IN THE SUPREME COURT OF FLORIDA

CASE NOS. 85,585 & 85,801

IN RE: AMENDMENT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.220(h)

COMMENTS OF THE FLORIDA BAR CRIMINAL PROCEDURE RULES COMMITTEE

John F. Harkness, Jr., Executive Director of The Florida Bar, and the Honorable Dedee S. Costello, Chair of The Florida Bar Criminal Procedure Rules Committee, respectfully submit these comments concerning the proposed amendment to Fla.R.Crim.P. 3.220(p)(3), in response to this Court's orders of September 12, 1996, September 25, 1996, and February 19, 1997.

During the full committee meeting on June 27, 1997, the committee considered the majority recommendation of the subcommittee (attached as Exhibit A and made a part hereof by reference) and the comments of the Honorable Rodolfo Sorondo, Jr. (attached as Exhibit B and made a part hereof by reference). After further discussion and debate of the issues raised by the proposed amendment, the committee voted (30 to 4) to advise this Court that the committee does not recommend adoption of proposed subdivision (3) to rule 3.220(p), Pretrial Conference.

The committee submits a copy of the minutes of the January 1997 midyear meeting (attached as Exhibit C and made a part hereof by reference). When they are available, the minutes of the June 27, 1997, committee meeting will be filed with this Court to supplement these comments and those filed with this Court on January 28, 1997.

We certify that a copy of this motion has been furnished by mail to all counsel of record.

Respectfully submitted,

John F. Harkness, Jr.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904)561-5600
Florida Bar Number 123390

Honorable Dedee S. Costello
Chair, The Florida Bar Criminal Procedure
Rules Committee
Bay County Courthouse
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Robert A. Butterworth, Attorney General; Marty E. Moore, Deputy General Counsel, Tallahassee, Florida, and Harry Shorstein, State Attorney, Fourth Judicial Circuit, Jacksonville, Florida, on behalf of the Attorney General of the State of Florida, the State Attorneys of Florida, and the United States Attorneys for the Southern , Middle and Northern Districts of Florida; Arthur I. Jacobs, General Counsel, Florida Prosecuting Attorneys Association, Inc., Tallahassee, Florida; and Thomas L. Powell, President, Florida Association of Criminal Defense Lawyers (FACDL) , Tallahassee, Florida,

for Petitioners

Honorable O.H. Eaton, Jr., Circuit Judge, 18th Judicial Circuit, Chair, Criminal Justice Section, Flotida Conference of Circuit Judges and member of the Florida Bar Criminal Procedure Rules Committee, Sanford, Florida; Howard L. Dimmig, II, member of the Criminal Procedure Rules Committee, Lakeland, Florida; John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, Florida; Henry Matson Coxe, III, on behalf of The Florida Bar Board of Governors, Jacksonville, Florida; Honorable Dedee S. Costello, Circuit Judge, 14th Judicial Circuit, Chair, Criminal Procedure Rules Committee, Panama City, Florida; Melanie Ann Hines, Statewide Prosecutor, Office of Statewide Prosecution, Tallahassee, Flotida; Elizabeth L. Hapner, Chair, Juvenile Court Rules Committee, Tampa, Florida; Ward L. Metzger, Assistant Public Defender, Fourth Judicial Circuit, Jacksonville, Florida; Nancy A. Daniels, Public Defender, Second Judicial Circuit, on behalf of Florida Public Defenders Association,, Tallahassee, Florida; Douglas E. Crow, Executive Assistant State Attorney, Sixth Judicial Circuit, Clearwater, Florida; Steven H. Parton, Tallahassee, Florida: Louis O. Frost, Jr., Public Defender, Jacksonville, Florida; C. Richard Parker, Public Defender, Gainesville, Florida; Benedict P. Kuehne of Sale 6 Kuehne, Miami, Florida; and Thomas C. Gano of Lubin & Gano, P.A., West Palm Beach, Florida,

FLORIDA BAR CRIMINAL PROCEDURE RULES COMMITTEE

SUBCOMMITTEE ACTION REPORT

TO: JUDGE DEDEE S. COSTELLO, CHAIR

FROM: ANN E. FINNELL, SUBCOMMITTEE III CHAIR

DATE: May 16, 1997

Please be advised that Subcommittee III conducted a meeting on May 9, 1997, via conference call and in person to discuss Docket #96-40-III, and Docket #97-3-III.

