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SID J. WHITE
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CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE FLORIDA SUPREME COURT, TALLAHASSEE, FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULES RULES OF CRIMINAL PROCEDURE 3.220 - DISCOVERY

CASE NO. 84,273

COMMENTS AND SUGGESTIONS TO PROPOSED AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.220 - DISCOVERY

The Florida Association of Criminal Defense Lawyers (FACDL herein) respectfully requests that this Honorable Court consider the following comments and suggested changes regarding the Florida Bar Criminal Procedure Rules Committee (Rules Committee herein) proposed amendments to Florida Rules of Criminal Procedure 3.220 - Discovery:

1) 3.220(a)

a) FACDL SUGGESTED CHANGES: Delete the Rules Committee amendment to this section and substitute the following suggested change by FACDL: In a capital case a defendant may elect to participate only in guilt phase discovery by filing a "Notice of Discovery - Guilt Phase," or only in penalty phase discovery by filing a "Notice of Discovery - Penalty Phase," or in both guilty and penalty phase discovery by filing a "Notice of Discovery - Guilt and Penalty Phase." A "Notice of Discovery - Guilt Phase" and a "Notice of Discovery - Penalty Phase" may be filed at separate times.

b) COMMENTS: The discovery rules are triggered by a defendant's election to participate in the discovery process. As such, an election to participate in discovery involves strategic and tactical decisions on the part of defense counsel. In a capital case the strategic and tactical decisions regarding the election to participate in discovery must be made in the context of a bifurcated proceeding. In such a situation defense counsel is often faced with different or conflicting considerations with respect to participating in discovery in the guilt phase and the penalty phase of the trial. By creating a rule of procedure that recognizes the importance of the bifurcated nature of the proceedings in a capital case, this Court would maintain the integrity of the bifurcated procedure of the post-Furman death penalty statutes that the United States Supreme Court found to be an essential protection for the defendant and an important element in holding these statutes to be constitutional. Gregg v. Georgia, 428 U.S. 153 (1976); Profitt v. Florida, 428 U.S. 242 (1976). This would also be consistent with this Court's recognition in State v. Dixon, 283 So.2d 1 (Fla. 1973), that the nature of the evidence and argument by both parties at the penalty phase is vastly different from and frequently contradictory to that permitted in the guilt phase.

In Dixon, this Court explained:

> "First, 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."

The FACDL's suggested change allows defense counsel the flexibility of electing to participate in discovery only in those phases of the bifurcated trial where it is strategically and tactically warranted.

2) 3.220(b)(1)(A)
a) FACDL SUGGESTED CHANGES: None.

b) COMMENTS: This change is acceptable as written.

3) 3.220(c)(1)(J)
a) FACDL SUGGESTED CHANGES: Delete reference to "court experts." Limit the state to one expert. The rest of the proposed changes are acceptable as written.
b) COMMENTS: At this point in time, there does not exist any procedural rule for a court-appointed expert in the penalty phase. Unless the procedural rules related to court-appointed experts are modified to include the provisions necessary to implement a court-appointed expert for the penalty phase, the reference to "court experts" should not be included.

The state should be limited to one expert. Since the primary reason for allowing a state mental health expert in the penalty phase is for the purpose of developing potential rebuttal, one expert would be sufficient for this purpose. If more than one expert was allowed, this could easily lead to abuses where the state would have the defendant examined post-guilt phase by a number of different experts until an expert who will rebut the defense experts could be found. Having more than one expert would also involve greater delay between the guilt phase of the trial and the penalty phase of the trial in that it would necessitate more than one examination of the defendant and additional discovery as to each witness. The goal of "leveling the playing field" for the state would adequately be met by one expert.

4) 3.220(d)(1)(A)(i)
a) FACDL SUGGESTED CHANGES: None.

b) COMMENTS: This change is acceptable as written.

