes no corresponding duties and/or time limits on the State. It imposes no time limits on the State as to when it must decide whether to seek the death penalty. It imposes no duty on the prosecution to reveal aggravating factors or what evidence will be relied on in support of these factors. Indeed, both this Court and the Fifth Circuit Court of Appeals have held that the State is not required to provide notice of aggravating factors. Mines v. State, 390 So. 2d 332 (Fla. 1980); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). If the goal is a "level playing field" these would be minimal requirements. It imposes no duty on the State to reveal whether it intends to introduce victim impact evidence pursuant to Fla. Stat. 921.141(7) and the nature of such evidence. It also imposes no duty on the prosecution to reveal its mental health expert and the nature of its rebuttal to the mental mitigation proposed by the defense. This would also be essential to a "level playing field." The proposed rule implements a form of discovery which is completely one-sided in favor of the prosecution.

The proposed rule also allows the sanction of excluding mental mitigation. This sanction violates the United States Constitution. The United States Supreme Court has repeatedly held that the Eighth Amendment requires the sentencer to consider all relevant mitigating circumstances. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Skipper v. North Carolina, 476 U.S. 1, 106 S.Ct.

1669, 90 L.Ed.2d 1 (1986); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). The exclusion of mental mitigation based on the refusal to submit to a compelled mental evaluation would be in violation of the Eighth Amendment. Exclusion must be eliminated as a possible sanction.

The proposed rule leaves several crucial areas unclear. This Court's opinion and the proposed rule do not clarify the broader question of penalty phase discovery. The opinion contrasts this Court's proposal with the committee's proposal as follows:

> We recognize the effort the rules committee obviously put into its comprehensive proposal. However, after giving the matter much consideration, we believe a more narrowly drawn rule that "levels the playing field" in a capital case simply by providing a procedure whereby a State expert can examine a defendant who intends to present expert testimony of mental mitigation is preferable.

Slip Opinion at p.3

This seems to imply that there is no penalty phase discovery by describing the proposal as a more narrow one dealing with mental mitigation. However, this Court's opinion also contains the following footnote:

> The proposed rule will not relieve the parties of the continuing duty to disclose witnesses under Florida Rule of Criminal Procedure 3.220(j).

Id. at 3.

This footnote seems to imply that there is penalty phase discovery. Thus, this Court's opinion seems to continue the uncertainty as to whether there is penalty phase discovery, what triggers it, and when it occurs. Compare Mines v. State, 390 So. 2d 332, 336 (Fla. 1980) (no need for notice of aggravators due to discovery rules) with Maxwell v. State, 443 So. 2d 967, 970 (Fla. 1983) (no reversible error in refusing to permit penalty phase discovery).

This broader confusion directly affects the proposed rule on mental mitigation. The proposed rule makes clear that the names of the defense mental health experts must be revealed at least 45 days before the guilt phase. The proposed rule is unclear whether the expert can be deposed or whether any reports must be revealed. Any rule should explicitly prohibit this. The deposing of the defense mental health professional or the revealing of any reports could directly undercut the guilt phase defense and aggravate existing Fifth and Sixth Amendments problems.

The proposed rule also contains no prohibition against the use of information learned through the procedures created by this rule to prove aggravators or to prove guilt in this case or in a re-trial. The use of information obtained from a compelled mental health evaluation to prove aggravators clearly violates the Fifth and Sixth Amendments. Bradford, supra; Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) ("the State must make its own case for future dangerousness". 451 U.S. at 468). The use of penalty phase discovery to prove guilt also violates the Fifth and Sixth Amendments. Lovette v. State, 636 So. 2d 1304, 1308-1309 (Fla. 1994). Any rule must explicitly prohibit this.

The proposed rule also allows the attendance of defense counsel at the examinations. However, it provides no procedure for counsel to make objections to questions during the examination and for a ruling on those questions.