Subcommittee attendance was as follows on May 9, 1997:

	Yes	NO
Ann Finnell	X	
Judge Aaron Bowden		X
Joe D'Alessandro	X	
Susan Hugentugler	X	
Raymond Rafool		X in part
Lewis Buzzell	X	
Judge Eaton	X	
Stephen Evrrhart		X

Additional participants in the meeting included:

Bob Wills	John Thornton
Gary Anderson	Kate toncleg
Robert Doyel	Kate Sabello
Carol McCann	Susan Elsass
Bill Vose	Kay Blanco
Cally Ann Lantz	Denise Ferraro
Daryl Flannagan	Richard Martel
Michael Band	

The subcommittee determined that the submission is within the scope of subcommittee authority.

EXHIBIT A

The subcommittee revisited the the new Rule 3.221: Procedures Relating to the Death Penalty.

Subparagraph (a) was changed from the original proposal due to a motion originally made by Mr. Thornton and adopted by the subcommittee in response to objections by many prosecutors that the proposal would result in lengthy hearings in all cases. The subcommittee agreed that this proposal should be utilized only where there exists one or fewer aggravating circumstances (or 2 which merge into one) and the defense believes that substantial mitigation exists which would foreclose death as a possible penalty as a matter of law. The subcommittee also deleted the taking of evidence provision in the belief that presentation of aggravating and mitigating circumstances can be made by affidavits, exhibits or depositions. The scope and nature *of* the affidavits was taken from the language of Rule 1.510(c), Florida Rules of Civil Procedures.

Subparagraph (b) was not changsd from the original proposal.

The proposed new language is attached.

Thm subcommittee considered an amendment to Rule 3.220(h), to allow attorney8 to issue deposition subpoenas, and recommends amendment to said rule by tho attached proposed language.

Therefore, subcommittee III moves adoption of proposed Rule 3.221 Procedures Relating To tho Death Penalty, as amended by the subcommittee, and moves amendment of Rule 3.220(h)(1).

Respectfully submitted,

Ann E. Finnell

Chair, Subcommittee III

AEF/jw

3.221. PROCEDURES RELATING TO THE DEATH PENALTY

(a) PRETRIAL EVIDENTIARY HEARING TO DETERMINE DEATH PENALTY ISSUES. In a capital case, when there is one or fewer aggravating circumstances or two aggravating circumstances which merge into one, upon motion of the defendant, the court shall conduct a pretrial-e-vi-d-e-n-t-i-a-r-y hearing to determine whether the death penalty should be an issue at trial. At such hearing the court may t-a-k-e e-v-i-d-e-n-c-e-a-n-d- consider affidavits, depositions, or exhibits t-e-s-t-i-m-o-n-y- to establish statutory aggravating circumstances and statutory and non-rtatutory mitigating circumstances. Affidavits shall be made on personal knowledge, shall set forth such facts a8 would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, ~~or by~~ further affidavits. If tho court find8 from the evidence presented that the mitigating circumstances substantially outweigh the aggravating circumstances, the death penalty shall not be an issue at trial and the case shall proceed as a non-capital case. The state ahall be given at least twenty days notice before the hearing on the motion.

(b) Disclosure of Aggravating and Mitigating Circumstances. Upon conviction in a capital case, if the prosecutor intends to seek the death penalty, the court shall order the disclosure of aggravating and mitigating circumstances to be relied upon in good faith during the penalty phase.

