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IN THE SUPREME COURT OF FLORIDA

In Re:

Proposed Amendment to Rule 3.220
Fla. R. Crim. P.

CASE NO. 84,273

_____/

COMMENT TO PROPOSED AMENDMENT TO RULE 3.220 FLA. R. CRIM. P.

I. Interest of party filing this comment.

The undersigned attorney is an Assistant Public Defender with the Public Defender's Office of the Second Judicial Circuit. He has practiced criminal appellate law for the past sixteen years, and has focussed almost exclusively on capital appellate litigation for the past ten years. He has represented over fifty persons sentenced to death before this court and was counsel in Dillbeck v. State, 19 Fla. L. Weekly S408 (Fla. August 18, 1994).

II. Comment to proposed Amendment to Rule 3.220 Fla. R. Crim. P.

> THE PROPOSED AMENDMENT TO RULE 3.220 FLA. R. CRIM. P. HAS NO PROVISION FOR LIMITING THE USE THE PROSECUTION MAY MAKE OF ANY STATEMENTS MADE BY THE DEFENDANT TO A STATE HIRED OR COURT APPOINTED MENTAL HEALTH EXPERT WHO EXAMINES HIM, THUS RAISING A SIGNIFICANT FIFTH AND POSSIBLY SIXTH AMENDMENT CONCERN.

In Dillbeck v. State, 19 Fla. L. Weekly S408 (August 18, 1994), the defendant sought to prohibit a state employed psychiatrist from examining him before the penalty phase of his capital trial. The trial court allowed the examination,

primarily as a matter of fundamental fairness, and this court affirmed that decision.

> Under these circumstances, we cannot say that the trial court abused its discretion in striving to level the playing field by ordering Dillbeck to submit to a pretrial interview with the State's expert. See Burns [v. State, 609 So. 2d 600 (Fla. 1992)]. No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved.

19 Fla. L. Weekly at S2312.

The import of the court's ruling in that case was that the State could have its experts examine the Defendant solely to rebut any mental mitigation the Defendant might present. Nothing was said about using that examination or statements the defendant made during it to prove any aggravating factors.

The proposed amendment to Rule 3.220 Fla. R. Crim. P. extends discovery to the penalty phase of a capital trial. It also allows the state to have a mental health expert of its choice examine the defendant if he intends to use one who has examined him. That is, according to proposed amendment 3.220(d)(1)(A)(ii):

> If the defendant has elected to participate in discovery, the defendant must disclose the names and addresses of any psychological, psychiatric, or other expert with evidence relevant to the defendant's mental health whom the defendant intends to call as a witness if the testimony of that expert will be premised in whole or in part on a psychological, psychiatric, or other mental health test, evaluation, or examination of the defendant.

If the defendant intends to call an expert who has examined him, he must, according to the proposed amendment:

> submit to reasonable psychological, psychiatric, or other mental health testing, evaluations, or examinations by court and/or state experts in cases in which the defendant is required by subdivision (d)(1)(A) to designate psychological, psychiatric, or other experts with evidence relevant to the defendants mental health . . . . An examination of the defendant by court and/or state experts shall not be allowed unless the defendant's disclosure pursuant to (d)(1)(A) includes an expert who has personally examined the defendant.

Nothing in the proposed changes to the discovery rule explicitly limits the state's use of its expert's examination of the defendant or any statements he or she may have made during that evaluation. Nothing limits the prosecutor, during the penalty phase from using the defendant's statements to prove several of the aggravating factors available to justify a death sentence.

Specifically, at least six of the eleven statutory aggravating factors available to the state involve issues of the defendant's mental state or intentions when he committed a murder:

> (c) The defendant knowingly created a great risk of death to many persons.
> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
> (f) The capital felony was committed for pecuniary gain.
> (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
> (h) The capital felony was especially

heinous, atrocious, or cruel.
(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Section 921.141(5) Fla. Stats. (1992). Thus, rather than simply rebutting a defendant's mitigation, the state's expert, using statements made by the defendant, can establish many of the aggravating factors that justify a death sentence.