The proposed rule is fraught with problems. Most importantly, it violates the United States and Florida Constitutions. It fails to recognize the bifurcated nature of the proceeding. Thus, it violates a core premise of both Gregg and Dixon. It is actually a step

backward from the Committee's proposal, adopted as an interim measure in Dillbeck, supra. This proposal should be abandoned.

C. Problems With Compelled Mental Evaluations

The proposed rule is based on a perceived need to "level the playing field" in capital sentencing. See Burns v. State, 609 So. 2d 600, 606 (Fla. 1992); Dillbeck, supra. This assertion is put forward without any empirical evidence of the prosecution being handcuffed in its ability to obtain death sentences. Indeed, the objective evidence is to the contrary. Only Texas has executed more people than Florida in the post-Furman era. Only Texas and California have sentenced more people to death. (Both of these states have far larger populations.) Indeed, there is no evidence that prosecutors have had any problem in obtaining death sentences or in carrying out executions.

The particular area in which this Court seems to feel there is a need to level the playing field is in terms of rebutting mental mitigation. Once again, there is no objective evidence that the prosecution has had any difficulty in rebutting false claims of mental mitigation. Indeed, there has been no evidence that "spurious" claims of mental mitigation have resulted in "unwarranted" life sentences.

This Court's perceived need to "level the playing field" in terms of rebutting mental mitigation seems to be based on analogies to the State's need to rebut an insanity defense or a claim of battered spouse syndrome. See Dillbeck, supra, at p.1030-1031. These analogies, while superficially attractive, are fundamentally flawed. Insanity and self-defense (explained by the battered-spouse syndrome) are complete defenses. The jury is faced with a choice of returning a verdict of guilty or not guilty. In this context, the concept of a "level playing field" is very persuasive. Society has a tremendous

interest in seeing that innocent persons are acquitted and in seeing that persons guilty of serious, violent crimes are incarcerated.

The penalty phase of a capital case poses different issues. The sentencers (judge and jury) are faced with a very different choice. The choice is between a sentence of death and a sentence of life without parole. Fla. Stat. § 921.141 (1994). Thus, the societal interests are very different. The prosecution has, in essence, already won the case. It has already been decided that the defendant is to be removed from society forever. There is no fear, as in the insanity or self-defense (based on battered spouse syndrome) situations, that a person, guilty of a serious offense, may be released. The erroneous imposition of the death penalty is obviously a tremendous social evil. The erroneous imposition of a sentence of life without parole when the defendant "deserves" the death penalty is of little social import. The perceived need to "level the playing field" is not supported by any evidence and seems to be based on a false analogy.

Both this Court and the United States Supreme Court have recognized that the death penalty is a unique punishment requiring a higher standard of due process pursuant to the Florida and United States Constitutions. Dixon, supra; Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). In Dixon, supra, this Court premised its holding that the death penalty was constitutional based on these additional protections. Id. at 7-11.

In Woodson, supra, the United States Supreme Court explained the need for this higher level of due process protections.

> The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its

> finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

428 U.S. at 305 (footnote omitted). Any proposed rule change must be guided by these concepts.

Assuming arguendo, there is some legitimate need to "level the playing field" in terms of mental mitigation, compelled mental evaluations are not the proper remedy. This idea violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

The Texas Court of Criminal Appeals has explicitly held that ordering a compelled mental health evaluation, when a defendant seeks to introduce the testimony of a penalty phase mental health expert who has examined him, violates the Fifth and Sixth Amendments to the United States Constitution. Bradford v. State, 873 S.W.2d 15 (Tex. Cr.App. 1993), cert. denied, Texas v. Bradford, ___ U.S. ___, 115 S.Ct. 311, ___ L.Ed.2d ___ (1994). In Bradford, the defense put on no mental health testimony as to competency or sanity. 873 S.W.2d at 16. However, in the penalty phase, defense counsel intended to call a mental health expert (Dr. Wettstein) who had examined the client. Id. The trial court ruled that the defense expert could not testify to any matters which were based on his examination of the defendant, unless the defendant submitted to a compelled mental examination by the prosecution's expert (Dr. Grigson). Id. at 16-17.

