D.A. 8-29-95

047

IN THE SUPREME COURT OF FLORIDA

CASE NOS. 85,585 & 85,801

IN RE AMENDMENT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.220(h) AND FLORIDA RULE OF JUVENILE PROCEDURE 8.060(d)

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

FILED
SID J. WHITE
DEC 11 1996
CLERK, SUPREME COURT
By Chief Deputy Clerk

COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC. ON PROPOSED RULE OF CRIMINAL PROCEDURE 3.220(p)(3)

This Court recently published for comment the following proposed amendment to Rule of Criminal Procedure 3.220:

> (p) **Pretrial Conference.**
> . . .
> (3) In capital cases, 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 at trial.

In re Amendment to Florida Rule of Criminal Procedure 3.220(h) and Florida Rule of Juvenile Procedure 8.060(d). In re Amendment to Florida Rule of Criminal Procedure 3.220(h), 681 So. 2d 666 (Fla. 1996).

The Florida Public Defender Association, Inc. hereby urges this honorable Court to (1) reject proposed Rule of Criminal Procedure 3.220(p)(3), which requires the listing of aggravating and mitigating circumstances prior to trial;[1] or (2) if such a proposal is adopted, require disclosure only after conviction; and (3) adopt a procedure, as Judge Eaton also proposed, to allow a pre-trial

[1] This proposal was originally made by the Honorable O.H. Eaton, Jr., Circuit Judge. *See* Appendix A.

determination of the defendant's legal eligibility for the death penalty.[2] The Association comments as follows:

The Proposed Rule Expands Discovery Obligations Well Beyond Current Requirements for Either Guilt or Penalty Phase.

1. The proposed rule would require this Court to overrule long-standing precedent holding that the prosecution is not obligated to identify the aggravating circumstances on which it intends to rely in seeking the death penalty. *E.g., Sireci v. State,* 399 So. 2d 964, 970 (Fla. 1981), cert. *denied,* 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). The proposal also expands defense discovery obligations well beyond the current guilt-phase discovery rules which require disclosure of only certain limited affirmative defenses such as insanity or alibi. Fla.R.Crim.P. 3.200, 3.216, 3.220. The proposed rule is equivalent to requiring every defendant to detail, in advance, his entire guilt-phase defense.

The Proposed Rule is Unworkable as both a Practical and Legal Matter.

2. The constitutionality of modern death penalty statutes is premised on the use of a bifurcated procedure which ensures that defendants are not forced to choose between their Fifth and Sixth Amendment rights at the guilt phase and their Eighth Amendment right to present evidence in mitigation of a possible death sentence. *Gregg v.* Georgia, 423 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), cert. denied *sub nom Hunter v. Florida,* 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Requiring disclosure of mitigating circumstances prior to the guilt phase subverts the very purpose of a bifurcated proceeding.

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[2] *See* Appendix A.

3. Many mitigating circumstances relate to the offense itself and effectively concede the defendant's guilt. These include the relative participation of co-defendants, sentences of equally culpable co-defendants, the defendant's mental state at the time of the offense, intoxication and/or drug abuse at the time of the offense, remorse, and other circumstances of the offense. Similarly, disclosing other types of mitigation could lead the State to guilt-phase evidence. For example, a history of mental illness, alcoholism, and/or drug addiction may also involve criminal and/or violent activity and could lead the prosecution to collateral crime evidence and/or evidence to rebut a claim of self-defense.

4. Requiring the defense to disclose mitigating circumstances before the guilt phase therefore creates a constitutionally impermissible dilemma. Defense counsel may be forced to choose between (1) pursuing a guilt-phase defense and abandoning any mitigating circumstances that relate to the circumstances of the offense or (2) pursuing mitigation that will effectively sabotage the client's guilt-phase defense or even help (directly or indirectly) the State prove its case at the guilt phase.

5. This dilemma is precisely what a bifurcated capital sentencing procedure is intended to prevent. As the Supreme Court explained in Gregg, bifurcation is necessary to ensure accuracy in sentencing without compromising the defendant's rights at the guilt phase:

> Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question. This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure -- one in which the question of sentence is not considered until the determination of guilt has been made -- is the best answer. The drafters of the Model Penal Code concluded:

"[If a unitary proceeding is used] the determination of punishment must be based on less than all the evidence that has a bearing on that issue, such for example as a previous criminal record of the accused, or evidence must be admitted on the ground that it is relevant to sentence, though it would be excluded as irrelevant or prejudicial with respect to guilt or innocence alone. Trial lawyers understandably have little confidence in a solution that admits the evidence and trusts to an instruction to the jury that it should be considered only in determining the penalty and disregarded in assessing guilt.

". . . The obvious solution . . . is to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction, but once guilt has been determined opening the record to the further information that is relevant to sentence. This is the analogue of the procedure in the ordinary case when capital punishment is not in issue; the court conducts a separate inquiry before imposing sentence." ALI, Model Penal Code § 201.6, Comment 5, pp. 74-75 (Tent. Draft No. 9, 1959).

See also Spencer *v. Texas*, 385 U.S. 554, 567-569, 87 S.Ct. 648, 655-567, 17 L.Ed. 2d 606 (1967); Report of the Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, ¶¶ 555, 574; Knowlton, Problems of Jury Discretion in Capital Cases, 101 U.Pa.L. Rev. 1099, 1135-1136 (1953). When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.

428 U.S. at 190-192 (footnotes omitted).

6. This Court relied on the same premise in upholding the constitutionality of Florida's death penalty statute in *Dixon,* supra:

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.

283 So. 2d at 7.

7. The current proposal is also unworkable because it fails to specify when the prescribed pre-trial conference should be held and creates no vehicle for the defense to add mitigating circumstances as they are uncovered by further investigation. The rule therefore requires the defense to produce, well before trial, a binding list of all statutory and nonstatutory mitigating circumstances. However, because defense counsel has an ongoing duty to investigate all potential mitigation, he or she cannot always know with certainty, prior to the guilt phase, exactly what mitigation will be presented. Indeed, the final decision will often depend on what transpires at the guilt-phase, including answers during voir dire, the final composition of the jury, the state's guilt-phase evidence, judicial rulings during trial, the length of the guilt-phase deliberations, jury questions during deliberations, and the jury's verdict on other counts. Anticipating mitigation is even more difficult in felony-murder and co-defendant cases in which there can be marked differences in levels of culpability for the homicide. The exact nature of the State's evidence in these cases can dramatically alter the presentation of mitigating evidence, especially concerning the circumstances of the offense.

8. Given the particularly egregious difficulties with compelling disclosure of mitigating circumstances prior to the guilt phase, the Florida Public Defender Association strongly urges that, if this Court decides to compel a list of aggravating and mitigating circumstances, disclosure should be required only *after* conviction. This is consistent with the recent proposal of the subcommittee of the Criminal Procedure Rules Committee. See Appendix D.

The Sound Administration of Justice Requires a Mechanism for Pre-Trial Determination of a Defendant's Legal Eligibility for the Death Penalty.

9. Judge Eaton's proposed rules for penalty-phase discovery included the following procedure for a pre-trial determination of a defendant's eligibility for the death penalty:[3]

RULE 3.190 PRETRIAL MOTIONS

(k) Motion to Determine Existence of Evidence in Penalty Phase of Capital Cases

(1) The defendant may move to determine the existence of evidence to support any aggravating circumstance anytime after receipt of the Notice of Intent to Seek Death Penalty required by Rule **3.141.**

(2) A hearing on the motion may be scheduled with not less than twenty days notice to the State.

(3) At the hearing the court may consider any matter of record or evidence presented which establishes one or more aggravating circumstances by clear and convincing evidence.

(4) After considering the record and evidentiary matters presented the court shall determine that the death penalty is an issue at trial if the court finds that one or more aggravating factors exist which, without consideration of mitigating factors, would support the imposition of the death penalty unless the death penalty cannot be imposed as a matter of law. If the court finds that one or more aggravating factors do not exist or, if one or more factors do exist, and the death penalty cannot be imposed as a matter of law, the court shall determine the death penalty not to be an issue at trial.

Appendix A.

The subcommittee of the Criminal Procedure Rules Committee of The Florida Bar has recently made the following, similar proposal:

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[3]This Court mentioned both of Judge Eaton's proposals in its opinion of May **4,** 1995. ***Amendments to Florida Rule of Criminal Procedure 3.220 -- Discovery, 654 So. 2d*** 915, 916 (Fla. 1995). Appendix B.

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 a 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.

Appendix D.

10. The Florida Public Defender Association submits that the sound administration of justice requires a mechanism for the prompt, pre-trial determination of a defendant's legal eligibility for the death penalty; that such a procedure is entirely within the proper province of the judiciary; and that it will save scarce time and resources throughout the criminal justice system.

11. This Court has recognized that there are numerous circumstances in which a person who is convicted of first degree murder is ***legally ineligible*** for the death penalty. *E.g.* Allen v. *State, 636 So.* 2d **494, 497** (Fla. **1994)** (defendant under **16); *Scott v. Dugger, 604 So.* 2d 465,** 469 (Fla. 1992) (equally culpable codefendant receives a lesser sentence); Jackson *v. State, 575* So. 2d **181,** 193 (Fla. **1991)** (non-trigger person who does not possess the requisite level of intent and/or participation); *Songer* v. ***State,* 544 So. 2d 1010, 1011-12** (Fla. **1989)** (one aggravating circumstance insufficient for death penalty unless there is "little or nothing in mitigation"); *Dixon,* **283** So, **2d** at 8 (no aggravating circumstances). At present, however, there is no mechanism for a defendant to assert pre-trial that, even taking the evidence in the light most favorable to the State, he is not legally eligible for the death penalty. Both the subcommittee's proposal and Judge

Eaton's original proposal would provide a procedure similar to a motions to dismiss under Rule 3.190(c).

12. There is a great and obvious need for such a rule. In some circuits, the prosecution seeks the death penalty in virtually all first degree murder cases. This imposes unnecessary costs on the entire legal system. First, it forces defense counsel and prosecutors to devote tremendous resources to extensive preparation for a potential penalty phase. When the state is seeking the death penalty, defense counsel has an ethical obligation to prepare for a penalty phase, including thorough investigation of all potential mitigation. ***See*** generally ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989). The competent investigation and preparation of mitigating evidence is a very lengthy and expensive process that often requires the assistance of at least one additional attorney and several experts, including a mitigation specialist, mental health professionals to examine the defendant for both psychological and organic impairments, and other experts on matters such as the defendant's ability to adapt to prison, See ***id.;*** Welsh S. White, ***Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care,*** **1993** U. ILL. L. REV. **323 (1993).** In a state as diverse as Florida, a competent mitigation investigation will also often entail extensive work -- such as locating and interviewing the defendant's family, teachers, and other potential mitigation witnesses and locating and compiling school, military, medical, and mental health records -- in foreign countries.

13. Death penalty cases also generate substantially more pretrial motions than other cases, due to the host of issues raised by the potential penalty, and jury selection is much longer and more complex, since jurors must be "death-qualified." Capital cases therefore impose unique and extensive costs on the criminal justice system, in the use of both facilities and personnel,

including judges, potential jurors, attorneys, and others. As all branches of government are facing demands to cut costs, litigating cases as capital when there is no legal basis to support the death penalty is an enormous waste of resources for which there is no plausible justification. The proposed procedure is an appropriate means to avoid this waste.

14. It is, moreover, well within the traditional province of the judiciary to decide whether there is a legal basis for imposing a particular penalty, just as a judge may decide, pursuant to a motion to dismiss under Rule 3.190(c), whether there is a legal basis to support a particular charge. State v. Bloom, 497 So. 2d 2 (Fla. 1986), cannot be reasonably interpreted to prevent trial judges from precluding the death penalty in cases where the defendant is not legally eligible for it. It is absurd to suggest, for example, that a trial judge is powerless to prevent a prosecutor from seeking the death penalty for a non-capital felony, or from seeking the death penalty against a fifteen (15) year old, in direct violation of Allen, supra. In both cases, the death penalty is not legally available -- in the first instance because the legislature has not authorized it and in the second because the state and federal constitutions prohibit it. A prosecutor does not have discretion to seek the death penalty in such cases any more than he or she has discretion to pursue a conviction when there is no legal basis for the charge. Creating a mechanism to make this legal determination pre-trial would result in substantial savings of time and resources at every level of the criminal justice system.