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CRIMINAL TRIAL & APPELLATE PRACTICE IN STATE & FEDERAL COURTS

June 23, 1997

Via **Fax 1-904-561-5702**

Susan Elsass, Staff Liaison
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

Re: Agenda Item IV B (96-40-III)
Cr.P.R. Committee Meeting - 6/27/97

Dear Susan:

Enclosed is Third District Court of Appeals Judge Rodolfo Sorondo, Jr.'s comments on the above-referenced proposed rule. Please make sure copies are distributed to all members of the Committee as they are crucial to our discussion of the proposed rule.

Very truly yours,

THORNTON & ROTHMAN, P.A.

By: _____
JOHN W. THORNTON, JR.

JWT/ag
Enclosure

EXHIBIT B

Fax Transmittal Sheet

IF ALL PAGES ARE NOT RECEIVED PLEASE CALL SENDER AT (305) 229-3270

TO: John Thornton

FROM: Judge Rodolfo Sorondo, Jr.

NO. OF PAGES (including cover sheet) 4

DATE: June 20, 1997

TIME:

FAX #: 374-5747

REMARKS: I decided to fax you the letter. You are free to publish it to the other members of the committee.

June 19, 1997

John Thornton, Esquire
200 S. Biscayne Blvd.
Suite 3420
Miami, Florida 33131

Dear John:

I am in receipt of your facsimile transmission of June 18, 5997. I have read proposed Rule 3.221(a), with great interest (I have no particular aversion to subsection (b) as I have never believed that there is such a thing as a surprise aggravating factor under thb present system). As we have previously discussed I have some reservations about the rule I would like to share with you because I feel that the practical application of the rule promises to be a nightmare for trial judges.

To begin I observe that the decision whether or not to seek the drrth penalty ha6 traditionally been one delegated to thr executive branch. In State v. Bloom, 497 So. 2d 2 (Fla. 1986), the Supreme Court held that Article 11, Section 3 of the Florida Constitution prohibits the judiciary from interfering with ths complete discretion of the state attorney to decide whether and how to prosecute a death penalty case:

> We conclude that the circuit judge has no authority to interfere with the prosecutor's discretion in proceeding with this cause as a drath penalty case. If we allowed thr circuit judge to make pre-trial determinations of tho death penalty's applicability, we wouldbe modifying the death penalty's statutory scheme. Section 921.141(1), Florida Statutes(1985), mandates that the decision to impose thr death penalty must be made in a separate proceeding after OR adjudication of guilt.

Id. at 3. The proposed rule seeks to do what thr Supreme Court has specifically said it could not do, to-wit: "modify tho death penalty's statutory scheme." See also State v. Donner, 500 So. 2d 532 (Fla. 1987).

The rule in question essentially provides for a hearing on a defense motion for directed verdict, as concerns the potential penalty, before the trial begins, Although the rule's intent is a noble one, i.e., ensuring that only "true" death cases are actually tried as such, the method leaves much to be desired in that it creates the nard for pre-trial death penalty phase.

It *is* naive to presume that the state will not choose to present a full-blown hearing in cases where they have only one aggravating circumstance and are determined to seek the death penalty. Although the rule allows both sides to proceed by way of affidavit rnd depositions, I cannot imagine the state taking the chance that the trial judge will not conduct an in depth analysis of their written presentation. Because the vast majority of the state's aggravators are to be found in their case-in-chief, it will be necessary for the state to put on a significant part of their guilt phase presentation during this hearing. These hearings, I predict, will become full-blown trials.

