

Supreme Court of Florida

COPY

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).

[November 2, 1995]

PER CURIAM.

By order issued May 4, 1995, this Court proposed new Rule of Criminal Procedure 3.202, entitled "Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial."

Amendments to Florida Rule of Criminal Procedure 3.220--
Discovery (3.202--Expert Testimony of Mental Mitigation During
Penalty Phase of Capital Trial), 654 So. 2d 915 (Fla. 1995). We
have jurisdiction. Art. V, § 2(a), Fla. Const.

We had previously asked the Florida Criminal Procedure Rules Committee to consider whether a rule similar to Florida Rule of

Criminal Procedure 3.216, dealing with the appointment of experts when a defendant intends to rely on the insanity defense, should be adopted to allow a State mental health expert to examine a defendant who intends to present expert testimony of mental mitigation during the penalty phase of a capital trial. See Burns v. State, 609 So. 2d 600, 606 n.8 (Fla. 1992). In response to that request, the committee proposed comprehensive amendments to Florida Rule of Criminal Procedure 3.220 entitled "Discovery," which would have made the discovery rules applicable to the penalty phase of a capital trial.

After hearing oral argument and considering the comments of interested parties, we declined to adopt the committee's proposal. In its place we proposed new rule 3.202. We recognized the effort that the rules committee put into its proposal. However, we felt that "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 [was] preferable." 654 So. 2d 915-16.

All interested parties were notified of our May 4 order and the proposed rule was published for comment in The Florida Bar News. The Criminal Procedure Rules Committee also was asked to review the proposed rule and to submit a response.

After considering the comments filed by interested parties and the response of the Criminal Procedure Rules Committee, we

adopt new rule 3.202 as appended. We have modified the new rule to address two of the concerns raised in response to our proposed amendment. First, it appears that the requirement that notice of intent to establish mental mitigation through expert testimony be given forty-five days before the capital trial may be unworkable. Second, it is feared that unless the State is required to give notice of its intent to seek the death penalty before the defendant is required to give notice of intent to establish mental mitigation, defense resources may be wasted developing mitigation if the State does not seek the death penalty.

As modified, the provisions of rule 3.202 are triggered if within ten days after arraignment the State gives notice that it will seek the death penalty. If the State gives timely notice of its intent to seek the death penalty, the defense must give notice of its intent to establish mental mitigation through expert testimony within forty-five days of service of the State's notice. If the State fails to give notice of its intent to seek the death penalty within ten days after arraignment, the State still may seek the death penalty, although it may not avail itself of the provisions of the rule.

Accordingly, we adopt appended new rule 3.202. The new rule shall become effective January 1, 1996, at 12:01 a.m. Until that time, the interim procedure approved in Dillbeck v. State, 643 So. 2d 1027, 1031 (Fla. 1994), should be followed.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING and WELLS, JJ.,
concur.

ANSTEAD, J., dissents with an opinion.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE
EFFECTIVE DATE OF THIS RULE.

ANSTEAD, J., dissenting.

I am still of the view, as expressed in my separate opinion on May 4, 1995, that we should accept the recommendations of the Florida Criminal Procedure Rules Committee.

APPENDIX

**RULE 3.202. EXPERT TESTIMONY OF MENTAL MITIGATION
DURING PENALTY PHASE OF CAPITAL TRIAL:
NOTICE AND EXAMINATION BY STATE EXPERT**

(a) **Notice of Intent to Seek Death Penalty.** The provisions of this rule apply only in those capital cases in which the state gives written notice of its intent to seek the death penalty within 10 days from the date of arraignment. Failure to give timely written notice under this subdivision does not preclude the state from seeking the death penalty.

(b) **Notice of Intent to Present Expert Testimony of Mental Mitigation.** When in any capital case, in which the state has given notice of intent to seek the death penalty under subdivision (a) of this rule, it shall be the intention of the defendant to present, during the penalty phase of the trial, expert testimony of a mental health professional, who has tested, evaluated, or examined the defendant, in order to establish statutory or nonstatutory mental mitigating circumstances, the defendant shall give written notice of intent to present such testimony.

(c) **Time for Filing Notice; Contents.** The defendant shall give notice of intent to present expert testimony of mental mitigation within 45 days from the date of service of the state's notice of intent to seek the death penalty. The notice shall contain a statement of particulars listing the statutory and nonstatutory mental mitigating circumstances the defendant expects to establish through expert testimony and the names and addresses of the mental health experts by whom the defendant expects to establish mental mitigation, insofar as is possible.

(d) **Appointment of State Expert; Time of Examination.** After the filing of such notice and on the motion of the state indicating its desire to seek the death penalty, the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the state. Attorneys for the state and defendant may be present at the examination. The examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony.

(e) **Defendant's Refusal to Cooperate.** If the defendant refuses to be examined by or fully cooperate with the state's mental health expert, the court may, in its discretion:

(1) order the defense to allow the state's expert to review all mental health reports, tests, and evaluations by the defendant's mental health expert; or

(2) prohibit defense mental health experts from testifying concerning mental health tests, evaluations, or examinations of the defendant.

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John F. Harkness, Jr., Executive Director, The Florida Bar and
Melanie Ann Hines, Chair, Florida Bar Criminal Procedure Rules
Committee, Tallahassee, Florida,

for Petitioner

Julianne M. Holt, Public Defender and John J. Skye, Assistant
Public Defender, Thirteenth Judicial Circuit, Tampa, Florida;
Nancy Daniels, President of the Florida Public Defenders'
Association, Tallahassee, Florida; David A. Davis and Chet
Kaufman, Assistant Public Defenders, Second Judicial Circuit,
Tallahassee, Florida; Robert A. Norgard, Florida Association of
Criminal Defense Lawyers Death Penalty Chairman, Bartow, Florida;
and Honorable O. H. Eaton, Jr., Circuit Judge, Eighteenth
Judicial Circuit, Sanford, Florida,

Interested Parties