WHEREFORE, the Florida Public Defender Association urges this honorable Court to reject the proposed rule requiring a list of aggravating and mitigating circumstances. If the Court determines that such a list is required, it should not compel the list to be disclosed until after the defendant is convicted of first degree murder. Also, the Court should adopt a rule allowing defendants to file a motion to dismiss the death penalty when they are legally ineligible for such punishment.

Respectfully submitted,

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December 6, 1996

APPENDIX A

097

IN THE SUPREME *COURT*

OF THE STATE OF FLORIDA

CASE NO. 84273

IN RE: AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.220

COMMENTS ON THE PROPOSED RULE

SUBMITTED BY:

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PENALTY PHASE PRETRIAL DISCOVERY

There is a general agreement among the circuit judges that a discovery rule is needed in capital cases.

Capital cases are the most expensive criminal cases, sometimes costing over a million dollars at the trial level and several million more for both state and federal appellate review.

In addition, capital cases are highly publicized. The news media pays close attention when the prosecutor announces that the State will "seek the death penalty." The horrendous and often revolting facts surrounding the homicide are usually well publicized and public perception of the case *is* reduced *to* the simplistic "life for a life" approach to justice.

Judges understand that no matter how guilty the defendant may appear or how revolting the circumstances, the death penalty may not be the appropriate sentence. Mutilation *of* a corpse after a homicide *is* just one example. Halliwell v. State, 323 So.2d 557 (Fla. 1975).

Discovery in a criminal case is desirable for three reasons. First, it allows the state and the defendant to identify the issues. Second, it gives *the* attorneys an opportunity *to* meet those issues at trial. Third, it provides an opportunity to narrow the issues prior *to* trial.

Unfortunately, the proposed rule fails to meet these three discovery goals and, as a result, the rule complicates existing problems for trial judges.

The comments which follow identify the deficiencies in the proposed rule and propose solutions.

PROBLEM ONE

Delay Between Guilty Phase and Penalty Phase

The proposed rule authorizes access to the defendant by prosecution experts only after the guilt phase of the trial. This procedure was authorized by Dillbeck v. State, 19 F.L.W. S408 (August 18, 1994), pending implementation of a permanent rule. Since the defendant's mental problems are almost always an issue in these cases, the practical effect of this procedure will be to build in an indefinite delay between the guilt phase and the penalty phase.

During the discussions which took place in the rules committee, the prosecutors took the position that the delay would be minimal and would amount to only a few days, That position is perhaps well intended but it does not measure up *to* actual experience. Psychiatrists and other experts are usually selected because the party making the selection is looking for specific expertise or bias. These experts are usually in demand. They are unavailable for immediate evaluations due to demands from other litigants and they are often unavailable for discovery depositions for the same reason. Trial dates have to be adjusted to meet the schedule of experts and the adjustments invariably add to the delay.

The main cause for delay in personal injury cases is unavailability of expert witnesses. To presume that experts will be available with minimal delay just because a case is a capital case is unrealistic.

The question to be answered is, other than inconvenience to the trial judge's calendar, what difference does a delay make?

Perhaps the most obvious problem caused by delay is the fact that twelve to fourteen unsequestered jurors are in the community being exposed to the comments and prejudices of the public. One such case occurred in Seminole County recently when a juror recognized one of the victim's family in a grocery store and had a sympathy conference with her.

Considering the stress of a capital trial, it should be obvious that *to* allow jurors to be exposed to outside influences for days or weeks at a time simply invites unnecessary problems.

Reassembly of the jury is the second problem that may be caused by delay. This situation occurred in Seminole County when a juror moved out of the state between the guilt and penalty phase. Illness, accident or even death are factors that become more problematical depending upon the length of a delay.

A third problem is public perception of the progress of capital cases. The public expects these cases *to* be tried with reasonable dispatch and far the judgment *of* the court to be carried out. Approving a rule that builds in even more delay than *is* presently in the system will further erode public confidence in the ability for the courts to adjudicate these cases in a timely manner.

Finally, trial judges need to be in control of their dockets. Many trial judges, this writer included, prefer *to* proceed to the penalty phase the day after the guilt phase is concluded.

The rules committee discussed the potential constitutional problems concerning evaluation of the defendant prior to the guilt phase of the trial. No authority was cited which would prevent such an evaluation. The fact of the matter is that under the criminal rules, discovery is optional to the defendant. Lawyers make the decision to participate or not participate in discovery in every criminal case. The advantages and disadvantages of the reciprocal obligation is weighed and the decision is made. It should be no different in penalty phase discovery. If there is an objection to an "all or nothing" approach to discovery, the rule could allow the defendant to have an option to participate in discovery in either the guilt phase, the penalty phase, or both.

PROBLEM TWO

List of Aggravating and Mitigating Circumstances Not Required

The penalty phase *of* a capital trial is the most serious court proceeding under Florida law. Yet, the rules do not require the filing of any pleading or statement of the issues to be tried. It is conceivable that the prosecutor may not disclose which of the aggravating circumstances will be relied upon by the State until final argument in the penalty phase.

The trial judge needs to know the issues in a proceeding in order to be able to rule upon basic evidentiary matters such as relevancy.

The parties need to know which circumstances will be relied upon in order to prepare for trial efficiently and without delay.

The State and the defendant should be obligated to provide a list of aggravating or mitigating circumstances prior to trial whether or not discovery *is* sought in the penalty phase in order for that information to be known and in order for the trial judge to conduct a trial according to the rules of evidence.

Requiring the disclosure of aggravating and mitigating circumstances will necessarily require the court to review the holding in Sireci v. State, 399 So.2d 964 (Fla. 1981) at p. 970.

In Sireci, the court held that *it* is not a violation of due process for the State to fail to notify a defendant of aggravating circumstances. That holding is the law and is valid. However, the need for disclosure is not being suggested on due process grounds but upon grounds of sound procedure for the trial of the penalty phase of capital cases.

PROBLEM THREE

There Are No Provisions *To* Narrow Issues Prior To Trial

As previously stated, one of the purposes of discovery is *to* provide *the* opportunity *to* narrow the issues prior to trial. The proposed. rule does not provide any method to narrow the issues.

There should be a pretrial procedure, similar to summary judgment, which will allow issues to be narrowed and a determination made as to whether or not the death penalty is an option in a case.

Not all first degree murder cases are death penalty cases. Sometimes, the death penalty is not available as a matter of law. For instance, children under sixteen years of age may not be

executed. Allen v. State, 636 So.2d 494 (Fla. 1994). Nor may an accomplice under certain circumstances. Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 33 L.Ed.2d 1140 (1982); Reed v. State, 496 So.2d 213 (Fla. 1st DCA 1986). Other times the evidence in the case may not justify the death penalty due to the nonexistence of aggravating factors.

This court has held that Art. II, §3 of the Florida Constitution prohibits the judiciary from interfering with the executive function of the prosecutor to charge and prosecute. State v. Bloom, 497 So.2d 2 (Fla. 1986). The Bloom case contains broad language which prohibits a trial judge from making a pretrial determination of the death penalty's applicability. While the facts in Bloom are not set forth, the opinion states that the trial judge ruled upon the sufficiency of the evidence for the death penalty's imposition.

There is a great deal of difference between determining the sufficiency *of* evidence and the existence *of* evidence. Rule 3.190(c)(4) allows *a* trial judge to dismiss *a* criminal charge when it is established pretrial that the undisputed evidence does not establish a prima facie case. Dismissal under such circumstances is not interfering with the prosecutor's discretion. It is determining that these *is* no case.

Like it or not, some prosecutors insist on invoking the death penalty absent any proof of aggravating circumstances. The desire to "death qualify" the jury *is* often a motivating factor. Another

is the desire to bludgeon a defendant into a plea. See Fletcher, Reflections on Felony Murder, 12 S.W.U.L.R. 413 (1980-1981), 418.

The cost of a capital trial is a factor which responsible public officials, including judges, should consider. Presently, prosecutors may usurp the legislative function of a county by involving the death penalty without evidence. Public funds are then diverted from other legislative priorities and applied to a trial for no purpose.

While it is true that the prosecutor has the discretion to proceed with a capital trial as a death penalty case, there should be a mechanism to avoid the expense of a penalty phase trial if there is no evidence which would support a death sentence.

THE SOLUTION

There has been much discussion about the proposed rule within the Florida Conference of Circuit Judges, both in the Criminal Justice Section and in the Executive Committee. No particular penalty phase discovery rule has been recommended by the Conference.

However, an ad hoc committee of the Criminal Justice Section was appointed to review the proposed rule and offer an alternative. The committee was composed of five trial judges who were unable to reach consensus on every aspect of an alternative rule within the time available. A draft of the committee's alternative rule is attached to these comments. The alternative rule merits further

consideration by both the ad hoc committee and the Criminal Justice Section.

The petition that has been filed in this proceeding is titled as an "Emergency" petition. There is no emergency. The court is considering a rule which may be unique in the United States. It deserves further study. If the court agrees, the proposed rule should be returned to the rules committee with specific directions to address the deficiencies discussed in these comments.

Respectfully submitted,

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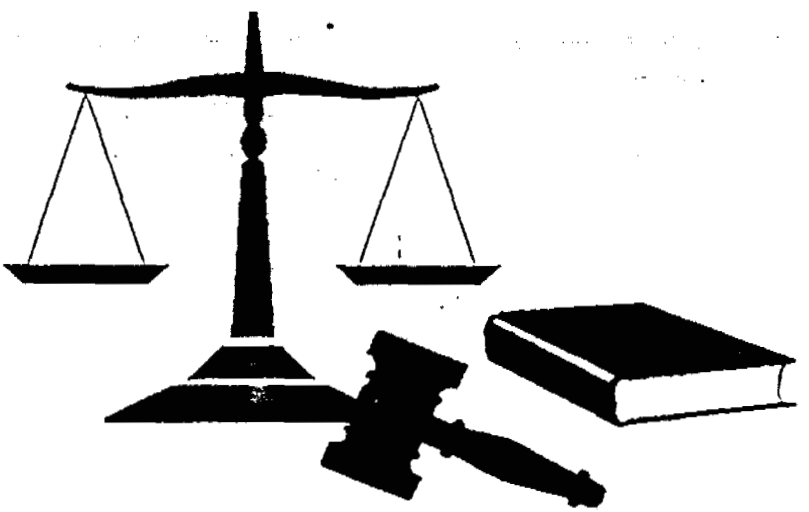
THE FLORIDA CONFERENCE OF CIRCUIT JUDGES

CRIMINAL

JUSTICE

SECTION



Ad Hoc Committee On

Capital Case Penalty Phase Discovery

Honorable O.H. Eaton, Jr., Chair
Honorable Robert B. Carney III
Honorable **Marvin U. Mounts,** Jr.
Honorable **Philip John Padovano**
Honorable Susan F. Schaeffer

(SECOND DRAFT)
(June 7, 1994)

DISCOVERY

RULE 3.220 DISCOVERY

(a) Notice of Discovery. If a defendant should elect to participate in the discovery process provided by these rules, including the taking of discovery depositions, the defendant shall file with the court and serve on the prosecuting attorney notice of the defendant's intent to participate in discovery. The "Notice of Discovery" shall bind both the prosecution and defendant to all discovery procedures contained in these rules. The defendant may take discovery depositions on the filing of the notice. The defendant's participating in the discovery process, including the defendant's taking of the deposition of any person, shall be an election to participate in discovery. If any defendant knowingly or purposely shares in discovery obtained by a codefendant, the defendant shall be deemed to have elected to participate in discovery. This rule shall apply to both the guilt phase and the penalty phase of a capital case.

(b) Prosecutor's Discovery Obligation.

(1) After the filing of the charging documents, within 15 days after service of the defendant's notice of election to participate in discovery, the prosecutor shall disclose to defense counsel and permit counsel to inspect, copy, test, and photograph the following information and material within the state's possession or control:

(A) the names and addresses of all persons known to the Prosecutor to have information that may be relevant to the offense

charged and to any defense with respect thereto. Expert witnesses shall be identified with their area of expertise. The defendant may take the deposition of any person not designated by the prosecutor as a person:

(i) who performed only a ministerial function with respect to the case or whom the prosecutor does not, in good faith, intend to call at trial; and

(ii) whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense;

(B) the statement of any person whose name is furnished in compliance with the preceding subdivision. The term "statement" as used herein includes a written statement made by the person and signed or otherwise adopted or Approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording. The term "statement" is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case, but shall. not include the notes from which those reports are compiled;

(C) any *written* or recorded statements and the substance of any oral statements made by the accused, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements;

(D) any written or recorded statements and the substance of any oral statements made by a codefendant if the trial is to be a joint one;

(E) those portions of recorded grand jury minutes that contain testimony of the accused;

(F) any tangible papers or objects that were obtained from or belonged to the accused;

(G) whether the state has any material or information that has been provided by a confidential informant;

(H) whether there has been any electronic surveillance, including wiretapping, of the premises of the accused or of conversations to which the accused was a party and any documents relating thereto;

(I) whether there has been any search or seizure and any documents relating thereto;

(J) reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons; and

(K) any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the accused.