The next issue that concerns me is whether the state will have a right to take an interlocutory appeal from an adverse decision. It seems to me that this situation is analogous to tho granting of a severance or a motion to suppress evidence where the atata has the right to seek immediate appellate review. If this is thr case, then a system that *is* already plagued by a Byzantine appellate and collateral review process will be further obstructed by yet another, this time pre-trial, appeal. As it is, bringing a first degree murder case to trial takes between 12 and 24 months. Add to that enother 9 to 19 months for an interlocutory appeal (I remind you that the Supreme Court is an en brnc court that is already overwhelmed with work in this and other areas), and you will completely demoralize everyone participating in the process with the possible exception of the defendant who knows that tha passage of time works in his favor,

Yet another area of concern is that judges will be asked to make a prr-trial determination of the propriety of the maximum sentence before thr defendant has been found guilty of the crime charged. I do not believe that it is appropriate for a trial judge to consider tha propriety of any sentence at a time whmn the defendant *is* still presumed to be innocent. Outside the realm of the death penalty, consider how awkward it would be to conduct a pro-trial hearing to determine a defendant's eligibility for treatment as a habitual

violent offender where the defendant was vehemently contesting the issue of his guilt. Consider the message sent to thr community where the judge decides that the reeking of the death penalty is appropriate before he or she has heard the case. Although lawyers may understand what is being done, it will be very difficult to educate the public in this regard.

Finally, I am concerned with tha standard chosen, i.e. that "the mitigating circumstances substantially outweigh the aggravating circumstance." The term "substantially outweigh" is one! I am unfamiliar with in the death penalty jurisprudence. This is an extremely subjective standard for which there is no precedent. Is this a standard that can be uniformly applied? As you know the primary objection to thr death penalty is the arbitrariness with which it is meted out. Does this rule extend that arbitrariness (if such iffis) to the seeking of the death penalty? Evan iffthe response to this question la that the death prnalty is presently sought in an arbitrary manner anyway, that arbitrariness is a prosecutorial function which can be remedied by judicial intervention in thr sentencing process. The judge's ultimate sentence *is* reviewable under a proportionality analysis, there has never been such a review process for the decision to seek the death penalty because the judiciary has never been a part of that process.

I conclude by suggesting that the rule is unconstitutional because it violates the separation of powers doctrine and is in *direct* conflict with the Supreme Court's decision in Bloom. Additionally, it raises several significant practical problems that would make it more of a curse than a blessing.

As always I thank you for allowing me the privilege of commenting on these vary important issues. Needless to say the concerns expressed above are purely personal and in no way represent tho feelings of tho judges of this court.

Very truly yours,

RODOLFO SORONDO, JR.
District Judge

RS/cmc

MINUTES

CRIMINAL PROCEDURE RULES COMMITTEE

Meeting of January 24, 1997

Crowne Plaza Hotel
Miami, Florida

Chair Judge Dedee Costello called the meeting to order at 2:30 p.m. The following committee members were present: Jerome Latimer, David Morgan, Robert Wills, John Thornton, Jr. (Board of Governor's Liaison), Michael Band, Gary Beatty, Katherine Blanco, Edward Blumberg, Ex Officio Member, Aaron Bowden, Lewis Buzzell, Russell Crawford, Jr., Joseph D'Alessandro, John Daniel, Howard Dimmig, Robert Doyel, Douglas Duncan, Oscar Eaton, Jr., Stephen Everhart, Denise Ferrero, *Ann* Finnell, Dyril Planagan, Les Hess, Melanie Hines, Susan Hugentugler, Nelly Khouzam, Shelley Kravitz, Abe Laeser, Calianne Lantz, Leroy Arthur Lawrence, Jr., Randy Merrill, Doug Midgely, Larry Donald Murrell, Raymond Rafool, Maria Sachs, Ivy Ginsberg Shanock, William Vose, Shelly Wilson, Paul Zacha, and Chester Jay Zerlin.

The minuter of the September 6, 1996 meeting were approved with the correction that Mr. Buzzell was not in attendance at that meeting.