Dillbeck exhibits how that can be done. There, the defendant told Dr. McClaren, the state's psychiatrist, that he had used the money he had to buy a knife rather than alcohol, he had traveled through the woods to avoid detection, and he had bought the knife to use for robbery and kidnapping (T 2611-12). Such statements were relevant to at least the pecuniary gain and avoid lawful arrest aggravators. Obtaining these statements from the defendant and then using them against him surely must have violated the Defendant's Fifth Amendment rights.

Cases from the United States Supreme Court in this area of the law suggest that unless limiting language is added to the amended rule, significant Fifth and Sixth Amendment problems may arise.

In Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed. 359 (1981) the court ordered a Doctor Grigson to examine the defendant, apparently without counsel's knowledge. At the subsequent penalty phase of Smith's trial, the prosecutor called the doctor as its only witness, and he provided the damning evidence about Smith's future dangerousness, a key

consideration in the Texas death penalty scheme. This court found that this testimony violated the defendant's Fifth Amendment right against compelled self-incrimination because during the examination, the psychiatrist had elicited statements from Smith about the underlying crime. Id. at 464, and n. 9. When the expert

> went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting.

Id. at 467.

In Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed. 336 (1987), Buchanan raised an affirmative defense of "extreme emotional disturbance" in the guilt phase portion of his capital murder trial. To support that defense, the defendant introduced evidence of several of his mental evaluations. The state, seeking to rebut this proof, had other evidence introduced. In particular, the evaluation of a Dr. Lange was read. He had examined Buchanan after his arrest for the murder at his and the state's request. This court approved the trial court's ruling allowing Dr. Lange's testimony, and in doing so, it distinguished Smith: "the trial judge had ordered, sua sponte, the psychiatric examination and Smith neither had asserted an insanity defense nor had offered psychiatric evidence at trial." Id. at 422. Buchanan, on the other hand, had done both. This court also noted that if the defendant had

requested an evaluation, the prosecution could rebut whatever was presented "with evidence from the reports of the examination that the defendant requested." Id. Finding no Fifth Amendment violation, this court found

> with petitioner not taking the stand, the Commonwealth could not respond to this defense unless it presented other psychological evidence. Accordingly, the Commonwealth asked Elam to read excerpts of Doctor Lange's report, in which the psychiatrist had set forth his general observations about the mental state of petition but had not described any statement by petitioner dealing with the crimes for which he was charged. The introduction of such a report for this limited rebuttal purpose does not constitute a Fifth Amendment violation. Id. at 423-24 (Emphasis in opinion.

Buchanan, thus, was distinguishable from Smith in that Buchanan sought to raise an affirmative mental condition defense in the guilt phase portion of his trial. Also, the examining psychologist's reports, which were read at trial, contained none of the defendant's statements, and they were necessary for a limited rebuttal. Id. at 423-24.

Buchanan, and more appropriately, Smith strongly suggest that without any limits placed on the State's use of its expert's examination or the defendant's statements made during it, serious Fifth and Sixth Amendment problems may arise.

This court has also recognized the Fifth Amendment problems arising from allowing unfettered use of experts. Lovette v. State, 636 So.2d 1304 (Fla. 1994). In Lovette, the prosecutor called Dr. Robert Berland, a confidential expert Lovette intended to use only during the penalty phase portion

of his capital murder trial. As it turned out, defense counsel decided not to call him, but during the guilt portion of the trial, the state called him to rebut statement's made by Lovette. That, this court ruled, violated his Fifth Amendment rights.

> Even though Lovette voluntarily submitted to an examination by Berland, he never called Berland as a witness or in any way opened the door for the state to question Berland about any factors of the crimes that Lovette may have told him. Berland testified that he ordinarily gives his patients a Miranda-type warning, but we disagree with the trial court's conclusion that a valid Miranda waning and waiver occurred here. See Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) Lovette at 1308.

III. Recommendantion

Thus, I am recommending that the proposed amendment to Rule 3.220 be itself amended to reflect that the state may not use any report, evaluation, or test produced by its expert or any statements made by the defendant to its expert to prove any of the aggravating factors.

Further, if the defendant alleges that the prosecutor used either what he said or evidence which was derived from what he said to any state hired or court appointed expert, the prosecutor has the burden to show (by clear and convincing evidence) that either this was not so, or that he would have discovered the evidence by other means.

Respectfully submitted,

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