(2) If the court determines, in camera, that any police or investigative report contains irrelevant, sensitive information or information interrelated with other crimes or criminal activities and the disclosure of the contents of the police report may

seriously impair law enforcement or jeopardize the investigation of those other crimes or activities, the court may prohibit or partially restrict the disclosure.

(3) The court may prohibit the state from introducing into evidence any of the foregoing material not disclosed, *so* as to secure and maintain fairness in the just determination of the cause.

(4) As soon as practicable after the filing *of* the charging document the prosecutor shall disclose to the defense counsel any material information within the state's possession or control that tends to negate the guilt of the accused as to the offense charged, regardless of whether the defendant has incurred reciprocal discovery obligations.

(5) The prosecutor shall perform the foregoing obligations in any manner mutually agreeable to the prosecutor and defense counsel or as ordered by the court.

The prosecutor shall file a separate disclosure under this rule for the penalty phase in a capital case. The disclosure shall be filed within fifteen days after the prosecutor files a Notice of Intent to Seek Death Penalty pursuant *to* Rule 3.141.

(c) Disclosure to Prosecution.

(1) After the filing *of* the charging document and subject to constitutional limitations, a judicial officer may require the accused *to:*

(A) appear in a lineup;

(B) speak for identification by witnesses to an offense;

(C) be fingerprinted;

(D) pose for photographs not involving reenactment of a scene;

(E) try on articles of clothing;

(F) permit the taking of specimens of material under the defendant's fingernails;

(G) permit the taking of samples of the defendant's blood, hair, and other materials of the defendant's body that involves no unreasonable intrusion thereof;

(H) provide specimens of the defendant's handwriting; and

(I) submit to a reasonable physical or medical inspection *of* the defendant's body.

(2) If the accused lists any aspect of mental health as a mitigating factor in a Notice of Mitigating Circumstances for the penalty phase in a capital case, the accused shall submit *to* reasonable psychological, psychiatric, or other mental health testing, evaluations, or examinations at the request *of* the State Attorney. Attorneys representing the state and the accused may be present for any test evaluation or examination.

(3) Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice *of* the time and place of the appearance shall be given by the prosecuting attorney to the accused and his or her counsel. Provisions may be made for appearances for such purposes in an order admitting the accused *to* bail or providing for the accused's pretrial release.

(4) The accused shall file a separate disclosure under this rule for the penalty phase in a capital case. The disclosure shall be filed within fifteen days after the prosecutor files the disclosure required by Rule 3.220(b)(6).

(d) Defendant's Obligation.

(1) If a defendant elects to participate in discovery, either **through filing** the **appropriate notice or by participating in any discovery process, including the taking of a discovery deposition, the following disclosures shall be made:**

(A) **Within 7 days after receipt by** the **defendant** *of* the **list of** names **and addresses furnished by** the **prosecutor pursuant to subdivision (b)(1)(A) of this rule, the defendant shall furnish** *to* **the prosecutor a** written **list of the names and addresses of all witnesses** whom **the defendant expects to call as witnesses at** the **trial or** hearing. Expert witnesses shall be identified with their area of expertise. **When the** prosecutor **subpoenas** a **witness whose** name has **been furnished by the defendant,** except for **trial subpoenas, reasonable notice** shall be given to the **defendant** as to the time and place *of* **examination pursuant** to the **subpoena.** At such examination, the defendant, through defense counsel, shall nave the right to be **present** and to examine the witness. The physical **presence** of **the defendant** shall **be governed by rule** 3.220(h) **(6).**

(B) The **defendant shall** disclose **to** the **prosecutor and permit the prosecutor** *to* inspect, **copy,** *test,* and **photograph** the following

information and material that is in the defendant's possession or control:

(i) the statement of any person listed in subdivision (d)(1)(A), other than that of the defendant;

(ii) reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons; and

(iii) any tangible papers or objects that the defendant intends *to* use in the hearing or trial.

(2) The defendant shall make the foregoing disclosures within 15 days after receipt by the defendant of the corresponding disclosure from the prosecutor. The defendant shall perform the foregoing obligations in any manner mutually agreeable to the defendant and the prosecutor, or as ordered by the court.

(3) The filing of a motion for protective order by the prosecutor will automatically stay the times provided for in this subdivision. If a protective order is granted, the defendant may, within 2 days thereafter, or at any time before the prosecutor furnishes the information or material that is the subject of the motion for protective order, withdraw the defendant's notice of discovery and not be required to furnish reciprocal discovery.

(e) Restricting Disclosure. The court on its own initiative or on motion of counsel shall deny or partially restrict disclosures authorized by this rule if it finds there is a substantial risk *to* any person of physical harm, intimidation, bribery, economic

reprisals, or unnecessary annoyance or embarrassment resulting from the disclosure, that outweighs any usefulness of the disclosure to either party.

(f) Additional Discovery. On a showing of materiality, the court may require such other discovery to the parties as justice may require.

(g) Matters Not Subject to Disclosure.

(1) Work *Product.* Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of their legal staffs.

(2) *Informants.* Disclosure of a confidential informant shall not be required unless the confidential informant is to be produced at a hearing or trial or a failure to disclose the informant's identity will infringe the constitutional rights of the accused.

(h) Discovery Depositions.

(1) *Generally.* At any time after the filing of the charging document the defendant may take the deposition upon oral examination of any person who may have information relevant *to* the offense charged. Subject to the provisions of this rule, a party taking a deposition shall give reasonable written notice to each other party. The notice shall state the time and place the deposition is to be taken and the name *of* each person *to* be examined. After notice to the parties the court may, for good cause shown, extend or shorten the time and may change the place *of*

taking. Except as provided herein, the procedure for taking the deposition, including the scope of the examination, shall be the same as that provided in the Florida Rules *of* Civil Procedure. Any deposition taken pursuant hereto may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. The trial court or its clerk shall, upon application, issue subpoenas for the persons whose depositions are to be taken. In any case, including multiple defendant or consolidated cases, no person shall be deposed more than once except by consent of the parties or by order of the court issued on good cause shown. A resident of the state may be required to attend an examination only in the county wherein the person resides, is employed, or regularly transacts his or her business in person. A person who refuses *to* obey a subpoena served on him or her may be adjudged in contempt of the court from which the subpoena issued.

(A) No defendant may take the deposition of a person designated under subdivision (b)(1)(A) unless an order has been entered by the trial court permitting the taking of the deposition based on good cause shown by the defendant.

(B) Abuses by either the prosecutor or the defendant in designating and seeking to take the depositions of those persons designated under subdivision (b)(1)(A) are subject to the sanctions provision of this rule,

(C) No deposition shall be taken in a case in which the defendant is charged only with a misdemeanor or a criminal traffic

Offense when all other discovery provided by this rule has been complied with unless good cause can be shown to the trial court. In determining whether to allow a deposition, the court should consider the consequences *to* the defendant, the complexity of the issues involved, the complexity of the witness' testimony (e.g., experts), and the other opportunities available to the defendant to discover the ,information sought by the deposition. However, this prohibition against the taking of depositions shall not be applicable if following the furnishing of discovery by the defendant the state then takes the statement of a listed defense witness pursuant to section 27.04, Florida Statutes.

(2) ***Transcripts.*** No transcript of a deposition for which a county may be obligated to expend funds shall be ordered by a party unless it is:

(A) agreed between the state and any defendant that the depositian should be transcribed and a written agreement certifying that the deposed witness is material or specifying other good cause *is* filed with the court or

(B) ordered by the court on a showing that the deposed witness is material or on showing of good cause.

This rule shall not apply *to* applications for reimbursement of costs pursuant to section 939.06, Florida Statutes, and article I, section 9, of the Florida Constitution.

(3) *Place of Deposition.* The deposition shall be taken in a building where the trial will be held, such other place agreed on

by the parties, or such place as the trial judge, administrative judge, or chief judge may designate by special or general order.

(4) *Depositions of* Sensitive *Witnesses.* Depositions of children under the age of 16 shall be videotaped unless otherwise ordered by the court. The court may order the videotaping of a deposition or the taking of a deposition of a witness with fragile emotional strength to be in the presence of the trial judge or a special master.

(5) *Witness Coordinating Office/Notice of Taking Deposition.* If a witness coordinating office has been established in the jurisdiction pursuant to applicable Florida Statutes the deposition of any law enforcement officer should be coordinated through that office. The witness coordinating office should attempt to schedule depositions of witnesses, especially law enforcement officers, at a time and place convenient for the witness and acceptable to counsel for both the defense and the prosecution.

(6) Defendant's Physical Presence. A defendant shall not be physically present at a deposition except on stipulation of the parties or an court order for good cause shown.

(A) The defendant may move for an order permitting physical presence of the defendant on a showing of good cause. In ruling on the motion, the court may consider the need for the physical presence *of* the defendant to obtain effective discovery, the intimidating effect of the defendant's presence on the witness, if any, and any cost or inconvenience related *to* the defendant's presence.

(B) In considering the defendant's motion to be physically present at a discovery deposition, the court may consider alternative electronic or audio/visual means to protect the defendant's ability *to* participate in discovery without the defendant's physical presence.

(7) *Telephonic Statements.* On stipulation of the parties and the consent of the witness, the statement of a law enforcement officer may be taken by telephone in lieu of the deposition of the officer. In such case, the officer need not be under oath. The statement, however, shall be recorded and may be used for impeachment at trial as a prior inconsistent statement pursuant *to* the Florida Evidence Code.

(i) Investigations Not to Be Impeded. Except 'as is otherwise provided as to matters not subject *to* disclosure or restricted by protective orders, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information (except the accused) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(j) Continuing Duty to Disclose. If, subsequent to compliance with the rules, a party discovers additional witnesses or material that the party would have been under a duty to disclose or produce at the time *of* the previous compliance, the parry shall promptly disclose or produce the witnesses or material in the same manner *as* required under these rules for initial discovery.

(k) Court May Alter Times. The court may alter the times for compliance with any discovery under these rules on good cause shown.

(1) Protective Orders. On a showing of good cause, the court shall at any time order that specified disclosures be restricted or deferred, that certain matters not be inquired into, that the scope of the deposition be limited to certain matters, that a deposition be sealed and after being sealed be opened only by order of the court, or make such other order as *is* appropriate to protect a witness from harassment, unnecessary inconvenience, or invasion *of* privacy, provided that all material and information to which a party is entitled must be disclosed in time to permit the party to make beneficial use thereof.

(m) In Camera Proceedings. On request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting the relief following a showing in camera, the entire record of the snowing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(n) Sanctions.

(1) If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order the

party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

(2) Willful violation by counsel of an applicable discovery rule, or an order issued pursuant thereto, shall subject counsel to appropriate sanctions by the court. The sanctions may include, but are not limited to, contempt proceedings against the attorney, as well as the assessment of costs incurred by the opposing party, when appropriate.

(3) Every request for discovery or response or objection, including a notice of deposition made by a party represented by an attorney, shall be signed by at least 1 attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and list his or her address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection and that to the best of the signer's knowledge, information, or belief formed after a reasonable inquiry it is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of this rule, the court, on motion or on its own initiative, shall impose on the person who made the certification, the firm or agency with which the person is affiliated, the party on whose behalf the request, response, or objection is made, or any or all of the above an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because *of* the violation, including a reasonable attorney's fee.

(o) Costs of Indigents. After a defendant is adjudged insolvent, the reasonable casts incurred in the operation of these rules shall be taxed as costs against the county.

(p) Pretrial Conference. The trial court may hold 1 or more pretrial conferences with trial counsel present, to consider such matters as will promote a fair and expeditious trial. The accused shall be present unless the accused waives this in writing.