I.
Chair's Report

The Chair reported that the four year cycle amendments were passed by the Supreme Court of Florida. The Court named a new committee to discuss the whole rulemaking process including Melanie Hines as a member. The Rules of Judicial Administration felt that there has been some change in the process from the Supreme Court that in some instances the Court has appointed special committees to work on rulemaking and avoiding the Florida Bar. Because *of* that it is important for this Committee to do our job and submit rules and suggestion8 to the Court. We are .also on the Bar's Website.

11.
SubCommittee I Report

Chair MI. Lantz reported that the subcommittee met to discuss Docket No. 96-39-1 as submitted by the Honorable Dennis Maloney. The proposal concernedusing separate amounts in bond schedules for cash bonds as opposed to corporate surety bonda. The sucommittee unanimously rejected the proposal because the current rule 3.131(b)(1)(E) tracks the language of section 903.105, Fla. Stat. As such, the subcommittee believes the proposal should be referred co the Legislature. The full committee voted 32-1 rejecting the

proposal.

111.
SubCommittee II Report

Chair Bill Vose reported that three of eight subcommittee members met to discuss the Proposed Amendment to rule 3.191, the speedy trial rule. The proposal was to change the language in 3.191(b) to add that a separate pleading entitled Demand for Speedy Trial be filed and serving a copy of the prosecuting attorney.

The proposal also sought to amend 3.191(p)(2) to add that a separate pleading entitled "Notice of Expiration of Speedy Trial Time be filed and serve a copy on the prosecuting attorney.

Mr. Midgely preferred the use of the term prosecuting authority rather than the assigned attorney so that the pleading would be served on the proper agency, not necessarily the attorney on the case. Mr. Latimer felt the rule should use the term "state" rather than prosecuting attorney or authority. However, Mr. Vose indicated that the State would not include the City Attorney who prosecutes cases under rules of criminal procedure in county court. Mr. Beatty wanted a courtesy copy served on the Judge.

Mr. Vose moved to adopt the proposal with a friendly amendment from Mr. Midgely using the word prosecuting authority. Ms. Hines opposed the motion. The problem with the rule was how can we get pleadings to the judges? Judge Baton feels defense attorneys should have to calendar the motion and notice it for hearing.

Mr. Laeser stated that the proposal solves one problem at least because a prosecutor will get a separate piece of paper notifying them of a speedy trial problem twice both an initial demand and a Notice of Expiration.

The motion to amend the rule passed 33-1.

IV.
Special SubCommittee

Mr. Latimer reported that the Chair appointed a special subcommittee of the vice-chairs and Ms. Hines to review all of the rules and make uniform references to the State, State Attorney and prosecuting authority.

The committee proposed creating Rule 3.025 and substitute the term prosecuting attorney for State Attorney.

Mr. Vose noted that "city prosecutor" should be added and we should delete "Office of" before the words State Attorney.

State Attorney Joe D'Allessandro was concerned that for

example in rule 3.140(g) usage of designated assistant state attorney has particular meaning and in some rules it is appropriate to leave language "as is."

Ms. Finnell suggested amending the language to use prosecuting authority. Ms. Hines commented that the Statewide Prosecutor's Office has been in existence for ten years but because they are not specifically referred to in the criminal rules often pleadings are sent be defense attorneys to the State Attorney.

Mr. Latimer proposed the following amendment:

Rule 3.025 State and Prosecuting Attorney defined.

(a) Whenever the term "State" or "prosecuting authority" is used in these rules, it shall be construed to refer to the state of Florida acting through its appropriate State Attorney, Statewide Prosecutor or other prosecuting authority authorized by law.

(b) Whenever the term "Prosecuting Attorney" is used in these rules it shall be construed to include the appropriate State Attorney and Assistant State Attorney and the Statewide Prosecutor and Assistant Statewide Prosecutor and any other prosecuting authority by law.

The rule would be accompanied by a committee note explaining its intent to include the Statewide Prosecutor as a prosecuting official acting on behalf of the State of Florida and a cross-reference to Rule 3.030 for Service of Pleadings and Papers.