The Texas Court of Criminal Appeals held this procedure to be in violation of the Fifth and Sixth Amendments to the United States Constitution. Id. at 20. The Court stated:

The Fifth Amendment to the United States Constitution provides, among other things, that "[n]o person ... shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend V. It is very well-settled that this protection applies to defendants facing examinations seeking to elicit evidence to prove future dangerousness under Texas capital sentencing procedures. *Estelle v. Smith, supra*. Thus, if appellant's statements made during the Grigson examination were compelled, then the above-quoted Fifth Amendment protection would have been violated in admitting into evidence Dr. Grigson's testimony based upon such statements.

Appellant vociferously objected to being ordered to submit to the Grigson examination. He specifically stated that he was acquiescing merely because the trial court was making the admissibility of evidence which he wanted to present be contingent upon submitting to such examination. Appellant insisted, and the trial court acknowledged, that such acquiescence was not waiving his claim of error in being coerced into a position of making such a choice.

We note that the United States Supreme Court, admittedly in a different context, has recognized that "an undeniable tension is created" when a defendant must choose between the pursuit of one benefit under the Constitution and the waiver of another. *Simmons v. U.S.*, 390 U.S. 377, 394, 88 S.Ct. 967, 976, 19 L.Ed.2d 1247, 1259 (1968). In *Simmons*, that defendant (actually named Garrett) had testified at his unsuccessful suppression hearing, whereupon the State thereafter presented that testimony at the trial on the merits. *Id.* at 389, 88 S.Ct. at 973, 19 L.Ed.2d at 1256. Under those circumstances, the Court said, "[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394, 88 S.Ct. at 976, 19 L.Ed.2d at 1259. The Fifth Amendment privilege "is a bar against compelling 'communications' or 'testimony'...." *Schmerber v. California*, 384 U.S. 757, 764, 88 S.Ct. 1826, 1832, 16 L.Ed.2d 908, 916 (1966). That privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will. *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653, 659 (1964); *Miranda v. Arizona*, 384 U.S. 436, 460, 86 S.Ct. 1602, 16 L.Ed.2d 694, 715 (1966). Thus, a defendant has the right to remain silent and not discuss his case with anyone.

The *Simmons* rationale appears analogous in the instant cause. The trial court's requirement, at the State's urging, that appellant submit to the Grigson examination forced him, in effect, to choose between exercising his Fifth Amendment right against self-incrimination and Sixth Amendment right to effective assistance of counsel. Like the United States Supreme Court, we find such coercion to be intolerable.

> This Court has specifically held that a trial court does not have the authority to appoint a psychiatrist for the purpose of examining a defendant for evidence relating solely to his future dangerousness, and that doing so was error. *Bennett v. State*, 742 S.W.2d 664, 671 (Tex.Cr.App. 1987), *vacated and remanded on other grounds*, 486 U.S. 1051, 108 S.Ct. 2814, 100 L.Ed.2d 917 (1988), *reaffirmed*, 766 S.W.2d 227 (Tex.Cr.App. 1989), *cert. denied*, 492 U.S. 911, 109 S.Ct. 3229, 106 L.Ed.2d 578 (1989)....
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> In light of the above authority, we conclude that the trial court's action in making the admissibility of portions of Dr. Wettstein's proffered testimony contingent upon appellant submitting to an examination by a State-selected expert was erroneous and such violated the Sixth Amendment to the United States Constitution. And under these circumstances the admission of Dr. Grigson's testimony based upon his examination of appellant violated appellant's Fifth Amendment right against self-incrimination.

Id. at 19-20.