NEW RULE

RULE 3.141 PROCEDURE FOR **PENALTY PHASE PROCEEDINGS** IN **CAPITAL CASES**

(a) Disclosure of Aggravating Circumstances. Within **sixty days** after **arraignment, the prosecutor** shall **file and serve a** Notice ***of*** **Intent *to* Seek** Death **Penalty** if the **death penalty is to** become **an issue at trial. The notice shall be substantially in** the **form provided in** Rule **3.990 and shall contain a list of** all **statutory** aggravating **circumstances listed in F.S. 921.141(5) which will be relied** upon **in good faith by the** State **at trial.**

(b) Disclosure of Mitigating Circumstances. Within thirty days **after service of a** Notice **of Intent *to* Seek Death Penalty, the defendant shall serve a** Notice ***of*** **Mitigating Circumstances.** The **notice shall be substantially** in the **form provided** in **Rule 3.991 and shall contain a list *of* all** statutory mitigating **circumstances listed** in F.S. **921.141(6), and any** nonstatutory mitigating **circumstances** which will **be relied** upon in good faith **by** the defendant at trial.

(c) Amendments to Notices. The notices required by this rule may **be** amended to **delete aggravating** or mitigating **circumstances** at **any time and may be amended to** add **aggravating** or **mitigating circumstances** with **leave *of* court.**

NEW RULE

RULE 3.190 PRETRIAL MOTIONS

(k) Motion *to* Determine Existence *of* Evidence in Penalty Phase of capital Cases

(1) The defendant **may move** to **determine** the **existence of evidence** to **support any aggravating circumstance anytime** after **receipt of** the **Notice** of Intent to **Seek Death Penalty required by Rule 3.141.**

(2) **A hearing** on the **motion** may be **scheduled** with not **less** than **twenty days notice to the state.**

(3) 'At the **hearing the court may consider any** matter of **record** or **evidence presented which establishes one or** more **aggravating circumstances by clear and convincing evidence.**

(4) After considering the record and **evidentiary matters presented** the **court shall determine that** the death **penalty** is an **issue at trial if the court** finds that one or **more aggravating factors exist which, without consideration of mitigating factors, would** support **the imposition of the death penalty** unless the death **penalty cannot be** imposed as **a matter** of law. If the court finds that one or more aggravating factors **do** not exist or, if **one** or more factors **do** exist, **and** the **death penalty cannot be imposed as a** matter of law, the court **shall** determine **the** death penalty not to **be an issue at trial.**

NEW **RULE**

RULE 3.991 **NOTICE OF MITIGATING CIRCUMSTANCES**

(Court)
(Case No. _____)

(Style)

Notice of Mitigating **Circumstances**

The **defendant will present evidence at** trial **which,** if **believed, will establish the following** mitigating circumstance(s):

_____
(Attorney for Defendant)
(Address)

NEW RULE

RULE 3.990 NOTICE **OF INTENT TO SEEK** DEATH PENALTY

(Court)
(Case No. _____)

(Style)

NOTICE **OF** INTENT **TO SEEK DEATH PENALTY**

The **undersigned State Attorney notifies the defendant that the death penalty will be an issue in the trial of this cause and that evidence** will **be presented at trial which, if believed,** will **establish** the **following aggravated circumstances pursuant to F.S. 921.141 (5):**

_____
(Assistant State Attorney)
(Address)

APPENDIX B

*915 20 Fla. L. Weekly S215

AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.220--DISCOVERY (3.202—EXPERT TESTIMONY OF MENTAL MITIGATION DURING PENALTY PHASE OF CAPITAL TRIAL).

No. 84273.
Supreme Court of Florida.
May 4, 1995.

ORDER

This Court 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 this request, the committee has submitted proposed amendments to Florida Rule of Criminal Procedure 3.220 entitled "Discovery."

The committee's proposal would make the discovery rules applicable to the penalty phase of a capital trial. The amendments set forth the discovery obligations of the prosecutor and defendant in a capital trial. Under the committee's proposal, if the defendant elects to participate in discovery, the defendant must disclose the names and addresses of **any** mental health expert with evidence relevant to the defendant's mental health whom the defendant intends to call **as** a witness if **the** expert's testimony will be premised on a mental health test, evaluation, or examination of the defendant. If the defendant is required to designate mental health experts, the court may order the accused to submit to mental health testing or examinations by court or state experts. However, if **the** defendant intends to use the designated expert only in the penalty phase, the State or court expert cannot test or examine the defendant until after the defendant has been convicted and the State has indicated its desire to seek the death penalty. Under the committee's proposal, if the defendant refuses to submit to testing or examination by State or court mental health experts, the court may prohibit the defendant **from** presenting expert testimony based on mental health tests or examinations.

The committee's proposed amendments were published for comment in **The Florida Bar** News. We received numerous comments from judges and other interested persons, most of which express concern with the delay between the guilt phase and penalty phase of a capital trial inherent in the committee's proposal.

After reviewing the proposed amendments to rule 3.220, hearing oral argument on the matter, and considering the comments of interested parties, we decline to adopt the committee's proposal. In its place we propose attached new rule 3.202, entitled "Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial." We recognize the effort the rules committee obviously put into its comprehensive proposal. However, after giving the matter much consideration, we believe a more narrowly drawn rule *916 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 is preferable.

Under the new rule, the State would be made aware of the defendant's intent to establish mental mitigation through expert testimony forty-five days before the capital trial begins. (FN1) This will enable the State to arrange to have its mental health expert examine the defendant within forty-eight hours after a conviction, thus avoiding the delay inherent in the more comprehensive proposal.

The Clerk of this Court is hereby directed to notify all interested parties of this order and to publish notification of the proposed rule in **The** Florida **Bar News** for comment. We ask that the Criminal Procedure Rules Committee review the proposed rule and submit a response, along with any suggested substantive or editorial changes the committee deems appropriate. The committee's response and all comments should be filed with the Clerk of the Court by July 1, 1995 for consideration prior to the adoption of **a** permanent rule. Until a permanent rule is adopted, the interim procedure set out in Dillbeck v. State, 643 So.2d 1027, 1031 (Fla.1994), should continue to be followed.

We also ask the Criminal Procedure Rules Committee to consider, for possible inclusion in its regular four-year cycle of proposed rules changes, the suggestions of the Honorable Judge O.H. Eaton, Jr. concerning the need for 1) a rule requiring the defendant and the State to file a statement of the issues to be tried in the penalty phase of a capital trial and 2) a pretrial procedure, similar to summary judgment, that would allow the trial court to determine whether the death penalty is an option based on the aggravating and mitigating factors alleged to exist in a capital case.

It is so ordered.

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

ANSTEAD, J., concurs in part and dissents in part with an opinion.

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 Present Expert Testimony of Mental Mitigation. When in any capital case 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.

(b) Time for Filing Notice; Contents. The defendant shall give notice of intent to present expert testimony of mental mitigation no later than 45 days before the guilt phase of the capital trial. 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.

(c) 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 *917. the defendant expects to establish through expert testimony.

(d) 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.

ANSTEAD, Justice, concurring in part, dissenting in part.

Although there may be a need for some modest fine tuning as candidly conceded by the rules committee, I would accept the product of the committee as an excellent effort in an extremely difficult and sensitive area. The committee members, including prosecutors, defense lawyers, judges, and law teachers, have made a genuine bipartisan effort to address the issue, and I would accept this product with little change.

I agree completely with the suggestions of the state trial judges that more attention needs to be addressed to pre-trial procedures for the penalty phase of a capital trial. Hopefully, those suggestions will lead to concrete proposals that will enhance the fairness and effectiveness of the hearing that the trial judges appropriately cite as "the most serious court proceeding under Florida law."

FN1. The proposed rule will not relieve the parties of the continuing duty to disclose witnesses under Florida Rule of Criminal Procedure 3.2200).

APPENDIX C

In re AMENDMENT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.220(h) AND FLORIDA RULE OF JUVENILE PROCEDURE 8.060(d). In re Amendment to Florida Rule of Criminal Procedure 3.220(h).

Nos. 85585,85801.

Supreme Court of Florida.

Sept. 12, 1996.

Robert A. Butterworth, Attorney General; Marty E. Moore, Deputy General Counsel, *667 Tallahassee, and Harry Shorstein, State Attorney, Fourth Judicial Circuit, Jacksonville, 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, and Thomas L. Powell, President, Florida Association of Criminal Defense Lawyers (FACDL), Tallahassee, for Petitioners.

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

PER CURIAM.

In response to our opinion of December 21, 1995, the Criminal and Juvenile Procedure Rules Committees have filed proposed amendments to Florida Rule of Criminal Procedure 3.220 and Florida Rule of Juvenile Procedure 8.060. In re Amendment to Florida Rule of Criminal Procedure 3.220(h) & Florida Rule of Juvenile Procedure 8.060(d), 668 So.2d 951 (Fla.1996). We have jurisdiction. Art. V, § 2(a), Fla. Const.

In our December 21 opinion, we asked the rules committees to submit proposed amendments implementing recommendations of the Special Subcommittee on Depositions and addressing several other aspects of the deposition process. 668 So.2d at 953. After reviewing the committees' proposals and the comments of various individuals and organizations, we adopt the attached amendments to rules 3.220 and 8.060 in the hope of further curtailing abuse of the deposition process.

The most significant change to the discovery rules is the requirement that the prosecutor in a felony case and the petitioner in a juvenile case designate witnesses into three categories. Fla.R.Crim.P. 3.220(b)(1)(A); Fla.R.Juv.P. 8.060(a)(2)(A). Category A witnesses are subject to deposition as under the former rules. Fla.R.Crim.P. 3.220(h)(1)(A); Fla.R.Juv.P. 8.060(d)(2)(F). Category B witnesses are subject to deposition only upon leave of court upon a showing of good cause. Fla.R.Crim.P. 3.220(h)(1)(B); Fla.R.Juv.P. 8.060(d)(2)(G). Absent a showing that a Category C witness has been improperly designated, such witnesses cannot be deposed. Fla.R.Crim.P. 3.220(h)(1)(C); Fla.R.Juv.P. 8.060(d)(2)(H).

Another significant change is found in rule 8.060(d)(2)(I) which conforms the juvenile rule with criminal rule 3.220(h)(1)(D) by restricting depositions in juvenile cases in which only a misdemeanor or criminal traffic offense has been alleged. The other changes made in response to our December 21 opinion are readily apparent from a review of the attached amendments.

We have included one amendment to rule 3.220 not addressed in our December 21 opinion. At the suggestion of The Honorable O.H. Eaton, Jr., Circuit Judge, we have added proposed subdivision (3) to rule 3.220(p), Pretrial Conference. The proposed amendment reads:

> In capital cases, 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 at trial.

*668 This amendment is included for comment only and will not become effective until after the Criminal Procedure Rules Committee reviews the proposed amendment and files comments for this Court's further consideration. The Committee shall file its comments within ninety days from the date of this opinion. Interested parties also may file comments on the proposed change within the ninety-day period.

Accordingly, rules 3.220 and 8.060 are otherwise amended as reflected in the appendix to this opinion. The new language is indicated by underscoring; deletions are indicated by strike-through type. The committee notes are offered for explanation only and are not adopted as an official part of the rules. The amendments shall become effective October 1, 1996, at 12:01 a.m.

It is so ordered.

OVERTON, SHAW, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur.

KOGAN, C.J., concurs in part and dissents in part with an opinion.

KOGAN, Chief Justice, concurring in part and dissenting in part.

I agree that Judge Eaton's suggested change dealing with disclosure of aggravating and mitigating circumstances in capital cases should be included in the majority opinion for comment. However, because I believe the current rules governing discovery depositions in felony and juvenile cases are adequate, I dissent from the remainder of the opinion.

APPENDIX

RULE 3.220. DISCOVERY

(a) Notice of Discovery. After the filing of the charging document, a defendant may elect to participate in the discovery process provided by these rules, including the taking of discovery depositions, by filing with the court and serving on the prosecuting attorney a "Notice of Discovery" which shall bind both the prosecution and defendant to all discovery procedures contained in these rules. Participation by a defendant in the discovery process, including the taking of any deposition by a defendant, shall be an election to participate in discovery. If any defendant knowingly or purposely shares in discovery obtained by a codefendant, the defendant shall be deemed to have elected to participate in discovery.

(b) Prosecutor's Discovery Obligation.

(1) Within 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit which shall disclose to the defendant and permit the defendant to inspect, copy, test, and photograph the following information and material within the state's possession or control:

(A) a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto, or to any similar fact evidence to be presented at trial under section 90.404(2), Florida Statutes.

The names and addresses of persons listed shall be clearly designated in the following categories:

(i) Category A. These witnesses shall include (1) eye witnesses, (2) alibi witnesses and rebuttal to alibi witnesses, (3) witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or codefendant, which shall be *669 separately identified within this category, (4) investigating officers, (5) witnesses known by the prosecutor to have any material information that tends to negate the guilt of the defendant as to any offense charged, (6) child hearsay witnesses, and (7) expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify to test results or give opinions that will have to meet the test set forth in Frye v. United States, 293 F. 1013 (D.C.Cir.1923).

