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SUPREME COURT OF FLORIDA

NO. 84,273

AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.220 - DISCOVERY (3.202 - EXPERT TESTIMONY OF MENTAL MITIGATION DURING PENALTY PHASE OF CAPITAL TRIAL)

COMMENTS OF THE
FLORIDA BAR CRIMINAL
PROCEDURE RULES COMMITTEE

The undersigned chair of the Florida Bar Criminal Procedure Rules Committee respectfully submits these comments in response to this Court's order of May 4, 1995.

During a full committee meeting held on September 8, 1995, a majority of the committee concurred in the following comments:

1. Regarding paragraph 3.202(b), the committee concludes that its requirement that notice of the intent to present expert testimony of mental health mitigation no later than 45 days before the guilt phase of a capital trial is impractical.

2. Regarding paragraph 3.202(b), the committee recommends the deletion of the provision that the required notice of the defendant "shall contain a statement of particulars listing the statutory and nonstatutory mental health mitigating circumstances". The rationale for this deletion is that there is no reciprocal obligation upon the state to give notice of any statutory aggravating circumstance. Additionally, full compliance with the requirement that all nonstatutory mental mitigation circumstances be listed, in many cases,

would be impossible. This dilemma is created since nonstatutory mental mitigation circumstances could virtually encompass most aspects of the defendant's background and experiences.

3. Regarding paragraph 3.202(b), the committee feels that the use of the phrase "refuses...to fully cooperate" is inadvisable and problematic. This prerequisite to the sanctions should be modified or deleted. As illustrated in State v. Williams, 742 P2d 1352 (Ariz. 1987) a meaningful compelled psychiatric examination may result where the accused is examined by a state mental health expert and, during the course thereof, the defendant is uncooperative, evasive and malingers. The court, in Williams, held this circumstance did not justify excluding the defendant's expert witnesses on the issue of sanity.

   Obviously, evasive conduct, refusal to answer questions, and the like may be so egregious as to render a meaningful examination impossible. In such circumstance, the Court could simply find the conduct of the accused constitutes a "refusal to be examined".

4. Regarding paragraph 3.202(d), the committee feels that this provision, authorizing two alternative and substantatively diverse sanctions but failing to provide criteria to guide the trial judge's discretionary selection thereof, is unwise and will lead to disparate application.

5. The submission of these comments by the committee should not be construed as an abandonment of support for the previously submitted proposed rule.

Respectfully submitted,

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