A motion to approve the proposal received a vote of 23-13 in favor but was below the 2/3 requirement to pass. The proposal was referred back to the special subcommittee for revision.

V.
SubCommittee III
Proposed Rule 3.221

The Chair noted at the outset that the Florida Supreme Court wanted a response on this issue by the end of the month.

On September 12, 1996 the Supreme Court passed out the new rule on discovery depositions and they suggested that we have 90 days to respond to their proposal to list aggravating and mitigating factors pre-trial. We were granted an extension until the end of this month to do this.

Subcommittee Chair *Ann* Finnell explained that in May 1995 there was an order from the Supreme Court asking the committee to consider two issues: 1) a rule requiring the defense and State to file a statement of issues to be tried in the penalty phase of a

capital trial; and 2) a pre-trial procedure like a summary judgment procedure that will allow the trial court to determine whether the death penalty should be an option based on the aggravating and mitigating factors. The committee did not take any action.

In September of 1996 the Supreme Court created a proposed rule that in capital cases if the prosecutor intends to seek the death penalty the court shall order disclosure of a list of aggravating and mitigating factors to be relied upon in good faith at trial and that the rule should be included under Rule 3.220.

The subcommittee discussed this narrow issue and Judge Eaton mentioned that the Supreme Court has also asked the committee to look at a summary judgment procedure.

A majority of the subcornittee agreed on the proposed new rule 3.221:

3.221 **Procedures Relating to the Death Penalty**

(a) Pretrial Evidentiary Hearing to Determine Death Penalty Issues.

In a capital case, upon motion of the defendant, the court shall conduct a pretrial evidentiary hearing to determine whether the death penalty should be an issue at trial. At such hearing the court may take evidence and consider affidavits, depositions, or testimony to establish statutory aggravating circumstances and non-statutory mitigating circumstances. If the court finds from the evidence presented that the mitigating circumstances substantially outweigh the aggravating circumstances, the death penalty shall not be an issue at trial and the case shall proceed as a non-capital case. The state shall be given at least twenty days notice before the hearing on the motion.

(b, Disclosure of Aggravating and Mitigating Circumstances.

Upon conviction in a capital case, if the prosecutor intends to seek the death penalty, the court shall order the disclosure of aggravating and mitigating circumstances to be relied upon in good faith during the penalty phase.

Ms. Finnell stated that the subcommittee felt the defendant should not have to disclose before trial mitigating circumstances such as remorse and therefore required disclosure only upon conviction.

As to the pretrial evidentiary hearing to determine death penalty issues in subparagraph a, it was suggested that defense attorneys would rarely use the rule except in cases where there were no or only one or two aggravating circumstances which merged into one circumstance. The rule should only be triggered by the defense to avoid impinging on the defendant's constitutional right to self-incrimination.

Ms. Hugentugler prepared a minority report opposing the proposal because: 1) the determination of whether to seek the death penalty is solely within the discretionary function of the prosecution under Article II, Section 3 Fla. Const.; 2) the rule forces the state to prematurely disclose and be bound by aggravating circumstances before they are fully developed at trial and will force a judge to rule without an in-depth knowledge of all the circumstances in the case; 3) use of affidavits not subject to cross-examination to establish aggravating or mitigating circumstances would be inadequate; 4) the state would have to petition for a writ of common law certiorari if the trial judge adversely rules; 5) would petitions be heard by the district court of appeal or the Florida Supreme Court?; 6) if a judge ruled pre-trial that death could be an appropriate sanction this could promote forum shopping.

Mr. Laeser commented that this is an ill-conceived plan that will not result in judicial economy but will result in two trials, a hearing and trial and reiterated the concerns cited in the minority report. He suggested 'that a more narrow rule may be appropriate only in the circumstances where the prosecutor has no aggavating circumstances or where the defense has substantial mitigating circumstances and the prosecutor is not listening.

Mr. Beatty stated that this is an effort to nullify the death penalty and a judicial effort to usurp a prosecutor's authority and the Legislature's prerogative to enact the death penalty.