(ii) Category B. All witnesses not listed in either Category A or Category C.

(iii) Category C. All witnesses who performed only ministerial functions or whom the prosecutor does not intend to call at trial and whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense;

(B) the statement of any person whose name is furnished in compliance with the preceding subdivision. The term "statement" as used herein includes a written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording. The term "statement" is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case, but shall not include the notes from which those reports are compiled;

(C) any written or recorded statements and the substance of any oral statements made by the defendant, including a copy of any Statements contained in police reports or report summaries, together with the name and address of each witness to the statements;

(D) any written or recorded statements and the substance of any oral statements made by a codefendant if the trial is to be a joint one;

(E) those portions of recorded grand jury minutes that contain testimony of the defendant;

(F) any tangible papers or objects that were obtained from or belonged to the defendant;

(G) whether the state has any material or information that has been provided by a confidential informant:

(H) whether there has been any electronic surveillance, including wiretapping, of the premises of the defendant or of conversations to which the defendant was a party and any documents relating thereto;

(I) whether there has been any search or seizure and any documents relating thereto;

(J) reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons; and

(K) any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the defendant.

(2) If the court determines, in camera, that any police or investigative report contains irrelevant, sensitive information or information interrelated with other crimes or criminal activities and the disclosure of the contents of the police report may seriously impair law enforcement or jeopardize the investigation of those other crimes or activities, the court may prohibit or partially restrict the disclosure.

(3) The court may prohibit the state from introducing into evidence any of the foregoing material not disclosed, so as to secure and maintain fairness in the just determination of the cause.

(4) As soon as practicable after the filing of the charging document the prosecutor shall disclose to the defendant any material information within the state's possession or control that tends to negate the guilt of the defendant as to any offense charged, regardless of whether the defendant has incurred reciprocal discovery obligations.

*670
(c) Disclosure to Prosecution.

(1) After the filing of the charging document and subject to constitutional limitations, the court may require a defendant to:

(A) appear in a lineup;

(B) speak for identification by witnesses to an offense;

(C) be fingerprinted;

(D) pose for photographs not involving reenactment of a scene;

(E) try on articles of clothing;

(F) permit the taking of specimens of material under the defendant's fmgernails;

(G) permit the taking of samples of the defendant's blood, hair, and other materials of the defendant's body that involves no unreasonable intrusion thereof;

(H) provide specimens of the defendant's handwriting; and

(I) submit to a reasonable physical or medical inspection of the defendant's body.

(2) If the personal appearance of a defendant is required for the foregoing purposes, reasonable notice of the time and location of the appearance shall be given by the prosecuting attorney to the defendant and his or her counsel. Provisions may be made for appearances for such purposes in an order admitting a defendant to bail or providing for pretrial release.

(d) Defendant's Obligation.

(1) If a defendant elects to participate in discovery, either through filing the appropriate notice or by participating in any discovery process, including the taking of a discovery deposition, the following disclosures shall be made:

(A) Within 15 days after receipt by the defendant of the Discovery Exhibit furnished by the prosecutor pursuant to subdivision (b)(1)(A) of this rule, the defendant shall furnish to the prosecutor a written list of the names and addresses of all witnesses whom the defendant expects to call as witnesses at the trial or hearing. When the prosecutor subpoenas a witness whose name has been furnished by the defendant, except for trial subpoenas, the rules applicable to the taking of depositions shall apply.

(B) Within 15 days after receipt of the prosecutor's Discovery Exhibit the defendant shall serve a written Discovery Exhibit which shall disclose to and permit the prosecutor to inspect, copy, test, and photograph the following information and material that is in the defendant's possession or control:

(i) the statement of any person listed in subdivision (d)(1)(A), other than that of the defendant;

(ii) reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons; and

(iii) any tangible papers or objects that the defendant intends to use in the hearing or trial.

(2) The prosecutor and the defendant shall perform their obligations under this rule in a manner mutually agreeable or as ordered by the court.

(3) The filing of a motion for protective order by the prosecutor will automatically stay the times provided for in this subdivision. If a protective order is granted, the defendant may, within 2 days thereafter, or *671 at any time before the prosecutor furnishes the information or material that is the subject of the motion for protective order, withdraw the defendant's notice of discovery and not be required to furnish reciprocal discovery.

(e) Restricting Disclosure. The court on its own initiative or on motion of counsel shall deny or partially restrict disclosures authorized by this rule if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from the disclosure, that outweighs any usefulness of the disclosure to either party.

(f) Additional Discovery. On a showing of materiality. the court may require such other discovery to the parties as justice may require.

(g) Matters Not Subject to Disclosure.

(1) Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of their legal staffs.

(2) Informants. Disclosure of a confidential informant shall not be required unless the confidential informant is to be produced at a hearing or trial or a failure to disclose the informant's identity will infringe the constitutional rights of the defendant.

(h) Discovery Depositions.

(1) Generally. At any time after the filing of the charging document any party may take the deposition upon oral examination of any person authorized by this rule. A party taking a deposition shall give reasonable written notice to each other party and shall make a good faith effort to coordinate the date, time, and location of the deposition to accommodate the schedules of other parties and the witness to be deposed. The notice shall state the time and the location where the deposition is to be taken, the name of each person to be examined, and a certificate of counsel that a good faith effort was made to coordinate the deposition schedule. After notice to the parties the court may, for goad cause shown, extend or shorten the time and may change the location of the deposition. Except as provided herein, the procedure for taking the deposition, including the scope of the examination, shall be the same as that provided in the Florida Rules of Civil Procedure. Any deposition taken pursuant to this rule may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. The trial court or the clerk of the court shall, upon application, issue subpoenas for the persons whose depositions are to be taken. In any case, including multiple defendants or consolidated cases. no be deposed more than once except by consent of the parties or by order of the court issued on good cause shown. A witness who is a resident of the state may be required to attend a deposition only in the county where the witness resides, where the witness is employed, or where the witness regularly transacts his or her business in person, A witness who refuses to obey a duly served subpoena may be adjudged in contempt of the court from which the subpoena issued.

(A) The defendant may, without leave of court, take the deposition of any witness listed by the prosecutor as a Category A witness or listed by a co- defendant as a witness to be called at a joint trial or hearing. After receipt by the defendant of the Discovery Exhibit, the defendant may, without leave of court, take the deposition of any unlisted witness who may have information relevant to the offense charged, The prosecutor may, without leave of court, take the deposition of any witness listed by the defendant to be called at a trial or hearing.

*672 (B) No party may take the deposition of a witness listed by the prosecutor as a Category B witness except upon leave of court with good cause shown. In determining whether to allow a deposition, the court should consider the consequences to the defendant, the complexities of the issues involved, the complexity of the testimony of the witness (e.g., experts), and the other opportunities available to the defendant to discover the information sought by deposition.

(C) A witness listed by the prosecutor as a Category C witness shall not be subject to deposition unless the court determines chat the witness should be listed in another category.

(D) No deposition shall be taken in a case in which the defendant is charged only with a misdemeanor or a criminal traffic offense when all other discovery provided by this rule has been complied with unless good cause can be shown to the trial court. In determining whether to allow a deposition, the court should consider the consequences to the defendant, the complexity of the issues involved, the complexity of the witness' testimony (e.g., experts), and the other opportunities available to the defendant to discover the information sought by deposition. However, this prohibition against the taking of depositions shall not be applicable if following the furnishing of discovery by the defendant the state then takes the statement of a listed defense witness pursuant to section 27.04, Florida Statutes.

(2) Transcripts. No transcript of a deposition for which a county may be obligated to expend funds shall be ordered by a party unless it is:

(A) agreed between the state and any defendant that the deposition should be transcribed and a written agreement certifying that the deposed witness is material or specifying other good cause is filed with the court or

(B) ordered by the court on a showing that the deposed witness is material or on showing of good cause.

This rule shall not apply to applications for reimbursement of costs pursuant to section 939.06, Florida Statutes, and article I, section 9, of the Florida Constitution.

(3) Location of Deposition. The deposition shall be taken in a building where the trial will be held, such other location agreed on by the parties, or such location as the trial judge, administrative judge, or chief judge may designate by special or general order.

(4) Depositions of Sensitive Witnesses. Depositions of children under the age of 16 shall be videotaped unless otherwise ordered by the court. The court may order the videotaping of a deposition or the taking of a deposition of a witness with fragile emotional strength to be in the presence of the trial judge or a special master.

(5) Depositions of Law Enforcement Officers. Subject to the general provisions of subdivision (h)(1), law enforcement officers shall appear for deposition, without subpoena, upon written notice of taking deposition delivered at the address of the law enforcement agency or department, or an address designated by the law enforcement agency or department, five days prior to the date of the deposition. Law enforcement officers who fail to appear for deposition after being served notice are subject to contempt proceedings,

(6) Witness Coordinating Office/Notice of Taking Deposition. If a witness coordinating office has been established in the jurisdiction pursuant to applicable Florida Statutes, the deposition of any witness should be coordinated through that office. The witness coordinating office should attempt to schedule the deposition of a witness at a time and location convenient for the witness and acceptable to the parties.

(7) Defendant's Physical Presence. A defendant shall not be physically present at a deposition except on stipulation of the parties *673 or as provided by this rule.

The court may order the physical presence of the defendant on a showing of good cause. The court may consider (A) the need for the physical presence of the defendant to obtain effective discovery, (B) the intimidating effect of the defendant's presence on the witness, if any, (C) any cost or inconvenience which may result, and (D) any alternative electronic or audio/visual means available.

(8) Telephonic Statements. On stipulation of the parties and the consent of the witness, the statement of a law enforcement officer may be taken by telephone in lieu of the deposition of the officer. In such case, the officer need not be under oath. The statement, however, shall be recorded and may be used for impeachment at trial as a prior inconsistent statement pursuant to the Florida Evidence Code.

(i) Investigations Not to Be Impeded. Except as is otherwise provided as to matters not subject to disclosure or restricted by protective orders, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information (except the defendant) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(j) Continuing Duty to Disclose. If, subsequent to compliance with the rules, a party discovers additional witnesses or material that the party would have been under a duty to disclose or produce at the time of the previous compliance, the party shall promptly disclose or produce the witnesses or material in the same manner as required under these rules for initial discovery.

(k) Court May Alter Times. The court may alter the times for compliance with any discovery under these rules on good cause shown.

(l) Protective Orders.

(1) Motion to Restrict Disclosure of Matters. On a showing of good cause, the court shall at any time order that specified disclosures be restricted, deferred, or exempted from discovery, that certain matters not be inquired into, that the scope of the deposition be limited to certain matters, that a deposition be sealed and after being sealed be opened only by order of the court, or make such other order as is appropriate to protect a witness from harassment, unnecessary inconvenience, or invasion of privacy, including prohibiting the taking of a deposition. All material and information to which a party is entitled, however, must be disclosed in time to permit the party to make beneficial use of it.

(2) Motion to Terminate or Limit Examination. At any time during the taking of a deposition, on

motion of a party or of the deponent, and upon a showing that the examination is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the circuit court where the deposition is being taken may (1) terminate the deposition, (2) limit the scope and manner of the taking of the deposition, (3) limit the time of the deposition, (4) continue the deposition to a later time, (5) order the deposition to be taken in open court, and, in addition, may (6) impose any sanction authorized by this rule. If the order terminates the deposition, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of any party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

(m) In Camera and Ex Parte Proceedings. *674

(1) Any person may move for an order denying or regulating disclosure of sensitive matters. The court may consider the matters contained in the motion in camera.

(2) Upon request, the court shall allow the defendant to make an ex parte showing of good cause for taking the deposition of a Category B witness.

(3) A record shall be made of proceedings authorized under this subdivision. If the court enters an order granting relief after an in camera inspection or ex parte showing, the entire record of the proceeding shall be sealed and preserved and be made available to the appellate court in the event of an appeal.

(n) Sanctions.

(1) If, at any time during the course of the proceedings. it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order the party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

(2) Willful violation by counsel or a party not represented by counsel of an applicable discovery rule, or an order issued pursuant thereto, shall subject counsel or the unrepresented party to appropriate sanctions by the court. The sanctions may include, but are not limited to, contempt proceedings against the attorney or unrepresented party, as well as the assessment of costs incurred by the opposing party, when appropriate.