5) 3.220(d)(1)(A)(ii)
a) FACDL SUGGESTED CHANGES: Change "...submit a report..." to "...disclose a report, if any..." The balance of the changes are acceptable as written.

b) COMMENTS: The Rules Committee's change as written with respect to reports could be interpreted to mean that the defense expert could be required to submit a report at the conclusion of the guilt phase, even if a report was not requested by the defense of their expert. It is obviously the intent of the Rules Committee to protect confidential communications prior to the conclusion of the guilt phase by delaying the deposition and disclosure of any report by the defense mental health expert. This change would clarify that intent.

6) 3.220(l)

a) FACDL SUGGESTED CHANGES: Make the granting of a protective order mandatory in situations where a witness has knowledge of evidence that could be used in the guilt phase of the trial by the state, such as knowledge of that collateral bad acts or knowledge of the charged crime. The balance of the changes are acceptable as written.

b) COMMENTS: A defendant should not be required to disclose a penalty phase witness that can hurt the defendant in the guilt phase until after the conclusion of the guilt phase of the trial. Therefore, any protective order should be mandatory as to a witness who has knowledge of evidence that could be used by the state in the guilt phase of the trial. The current proposed Rule, which leaves the protective order in the discretion of the trial judge, would lead to arbitrary and capricious results throughout the state. A mandatory protective order in the above-specified situations is essential under Dixon, Gregg and Profitt in order to give the defendant the full benefit of a constitutionally mandated bifurcated proceeding.

7) 3.220(n)(l)

a) FACDL SUGGESTED CHANGES: In a situation in which a defendant refuses to cooperate with the state mental health expert, there should be a requirement of a mandatory proffer of the defendant's mental health testimony. The balance of the Rule is acceptable as written, provided that the written comments to the Rule offer some additional clarification regarding sanctions.

b) COMMENTS: In the situation where a defendant refuses to cooperate with the state's mental health expert, there should be a mandatory proffer of the testimony of the defendant's mental health experts. This would allow the trial court to be in a position to make the best decision with respect to possible sanctions. It would also allow the trial court, who will be the ultimate sentencer, to hear this important evidence. It will also make certain that this evidence is preserved for appellate review. This will be important in determining issues on appeal related to the exclusion of testimony, as well as assisting the Florida Supreme Court in its proportionality review of a particular case.

The comments to the Rule should make very clear that the sanction of excluding the defendant's mental health expert is only one option. It should be made clear that the trial court may fashion whatever remedy is just and proper based on the facts of a particular case. This is consistent with this Court's jurisprudence concerning discovery violations in Richardson v. State, 246 So.2d 771 (1971), and its progeny. This Court has consistently held that the exclusion of a witness is a severe sanction of last resort. For example, in

Cooper v. State, 336 So.2d 1133 (Fla. 1976) this Court stated: "Relevant evidence should not be excluded from the jury unless no other remedy suffices."

8) 3.220(q) (New Provision)

a) FACDL SUGGESTED CHANGES: Add the following:
In a capital case, any materials revealed to the prosecution in penalty phase discovery can be used by the prosecution only to rebut mitigating evidence presented by the defense. It can never be used to prove aggravating circumstances, guilt of the offense or degree of the offense. This provision includes any retrials, resentencings or other cases. If a defendant alleges that the prosecution has violated this provision then the judge shall hold an evidentiary hearing. The burden shall be on the prosecution to establish that it did not learn of the challenged information through penalty phase discovery. The trial court shall prohibit use of materials learned from penalty phase discovery to prove guilt, degree of guilt or aggravating circumstances.

b) COMMENTS: The portions of the proposed Rule regarding delayed disclosures and protective orders are designed for the purpose of protecting the defendant's rights in the guilt phase, while at the same time allowing eventual discovery as to matters that apply only to the penalty phase. In situations where there is a retrial or resentencing on appeal, the protection afforded by delayed disclosure and protective orders would become moot. For this reason, there should be a specific provision protecting the defendant from being harmed by these matters upon a retrial or resentencing. This would be a logical extension of this Court's recognition that certain evidence developed by the state from defense penalty phase witnesses cannot be used during the guilt phase of the trial. Dilbeck v. State, 19 FLW S408 (Fla. 8/18/94) and Lovette v. State, 636 So.2d 1304 (Fla. 1994).

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