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IN THE SUPREME COURT OF FLORIDA

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

The position of the Florida Association of Criminal Defense Lawyers (FACDL) is that the Court should not adopt a rule involving the matters contained in the Court's proposed Florida Rule of Criminal Procedure 3.202. In support of this position FACDL would adopt the comments of the Florida Public Defender's Association (FPDA) on this proposed rule.

Should the Court decide to adopt a rule, it is the position of FACDL that a more comprehensive rule is required. Although the Court has indicated that a narrowly drawn rule will "level the playing field," the fact that this is an extremely difficult and sensitive area (as recognized by J. Anstead in his opinion) necessitates that there be a more comprehensive rule. The following are some of the more significant things that should be considered in drafting a more comprehensive rule:

1. The Court's proposed rule fails to address a number of concerns raised by the Florida Criminal Rules Procedure Committee, FACDL, FPDA etc. at the time these issues were considered in the context of the Rules Committee proposed amendments to rule 3.220.

2. The Court's proposed rule should require that the state's motion indicating its desire to seek the death penalty be filed before the defense is required to file a notice of intent to

present expert testimony of mental mitigation.

3. The Court's proposed rule should set a specific time period within which the state must file the motion indicating its desire to seek the death penalty.

4. The Court's proposed rule should require that the state's motion indicating its desire to seek the death penalty specify what aggravating factors the state intends to rely upon in seeking the death penalty.

5. The Court's proposed rule should not allow the state to choose it's own mental health expert. This gives the state too much power, in that they will inevitably shop around for experts until they find one who will support their position in a given case.

6. The Court's proposed rule containing the requirement of a statement of particulars in the defense notice does not "level the playing field," in that the state is not in any way required to provide notice of aggravators, but the defense is required to provide notice of their mitigators.

7. The Court's proposed rule requiring a statement of particulars creates Fifth and Sixth Amendment problems, as noted in the FPDA Comments.

8. The phrase "statutory and nonstatutory mental mitigating circumstances" in the Court's proposed rule is vague. Obviously a statutory mitigating factor such as 921.141(6)(b) would be considered a statutory mental mitigating circumstance. Other statutory mitigating factors, however, are not per se mental mitigating circumstances, but nonetheless can involve psychological

issues. For example, the age of the defendant at the time of the crime can involve psychological issues such as intelligence, emotional maturity etc. Does this make the age of the defendant a statutory mental mitigating circumstance? This problem is even more complex as it relates to nonstatutory mitigating circumstances. Obviously, if the defendant had some type of mental or emotional disturbance, that did not rise to the level of extreme, that would clearly be a mental nonstatutory mental mitigating circumstance. There are, however, a number of nonstatutory mitigating factors, that are not per se mental mitigation, but involve psychological considerations. For example, the defendant may come from a dysfunctional family. Because coming from a dysfunctional family can have psychological ramifications, does this make this factor a nonstatutory mental mitigating circumstance? Because any number of life events that have been recognized as nonstatutory mitigating circumstances can also involve psychological ramifications, does this make every nonstatutory mitigating circumstance a nonstatutory mental mitigating circumstance?

9. A further problem with the statement of particulars, as required in the Court's proposed rule, relates to the degree of specificity that is required. For example, could the defendant simply list "any other aspect of his character or record," and comply with the rule. Assuming that the defendant needs to be more specific, would stating that the defendant came from a dysfunctional family be sufficient, or would the defendant be required to particularize such things as child abuse, mental abuse,

neglect, or the other specific aspects of the dysfunctional family situation?

10. The statement of particulars requirement of the Court's proposed rule would force the defendant to disclose matters related to the crime itself, that would have a direct bearing on the guilt phase of the trial. Mental health mitigation frequently involves matters related to the defendant's mental state at the time of the offense. By requiring a statement of particulars, the defense is being forced to reveal to the state information about the defendant's state of mind at the time of the offense prior to the guilt phase of the trial.

11. Since the Court's proposed rule limits the scope of inquiry by the state's expert, it would appear that it would be incumbent upon defense counsel to be present at the compelled examination, even though the rule leaves it up to defense counsel's discretion. Unless defense counsel is at the examination, there would be no way for defense counsel to object to inquiries by the state's expert that go beyond the scope of a proper examination. If defense counsel objects to an area of inquiry as going beyond the scope of the allowed examination, this would require a court ruling. This would create significant logistical problems with respect to completing the examination in a timely and orderly manner. Furthermore, in many instances there will not be a bright line for determining the areas of proper inquiry by the state's expert.

12. The Court's proposed sanction of excluding mitigation evidence for non-cooperation would be unconstitutional as noted in

the FPDA comments.

13. It would appear that the Court's proposed sanctions for non-cooperation are based on the premise that the defendant has fully cooperated with the defense mental health experts. This premise, however, is not true in cases involving a death volunteer, a quasi-death volunteer or a defendant who will not agree to certain mitigating facts coming out, such as evidence that he or she was sexually abused.

14. The phrase "fully cooperate" in the Court's proposed rule is vague. There will be significant questions as to what this means. Even in the non-forensic, therapeutic setting a mental health expert will frequently report that a patient is not fully cooperative. This is not something that is a reflection on the persons willingness, but is a reflection of their mental health problem. This issue is further complicated in a capital case in that it does not take into consideration the impact of a first degree murder conviction on the defendant's mental state, especially if the examination is to occur within 48 hours of the determination of guilt.

15. The Court's proposed rule will entirely skew the death penalty process. The application of this rule will result in three categories of defendants, as it relates to mental health evidence: The defendants who refused to cooperate with the state mental health expert, but the trial judge allowed their expert testimony. The defendants who cooperated with the state's expert, and thus had to face possible rebuttal by the state's expert. The defendants who refused to cooperate with the state mental health expert and

whose expert testimony was totally excluded, or significantly limited. Arguably noncooperative defendants, whose mental health evidence is allowed, are in a better position than defendants who cooperate, and are clearly in a better position than defendants who don't cooperate and have their mental health evidence excluded or limited.

16. The problems created by the Court's proposed sanctions for non-cooperation would also skew the judicial determinations made in capital cases. The trial judge, who excludes or limits the use of a defense mental health expert pursuant to the Court's proposed rule, will more likely then not be presented with the excluded psychological testimony in a proffer or at the sentencing hearing. The judge will then have to make a sentencing decision based on a jury recommendation that was not based on this psychological testimony, that the Court knows about. This could then have further ramifications as it relates to appellate review of the trial judge's sentencing order, proportionality review etc.

17. The Court's proposed rule requiring that the compelled examination occur within 48 hours of conviction is unrealistic. Innumerable logistical problems will inevitably occur in the trial setting, making this an impossibility. This would include the significant issue of the defendant's mental and emotional state within a short period of time after a guilt conviction. Even if these time requirements are met, further delays will occur in order to effectuate a proper level of discovery by both sides with respect to the mental health witnesses.

For all of the above reasons FACDL would suggest that the

Court not adopt proposed rule 3.202, or if the Court intends to adopt such a rule that the Court refer this matter to the Rules Committee for the consideration of a more comprehensive rule.

Respectfully submitted,

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