(3) Every request for discovery or response or objection, including a notice of deposition made by a party represented by an attorney, shall be signed by at least 1 attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and list his or her address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection and that to the best of the signer's knowledge, information, or belief formed after a reasonable inquiry it is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of this rule, the court, on motion or on its own initiative, shall impose on the person who made the certification, the firm or agency with which the person is affiliated, the party on whose behalf the request, response, or objection is made; or any or all of the above an appropriate sanction, which may include an order to pay the amount of the reasonable

expenses incurred because of the violation, including a reasonable attorney's fee.

(o) Costs of Indigents. After a defendant is adjudged insolvent, the reasonable costs incurred in the operation of these rules shall be taxed as costs against the county.

(p) Pretrial Conference.

(1) The trial court may hold 1 or more pretrial conferences, with trial counsel present, to consider such matters as will promote a fair and expeditious trial. The defendant shall be present unless the defendant waives this in writing.

*675 (2) The court may set, and upon the request of any party shall set, a discovery schedule, including a discovery cut-off date, at the pretrial conference.

(3) In capital cases, 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 at trial.

Committee Notes

1968 Adoption.

(a)(1) This is substantially the same as section 925.05, Florida Statutes,

(a)(2) This is new and allows a defendant rights which he did not have, but must be considered in light of subdivision (c).

(a)(3) This is a slight enlargement upon the present practice; however, from a practical standpoint, it is not an enlargement, but merely a codification of section 925.05, Florida Statutes, with respect to the defendant's testimony before a grand jury.

(b) This is a restatement of section 925.04, Florida Statutes, except for the change of the word "may" to "shall."

(c) This is new and affords discovery to the state within the trial judge's discretion by allowing the trial judge to make discovery under (a)(2) and (b) conditioned upon the defendant giving the state some information if the defendant has it. This affords the state some area of discovery which it did not previously have with respect to (b). A question was raised concerning the effect of (a)(2) on FBI reports and other reports which are submitted to a prosecutor as "confidential" but it was agreed that the interests of justice would be better served by allowing this rule and that, after the appropriate governmental authorities are made aware of the fact that their reports may be subject to compulsory disclosure, no harm to the state will be done.

(d) and (e) This gives the defendant optional procedures. (d) is simply a codification of section 906.29, Florida Statutes, except for the addition of "addresses." The defendant is allowed this procedure in any event. (e) affords the defendant the additional practice of obtaining all of the state's witnesses, as distinguished from merely those on whose evidence the information, or indictment, is based, but only if the defendant is willing to give the state a list of all defense witnesses, which must be done to take advantage of this rule. The confidential informant who is to be used as a witness must be disclosed; but it was expressly viewed that this should not otherwise overrule present case law on the subject of disclosure of confidential informants, either where disclosure is required or not required.

(f) This is new and is a compromise between the philosophy that the defendant should be allowed unlimited discovery depositions and the philosophy that the defendant should not be allowed any discovery depositions at all. The purpose of the rule is to afford the defendant relief from situations when witnesses refuse to "cooperate" by making pretrial disclosures to the defense. It was determined to be necessary that the written signed statement be a criterion because this is the only way witnesses can be impeached by prior contradictory statements. The word "cooperate" was intentionally left in the rule, although the word is a loose one, so that it can be given a liberal interpretation, i.e., a witness may claim to be available and yet never actually submit to an interview. Some express the view that the defendant is not being afforded adequate protection because the cooperating witness will not have been under oath, but the subcommittee felt that the only alternative would be to make unlimited discovery depositions available to the defendant which was a view not approved by a majority of the subcommittee. Each minority is expressed by the following alternative proposals:

Alternative Proposal (1): When a person is charged with an offense, at any time after the filing of the indictment, information, or affidavit upon which the defendant is to be tried, such person may take the deposition of any person by deposition upon oral examination for the purpose of discovery. The attendances of witnesses may be compelled by the use of subpoenas as provided by law. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. The scope of *676 examination and the manner and method of taking such deposition shall be as provided in the Florida Rules of Civil Procedure and the deposition may be used for the purpose of contradicting or impeaching the testimony of a deponent as a witness,

Alternative Proposal (2): If a defendant signs and files a written waiver of his or her privilege against self-incrimination and submits to interrogation under oath by the prosecuting attorney, then the defendant shall be entitled to compulsory process for any or all witnesses to enable the defendant to interrogate them under oath, before trial, for discovery purposes.

A view was expressed that some limitation should be placed on the state's rights under sections 27.04 and 32.20, Florida Statutes, which allow the prosecutor to take all depositions unilaterally at any time. It was agreed by all members of the subcommittee that this right should not be curtailed until some specific time after the filing of an indictment, information, or affidavit, because circumstances sometimes require the filing of the charge and a studied marshalling of evidence thereafter. Criticism of the present practice lies in the fact that any time up to and during the course of the trial the prosecutor can subpoena any person to the privacy of the prosecutor's office without notice to the defense and there take a statement of such person under oath. The subcommittee was divided, however, on the method of altering this situation and the end result was that this subcommittee itself should not undertake to change the existing practice, but should make the Supreme Court aware of this apparent imbalance,

(g) This is new and is required in order to make effective the preceding rules.

(h) This is new and, although it encompasses relief for both the state and the defense, its primary purpose is to afford relief in situations when witnesses may be intimidated and a prosecuting attorney's heavy docket might not allow compliance with discovery within the time limitations set forth in the rules. The words, "sufficient showing" were intentionally included in order to permit the trial judge to have discretion in granting the protective relief. It would be impossible to specify all possible grounds which can be the basis of a protective order. This verbiage also permits a possible abuse by a prosecution-minded trial judge, but the subcommittee felt that the appellate court would remedy any such abuse in the course of making appellate decisions.

(i) This is new and, although it will entail additional expense to counties, it was determined that it was necessary in order to comply with the recent trend of federal decisions which hold that due process is violated when a person who has the money with which to resist criminal prosecution gains an advantage over the person who is not so endowed. Actually, there is serious doubt that the intent of this subdivision can be accomplished by a rule of procedure; a statute is needed. It is recognized that such a statute may be unpopular with the legislature and not enacted. But, if this subdivision has not given effect there is a likelihood that a constitutional infirmity (equal protection of the law) will be found and either the entire rule with all subdivisions will be held void or confusion in application will result.

(j) This provision is necessary since the prosecutor is required to assume many responsibilities under the various subdivisions under the rule. There are no prosecuting attorneys, either elected or regularly assigned, in justice of the peace courts. County judge's courts, as distinguished from county courts, do not have elected prosecutors. Prosecuting attorneys in such courts are employed by county commissions and may be handicapped in meeting the requirements of the rule due to the irregularity and uncertainty of such employment. This subdivision is inserted as a method of achieving as much uniformity as possible in all of the courts of Florida having jurisdictions to try criminal cases.

1972 Amendment. The committee studied the ABA Standards for Criminal Justice relating to discovery and procedure before trial. Some of the standards are incorporated in the committee's proposal, others are not. Generally, the standards are divided into 5

parts:

*677 Part I deals with policy and philosophy and, while the committee approves the substance of Part I, it was determined that specific rules setting out this policy and philosophy should not be proposed.

Part II provides for automatic disclosures (avoiding judicial labor) by the prosecutor to the defense of almost everything within the prosecutor's knowledge, except for work product and the identity of confidential informants. The committee adopted much of Part II, but felt that the disclosure should not be automatic in every case; the disclosure should be made only after request or demand and within certain time limitations. The ABA Standards do not recommend reciprocity of discovery, but the committee deemed that a large degree of reciprocity is in order and made appropriate recommendations.

Part III of the ABA Standards recommends some disclosure by the defense (not reciprocal) to which the state was not previously entitled. The committee adopted Part III and enlarged upon it.

Part IV of the Standards sets forth methods of regulation of discovery by the court. Under the Standards the discovery mentioned in Parts II and III would have been automatic and without the necessity of court orders or court intervention. Part III provides for procedures of protection of the parties and was generally incorporated in the recommendations of the committee.

Part V of the ABA Standards deals with omnibus hearings and pretrial conferences. The committee rejected part of the Standards dealing with omnibus hearings because it felt that it was superfluous under Florida procedure, The Florida committee determined that a trial court may, at its discretion, schedule a hearing for the purposes enumerated in the ABA Omnibus Hearing and that a rule authorizing it is not necessary. Some of the provisions of the ABA Omnibus Hearing were rejected by the Florida committee, i.e., stipulations as to issues, waivers by defendant, etc. A modified form of pretrial conference was provided in the proposals by the Florida committee.

(a)(1)(i) Same as ABA Standard 2.1(a)(i) and substance of Standard 2.1(e). Formerly Florida Rule of Criminal Procedure 3.220(e) authorized exchange of witness lists. When considered with proposal 3.220(a)(3), it is seen that the proposal represents no significant change.

(ii) This rule is a modification of Standard 2.1(a)(ii) and is new in Florida, although some such statements might have been discoverable under rule 3.220(f). Definition of "statement" is derived from 18 U.S.C. § 3500.

Requiring law enforcement officers to include irrelevant or sensitive material in their disclosures to the defense would not serve justice. Many investigations overlap and information developed as a byproduct of one investigation may form the basis and starting point for a new and entirely separate one. Also, the disclosure of any information obtained from computerized records of the Florida Crime Information Center and the National Crime Information Center should be subject to the regulations prescribing the confidentiality of such information so as to safeguard the right of the innocent to privacy.

(iii) Same as Standard 2.1(a)(ii) relating to statements of accused; words "known to the prosecutor, together with the name and address of each witness to the statement" added and is new in Florida.

(iv) From Standard 2.1(a)(ii). New in Florida.

(v) From Standard 2.1(a)(iii) except for addition of words, "that have been recorded" which were inserted to avoid any inference that the proposed rule makes recording of grand jury testimony mandatory. This discovery was formerly available under rule 3.220(a)(3).

(vi) From Standard 2.1(a)(v). Words, "books, papers, documents, photographs" were condensed to "papers or objects" without intending to change their meaning. This was previously available under rule 3.220(b).

(vii) From Standard 2.1(b)(i) except word "confidential" was added to clarify meaning. This is new in this form.

*678 (viii) From Standard 2.1(b)(iii) and is new in Florida in this form. Previously this was disclosed upon motion and order.

(ix) From Standard 2.3(a), but also requiring production of "documents relating thereto" such as search warrants and affidavits. Previously this was disclosed upon motion and order.

(x) From Standard 2.1(a)(iv). Previously available under rule 3.220(a)(2). Defendant must reciprocate under proposed rule 3.220(b)(4).

(xi) Same committee note as (b) under this subdivision.

(2) From Standard 2.1(c) except omission of words "or would tend to reduce his punishment therefor" which should be included in sentencing.

(3) Based upon Standard 2.2(a) and (b) except Standards required prosecutor to furnish voluntarily and without demand while this proposal requires defendant to make demand and permits prosecutor 15 days in which to respond.

(4) From Standards 2.5(b) and 4.4. Substance of this proposal previously available under rule 3.220(h).

(5) From Standard 2.5. New in Florida.

(b)(1) From Standard 3.1(a). New in Florida.

(2) From Standard 3.1(b). New in Florida.

(3) Standards did not recommend that defendant furnish prosecution with reciprocal witness list; however, formerly, rule 3.220(e) did make such provision. The committee recommended continuation of reciprocity.

(4) Standards did not recommend reciprocity of discovery. Previously, Florida rules required some reciprocity. The committee recommended continuation of former reciprocity and addition of exchanging witness' statement other than defendants'.

(c) From Standard 2.6. New in Florida, but generally recognized in decisions.

(d) Not recommended by Standards. Previously permitted under rule 3.220(f) except for change limiting the place of taking the deposition and eliminating requirement that witness refuse to give voluntary signed statement.

(e) From Standard 4.1. New in Florida.

(f) Same as rule 3.220(g).

(g) From Standard 4.4 and rule 3.220(h).

(h) From Standard 4.4 and rule 3.220(h).

(i) From Standard 4.6. Not previously covered by rule in Florida, but permitted by decisions.

(j)(1) From Standard 4.7(a). New in Florida except court discretion permitted by rule 3.220(g).

(2) From Standard 4.7(b). New in Florida.

(k) Same as prior rule.

(1) Modified Standard 5.4. New in Florida.

1977 Amendment. The proposed change only removes the comma which currently appears after (a)(1).

1980 Amendment. The intent of the rule change is to guarantee that the accused will receive those portions of police reports or report summaries which contain any written, recorded, or oral statements made by the accused.