The Texas Court of Criminal Appeals also explicitly rejected the State's claim that by introducing mental health testimony at the penalty phase, Mr. Bradford had waived his Fifth Amendment privilege. The Court stated:

> The State also claims that "[b]y introducing evidence of two psychiatric evaluations, then, [a]ppellant clearly waived his Fifth Amendment rights in the instant case." It cites language in several United States Supreme Court cases in support of that proposition, specifically *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987); and *Powell v. Texas*, 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989).
>
> *Estelle v. Smith* involved a defendant's Fifth and Sixth Amendment rights under the United States Constitution being abridged by the State's introduction of psychiatric testimony at punishment because of the failure to administer warnings to that defendant prior to the examination which elicited incriminating statements that the failure to notify defense counsel that the examination would encompass the future dangerousness issue. *Estelle v. Smith, supra*. In light of the facts in the instant case not involving any lack of such warnings or notice, *Smith* is not entirely analogous. However, the State cites language in *Smith* which states that a criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. *Estelle v. Smith*, 451

> U.S. at 468, 101 S.Ct. at 1876, 68 L.Ed.2d at 372. The State suggests that such language implies that a capital defendant might waive his Fifth Amendment privilege by introducing psychiatric evidence. However, we observe that *Smith* then indicated that if, after being properly warned, such a defendant refused to answer an examiner's questions, a validly ordered competency examination could proceed but on the condition that the results be applied solely for that purpose; in other words, "the State must make its case on future dangerousness in some other way." *Id.*
>
> The State also points to language in *Buchanan v. Kentucky*, 483 U.S. at 422, 107 S.Ct. at 2917, 97 L.Ed.2d at 355, which after discussing language from *Smith* regarding a defendant asserting an insanity defense and introducing supporting psychiatric testimony, states the logical proposition that if a defendant requests such an evaluation or presents psychiatric evidence, then at the very least, the State may rebut this presentation with evidence from reports of the examination that the defendant himself requested; i.e. the defendant would have no Fifth Amendment privilege against the introduction of that psychiatric testimony by the prosecution. Again however, it is undisputed that none of the examinations in the instant cause were for the purpose of determining competency or sanity issues.
>
> The State also cites *Powell*, apparently based upon its language suggesting that "it m[ight] be unfair to the State to permit a defendant to use psychiatric testimony without allowing the State a means to rebut that testimony[.]" *Powell v. Texas*, 492 U.S. at 685, 109 S.Ct. at 3149, 106 L.Ed.2d at 556. However, the Supreme Court was clearly speaking in the context of a defendant raising a "mental-status defense." *Id.* As noted previously, it is undisputed that the examination in the instant cause were not for the purpose of determining competency or sanity issues; thus, there was no "mental-status" defense raised and the Grigson examination was not ordered as rebuttal to such a defense.

Id. at 18-19.

The Bradford Court correctly notes the critical distinction between the use of expert mental health testimony as to competency or sanity and its use at a penalty phase. The Bradford Court correctly holds that conditioning use of expert mental health testimony at the penalty phase upon a compelled exam by the State's mental health expert

violates the Fifth and Sixth Amendments to the United States Constitution.[1]

II. Recommendations of the Florida Public Defenders Association

In addition, to the above-styled comments concerning this Court's proposed rule and opinion, the Association would offer the following recommendations.

A. Mental Mitigation

1. This Court should reject any form of compelled penalty phase mental health evaluation as the Texas Court of Criminal Appeals did in Bradford, supra.

2. If there is to be any form of discovery of defense mental health evidence it should be after guilt phase.

B. Discovery

1. Any penalty phase discovery should take place after the guilt phase.

2. There should be explicit guidelines against the use of penalty discovery to prove aggravation, or as evidence of guilt in the current, or in a re-trial.

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[1] It should also be noted that the fact Texas refuses to allow compelled mental evaluations at the penalty phase is perhaps the best argument that compelled mental evaluations are not necessary to "level the playing field" in terms of mental mitigation. In Texas, a defendant can present expert mental health testimony at the penalty phase without a compelled mental health evaluation by a state or court expert. Despite this, Texas has the largest number of post-Furman executions and the largest death row population in the country.

3. This Court should recognize the bifurcated nature of the proceeding by holding that discovery is separately invoked. This Court should set up a procedure whereby defense counsel can invoke discovery for guilt phase, penalty phase, both, or neither.

Respectfully submitted,

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