Ms. Blanco stated this results in a mini-penalty phase pre-trial, creates the possibility of two appeals, the rule is not needed and it doesn't consider a jury's recommendation.

Mr. Wills stated that as the Chief Assistant Public Defender in Broward County lots of resources are wasted on cases they know are not "death-penalty" cases, As a result in every Murder One indictment the defense requires a full battery of neuropsychological tests and the like. Mr. Wills commends the sub-committee and Judge Eaton for putting the issue on the table.

Mr. D'Alessandro stated the proposal does away with one of the checks and balances and the proposal is silent as to the standard of proof (beyond reasonable doubt?)

Mr. Murrell felt this is an issue that needs to be addressed in depth and shouldn't be rushed. Now, the State has no recourse if judge concludes after penalty phase that life is the appropriate sentence. Mr. Midgely added that the issue has merit and should be throroughly considered and that judges who are subjected to the political process provide a more stable forum than in front of jurors.

Judge Doyel (10th Circuit) noted that paragraph (a) rewrites

the law on ummary judgment and aces the judge in a position of weighing evidence. He moved tc amecd the proposal by striking paragraph (a).

Mr. Latimer replied that the burden is that the mitigating circumstances must outweigh the aggravating circumstances. A judge can still deny this motion and refuse to impose the death penalty. The subcommittee tried to make it easy for the state to comply by using affidavits.

Mr. Laeser noted that the timing and sanctions need to be addressed in paragraph (b). A Judge will preclude the state from arguing an aggravator that was not listed pretrial, however, no judge will preclude the defense from arguing an undisclosed mitigating factor. Some judges start the penalty phase on Monday when the guilt phase ends on Friday. Defense attorneys won't be held to the same standard.

Mr. Buzzell pointed out that if the two subparagraphs are voted on separately and if the committee votes against a and in favor of (b) then defendants give up everything and receive nothing. Therefore the proposals should not be voted on separately.

The Chair commented that the Supreme Court requested a determination on paragraph b, not a.

Judge Doyel urged that he was in favor of disclosure of aggravating factors before jury selection.

Mr. Dimmig noted that this rule would be applicable to one case in 15 years and recommended that subparagraph a should be referred back to subcommittee since this is the single most litigated law. We should simply comment on the court's proposal for disclosure on aggravating and mitigating factors.

Mr. Laeser said we should tell the Supreme Court that within the four year cycle we will submit a proposal after fully looking at all the issues which were raised in our meeting.

Ms. Finnell agrees a rule is needed for cases where there are no aggravating factors but the rule also should include situations where there is a single aggravating circumstances with substantial mitigating circumstances in accordance with caaelaw. In those cases, they are being tried as death penalty cases when they are not. The state attorney gets to death-qualify a jury who are more prone to convict and then obtain a conviction where death is inappropriate. She opined that the Supreme Court will not only remand for a life sentence but also reverse for a new trial becuase the jury was improperly death qualified.

Mr. Zachs noted that some judges think this is a bad idea

because it creates a trifurcated system. If **there** are no aggravating factors maybe there should be a rule but this proposal is too **broad.**

Judge Eaton said the purpose of the proposal as Ms. Finnell stated is that the Supreme Court wants us to send **cases** to Tallahassee for them to review where the issue of whether or not the **death** penalty is appropriate is not an issue; their asking us to come up with a method to eliminate appellate review of this issue and instead the issues on appeal should concern whether there were **errors** in the trial.

Ms. Hines moved the Chair to **refer** the issue back to the subcommittee for an additional conference call. The committee voted 29-5 to **table** the motion. The committee voted 35-1 to submit rhe majority and minority reports and other memorandum to the Supreme Court as the Committee's comment.

The next committee meeting is **set** for June 27th, 1997 at 2:30 p.m. in Orlando at the Dolphin Hotel.