1986 Amendment. The showing of good cause under (d)(2) of this rule may be presented ex parte or in camera to the court.

1989 Amendment. 3.220(a). The purpose of this change is to ensure reciprocity of discovery. Under the previous rule, the defendant could tailor discovery, demanding **only** certain items of discovery with no requirement to reciprocate items other than those demanded. A defendant could avoid reciprocal discovery by taking depositions, thereby learning of witnesses through the deposition process, and then deposing those witnesses without filing a demand for discovery. With this change, once a defendant opts to use any discovery device, the defendant is required to produce all items designated under the discovery rule, whether or not the defendant has specifically requested production of those items.

*679 Former subdivision (c) is relettered (b). Under (b)(1) the prosecutor's obligation to furnish a witness list is conditioned upon the defendant filing a "Notice of Discovery."

Former subdivision (a)(1)(i) is renumbered (b)(1)(i) and, as amended, limits the ability of the defense to rake depositions of those persons designated by the prosecutor as witnesses who should not be deposed because of their tangential relationship to the case. This does not preclude the defense attorney or a defense investigator from interviewing any witness, including a police witness, about the witness's knowledge of the case.

This change is intended to meet a primary complaint of law enforcement agencies that depositions are frequently taken of persons who have no knowledge of the events leading to the charge, but whose names are disclosed on the witness list. Examples of these persons are transport officers, evidence technicians, etc.

In order to permit the defense to evaluate the potential testimony of those individuals designated by the prosecutor, their testimony must be fully set forth in some document, generally a police report.

(a)(1)(ii) is renumbered (b)(1)(ii). This subdivision is amended to require full production of all police incident and investigative reports, of any kind, that are discoverable, provided there is no independent reason for restricting their disclosure. The term "statement" is intended to include summaries of statements of witnesses made by investigating officers as well as statements adopted by the witnesses themselves.

The protection against disclosure of sensitive information, or information that otherwise should not be disclosed, formerly set forth in (a)(1)(i), is retained, but transferred to subdivision @)(1)(xii).

The prohibition sanction is not eliminated, but is transferred to subdivision (b)(1)(xiii). "Shall" has been changed to "may" in order to reflect the procedure for imposition of sanctions specified in Richardson v. State, 246 So.2d 771 (Fla.1971).

The last phrase of renumbered subdivision (b)(2) is added to emphasize that constitutionally required Brady material must be produced regardless of the defendant's election to participate in the discovery process.

Former subdivision (b) is relettered (c).

Former subdivisions (b)(3) and (4) are now included in new subdivision (d). An introductory phrase has been added to subdivision (d). Subdivision (d) reflects the change in nomenclature from a "Demand for Discovery" to the filing of a "Notice of Discovery."

As used in subdivision (d), the word "defendant" is intended to refer to the party rather than to the person. Any obligations incurred by the "defendant" are incurred by the defendant's attorney if the defendant is represented by counsel and by the defendant personally if the defendant is not represented.

The right of the defendant to be present and to examine witnesses, set forth in renumbered subdivision (d)(1), refers to the right of the defense, as party to the action. The term refers to the attorney for the defendant if the defendant is represented by counsel. The right of the defendant to be physically present at the deposition is controlled by new subdivision (h)(6).

Renumbered subdivision (d)(2), as amended, reflects the new notice of discovery procedure. If the defendant elects to participate in discovery, the defendant is obligated to furnish full reciprocal disclosure.

Subdivision (e) was previously numbered (a)(4). This subdivision has been modified to permit the remedy to be sought by either prosecution or defense.

Subdivision (f) was previously numbered (a)(5) and has been modified to permit the prosecutor, as well as the defense attorney, to seek additional discovery.

Former subdivision (c) is relettered (g).

Former subdivision (d) is relettered (h). Renumbered subdivision (h)(1) has been amended to reflect the restrictions on deposing a witness designated by the prosecution under (b)(1)(i) (designation of a witness performing ministerial duties only or one who will not be called at trial).

*680 (h)(1)(i) is added to provide that a deposition of a witness designated by the prosecutor under (b)(1)(i) may be taken only upon good cause shown by the defendant to the court.

(h)(1)(ii) is added to provide that abuses by attorneys of the provisions of (b)(1)(i) are subject.to stringent sanctions.

New subdivision (h)(1)(iii) abolishes depositions in misdemeanor cases except when good cause is shown.

A portion of former subdivision (d)(1) is renumbered (h)(3). This subdivision now permits the administrative judge or chief judge, in addition to the trial judge, to designate the place for taking the deposition.

New subdivision (h)(4) recognizes that children and some adults are especially vulnerable to intimidation tactics. Although it has been shown that such tactics are infrequent, they should not be tolerated because of the traumatic effect on the witness. The videotaping of the deposition will enable the trial judge to control such tactics. Provision is also made to protect witnesses of fragile emotional strength because of their vulnerability to intimidation tactics.

New subdivision (h)(5) emphasizes the necessity for the establishment, in each jurisdiction, of an effective witness coordinating office. The Florida Legislature has authorized the establishment of such office through section 43.35, Florida Statutes. This subdivision is intended to make depositions of witnesses and law enforcement officers as convenient as possible for the witnesses and with minimal disruption of law enforcement officers' official duties.

New subdivision (h)(6) recognizes that one of the most frequent complaints from child protection workers and from rape victim counselors is that the presence of the defendant intimidates the witnesses. The trauma to the victim surpasses the benefit to the defense of having the defendant present at the deposition. Since there is no right, other than that given by the rules of procedure, for a defendant to attend a deposition, the Florida Supreme Court Commission on Criminal Discovery believes that no such right should exist in those cases. The "defense," of course, as a party to the action, has a right to be present through counsel at the deposition. In this subdivision, the word "defendant" is meant to refer to the person of the defendant, not to the defense as a party. See comments to rules 3.220(d) and 3.220(d)(1).

Although defendants have no right to be present at depositions and generally there is no legitimate reason for their presence, their presence is appropriate in certain cases. An example is a complex white collar fraud prosecution in which the defendant must explain the meaning of technical documents or terms. Cases requiring the defendant's presence are the exception rather than the rule. Accordingly, (h)(6)(i)-(ii) preclude the presence of defendants at depositions unless agreed to by the parties or ordered by the court. These subdivisions set forth factors that a court should take into account in considering motions to allow a defendant's presence.

New subdivision (h)(7) permits the defense to obtain needed factual information from law enforcement officers by informal telephone deposition. Recognizing that the formal deposition of a law enforcement officer is often unnecessary, this procedure will permit such discovery at a significant reduction of costs.

Former subdivisions (e), (f), and (g) are relettered (i), (j), and (k), respectively.

Former subdivision (h) is relettered (1) and is modified to emphasize the use of protective orders to protect witnesses from harassment or intimidation and to provide for limiting the scope of the deposition as to certain matters.

Former subdivision (i) is relettered (m).

Former subdivision (j) is relettered (n).

Renumbered (n)(2) is amended to provide that sanctions are mandatory if the court finds willful abuse of discovery. Although the amount of sanction is discretionary, some sanction must be imposed.

(n)(3) is new and tracks the certification provisions of federal procedure, The very fact of signing such a certification will make counsel cognizant of the effect of that action.

Subdivision (k) is relettered (o).

*681 Subdivision (l) is relettered (p).

1992 Amendment. The proposed amendments change the references to "indictment or information" in subdivisions (b)(1), (b)(2), (c)(1), and (h)(1) to "charging document," This amendment is proposed in conjunction with amendments to rule 3.125 to provide that all individuals charged with a criminal violation would be entitled to the same discovery regardless of the nature of the charging document (i.e., indictment, information, or notice to appear).

1996 Amendment. This is a substantial rewording of the rule as it pertains to depositions and pretrial case management. The amendment was in response to allegations of discovery abuse and a call for a more cost conscious approach to discovery by the Florida Supreme Court. In felony cases, the rule requires prosecutors to list witnesses in categories A, B, and C. Category A witnesses are subject to deposition as under the former rule. Category B witnesses are subject to deposition only upon leave of court. Category B witnesses include, but are not limited to, witnesses whose only connection to the case is the fact that they are the owners of property; transporting officers; booking officers; records and evidence custodians; and experts who have filed a report and curriculum vitae and who will not offer opinions subject to the Frye test. Category C witnesses may not be deposed. The trial courts are given more responsibility to regulate discovery by pretrial conference and by determining which category B witnesses should be deposed in a given case.

The rule was not amended for the purpose of prohibiting discovery. Instead, the rule recognizes that many circuits now have "early resolution" or "rocket dockets" in which "open file discovery" is used to resolve a substantial percentage of cases at or before arraignment. The committee encourages that procedure. If a case cannot be resolved early, the committee believes that resolution of typical cases will occur after the depositions of the most essential witnesses (category A) are taken. Cases which do not resolve after the depositions of category A, may resolve if one or more category B witnesses are deposed, If the case is still unresolved, it is probably going to be a case that needs to be tried. In that event, judges may determine which additional depositions, if any, are necessary for pretrial preparation. A method for making that determination is provided in the rule.

Additionally, trial judges may regulate the taking of depositions in a number of ways to both facilitate resolution of a case and protect a witness from unnecessary inconvenience or harassment. There is a provision for setting a discovery schedule, including a discovery cut-off date as is common in civil practice. Also, a specific method is provided for application for protective orders.

One feature of the new rule relates to the deposition of law enforcement officers. Subpoenas are no longer required.

The rule has standardized the time for serving papers relating to discovery at fifteen days.

Discovery in misdemeanor cases has not been changed.

(b)(1)(A)(i) An investigating officer is an officer who has directed the collection of evidence, interviewed material witnesses, or who was assigned as the case investigator.

(h)(1) The prosecutor and defense counsel are encouraged to be present for the depositions of essential witnesses, and judges are encouraged to provide calendar time for the taking of depositions so that counsel for all parties can attend. This will 1) diminish the potential for the abuse of witnesses, 2) place the parties in a position to timely and effectively avail themselves of the remedies and sanctions established in this rule, 3) promote an expeditious and timely resolution of the cause, and 4) diminish the need to order transcripts of the deposition, thereby reducing costs.

Court Commentary

1996 Amendment. The designation of a witness who will present similar fact evidence will be dependent upon the witness's relationship to the similar crime, wrong, or act about which testimony will be given rather than the witness's relationship to the crime with which the defendant is currently charged.

***682 RULE 8,060.DISCOVERY**

(a) Notice of Discovery.

(1) After the filing of the petition, a child may elect to utilize the discovery process provided by these rules, including the taking of discovery depositions, by filing with the court and serving upon thepetitioner a "notice of discovery" which shall bind both the petitioner and the child to all discovery procedures contained in these rules. Participation by a child in the discovery process, including the taking of any deposition by a child, shall be an election to participate in discovery. If any child knowingly or purposely shares in discovery obtained by a codefendant, the child shall be deemed to have elected to participate in discovery.

(2) Within 5 days of service of the child's notice of discovery, the petitioner shall serve a written discovery exhibit which shall disclose to the child or the child's counsel and permit the child or the child's counsel to inspect, copy, test, and photograph the following information and material within the petitioner's possession or control:

(A) A list of the names and addresses of all persons known to the petitioner to have information which may be relevant to the allegations, to any defense with respect thereto, or to any similar fact evidence to be presented at trial under section 90.404(2), Florida Statutes. The names and addresses of persons listed shall be clearly designated in the following categories:

(i) Category A. These witnesses shall include

(a) eye witnesses;

(b) alibi witnesses and rebuttal to alibi witnesses;

(c) witnesses who were present when a recorded or unrecorded statement was taken from or made by the child or codefendant, which shall be separately identified within this category;

(d) investigating officers;

(e) witnesses known by the petitioner to have any material information that tends to negate the guilt of the child as to the petition's allegations;

(f) child hearsay witnesses; and

(g) expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify to test results or give opinions that will have to meet the test set forth in Frye v. United States, 293 F, 1013(D.C.Cir.1923).

(ii) Category B. All witnesses not listed in either Category A or Category C.

(iii) Category C. All witnesses who performed only ministerial functions or whom the petitioner does not intend to call at the hearing and whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense.

(B) The statement of any person whose name is furnished in compliance with the preceding paragraph. The term "statement" as used herein means a written statement made by said person and signed or otherwise adopted by him or her and also includes any statement of any kind or manner made by such person and written or recorded or summarized in any writing or recording. The term "statement" is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case, but shall not include the notes from which such reports are compiled.

(C) Any written or recorded statements and the substance of any oral statements made by the child and known to the petitioner, including a copy of any statements contained in police reports or summaries, together with the name and address of each witness to the statement.

(D) Any written or recorded Statements, and the substance of any oral statements, made by a codefendant if the hearing is to be a joint one.

*683 (E) Those portions of recorded grand jury minutes that contain testimony of the child.

(F) Any tangible papers or objects which were obtained from or belonged to the child.

(G) Whether the petitioner has any material or information which has been provided by a confidential informant.

(H) Whether there has been any electronic

surveillance, including wiretapping, of the premises of the child, or of conversations to which the child was a party, and any documents relating thereto.

(I) Whether there has been any search or seizure and any document relating thereto.

(J) Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.

(K) Any tangible papers or objects which the petitioner intends to use in the hearing and which were not obtained from or belonged to the child.

(3) As soon as practicable after the filing of the petition, the petitioner shall disclose to the child any material information within the state's possession or control which tends to negate the guilt of the child as to the petition's allegations.

(4) The petitioner shall perform the foregoing obligations in any manner mutually agreeable to the petitioner and the child or as ordered by the court.

(5) Upon a showing of materiality to the preparation of the defense, the court may require such other discovery to the child as justice may require.

(b) Required Disclosure to Petitioner.

(1) If a child elects to participate in discovery, within 5 days after receipt by the child of the discovery exhibit furnished by the petitioner under this rule, the following disclosures shall be made:

(A) The child shall furnish to the petitioner a written list of all persons whom the child expects to call as witnesses at the hearing. When the petitioner subpoenas a witness whose name has been furnished by the child, except for hearing subpoenas, reasonable notice shall be given to the child as to the time and location of examination pursuant to the subpoena. At such examination, the child through counsel shall have the right to be present and to examine the witness. The physical presence of the child shall be governed by rule 8.060(d)(6).

(B) The child shall serve a written discovery exhibit which shall disclose to the petitioner and permit the petitioner to inspect, copy, test, and photograph the following information and material which is in the child's possession or control:

(i) The statement of any person whom the child expects to call as a trial witness other than that of the child.

(ii) Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.

(iii) Any tangible papers or objects which the child intends to use in the hearing.

(2) The child shall perform the foregoing obligations in any manner mutually agreeable to the child and the petitioner or as ordered by the court.

(3) The filing of a motion for protective order by the petitioner will automatically stay the times provided for in this subdivision. If a protective order is granted, the child may, within 2 days thereafter, or at any time before the petitioner furnishes the information or material which is the subject of the motion for protective order, withdraw the demand and not be required to furnish reciprocal discovery.

(c) Limitations on Disclosure.

(1) Upon application, the court may deny or partially restrict disclosure authorized by this rule if it finds there is a substantial risk *684 to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to the party requesting it.

(2) The following matters shall not be subject to disclosure:

(A) Disclosure shall not be required of legal research or of records, correspondence, or memoranda, to the extent that they contain the opinion, theories, or conclusions of the prosecuting or defense attorney or members of their legal staff.

(B) Disclosure of a confidential informant shall not be required unless the confidential informant is to be

produced at a hearing or a failure to disclose the informant's identity will infringe upon the constitutional rights of the child.

(d) Depositions.

(1) Time and Location.

(A) At any time after the filing of the petition alleging a child to be delinquent, any party may take the deposition upon oral examination of any person authorized by this rule.

(B) The deposition shall be taken in a building where the adjudicatory hearing may be held, such other location agreed upon by the parties, or such location as the trial judge, administrative judge, or chief judge may designate by special or general order. A witness who is a resident of the state may be required to attend a deposition only in the county where the witness resides, is regularly employed, or regularly transacts business in person.

(2) Procedure.

(A) The party taking the deposition shall give reasonable written notice to each other party and shall make a good faith effort to coordinate the date, time, and location of the deposition to accommodate the schedules of other parties and the witness to be deposed. The notice shall state the time and the location of the deposition and the name of each person to be examined, and include a certificate of counsel that a good faith effort was made to coordinate the deposition schedule.

(B) Upon application, the court or the clerk of the court shall issue subpoenas for the persons whose depositions are to be taken.

(C) After notice to the parties the court, for good cause shown, may change the time or location of the deposition,

(D) In any case, no person shall be deposed more than once except by consent of the parties or by order of the court issued on good cause shown.

(E) Except as otherwise provided by this rule, the procedure for taking the deposition, including the scope of the examination, objections, and the issuance. execution, and return of service, shall be the same as that provided by the Florida Rules of Civil Procedure.

(F) The child, without leave of court, may take the deposition of any witness listed by the petitioner as a Category A witness or listed by a codefendant as a witness to be called at a joint hearing. After receipt by the child of the discovery exhibit, the child, without leave of court, may take the deposition of any unlisted witness who may have information relevant to the petition's allegations. The petitioner, without leave of court, may take the deposition of any witness listed by the child to be called at a hearing.

(G) No party may take the deposition of a witness listed by the petitioner as a Category B witness except upon leave of court with good cause shown. In determining whether to allow a deposition, the court should consider the consequences to the child, the complexities of the issues involved, the complexity of the testimony of the witness (e.g., experts), and the other opportunities available to the child to discover the information sought by deposition.

(H) A witness listed by the petitioner as a Category C witness shall not be subject to deposition unless the court determines that the witness should be listed in another category.

*685 (I) No deposition shall be taken in a case in which a petition has been filed alleging that the child committed only a misdemeanor or a criminal traffic offense when all other discovery provided by this rule has been complied with unless good cause can be shown to the trial court. In determining whether to allow a deposition, the court should consider the consequences to the child, the complexity of the issues involved, the complexity of the witness's testimony (e.g., experts), and the other opportunities available to the child to discover the information sought by deposition. However, this prohibition against the taking of depositions shall not be applicable if following the furnishing of discovery by the child the petitioner then takes the statement of a listed defense witness pursuant to section 27.04, Florida Statutes.

(3) Use of Deposition. Any deposition taken pursuant to this rule may be used at any hearing covered by these rules by any party for the purpose

of impeaching the testimony of the deponent as a witness.

(4) Introduction of Part of Deposition. If only part of a deposition is offered in evidence by a party, an adverse party may require the introduction of any other part that in fairness ought to be considered with the part introduced, and any party may introduce any other parts.

(5) Sanctions, A witness who refuses to obey a duly served subpoena for the taking of a deposition may be adjudged in contempt of the court from which the subpoena issued.

(6) Physical Presence of Child, The child shall not be physically present at a deposition except upon stipulation of the parties or as provided by this rule.

The court may order the physical presence of the child upon a showing of good cause. In ruling, the court may consider

(A) the need for the physical presence of the child to obtain effective discovery;

(B) the intimidating effect of the child's presence on the witness, if any;

(C) any cost or inconvenience which may result; and

(D) any alternative electronic or audio-visual means available to protect the child's ability to participate in discovery without the child's physical presence.

(7) Statements of Law Enforcement Officers. Upon stipulation of the parties and the consent of the witness, the statement of a law enforcement officer may be taken by telephone in lieu of deposition of the officer, In such case, the officer need not be under oath. The statement, however, shall be recorded and may be used for impeachment at trial as a prior inconsistent statement pursuant to the Florida Evidence Code.

(8) Depositions of Law Enforcement Officers. Subject to the general provisions of this rule, law enforcement officers shall appear for deposition, without subpoena, upon written notice of taking deposition delivered at the address designated by the law enforcement agency or department or, if no address has been designated, to the address of the law enforcement agency or department, 5 days prior to the date of the deposition. Law enforcement officers who fail to appear for deposition after being served notice are subject to contempt proceedings.

(9) Videotaped Depositions. Depositions of children under the age of 16 shall be videotaped upon demand of any party unless otherwise ordered by the court. The court may order videotaping of a deposition or taking of a deposition of a witness with fragile emotional strength to be in the presence of the trial judge or a special master.

(e) Perpetuating Testimony.

(1) After the filing of the petition and upon reasonable notice, any party may apply for an order to perpetuate testimony of a witness. The application shall be verified or supported by the affidavits of credible persons, and shall state that the prospective witness resides beyond the territorial jurisdiction of the court or may be unable to *686 attend or be prevented from attending the subsequent court proceedings, or that grounds exist to believe that the witness will absent himself or herself from the jurisdiction of the court, that the testimony is material, and that it is necessary to take the deposition to prevent a failure of justice.

(2) If the application is well founded and timely made, the court shall order a commission to be issued to take the deposition of the witness to be used in subsequent court proceedings and that any designated books, papers, documents, or tangible objects, not privileged, be produced at the same time and place. The commission may be issued to any official court reporter, whether the witness be within or without the state, transcribed by the reporter, and filed in the court. The commission shall state the time and place of the deposition and be served on all parties.

(3) No deposition shall be used or read in evidence when the attendance of the witness can be procured. If it shall appear to the court that any person whose deposition has been taken has absented himself or herself by procurement, inducements, or threats by or on behalf of any party, the deposition shall not be read in evidence on behalf of that party.

(f) Nontestimonial Discovery. After the filing of

the petition, upon application, and subject to constitutional limitations, the court may with directions as to time, place, and method, and upon conditions which are just, require:

(1) the child in all proceedings to:

(A) appear in a lineup;

(B) speak for identification by a witness to an offense;

(C) be fingerprinted;

(D) pose for photographs not involving reenactment of a scene;

(E) try on articles of clothing;

(F) permit the taking of specimens of material under the fingernails;

(G) permit the taking of samples of blood, hair, and other materials of the body which involve no unreasonable intrusion thereof;

(H) provide specimens of handwriting; or

(I) submit to a reasonable physical or medical inspection of his or her body; and

(2) such other discovery as justice may require upon a showing that such would be relevant or material.

(g) Court May Alter Times. The court may alter the times for compliance with any discovery under these rules on good cause shown.

(h) Supplemental Discovery. If, subsequent to compliance with these rules, a party discovers additional witnesses, evidence, or material which the party would have been under a duty to disclose or produce at the time of such previous compliance, the party shall promptly disclose or produce such witnesses, evidence, or material in the same manner as required under these rules for initial discovery.

(i) Investigations Not to be Impeded. Except as otherwise provided for matters not subject to disclosure or restricted by protective orders, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information, except for the child, to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(j) Protective Orders. Upon a showing of good cause, the court shall at any time order that specified disclosures be restricted, deferred, or exempted from discovery, that certain matters are not to be inquired into or that the scope of the deposition be limited to certain matters, that a deposition be sealed and after being sealed be opened only by order of the court, or make such other order as is appropriate to protect a witness from harassment, unnecessary inconvenience, or invasion of privacy, including prohibiting the taking of a deposition. All material and information to which a party is entitled, however, must be disclosed in time to permit such party to make beneficial use of it.

(k) Motion to Terminate or Limit Examination. At any time during the taking of a deposition, on motion of a party or of the *687 deponent, and upon a showing that the examination is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the circuit court where the deposition is being taken may (1) terminate the deposition, (2) limit the scope and manner of the taking of the deposition, (3) limit the time of the deposition, (4) continue the deposition to a later time, (5) order the deposition to be taken in open court and, in addition, (6) may impose any sanction authorized by this rule. If the order terminates the deposition, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of any party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

(l) In Cameraand Ex Parte Proceedings.

(1) Any person may move for an order denying or regulating disclosure of sensitive matters. The court may consider the matters contained in the motion in camera.

(2) Upon request, the court shall allow the child to make an ex parte showing of good cause for taking

the deposition of a Category B witness.

(3) A record shall be made of proceedings authorized under this subdivision. If the court enters an order granting relief after an in camera inspection or ex parte showing, the entire record of the proceeding shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(m) Sanctions.

(1) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may:

(A) order such party to comply with the discovery or inspection of materials not previously disclosed or produced;

(B) grant a continuance;

(C) grant a mistrial;

(D) prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed; or

(E) enter such order as it deems just under the circumstances.

(2) Willful violation by counsel or a party not represented by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel or a party not represented by counsel to appropriate sanction by the court. The sanctions may include, but are not limited to, contempt proceedings against the attorney or party not represented by counsel, as well as the assessment of costs incurred by the opposing party, when appropriate.

Committee Notes

*688

Court Commentary

1996 Amendment. This amendment generally conforms the rule to the 1996 amendment to Florida Rule of Criminal Procedure 3.220.

END OF DOCUMENT

APPENDIX D

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 statutory 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.